

National Forest Law

Newsletter

by Ryan Woody

<http://www.nationalforestlawblog.com>

July 2008



Flathead National Forest, Montana



This monthly electronic newsletter is a service provided by Attorney Ryan L. Woody for the benefit of clients and forest stakeholders. The vagaries and complexity of the laws and current issues in National Forest Management have, for many lawyers, and professionals alike, made keeping current laws an arduous and laborious task. It is the goal of this electronic newsletter to assist in the dissemination of new legal developments as they occur within the National Forests. If anyone has co-workers, associates or other individuals who wish to be placed on this e-mail mailing list, please provide their e-mail addresses to Ryan Woody at rwoody@mwl-law.com. I appreciate your friendship and your business.

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National Forest Management Act

By Ryan L. Woody

**En Banc Panel of the Ninth Circuit Rebukes Itself For
Acting as a Panel of Scientists Instead of Jurists.**

The Lands Council v. McNair, 07--35000 (9th Cir. July 2, 2008)

In what can fairly be described as a landmark decision from the San Francisco-based 9th Circuit Court of Appeals, an en banc panel overruled its prior decisions about what amount of deference Forest Service decisions should be given. At issue was a preliminary injunction that had stopped the Mission Brush, which called for selective logging of approximately 3,829 acres in the Idaho Panhandle. Among the goals of the project were to return the area to its historic composition, reduce forest density, restore forest health, wildlife habitat and provide recreational opportunities. Environmental groups sought to enjoin the project, arguing that the Forest Service failed to adequately explain its methodology underlying its analysis of the Project's effect on wildlife, specifically the flammulated owl. The district court ruled in favor of the Forest Service, but a three judge panel of the 9th Circuit ruled in favor of the plaintiffs and enjoined the project. In a rare move, primarily prompted by a vigorous dissent, the 9th Circuit agreed to hear the case en banc.



The broad issue on appeal was the role of the federal courts in reviewing the science-based decisions of the Forest Service. If the en banc panel was going to rule in favor of the Forest Service, it was going to have to reexamine, even overrule its prior case law, specifically *Ecology Center, Inc., v. Austin*, 127 F.3d 1057 (9th Cir. 2005). The teaching of *Ecology Center* required the Forest Service to verify its modeling and predictions with actual on-the-ground analysis and verification.

The en banc panel unanimously agreed to overrule *Ecology Center*, finding that it had made key errors in reading its prior precedents, creating requirements not found in any statute, and failing to provide proper deference to the methodological choices of the Forest Service. Specifically, the panel held that the Forest Service is not required to use on-the-ground analysis “where there is a reasonable scientific basis to uphold the legitimacy of modeling.” *quoting* Judge McKeown’s dissenting opinion in *Ecology Center*. Instead, the Forest Service will be granted judicial latitude “to decide how best to demonstrate that its plans will provide for wildlife viability”. As such, the court deferred to the agency’s determination of what evidence was necessary to support wildlife viability in the project area.

The impact of the 9th Circuit’s decision cannot be understated. Instead of allowing environmental plaintiffs to selectively critique agency modeling and analysis, courts will now defer to the agency’s determinations. Reaffirming the role of the judiciary in the administrative process the court wrote:

our proper role is simply to ensure that the Forest Service made no “clear error of judgment” that would render its action “arbitrary and capricious.” To do so,

we look to the evidence the Forest Service has provided to support its conclusions, along with other materials in the record, to ensure that the Service has not, for instance, “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Internal citations omitted.

The court went on to find that the Forest Service had met the requirements of NFMA and the Forest Plan in approving the project. When addressing the “lone flammulated owl response” that was a main talking point of the environmental plaintiffs, the court said, simply, that “it is within the Forest Service’s expertise, not ours, to determine the significance of these responses.” The court also approved the Forest Service’ use of “habitat as proxy” approach towards species viability. It also took time out to chastize the plaintiff’s for presenting arguments it characterized as a “constantly moving target.” For example, the plaintiffs argued the viability of an ever-changing list of species that included the pileated woodpecker, black-backed woodpecker, grizzly bear, Canada lynx, and gray wolf at the district court level and the flammulated owl at the court of appeals level.

The en banc decision is a wonderful surprise from the 9th Circuit and I recommend that everyone read the decision. I imagine that champagne and cigars were hard to come by in Portland, Juneau, Missoula and San Francisco after the decision came down. It’s a decision that the Forest Service should celebrate after so many years of tough losses. The Forest Service should be able to reap the rewards of this decision for many, many years to come.

Should you have any specific questions, feel free to contact me at rwoody@mwl-law.com

Fifth Amendment Taking

Forest Service to Pay Big for Harassment, Fifth Amendment Taking.

In a dispute that goes back nearly thirty years, the Court of Federal Claims finally issued its final ruling in favor of a Nevada rancher. Hage v. United States, 82 Fed.Cl. 202 (2008) involved E. Wayne Hage, owner of the Pine Creek Ranch in Nye County, Nevada



since 1978. The Pine Creek Ranch was initially established in 1865. The 7,000 acre ranch was primarily used for grazing Mr. Hage's cattle, but due to the arid climate relied upon irrigation and access to federal lands. As such, he also grazed his cattle by permit on the adjacent lands of the Toiyabe National Forest.

All of Mr. Hage's problems began when the Nevada Department of Wildlife released elk into the Table Mountain allotment area of the Toiyabe National Forest in 1979. Immediately, the elk began competing with Hage's cattle for forage and water, and elk hunters began tearing down Hage's fences and scattering his cattle. Also following the introduction the Forest Service erected electric fences that excluded Hage's cattle from accessing forage and water. In 1983, the Forest Service began sending Mr. Hage letters, 40 to be exact, charging him with various violations. The Forest Service eventually filed 22 charges against Hage for issues of fence maintenance, some of them very minor infractions. In addition, the Forest Service demanded that Hage maintain his irrigation ditches with nothing other than hand tools. Thus began the long pattern of Forest Service harassment.

As you can imagine the Forest Service failed to manage its lands and beaver dams, willows and other riparian growth choked the upstream waterways resulting in minimal flows to the Hage's property. As such, Hage was unable to irrigate his property any longer and to top it off, the Forest Service threatened Hage with prosecution if he entered Forest Service land to maintain the ditches. And, in fact, the Forest Service did unsuccessful attempt to prosecute Mr. Hage for clearing trees and brush along the ditches.

Stunningly, in 1990 the Forest Service determined that a large allotment had been "overgrazed" and ordered Hage and his cattle off that area. Of course, with no actual fenced boundary, it was impossible for Hage to insure that his cattle would not stray onto the forbidden allotment. In 1991, the Forest Service twice impounded Mr. Hage's cattle and ultimately sold his cattle for \$39,150.00 when he was unable to pay the costs of impoundment. The Forest Service kept the proceeds of the sale.

Mr. Hage finally had enough. The Forest Service had revoked his grazing allotments, refused him access, cut off his water supply, and taken his cattle away. He filed a claim against the Forest Service alleging a Fifth Amendment Taking of compensable property, breach of grazing permit, and compensation for improvements that he made to public property. After decades of legal fighting, multiple opinions from the court, and the death of Mr. and Mrs. Hage, his Estate finally got what it deserved. Initially the court held that a grazing permit is not a property right that could give right to a taking. However, the court held that (1) the Forest Service's construction of fences on federal land around water and streams in which ranch owners had a vested water right constituted a physical taking; (2) the Forest Service's refusal to allow Mr. Hage to access federal land to clear the obstructions in the streams and ditches constituted a regulatory taking; and (3) the Forest Service's requirement that Mr. Hage use only hand tools to constituted a taking of Hage's 1866 Act ditches. The court wrote:

the hand tools requirement prevented all effective ditch maintenance, as it cannot be seriously argued that the work normally done by caterpillars and back hoes could be accomplished with hand tools over thousands of acres. With hand tools the task would have taken years or decades and required hundreds of workers....Plaintiffs offered ample evidence that the Forest Service had engaged in harassment towards Plaintiffs, enough to suggest that implementation of the hand tools requirement was based solely on hostility to the Plaintiffs.

In finding the Hage's the last task for the court was to determine the amount of compensation. To set compensation, the plaintiffs had to calculate at trial the actual amount of water that was diverted over time due to the Forest Service's actions. At trial, the plaintiffs' expert calculated a loss of total acre feet of 17,520.65 at a value of \$2,854,816.20. Additionally, the plaintiffs were entitled to compensation for their improvements to fences, roads, and springs on Forest Service land, of which the court awarded \$1,265,615.00. Total award for the plaintiffs, \$4,220,431.20, plus interest from the date of the taking and attorneys fees and costs. I'm no economist, but I can imagine the interest on \$4 million over 17 years has got to be a chunk of change. It's possible, but not likely, that the massive verdict will make the Forest Service change its pattern of harassment towards western ranchers. It remains to be seen.

Should you have any specific questions, feel free to contact me at rwoody@mwl-law.com

Endangered Species Act

ESA Protections Reinstated For Gray Wolf In Idaho, Montana & Wyoming

By Ryan L. Woody

The U.S. Fish & Wildlife's decision to delist the gray wolf in Montana, Idaho, and Wyoming was bound to be controversial and was certain to head for the courts. With fall wolf hunts scheduled in all three states, the Defenders of Wildlife and other environmental groups immediately filed suit in the District of Montana to stop the de-listing decision. Why Montana and not Wyoming or Idaho? Montana presented



the best venue for a favorable ruling. Montana's Judge Molloy has routinely ruled in favor of environmental plaintiffs, while the same success cannot be said for federal judges in Idaho and especially Wyoming. Additionally, Montana belongs to the 9th Circuit, while Wyoming to the 10th Circuit, a much more conservative court of appeals.

Plaintiffs to the lawsuit, included Defenders of Wildlife, Sierra Club, Humane Society, Center for Biological Diversity and others. Intervening as defendants in the case were the States of Montana, Idaho and Wyoming, the National Rifle Association, Safari Club, Montana Stockgrowers Association, Montana Farm Bureau and others.

The Plaintiffs asked the court to reinstate the wolf's endangered species act protections pending the outcome of the litigation. In support, they argued that the Fish & Wildlife Service failed to show genetic exchange between subpopulations and that it approved Wyoming's wolf management plan despite existing provisions it had already deemed inadequate. District Judge Molloy agreed and reinstated the previous ESA protections pending the ultimate result of the case. He wrote:

As recently as 2002, the Service determined genetic exchange between wolves in the Greater Yellowstone, northwestern Montana, and central Idaho core recovery areas was necessary to maintain a viable northern Rocky Mountain wolf population in the face of environmental variability and stochastic events. The Fish & Wildlife Service nevertheless delisted the wolf without any evidence of genetic exchange between the wolves in the Greater Yellowstone core recovery area and the other two core recovery areas. To justify its decision, the Service relied on the same information that was available to it when it determined exchange was necessary in 2002.

In 2004, the Fish & Wildlife Service rejected Wyoming's 2003 wolf management plan. The Service determined the 2003 plan was inadequate to protect wolves because it permitted Wyoming state officials to classify the wolf as a predatory animal throughout the state and then failed to clearly commit the state to managing for 15 breeding pairs within its borders. Before delisting the wolf, the Fish & Wildlife Service approved Wyoming's revised 2007 plan. This revised plan suffers from the same deficiencies as the 2003 plan: it classifies the wolf as a predatory animal in almost 90 percent of the state and only commits the state to managing for 7 breeding pairs outside the national parks. In supporting its decision to approve Wyoming's 2007 plan, the Service does not offer any information not available to it when it rejected the 2003 plan. Armed with the same information, the agency flip-flopped without explanation.

Even with a favorable jurisdiction, the Fish & Wildlife Service was bound to lose. It was the agency that determined that genetic exchange was critical to the wolf's recovery. However, before delisting the agency did not make any finding of actual genetic exchange,

which would by its own definition insure future viability. As such, the agency's decision to delist was arbitrary and capricious under its own standard.

Likewise, Wyoming's plan classifies the wolf as predatory "so long as there were seven (7) wolf packs outside the National Park Units or fifteen (15) wolf packs in the entire state (the "seven or fifteen criteria")." The critical word in the Wyoming plan was "or". By its definition it could allow the population to sink well below the 15 minimum, so long as there were at least 7 breeding pair within the park units. Clearly that violates the 15 breeding pair minimum.

In short, this was an easy win for environmental plaintiffs. It was as if the Fish & Wildlife Service was hoping to lose. The FWS knew that it had not met its own "genetic exchange" standard, yet failed to at least formally change its standard before approving the delisting. It also knew that Wyoming's plan failed to insure at least 15 breeding pairs, yet it approved the delisting. Maybe I'm being too harsh on the agency, but in light of the microscopic treatment its wolf delisting decision was sure to receive, it utterly failed to even follow its own criteria. It was either intentional or complete incompetence that led to its decision to delist the wolf in this manner. Personally, I suspect the former. At this point, it is unclear whether the FWS will appeal, but there is little point in continuing to the merits stage of litigation, because it is clear that the plaintiffs will prevail.

Should you have any questions or comments about this or any other topic please do not hesitate to contact Ryan Woody at rwoody@mwl-law.com

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