

National Forest Law Newsletter

by Ryan Woody

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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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Ninth Circuit Court of Appeals



Lands Council v. McNair, 494 F.3d 771 (9th Cir. 2007).

By Ryan L. Woody

Big news out of the Ninth Circuit. On January 16, 2008 the full Ninth Circuit agreed to rehear this controversial case. The case is controversial in part for its failure to defer to the Forest Service's scientific methodology and also in part for its fiery concurrences authored by Judge Milan Smith and Judge Stephen Reinhardt.

As a matter of background, the Ninth Circuit well-known as the most liberal leaning court in the country. However, there also exists a quite vocal feud between the liberals on the court and the smaller yet vocal conservative minority. The fight has generally been fought between the Liberal Lion, Judge Stephen Reinhardt, and the very conservative Judge Diarmuid O'Scannlain. The fundamental dispute arises over the role of the federal judge under Article III of the Constitution. The conservatives believe that federal judges have a limited role of determining whether the law has been enforced "correctly". Conversely, the liberals see the role of the federal judiciary expansively, not as the defender of rigid laws, but rather as a promoter of justice and fairness. Maybe that oversimplifies the dispute, but you get the picture. The Ninth's Circuit's split at times is not only ideological but personal and their opinions can get nasty.

This case arose when environmental groups, led by The Lands Council appealed a district court's denial of a preliminary injunction. The plaintiffs sought to stop the Mission Brush Project of selected logging in the Idaho Panhandle National Forests. The Project would treat approximately 3,829 acres of forest including 277 acres of old growth stands. The Forest Service proposed the Project because, in its view, "the densely stocked stands we see today are causing a general health and vigor decline in all trees species." 494 F.3d at 774.

The Plaintiffs contended that the Project had to be stopped, because the Forest Service had not demonstrated that the Project would not harm the flammulated owl, northern goshawk, and other "sensitive species". *Id.* at 776. Specifically, the Plaintiffs argued that the Forest Service was relying upon the "unverified hypothesis" that "treating old-growth forest is beneficial to dependent species." *Id.* The court looked to the administrative record for on-the-ground evidence to verify the agency's hypothesis. After discounting much of the agency's work that did not contain on-the-ground verifications the court looked to the Dawson Ridge Study which contained actual on-the-ground observations of the owl habitat. The majority criticized this study and discounted its conclusions because it only noted one response in the observation area. The court mocked the agency's conclusions - "[b]ased on this solitary hoot, and the fact that the area has been logged in 2000 and underburned in 2002, the report concluded that 'owls are using the area after harvest.'" *Id.* Accordingly, the court in an extension of its current precedent in *Ecology Center*, 430 F.3d 1057, reversed the district court and granted the preliminary injunction. Essentially, the court refused to defer to the Forest Service's determination that treatment will benefit old-growth dependent species. On a sidenote, the court considered and rejected the fact that their decision directly eliminated dozens of jobs in one of Idaho's most depressed regions. at 789.

Apparently, this decision and those before it did not sit well with Judge Smith. He wrote a scathing concurrence ripping the 9th Circuit's precedents and Judge Reinhardt's authorities. Several notable quotes from his concurrence:

"the majority's extension of...[*Lands Council I*]...represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service...[T]he majority has, in effect, displaced 'arbitrary and capricious' review for a more demanding standard."

...

"there is no legal basis to conclude that NFMA requires an on-site analysis where there is reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA"

...

"I question whether, without *Ecology Center*, we would be able to scrutinize how many owl hoots were heard on the Dawson Ridge Study."

...

"cases like *Ecology Center* make it virtually impossible for logging to occur under any conditions because the Forest Service can never satisfy the constantly moving legal targets created by our circuit, sometimes out of whole cloth."

Judge Smith then began taking personal shots at his colleague Judge Reinhardt's own concurrence in which he cited a piece by Derrick Jenson. After apparently doing a little research that included Wikipedia, Smith concluded that Reinhardt's source was of dubious reliability.

"According to Wikipedia, "Jensen is often labeled as an 'anarcho-primitivist,' who is quoted as saying in his book *A Language Older Than Words* that "[e]very morning when I awake I ask myself whether I should write or blow up a dam. I tell myself I should keep writing, though I'm not sure that's right...I respectfully suggest that the views of persons who, for example, fantasize about blowing up dams (a form of eco-terrorism and criminal act that potentially threatens the lives and property of thoughts of people) deserve a healthy skepticism because they are so skewed and are so far from the mainstream of

knowledgeable discourse.”

I suggest reading the entire decision yourself to see the full back and forth dialogue between Smith and Reinhardt. However, I imagine that you won't find the two splitting a cab or exchanging Christmas cards.

Now that the full Ninth Circuit panel will hear the case, you can expect another colorful opinion. However, as you can see the case raises the fundamental concerns that the judges of the 9th Circuit have struggled with regarding the proper role of the federal judiciary. Should judges pry into the science behind Forest Service decisions or does that exceed their role? Does the 9th Circuit owe deference to the Forest Service's own methodology or is every study, hypothesis and conclusion up for de novo review? I promise the case will be must see TV or at least a must read case.

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

INTERVENTION

A Discussion of Intervention by Pro-Logging Groups



For those groups out there considering whether to intervene into pending Forest Service litigation, you must consider whether you meet the criteria set for in Federal Rules of Civil Procedure 24(a) or (b), which allows intervention. Rule 24 provides for intervention as of right and permissive intervention. Rule 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Eastern District Court for California recently considered whether to allow intervention by a small, family owned sawmill into litigation by environmental groups challenging a timber sale on the Sequoia National Forest. *Sequoia Forestkeeper v. United States Forest Service*, 2008 WL 324013, 07CV1690 (E.D.Cal. Feb. 5, 2008). The proposed intervenor, Sierra Forest Products ("SFP") is a locally owned sawmill located in Terra Bella, California. SFP purchased a timber sale contract for some light thinning across approximately 705 acres on the Clear Creek Thinning sale. The lawsuit brought by environmental groups would halt the sale and SFP's contract. The environmental groups opposed the intervention arguing, as in many similar cases, that the Forest Service adequately represented SFP's interests.

The district court analyzed the situation under the standards set out in Rule 24(a) and (b). First the parties agreed that intervention was timely and the outcome would affect SFP. Next, the court looked at whether SFP had a right to intervene under Rule 24(a). Does SFP have a significant protectable interest? The key factor in the case was the fact that SFP held an actual timber contract for the proposed project. The court found this persuasive, writing, “where ‘injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party’s legally protectable interests,’ that party demonstrates that it has a significant protectable interest in the action.” Next, the court looked to whether the government adequately represented SFP’s interests. The court found that the Forest Service would not adequately defend SFP where, according to SFP, past history has shown that the agency has failed to sell the amount of timber authorized under the Sequoia Forest Plan and has not pursued certain legal defenses available in order to defend these sales. As such, the elements of mandatory intervention under 24(a) were met. However, under 9th Circuit precedent an applicant only has a right to intervene into the remedial portion of the case under Rule 24(a), therefore the court moved onto 24(b) to determine whether SFP could intervene into the merits portion of the case.

Under 24(b)’s permissive intervention a court has discretion to allow the applicant full intervention into the important merits phase of the litigation. Permissive intervention is, therefore, an important way to get an important merits argument before the court. Because SFP demonstrated that it had a protectable interest and that it would be directly affected the court seemed inclined to allow intervention. However, in this case, it was clear that the current parties would not make some of the important arguments that SFP would raise. Maybe more importantly, SFP was able to show the court that it was a sophisticated litigant that would raise important and viable legal arguments that would benefit the trial judge’s consideration. Accordingly, the court found that there would be a certain vacuum without SFP’s involvement. Therefore, the court ruled, “[b]ecause SFP’s interests are not adequately protected and because it can expand upon common factual and legal issues before the Court” pursuant to Rule 24(b)

The merits stage is where the case is won or lost so having your voice heard that this stage is vitally important. Therefore, where your organization believes that it will be directly and concretely affected by pending litigation, the courts will generally allow intervention at this critical phase. However, the rules of intervention differ slightly in each federal circuit. Should you or anyone you know have any additional questions about intervention, please feel free to contact me at rwoody@mwl-law.com

Ochoco National Forest (Oregon)

Forest Service’s Failure to Act on Pending Application Does Not Warrant Damages For Constitutional Violations

Because the federal government is this country’s largest landowner, of which the Forest Service controls a large portion, the agency is often involved in issues beyond environmental and natural resources issues. This newsletter will also provide a look at some of the other issues the agency faces. Just this month the District Court for Oregon faced a challenge by a telecommunications company over the Forest Service’s inaction on its special use application for antennas to be located at Gray Butte within the Ochoco National Forest. *Western Radio Serv. Co. v. United States Forest Service, et al.*, 2008 WL 427787, No. 04-CV-1346 (D. Or. Feb.12, 2008).



The dispute arose after Western Radio sent letters dated January 3, 1991 and September 10, 1991 seeking the Forest Service's permission to install two antennas at Gray Butte. The Forest Service did not act upon either of those letters. Western Radio formally followed up with a revised application on October 19, 1998. On December 3, 1998 the Forest Service denied the application. Western Radio administratively appealed and the agency withdrew its opinion on January 4, 1999. No further agency action occurred and Western Radio filed suit on September 22, 2004. Two years later Western Radio submitted another application for four sidehill antennas. On September 4, 2007 the Forest Service issued an EA and FONSI and approved Western's request to construct two of the four antennas.

In the meantime, Western's suit continued. Western had spent nearly 17 years pursuing the agency to act on its request for the antennas. Western also alleged that during the same time period the Forest Service gave preferential treatment to its competitors, Day Wireless and Slater Communications. The Plaintiffs characterized their claims as constitutional violations and sought monetary damages under the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Forest Service countered that the Plaintiff's claims merely sounded in common law tort and adequate remedies were available under the Administrative Procedure Act.

Bivens is a famous case that established that parties could receive monetary damage awards against government officials for violations of their constitutional rights even in the absence of a specific authorizing statute. However, as the Supreme Court recently explained *Bivens* remedies are not available in every constitutional case. Instead, "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee". *Wilkie v. Robbins*, 127 S.Ct. 2588, 2597 (2007).

In that light the court addressed the issues. Before deciding whether a *Bivens* remedy was appropriate, the first step is to determine whether Congress has provided "adequate remedial mechanisms". In this case, the court held that the Administrative Procedures Act ("APA") provides an alternate and comprehensive remedy for the plaintiff. If Western wants the government to act it can do so by filing an appeal and following through via the APA. Additionally, the court found no evidence of any willful or malicious conduct on the part of any Forest Service officials. The court was also skeptical of the plaintiff's attempt to couch ordinary tort claims into extraordinary constitutional violations. Accordingly, the court dismissed the plaintiff's action and denied any compensatory damages.

The lesson is clear. Government agencies can take as much time as they want to act upon a request. A plaintiff's only remedy is through the APA, or in the case of a tort through the Federal Tort Claims Act.

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

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