E. Healthy Forests Restoration Act

1. Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019)*

Two environmental groups, the Center for Biological Diversity and Earth Island Institute (collectively, CBD), sued the United States Forest Service, alleging the Forest Service violated the National Environmental Policy Act (NEPA)[1] both by designating 5.3 million acres of at-risk forest under Healthy Forests Restoration Act (HFRA)[2] without preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), and by invoking the categorical exclusion allowed under the HFRA for the Sunny South Project. The United States District Court for the Eastern District of California granted summary judgment in favor of the Forest Service and Defendant-Intervenor, Sierra Pacific Industries.[3] On appeal, the Ninth Circuit affirmed, holding that landscape-scale area designations under the HFRA do not require NEPA analysis, and that the Forest Service's determination that Sunny South project qualified as a categorical exclusion was not arbitrary and capricious.

In response to the growing threat of insect and disease infestation in National Forests, Congress amended the HFRA to enable the Forest Service to more expeditiously identify and manage the risks associated with pine bark beetle. The amendments create a two-step process, the first of which requires the designation of large areas of forest land that face heightened risk of harms from infestation and disease as "landscape-scale areas." The second step under the HFRA requires the Forest Service to develop and implement treatment projects to combat issues faced in the landscape-scale areas. A project under the second step may be categorically excluded from the requirements of NEPA if it meets certain requirements pertaining to its location, size, purpose, development, and implementation, and does not present extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

In 2015, the Chief of the Forest Service designated 5.3 million acres of land in California as a landscape-scale area under the HFRA. Following this designation, the Forest Service developed the Sunny South Project, which authorized tree thinning and prescribed burning across 2,700 acres of the Tahoe National Forest. In 2016, biologists conducted research to determine the possible effects of the project on sensitive species. As part of the study, biologists examined the project's potential impact on the California spotted owl, which the Forest Service designated as a sensitive species in the Tahoe National Forest. The Forest Service incorporated project measures intended to protect important areas of owl habitat. The study concluded that while the Sunny South Project may affect individual owls, it was not likely to result in a trend toward federal listing or loss of viability, and would ultimately benefit the species. The Forest Service approved the project, concluding that the degree of potential effect on the owl did not necessitate a finding of "extraordinary circumstances" and the project was categorically excluded from the NEPA under the HFRA.

CBD sued, alleging the Forest Service violated the NEPA, both in its designation of the landscape-scale area and by categorically excluding the Sunny South Project. The district court granted summary judgment for the Forest Service and CBD appealed. The Ninth Circuit reviewed the district court's grant of summary judgment de novo.

The Ninth Circuit first held that landscape-scale area designations under the HFRA do not require the NEPA analysis. CBD argued that the Forest Service's designation of 5.3 million acres violated NEPA because the Agency failed to prepare an EA or EIS to determine whether the proposed action would have a significant impact on the human environment. The Forest Service contended that because the designation of landscape-scale areas does not directly or indirectly affect the environment, evaluation of effects could not be meaningful, and relieved the Agency of conducting NEPA analysis. The Ninth Circuit agreed with the Forest Service, finding that designation of landscape-scale areas, as opposed to a particular planned project, is too speculative of a government action and that any

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[1] National Environmental Policy Act, 16 U.S.C. §§ 4321–4370h (2012).

[2] Healthy Forest Restoration Act, 16 U.S.C. §§ 6501–6591e (2012).

[3] Ctr. for Biological Diversity v. Ilano, 261 F. Supp. 3d 1063, 1071 (E.D. Cal. 2017).

NEPA analysis prepared would be little more than a study. The court noted that this interpretation was consistent with legislative intent that the HFRA expedite the response to declining forest lands by removing certain environmental analysis barriers.

The Ninth Circuit next analyzed CBD's second NEPA claim, holding that the Forest Service's finding that the Sunny South Project did not involve extraordinary circumstances was not arbitrary or capricious. CBD challenged the Forest Service's finding on the ground that the project's potential impact on the California spotted owl constituted extraordinary circumstances, due to canopy reduction in the project area, and that the Forest Service should have conducted an EA before proceeding with the project. The Forest Service argued that it sufficiently identified the owl as a sensitive species, examined the cause-and-effect relationship between the Sunny South Project and the potential effect on the owl, determined the Project did not present extraordinary circumstances, and therefore correctly invoked the categorical exclusion from NEPA compliance. The Ninth Circuit held in favor of the Forest Service, finding that because the Agency considered relevant scientific data and engaged in careful analysis, the Forest Service's determination of no extraordinary circumstances was not arbitrary and capricious. The court also noted that though CBD presented scientific data that conflicted with studies relied upon by the Forest Service, the Forest Service has deference to rely on the reasonable opinions of its own qualified experts.

In sum, the Ninth Circuit affirmed the judgment of the district court, holding that the Forest Service's designation of 5.3 million acres as facing elevated threat from infestation and disease did not require the preparation of an EA or EIS since the effects were too speculative to effectively analyze the environmental consequences. Additionally, the court held that the Forest Service appropriately invoked the categorical exclusion from the NEPA compliance provided for in the HFRA because sufficient evidence supported the Agency's finding of no extraordinary circumstances and therefore the finding was not arbitrary and capricious.