

2. WildEarth Guardians v. Provencio, 923 F.3d 655 (9th Cir. 2019)

WildEarth Guardians, along with other environmental advocacy groups (collectively, Guardians),^{[[1]]} filed a claim against the United States Forest Service (USFS), challenging travel management plans implemented by USFS that permitted limited motorized big game retrieval in three regions of the Kaibab National Forest (the Kaibab). Guardians sought injunctive and declaratory relief, alleging violations of the Travel Management Rule,^{[[2]]} the Administrative Procedure Act^{[[3]]} (APA), the National Environmental Procedure Act^{[[4]]} (NEPA), and the National Historic Preservation Act^{[[5]]} (NHPA). The District Court for the District of Arizona granted summary judgment in favor of USFS.^{[[6]]} On appeal, the Ninth Circuit affirmed.

The Kaibab, located in northern Arizona, is approximately 1.6 million acres, including Grand Canyon National Park, and is comprised of three noncontiguous Ranger Districts. The Kaibab hosts a wide variety of landscapes, and it is also home to a number of endangered and sensitive species.^{[[7]]} The Travel Management Rule was promulgated by the U.S. Department of Agriculture in 2005 to “provide[] for a system of National Forest System roads, National Forest System trails, and areas on National Forest System lands that are designated for motor vehicle use.”^{[[8]]} The rule created certain restrictions on motor vehicle use for designated roads and prohibited motor vehicle use on roads not designated.^{[[9]]} The rule also included a provision allowing for “the limited use of motor vehicles within a specified distance of certain forest roads” specifically for the retrieval of legally downed big game.^{[[10]]}

Guidelines for implementation of the rule were prepared by USFS’s Southwestern Regional Office, which noted the importance of hunting to the public in the region. The guidelines suggested allowing motor vehicles to travel up to three miles from designated roads for bison retrieval and up to one mile for elk and deer retrieval. In implementing the rule, USFS created a travel management plan for each of the three Ranger Districts in the Kaibab. For each of the districts, USFS performed an environmental assessment (EA), concluding with a finding of no significant impact (FONSI). In the Williams and Tusayan Ranger Districts, the FONSI allowed for the motorized retrieval of elk within one mile of designated roads and included several other restrictions, but neither FONSI allowed for the motorized retrieval of bison. The FONSI for the North Kaibab Ranger District did allow for the motorized retrieval of bison and elk because in 2009 no elk were taken while thirty-eight bison were taken in that district. The FONSI also prohibited retrieval of deer due to the high number of deer takings in the district. Following an affirmation of the travel management plans by the Regional Forester on an administrative appeal, Guardians filed a complaint in the district court alleging violations of the Travel Management Rule, NEPA, APA, and NHPA. On appeal, the Ninth Circuit reviewed the district court’s summary judgment ruling in favor of USFS de novo. Under the APA, an agency action can be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”^{[[11]]}

[[1]] Plaintiffs include WildEarth Guardians, Grand Canyon Wildlands Council, Wildlands Network, and the Sierra Club. [[1]]

[[2]] Travel Management Rule, 36 C.F.R. § 212.50(a) (2019). [[2]]

[[3]] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012). [[3]]

[[4]] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012). [[4]]

[[5]] National Historic Preservation Act, 54 U.S.C. §§ 300101–307108 (2012). [[5]]

[[6]] WildEarth Guardians v. Provencio, 272 F. Supp. 3d 1136 (D. Ariz. 2017). [[6]]

[[7]] The court stated: The Williams Ranger District . . . features a diverse array of vegetation including Douglas firs, white firs, ponderosa pines, and aspens . . . [and] . . . also serves as a habitat for a number of endangered species, including the Mexican spotted owl, the California condor, and the black-footed ferret. It contains six areas where spotted owls are known to live and breed, and three spotted owl critical habitats overlap the District. . . . The Tusayan Ranger District . . . features varied terrain, from ponderosa pine forests to grasslands, and is home to a number of sensitive species, including bald eagles, goshawks, peregrine falcons, burrowing owls, bats, and voles. . . . The North Kaibab Ranger District . . . boasts diverse terrain and vegetation, as well as sensitive animal species. Two federally listed endangered species—the Mexican spotted owl and California condor—live in the District, which the U.S. Fish and Wildlife Service has designated as critical habitat for the spotted owl. WildEarth Guardians v. Provencio, 923 F.3d 655, 661–62 (9th Cir. 2019). [[7]]

[[8]] Travel Management Rule, 36 C.F.R. § 212.50(a) (2019). [[8]]

[[9]] *Id.* [[9]]

[[10]] *Id.* § 212.51(b). [[10]]

[[11]] APA, 5 U.S.C. § 706(2)(A) (2012). [[11]]

Guardians first argued that the travel management plans violated the Travel Management Rule because the rule calls for the “limited” use of motor vehicles on “certain” roads for big game retrieval, while the management plans allow for big game retrieval on *all* designated roads. The Ninth Circuit, however, agreed with the district court that Guardians’ interpretation of the word “limited” focused only on the spatial aspect of the limitation. The management plans included limitations based on factors other than geography, which were significantly stricter than prior to the management plans, and the Ninth Circuit noted that although Guardian’s interpretation was not unreasonable, they presented no evidence that such an interpretation is required. The Ninth Circuit concluded that the restrictions constituted a “limited” use of motorized vehicles.

As to allowing motorized use on “certain” forest roads, Guardians argued that “certain” should be interpreted as “some, but not all,” however, the Ninth Circuit was persuaded by USFS’s argument that the more common definition is “definite” or “fixed.” By allowing motorized use only on designated roads, the Ninth Circuit found USFS to have complied with the Travel Management Rule. Lastly, the preamble to the Rule calls for USFS to allow for big game retrieval “sparingly,” which Guardians argued was violated for the same reason that the management plans allow for retrieval on all designated roads. The Ninth Circuit found this argument unpersuasive for the same reasons as above, and also noted that the preamble does not impose a duty beyond the language of the regulations. The court also noted that Guardians’ relied only on the spatial concept of “sparingly,” ignoring the other restrictions imposed by the plans. Ultimately, the Ninth Circuit held that the USFS did not violate the Travel Management Rule.

The Ninth Circuit then addressed defendant’s argument that Guardians lacked standing for its NEPA claims because the standing declarant himself was a source of the negative effects, resulting in redressability not being satisfied. The Ninth Circuit equated this argument to a hypothetical plaintiff challenging a CO₂ producing power plant, who would lack standing because they happen to exhale CO₂ themselves, which the court stated would be an absurd result and defy precedent. Defendants also contended that Guardians’ lacked prudential standing based on the perceived motivation behind the claims, asserting that NEPA cannot be used to reverse USFS decisions. The Ninth Circuit was not persuaded by this argument, stating that attempting to protect the environment is well within NEPA’s zone of interests, and concluded that Guardians did have standing to bring the NEPA claims.

Guardians claimed that USFS violated NEPA by failing to perform an environmental impact statement (EIS), which is required if an action might significantly affect environmental quality. First, Guardians contended that motorized big game retrieval could have detrimental effects on the environment, however, each of the three EAs produced discussed the negative effects and concluded the concern was not substantial enough to warrant an EIS. The Ninth Circuit agreed with Guardians that motorized big game retrieval can negatively affect the environment, but concluded the effects were not substantial enough to warrant an EIS, stating that Guardians may disagree with the substantive conclusions of the EA, but that there was no indication of procedural failures. The court expressed skepticism of USFS’s argument that the management plans *reduced* the negative impacts in relation to the pre-plan activity, thereby making the impacts insignificant. However, the Ninth Circuit ultimately concluded that USFS’s determination that the impacts were not significant enough to warrant an EIS was not arbitrary and capricious, and therefore USFS did not violate NEPA based on the environmental impact of the travel management plans.

Guardians also claimed USFS violated NEPA’s requirement to prepare an EIS when an action’s effects are likely to be highly controversial or highly uncertain.^{[[12]]} The Ninth Circuit stated, however, that mere opposition is not sufficient to support an action being “highly controversial,” and USFS recognized the potential for controversy but determined there was not significant scientific controversy regarding the impacts. Guardians also claimed USFS violated NEPA for not considering the precedent that may be established by this action for future actions.^{[[13]]} The Ninth Circuit noted, however, that despite language in the record indicating that other districts will defer to the Kaibab’s policy for motorized game retrieval, each forest plan would still be subject to its own NEPA analysis, and thus concluded the consideration of precedential impact did not warrant an EIS. Guardians’ final NEPA

[[12]] 40 C.F.R. § 1508.27(b)(4)–(5) (2019).[[12]]

[[13]] *Id.* § 1508.27(b)(6).[[13]]

claim contended that USFS did not adequately consider the impact of the plans on the Mexican spotted owl, a threatened species found in the Williams and North Kaibab districts. The Ninth Circuit disagreed, stating that the EA's conclusion that the plans would not adversely affect the owl was sufficient to obviate the need for an EIS. The Ninth Circuit ultimately concluded USFS completed the requisite hard look analysis, and its conclusions were not arbitrary and capricious, satisfying NEPA requirements.

Finally, Guardians claimed USFS violated the NHPA by (1) failing to properly identify and evaluate cultural properties; (2) erroneously applying "Exemption Q"^{[[14]]} to excuse NHPA consultation; and (3) arbitrarily concluding the travel plans would have no adverse effect on cultural resources. On the first claim, Guardians contended that USFS failed to reasonably survey the area because it did not survey 100 percent of the affected areas. The Ninth Circuit agreed with USFS, finding that because less than 0.1 percent of the acreage in each district would be impacted, USFS reasonably concluded it did not need to complete 100 percent surveys. The Ninth Circuit agreed with Guardians that Exemption Q was not appropriate because the travel plans involved surface disturbances, but the court explained that USFS did consult with appropriate parties, which would not be required had Exemption Q been applied, and therefore, the court determined any reference to Exemption Q by USFS did not affect the NHPA process. Lastly, the Ninth Circuit was not persuaded by Guardians' contention that USFS arbitrarily determined the plans would have no adverse effect on cultural resources, stating Guardians had cherry-picked from the record to establish its assertion. Instead, the Ninth Circuit concluded USFS's determination was adequately supported.

In conclusion, the Ninth Circuit held that USFS, in producing the three travel management plans, did not violate the Travel Management Rule and sufficiently fulfilled the procedural requirements of NEPA and the NHPA, and the court affirmed the district court ruling.

[[14]] "The Programmatic Agreement's Exemption Q provided that '[a]ctivities not involving ground or surface disturbance (e.g., timber stand improvement and precommercial thinning by hand)' are 'exempt from further review and consultation.'" *WildEarth Guardians*, 923 F.3d 655, 677 (9th Cir. 2019).[[14]]