NOTES

Wilderness Society v. Thomas: The Ninth Circuit Perpetuates the Forest Service's Mismanagement of Public Range Land

I. OVERVIEW OF THE CASE

Does the National Forest Management Act (NFMA)[1] require the United States Forest Service to differentiate between land that is "capable" of supporting livestock grazing and land that is "suitable" for grazing? Believing the answer to be yes, the Wilderness Society and the Sierra Club, both public interest environmental organizations, sued the Chief of the Forest Service, the Southwest Regional Forester, and the Forest Supervisor for the Prescott National Forest for violating NFMA and the Administrative Procedure Act (APA).[2] The controversy centered on whether the Forest Service violated NFMA and the APA by failing to make a "grazing suitability determination" in its land and resource management plan (Forest Plan) before issuing livestock grazing permits for allotments on the Prescott National Forest (Forest) in Arizona.[3]

Preparation of the Forest Plan and an accompanying environmental impact statement (EIS) was initiated in 1985.[4] The Forest Plan identified total acreage that was "not 'capable' of being used for commercial livestock grazing due to physical constraints."[5] The Forest Plan identified 273,000 acres of the Forest as not "suitable" for livestock grazing due to steep terrain, unstable soils, and heavily forested areas.[6] The remaining 977,834 acres were listed

1. 16 U.S.C. §§ 1600-1687 (1994 & Supp. IV 1998).
2. *See* Wilderness Soc'y v. Thomas, 188 F.3d 1130, 1132-33 (9th Cir. 1999). Note also that the Yavapai Cattle Growers Association and several local cattle ranchers intervened as Defendants. *See id.*
3. *Id.* at 1133.
4. *See id.* at 1132.
5. *Id.*
6. *See id.* at 1134.

as "suitable."[7] The plaintiffs administratively challenged the adequacy of the Forest Plan because it did not "physically identify" the land that was "suitable" for grazing.[8] The plaintiffs asserted that the Forest Service's "blanket decision to designate as suitable all lands capable of grazing" was in violation of federal regulations because the decision did not consider the "economic or environmental consequences of livestock grazing or its effects on alternative uses of those lands."[9] Ultimately, the Forest Service approved the Forest Plan as prepared.[10]

The plaintiffs filed suit against the Forest Service in federal district court after the administrative appeal failed.[11] The plaintiffs asserted four claims for relief in their complaint.[12] The first claim alleged that the Forest Service violated the requirements of NFMA by approving the Forest Plan without conducting a grazing suitability determination.[13] The second and third claims alleged that the Forest Service violated NFMA by issuing grazing permits for site-specific allotments in the Forest without conducting the grazing suitability determination for those areas.[14] Finally, the plaintiffs alleged that the Forest Service violated the APA by "arbitrarily and capriciously" approving grazing permits in the Forest without making a suitability determination.[15] The district court ordered summary judgment in favor of the Forest Service.[16]

The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.[17] After scrutinizing the justiciability of the case and reviewing the statutory and regulatory requirements under NFMA, the Ninth Circuit dismissed the first claim as nonjusticiable and affirmed the district court's grant of summary judgment.[18] The court held that because the Forest Plan satisfied NFMA, the court would defer to the Forest Service's grazing decisions contained therein.[19] *Wilderness Society v. Thomas*, 188 F.3d 1130 (9th Cir. 1999).

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7. *See id.*
8. *See id.* at 1132.
9. *Id.* at 1134 (paraphrasing 36 C.F.R. § 219.3 (1999)).
10. *See id.* at 1132.
11. *See id.* at 1133.
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.* at 1136.
19. *See id.*

II. BACKGROUND

Under NFMA, the Forest Service is required to develop, maintain, and revise forest plans for each forest in the National Forest System.[20] The plans call for a "systematic interdisciplinary approach" to assure that the forests provide "multiple use and sustained yield of the products and services obtained therefrom,"[21] including "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."[22] Additionally, an EIS must be prepared for each forest plan pursuant to the requirements of the National Environmental Policy Act (NEPA).[23]

Regulations governing grazing resources on national forests were promulgated to implement NFMA.[24] In particular, the regulations specify that in a Forest Plan the Forest Service must determine "the suitability and potential capability of National Forest System lands for producing forage for grazing animals and for providing habitat for management indicator species."[25] The key terms are "capability" and "suitability." "Capability" is defined in the regulations as the "potential" usefulness of an area of the forest for specified management purposes.[26] On the other hand, "suitability" refers to the "appropriateness" of using specific areas of the forest for specific management practices.[27]

The APA provides citizens access to judicial review in order to challenge agency action or inaction.[28] Generally, the courts will defer to an agency's decision unless the decision is "arbitrary, capricious, an

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20. *See* 16 U.S.C. § 1604(a) (1994).
21. *Id.* § 1604(b).
22. *Id.* § 1604(e)(1).
23. *See id.* § 1604(g)(1); Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994).
24. *See* 36 C.F.R. § 219 (1999).
25. *Id.* § 219.20.
26. *Id.* § 219.3. "Capability" is defined in full as:

> The potential of an area of land to produce resources, supply goods and services, and allow resource uses under an assumed set of management practices and at a given level of management intensity. Capability depends upon current conditions and site conditions such as climate, slope, landform, soils, and geology, as well as the application of management practices, such as silviculture or protection from fire, insects, and disease.

Id.

27. *Id.* "Suitability" is defined in full as: "[t]he appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone. A unit of land may be suitable for a variety of individual or combined management practices." *Id.*
28. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).

abuse of discretion, or otherwise not in accordance with law."[29] Furthermore, when reviewing an agency's interpretation of its own regulations, the courts "defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the regulation."[30]

Before reviewing the merits of a challenge to a Forest Plan, courts will consider the justiciability of a case.[31] Justiciability encompasses the courts' self-imposed limits on federal jurisdiction.[32] Specifically, a case can be deemed nonjusticiable if the dispute is not "ripe" for review.[33] In 1998, the United States Supreme Court, in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, developed a three-part test to determine whether challenges to Forest Plans are ripe for judicial review.[34] First, a court must evaluate "whether delayed review would cause hardship to the plaintiffs."[35] Second, a court must consider "whether judicial intervention would inappropriately interfere with further administrative action."[36] Third, a court must consider "whether the courts would benefit from further factual development of the issues presented."[37] The Supreme Court clearly established that challenges to a forest plan must involve imminent concrete injury or site-specific harm rather than generic claims.[38] This new protocol provided the framework within which the Ninth Circuit evaluated the plaintiffs' challenge to the Forest Plan for the Prescott National Forest in the noted case.[39]

III. THE COURT'S DECISION

Before reaching the substantive NFMA issues of the claims in the noted case, the Ninth Circuit addressed the justiciability of the case in light of the Supreme Court's recent ruling in *Ohio Forestry*.[40] The court applied the *Ohio Forestry* three-factor justiciability test and stated that the plaintiffs must show either "imminent concrete injuries" or a "site-specific injury" causally related to the Forest

29. *Id.* § 706(2)(A).
30. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994) (citations omitted).
31. *See* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).
32. *See id.* at 732.
33. *See id.*
34. *See id.* at 733.
35. *Id.*
36. *Id.*
37. *Id.*
38. *See id.* at 738-39.
39. *See* Wilderness Soc'y v. Thomas, 188 F.3d 1130, 1133 (9th Cir. 1999).
40. *See id.*

Plan.[41] Relying on *Ohio Forestry*, the court declared that "[g]eneric challenges to the sufficiency of forest plans are no longer justiciable."[42] Using this rationale, the court viewed the first claim as nonjusticiable because it made the generic claim that the Forest Service failed to include a grazing suitability study in the Forest Plan.[43] As for the second and third claims, the court held that the claims were ripe for review because they identified site-specific injuries to the grazing allotment areas as a result of the Forest Service's general grazing suitability determinations.[44] The fourth claim was viewed as a close variant of the second and third claims and was therefore justiciable as well.[45]

After finding the second, third, and fourth claims justiciable, the court next considered the heart of the issue: whether the grazing determinations in the Forest Plan complied with NFMA.[46] Again, the precise point of contention was whether all land designated as "capable" of grazing could be considered "suitable" for grazing without first formally analyzing the economic and environmental consequences and its effects on alternative uses.[47] The court interpreted NFMA regulations to require the Forest Service to identify particular areas "suitable" or appropriate for grazing and browsing.[48] The court also acknowledged that a suitability determination, as defined in the regulations, requires assessment of the economic and environmental consequences as well as the preclusion of alternative uses.[49] Based on this framework, the court decided that the Forest Service had adequately analyzed economic and environmental consequences and considered alternatives to grazing suitability for the Forest in the EIS associated with the Forest Plan.[50] Even though the EIS was not strictly focused on grazing impacts on any particular areas of the Forest, grazing impacts were considered within the

41. *Id.*
42. *Id.* at 1134.
43. *See id.*
44. *See id.*
45. *See id.* at 1136.
46. *See id.* at 1134-36.
47. *See id.* at 1134. As a supplemental issue, the court also rejected the plaintiffs' argument against the Forest Service's use of the FORPLAN analytic modeling computer program for determining grazing suitability in its evaluation of alternatives. *See id.* at 1135-36. Relying on its decision in *Nevada Land Assoc. v. United States Forest Service*, 8 F.3d 713, 718 (9th Cir. 1993), the court held that the Forest Service was free to use FORPLAN to assist in the planning process. *See Wilderness Soc'y*, 188 F.3d at 1136.
48. *See Wilderness Soc'y*, 188 F.3d at 1135; *see also* 36 C.F.R. § 219.20 (1999).
49. *See Wilderness Soc'y*, 188 F.3d at 1135; *see also* 36 C.F.R. § 219.3 (1999).
50. *See Wilderness Soc'y*, 188 F.3d at 1135.

context of various proposed resources and management practices.[51] The court then fell back on the traditional notion of judicial deference to agency interpretation in the absence of "plainly erroneous or inconsistent" application of the regulation.[52] The court did not address the significance of the term "capability" when it reviewed the Forest Service's suitability analysis.[53] The court simply stated that the Forest Service interchanged the two words in the Forest Plan, but found that this did not amount to a violation of NFMA or the implementing regulations.[54]

Finally, the court summarily rejected the plaintiffs' fourth claim under the APA.[55] The court considered the plaintiffs' assertion that the record lacked any "rational basis or explanation for the Forest Service's grazing suitability determination" to be subsumed under the other two NFMA claims.[56] The APA claim necessarily failed because the court already decided that the Forest Service had complied with NFMA's grazing suitability determination requirements.[57]

IV. ANALYSIS

While the Ninth Circuit's assessment of the ripeness of the plaintiffs' claims comports with modern jurisprudence,[58] the court's flat rejection of the plaintiffs' challenge to the Forest Plan was based on a faulty reading of the plain language of NFMA's implementing regulations. Under *Ohio Forestry*, the court properly dismissed the plaintiffs' first claim as nonjusticiable and stated that the remaining claims were ripe for judicial review.[59] Unfortunately, the court still focused its decision on the sufficiency of the consideration of alternatives even though that was more of a generic claim under the now-dismissed first claim.[60] In so doing, the court failed to reach the heart of the remaining justiciable claims pertaining to the concrete harm caused by the Forest Service's failure to conduct a site-specific assessment of the specific grazing allotments.

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51. *See id.*
52. *Id.* (quoting Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994)).
53. *See id.* at 1135.
54. *See id.*
55. *See id.* at 1136.
56. *Id.*
57. *See id.*
58. *See* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).
59. *See Wilderness Soc'y*, 188 F.3d at 1134.
60. *See id.* at 1135-36.

The plaintiffs' second and third claims asserted that the Forest Service failed to comply with NFMA's grazing suitability determination requirements.[61] Under NFMA regulations, the Forest Service is required to identify site-specific areas that are suitable for grazing purposes in the Forest.[62] The Forest Service did not satisfy this requirement in the alternatives analysis section of the EIS.[63] Nevertheless, the court overlooked this regulatory requirement in condoning the Forest Service's less-informed general determination that all of the land that was not too steep, too rocky, or too wooded was suitable for grazing.[64] This allows the Forest Service to offer for grazing nearly one million acres of the Forest without determining whether any of the specific areas are actually suitable for such use.

The court's decision amounts to turning a blind eye on NFMA's requirement that the Forest Service assess both the "suitability" and "capability" of specific areas of the Forest for grazing purposes. The applicable NFMA regulations clearly require the Forest Service to determine and identify forest land that has "the suitability *and* potential capability" for grazing.[65] Thus, the terms "suitable" and "capable," which are defined separately in the regulations, are intended to mean two distinctly different things.[66] Given the clear definitions in the regulations, it should not be disputed that "capability" means that a specific area has the potential to serve as a grazing area while "suitability" means that it would be appropriate to use the specific area for grazing.[67] The essence of the plaintiffs' claims was that, even if the Forest Service competently determined that 977,834 acres had the potential to serve as livestock grazing land, it did not determine whether the specific allotment areas (or any areas) were suitable or appropriate for grazing purposes.[68] Incredibly, the court in one sweeping sentence eviscerates the distinction between "capable" and "suitable."[69] The court simply brushed aside the importance of the two terms by stating that the Forest Service "unnecessarily complicated the analysis by occasionally interchanging the terms" but did not fail to meet the statutory and

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61. *See id.* at 1134.
62. *See* 36 C.F.R. § 219.3 (1999) (requiring the suitability assessment to be applied to "a particular area of land").
63. *See Wilderness Soc'y*, 188 F.3d at 1135.
64. *See id.* at 1134-35.
65. 36 C.F.R. § 219.20 (1999) (emphasis added).
66. *See id.* § 219.3.
67. *See id.*
68. *See Wilderness Soc'y*, 188 F.3d at 1134.
69. *See id.* at 1135.

regulatory requirements.[70] The court deferred to the agency's interpretation of the regulations and overlooked the regulatory requirement that calls for a particularized assessment of both the suitability and capability of forest land for grazing.[71] Given the Ninth Circuit's criteria for judicial deference, the court should not have deferred to the Forest Service's interpretation because it is inconsistent with the plain text of the regulation.[72] Instead, the court should have taken the opportunity to intervene in order to bring the Forest Service into compliance with its own regulations pertaining to the need for site-specific grazing suitability determinations in National Forests.

V. CONCLUSION

In the noted case, the Forest Service's resolute protection of the cattle industry's grazing interests and its disregard for NFMA is a prime example of the agency's mismanagement of National Forest land. For the Forest Service to ignore its own mandate to accurately characterize the suitability of forest land for grazing is to betray the agency's public trust obligation. Moreover, the Forest Service is doing a disservice to cattle ranchers because the mismanagement of range land today will lead to long-term depletion of grazing resources in the foreseeable future.

While it is readily conceivable that the Forest Service would fail to fulfill its environmental protection mandates, the Ninth Circuit's support of such conduct is cause for greater despair. The court serves as the last chance to ensure that grazing permits are granted only for those areas of the Forest that can sustain such use. Here, the court ignores the fact that the Forest Service did not assess and identify specific areas appropriate for grazing and instead relies on agency discretion. This deference is misplaced in this situation because it is just as likely that the Forest Service chose not to go through the work of accurately assessing 977,834 acres for suitable grazing areas as it is that the Forest Service truly considered that its general grazing capability assessment sufficiently characterized such a vast area as suitable for grazing. The plaintiffs and the hope for sustainable use of the Prescott National Forest would have had a better chance if the

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70. *Id.*

71. *See id.* at 1136; *see also* 36 C.F.R. § 219.20 (1999).

72. *See* Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994).

court had scrutinized the decision-making criteria of the Forest Service as strictly as it did the justiciability of the plaintiffs' case.

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