

**USDA OGC Portland**

# **Litigation update**

**November 30, 2005, Oregon Convention Center, Room A106**

**Intergovernmental Advisory Committee Meeting**

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*The views expressed are those of the author alone, not necessarily those of the Office of the General Counsel, U.S. Department of Agriculture, or the Federal Government.*

**There are only 2 rules for a good presentation:**

- 1. Don't tell everything you know**
- 2.**

**— Anonymous**

*Portland Audubon Society v. Babbit*, 998 F.2d 705 (9th Cir. 1993)

**1.**

*Seattle Audubon Soc. v. Lyons*, 871 F.Supp. 1291 (W.D. Wash. 1994); affirmed *Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (Northwest Forest Plan affirmed for range of the Northern Spotted Owl).

**2.**

**3.**

*Oregon Natural Resources Council v. U.S. Forest Service*, 59 F.Supp.2d 1085, 1092 (W.D. Wash. 1999) (Forest Service and BLM implementation of the Northwest Forest Plan in the range of the Northern Spotted Owl) (agency policy that actions were exempt from plant and animal surveys if decisions were reached in the NEPA process by a certain date, is held arbitrary and capricious)

**4.**

*Hanson v. U.S. Forest Service*, 138 F.Supp.2d 1295 (W.D. Wash. 2001) (supplemental EIS is not required for Northwest Forest Plan despite allegations of 3 pieces of significant new information)

**5.**

*Oregon Natural Resources Council Action v. U.S. Forest Service*, 293 F.Supp.2d 1200 (D. Ore. 2003) (challenge to six timber sales on the Mt. Hood and Willamette National Forests)

**6.**

*Northwest Ecosystem Alliance v. Rey*, 380 F.Supp.2d 1175, 1192-93 (W.D. Wash. 2005) (Forest Service and BLM action to eliminate from management plan "survey and manage" standard used to protect certain rare and uncommon species on forested land) (agencies' policy choice to rebalance Forest Plan appeared to lack support where "survey and manage" was deemed necessary in 2001 but not in 2004):

**7.**

*Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service*, Civil No. 04-1299-RSM-MAT (W.D. Wash., filed May 27, 2004) (agencies' changes to language of NW Forest Plan ROD to clarify that achieving ACS Objectives would be measured at the 5th field watershed scale rather than the project scale)

**1.** *Portland Audubon Society v. Babbitt*, 998 F.2d 705, 708-09 (9th Cir. 1993) (“At the very least, the body of scientific evidence available by 1987 concerning the effect of continued logging on the ability of the owl to survive as a species raised serious doubts about the BLM’s ability to preserve viability options for the owl if logging continued at the rates and in the areas authorized by the [Timber Management Plans]. \*\*\* A supplemental EIS should have been prepared because the scientific evidence available to the Secretary in 1987 raised significant new information relevant to environmental concerns, information bearing on the impacts arising from the ongoing implementation of the land use decision driven by the original TMPs.”).

The Court of Appeals held that: (1) plaintiffs had standing; (2) decision was ripe for review; (3) decision not to supplement environmental impact statements in light of available scientific evidence concerning effect of continued logging on ability of owl to survive as species was arbitrary and capricious; (4) injunction was not precluded by Oregon and California Lands Act; and (5) requiring supplemental environmental impact statements was not inappropriate on ground that new resources management plans and accompanying statements would address all relevant information.

2.

*Seattle Audubon Soc. v. Lyons*, 871 F.Supp. 1291, 1318 (W.D. Wash. 1994)  
Affirmed on other grounds *Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (Northwest Forest Plan affirmed for range of the Northern Spotted Owl).

“NEPA requires, where economic analysis forms the basis of choosing among alternatives, that the analysis not be misleading, biased, or incomplete. To present a full and unbiased picture of proposed alternatives, the EIS must disclose both benefits and costs. In a programmatic EIS, however, NEPA does not require a particularized assessment of nonenvironmental impact.”

NEPA process upheld on management plan for Federal actions within the range of the Northern Spotted Owl despite allegations that the chosen alternative — Alternative 9 — was prejudged “by the President and the Secretaries before the [final EIS] was issued and subjected to public comment,” because agencies may have a preferred alternative, agencies are presumed to have acted in good faith, and the “early preference for Alternative 9 was not final”

**3.**

*Hanson v. U.S. Forest Service*, 138 F.Supp.2d 1295, 1300-04 (W.D. Wash. 2001) (supplemental EIS is not required for Northwest Forest Plan despite allegations of 3 pieces of significant new information):

The citizen groups have not demonstrated that the three pieces of information are new and significant, warranting an SEIS be prepared for the Plan. They have not shown that such information, if deemed relevant, could not be addressed by the process of adaptive management. The Forest Service has demonstrated that it reasonably relied upon its own expertise in their determination to not prepare an SEIS. That decision was not arbitrary or capricious. Accordingly, the citizen groups' requests for an SEIS and for an injunction is denied.

138 F.Supp.2d 1295, 1302:

The Court agrees with the Forest Service that the Plan predicted an annual NSO population decline of 4.5%, and the 1999 Demographic Report estimate of 3.9% is consistent with such an estimate. The citizen groups' reliance on a simulation analysis that states it should not be utilized to predict population trends is misplaced. They cite to Figures 7A-7D of the paper, but the Court finds no evidence of a 1% annual decline estimate in those figures. The paper is not officially part of the 1994 FSEIS, states its estimates are conservative, and states it should not be used for predicting population trends. The Court does not find the 1999 Demographic Report to contain new and significant information.

## *Oregon Natural Resources Council v.*

4.

*U.S. Forest Service*, 59 F.Supp.2d 1085, 1092 (W.D. Wash. 1999) (Forest Service and BLM implementation of the Northwest Forest Plan in the range of the Northern Spotted Owl) (agency policy that actions were exempt from plant and animal surveys if decisions were reached in the NEPA process by a certain date, is held arbitrary and capricious):

The result is to exempt numerous proposed sales from the survey requirements. A November 1, 1997, memorandum issued jointly by the Forest Service and BLM stated that "[t]he interagency interpretation is that the 'NEPA decision equals implemented'." "Thus, for the first six category two species, for "[p]rojects with NEPA decisions signed prior to October 1, 1996, and contracts offered before January 1, 1997—no survey is required." A September 1, 1998, memorandum extended this interpretation to the survey requirements for the remaining 71 category two species, concluding that surveys need not be done for any timber sale for which an environmental impact statement was completed before October 1, 1998. The record shows that Forest Service and, BLM managers, uniformly relied on these memoranda in deciding not to require category two surveys before approving the nine timber sales challenged here, even though ground-disturbing activities have yet to begin on any of those sales.

*Oregon Natural Resources Council v. U.S. Forest Service*, 59 F.Supp.2d 1085, 1096 (W.D. Wash. 1999) (Forest Service and BLM implementation of the Northwest Forest Plan in the range of the Northern Spotted Owl) (no supplemental EIS required where plan includes "adaptive management" provisions):

The plan's adaptive management approach is adequate to deal with any new information plaintiffs have identified. If circumstances warrant, the ROD gives the Forest Service and BLM the flexibility to reduce or halt logging in order to comply with their statutory mandates. *See Lyons*, 871 F.Supp. at 1321 ("New information may require that timber sales be ended or curtailed."). But they are not required to conduct a new SEIS at this point. *See, e.g., Enos v. Marsh*, 769 F.2d 1363, 1373-74 (9th Cir. 1985) (upholding decision not to conduct SEIS despite nearly fifty percent increase in size of project). If the wildlife survey requirements were abolished or substantially weakened, the outcome under NEPA might be different.

A claim under § 706(1) of the APA is "in essence" one for mandamus under 28 U.S.C. § 1361. *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997). Plaintiffs must show that defendants' duty to act "is ministerial and so plainly prescribed as to be free from doubt *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995) (internal quotations and citation omitted). On the present record, plaintiffs have not carried their burden to compel the preparation of a new region-wide SEIS.

## 5.

*Oregon Natural Resources Council Action v. U.S. Forest Service*, 293 F.Supp.2d 1200 (D. Ore. 2003) (challenge to six timber sales on the Mt. Hood and Willamette National Forests):

- (1) underlying environmental assessments (EAs) for timber sales were legally deficient;
- (2) under Ninth Circuit's Idaho Sporting Congress decision, use of Supplemental Information Reports (SIRs) documenting survey results and management actions to correct deficiencies in underlying EAs violated NEPA;
- (3) res judicata did not preclude challenge, insofar as parties were not the same as those in another case; and
- (4) stipulation did not bind parties to raise challenges to adequacy of project decisions based on survey and management requirement in context of related litigation in another district.

Summary judgment for plaintiffs.

# the Survey and Manage Mitigation

## Guidelines

*in Forest Service and Bureau of Land  
Management Planning  
Documents Within the Range of the  
Northern Spotted Owl*



*Public Lands USA: Use, Share, Appreciate*



**6.**

*Northwest Ecosystem Alliance v. Rey*, 380 F.Supp.2d 1175, 1192-93 (W.D. Wash. 2005)

(Forest Service and BLM action to eliminate from management plan "survey and manage" standard used to protect certain rare and uncommon species on forested land) (agencies' policy choice to rebalance Forest Plan appeared to lack support where "survey and manage" was deemed necessary in 2001 but not in 2004):

***Decided August 1, 2005***

Oral arguments have been set for December 16, 2005 at 10:00 in Seattle on the S&M case

## On August 1, 2005, Judge Marsha J. Pechman ruled against the agencies on 6 claims, and for the agencies on 6 claims, as follows:

### FOR

- the purpose and need statement in the 2004 SEIS does not violate NEPA
- the Court agreed that the “restoration logging” alternative would not increase the volume available for sustained timber harvest as represented by the PSQ
- the 2004 supplemental EIS “contained a reasonably thorough analysis of the effect on each species of the increase in young mature forest and the decrease in old-growth”
- the 2004 supplemental EIS adequately disclosed the conflict between S&M and hazardous fuel treatments
- the Court agreed that the 2004 supplemental EIS “disclosed sufficient information to permit a reasoned decision”
- the agencies “reasonably relied on their prior analysis and have disclosed new information relevant to that analysis” for the cost estimates for pre-disturbance surveys

### AGAINST

- The 4 declarations submitted by Plaintiffs (Brumley, Dellasala, Furnish, and Odion) are not stricken
- The supplemental EIS assumed that 152 species from the Survey & Manage program would be moved to the agencies’ Special Status Species (SSS) program, “but fails to ensure that this will happen”
- whether “the Agencies’ analysis of the environmental impacts of eliminating the standard is premised on an assumption that is inconsistent with their own prior analysis” and therefore whether there is adequate support for eliminating the S&M standard
- the agencies used stale data in calculating the number of acres in need of hazardous fuel treatments
- the agencies “failed to take a hard look at whether the 8,500 acres gain by eliminating the Survey and Manage standard would still be necessary if these other constraints were resolved”
- Because the analysis of the acreage discussed above is inadequate, the disclosures and analysis of the cost estimates based on those acreage figures is similarly inadequate



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March 2004

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## ***RECORD OF DECISION***

**Amending Resource Management Plans for Seven  
Bureau of Land Management Districts and Land and Resource  
Management Plans for Nineteen National Forests Within the  
Range of the Northern Spotted Owl**

*Decision to Clarify Provisions Relating to the Aquatic Conservation Strategy*



*Western Oregon, Western Washington, and Northwestern California*

**7.**

***Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service, Civil No. 04-1299-RSM-MAT (W.D. Wash., filed May 27, 2004) (agencies' changes to language of NW Forest Plan ROD to clarify that achieving ACS Objectives would be measured at the 5th field watershed scale rather than the project scale)***

***“PCFFA IV”***

“This action challenges the biological opinions issued under Section 7(a)(2) of the Endangered Species Act .... by the National Marine Fisheries Service ... for listed salmon and steelhead and by the Fish and Wildlife Service ... for listed bull trout.”

**Count 1: NEPA**

The final SEIS on the 2004 ACS amendment to the NW Forest Plan failed to adequately assess the impacts of eliminating the requirement that each project must be consistent with the ACS objectives of the NW Forest Plan

**Count 2: ESA**

The NMFS Biological Opinion and FWS Biological Opinion are inadequate because they assume that project compliance with ACS S&Gs will lead to attainment of ACS Objectives

Arguments in Seattle on November 22, 2005

# Remaining agency discretion .....

*Norton v. Southern Utah Wilderness Alliance*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2373, 2384-85 \_\_\_ L.Ed.2d \_\_\_ (2004) (BLM land use plan is not on-going action with remaining discretion that could be informed in the NEPA process):

Finally, we turn to SUWA's contention that BLM failed to fulfill certain obligations under NEPA. Before addressing whether a NEPA-required duty is actionable under the APA, we must decide whether NEPA creates an obligation in the first place. NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Often an initial EIS is sufficient, but in certain circumstances an EIS must be supplemented. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370-374, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). A regulation of the Council on Environmental Quality requires supplementation where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR §1502.9(c)(1)(ii) (2003). In *Marsh*, we interpreted §4332 in light of this regulation to require an agency to take a "hard look" at the new information to assess whether supplementation might be necessary. 490 U.S., at 385, 109 S.Ct. 1851; see *id.*, at 378-385, 109 S.Ct. 1851.

SUWA argues that evidence of increased ORV use is "significant new circumstances or information" that requires a "hard look." We disagree. As we noted in *Marsh*, supplementation is necessary only if "there remains 'major Federal actio[n]' to occur," as that term is used in §4332(2)(C). 490 U.S., at 374, 109 S.Ct. 1851. In *Marsh*, that condition was met: the dam construction project that gave rise to environmental review was not yet completed. Here, by contrast, although the "[a]pproval of a [land use plan]" is a "major Federal action" requiring an EIS, 43 CFR §1601.0-6 (2003) (emphasis added), that action is completed when the plan is approved. The land use plan is the "proposed action" contemplated by the regulation. There is no ongoing "major Federal action" that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§1610.5-5, 5-6).

\* \* \*

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*Cold Mountain v. Garber*, 375 F.3d 884, 894 (9<sup>th</sup> Cir. 2004) (EA/FONSI on Forest Service's issuance of a permit to operate a bison capture facility in the Gallatin National Forest, just outside Yellowstone's western boundary, in an area north of the Madison Arm of Hebgen Lake known as the Horse Butte area) (once the permit is issued, there is no further Federal discretion to inform and thus the NEPA process is inapplicable):

In support of its contention that other supplemental NEPA analysis is now warranted by substantial changes or significant new information, *see* 40 C.F.R. §1502.9(c)(1)(i) and (ii), *Cold Mountain* repeats its charges that the Permit's helicopter hazing restrictions have been violated, thereby causing a prohibited take in the form of the reproductive failure of the Ridge nest. We conclude, however, that there is no ongoing "major Federal action" requiring supplementation. *See* 42 U.S.C. §4332(2)(C). Because the Permit has been approved and issued, the Forest Service's obligation under NEPA has been fulfilled. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. ----, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004); *Marsh*, 490 U.S. at 374, 109 S.Ct. 1851.

*Wyoming v. U.S. Dept. of the Interior*, 360 F.Supp.2d 1214, 1237-38 (D. Wyo. 2005) (complex litigation over the management plan for reintroduction of the timber wolf into Wyoming) (supplement not necessary where the wolf reintroduction plan is in place and there is no further Federal action):

If the Wolf Coalition's argument is that the FEIS preparation for the 1994 Rule is inadequate, then it is surely barred by the statute of limitations discussed below. However, if their argument is that the FEIS for the 1994 Rule needs to be supplemented, then the Court needs to focus its attention on that standard. For supplementation, there needs to remain "major federal action to occur." *See SUWA*, 124 S.Ct. at 2385. The Plaintiff-Intervenors argue that the Federal Defendants' demand that Wyoming adopt specifically-designed protections for the sole purpose of securing the gray wolf population in areas of the State that the Federal Defendants previously concluded "were undesirable" satisfies the major federal action requirement.

A survey of what various courts have concluded to be "major federal action" is instructive. The plaintiffs in *SUWA* contended that BLM had not fulfilled its obligation under NEPA to supplement the EIS to take increased off-road vehicle use into account. In *SUWA* the Court concluded that once BLM approved a land use plan major federal action came to an end and there was no obligation to supplement. *See SUWA*, 124 S.Ct. at 2385. In making its conclusion, the Court held that since BLM's approval of the land use plan was the action that required the initial EIS, and since that plan had already been approved, there was no ongoing federal action that could require supplementation. *Id.*

The Federal Defendants assert that *SUWA* is analogous to this case. Specifically, the 1994 Rule for reintroduction of the wolves was the reason for the FEIS, and that once the rule was finalized there remained no further action. This is a similar situation to BLM's approval of the land use plan. Once the land use plan went into effect, the need for supplementation of the EIS was at an end. The Court agrees that the situation in *SUWA* is analogous. In the instant case, once the reintroduction plan went into effect the need for supplementation was at an end. Shifting the responsibility of management of the gray wolf recovery from the Federal Government to Wyoming is not a "major federal action" as contemplated by NEPA.

*Buckeye Forest Council v. U.S. Forest Service*, 378 F.Supp.2d 835, 844-45 (S.D.

Ohio 2005) (preliminary injunction granted *Buckeye Forest Council v. U.S. Forest Service*, 337 F.Supp.2d 1030 (S.D. Ohio 2004)) (Forest Service EA/FONSI is adequate for 2 timber projects, Bluegrass Project and Ironton Project, and Forest Plan amendment on the Wayne National Forest) (discovery of a listed species, the Indiana bat, does not compel supplementation of Forest Plan EIS because there was no ongoing Federal action subject to NEPA):

Plaintiffs argue that after the Forest Service discovered the presence of the Indiana bat in the Wayne National Forest, the Forest Service was required to prepare a supplemental EIS regarding the continued implementation of the Forest Plan. Under NEPA, if an agency proposes a "major Federal action [that] significantly affect[s] the quality of the human environment," the agency must prepare an EIS that details that environmental impact of the proposed agency action. 42 U.S.C. §4332(C).

Plaintiffs' argument that the Forest Service was required to prepare a supplemental EIS in order to continue implementation of the Forest Plan once the Indiana bat was found in the forest is foreclosed by the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, ("SUWA") 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). Although *SUWA* involved a land use plan under the Federal Land Policy and Management Act rather than a Forest Plan under the NFMA, the NEPA requirements and APA standard of review are the same.

As the Court pointed out, the only agency action that can be compelled under the APA is agency action that is legally required. *SUWA*, 124 S.Ct. at 2379. A claim that an agency violated the APA by failing to act may proceed only where a plaintiff claims that the agency failed to take a discrete action that it was required to take. *Id.* at 2379. Supplementation of an EIS, the action that Plaintiffs claim that Defendants failed to perform, is necessary only if there remains major federal action to occur as the term is used in 42 U.S.C. §4332(C). The Court in *SUWA* held that "although the approval of a land use plan is a major Federal action requiring an EIS, ... the action is completed when the plan is approved. The land use plan is the proposed action contemplated ... There is no ongoing major Federal action that could require supplementation (though [the agency] *is* required to perform additional NEPA analyses if a plan is amended or revised...)" *SUWA*, 124 S.Ct. at 2385 (internal quotations omitted). Because the Forest Plan was approved in 1988, the agency action was completed and there was no ongoing major federal action requiring supplementation. The Forest Service therefore committed no NEPA violation by failing to supplement the EIS for the Forest Plan after the Indiana bat was found on the forest.

