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The Forest Service, NEPA, and Clear Cutting

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THE FOREST SERVICE, NEPA, AND CLEAR CUTTING

ENVIRONMENTAL LAW—FOREST SERVICE: The Forest Service must comply with the National Environmental Policy Act (NEPA). The 1976 National Forest Management Act does not conflict with NEPA. *Texas Committee on Natural Resources v. Bergland,* 573 F.2d 201 (5th Cir. 1978), *cert. denied* ____U.S. ____(1978).

BACKGROUND

Over ninety million acres of federally owned forests in the United States are managed by the Forest Service.[1] As one of several bureaus within the Department of Agriculture, in theory the Forest Service is responsible to the Secretary of Agriculture (Secretary). But, in practice, it has traditionally functioned as a largely autonomous, independent agency.[2] Regarded by most Americans as a protector of our national forests, it is called a "federal timber company" by many informed conservationists and environmental groups.[3]

The manager of our federal forests has not always been viewed with such cynicism. In its early days, the Forest Service was bursting with idealism and espirit de corps.[4] It was a swashbuckling outfit that occupied itself fighting fires, reseeding, conducting silvicultural experiments,[5] and educating private timber owners in the ways of sound forestry. Timber was plentiful and cheap; there was little demand for timber from the national forests. The private timber industry owned its own forests and did not want competition from the federal government.

Following World War II, the housing boom and "a paperwork society generated insatiable demands on American forests. The timber industry's lands, which had been badly overcut, couldn't keep up with the demand, so the industry looked to the national forests."[6] Lumber companies and their lobbyists, for the past thirty years, have successfully campaigned in Washington to get the Forest Service to increase the sale of timber from these forests. By yielding

1. G. ROBINSON, THE FOREST SERVICE, 60 (1975).
2. *Id.* at 21.
3. J. SHEPHARD, THE FOREST KILLERS, 31 (1975).
4. 7 NRDC NEWSLETTER 4 (September/December 1978).
5. *Id.* at 7.
6. *Id.* at 5.

to this pressure and emphasizing timber production over conservation, recreation, and wildlife purposes, many critics believe that the Forest Service has violated its "primary doctrine and legal mandate."[7]

In 1897, Congress issued the first major policy directive to the Forest Service. Known as the Organic Act,[8] the measure prescribed forestry practices which required responsible forest management on public timberlands. The sale of timber from these lands was limited to "dead, matured, or of large growth trees."[9]

In 1960, without repealing the Organic Act, Congress passed the Multiple-Use Sustained-Yield Act.[10] This act provides that the Secretary is to develop and administer the renewable resources of the national forests for multiple uses while maintaining sustained yields. "Congress, with this law, was reasserting its right—and the right of the American people—to have a say in the management of the public lands."[11] In the bill, Congress adopted a mandatory tone that was supposed to redirect the previously autonomous and independent Forest Service. The act stated a congressional policy:

> National forests were established and were to be administered for outdoor recreation, range, timber, watershed, wildlife, and fish purposes. . . . The definition of "multiple use" as it pertains to timber manifested a congressional intent to balance the use of national forests between the one pole of timber production and the other of aesthetic and recreational use.[12]

Many critics feel that the Forest Service has violated this mandate. In support of their claim, critics point to a forest management scheme known as "clearcutting," which the Forest Service implemented in 1964, four years after the passage of the Multiple-Use Sustained-Yield Act. Clearcutting is aimed at establishing single-age strata stands in the forest. Even-age management, as this practice is called, makes clearcutting inevitable because all the trees in a stand reach harvesting age at the same time. Clearcutting of slow-growing and diverse species of hardwood trees is often followed by the planting of quick-maturing and similar species of softwood pines.[13] This practice seems to benefit no one but the timber industry, who is

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7. J. SHEPHARD, *supra* note 3, at 34.
8. Organic Act of 1897, 16 U.S.C. §476 (1976).
9. *Id.*
10. Multiple-Use Sustained-Yield Act, 16 U.S.C. §§528-31 (1976).
11. J. SHEPHARD, *supra* note 3, at 34-35.
12. Tex. Committee on Natural Resources v. Bergland, 573 F.2d 201, 205 (5th Cir. 1978) *cert. denied* ____U.S. ____(1978).
13. 7 NRDC NEWSLETTER, *supra* note 4, at 12.

provided with easily harvestable trees of uniform size and quality.[14]

The environmental impact of clearcutting appears to be significant: a) an increased fire hazard because the moisture content of the forest undergrowth is low, shade from tall trees prevents transpiration of the forest moisture, and because the air is more free to move and spread fire when there is no forest canopy; b) an impairment of the productivity of the land because of erosion, which increases exponentially with the increase in the size of the openings created in the forests by logging and with the proportion of timber cut, and because of the leaching of nutrients essential to tree growth; c) an impairment and reduction of the amount of habitat essential to various species of wildlife; and d) the liquidation of high quality timber while it is still in the period of greatest volume growth, which will lead to a future scarcity of high quality wood.[15]

Clearcutting, as a forest management scheme, does not appear to incorporate the principle of multiple-use/sustained-yield. Nor does it comply with Section 476 of the Organic Act that limits the sale of public timber to "dead, mature, or of large growth trees."[16] Soon after the Forest Service began implementation of clearcutting in the national forests, a suit was brought against it claiming just that. In *West Virginia Division of Izaack Walton League of America, Inc. v. Butz*,[17] the Fourth Circuit upheld the conservation-oriented plaintiffs' claims and ruled that all contracts for the sale of timber in the national forests which did not provide for selective, marked cutting of dead, matured, or large growth trees violated the Organic Act.[18]

Following this decision, the timber industry, through its lobbying arm, the National Forests Products Association, "immediately mounted a scare campaign predicting huge timber shortages and dismal unemployment in the industry. . . ."[19] In 1976, Congress repealed Section 476 of the Organic Act and passed the National Forest Management Act (NFMA).[20] This act was clearly a compromise between conservationists and the timber industry: although it

14. Each sale of timber from our national forests is consummated through a formal sale contract. These sales of timber are conducted according to regulations issued by the Secretary of Agriculture and the procedures and guidelines contained in the Forest Service Manual.

15. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. 1235, 1240 (1977). These are some of the Conclusions of Fact as found by the district court.

16. Organic Act, *supra* note 7, §476.

17. West Virginia Division of Izaack Walton League of America, Inc. v. Butz, 522 F.2d 945 (1975).

18. *Id.* at 949.

19. 7 NRDC NEWSLETTER, *supra* note 4, at 16.

20. National Forest Management Act of 1976, 16 U.S.C. §1600 *et. seq* (1976).

permits clearcutting, it requires the Forest Service to prepare regulations that will effectively prevent forest abuses.

The United States Supreme Court recently denied *certiorari*[21] to a Fifth Circuit decision[22] involving the Forest Service and clearcutting of national forests lands in East Texas. Although the suit was filed in federal district court before the NFMA was passed, the trial on the merits did not occur until after the act was signed into law. For this reason, the district court in *Texas Committee on Natural Resources v. Bergland* declined to rule on a number of plaintiff's[23] claims. The defendants[24] appealed the rulings the district court did make. The issues raised by the parties and addressed by the district court and the Fifth Circuit Court of Appeals will be discussed below.

NEPA

Section 102 of NEPA[25] stipulates, in part, that "all agencies of the Federal government . . . shall include in every recommendation and report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement (EIS). This EIS must discuss not only the impact of the proposed action, but alternatives to it. Whether the proposal could be considered a minor, as opposed to a major, federal action, or whether it is a small step in a larger plan, "a finding of significant environmental effects is the determining factor for imposition of the NEPA impact statement requirement."[26]

As discussed above, the environmental impact of clearcutting appears to be "significant," if not at least open to discussion. According to the Council on Environmental Quality[27] guidelines, which are "merely advisory" although often used by the courts to measure the adequacy of a federal agency's EIS,[28] a "proposed

21. Tex. Committee on Natural Resources v. Bergland, ____U.S. ____(1978).

22. Tex. Committee on Natural Resources v. Bergland, 573 F.2d 201 (1978).

23. Plaintiff is a voluntary organization supported by contributions from its individual members. The organization had standing to bring this suit under Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972) because its various members make use of the national forests of Texas for recreational purposes.

24. Defendants included Robert Bergland, Secretary of Agriculture of the United States, John McGuire, Chief, Forest Service, Department of Agriculture, John Courtenay, Forest Supervisor, National Forest in Texas, and various lumber and paper companies who were permitted to intervene.

25. National Environmental Policy Act, 42 U.S.C. §4332(2)(D)-(I) (Supp. 1976).

26. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1247.

27. The Council on Environmental Quality was established as an advisory committee to the President by the National Environmental Policy Act, §4342.

28. Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1138 (5th Cir. 1974).

major action, the environmental impact of which is likely to be highly controversial, should be covered (by an EIS) in all cases."[29] For these reasons, the district court held that the Forest Service's failure to file an EIS for the East Texas forest management scheme violated NEPA.[30]

On appeal to the Fifth Circuit, defendants/appellants claimed that the NFMA directly conflicts with NEPA, and that in such a situation NEPA must yield. The Fifth Circuit had determined in a previous case that an agency's initial determination whether to file an EIS is to be tested under a rule of reasonableness.[31] But, this rule does not apply when there is a fundamental conflict of statutory purpose between NEPA and an agency's organic statute.[32]

Before examining the NFMA to determine whether it conflicted with NEPA, the court made two observations: a) that the statutory conflict exception has been applied sparingly,[33] and b) that the conflict between NEPA and the agency's organic statute must be both fundamental and irreconcilable.[34] "Fundamental and irreconcilable" conflicts which have rendered compliance with NEPA impossible have included situations in which there was a statutorily mandated deadline, where there was an indispensible need for haste, and where the agency's organic legislation mandated specific procedures for considering the environment that were the "functional equivalents" of the impact statement process. Only if the NFMA falls within one of these narrow exceptions to NEPA would the Forest Service be considered exempt from NEPA requirements.

Section 1604(g) of NFMA states that as soon as practicable, but not later than two years after October 22, 1978, the Secretary shall promulgate regulations under the principles of the Multiple-Use Sustained-Yield Act of 1960. The Fifth Circuit stated that this timetable did not demonstrate a direct conflict between the NFMA and NEPA. "The agency action contemplated in this case, . . . was expected to proceed over a substantial period of time."[35] Thus, the Forest Service is not exempt from NEPA under the timeliness exceptions.

As for the third exception to NEPA compliance, where an

29. 40 C.F.R. § 1500.6(a) (1976).

30. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1248.

31. Save Our Ten Acres v. Krege, 472 F.2d 463, 465-66 (1973).

32. Louisiana Power & Light Co. v. Fed. Power Comm., 557 F.2d 1122 (1977); Atlanta Gas Light Co. v. Fed. Power Comm. 476 F.2d 142 (1973).

33. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 206. *See generally,* Note, *The Environmental Impact Statment Requirement in Agency Enforcement Adjudication,* 91 HARV. L. REV. 815, 825 (1978).

34. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 206.

35. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 208.

agency's organic legislation mandates specific procedures for considering the environment which are functionally equivalent to an EIS, the Fifth Circuit noted that this exception has generally been limited to environmental agencies themselves.[36]

> Unlike an agency whose sole responsibility is to protect the environment, the Forest Service is charged with management of the nation's timber resources. Its duties include both promotion of conservation of renewable timber resources and a duty to ensure that there is a sustained yield of these resources available.[37]

Both the NFMA and its legislative history reveal that Congress did not intend to exempt the Forest Service from NEPA compliance. Section 1604(g) of the NFMA provides that the management guidelines to be promulgated by the Secretary are to include specific procedures to ensure that land management plans are prepared in accordance with NEPA. And the Senate Committee considering the bill that was to become the NFMA stated:

> The bill specifically requires that (the Secretary) describe how the interdisciplinary approach will be used, the type of plans that will be prepared and their relationship to the program, the procedures to insure public participation, and the procedures for coordinating the preparation of land management to insure that they are prepared in accordance with the National Environmental Policy Act of 1969.[38]

Thus, the Fifth Circuit concluded, "the final guidelines, as developed by the Forest Service over the two-year period must comply with NEPA, and they may, in certain cases require production of an environmental impact statement."[39] But, the court stated, in the two-year interim, an EIS was required only if the interim guidelines differed significantly from the then current Forest Service guidelines.[40] Since the issue of whether the Forest Service's interim guidelines were different from its guidelines at the point from which the two-year period began to run was not raised at trial or on appeal, the Fifth Circuit made no ruling as to whether the Foreset Service had violated NEPA by not filing an EIS concerning its interim guidelines.

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36. *Id. See,* Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247 (1973).

37. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 208.

38. Sen. Rep. No. 94-893, 94th Cong., 2d Sess., reprinted in U.S. CODE CONG. & AD. NEWS, 6673 (1976).

39. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 208.

40. *Id.*

CLEARCUTTING

The district court had enjoined the Forest Service from permitting clearcutting in the East Texas national forests until the Forest Service had prepared an EIS.[41] In any case, according to its holding on the NEPA issue, the Fifth Circuit would not have required the Forest Service to file an EIS concerning clearcutting unless the interim guidelines permitting it were significantly different from the then current guidelines. Defendant/appellants, in addition, claimed that the district court had impermissably substituted its judgment for that of Congress in determining that no further clearcutting should be permitted in the East Texas forests until an EIS had been filed.

The Fifth Circuit agreed with this claim. In support of its ruling dissolving the injunction, the court discussed the legislative history of the NFMA. The congressional committee that examined the bill clearly recognized the environmental impact of clearcutting. It had directed the Secretary to use clearcutting "only when (it) best meet(s) forest management objectives for the individual management plan . . . (and) to write specific guidelines and hold the average size of clearcuts as low as practicable."[42] Under certain guidelines,[43] the Senate-House conference had agreed that the Forest Service could continue to permit clearcutting in the national forests pending development of the final guidelines to be promulgated by the Secretary.

A congressional decision such as this, the Fifth Circuit stated, is not subject to judicial review. Only recently, the court noted, has the United States Supreme Court reminded the lower federal courts "that fundamental policy questions appropriately resolved in Congress and the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action."[44]

PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

In 1964, the Forest Service had decided to clearcut all the timber left available for timber management purposes in the national forests of Texas. The Forest Service stipulated at trial that it is continuing

41. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1254.

42. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 209.

43. The Church guidelines are spelled out in Footnote 8, Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 210.

44. *Id. See,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 98 S.Ct. 1197 (1978).

this program to completion.[45] It is clear, the district court held, that this "program of clearcutting, if permitted to continue, may cause significant cumulative or synergistic impacts upon the quality of the human environment in the entire region."[46] Since NEPA, passed in 1969, applies to projects commenced prior to its passage,[47] the Forest Service was obligated to review the cumulative effect of its 1964 clearcutting decision. The district court held, therefore, that the Forest Service must file a programmatic, over-all or regional EIS relating to its program of clearcutting all the national forests in Texas.[48]

In reversing this ruling, the Fifth Circuit discussed the 1976 Supreme Court's decision in *Kleppe v. Sierra Club.*[49] The Court in that case had rejected the claim that a federal agency involved in granting coal leases in the Northern Great Plains was required by NEPA to file a regional EIS. "The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors. . . . Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately."[50] Plaintiff in the instant case, the Fifth Circuit found, had failed to show arbitrary agency action. Therefore, the court reversed the district court's ruling requiring the Forest Service to file a regional EIS.[51]

CONROE UNIT EIS

At the time of trial, the Forest Service had completed three land management plans, which were accompanied by environmental impact statements, for three areas within the various national forests in Texas. The Conroe Unit of the Sam Houston National Forest was one such area for which the Forest Service had prepared an EIS. In focusing on this EIS, the district court discussed the process involved in finalizing an EIS. Public participation, a draft plan, and a period for comments and suggestions are all stages in the process before a final EIS is filed with the Council on Environmental Quality.

The district court noted that only ten out of 170 participants at

45. ,Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1253.
46. *Id.*
47. Minn. Public Interest Research Group v. Butz, 498 F.2d 1314, 1321 (1974).
48. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1253.
49. Kleppe v. Sierra Club, 96 S.Ct. 2718 (1976).
50. *Id.* 2732.
51. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 210.

the public forum discussing the Conroe EIS could be considered unaffiliated with public agencies, special interest organizations, or private industry.[52] In its findings of fact, the district court found the Conroe EIS deficient in numerous respects, including: a) it barely mentioned the alternative of selective harvesting of mature trees, the principal method of sawlog harvesting in the national forests prior to 1964, and a classic method of forest management; b) it largely ignored the consequences of its hardwood killing practices and failed to consider the alternative of restoring the forests to their former balance; c) it failed to discuss the effects of massive clearcutting on wildlife, recreation, water supply, soil erosion, fire, insects, and disease; d) it failed to explain how sustained yield will be achieved; and e) it failed to include an adeauate cost-benefit analysis.[53]

Failure to explore the alternative of uneven-aged management of timber in the Conroe Unit, the district court held, constituted a violation of both the "procedural and substantive" provisions of NEPA.[54] Specifically, the requirement that an agency obtain information on the effects of and alternatives to a proposed action and consider this information when making a decision on the proposed action is not to be ignored, "This non-observance of the law by the Forest Service can only be characterized as arbitrary and capricious," the district court stated.[55]

Once again, the Fifth Circuit reversed the district court. In a rather cavalier manner, the Fifth Circuit held that the Conroe EIS was "sufficient to pass muster under NEPA."[56] Addressing only one of the criticisms the district court had made of the EIS, that it failed to discuss alternatives to clearcutting as a forest management scheme, the Fifth Circuit ignored the other deficiencies found by the district court. Since the EIS contained a list of alternatives for forest management which were explored at a public discussion of the Conroe land management plan, this was enough, the court stated, "to demonstrate that consideration was given to other silvicultural systems."[57]

CONCLUSION

Environmentalists applauded the Fifth Circuit's ruling that the National Forest Management Act does not exempt the Forest Service

52. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1243.
53. *Id.* at 1243-44.
54. *Id.* at 1251.
55. *Id.* at 1252.
56. Tex. Committee on Natural Resources v. Bergland, 573 F.2d at 211.
57. *Id.*

from compliance with NEPA. According to its ruling, the final guidelines for national forest management to be promulgated by the Secretary of Agriculture are subject to NEPA and "they may, in certain cases, require production of an environmental impact statement."[58] Although the majority did not hold that the interim guidelines required an EIS unless they differed significantly from the then current guidelines, Judge Goldberg in his dissent stated that "fidelity to NEPA" compelled him to conclude that even interim management under existing plans required an EIS.[59]

Reversal of the district court's injunction against the Forest Service from permitting clearcutting clearly seemed to be required by the congressional decision to permit it. Although the Fifth Circuit felt that the plaintiff failed to demonstrate that the Forest Service acted in an arbitrary manner by failing to file a regional EIS, the district court apparently felt there was enough evidence in the record to hold that the Forest Service's failure to do so was "arbitrary and capricious."[60] As for the Conroe Unit EIS, the Fifth Circuit's finding of sufficiency clearly violated the scope of review of an appellate court as to findings of fact by a trial judge.[61]

Our national forests are a public resource. Most people agree that they should not be denuded for the benefit of a rapacious industry. The courts generally take their cues from Congress. Only when Congress finally takes the Forest Service in hand, many critics feel, and learns to ignore the moans and money of the timber industry, will the Forest Service really start complying with the principle of multiple-use/sustained-yield in its management of our national forests.

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58. *Id.* at 208.
59. *Id.* at 213.
60. Tex. Committee on Natural Resources v. Bergland, 433 F. Supp. at 1253.
61. *See* 5A C.J.S. *Appeal & Error* § 1656(1).