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NEPA REQUIRES EIS FOR ALASKAN WOLF KILL

ENVIRONMENTAL LAW, NATIONAL ENVIRONMENTAL POLICY ACT: United States District Court for the District of Columbia determines that because the Secretary of Interior has authority to allow or disallow a "wolf kill" by Alaska authorities on federal land, the failure of the Secretary to stop the kill constitutes a "federal action." Therefore an EIS is mandated by NEPA. *Defenders of Wildlife, et al. v. Andrus,* 9 E.R.C. 2111 (D.D.C. 1977).

Plaintiffs, several environmentalist organizations, sued for declaratory relief and an injunction forbidding the Department of Interior to allow the continuation of a "wolf kill" by the Alaska Department of Fish and Game (ADFG) without the preparation and circulation of an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA).[1]

The wolf kill entailed killing 80% of the wolf population on 144,000 square miles of "d-2 lands" in Alaska. These lands have been withdrawn by the federal government pursuant to the Alaska Native Claims Settlement Act[2] (ANCSA) for possible inclusion in National Parks, National Forests, Wildlife Refuges and the Wild and Scenic Rivers System.[3] The Bureau of Land Management refused to prepare an EIS considering the effects of the wolf kill.

Since wolves are the principle predators of a caribou population which had decreased by almost 75% in six years, the ADFG had hoped to bolster the caribou population. In assessing the background of the case however, the U.S. District Court for the District of Columbia pointed out several possible negative effects of the project.

First of all, the project could have adverse effects on the caribou population itself. The wolves perform the necessary function of killing the weakest members of the caribou herd, thereby preventing the food sources of the caribou from becoming overburdened. The elimination of this function could cause the long-run decline of the herd. Such a decline would, in turn, have a substantial impact upon the lives of several native groups in the area who depend on the caribou as part of their food supply.[4]

1. National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et. seq.* (1970).
2. Alaska Native Claims Settlement Act, 43 U.S.C. §1616(d)(2) (1975 Supp.).
3. Defenders of Wildlife v. Andrus, 9 E.R.C. 2111, 2112 (D.D.C. 1977).
4. *Id.*

The court pointed out that the killing of random wolves from airplanes could have a greater effect on the wolf population than is manifest. The wolves depend on the pack structure for survival with the dominant males hunting for the pack. As dominant males are killed and the caribou population declines as described above, the hunting success of the pack will decline and the weaker members will also die. The birth rate of wolves also declines during such periods.[5]

In arguing for a preliminary injunction, plaintiffs alleged that defendants violated the ANCSA and NEPA by "failing to assess and consider the environmental effects of the wolf kill and to prepare and circulate an EIS prior to permitting this wolf kill to occur on federal lands."[6] The burden of proof was on the plaintiffs to show: (1) that there was substantial likelihood of success of the case on the merits; (2) that there would be irreparable injury absent such relief; (3) that such relief would not substantially harm the other parties in the proceedings; and (4) that the public interest would be served by such relief.[7]

In determining the likelihood of success on the merits, the court was first faced with the question of whether the defendants had the authority to either permit or forbid Alaska authorities from undertaking the hunt. Defendants relied upon Chapter 2, § 6(e) of the Alaska Statehood Act,[8] which provides that Alaska shall have responsibility for management of wildlife within its boundaries. The defendants argued that, as a result, the Secretary's power in administering "d-2 lands" was limited.

In rejecting this position, the court, finding support in *Parker v. U.S.*,[9] held that by designating these lands for possible inclusion in the National Park System, Congress intended that "the essential character of the resources on d-2 lands should be preserved and that it should have a meaningful opportunity to determine the ultimate designation or disposition of these lands."[10] Therefore, in order to preserve the essential character of these lands and to insure Congress' meaningful opportunity in their disposition, the Secretary has the authority to administer such lands.[11]

The court found another source of federal authority in Title III of the Federal Land Policy and Management Act of 1976, more com-

5. *Id.* at 2113.
6. *Id.*
7. Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958).
8. Alaska Statehood Act, 48 U.S.C. ch. 2 §6(e) (1971).
9. Parker v. U.S., 488 F.2d 793 (10th Cir. 1971).
10. Defenders of Wildlife v. Andrus, 9 E.R.C. 2111, 2114 (D.D.C. 1977).
11. *Id.*

monly known as the BLM Organic Act.[12] Section 302(a) of this Act provides that the "Secretary shall manage the public lands under principles of multiple use and sustained yield. . . ."[13] "Multiple use" is defined in § 103(c) of the Act as "the management of the public lands and their various resource value so that they are utilized in the combination that will best meet the present and future needs of the American people. . . ."[14] The prohibition of the wolf kill would come within such multiple use management since "the Secretary's mandate to administer the land for multiple use purposes includes, in circumstances such as those presented here, the authority to close the federal lands to hunting when one of the multiple uses, such as wildlife, is seriously threatened."[15]

Although § 302(b) of the Act proclaims that "nothing in this Act shall be construed . . . as enlarging or diminishing the responsibility and authority of the states for management of fish and resident wildlife," the court held that such a restriction was not the intent of Congress. "Congress intended to preserve to the states their traditional control over sport hunting and fishing seasons."[16] Federal control in this case is justified by the rights which accrue to the federal government as property owner.[17]

Having found authority for federal control, the court next turned to discussion of the alleged violations of the NEPA by defendants. Due to the previously discussed possible impacts upon the environment if federal permission were given, the Court found that the plaintiffs had proved, for purposes of injunctive relief, a substantial likelihood that the BLM's previous decision not to require an EIS was arbitrary and capricious and contrary to the requirements of NEPA.[18] Whether this decision was arbitrary and capricious in fact should be the subject of further review by the court.[19]

The court also noted that the plaintiffs had proved a substantial likelihood that an EIS was suggested by BLM's regulation that projects involving a Bureau entitlement of use may require an EIS.[20] The permission to hunt involved here is such an entitlement of use, according to the court.

12. Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§1701 *et. seq.* (1976).
13. *Id.* §1732(b).
14. *Id.* §1702(c).
15. Defenders of Wildlife v. Andrus, 9 E.R.C. 2111, 2115 (D.D.C. 1977).
16. *Id.* at 2117.
17. *See* Kleppe v. N.M., 426 U.S. 529 (1976).
18. Defenders of Wildlife v. Andrus, 9 E.R.C. 2111, 2118 (D.D.C. 1977).
19. Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973).
20. 37 Fed. Reg. 15015, 15017 (1972).

The next major issue involved the likelihood of plaintiffs' suffering irreparable injury if the preliminary injunction were not granted. The court found that, if the wolf kill were allowed to continue, the rights of the plaintiffs under NEPA to "public knowledge of environmental effects of federal actions"[21] might never be fully vindicated—since the wolf kill could be completed prior to resolution of the case on its merits. The court also acknowledged a substantial likelihood that the environment of these regions would be harmed.

Finally, the court held that the granting of the requested injunction would not substantially injure the defendants. They had invested neither time nor money and the problem was not an immediate one. The affected interests of the State of Alaska were "not substantial enough to warrant a denial."[22]

In summary, the court held that the prohibition or allowance of state-run wildlife management programs by the Secretary of the Interior is permissible as administration of "d-2 lands." The court granted the requested injunction, at the same time making known its opinion that the "defendants have never fully considered the environmental impact of the wolf kill"[23] and that an EIS should be prepared.

Since the granting of the injunction in this case, the U.S. District Court for the District of Alaska has demonstrated its disagreement on the question of federal action. In *State of Alaska v. Andrus*[24] the state first requested the court to grant an injunction commanding the Secretary of the Interior to withdraw his order to stop the hunt. This was the order which was issued at the command of the District Court in Washington, D.C. To avoid obvious conflicts the court declined to issue such an injunction, but did rule on the state's motion for a summary judgment on an action for declaratory relief.

The Alaska court found authority in the Secretary to allow or forbid the continuation of the project. This court, however, ruled that allowing the kill does not constitute federal action and there was therefore no requirement of an EIS. According to this court, "[i]n the present case, there exists none of the affirmative action on the part of the federal government which existed in previous cases. . .

21. *See* Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

22. Defenders of Wildlife v. Andrus, 9 E.R.C. 2111, 2120 (D.D.C. 1977).

23. *Id.* at 2119.

24. State of Alaska v. Andrus, 429 F.Supp. 958 (D. Alaska, 1977).

This court finds it a strained chain of logic which turns totally non-federal action into federal action just because the Secretary has the power to regulate the activity."[25]

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25. *Id.*