

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 10
Issue 3 2002-2003

Article 6

2003

What is the "Hard Look" that the Ninth Circuit is Looking for when Reviewing United States Forest Service Actions under NEPA? Native Ecosystems Council, et al. v. United States Forest Service, et al.

Devin Kirby

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Devin Kirby, *What is the "Hard Look" that the Ninth Circuit is Looking for when Reviewing United States Forest Service Actions under NEPA? Native Ecosystems Council, et al. v. United States Forest Service, et al.*, 10 Mo. Envtl. L. & Pol'y Rev. 213 (2003)

Available at: <https://scholarship.law.missouri.edu/jesl/vol10/iss3/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

CASENOTE

WHAT IS THE “HARD LOOK” THAT THE NINTH CIRCUIT IS LOOKING FOR WHEN REVIEWING UNITED STATES FOREST SERVICE ACTIONS UNDER NEPA?

*Native Ecosystems Council, et al v. United States Forest Service, et al.*¹

I. INTRODUCTION

Of all of the laws that protect the environment, the National Environmental Policy Act (“NEPA”) is considered by some as the “Magna Carta” of environmental regulations.² This note focuses on NEPA’s process and whether the United States Forest Service violated NEPA’s process when it decided to harvest timber in the Helena National Forest. The Ninth Circuit’s interpretation and application of the appropriate standard of review under NEPA is pertinent because the level of deference the court grants to the Forest Service when reviewing the Forest Service’s decision-making process will probably decide the outcome of the case. The Ninth Circuit has exhibited different levels of deference to the Forest Service, and this case clearly marks a step toward the right direction for courts to follow when interpreting and applying the applicable standard of review under NEPA.

II. FACTS AND HOLDING

The conflict in this case concerned the United States Forest Service’s decision to sell timber from the Helena National Forest.³ When the Forest Service decided to sell the timber from the Helena National Forest, Native Ecosystems brought suit against the Forest Service claiming that the sale violated the National Forest Management Act (“NFMA”) and NEPA.⁴ The district court granted summary judgment in favor of the Forest Service.⁵ Thereafter, Native Ecosystems appealed the district court’s ruling to the Ninth Circuit Court of Appeals.⁶

On appeal, Native Ecosystems raised several issues for the Ninth Circuit to consider.⁷ Native Ecosystems argued that “the timber sale, as described in the environmental impact statement, [was] inconsistent with the forest plan’s old growth forest standard.”⁸ The Helena National Forest’s Forest Plan required that “five percent of each third order drainage should be managed for old growth.”⁹ Native Ecosystems believed that this standard was not being met in the sale of the Helena National Forest’s timber.¹⁰

Native Ecosystems also argued that the Forest Service was required to prepare a supplemental environmental impact statement before it sold the timber from the Helena National Forest.¹¹ They argued that

¹ 54 Fed. Appx. 901 (9th Cir. 2003).

² Michael Schmidt, Mary Yarborough, Lira Behrens, *Talk of NEPA Changes Sets Off Debate*. Inside Energy with Federal Lands 1 (Sept. 2002).

³ *Native Ecosystems Council*, 54 Fed. Appx. at 902.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

the sale of the timber from the Helena National Forest would bring a negative net value to the Forest Service after all of the “remediation” costs from the sale were included.¹² Therefore, according to Native Ecosystems, this required the production of a supplemental environmental impact statement.¹³ However, the Forest Service claimed that the timber sale from the Helena National Forest would “be profitable on its accounting.”¹⁴

Another argument raised by Native Ecosystems was that the reduction in profits from the sale of the timber from the Helena National Forest changed the environmental concerns surrounding the sale.¹⁵ Profits from the timber sale were designated to go toward forest restoration.¹⁶ Native Ecosystems argued that since the Forest Service may have a negative net value from the sale of the timber, there were new environmental concerns because there would be less money for restoring the Helena National Forest.¹⁷ Therefore, Native Ecosystems believed that this too required the Forest Service to produce a supplemental environmental impact statement before commencing with the project.¹⁸

Native Ecosystems also raised the issue that Helena National Forest’s Forest Plan required “that if ‘anticipated costs [were] higher than predicted high bids,’ the Forest Service should ‘defer the sale’ or ‘proceed to sell the timber and provide proper documentation that benefits, other than immediate monetary [sic] return from the timber, are of importance.’”¹⁹ As noted earlier, Native Ecosystems believed that the sale of the timber from the Helena National Forest would bring a negative net value to the Forest Service.²⁰ Therefore, without providing other important benefits from the proposed sale, the sale of the timber would be violating the Helena National Forest’s Forest Plan.²¹

The last argument raised on appeal by Native Ecosystems was that they believed the environmental impact statement prepared by the Forest Service was inadequate.²² There was no mention of the 1995 Beschta Report in the Forest Service’s environmental impact statement for the sale of timber from the Helena National Forest.²³ Native Ecosystems argued that the lack of including this report was “evidence that the Forest Service did not take a ‘hard look’ at the environmental consequences of its actions.”²⁴ Therefore, the Forest Service was in violation of NEPA.²⁵

In the instant case, the Ninth Circuit Court of Appeals rejected all arguments raised by Native Ecosystems and affirmed the District Court’s ruling of granting summary judgment in favor of the United States Forest Service.²⁶ In holding the Forest Service’s proposed action did not violate NEPA, the Ninth Circuit gave the Forest Service a great deal of deference when applying the “hard look” doctrine in determining that the Forest Service’s action was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁷

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 903.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 901-04.

²⁷ *Id.*

III. LEGAL BACKGROUND

Due to the rising concerns surrounding environmental issues in the 1960's, Congress enacted NEPA on January 1, 1970.²⁸ The purpose of NEPA was to promote a better interaction between people and the environment.²⁹ NEPA is considered a broad sweeping piece of legislation because it applies to all federal agencies and established the Council on Environmental Quality ("CEQ").³⁰ CEQ has the authority to promulgate administrative procedures in order to aid administrative agencies in complying with NEPA.³¹ "The [CEQ] has become the principle agency responsible for the administration of NEPA, primarily through the adoption of interpretive regulations."³² When interpreting NEPA, the courts have given CEQ's regulations controlling effect.³³ Therefore, since the United States Forest Service is a federal agency, it adheres to CEQ's regulations.³⁴

The CEQ's regulations spell out the administrative procedures that any federal agency must take before commencing upon any major federal action.³⁵ The driving force of NEPA is the requirement that a federal agency shall complete an environmental impact statement before deciding to commence upon any major federal action.³⁶ The Supreme Court, in *Robertson v. Methow Valley Citizens Council*, explained the purpose of the environmental impact statement as "[ensuring] that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation process."³⁷

In determining whether a proposed federal project requires the production of an environmental impact statement, a federal agency shall determine if the proposed project is one that normally requires the making of an environmental impact statement or is the type of project that is categorically excluded from the environmental impact statement requirement.³⁸ If a proposed federal action does not fall under either one of those areas, the federal agency is required to perform an environmental assessment in order to determine if the project requires the making of an environmental impact statement.³⁹ The federal agency is not required to make an environmental impact statement if, after completing the environmental assessment, the federal agency

²⁸ 42 U.S.C. § 4321 (2000).

²⁹ *Id.* "The purposes of [NEPA] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." *Id.*

³⁰ 42 U.S.C. § 4332 (2000).

³¹ 42 U.S.C. § 4321.

³² Daniel R. Mundelker, *An Outline of NEPA and Its Administration*, NEPA Law and Litigation § 2.8 (2002).

³³ *Id.*

³⁴ 40 C.F.R. § 1507.3 (2002).

³⁵ See 40 C.F.R. § 1500.1 (2002) "Major Federal action includes actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. § 1508.18 (2002).

³⁶ 42 U.S.C. § 4332(C).

³⁷ 409 U.S. 332, 349 (1989).

³⁸ 40 C.F.R. § 1501.4 (2002). "Categorical exclusion means a category of action which do no individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4.

³⁹ *Id.* "Environmental assessment means a concise public document for which a Federal agency is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact..." 40 C.F.R. § 1508.9.

determines that the proposed project will have no significant environmental impact.⁴⁰ However, if, through the environmental assessment process, the federal agency determines that the proposed project will have or could have a significant environmental impact, the agency is required to prepare an environmental impact statement before commencing with the project.⁴¹

In projects where the federal agency determines that an environmental impact statement is required before commencing upon the proposed action, the mere fact that the agency produces an environmental impact statement does not preclude the federal agency from being challenged in court on its decision to commence with the proposed project. "Ultimately, public and private organizations can sue under the Administrative Procedures Act for judicial review of an agency's implementation of the requirements of [NEPA] and the reasonableness of the agency's decision."⁴² Pursuant to the Administrative Procedure Act, a court reviewing a federal administrative agency's decision-making process shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁴³ This standard of judicial review has become commonly known as the "arbitrary and capricious" standard.⁴⁴

Courts and legal scholars have debated the meaning and the proper application of this arbitrary and capricious standard of review.⁴⁵ From this debate emerged the "hard look doctrine," whose creation has been attributed to Judge Leventhal of the D.C. Court of Appeals.⁴⁶ In *Greater Boston Television Corp. v. FCC*, Judge Leventhal, writing for the majority, articulated and explained the "hard look doctrine" as a way for courts to give meaning to the arbitrary and capricious standard in reviewing federal administrative agency actions.⁴⁷ In that case, the court explained that the "supervisory function calls on the court to intervene... if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."⁴⁸ However, if the particular administrative agency took this requisite "hard look," then the court shall exercise restraint and affirm "the agency's action even though the court would on its own account have made different findings or adopted different standards. Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error."⁴⁹ This hard look doctrine articulated by Judge Leventhal has become the cornerstone for judicial review on federal administrative agency actions.⁵⁰ The Ninth Circuit Court of Appeals has applied this standard to the cases involving organizations challenging the United States Forest Service's decision to harvest national forest timber.

Two recent cases where the Ninth Circuit was forced to decide whether an environmental impact statement prepared by the Forest Service was adequate under NEPA exemplify the two very different approaches that it has taken when applying the "hard look doctrine" in reviewing the Forest Service's decisions to harvest timber. Even though the court in both of these cases applied the same standard of review, it analyzed the cases differently and came to opposite conclusions. In *Neighbors of Cuddy Mountain v. United States*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Applying the NEPA Process, 2-3.

⁴³ 5 U.S.C. § 706(2)(A) (2000).

⁴⁴ Gary Lawson, *Federal Administrative Law*, 661 (2d. ed., West 2001).

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970);

⁴⁹ *Id.*

⁵⁰ Lawson at 672.

Forest Service,⁵¹ an environmental group brought an action against the Forest Service claiming, among other allegations, that the Forest Service had violated NEPA in that the alternatives including proposed action requirement of NEPA was not satisfied because the mitigating measures imposed to off-set the damage from the timber sale were insufficient in the environmental impact statement.⁵² The court explained, “[f]or actions challenging the adequacy of an [environmental impact statement (‘EIS’)], brought under NEPA, we employ a rule of reason to determine whether the EIS contains a ‘reasonably thorough discussion of the significant aspects of probable environmental consequences.’ Under this standard, review consists only of insuring that the agency took a ‘hard look.’”⁵³ In ruling against the Forest Service, by concluding that the environmental impact statement violated NEPA, the court felt that “[t]he Forest Service’s broad generalizations and vague references to mitigation measures in relation to the . . . project [did] not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, [which] the Forest Service [is] required to provide.”⁵⁴

Neighbors of Cuddy Mountain also claimed, among other allegations, that the Forest Service did not adequately consider the cumulative effects that three timber sales in the Cuddy Mountain Roadless area would have on old growth habitat.⁵⁵ In finding against the Forest Service, the court explained that. “[t]he Forest Service provided some information in regard to the cumulative effects of all proposed timber sales on old growth habitat, but the analysis provided was very general, and did not constitute the “hard look” that the Forest Service is required to provide under NEPA.”⁵⁶ For these two reasons, among others, the Ninth Circuit found that the Forest Service’s decision to sell the 18.8 million board feet of timber in the Payette National Forest violated NEPA.⁵⁷

The reasoning of these two holdings by the court clearly illustrates the Ninth Circuit’s approach toward the “hard look doctrine” in this case. In applying the “hard look doctrine,” the court was not satisfied that the Forest Service had considered the alternatives or the cumulative effects that the three timber sales would have on the old growth habitat.⁵⁸ The court felt that the Forest Service’s analysis and record for their decision was inadequate.⁵⁹ The court in this case gave very little deference to the Forest Service and closely scrutinized their decision-making process.⁶⁰

While the Ninth Circuit found the environmental impact statement in *Neighbors of Cuddy Mountain* to be inadequate, it upheld the environmental impact statement prepared by the Forest Service in *Friends of Southeast’s Future v. Morrison*.⁶¹ This case involved the Forest Service’s proposed sale of sixty-seven million board feet of timber in Tongass National Forest.⁶² Just as it was an issue in *Neighbors of Cuddy Mountain*, the

⁵¹ 137 F.3d 13720 (9th Cir. 1998).

⁵² Mitigating measures must be included in an environmental impact statement in order to comply with NEPA.

“Mitigation includes, (a)Avoiding the impact altogether by not taking a certain action or parts of an action, (b)Minimizing impacts by limiting the degree or magnitude of the action and its implementation, (c)Rectifying the impact by repairing, rehabilitating, or restoring the affected environment, (d)Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, (e)Compensating for the impact b y replacing or providing substitute resources or environments.” 40 C.F.R. § 1508.20 (2002). *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

⁵³ *Id.* at 1376.

⁵⁴ *Id.* at 1381.

⁵⁵ *Id.* at 1378.

⁵⁶ *Id.* at 1378-79.

⁵⁷ *Id.* at 1375, 1381.

⁵⁸ *Id.* at 1378-80.

⁵⁹ *Id.* at 1378-79.

⁶⁰ *See id.*

⁶¹ 153 F.3d 1059 (9th. Cir. 1998).

⁶² *Id.* at 1061.

appellants argued that the environmental impact statement was inadequate because it did not describe and analyze the alternative including the proposed action requirement of NEPA pursuant to 40 C.F.R. § 1502.14.⁶³ However, instead of closely scrutinizing the Forest Service's record as the court did in *Neighbors of Cuddy Mountain*, the court gave the Forest Service a great deal of deference in determining the adequacy of the environmental impact statement.⁶⁴ The appellants were arguing that the Forest Service did not give enough consideration to the no-action alternative.⁶⁵ The court ruled that, "merely because a 'no action' proposal is given a brief discussion [in the EIS] does not suggest that it has been insufficiently addressed."⁶⁶ Therefore, the court found that the environmental impact statement prepared by the Forest Service satisfied NEPA requirements because the Forest Service had taken the requisite "hard look" at the no-action alternative.⁶⁷

While the Ninth Circuit seemed to have taken a very tough stance with the Forest Service in *Neighbors of Cuddy Mountain*, the court in *Friends of Southeast's Future* gave the Forest Service a great deal of deference when ruling in its favor.⁶⁸ The court's reasoning in *Friends of Southeast's Future* appears to be a stark contrast to the court's reasoning in *Neighbors of Cuddy Mountain*. The court in *Friends of Southeast's Future* was satisfied that the Forest Service had taken the requisite "hard look" if the record indicated that the Forest Service had considered the matter in controversy.⁶⁹ The Ninth Circuit gave a great deal of deference to the Forest Service by not overly scrutinizing the Forest Service's record and analysis as it did in *Neighbors of Cuddy Mountain*.⁷⁰

In examining these two Ninth Circuit cases, the court clearly gave two very different levels of deference to the United States Forest Service in determining if the environmental impact statement satisfied NEPA. Even though both of these cases employed the hard look doctrine, the court came to two different conclusions because the court applied two different levels of deference to the Forest Service's decision making process.

IV. INSTANT DECISION

In the instant case, as illustrated above, Native Ecosystems raised several issues on appeal for the Ninth Circuit to consider in challenging the Forest Service's decision to sell timber from the Helena National Forest.⁷¹ First, Native Ecosystems argued that the timber sale violated the Helena National Forest's Forest Plan.⁷² The Forest Plan required that "five percent of each third order drainage should be managed for old growth," and Native Ecosystems argued that this standard was not being met by the timber sale from the Helena National Forest.⁷³ In rejecting this argument, the court found that Native Ecosystems had not offered any evidence to show that the timber sale was violating this standard.⁷⁴ The Court noted that the Forest Service had "considered the potential impact on species associated with old growth forests, . . . , and determined that although no identifiable individuals live within the areas marked for logging, the Forest Service concluded that the logging could increase foraging habitat for these species."⁷⁵ Without going into any further detail or examination, the

⁶³ *Id.* at 1065.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1064-65.

⁶⁶ *Id.* at 1065 (quoting *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990)).

⁶⁷ *Id.* at 1065-66.

⁶⁸ *Id.* at 1065.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Native Ecosystems Council*, 54 Fed. Appx. at 902-03..

⁷² *Id.* at 902.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Court ruled that the Forest Service “took the required ‘hard look’ at the environmental data in its decision that the timber sale will have no effect on old growth forests.”⁷⁶

The next issue raised on appeal by Native Ecosystems was that they argued that the Forest Service was required to prepare a supplemental environmental impact statement before it sold the timber from the Helena National Forest.⁷⁷ Native Ecosystems believed that a supplemental environmental impact statement was necessary because the timber sale was not going to be profitable after all of the “remediation” costs were included in the sale.⁷⁸ Profits from the sale were to be set aside for forest restoration.⁷⁹ Therefore, Native Ecosystems argued that since the sale would not bring any profits, there were new environmental concerns because there would not be any money for forest restoration.⁸⁰

The court also rejected this argument.⁸¹ In doing so, the court pointed out that Native Ecosystems had not identified any law that prohibited the Forest Service from selling timber merely because it is unprofitable.⁸² Even though the court viewed the Forest Service’s accounting practices in regard to the Helena National Forest timber sale with “considerable skepticism,” the court illustrated that “[e]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement.”⁸³ The court found that the Forest Service had adequately considered, in the environmental impact statement, the effects that the timber sale would have on the environment.⁸⁴ Even though, the Forest Service did not properly calculate the expected profits of the timber sale, the fact that the sale may not be profitable was not information “relevant to environmental concerns.”⁸⁵ Therefore, the court ruled that “the decision to continue with the timber sale in the face of decreased monetary gain without a supplemental environmental impact statement was not arbitrary and capricious.”⁸⁶

Native Ecosystems also argued that Helena National Forest’s Forest Plan required “that if, ‘anticipated costs are higher than predicted high bids,’ the Forest Service should ‘defer the sale’ or ‘proceed to sell the timber and provide proper documentation that benefits, other than immediate monetary [sic] return from the timber, are of importance.’”⁸⁷ In rejecting this argument, the Court ruled that the Forest Service had satisfied this requirement because the Forest Service had adequately listed non-monetary benefits in the environmental impact statement that would be derived from the timber sale.⁸⁸ The Court pointed out the non-monetary benefits of the Helena National Forest timber sale as being job creation in the local sawmills, “accelerat[ing] recovery of the fire area through measures that will protect and retain soils, improve watershed values and maintain wildlife habitat.”⁸⁹ Thus, the court ruled that the decision to sell the timber did not violate NFMA and was not arbitrary and capricious.⁹⁰

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 903.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 902.

⁸³ *Id.* at 902-03.

⁸⁴ *Id.* at 903.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

The last issue raised on appeal by Native Ecosystems was that the group believed that the environmental impact statement prepared by the Forest Service was inadequate.⁹¹ Native Ecosystems argued that since the Forest Service had not mentioned the 1995 Beschta Report in the final environmental impact statement, the Forest Service did not take a "hard look" at the environmental consequences of the proposed timber sale.⁹² The court rejected this argument as well.⁹³ The court explained that there is no authority that requires the Forest Service to include a discussion of a particular report in an environmental impact statement.⁹⁴ Instead, the Forest Service is only required to take a "'hard look' at all available environmental data."⁹⁵ Without going into detail, the court ruled that the Forest Service had taken the requisite hard look at the available environmental data when the Forest Service "determined that salvage logging in the site-specific context would 'accelerate recovery of the fire-damaged area.'"⁹⁶ Therefore, the Forest Service's decision to go ahead with the proposed timber sale from the Helena National Forest did not violate NEPA.⁹⁷

V. COMMENT

Due to the emergence of a more environmental conscience nation, administrative agencies responsible for protecting our environment have become closely scrutinized by the public. This has been especially true for the United States Forest Service. Environmental groups and organizations have targeted the Forest Service and have challenged numerous Forest Service proposed actions. These groups and organizations who have been challenging Forest Service proposed actions have met two very different standards of review in the Ninth Circuit. As illustrated from the two cases above, the court has given the Forest Service a great deal of deference in some cases and hardly any deference at all in others. Even though the Ninth Circuit applies the hard look doctrine when reviewing Forest Service proposed actions, the court's interpretation and application of the "hard look doctrine" appears to vary greatly from case to case.

The Ninth Circuit, in interpreting and applying the "hard look doctrine," extended its practice of giving the Forest Service a great deal of deference on its decision-making process in *Native Ecosystems Council v. United States Forest Service*.⁹⁸ As explained earlier, Native Ecosystems Council claimed, among other allegations, that the environmental impact statement prepared by the Forest Service was inadequate because the timber sale from the Helena National Forest was going to be below cost.⁹⁹ Since the Forest Service's project called for setting aside the profits from the sale for forest restoration, the fact that there would be no profits from the sale made new environmental concerns.¹⁰⁰ In rejecting this argument, the court ruled that, "the decision to continue with the timber sale in the face of decreased monetary gain without a supplemental environmental impact statement was not arbitrary and capricious."¹⁰¹ Even though the Forest Service miscalculated the costs of the timber sale before the final environmental impact statement was prepared, the court found that the decision to sell the timber was reasonable.¹⁰² This again, as it was the case in *Friends of*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 903-04.

⁹⁴ *Id.* at 904.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.* at 902-04.

⁹⁹ *Id.* at 902.

¹⁰⁰ *Id.* at 903.

¹⁰¹ *Id.*

¹⁰² *Id.*

Southeast's Future, appears to be a stark contrast to the Ninth Circuit's decision in *Neighbors of Cuddy Mountain*. The court explained, "we view the Forest Service's accounting practices in regard to this sale with considerable skepticism."¹⁰³ However, the Ninth Circuit still granted a great deal of deference to the Forest Service by upholding the timber sale.

The amount of deference the Ninth Circuit granted to the Forest Service in *Friends of Southeast's Future* and in *Native Ecosystems Council* is the proper amount of deference that courts throughout the country should grant to the United States Forest Service when reviewing the Forest Service's actions. Congress has delegated the responsibility of protecting and managing our national forests to the United States Forest Service. The Forest Service was created to make policy decisions for our national forests. The Forest Service comprises of our nation's experts and leaders on national forest management. The problem of giving the Forest Service very little deference, as the Ninth Circuit did in *Neighbors of Cuddy Mountain*, is that it allows courts to replace the expert judgments of the Forest Service with their own. The Forest Service has a great deal more expertise on national forest management than do judges. Judges should respect and uphold the determinations of the Forest Service in environmental impact statements, unless it is absolutely clear that the Forest Service did not give any consideration to the problem at controversy. Congress has entrusted our United States Forest Service to manage our national forest, not environmental groups or judges.¹⁰⁴

The result from courts throughout the country giving very little deference to the Forest Service when applying the hard look doctrine to Forest Service proposed actions has caused serious consequences. When a court applies this stringent standard when reviewing Forest Service actions under NEPA, as the Ninth Circuit did in *Neighbors of Cuddy Mountain*, it nearly prevents the national forest management process by giving environmentalists a method to stop many Forest Service proposed actions. One commentator noted that environmentalists have been able to use NEPA as a tool to file thousands of lawsuits designed to block and tremendously delay Forest Service actions because the environmental groups philosophically object the proposed action.¹⁰⁵ These types of lawsuits have resulted in what Forest Service Chief Dale Bosworth calls, "analysis paralysis," at his agency [because] workers spend most of their time planning an evaluating projects and very little time actually implementing them."¹⁰⁶ James Connaughton, chairman of the White House Council on Environmental Quality, in an interview explained that some agency decision making processes can last six to ten years before the proposed action is finally implemented.¹⁰⁷ These are the type of results that environmentalists seek. As one environmentalist explained, "[t]he whole purpose of [NEPA] was to slow down the government juggernaut and to make public officials think long and hard before they take any action that could be harmful to the environment."¹⁰⁸

For these reasons, among others, President Bush has proposed the Healthy Forest Initiative to help alleviate some of these problems.¹⁰⁹ One of the main purposes of the Healthy Forest Initiative is to "streamline the decision-making process."¹¹⁰ The President proposed the Healthy Forest Initiative, which if passed would, among other things, grant a categorical exclusion for projects that "do not result in significant impacts-eliminating the need for individual analyses and lengthier documentation," particularly the environmental

¹⁰³ *Id.* at 902.

¹⁰⁴ 16 U.S.C. § 528 (2000).

¹⁰⁵ Margaret Kriz, *Bush's Quiet Plan*, National Journal (Nov. 23, 2002) (available at 2002 WL 26794537).

¹⁰⁶ Zachary Coile, *White House seeks review shortcuts/Environmentalists fear loss of safeguard*, The San Francisco Chronicle (Sept. 27, 2002) (available at 2002 WL 4031657).

¹⁰⁷ Margaret Kriz, *The Goal Is to Get Faster Decisions*, National Journal (Nov. 23, 2002) (available at 2002 WL 26794538).

¹⁰⁸ Kriz, *supra* n. 105 (quoting John Echeverria, executive director of the Georgetown Environmental Policy Project).

¹⁰⁹ Kriz, *supra* n. 105.

¹¹⁰ Dale Bosworth, Congressional Testimony, Forest Service (Feb. 13, 2003) (available at 2003 WL 11715588).

impact statement requirement under the NEPA.¹¹¹ Among those projects that would fall under these new categorical exclusions is certain forest thinning and forest restoration projects.¹¹² These new categorical exclusions from the environmental impact requirement of NEPA would render these projects free from the stringent judicial review that the Forest Service has encountered in some courts throughout the country, and would aid the Forest Service in being able to return to implementing their actions instead of defending their proposed actions in courts.¹¹³ In a speech in Oregon, President Bush explained, “[t]here’s just too many lawsuits. We want to make sure our citizens have a right to the courthouse....But there’s a fine balance between people expressing [themselves] and their opinions and litigation to keep the United States of America from enacting commonsense forest policy.”¹¹⁴

As a result for proposing the Healthy Forest Initiative, President Bush has come under attack by environmentalists claiming that he is attempting to “undercut the NEPA process.”¹¹⁵ One commentator explained that NEPA is not the problem and I agree. NEPA is not the problem that is crippling the Forest Service’s ability to manage our national forest. The problem has come from environmental groups abusing the judicial system and from Circuit Courts granting the Forest Service very little deference when applying the hard look doctrine in reviewing Forest Service proposed actions under NEPA.

VI. CONCLUSION

The Ninth Circuit’s interpretation and application of the hard look doctrine in this case is clearly a step in the right direction because it grants the Forest Service a great deal of deference in its decision-making processes. If courts throughout the country would have been granting the United States Forest Service the same level of deference as the court did in this case, then perhaps NEPA would still be good law. However, because courts, such as the Ninth Circuit in *Neighbors of Cuddy Mountain*, applied a much more stringent standard of review than was intended for the “arbitrary and capricious” standard, there is now a need to reform NEPA. Environmentalists, by filing thousands of lawsuits against our federal agencies under NEPA, have prevented the Forest Service from implementing national forest policy. Courts should give a great deal of deference to the United States Forest Service because they are trained forest experts who have been entrusted to manage our national forests. If the courts throughout our country had given the Forest Service and other federal agencies the amount of deference that they deserve, and had applied the proper standard of review under the “arbitrary and capricious” standard, then perhaps there would have never been a need to change NEPA.

DEVIN KIRBY

¹¹¹ U.S. Dept. of Interior, *Bush Administration Proposes Steps To Restore Forest And Rangeland Health*, New Release (Dec. 11, 2002) (available at 2002 WL 31768805).

¹¹² *Id.*

¹¹³ 40 C.F.R. § 1508.4

¹¹⁴ *Id.*

¹¹⁵ Schmidt, Yarborough, Behrens, *supra* n. 2, at 3.