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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SISKIYOU REGIONAL EDUCATION PROJECT, et al.,	Civil No. 04-3058-CO (lead case)
Plaintiffs,	CONSOLIDATED CASES
v.	ORDER
LINDA GOODMAN, et al.,	
Defendants.	

Plaintiffs in these consolidated cases ask the court to enjoin ground disturbing activities on six salvage timber sales on the Siskiyou National Forest. The sales are among activities authorized by the late-successional reserve component (LSR ROD) of the Biscuit Fire Recovery Project (Biscuit Project).

Background

Lightning ignited the Biscuit Fire in the Klamath Mountains on July 13, 2002. These cases arise from the response of the Forest Service (the Service) to the fire, a project the Service

describes as among the largest and most complex in its history. Millions of trees burned during a 120-day period, in an area finally encompassing 499,965 acres, primarily within the Siskiyou National Forest. Twenty-three regional and national fire management teams contributed to fire suppression efforts. Seven thousand firefighters and support people were deployed during the peak of the blaze. The affected area includes nearly all of the Kalmiopsis Wilderness Area, 164,923 acres in late-successional reserves (LSRs), 3,428 acres in Wild and Scenic River Corridors, and approximately 188,000 acres in inventoried roadless areas (IRAs). EIS 2; <http://www.biscuitfire.com/facts.htm>. The Kalmiopsis Wilderness Area is well-known as a repository for rare plants, and the Siskiyou National Forest as a whole is similarly renowned for its diversity of plant life. EIS III-113.

Following fire suppression activities, resource specialists analyzed impacts through aerial photography and field reconnaissance. In December, 2002, and January, 2003, the Service held ten public meetings to gather input from residents of affected communities concerning desired treatments and options. On January 30, 2003, the Service published the Biscuit Post-Fire Assessment, setting forth options for moving toward desired conditions. The Service identified needs to recover economic value from burned timber, reduce risk to nearby communities and forest resources from future high intensity fire,

and revegetate burned conifer stands and other burned plant and animal habitats. EIS I-1-6.

The Service issued a draft environmental impact statement (DEIS) on November 23, 2003, triggering a public comment period that ended on January 20, 2004, after a fifteen-day extension. The Service received more than 23,000 comments. In December, 2003, the Service held five more public meetings to explain the DEIS. Approximately 400 people attended these meetings. Thereafter, the Service issued a two-volume, Final EIS (EIS) approximately 1,000 pages in length (including appendices), in which the Service considered seven alternative responses to the fire.

On July 8, 2004, Rogue River-Siskiyou National Forest Supervisor Scott Conroy issued the LSR ROD, authorizing activities in LSRs outside of IRAs. LSR ROD at 1. That ROD and three others issued the same day implement the action described in the EIS as alternative 7. "Alternative 7 was broken down into four RODs in recognition of legal responsibilities and differing land management objectives." LSR ROD at 1. The RODs not implicated in these consolidated cases authorize activities on Forest Service matrix lands outside of IRAs, on Forest Service lands within IRAs, and on lands managed by the Bureau of Land Management. Id.

In issuing the LSR ROD, Conroy decided to "select 6,305

acres of salvage harvest on LSR lands, create 52 miles of Priority 2 fuel management zones, plant 12,700 acres of burned conifer stands and associated riparian reserves, seed 1,630 acres of meadows and savannas, reduce tree encroachment on 590 acres of meadow, maintain 200 miles of road build, and subsequent to use, decommission 1.3 miles of temporary road and road realignments." LSR ROD at 2. Only dead trees with no green needles or leaves are slated for harvest, and harvest will not take place within the Kalmoipsis Wilderness Area. EIS II-35, 52-53.

The LSR ROD authorizes roughly 113 million board feet (mmbf) of salvage timber harvest. Of this quantity, 54.4 mmbf is covered by Regional Forester Linda Goodman's June 3, 2004 emergency situation determination (ESD). The ESD exempts the challenged timber sales from the automatic stay normally triggered by the filing of an administrative appeal, based on Goodman's finding that delaying implementation of the sales would result in substantial economic loss to the federal government. Salvage logging subject to the ESD is slated to occur on one half of one percent of the recovery area, and 1.5% of LSRs within the recovery area.

Plaintiffs allege the ESD violates the Appeals Reform Act (ARA) (16 U.S.C. § 1612), the Service violated the National Environmental Policy Act (NEPA) (43 U.S.C. § 4321 et seq.) in failing to adequately evaluate environmental consequences of the

project, and the Service violated the National Forest Management Act (NFMA) (16 U.S.C. § 1600 et seq.) in designing the project and implementing the salvage sales. Plaintiffs ask the court to enjoin ground disturbing activities on timber sales subject to the ESD and authorized by the LSR ROD.

Discussion

Preliminary equitable relief is appropriate if plaintiffs demonstrate a likelihood of success on the merits and the possibility of irreparable injury, or the existence of serious questions on the merits and a balance of hardships tipping in their favor. National Wildlife Federation v. Burlington N.R.R., 23 F.3d 1508, 1510 (9th Cir. 1994). These tests are points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. United States v. Nutri-Ecology, Inc., 982 F.2d 394, 397 (9th Cir. 1992). The court is required to balance the competing claims of injury and consider harm to each party and the public interest before granting or withholding requested relief. Amoco Production v. Village of Gambell, 480 U.S. 531, 542, 545 (1987). Owing to the nature of many environmental injuries, the balance of harms in environmental cases often favors issuance of an injunction where a plaintiff proves that serious questions are raised and harm to the environment is sufficiently likely. Amoco, supra; National Wildlife Federation, 23 F.3d at 1510.

In evaluating the likelihood that plaintiffs will ultimately prevail on their claims, the court is mindful that judicial review of plaintiffs' claims is governed by the Administrative Procedure Act (APA). Under the APA, the court must set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Factual disputes implicating substantial agency expertise are reviewed under the arbitrary and capricious standard, while the Service's legal interpretations are reviewed for reasonableness. Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 964 (9th Cir. 2002).

I. Emergency Situation Determination

Plaintiffs first argue that the regulation that authorized Goodman to base her ESD on a finding of substantial loss of economic value to the government violates the ARA, and the ESD is otherwise arbitrary, capricious and an abuse of discretion.

A. Appeals Reform Act

The ARA requires the Service to stay implementation of a decision during a period of administrative appeal unless the Chief determines that an emergency situation exists. 16 U.S.C. § 1612, Note(e). Until 2003, the Service defined "emergency" in its implementing regulations as "an unexpected event, or a serious occurrence or a situation requiring urgent action," examples of which included but were not limited to several types

of environmental damage or unsafe conditions. See 36 C.F.R. § 215.10(d)(1) (2002). In 2003, the Service issued a new regulation defining "emergency situation" to include situations that would result in substantial loss of economic value to the federal government if implementation of the decision were delayed.[1] 36 C.F.R. § 215.2.

The ARA does not define the terms "emergency" or "emergency situation." Plaintiffs urge the court to interpret the term "emergency" consistent with the manner Congress used the term elsewhere in the Appropriations Act. Plaintiffs point to Title II, where Congress appropriated money for the "'Emergency Forest Service Firefighting Fund,' '[f]or necessary expenses for *emergency* rehabilitation, presuppression due to *emergencies* or *economic efficiency* . . .'" (emphasis added). PL 102-381, 1992 HR 5503. The court disagrees that this language evidences Congressional intent that economic considerations may not constitute a basis for an emergency. While it permitted the Emergency Forest Service Firefighting Fund to be expended to achieve economic efficiency, Congress simply did not address whether an imminent substantial loss of economic value to the government may constitute an emergency situation.

Plaintiffs contend that in enacting the 2003 regulations,

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[1]The Service also issued a regulation authorizing the Chief and Associate Chief and certain authorized delegates to make the emergency situation determination. 36 C.F.R. § 215.10(a).

the Service reversed its position as to whether a substantial loss of economic value to the government may provide the basis for an ESD. Plaintiffs cite to a transcript of proceedings in Sierra Club v. Bosworth, No. 01-2626-SC (N.D.Cal. 2001). However, the Service's position in that case is consistent with the new regulation, although the court disapproved of the Service's interpretation of the old regulation. See Pls' Ex. 5. Plaintiffs also cite to Kentucky Heartwood v. Worthington, 125 F.Supp.2d 839 (E.D.Ky. 2000) and a memorandum prepared by a former Chief of the Forest Service addressing that opinion. Plaintiffs assert that the court and the former Chief "clarified that economic considerations were not normally accepted as a reason for an emergency stay exemption." Pls' Memo. at 10. Interpreting the old regulation, the court held that in order to avoid making an arbitrary decision, the Associate Deputy Chief had to consider potential environmental harm from a stay before issuing an ESD. 125 F.Supp.2d at 844. In his memorandum addressing the issue on remand, the Chief wrote, "[f]uel loading does not, in and of itself, satisfy the provisions of 36 C.F.R. § 215.10(d) . . . Those criteria center around demonstrating that an emergency situation exists because of imminent risks to public health and safety, private property, or the environment." Pls' Ex. 4 at 3. Neither the court nor the Chief explicitly stated that economic considerations may not suffice.

Plaintiffs finally point to a document prepared by the Service in which it explains that the proposed rule change "defines an emergency to include economic factors that would allow for immediate implementation of approved projects and exemption for stay on projects applied to non-emergency activities." Pls' Ex. 6 at 9. The court cannot fault the Service for not characterizing economic factors as an emergency in explaining the need for the rule change, where the need arises in part from judicial rejection of that characterization.

Because Congress has not addressed the precise question of whether an ESD may rest entirely on loss in economic value to the government, the court must determine whether the regulation is based on a permissible construction of the statute. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). Consistent with 36 C.F.R. § 215.10(d)(1) (2002), Webster's defines "emergency" as "an unforseen combination of circumstances or the resulting state that calls for immediate action," or "an urgent need for assistance or relief." Webster's Collegiate Dictionary 377 (10th Ed., 1996). The position of the Service that an imminent threat of loss of economic value may constitute an emergency is reasonable. Such a circumstance may require immediate action or assistance.

Plaintiffs have not convincingly demonstrated that the Service formerly held an opposite position, and even if it did, a

revised interpretation is entitled to deference if it is justified by experience or changed circumstances. Rust v. Sullivan, 500 U.S. 173, 186-87 (1991). The Service justified the expansion of the emergency definition. "[E]xperience has shown that situations exist which are not covered by the existing regulation. These include loss of economic value." Pls' Ex. 6 at 8. "[D]elayed implementation can affect the feasability of cost-effective removal." "If the timber is not harvested in a timely manner, the agency may need to use its own funds to have hazardous trees removed for public safety or other trees removed to support fire rehabilitation." Pls. Ex. 6 at 9. The Service's reasonable interpretation is entitled to deference. The court finds no conflict between the new regulation and the ARA.[2] On this record, it appears that plaintiffs are unlikely to prevail on their claim that the new regulation violates the ARA.

B. ESD Determination

Plaintiffs next argue there is no rational basis for the ESD. Plaintiffs advance three arguments. First, plaintiffs

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[2]Plaintiffs argue that the emergency exception may swallow the rule of administrative appeal in ordinary cases. The Executive Director of Forest Service Employees for Environmental Ethics opines that 40% of the nation's annual timber harvest value may qualify for exemption from the automatic stay. Stahl Decl., ¶ 15. No evidence speaks to how frequently the Chief, Associate Chief and/or their delegates exempt salvage sales on the basis of substantial economic loss to the government. Absent such evidence, the court cannot say that the Service is defying Congressional intent that emergency situation determinations should be made only in exceptional cases.

contend that the Service improperly assumed a one-year delay in performing its loss calculation, instead of the 105-day period of the automatic stay for administrative appeals. Prorating the Service's numbers, plaintiffs estimate the loss in value to timber from deterioration to be $1.1 million, not $3.3 million as found by Goodman. Plaintiffs assert that Conroy's letter to Goodman requesting the ESD evidences that harvest can occur year round. Stahl Decl., ¶ 10. Conroy states in his declaration, however, that his loss analysis assumed full winter production capacity, and restrictions on winter activities due to weather and conservation requirements are significant, so that a 105-day delay cannot be made up in the winter. Thus, volume that would have been harvested during the period of the automatic stay cannot be harvested until the end of the 2005 season. Conroy Decl., ¶¶ 6-9. Conroy sufficiently justified calculating loss of value based on a delay of one year. The court does not conclude that the loss calculations are arbitrary for this reason.

Plaintiffs next argue that Conroy and Goodman based their loss calculations on inflated market values for salvage timber. Goodman reduced Conroy's estimate of market value for salvage timber to $187.50 per thousand board feet, in order to reflect prevailing market conditions. Pls. Ex. 2. Plaintiffs argue that bid packages released by the Service on July 9, 2004 demonstrate a range of market value between $39 and $115 per thousand board

feet. Conroy explains that these rates are minimum bid rates the Service will accept, not estimates of market rates. Conroy Decl., ¶ 10. Conroy further states he based his loss calculations on then-current market data using standard appraisal methods; of the five sales auctioned on July 16, 2004, one sold for three times the advertised rate, two sold for the advertised rate, and two received no bids; and actual market values depend on many factors, including variable market conditions for wood products and the business needs of potential purchasers. Id. It is all too easy to second guess the Service's valuations with hindsight. Goodman adjusted Conroy's valuation to reflect current market conditions, and plaintiffs at best have shown only that those conditions did not prevail on July 16, 2004. The court is deferential to the Service's estimates. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Svc., 273 F.3d 1229, 1236 (9th Cir. 2001). Changed conditions are not enough to demonstrate that the loss calculations were arbitrary at the time Conroy and Goodman performed the calculations.

Citing to Kentucky Heartwood and the Odion and Nawa declarations, plaintiffs finally argue that in rendering the ESD, Goodman failed to consider potential harm that may result from authorized logging activities, including the potential for extreme fire hazard from logging slash. The ESD merely exempts the project from the 105-day automatic stay; the LSR ROD

authorizes logging activities. Further, Kentucky Heartwood predates the effective date of 36 C.F.R. § 215.2 (2003). The new regulation expressly permits an ESD to be based on loss of economic value alone, and the court believes the regulation comports with a reasonable interpretation of the ARA. Plaintiffs are not likely to ultimately prevail on their arguments against the ESD.

II. NFMA - Northwest Forest Plan LSR Guidelines

Plaintiffs next argue that the Service violated NFMA in designing the LSR component of the Biscuit project, because the Service has not demonstrated that salvage logging within LSRs will comply with Northwest Forest Plan (NWFP) Standards and Guidelines (S&G), the project as designed does not retain a sufficient quantity of large snags and the Service does not demonstrate that conditions justify planned research activities in the LSRs.

A. LSR Salvage Guidelines

The NWFP permits salvage of dead trees in LSRs in compliance with guidelines. NWFP S&G C-13. Eleven general guidelines are intended to prevent negative effects on late successional habitat (LSH) while permitting removal of some volume of commercially viable wood. Id. "While priority should be given to salvage in areas where it will have a positive effect on [LSH], salvage operations should not diminish habitat suitability now or in the

future." Id. Plaintiffs argue that salvage activities within LSRs will negatively impact present and future habitat suitability.

The service addressed the LSR salvage guidelines and determined that its planned activities comply with the eleven general guidelines, as well as the requirement that activities not diminish LSH suitability now or in the future. EIS App. E-51-52, 59-61, 68-69. The Regional Ecosystem Office Interagency LSR Work Group concurred with the Service's conclusion that the salvage activities are consistent with the NWFP. EIS App. E-48-49. Plaintiffs do not address compliance with the eleven general guidelines. Instead, plaintiffs provide the opinions of scientists in support of their argument that the salvage logging in LSRs will negatively impact LSH.[3] Where as here, the Service supports its conclusions with a thorough discussion and reasoned analysis, the court's function is not to referee a dispute between scientists. See Arizona Cattle Growers', 273 F.3d at 1236. The court is not likely to ultimately find that the Service arbitrarily concluded that salvage logging in the LSRs will not negatively impact LSH or habitat suitability.

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[3]Plaintiffs specifically cite to the declarations of Dr. Dominick Della Sala, Dr. Dennis C. Odion, and comments submitted to the Service by Dr. Jerry Franklin. The Service considered many of the opinions advanced by plaintiffs' experts, yet concluded that proposed salvage activities have neutral impact on LSH, and are economically beneficial. See EIS III-3 and App. L, generally, and L-48, 61.

> dead trees to be left for resource management needs, according to the following Dead Standing Tree Retention Table. Up to 70% of the required standing dead trees may be clumped within the Subdivision, and the remaining standing dead trees required to be left are to be dispersed throughout the remainder of the subdivision. Reserve trees necessary to be marked will be marked by the Forest Service with orange paint above and below stump height.

Pls' Ex. 22. For each listed subdivision, the table states average number of dead trees to be left per acre, minimum desired dbh, species preference, and desired dbh range. Id.

"Marking" in the context of forestry means selection and indication by painting or stamping of trees to be felled or retained; "designate" is a much broader term, and simply means to indicate. West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 949 (4th Cir. 1975) (interpreting predecessor statute). Congress included marking and designation provisions in the Act of 1897 to ensure that it is unmistakable "before the cutting what trees are to be cut and afterwards to ascertain that these trees, and these only, have been taken." Butz, 522 F.2d at 949 (quoting Gifford Pinchot, first Chief of the Forest Service). Congress enacted Section 472a(g) in response to holdings in Butz and other cases that the Act of 1897 required Department of Agriculture employees to mark each individual tree to be removed. S. REP. 94-893, *8, 1976 U.S.C.C.A.N. 6662, **6669. Although Section 472a(g) does not invariably require every tree to be marked, the legislative

history does not evidence that Congress intended to relieve the Department of Agriculture of its responsibility to designate trees for cutting and ensure that only those trees are cut.

> Subsection [(g)] requires persons employed by the Secretary of Agriculture to designate the trees or other forest products to be harvested, to mark the trees or forest products when the marking of individual trees or forest products is considered necessary, and to supervise the harvesting operations. (The existing provision of the 1897 Act, as interpreted by the courts, requires the marking of the individual trees to be cut and removed, as well as designating the sale area.) Subsection [(g)] will provide the Secretary with sufficient flexibility to indicate the timber to be harvested by designating an area in which all timber will be cut, where trees to be cut will be marked, or where trees to be left will be marked. The subsection incorporates the provisions of the 1897 Act that persons who supervise timber harvesting shall have no personal interest in the purchase or harvest of such products and shall not be directly or indirectly in the purchaser's employment.

S. REP. 94-893, *21-22, 1976 U.S.C.C.A.N. 6662, **6681.

The description in paragraph one of the contract is sufficient to inform the purchaser which trees not to cut and to permit the Service to verify that those trees are not cut in the area described therein. The provision in paragraph three that necessary marking will be performed by the Forest Service unquestionably comports with Section 472a(g). Plaintiffs have raised a serious question, however, as to whether the scheme described in paragraphs two and three for identification, selection and designation of snags for retention violates Section 472a(g).

The scheme appears to require the purchaser to identify leave trees in areas where not all trees will be cut, albeit according to guidelines and apparently subject to subsequent designation by the Service, although the contract language is somewhat unclear on this point. If the Service designates trees identified as leave trees by the purchaser (as opposed to designating trees identified by Service employees) the Service cannot ensure compliance with the snag retention scheme, and it might be said that the purchaser had a hand in designating leave trees.

The court is sympathetic to the difficult task facing the Service in designating and marking timber where necessary, and this ruling does not prevent the Service from attempting additional written designations, although the legislative history casts doubt on whether such a description can be sufficiently specific to permit the Service to verify that the purchaser does not cut the wrong trees. Of course the statue would unquestionably be satisfied if Department of Agriculture employees, lacking interest in the sale or harvest and not in the employ of the purchaser, and without assistance of any such persons, were to conduct all designation and necessary marking required to administer the snag retention scheme.

V. Harm/Application of Sliding Scale

Plaintiffs advance general allegations of imminent,

irreparable environmental injury. It is true that any snags intentionally or mistakenly harvested as a result of a violation of NFMA's designation and marking requirements cannot be replaced. On the other side of the scale, the Service determined that delay will result in loss of $3.3 million to the government, which the Service argues could be applied toward restoration and fire risk reduction activities. The Service also concluded that delay could impact 155 jobs in the local economy. See Pls' Exs. 2, 3.

With respect to salvage activities in the LSRs and the Biscuit Project as a whole, the public interest appears fractured. Opposition to the project is vocal. Yet the court has so far found that the project for the most part appears to comply with duly enacted environmental laws which also reflect the public interest. Of course the public interest is not served if the project goes forward in violation of 16 U.S.C. § 472a(g).

Considering the likelihood that plaintiffs will prevail on their claims, the allegations of evidence and harm, and the public interest, preliminary injunctive relief is appropriate, owing to the possibility that the designation and marking scheme for snag retention violates NFMA. Therefore, plaintiffs' motion for preliminary injunction is granted to the extent that felling of trees on the Berry, Fiddler, Steed, Chetco, Hobson and Lazy timber sales is enjoined until the Service demonstrates that

implementation of the sales will comply with 16 U.S.C. § 472a(g). No bond is required.

Conclusion

For the foregoing reasons, plaintiffs' motion for temporary restraining order and/or preliminary injunction [#7], treated as a motion for preliminary injunction, is granted to the extent provided herein.

IT IS SO ORDERED.

DATED this 3rd day of August, 2004.

/s/ MICHAEL R. HOGAN
United States District Judge

04-35749

If they have not already done so, within 7 calendar days of the filing date of this order, the parties shall make arrangements to obtain from the court reporter an official transcript of proceedings in the district court which will be included in the record on appeal.

The briefing schedule is set as follows: the opening brief is due not later than September 28, 2004; the answering brief is due October 26, 2004 or 28 days after service of the opening brief, whichever is earlier; and the optional reply brief is due within 14 days of service of the answering brief. *See* 9th Cir. R. 3-3(b). If appellants fail to file timely the opening brief, this appeal will be dismissed automatically by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

This appeal and any motions pending when briefing is completed shall be referred to the next available motions panel for disposition. *See* 9th Cir. R. 3-3(d).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SISKIYOU REGIONAL EDUCATION PROJECT; et al.,

Plaintiffs - Appellants,

v.

LINDA GOODMAN, Regional Forester, Pacific Northwest Region of the Forest Service; et al.,

Defendants - Appellees,

CLR TIMBER HOLDINGS, INC., an Oregon corporation; et al.,

Defendants-Intervenors - Appellees.

No. 04-35749

D.C. Nos. CV-04-03058-JPC
CV-04-03060-JPC
District of Oregon, Medford

ORDER

Before: PREGERSON and GRABER, Circuit Judges

Appellants' emergency motion for a stay of the Biscuit Fire Recovery Project emergency timber sales pending the resolution of this appeal is granted.

The appeal filed August 31, 2004 is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply.

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