

LEXSEE 395 F.3D 1019

THE LANDS COUNCIL, a Washington nonprofit corporation; KOOTENAI ENVIRONMENTAL ALLIANCE, an Idaho nonprofit corporation; THE ECOLOGY CENTER, a Montana nonprofit corporation; IDAHO SPORTING CONGRESS, INC., an Idaho nonprofit corporation, Plaintiffs-Appellants, v. BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; UNITED STATES FOREST SERVICE, an agency of the United States, Defendants-Appellees.

No. 03-35640

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

395 F.3d 1019; 2005 U.S. App. LEXIS 1153

January 24, 2005, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Idaho. D.C. No. CV-02-00517-EJL. Edward J. Lodge, District Judge, Presiding. *Lands Council v. Powell*, 379 F.3d 738, 2004 U.S. App. LEXIS 16678 (9th Cir. Idaho, 2004)

DISPOSITION: Prior opinion amended.

JUDGES: Before: William C. Canby, Kim McLane Wardlaw, and Ronald M. Gould, Circuit Judges.

OPINION:**[*1022] ORDER**

The opinion filed on August 13, 2004, and published at 379 F.3d 738, is AMENDED as follows:

The final sentence in the first paragraph in section III.B.2. states:

Because the Final Environmental Impact Statement must include cumulative effects discussion for "reasonably foreseeable projects," 40 C.F.R. § 1508.7, we must determine whether these two potential projects are "reasonably foreseeable."

The final sentence in the first paragraph in section III.B.2. is deleted in its entirety and replaced with the following language:

Because the Final Environmental Impact Statement must include cumulative effects discussion for "reasonably foreseeable projects," 40 C.F.R. § 1508.7, the Lands Council asks us to determine whether these two potential projects are "reasonably fore-

seeable."

The final two paragraphs in section III.B.2. state:

[*1023] Our precedent defines **[**2]** "reasonably foreseeable" in this context to include only "proposed actions." *Or. Natural Res. Council v. Marsh*, 832 F.2d 1489, 1498 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 360, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). This rule makes sense: The agency is required to analyze the cumulative effects of projects that it is already proposing. For any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature. By contrast, any future project, once proposed, becomes more concrete and less speculative, and thus, would be subject to NEPA's cumulative effects analysis. Further, at the time it was proposed, if it is a major federal action, its NEPA assessment would be obligated to include all past projects in the cumulative effects analysis.

Here, of the future projects that the Lands Council urges were improperly ignored, none appears to have been proposed or scoped at the date of the Final Environmental Impact Statement, with one exception. Under these circumstances, the Forest Service acted within its discretion when it did not analyze the projects cited by the Lands Council.

[3]**

Footnote 8 states:

Scoping occurs after there is a proposed

project. 40 C.F.R. § 1501.7. Although the Administrative Record is not clear on this matter, the Deerfoot Ridge Restoration Project could have been proposed at the time of the Final Environmental Impact Statement and Record of Decision because scoping occurred so soon after the Record of Decision in this case. If such is the case, then the Deerfoot Ridge Restoration Project should have been included as a reasonably foreseeable activity.

The final two paragraphs in section III.B.2. and footnote 8 are deleted in their entirety and replaced with the following language:

We need not address these issues, however, because: (1) the parties have agreed that the Deerfoot Ridge Restoration Project was in a different drainage and thus need not have been considered, and (2) the Lands Council has represented that a determination that the IPNF Inland Native Fish Strategy applies — a decision that we reach later in this opinion — moots the need to address the Geographic Assessment issue here.

The final sentence in the first paragraph in section IV.A. states:

The Forest Service concedes [**4] that it did not analyze the Project under the fry emergence standard, but argues that it did have to do so.

The final sentence in the first paragraph in section IV.A. is deleted in its entirety and replaced with the following language:

The Forest Service concedes that it did not analyze the Project under the fry emergence standard, but argues that it did not have to do so.

The final sentence in the third paragraph in section IV.A. states:

The Lands Council argue to the contrary.

The final sentence in the third paragraph in section IV.A. is deleted in its entirety and replaced with the following language:

The Lands Council argues to the contrary.

The first sentence in the third paragraph in section IV.B. states:

The Forest Service concedes that it did not test the activity area, but argues that because it tested similar soils within the Forest, and similar soils act the same way, then the methodology is sound.

[*1024] The first sentence in the third paragraph in section IV.B. is deleted in its entirety and replaced with the following language:

The Forest Service concedes that it did not test much of the activity area, but argues that [**5] because it tested similar soils within the Forest, and similar soils act the same way, then the methodology is sound.

The second sentence in the fifth paragraph in section IV.C. states:

Problems with the TSMRS database have been recognized by another court, which found that the data-base overstates old growth by thirty-two percent to fifty-six percent. *Lands Council, Idaho Sporting Cong. Inc. v. Vaught*, 198 F. Supp. 2d 1211 at 1224 (2002).

The second sentence in the fifth paragraph in section IV.C. is deleted in its entirety.

The two sentences in footnote 25 in section IV.C. read:

Snags are typically dense woody areas created by fallen trees or branches, and they are a key habitat for the pine marten, one of the Indicator Species. The database contains no information about this key habitat variable.

The two sentences in footnote 25 in section IV.C. are deleted in their entirety and replaced with the following language:

Snags are dead, standing trees, and they are a key habitat for the pine marten, one of the Indicator Species. The database contains no information about this key habitat variable.

The final sentence in the sixth paragraph in section IV.C. states:

The [**6] spot surveys do not rehabilitate the proxy on proxy method, and, in this case, do not vitiate the Forest Service's reliance on the proxy on proxy method as a monitoring of population trends.

The final sentence in the sixth paragraph in section IV.C. is deleted in its entirety and replaced with the following language:

The spot surveys do not rehabilitate the proxy

on proxy method, and, in this case, do not vindicate the Forest Service's reliance on the proxy on proxy method as a monitoring of population trends.

IT IS SO ORDERED.