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**Striking the Balance: The Tale of Eight
Ninth Circuit Timber Sales Cases**

by

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Originally published in ENVIRONMENTAL LAW
29 ENVTL. L. 639 (1999)

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STRIKING THE BALANCE: THE TALE OF EIGHT NINTH CIRCUIT TIMBER SALES CASES

BY
SUSAN JANE M. BROWN*

March 4, 1998 was a day that went from bad to worse for the United States Forest Service. On that day, the Ninth Circuit Court of Appeals handed down two precedential decisions against the Forest Service and in favor of environmental groups. This Chapter asserts that Neighbors of Cuddy Mountain v. United States Forest Service and Idaho Sporting Congress v. Thomas are unique in Ninth Circuit environmental case law because they halted, albeit perhaps only temporarily, the backward slide that is taking place in the Ninth Circuit with regard to environmental protection. These two opinions are distinctive because the court rigorously held the Forest Service to the standards established by law, in contrast to previous decisions in timber sale litigation. This Chapter argues that this development has important consequences for future environmental plaintiffs who may try to discern just what is the law in the Ninth Circuit Court of Appeals.

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I. INTRODUCTION

In *Neighbors of Cuddy Mountain v. United States Forest Service (Neighbors)*¹ and *Idaho Sporting Congress v. Thomas (Idaho Sporting Congress)*² the Ninth Circuit Court of Appeals held that the United States Forest Service (USFS) failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA)³ and the substantive requirements of the National Forest Management Act (NFMA),⁴ the Clean Water Act (CWA),⁵ and state water quality standards. The court reached decisions in *Neighbors* and *Idaho Sporting Congress* that are out of step with previous Ninth Circuit decisions in timber sale cases. Prior to *Neighbors* and *Idaho Sporting Congress*, the Ninth Circuit had almost categorically deferred to the Forest Service's interpretation of NEPA and NFMA when evaluating the reasonableness of proposed timber sales.

In *Neighbors* and *Idaho Sporting Congress*, the Ninth Circuit departed from a series of decisions favorable to the Forest Service and found in favor of environmental plaintiffs. This Chapter will attempt to discern why. Did the court view these two cases as factually different from previous cases? If not, was the court simply taking the hard-line approach to evaluating the Forest Service's environmental stewardship decisions? Is the Ninth Circuit engaged in judicial activism, or is it simply enforcing the law as Congress intended?

This Chapter focuses on Ninth Circuit decisions involving NEPA, NFMA, and the CWA in timber sale cases in the Pacific Northwest. It maintains that, based on the line of decisions prior to *Neighbors* and *Idaho Sporting Congress*, the court saw a need to correct what was becoming a trend in the Ninth Circuit—failure to closely examine the facts of the cases and to consider them in light of the requirements of NEPA and other environmental statutes. Part II reviews three representational timber sale cases prior to *Neighbors* and *Idaho Sporting Congress*. Part III examines *Neighbors* and *Idaho Sporting Congress* in an attempt to determine why the outcomes of these cases are different from those of their predecessors. The result of this examination is a hypothesis in Part IV that, unlike in prior opinions, the Ninth Circuit refused to defer to uninformed agency

¹ 137 F.3d 1372 (9th Cir. 1998).

² 137 F.3d 1146 (9th Cir. 1998).

³ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (1994 & Supp. III 1997).

⁴ National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (1994 & Supp. III 1997) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (1994 & Supp. III 1997).

decision and instead applied an arbitrary and capricious standard of review to find that USFS had not met its "hard look" burden. Part V discusses the legacy of *Neighbors* and *Idaho Sporting Congress*, and suggests that the Ninth Circuit is not engaged in judicial activism, but rather in an appropriate application of the law.

II. BEFORE THE REVOLUTION

In the wake of *Citizens to Preserve Overton Park v. Volpe*,⁶ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁷ and *Thomas v. Peterson*⁸ came renewed attention to the natural environment.⁹ This paradigm shift culminated in the spotted owl litigation, best exemplified by *Northern Spotted Owl v. Hodel*.¹⁰ That litigation highlighted the plight of the spotted owl and the state of forestland in the Pacific Northwest, and began to focus public attention on the devastating timber sales that were destroying the owl's habitat.¹¹

A. Oregon Natural Resources Council v. United States Forest Service

*Oregon Natural Resources Council v. United States Forest Service (ONRC)*¹² is a case typical of the push to prevent logging on public lands. In 1980, USFS prepared an environmental assessment (EA) for the North Roaring Devil timber sale in the Willamette National Forest in central Oregon, and subsequently issued a decision notice (DN) and finding of no significant impact (FONSI) for the sale.¹³ No administrative appeal was filed, and USFS awarded the sale to the highest bidder in 1981.¹⁴ The purchaser then defaulted on the sale, so the sale was returned to USFS pursuant to the Federal Timber Contract Payment Modification Act of 1984 (FTCPMA).¹⁵ USFS modified and reoffered the sale in December 1985, and the plaintiffs appealed that decision in January 1986.¹⁶

⁶ 401 U.S. 402 (1971) (requiring an adequate explanation for decision to construct expressway through park).

⁷ 467 U.S. 837 (1984) (agencies are entitled to substantial deference when interpreting ambiguous statutory mandates).

⁸ 753 F.2d 754 (9th Cir. 1985) (logging road and timber sale were "connected actions" and must therefore be considered in a single environmental impact statement).

⁹ The increase in environmental litigation led to comments such as: "The militancy of environmentalists, the increasingly protective posture of federal landlords, and the economically disastrous spotted owl controversy are the source of much anxiety in communities throughout [the Pacific Northwest] region." Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. ENVTL. L. & LITIG. 247, 254 (1996).

¹⁰ 716 F. Supp. 479 (W.D. Wash. 1988) (addressing the failure of the United States Fish and Wildlife Service to list the spotted owl under the Endangered Species Act).

¹¹ See *id.*

¹² 834 F.2d 842 (9th Cir. 1987).

¹³ *Id.* at 844.

¹⁴ *Id.*

¹⁵ 16 U.S.C. §§ 593f, 618, 619 (1994).

¹⁶ 834 F.2d at 844.

The Forest Service denied the appeal as untimely, explaining that the appeal of the decision should have been made in 1980, when North Roaring Devil was originally released, and not in 1986.¹⁷ Plaintiffs filed suit in district court, alleging that the failure to allow the appeal violated NEPA and that the EA violated the Endangered Species Act (ESA)¹⁸ due to the impact on the northern spotted owl.¹⁹ The district court denied injunctive relief to the plaintiffs and granted summary judgement to the defendants.²⁰

The appellants raised the following three claims on appeal: 1) USFS violated the Administrative Procedure Act (APA)²¹ by denying appellants an administrative appeal of the North Roaring Devil timber sale; 2) the EA prepared for the sale was inadequate under NEPA because the EA failed to analyze cumulative effects, disclose violations of Oregon state water quality standards, and was in fact preempted by the draft environmental impact statement (DEIS) on the northern spotted owl;²² and 3) the sale violated the CWA due to the effects of logging and bridge-building.²³ The appellants were attempting to halt not only the North Roaring Devil sale, but also the adjacent Crag sale.²⁴

The court first addressed the question of whether USFS had violated the APA when it failed to allow appellants to administratively appeal the North Roaring Devil sale. The district court had denied the plaintiffs an opportunity to appeal, and the Ninth Circuit reversed on the issue.²⁵ The panel held that under FTCPMA and NFMA appeal regulations,²⁶ the act of reoffering the sale constituted a "decision" and therefore was appealable.²⁷

The court next addressed the merits of ONRC's case, beginning with the claim that the EA for the North Roaring Devil sale inadequately assessed the sale's cumulative impacts. The district court had held that the

¹⁷ *Id.*

¹⁸ Endangered Species Act of 1973, 16 U.S.C §§ 5531-1544 (1994).

¹⁹ 834 F.2d at 844.

²⁰ *Id.*

²¹ 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344 (1994 & Supp. III 1997).

²² This DEIS was the forerunner to President Clinton's Northwest Forest Plan. See FOREST SERV., U.S. DEP'T OF AGRIC., DRAFT ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT FOR THE NORTHERN SPOTTED OWL IN THE NATIONAL FORESTS (1991); see also FOREST SERV., DEP'T OF AGRIC. & BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL S-1 (1993). The DEIS is a regional plan, in that it affects all National Forests and BLM lands within the range of the Northern Spotted Owl. The Willamette is within this region.

²³ 834 F.2d at 843-44.

²⁴ The published opinion of this case names the second sale as the "Crag" timber sale. In fact, the name of the second sale is the "Crag" sale. See Appellants' Opening Brief at 1, ONRC (No. 87-3737). The correct name—the "Crag Sale"—will be used throughout this Chapter.

²⁵ 834 F.2d at 846.

²⁶ 36 C.F.R. § 211.18(f)(1) (1998).

²⁷ 834 F.2d at 846.

programmatic EIS for the Willamette National Forest (Willamette Forest Plan) adequately addressed the impacts of timber harvest, and that the EA for the present sale tiered²⁸ to the programmatic EIS.²⁹ The Forest Service claimed that the appellants had had an opportunity in 1980 to administratively appeal the timber sale, and because they had passed up that opportunity, they should not be allowed to appeal later.³⁰ Passing on the issue of whether the cumulative effects analysis that should have appeared in the EA in fact could tier to the Willamette Forest Plan, the Ninth Circuit agreed with the appellees that the appellants were likely barred from appealing the sale at that time instead of raising an appeal in 1980.³¹ However, because the court had just held that the appellants *were* entitled to appeal the sale, it quickly noted that if ONRC could allege changed circumstances between 1980 and 1986, then a new appeal *would* be timely.³² Thus, the court vacated the district court's findings regarding the adequacy under NEPA of the North Roaring Devil EA.³³

The court then discussed whether the district court's decision to sever the northern spotted owl claim effectively condoned the Forest Service's violation of Council on Environmental Quality (CEQ) regulations.³⁴ ONRC claimed that severing the northern spotted owl claim limited the alternatives that USFS would have before it when it considered the DEIS on the spotted owl.³⁵ The court affirmed the district court's findings on this issue, holding that the appellants could have challenged the DEIS when it was issued and that the present litigation was not the proper forum for shaping the alternatives analysis for that document.³⁶

²⁸ "Tiering" means

the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

40 C.F.R. § 1508.28 (1998).

²⁹ 834 F.2d at 846.

³⁰ *Id.* at 847.

³¹ *Id.*

³² *Id.*

³³ *Id.* This of course precluded a discussion of the adequacy of the cumulative effects analysis that appeared in the EA. Therefore, the court also did not address whether the effects of the Crag sale should have been addressed in the North Roaring Devil EA. Both parties extensively briefed the issue. *See* Appellants' Opening Brief at 19-34, *ONRC* (No. 87-3737); Appellees' Response Brief at 13-31, *ONRC* (No. 87-3737); Appellants' Reply Brief at 4-15, *ONRC* (No. 87-3737).

³⁴ 834 F.2d at 847 (citing 40 C.F.R. § 1506.1(a)(2) (1998)). This regulation states that "no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a)(2) (1998).

³⁵ 834 F.2d at 847. Plaintiffs argued in their briefs that allowing the North Roaring Devil and Crag sales would foreclose consideration in the spotted owl DEIS of an alternative that would protect all old growth habitat. Appellants' Opening Brief at 37, *ONRC* (No. 87-3737). Essentially, if the proposed sales were sold and harvested, the consideration of a no-harvest alternative in a DEIS would be meaningless because there would be very little, if any, old growth habitat left to protect (at least on the Willamette). *Id.*

³⁶ 834 F.2d at 848.

Lastly, the court turned to the plaintiffs' claims that the North Roaring Devil sale would violate the CWA³⁷ and Oregon state water quality standards.³⁸ The district court held that the appellants were barred from bringing a claim under the citizen suit provision of the CWA³⁹ because they failed to provide the Forest Service with a sixty-day notice of intent to sue.⁴⁰ However, ONRC maintained that their claim was brought under the judicial review provision of the APA,⁴¹ and not the CWA.⁴² In raising this argument, the appellants explained that the citizens suit provision of the CWA allowed enforcement of violations of "an effluent standard or limitation,"⁴³ and that the state antidegradation policy was such a limitation.⁴⁴ The court explained that in its view, the citizen suit provision of the CWA was not intended to be a tool to enforce nonpoint source pollution⁴⁵ standards. Therefore, the sixty-day notice requirement was not applicable.⁴⁶ Thus, the district court erred in holding that the appellants were required to provide a sixty-day notice to USFS, because the appellants were not even permitted to sue under the CWA.

While the appellants were not allowed to sue under the citizen suit provision of the CWA, the Ninth Circuit held that standing to sue was proper under the APA.⁴⁷ The Forest Service claimed that APA review was not available in cases where review was provided in the enabling statute—

³⁷ 33 U.S.C. § 1323 (1994) states that the federal government must comply with state water quality standards and requirements. The CWA also requires the states to "develop and implement 'water quality' standards to protect and enhance the quality of water within the state." *ONRC*, 834 F.2d at 848 (quoting 33 U.S.C. § 1323 (1994)).

³⁸ OR. ADMIN. R. 340-41-0026(1)(a) (1999); OR. ADMIN. R. 340-41-0445(2)(c) (1999). Section 340-41-0026(1)(a)(A) requires that "existing water quality . . . shall be maintained and protected." This is Oregon's antidegradation policy. Section 340-41-0445(2)(c) states that "no activities shall be conducted which either alone or in combination with other wastes or activities will cause . . . in the waters of the Willamette River Basin [the location of the North Roaring Devil and Crag sales]. . . [more than] a ten percent cumulative increase in natural stream turbidities."

³⁹ 33 U.S.C. § 1365 (1994).

⁴⁰ 834 F.2d at 848 (citing 33 U.S.C. § 1365(b)(1) (1994)).

⁴¹ 5 U.S.C. § 701-06 (1994).

⁴² 834 F.2d at 848.

⁴³ 33 U.S.C. § 1365(a)(1)(A) (1994). Section 1311(b)(1)(C) of the CWA lists other enforceable standards, such as the antidegradation policies of the states: "any more stringent limitation, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard established pursuant to this chapter."

⁴⁴ 834 F.2d at 848.

⁴⁵ Increased peak flow, sedimentation, turbidity, and temperature are common nonpoint source pollution that result from silvicultural activities. The appellants alleged that these sorts of pollution would occur as a result of the North Roaring Devil timber sale. Appellants' Opening Brief at 10, *ONRC* (No. 87-3737).

⁴⁶ 834 F.2d at 849. Appellants claimed that "section 1311(b)(1)(C) incorporates state water quality standards established pursuant to section 1313 and does not explicitly refer to point sources, [and thus they were] entitled to sue under the citizen suit provision of the Act to enforce state water quality standards affected by non-point sources." *Id.* The court countered by noting that the name of § 1311 of the CWA was "Effluent Limitations" and that the section refers only to point source discharges, and therefore does not incorporate nonpoint source discharges. *Id.*

⁴⁷ *Id.* at 851.

here, the citizen suit provision of the CWA.⁴⁸ However, the court rejected this reasoning, noting that ONRC was not entitled to review under the citizen suit provision and would be foreclosed from relief unless the APA allowed judicial review.⁴⁹

Returning finally to whether Oregon water quality standards had been violated by the North Roaring Devil sale, the Ninth Circuit addressed the issue of whether "minor and transient" violations of state water quality standards were permissible.⁵⁰ Although the appellants argued that the Oregon antidegradation policy allowed no de minimis degradations, the Ninth Circuit held that the state law in fact contemplated such variations.⁵¹ Nevertheless, the Ninth Circuit remanded this issue for determination since the district court had not ruled on the issues of whether the applicable standards in fact had been violated or whether the proper in-stream permits had been obtained.⁵²

This case had mixed results for ORNC. It prevailed on the following two issues: 1) the right to administratively appeal the DN/FONSI for the North Roaring Devil sale, and 2) the right to bring a cause of action under the APA for violations of the CWA and Oregon water quality standards.⁵³ However, ONRC failed to obtain review on the issue of the foreclosure of all meaningful alternatives under the northern spotted owl DEIS due to the Forest Service's decision to go forward with the North Roaring Devil sale.⁵⁴ Most importantly, the Ninth Circuit failed to address the appellants' cumulative effects argument. This was ONRC's strongest and most developed argument; yet the court never addressed it. This is unfortunate for the appellants, because it was with this argument that the appellants tried to show that USFS completely disregarded expert advice on the effects of the timber sales.⁵⁵

Instead of tackling the factual issues head on, the Ninth Circuit looked to the relevant procedural laws to determine whether the timber harvesting should continue. Although the canons of construction teach

⁴⁸ *Id.* at 850.

⁴⁹ *Id.* The court noted in dicta that future plaintiffs should not interpret the present holding to suggest that plaintiffs can use the APA instead of the CWA citizen suit provision to enforce nonpoint source water quality standards in citizen suits. *Id.* at 851. Rather, if the citizen suit provision of the substantive statute is available, then § 701(a)(1) of the APA would preclude review under the latter statute. *Id.* at 850.

⁵⁰ *Id.* at 852. By the time the present case reached the Ninth Circuit, a road and a bridge across the Breitenbush River in the North Roaring Devil planning area had been constructed, and timber harvest had begun. Appellants' Opening Brief at 9-10, *ONRC* (No. 87-3737).

⁵¹ 834 F.2d at 852. OR. ADMIN. R. 340-41-0445(2)(c) states that increases in stream turbidity that are of "limited duration . . . [and] necessary to . . . accommodate essential dredging, construction or other legitimate activities" are permissible. Likewise, deviations from water quality standards are acceptable so long as "all practicable turbidity control techniques have been applied" and the requisite in-stream permits have been obtained. *Id.* at 340-41-0445(2)(c).

⁵² 834 F.2d at 853.

⁵³ *Id.*

⁵⁴ *Id.* at 847.

⁵⁵ Appellants' Opening Brief at 19-34, *ONRC* (No. 87-3737).

that it is better to decide an "easy" statutory question than a "tough" constitutional one,⁵⁶ no such tough questions were at issue in this case. As a result, the Ninth Circuit refused to address the most critical of ONRC's arguments. This was not the first time, nor the last time, that the Ninth Circuit evaded the real issues.

B. Inland Empire Public Lands Council v. Schultz

As in *ONRC*, the Ninth Circuit in *Inland Empire Public Lands Council v. Schultz (Inland Empire)*⁵⁷ continued to fail to rigorously apply the law to the facts at issue. In October 1990, the Forest Service, pursuant to the Colville National Forest Land and Resource Management Plan, offered the Calispell timber sale in the Colville National Forest in northeastern Washington. At the same time, the Forest Supervisor for the Colville National Forest issued an EA and a FONSI for the Calispell sale, both of which the plaintiffs administratively appealed.⁵⁸ Central to Inland Empire's appeal was the claim that the cumulative effects analysis in the EA was inadequate.⁵⁹ The Chief of the Forest Service agreed and reversed the Forest Supervisor's decision to implement the sale.⁶⁰ The Forest Supervisor then modified and expanded the EA and reoffered the sale.⁶¹ The following day, USFS awarded the sale to the highest bidder. Less than a month later, timber harvest began on the Calispell sale.⁶² Inland Empire filed suit in district court, moving for an injunction and a temporary restraining order, as well as judicial review on the merits.⁶³ The district court denied these motions, holding that the EA adequately discussed the cumulative effects of the timber sale.

On appeal, the appellants raised several claims. Inland Empire alleged that 1) the district court made an error in accepting USFS's argument that there was no right of an administrative appeal of the reoffering of the Calispell sale; 2) a preliminary injunction should have been granted while the case proceeded; and 3) the EA was inadequate because it failed to address the cumulative impacts of timber harvest in the Calispell planning area, thus compelling the preparation of an EIS.⁶⁴ The Ninth Circuit affirmed the district court in all respects and rejected appellants' claims that an EIS was required.⁶⁵

⁵⁶ The court took a formalist approach to this case. Legal formalism—"the idea that the judge has no will, makes no value choices, but is just a kind of calculating machine"—has been rejected by the majority of modern courts. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 307-09 (1996).

⁵⁷ 992 F.2d 977 (9th Cir. 1993).

⁵⁸ *Id.* at 979.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ In the district court, the plaintiffs argued that 1) the cumulative effects analysis in the EA was inadequate, and 2) they should have been given the right of an administrative appeal of the decision to reoffer the Calispell timber sale. *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

The Ninth Circuit quickly dismissed the appellants' argument that the failure to allow an administrative appeal violated NEPA.⁶⁶ The court reasoned that the decision to reoffer the sale was a final agency action and that "an agency's interpretation of its own regulations controls unless 'plainly erroneous or inconsistent with the regulation.'"⁶⁷ In addressing the question of whether the Calispell sale required the preparation of an EIS, the court acknowledged that the proper standard of review was the hard look standard, which obligated the court to uphold the decision of the agency so long as the inquiry of the agency was "truly informed."⁶⁸ The appellants alleged that the methodology used to assess the cumulative impacts of the Calispell sale was flawed and that USFS had violated federal and agency regulations when it failed to include foreseeable future actions within the Calispell planning area as part of the cumulative effects analysis in the EA. In addition, the methodology used by USFS did in fact predict significant effects, which should have triggered an EIS.⁶⁹

Regarding the contention that the methodology chosen by the Forest Service was flawed, the Ninth Circuit decided that it was not in the position to referee a dispute regarding methodology between Inland Empire and the agency. Unless appellants could point to some factor that USFS failed to consider, the court's place was to defer to the agency.⁷⁰ The Ninth Circuit also upheld the district court's ruling that the decision to omit a cumulative effects analysis pertaining to possible future timber harvest from the Calispell EA was not arbitrary and capricious.⁷¹ In so hold-

⁶⁶ The court in the present case did not cite to NEPA or its implementing regulations, but rather to Supreme Court precedent, including *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). See *id.* at 980.

⁶⁷ *Inland Empire*, 992 F.2d at 980 (quoting *Methow Valley Citizens Council*, 490 U.S. at 359). The reasoning by the court on this issue is hardly clear, especially in light of *ONRC*, which held that at least one level of appeal was available for reoffered timber sales.

⁶⁸ *Id.*

⁶⁹ *Id.* at 980-81.

⁷⁰ *Id.* at 981. There is no indication what "methodology" was in dispute. In a footnote, the court discusses a NEPA regulation, 40 C.F.R. § 1508.7 (1998), that defines "cumulative impact" and requires the consideration of past, present, and reasonably foreseeable federal and nonfederal (*i.e.*, private or state) actions that may affect the environment. *Id.* at 981 n.3. Other than this footnote, however, the Ninth Circuit provides little information regarding the methodology criticized by the appellants.

⁷¹ *Id.* at 981-82. Apparently appellants argued that the EA should not have explicitly excluded 1200 acres from the cumulative effects analysis. The Ninth Circuit's opinion is unclear, however, whether this 1200 acres was included in the original Calispell EA and then excluded in the supplemental EA, whether the 1200 acres was part of the Calispell planning area but was not addressed in the EA, or whether the 1200 acres was part of the Colville National Forest but not part of the Calispell planning area. If the final scenario was in fact the case, then the court's cursory treatment of the issue is understandable; if the planning area for the sale did not include the 1200 acres, then the Forest Service had no obligation under NEPA or NFMA to address it. It is possible that this 1200 acres was private land, although this does not relieve the Forest Service of analyzing the synergistic effects of private and federal actions. *Id.* at 981; 40 C.F.R. § 1508.7 (1998). If, on the other hand, the 1200 acres was part of the analysis area—which is probable, considering the large size of the Colville—then the court's refusal to require a cumulative analysis for these acres is questionable.

ing, the Ninth Circuit again noted that its place was not to question the expertise of the agency, and, since the Forest Service prepared models and performed field evaluations for the supplemental EA, the examination of the cumulative effects issue was reasonable.⁷²

The appellants also claimed that the EA was inadequate because the original Calispell EA found that the effects of the sale would exceed the "threshold of concern" established by the Forest Service for the planning area, which would seem to require the preparation of an EIS.⁷³ In rejecting this argument, the court reasoned that:

The threshold of concern, however, is a model-based threshold that signals the need to evaluate more closely watershed conditions during the project analysis. After the Calispell Sale was appealed successfully to the Chief, the Forest Service conducted more detailed watershed evaluations. Based on those evaluations, it concluded that no adverse effects on the streamflow regime were present and no significant degradation of the watershed was likely. We cannot say that this conclusion was arbitrary or capricious.⁷⁴

The court affirmed the district court on all issues raised on appeal.

Inland Empire is an unsettling case. It is a very short opinion—approximately five pages. In contrast to the court's extensive analysis in *ONRC*, the *Inland Empire* court quickly addressed the issues raised on appeal, rarely giving any of them more than a paragraph or two of discussion. Although the Ninth Circuit addressed all of the issues raised, the court seemingly did not take the case seriously.⁷⁵

In *Inland Empire*, the Ninth Circuit simply deferred to the decisions of USFS instead of assuring itself that USFS took the requisite hard look in justifying the FONSI.⁷⁶ In many respects, that deference was misplaced.⁷⁷ For example, instead of carefully assessing whether the models and field assessments in fact evaluated the cumulative effects, the court declined to

⁷² 992 F.2d at 982.

⁷³ *Id.*

⁷⁴ *Id.* However, the secondary analysis does not obviate the fact that the watershed initially was in poor condition.

⁷⁵ Indeed, the court opened its opinion by stating that "[e]nvironmental groups challenged a timber sale in northeastern Washington, alleging, in effect, that the Forest Service can't see the forest for the trees." *Id.* at 979.

⁷⁶ The high degree of deference to the agency in this case belies the prophecy that NEPA's "checklist of factors to be dealt with in an impact statement" would result in "close judicial scrutiny of a document to see that it fully discloses and analyzes the environmental impacts of a proposed action . . . and more generally, in the vernacular, that it all hangs together and makes elementary good sense." Harold Leventhal, *Environmental Decision-making and the Role of the Courts*, 122 U. PA. L. REV. 509, 525 (1974).

⁷⁷ Although *ONRC* concerned defaulted sales and the present case concerns a sale that was supplemented in a subsequent EA, the agency's implementation of its appeal regulations is not entitled to a high level of deference when its regulations specifically indicate how such appeals should occur. See 36 C.F.R. § 211.18 (1998) (appeal of decisions of forest officers); *id.* § 215 (notice, comment, and appeal procedures for National Forest System projects and activities). Indeed, the same reasoning used in *ONRC* is applicable to *Inland Empire*, since the issue in *ONRC* was whether USFS had made an appealable "decision." *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 844–45 (9th Cir. 1987) (quoting 36 C.F.R. §211.18(a)(1) (1998)).

apply the plain meaning requirements of the regulations that compelled USFS to consider the effects of future timber harvest. The Ninth Circuit did not look for itself at the adequacy of the Forest Service's analysis in the additional watershed studies, but instead deferred blindly to the rationale proffered by the Forest Service.

C. Southwest Center for Biological Diversity v. United States Forest Service

In May 1995, USFS proposed the Rustler salvage timber sale in the Coronado National Forest in Arizona, offering for harvest sixty-nine acres of forestland burned the year before in a wildfire.⁷⁸ In August, USFS completed a biological evaluation (BE) and a biological analysis (BA) for the area, concluding that the salvage sale would have "no effect" on the Mexican Spotted Owl, an endangered species.⁷⁹ In reliance on the BE and BA, USFS issued a categorical exclusion (CE) for the Rustler sale in November⁸⁰ and published a notice of decision on December 12, 1995.⁸¹ Fifteen days later, on December 27, 1995, plaintiffs filed a complaint in district court alleging that the decision to issue the CE violated the Rescissions Act of 1995 (Salvage Rider)⁸² and was arbitrary and capricious. The dis-

⁷⁸ *Southwest Ctr. for Biological Diversity v. United States Forest Serv. (Southwest Ctr.)*, 100 F.3d 1443, 1446 (9th Cir. 1996).

⁷⁹ *Id.* The no effect determination by the Coronado National Forest conflicts with an earlier United States Fish and Wildlife Service (FWS) memorandum that stated that any activity "within one mile of a Mexican Spotted Owl Protected Activity Center, or actions that alter mixed conifer or pine-oak forest habitats, may affect the Mexican Spotted Owl." *Id.* (emphasis added). One month after this memorandum was released, the Coronado National Forest eliminated the Rustler Park Territory, the Protected Activity Center in which the Rustler sale was located. Nevertheless, two other Protected Activity Centers were still within one mile of the Rustler sale. *Id.*

⁸⁰ *Id.* at 1447. Forest Service regulations allow issuance of a CE for a salvage sale that "removes . . . 1,000,000 board feet [1 MMbf] or less of merchantable wood products; which requires one mile or less of low standard road construction. . . ; and assures regeneration of harvested or salvaged areas, where required." FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 1909.15, 31.2 ¶ 4 (1992) [hereinafter FSH]. In contrast, NEPA regulations define a CE as

a category of actions which do not 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 (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impacts statement is required.

40 C.F.R. § 1508.4 (1998). The Rustler sale produced an estimated 250,000 board feet (250 Mbf) of timber and required no new roads, therefore falling within the Forest Service Handbook definition of a CE. No additional environmental analysis occurred. *Southwest Ctr.*, 100 F.3d at 1446-47.

⁸¹ *Southwest Ctr.*, 100 F.3d at 1447.

⁸² Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. No. 104-19, 109 Stat. 194. Originally an initiative intended to address the bombing of the Federal Building in Oklahoma City, the Rescissions Act harbored several "riders." One such rider, the Salvage Rider of 1995, "streamlined procedures pursuant to which the Secretary of Agriculture must prepare, advertise, offer, and award all contracts for salvage timber sales." 109 Stat. at 240 (codified as

trict court denied plaintiffs' motion for summary judgement, and plaintiffs appealed.

Southwest Center raised several issues on appeal, alleging that 1) the BE and BA did not comply with the Salvage Rider of 1995, 2) the no effect determination of the BE and BA was arbitrary and capricious, 3) the issuance of the CE was arbitrary and capricious, and 4) the district court had erred in striking documents that were not part of the record.⁸³

The Ninth Circuit first turned to whether or not the BE and BA complied with the Salvage Rider. The panel held that because the Salvage Rider only required the preparation of a BE under the ESA and a BA under NEPA,⁸⁴ and because the Forest Service had prepared both documents, the Forest Service acted reasonably in issuing a CE.⁸⁵

Furthermore, the Ninth Circuit held that Southwest Center did not show that USFS failed to comply with the consultation requirements of the ESA.⁸⁶ Instead, no further consultation was required of USFS because it made an initial determination that the Rustler sale would not effect the Mexican Spotted Owl. According to the court, an EA was not necessary—even though the Salvage Rider required one⁸⁷—because it was within the agency's discretion to determine when a CE rather than an EA would fulfill the agency's NEPA obligations.⁸⁸

Next, the Ninth Circuit turned to the adequacy of the BE and BA, holding that those documents were sufficient to meet the requirements of the Salvage Rider.⁸⁹ In so holding, the court noted that although there might be "gaps and imperfections in the Forest Service's analysis," these deficiencies did not mandate the invalidation of the BE and BA.⁹⁰ Finally,

amended at 16 U.S.C. § 1611 (1994)). The Salvage Rider of 1995 effectively suspended all environmental laws applicable to timber harvest for one year. It ended with the 1996 Department of the Interior Appropriations Act. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-209.

⁸³ 100 F.3d at 1445. The last issue was not central to the case, so the Ninth Circuit's discussion is not reviewed in this Chapter.

⁸⁴ See § 2001(c), 109 Stat. at 241-44.

⁸⁵ 100 F.3d at 1448. The court explained that the CE was reasonable because NEPA allowed CEs in some cases. However, the court did not address the issue of whether there would be *no* individual or cumulative effects from the salvage sale: NEPA allows for the issuance of a CE only when such a showing can be made. 40 C.F.R. § 1508.4 (1998). A majority of the scientific literature indicates that salvage logging after fire is an environmentally unsound management practice. See *generally* ROBERT L. BESCHTA, WILDLIFE AND SALVAGE LOGGING, RECOMMENDATIONS FOR ECOLOGICALLY SOUND POST-FIRE SALVAGE LOGGING AND OTHER POST-FIRE TREATMENTS ON FEDERAL LANDS IN THE WEST (1995).

⁸⁶ 16 U.S.C. § 1536 (1994) (implemented by 50 C.F.R. § 402.10-16(a) (1998)).

⁸⁷ § 2001(c)(1)(A), 109 Stat. at 241-42.

⁸⁸ 100 F.3d at 1448.

⁸⁹ *Id.*

⁹⁰ *Id.* The Ninth Circuit explained that the Forest Service's no effect determination is not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto., Ins. Co.*, 463 U.S. 29, 43 (1983)). The Ninth's Circuit's reasoning is difficult to accept, since the "agency expertise" came from FWS, which had concluded that harvest within or near Protected Activity Centers should be prohibited. The fact that USFS ignored this expertise and in fact *eliminated* the Protected Activity Center in which the Rustler sale was located should have been

the court rejected the Center's argument that the issuance of the CE was arbitrary and capricious because it violated USFS's Handbook requirements on issuing CEs.⁹¹ The Handbook states that a CE is only appropriate when there are no endangered or threatened species present in the activity area.⁹² NEPA allows a CE when the "agency determines that the project will not impact negatively on the species,"⁹³ and since the Handbook did not have the "force and effect of law," failure to rely on it was immaterial.⁹⁴

Southwest Center is also a brief opinion, similar to *Inland Empire*. Again, the Ninth Circuit refused to consider in any meaningful detail whether USFS acted in an arbitrary and capricious manner when it prepared timber sales,⁹⁵ even though the court acknowledged that the Forest Service's factual analysis was incomplete.⁹⁶ The court's unwillingness to closely scrutinize the Forest Service's compliance with NEPA and the ESA in this case may be explained by the intervention of the Salvage Rider of 1995. However, this case is another example of the court's reluctance to question the Forest Service's execution of the timber sale program. Instead of comparing the Forest Service's actions to the requirements of the law, the Ninth Circuit moved away from the hard look doctrine and adopted a policy of total deference to the agency.

Indeed, the Ninth Circuit admits, "Congress has seen fit to accord agencies great flexibility in proposing and completing salvage timber sales. It is not for this court to reconsider Congress's policy decision."⁹⁷ It may not be the province of the courts to second-guess Congress's policies, but it *is* the province of the courts to "say what the law is,"⁹⁸ and not to submit to the whim of an agency that is by all appearances trying to circumvent duly-enacted environmental laws.

categorized as more than a "gap and imperfection" in USFS's analysis. The court cited with approval *Idaho Sporting Congress v. United States Forest Service*, 92 F.3d 922 (9th Cir. 1996), which held that an action agency may rely on its own experts in the face of inter-agency disagreement when determining the effects of an agency project. 100 F.3d at 1449. However, FWS did not have an opportunity to consult on the site-specific effects of the Rustler sale, but rather issued a general policy statement that pertained to an endangered species, which is the proper jurisdiction of the FWS under the ESA. 50 C.F.R. § 402.14(a) (1998). USFS is not given the ability to eschew consultation requirements in order to carry out its projects. Therefore, it is dubious whether the court's conclusion here was valid.

⁹¹ 100 F.3d at 1450.

⁹² *Id.*; FSH, *supra* note 80, at 1909.15, 30.3 ¶ 2(b).

⁹³ 100 F.3d at 1450 (citing *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410, 1414-16, 1420 (9th Cir. 1990).

⁹⁴ *Id.* at 1448.

⁹⁵ For example, the Ninth Circuit did not address the fact that USFS eliminated the Spotted Owl Protected Activity Center in which the Rustler sale was located. Such an action suggests that the Forest Service was trying to circumvent FWS's recommendation to defer harvest in these areas, despite the fact that habitat and animals were present after the fire.

⁹⁶ 100 F.3d at 1448.

⁹⁷ *Id.* at 1451.

⁹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

III. RETREAT FROM TOTAL DEFERENCE

Before *Neighbors* and *Idaho Sporting Congress*, timber sale litigation in the Ninth Circuit continued much as it had in the preceding years. Most decisions favored the Forest Service, and plaintiffs were afforded victories only sporadically.⁹⁹ Litigating NEPA and NFMA timber cases in the Ninth Circuit for the most part was a losing proposition, and USFS seemed largely immune from legal challenge.¹⁰⁰

A. *Neighbors of Cuddy Mountain v. United States Forest Service*

In 1990, USFS prepared an EIS for the Grade/Dukes sale, which proposed to harvest 18.8 million board feet (MMbf) of timber from the Cuddy Mountain Roadless Area in the Payette National Forest in Idaho.¹⁰¹ In August 1991, the Forest Supervisor approved the sale in a record of decision (ROD).¹⁰² *Neighbors of Cuddy Mountain* (*Neighbors*) and others administratively appealed the sale to the Deputy Regional Forester, who reversed the decision of the Forest Supervisor and recommended that USFS supplement the EIS with additional information.¹⁰³

In 1994, USFS prepared a supplemental environmental impact statement (SEIS) for the Grade/Dukes Timber sale and issued a second ROD in

⁹⁹ See, e.g., *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590 (9th Cir. 1991); *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179 (9th Cir. 1990); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *rev'd in part on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

¹⁰⁰ In 1985, the Pacific Northwest Region of the Forest Service (Region 6) produced over 4 billion board feet (Bbf) of timber from National Forests in Oregon, Washington, and a small portion of Northern California. FOREST SERV., U.S. DEP'T OF AGRIC., STUMPAGE PRICES, VOLUME SOLD, AND VOLUMES HARVESTED FROM THE NATIONAL FORESTS OF THE PACIFIC NORTHWEST REGION, 1984 to 1996 68 (1998). In 1994, the same region produced over 243 MMbf. *Id.* The drop in board footage was due not to overzealous environmentalists, but rather President Clinton's Northwest Forest Plan (NWFP), which was adopted in that year. FOREST SERV., U.S. DEP'T OF AGRIC., RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL AND STANDARDS AND GUIDELINES FOR MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994). The NWFP applies to National Forest and BLM lands west of the Cascade mountain range, and imposes more stringent environmental requirements on timber harvest, including riparian buffers, management categories, reserve status for some old growth forests, and survey requirements for aquatic and terrestrial species. Based on scientific research, the NWFP was intended to protect the disappearing habitat of the northern spotted owl. In practice, however, the NWFP has been widely criticized by USFS as too difficult to implement, and by environmentalists as a broken promise by the Administration of a commitment to ecosystem management. See generally Chris Carrel, *A Patchwork Peace Unravels*, HIGH COUNTRY NEWS, Nov. 23, 1998, at 1.

¹⁰¹ *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1375 (9th Cir. 1998).

¹⁰² *Id.*

¹⁰³ *Id.* Specifically, the Deputy Regional Forester advised USFS to include a more detailed analysis regarding several species, complete biological evaluations for other species, and conduct a comprehensive cumulative effects analysis of the Grade/Dukes and other sales that were proposed in the same area. *Id.*

February 1994.¹⁰⁴ The appellants again administratively appealed the decision, and were notified in February 1995 that their appeal to the Regional Forester had been denied.¹⁰⁵ Meanwhile, USFS sold the Grade/Dukes timber contract to Boise Cascade,¹⁰⁶ which began timber harvest in August 1994.¹⁰⁷ Plaintiffs brought an action in the Idaho District Court in December 1996, alleging violations of NEPA and NFMA.¹⁰⁸ The district court granted the Forest Service's summary judgment motion, and plaintiffs appealed.¹⁰⁹

Before the Ninth Circuit, the appellants alleged that USFS had violated NFMA and NEPA when it prepared a timber sale that was inconsistent with the Payette Land and Resource Management Plan (PLRMP), and issued an EIS that inadequately addressed the cumulative effect of several other timber sales near the Grade/Dukes area.¹¹⁰ Neighbors also claimed that USFS had violated NEPA in proposing inadequate mitigation measures to compensate for adverse environmental impacts resulting from the timber sale.¹¹¹

First, the court addressed appellants' claim that USFS had violated NFMA when it prepared the EIS for the Grade/Dukes timber sale because the sale was inconsistent with the PLRMP.¹¹² Specifically, appellants claimed that harvesting the Grade/Dukes sale would result in a decrease in the amount of old growth habitat within the forest, in violation of the PLRMP.¹¹³ In order to assess the amount of old growth in the forest and as

¹⁰⁴ *Id.* at 1376.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* USFS awarded the sale to the purchaser before the Regional Forester issued a final disposition on the appellants' administrative appeal. Although this issue was not raised on appeal, awarding a contract before a final decision on an administrative appeal has been forwarded to the appellants is a violation of the regulations implementing NFMA. 36 C.F.R. §§ 211.18, 215.10(b), 215.13(f)(3) (1998).

¹⁰⁷ 137 F.3d at 1376. By the time appellants filed in district court, the road into the Grade/Dukes area—as well as 30% of the logging—was completed. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1377.

¹¹¹ *Id.* at 1380.

¹¹² *Id.* at 1376–77. NFMA requires that site-specific resource management projects (such as timber sales) remain consistent with area forest plans. 16 U.S.C. § 1604(i) (1994); 36 C.F.R. § 219.10(e) (1998); *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754, 756 (9th Cir. 1996).

¹¹³ 137 F.3d at 1377. In their briefs to the Ninth Circuit, the appellants explained that when the original EIS for the Grade/Dukes sale was issued, the BE that was prepared for the sale recommended further studies to determine the amount of old growth actually present in the forest—especially on the west side of the forest where the sale was proposed. Appellants' Opening Brief at 5–6, *Neighbors* (No. 97-35654). The study was eventually completed, but neither the original BE nor the old growth study was released to the public. *Id.* at 5–7. By the time the case came to trial, USFS had reworked the data in the old growth study at least four times and had calculated a different amount of remaining old growth each time. Appellants' Reply Brief at 19–23, *Neighbors* (No. 97-35654). Appellants argued that the Forest Service was not using a standard methodology for determining the amount of remaining old growth on the forest, which precluded the conclusion that the Grade/Dukes sale would not violate the PLRMP requirement that a certain amount of old growth be retained. *Id.*

required under NFMA regulations,¹¹⁴ USFS selected a group of several management indicator species (MISs) that use old growth habitat. The species at issue in this case was the pileated woodpecker.¹¹⁵ Ideally, by tracking the amount of old growth habitat remaining in the area, USFS could monitor the population of the woodpecker.¹¹⁶

The appellate court found that the Grade/Dukes sale was inconsistent with the PLRMP because USFS failed to analyze impacts to the woodpecker's habitat as required by the Forest Plan.¹¹⁷ Although the EIS addressed how much old growth would be left in the *planning area* after timber harvest, it did not address how much old growth would be left in the *home range* of the woodpecker as required by the Payette Forest Plan.¹¹⁸ As a result, the court found the sale inconsistent with NFMA's requirement that timber sales meet forest plan requirements.¹¹⁹

Second, the Ninth Circuit explained that the inadequate analysis of the effects of the sale on pileated woodpecker habitat contributed to its finding that USFS's cumulative impacts analysis was likewise inadequate.¹²⁰ Appellants alleged that the Grade/Dukes SEIS was incomplete because it failed to consider the cumulative effects from three other timber sales on the depletion of old growth in the Cuddy Mountain area.¹²¹ The Grade/Dukes SEIS only stated that future timber harvest could be expected to reduce the amount of woodpecker habitat, but that the extent of that habitat loss was unknown.¹²² Rejecting USFS's position that NEPA documents for future sales would address the issue of old growth in the Cuddy Mountain area, the court held that the cumulative effects analysis could not be deferred to a future time.¹²³

Finally, the Ninth Circuit turned to the appellants' argument that the mitigation measures proposed by USFS for the Grade/Dukes sale were in-

¹¹⁴ 36 C.F.R. § 219.19(a)(1) (1998).

¹¹⁵ 137 F.3d at 1377.

¹¹⁶ *Id.* (citing *Inland Empire*, 88 F.3d at 762 n.11).

¹¹⁷ *Id.* at 1377-78. The Ninth Circuit noted that USFS never provided information regarding the nature of pileated woodpecker habitat, the number and locations of "home ranges" of the bird, or the raw data for the old growth survey. Because the agency failed to provide any of this information, the court reasoned that "it is impossible to determine the exact geographic scope of the survey [of old growth], and whether the survey evaluated pileated woodpecker home ranges as it should have." *Id.* at 1378 n.5.

¹¹⁸ *Id.* at 1378.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; 40 C.F.R. § 1508.7 (1998).

¹²² 137 F.3d at 1378-79. Although USFS provided *some* information regarding the cumulative effects from three adjoining timber sales on the amount of old growth, the Ninth Circuit held that this information was too general to satisfy the Forest Service's hard look burden. *Id.*

¹²³ *Id.* at 1380. The Ninth Circuit pointedly stated that USFS would need to obtain site-specific quantifiable and qualifiable data before its cumulative effects analysis would be complete: "general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Id.* (citing *Inland Empire Public Lands Council v. United States Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996)).

sufficient and therefore violated NEPA.¹²⁴ Appellants were especially concerned about the mitigation measures proposed to obviate the effects on redband trout, another MIS.¹²⁵ In agreeing with the appellants that the mitigation measures proposed by USFS were inadequate to compensate for the effects of the sale, the court explained that the EIS contained only a “perfunctory description” of the mitigating measures,¹²⁶ and that this approach is inconsistent with the hard look required by NEPA.¹²⁷ Furthermore, the Ninth Circuit noted that because the measures provided in the EIS were not site specific,¹²⁸ it was unclear whether the mitigation measures were actually required under the timber sale contract. Since there was no indication that the measures would be effective even if implemented,¹²⁹ the requirements of NEPA were not fulfilled.¹³⁰

In sum, the Ninth Circuit concluded that USFS failed to conduct an adequate cumulative effects analysis, which violated NEPA. Likewise, the Forest Service transgressed NFMA when it prepared a sale that was inconsistent with the Land Resource Management Plan for the Payette National Forest. The court issued an injunction against further logging in the Cuddy Mountain roadless area until USFS addressed these issues.¹³¹

As opposed to some of its previous decisions, the Ninth Circuit in *Neighbors* delved into NEPA and NFMA in order to determine whether the decisions of the Forest Service were supported by the evidence before the agency at the time it made its decision. For example, instead of accepting the Forest Service’s disputed calculations of remaining old growth in the planning area after the Grade/Dukes sale, the court actually read the forest plan and determined that the agency had misread the requirements. Applying the obligations of NFMA literally, the court concluded that the sale

¹²⁴ *Id.*

¹²⁵ *Id.* The Forest Service admitted in the Grade/Dukes SEIS that adverse impacts to redband trout from increased sedimentation were expected to occur as a result of the sale. Both parties briefed additional water quality issues. See Appellants’ Opening Brief at 50–51, *Neighbors* (No. 97-35654); Appellee’s Response Brief at 45–50, *Neighbors* (No. 97-35654). However, the Ninth Circuit did not discuss these issues.

¹²⁶ 137 F.3d at 1380.

¹²⁷ *Id.* Regulations implementing NEPA require that an EIS include a description of “[m]eans to mitigate adverse environmental impact[s].” 40 C.F.R. § 1502.16(h) (1998). The Ninth Circuit previously held that “a mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev’d on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

¹²⁸ The Forest Service stated in the SEIS that the impacts to redband trout from the sale “would be mitigated by improvements in fish habitat *in other drainage[s]*.” Appellants’ Opening Brief at 49, *Neighbors* (No. 97–35654). The “list of offsetting mitigation” measures supplied by USFS then referenced the Payette Forest Plan; however, the mitigation measures did not appear in the referenced pages. *Id.*

¹²⁹ In analyzing the effects of the sale, experts for USFS stated that “most of the items listed under mitigation [in the SEIS] are not mitigation and are so general that *it would be impossible to determine where, how, and when they would be used and how effective they would be*. If they are to be used to reduce the significance of environmental impacts, they should be identified specifically” *Id.* at 49–50.

¹³⁰ 137 F.3d at 1381.

¹³¹ *Id.* at 1382.

was unlawful. Noting that there were extensive data gaps in the agency's analysis, the court found that USFS had made an unreasonable and factually unsupported decision. This type of scrutiny is what Congress intended and the results were what the hard look doctrine should bring about.

B. Idaho Sporting Congress v. Thomas

In 1993, USFS prepared an EA for the Miners Creek timber sale on the Targhee National Forest in southeastern Idaho.¹³² The Miners Creek sale proposed to harvest 3.1 MMbf of timber from 970 acres of the Miners Creek and West Camas Creek watersheds.¹³³ On June 30, 1993, the Forest Supervisor issued a DN and a FONSI approving the sale.¹³⁴ Idaho Sporting Congress (ISC) administratively appealed, but the Regional Forester affirmed the Forest Supervisor's decision to offer the sale on April 29, 1994.¹³⁵

In July 1996, USFS proposed a second timber sale in the West Camas Creek watershed, the Camas Creek timber sale.¹³⁶ USFS offered the Camas Creek sale in an EA, and did not supplement the Miners Creek EA from the earlier sale to reflect the Camas Creek sale.¹³⁷ The plaintiffs filed in district court and moved for summary judgment. Plaintiffs' motion was denied on February 21, 1997.¹³⁸

The appellants then took their case to the Ninth Circuit. On appeal, the appellants claimed that in offering the Camas Creek sale without preparing a joint EIS for the Miners Creek and Camas Creek timber sales, USFS violated NEPA with respect to water quality, fisheries, and cumulative impacts.¹³⁹ Appellants also alleged violations of Idaho water quality standards¹⁴⁰ as well as NFMA.¹⁴¹

First, Idaho Sporting Congress alleged that USFS violated NEPA when it failed to address the impact that the sales would have on the water quality of Miners and Camas Creeks. In preparing the sale, USFS relied on two reports conducted in 1985 and 1990 that addressed water quality in West Camas and Miners Creeks, which the Forest Service used to conclude that logging had not impaired water quality in the water-

¹³² *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1148 (9th Cir. 1998).

¹³³ *Id.*

¹³⁴ *Id.* at 1149.

¹³⁵ *Id.*

¹³⁶ *Id.* The Camas Creek sale proposed to harvest 7.2 MMbf of timber. *Id.*

¹³⁷ *Id.*

¹³⁸ Appellants' Opening Brief at 5, *Idaho Sporting Congress* (No. 97-35339).

¹³⁹ *Id.*

¹⁴⁰ 137 F.3d at 1150 (referring to IDAHO CODE § 39-3603 (1998) and IDAHO ADMIN. CODE § 16.01.02.200.08 (1998)). Both the Idaho Code and its implementing regulations prohibit "the discharge of sediment in quantities which impairs the designated beneficial uses, and mandates the absolute protection of the existing beneficial uses, along with the water quality necessary to protect those uses." Appellants' Opening Brief at 11, *Idaho Sporting Congress* (No. 97-35339).

¹⁴¹ 137 F.3d at 1153.

shed.¹⁴² The Ninth Circuit rejected this argument, holding that NEPA required USFS to release the baseline data on which the 1990 report was based.¹⁴³ Furthermore, the 1985 report was different in focus and scope from the 1990 report,¹⁴⁴ thus making USFS's decision to implement the sales based on these reports arbitrary and capricious under the APA.¹⁴⁵ USFS also argued that the mitigation measures proposed for the two timber sales would compensate for any adverse effects from the timber harvest.¹⁴⁶ The court also rejected this argument, holding that a "mere listing" of mitigation measures did not meet the "reasoned decision required by NEPA."¹⁴⁷ The court held that the Forest Service must prepare an EIS for the Miners and Camas Creek timber sales to clarify the impacts from those sales on water quality and to determine whether USFS could mitigate the effects of the timber harvest.¹⁴⁸

Second, appellants alleged that USFS violated NEPA's disclosure requirements when it failed to survey and disclose the survey results for trout within the planning area for the Miners and Camas Creek timber sales.¹⁴⁹ USFS designated the trout in the Targhee National Forest as a management indicator species, thereby requiring it to survey for the spe-

¹⁴² Appellants' Opening Brief at 13-20, *Idaho Sporting Congress* (No. 97-35339). The 1990 report was prepared for the Miners Creek sale, but instead of a site-specific analysis, the report drew from the "natural topography of the land" in making its conclusions. *Id.* at 14. The 1985 study indicated that "logging in the Camas Creek watershed is not resulting in increased sediment in area streams" and therefore condoned additional logging in that area. *Id.* at 15. However, this assessment is contradicted by data gathered in 1996 showing that "29% of West Camas Creek will soon be in a 'hydrologically disturbed state' and is approaching the 30% threshold level," and that the watershed had already been "heavily impacted" due to logging and road building. *Id.* The Forest Service stated that the condition of the West Camas Creek made the "subwatershed the most susceptible to water quality problems in the area." *Id.*

¹⁴³ 137 F.3d at 1150; 40 C.F.R. § 1502.24 (1998). The Ninth Circuit explained that the failure of USFS to release the baseline data for the 1990 report forced the plaintiffs to challenge the expertise and opinions of the agency, but that this type of challenge is one that the court found impermissible under an arbitrary and capricious review. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992). This in turn would allow USFS to "rely on expert opinion without hard data [, which] either vitiates a plaintiff's ability to challenge an agency action or results in the courts second-guessing an agency's scientific conclusions." 137 F.3d at 1150.

¹⁴⁴ The 1985 report did not study Miners Creek and assumed a riparian buffer of anywhere from 25 to 100 feet (the current standards require between 200 and 300 feet). 137 F.3d at 1151; Appellants' Reply Brief at 6-7, *Idaho Sporting Congress* (No. 97-35654). Site-specific analysis and current scientific data are required to satisfy NEPA. 40 C.F.R. §§ 1501.2(b), 1502.24 (1998).

¹⁴⁵ 137 F.3d at 1151; *see* 5 U.S.C. § 702(2)(a) (1994).

¹⁴⁶ 137 F.3d at 1151.

¹⁴⁷ *Id.* The Ninth Circuit further chastised that "without analytical data to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a 'mere listing' of good management practices." *Id.* (quoting *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds sub nom.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

cies.¹⁵⁰ After reviewing the Miners Creek EA, the Ninth Circuit held that USFS failed to fully disclose the presence¹⁵¹ of and impacts of the sales on trout and that an adequate study should be included in the forthcoming EIS.¹⁵²

Third, appellants maintained that the cumulative impacts analysis conducted by USFS for the two timber sales was inadequate and that an EIS was required.¹⁵³ USFS claimed that although the Miners Creek EA did not address the impacts from the Camas Creek sale, the Camas Creek EA had in fact addressed the effects of the Miners Creek sale.¹⁵⁴ The Ninth Circuit noted that the standard for a supplemental EA or EIS was whether “significant changes in the proposed action” had occurred.¹⁵⁵ Because no such changes had occurred between the preparation of the Camas Creek and the Miners Creek EAs,¹⁵⁶ the later EA adequately addressed the cumulative effects of the two sales. Although no EIS was required to address the cumulative impacts of the two sales, the court noted in dicta that the existing analysis was meager and that additional analysis should appear in the EIS to address the impacts to water quality from the sales.¹⁵⁷

Fourth, the court addressed Idaho Sporting Congress’s claims that the Forest Service was required to maintain the existing water quality under the Idaho State Code, which the appellants alleged was a more stringent standard than the federal Clean Water Act.¹⁵⁸ The Idaho Code contains an antidegradation provision that forbids any deterioration of water quality that harms existing instream uses,¹⁵⁹ and the Clean Water Act requires that federal agencies comply with water quality standards set by the state.¹⁶⁰ The state code contains two contradictory sections.¹⁶¹ One section, the antidegradation provision, provides that no action should deprive the water body of its existing instream uses,¹⁶² but another section explic-

¹⁵⁰ *Id.*; 36 C.F.R. § 219.19(a)(1)–(2) (1998).

¹⁵¹ 137 F.3d at 1152. On the issue of the presence of trout in the planning area, USFS tried to have its cake and eat it, too. The Forest Service first maintained that fish were present in the area and would not be affected, but then claimed that they were not present, releasing the Forest Service from the survey requirement. *Id.* at 1152 n.2.

¹⁵² *Id.* at 1152.

¹⁵³ *Id.*

¹⁵⁴ *Id.* The Appellees claimed that “[a]lthough the Camas Creek EA did not specifically mention the Miners Creek sale by name, it did assess the potential cumulative impacts of the Miners Creek sale, together with all other past, present, and future proposed actions within Camas Creek sale area.” Appellees’ Response Brief at 28–29, *Idaho Sporting Congress* (No. 97–35654). Furthermore, USFS alleged that a supplemental EA was unnecessary because no new information was presented. *Id.* at 30–32.

¹⁵⁵ 137 F.3d at 1151 (quoting *Price Rd. Neighborhood Ass’n v. United States Dep’t of Transp.*, 113 F.3d 1505, 1509 (9th Cir. 1997)).

¹⁵⁶ *Id.* at 1152; see also Appellees’ Response Brief at 28–29, *Idaho Sporting Congress* (No. 97–35339).

¹⁵⁷ 137 F.3d at 1152.

¹⁵⁸ *Id.*

¹⁵⁹ IDAHO CODE § 39-3603 (1998).

¹⁶⁰ 33 U.S.C. § 1323(a) (1994).

¹⁶¹ IDAHO CODE §§ 39-3601, -3603 (1998).

¹⁶² *Id.* § 39-3603.

itly states that the state code does not impose more stringent water quality standards than the Clean Water Act already imposes.¹⁶³

Because this was an issue of first impression, the Ninth Circuit contrasted the statute's plain meaning with the legislative intent behind the statute to determine which provision would control.¹⁶⁴ Idaho Sporting Congress urged that the plain meaning of the statute should control, which would require USFS to demonstrate that the timber sales would have *no* effect on the water quality in the watershed.¹⁶⁵ The court rejected this contention, holding that the legislative intent was controlling and that USFS was only required to meet the standards set forth in the Clean Water Act.¹⁶⁶ However, the court declined to determine whether the water quality in the area had been degraded as a result of timber harvest and therefore violated Idaho's antidegradation policy, because USFS had not yet conducted adequate studies on the water quality in the watershed.¹⁶⁷

Finally, the panel addressed the appellants' NFMA claims. Specifically, Idaho Sporting Congress alleged that USFS violated NFMA when it 1) failed to monitor the population trends of the trout MIS in relation to its habitat,¹⁶⁸ and 2) failed to monitor the trout as required by the Targhee National Forest Land Management Plan (Targhee Forest Plan).¹⁶⁹ First, the court deferred to USFS's interpretation of NFMA's monitoring requirements, noting that it was not arbitrary and capricious to use the amount of habitat for a given species as a proxy for actual populations of that species.¹⁷⁰ When USFS prepared the EIS for the Camas Creek sale, the court explained, the agency would be allowed to account for the effects of timber harvest on trout based on the amount of habitat affected rather than on the number of individuals affected.¹⁷¹

The Ninth Circuit also rejected the appellants' argument that USFS violated NFMA's consistency requirement¹⁷² when it failed to survey for trout *populations*, as required by the Targhee Forest Plan.¹⁷³ The court again deferred to USFS's interpretation of the Targhee Forest Plan, noting

Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained unless the department finds . . . that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

Id.

¹⁶³ *Id.* § 39-3601. The preamble in the Idaho Code provides that "[i]t is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that these rules promulgated under this act not impose requirements beyond those of the federal clean water act." *Id.*

¹⁶⁴ 137 F.3d at 1153.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 36 C.F.R. § 219.19 (1998) imposes this monitoring requirement.

¹⁶⁹ 137 F.3d at 1151.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1154.

¹⁷² 16 U.S.C. § 1604(i) (1994).

¹⁷³ 137 F.3d at 1154.

that the Targhee Forest Plan allowed for monitoring of habitat quantity as well as quality, and that it was within USFS's discretion to decide how to best achieve this requirement.¹⁷⁴ USFS was directed to address the suitability of trout habitat in the forthcoming EIS.¹⁷⁵

In sum, the Ninth Circuit reversed the district court and held that an EIS was required to address the effect of the timber sales on water quality and trout habitat. The sales did not violate NFMA, because they were consistent with the survey requirements of the Targhee Forest Plan. Nevertheless, the case was remanded to USFS for the preparation of an EIS.

This case again demonstrates the court's ability to hold USFS to its legal obligation while also showing the agency a high level of deference. The Ninth Circuit refused to allow USFS to make a finding of no significance without the data to support that conclusion. When that data was available and disclosed, however, the court deferred to the Forest Service's interpretation of its significance. The agency's analysis was also upheld when it met the requirements of the law. The result in *Idaho Sporting Congress* is appropriate because the court read the law and applied it to the facts of the case, refusing to allow USFS to abdicate its statutory obligations under NEPA, NFMA, and the CWA.

C. A Comparison

There is little difference between the early cases on one hand and *Neighbors* and *Idaho Sporting Congress* on the other. Factually, all the cases concern timber sales offered by USFS and challenged by environmentalists. Similarly, there was no change in the law that would result in different holdings in these cases. Although the Salvage Rider came and went and is therefore a historical anomaly, the other laws relevant to these cases remain substantively unchanged between *ONRC*, *Neighbors*, and *Idaho Sporting Congress*. Further, law schools are not teaching different methods of bringing and defending environmental cases, so it is not an issue of a change in lawyering skills.¹⁷⁶

It is because these five cases are factually and procedurally similar that *Neighbors* and *Idaho Sporting Congress* stand out as unique in Ninth Circuit timber case law. The only discernable difference between *Neighbors* and *Idaho Sporting Congress* and their predecessors is not procedural or factual, but rather *judicial*. In *Neighbors* and *Idaho Sporting*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ While it is possible that lawyers have become more skilled in timber sale litigation as they have had more practice, the briefs suggest otherwise; the briefs filed on behalf of the plaintiffs in all of these cases are uniformly well-drafted and articulate. See Appellants' Opening Brief, *ONRC* (No. 87-3737); Appellees' Response Brief, *ONRC* (No. 87-3737); Appellants' Response Brief, *ONRC* (No. 87-3737); Appellants' Opening Brief, *Neighbors* (No. 97-35654); Appellees' Response Brief, *Neighbors* (No. 97-35654); Appellants' Reply Brief, *Neighbors* (No. 97-35654); Appellants' Opening Brief, *Idaho Sporting Congress* (No. 97-35654); Appellees' Response Brief, *Idaho Sporting Congress* (No. 97-35654). Furthermore, timber sale litigation predates these cases, extending at least as far back as the passage of NEPA, NFMA, the ESA and the CWA—not to mention the state variations of these laws.

Congress, the Ninth Circuit carefully examined the applicable regulations while still allowing the agency substantial deference in interpreting the legal obligations that those regulations imposed. The difference in *Neighbors* and *Idaho Sporting Congress* was that the court did not unquestioningly resort to deference to agency decision making, but instead looked at the facts alleged to support the Forest Service's conclusions. This is factually informed judicial decision making, which properly balances the agency's hard look burden and discretion with the prerequisites of the law.

IV. THE LIGHT AT THE END OF THE TUNNEL

Judge Betty B. Fletcher, a Carter appointee, wrote both *Neighbors* and *Idaho Sporting Congress*. She was appointed to the Ninth Circuit in 1979 out of private practice in Seattle, Washington.¹⁷⁷ She has been described as "one of the more liberal judges on the court," but also tough and fair.¹⁷⁸ Although she has rendered a few "environmental" opinions,¹⁷⁹ there is no indication in Judge Fletcher's opinions prior to *Neighbors* and *Idaho Sporting Congress* to suggest that she was a particularly "green" judge. Given this situation, can the decisions in *Neighbors* and *Idaho Sporting Congress* be explained as instances of the Ninth Circuit engaging in judicial activism?

A. Activism and Restraint Defined

Judicial activism and restraint come in a variety of forms.¹⁸⁰ A court engaging in activism believes that the methods chosen by Congress are inadequate—that the policy enacted by Congress is deficient in some way.¹⁸¹ Typically, an activist court "elevates its own policy objectives

¹⁷⁷ MARIE T. FINN, *THE AMERICAN BENCH: JUDGES OF THE NATION* 12 (1999). Since 1995, Judge Fletcher's status in the Ninth Circuit has been a constant source of controversy. That year, her son, William A. Fletcher, was nominated to fill a vacant seat on the Ninth Circuit, raising the ire of Republican Senators who did not want "another liberal judge" on the country's largest appellate circuit. *Court Suffers as Political Games Roll On*, LA TIMES, Dec. 28, 1995, at B8. In an effort to keep Mr. Fletcher off of the Ninth Circuit bench, the Republicans resurrected an 1887 antinepotism statute as a bar to his confirmation. *Id.* To allow her son's nomination to come to a vote, Judge Fletcher agreed to take senior status (she is 75 years old), which would force her into partial retirement and open up another spot on the bench. *Playing Games with an Old Law: Phony Issue of Nepotism is Being Used to Block Judgeship Nominee*, LA TIMES, May 10, 1996, at B8. As of 1999, however, Judge Fletcher's status has not changed. FINN, *supra*, at 12.

¹⁷⁸ 2 ALMANAC OF THE FEDERAL JUDICIARY 13 (1998) [hereinafter ALMANAC].

¹⁷⁹ See generally *Masayeva v. Hale*, 118 F.3d 1371 (9th Cir. 1997) (Hopi-Apache dispute over land use rights); *Western Radio Serv. Co. v. Glickman*, 123 F.3d 1189 (9th Cir. 1997) (NFMA and NEPA); *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995) (action to force species listing under the ESA); *United States v. Holtzman*, 762 F.2d 720 (9th Cir. 1984) (Clean Air Act).

¹⁸⁰ See Robert L. Glicksman, *A Retreat From Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI-KENT L. REV. 209, 211 (1987). In his article, Glicksman distinguishes between "policy" activism and restraint, and "institutional" activism and restraint. For the present discussion, however, these fine distinctions are unnecessary.

¹⁸¹ *Id.* at 220.

above those of the other two branches of government."¹⁸² Judicial activism also "involves [the court's] view of the scope of the institutional competence and constitutional authority of the federal courts, in relation to similar attributes of the executive and legislature, to implement regulatory legislation."¹⁸³ In terms of environmental protection, an activist court does not view the other branches of government—particularly the regulatory agencies—as possessing a great degree of competency.¹⁸⁴

Activist courts exhibit an identifying set of characteristics. Chiefly, such courts 1) increase a plaintiff's procedural opportunities to participate in regulatory implementation, including increasing access to the federal courts; 2) interpret the law to fill in regulatory or statutory gaps to plaintiff's benefit; and 3) exhibit reluctance in deferring to agency expertise when the agency is interpreting its own statutory mandate.¹⁸⁵ Activist courts render broader opinions that reach the merits rather than dwell on procedural issues, and may in fact lower procedural hurdles in order to deliver "important and necessary judicial decisions."¹⁸⁶ They may also retain jurisdiction after a remand to ensure that remedial actions occur.¹⁸⁷

Activist courts defer less to other branches of government either because they have high confidence in judicial wisdom,¹⁸⁸ or because they seek to increase the court's power over the executive or legislative branches.¹⁸⁹ Although the term "activist court" may conjure up images of the judiciary run amok, a court is only improperly activist when it "is acting contrary to the will of the other branches of government."¹⁹⁰ Otherwise, the court is merely acting as a check on the other branches.¹⁹¹

Judicial "restraint," on the other hand, is exemplified in a belief that the court cannot (and should not) challenge the agency's expertise and therefore should not second guess its decisions.¹⁹² Restraint "focuses on the potential for separation of powers violations if an overzealous judiciary engaged in policy activism usurps legislative or executive authority."¹⁹³ However, "[i]t may also facilitate an invasion of the legislature's domain by both the courts and the agencies."¹⁹⁴ Courts showing signs of restraint will show the opposite characteristics of a court engaging in activism by 1) refusing to increase procedural opportunities at the agency

¹⁸² *Id.* at 211.

¹⁸³ *Id.* at 217.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 212.

¹⁸⁶ CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 3 (1997).

¹⁸⁷ *Id.* at 4-5.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ POSNER, *supra* note 56, at 331.

¹⁹⁰ *Id.* at 320.

¹⁹¹ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 994 (1992). Indeed, the role of judicial review is to check "arbitrariness and aggrandizement by the other branches of government." *Id.*

¹⁹² Glicksman, *supra* note 180, at 248.

¹⁹³ *Id.* at 251.

¹⁹⁴ *Id.*

level, 2) interpreting statutes and regulations narrowly and declining to fill in gaps, and 3) deferring to the agency by applying only a rule of reason to the agency's decision and not the hard look doctrine.¹⁹⁵ A restrained judge may "not like his colleagues' policy preferences, but rather than say so he takes the 'neutral' stance that the courts ought to be doing less—of everything."¹⁹⁶

Like judicial activism, judicial restraint undermines the role of the court. A court that is too restrained "invites executive branch subversion of the legislature's will," because the court fails to balance the power of the other branches.¹⁹⁷ Indeed, deferring to the agency—a classic tactic of judicial restraint—raises the "Marbury Problem": "[I]f it is the role of the courts to 'say what the law is,' then how can courts defer to the views of another branch of government on the meaning of the law?"¹⁹⁸ Although judicial activism carries with it the potential that the court may prefer its own policy agenda over the law and merits of the case, the hazards of judicial restraint have prompted some commentators to suggest that "judicial self-restraint cannot be equated to good judging."¹⁹⁹

A court, therefore, must strike a precarious balance between activism and restraint. On one hand, the hard look doctrine can be a tool used by an activist court to prevent the agency from disregarding its statutory mandate.²⁰⁰ On the other hand, a restrained court believes that it should not second guess the authority delegated to the agency by the executive or legislature.²⁰¹ Nevertheless, a near complete refusal to carefully scrutinize the agency's decision quickly shifts from restraint to abdication of the court's authority and obligation to provide review of executive-level decision making.

The difficulty in categorizing a court as "activist" or "restrained" is that these characterizations are necessarily subjective. For example, a plain meaning application of statutory and regulatory requirements can be "restrained" or "activist" depending on not only the perspective of the party evaluating that application (the plaintiff or the defendant), but also the past behavior of the court. Instead, a better approach is to assess the court's decisions based on whether or not the court inquired into the proffered rationale of the agency and the facts that may or may not support it. Particularly in timber sale cases, there is a heightened need to consider and be aware of the specific facts in each case, because many cases are facially similar. However, due to the nature of timber sale cases and the laws that they entail—NEPA, NFMA, the CWA, and the ESA include detailed standards rather than general policy mandates—facts are inescap-

¹⁹⁵ *Id.* at 212. Although a court may claim that it is applying the hard look doctrine, the actual standard of review may not be as rigorous as the doctrine itself calls for. *Id.*

¹⁹⁶ POSNER, *supra* note 56, at 329.

¹⁹⁷ Glicksman, *supra* note 180, at 210.

¹⁹⁸ Merrill, *supra* note 191, at 994 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁹⁹ POSNER, *supra* note 56, at 334.

²⁰⁰ Glicksman, *supra* note 180, at 224.

²⁰¹ *Id.* at 247.

ably tied to legal determinations. Thus, unless the court looks at the facts, it may make the incorrect conclusion of law.

B. An Activist Ninth Circuit?

In the 1960s and 1970s, the federal appellate courts were generally perceived to be activist-orientated.²⁰² However, the 1980s saw a return to a more restrained approach to judicial review, due in large part to Reaganera appointees who believed that environmental regulation unfairly burdened private industry.²⁰³ The retreat from activism has continued into the 1990s, leading at least the Seventh Circuit to characterize environmental protection as too expensive and excessive.²⁰⁴

According to one judge, the shift away from active participation in the preservation of the environment has found a welcome home in the Ninth Circuit.²⁰⁵ Despite being categorized as one of the most liberal appellate circuits,²⁰⁶ based on the precedent prior to *Neighbors* and *Idaho Sporting Congress*, it is apparent that the Ninth Circuit has been trending away from "liberal" environmental conservation. *Neighbors* and *Idaho Sporting Congress*, then, are the countervailing forces that have attempted to bring the court back into line with impartial and factually informed judicial review.

1. The Predecessors

a. Oregon Natural Resources Council v. United States Forest Service

*Oregon Natural Resources Council v. United States Forest Service (ONRC)*²⁰⁷ is a prime example of the court's refusal to apply the arbitrary and capricious standard of review and to require USFS to make reasoned decisions. In that case, the Ninth Circuit discussed the following: 1) issues of administrative appeal rights under NFMA; 2) the adequacy of the EA under NEPA, including cumulative impacts, water quality, and the preemption of the North Roaring Devil sale by the spotted owl DEIS; and 3) the right to bring a claim for water quality violations under the APA rather than the citizen suit provision of the CWA.²⁰⁸ Even though the Ninth Circuit held that the appellants were entitled to an administrative appeal at

²⁰² *Id.* at 218.

²⁰³ *Id.* at 241-42.

²⁰⁴ *Id.* at 210 (citing *United States v. Outboard Marine Corp.*, 789 F.2d 497 (7th Cir. 1986); *Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985), *vacated and remanded*, 479 U.S. 1002 (1986); *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981)).

²⁰⁵ J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 14-15 (1981) (maintaining that the court should not substitute its judgment for that of the executive or a legislature). The author, Judge Wallace, sits on the Ninth Circuit Court of Appeals.

²⁰⁶ *Court Suffers as Political Games Roll On*, *supra* note 177, at B8.

²⁰⁷ 834 F.2d 842 (9th Cir. 1987).

²⁰⁸ *Id.* at 843-44; see also *supra* notes 12-56 and accompanying text.

the agency level, this finding did not affect ONRC's substantive rights. Since the appellants had already filed an appeal with USFS—an appeal that was dismissed as untimely²⁰⁹—this was not a case where the court provided the appellants with a procedural right that they did not have before.

The Ninth Circuit's holding that the appellants were entitled to enforce water quality standards under the APA rather than the citizen suit provision of the CWA²¹⁰ is seemingly more difficult to classify as unquestioning deference to the agency. However, a "restrained" court will also interpret statutes and regulations narrowly when such an examination results in an "easier" decision. Here the court opined that although the APA was a permissible form of judicial review when other review was foreclosed, Oregon water quality standards may have exempted the type of degradation complained of by the appellants.²¹¹ The narrow interpretation of Oregon law prevented the court from reaching a decision on appellants' claim, resulting in a remand to the district court on the merits of the water quality claim.

Upon reaching the merits of appellants' case, the Ninth Circuit found that the EA was adequate under NEPA. The court quickly dismissed the NEPA challenges, essentially condoning the adequacy of the EA without dealing with the specific claim of a nonexistent cumulative impacts analysis of water quality.²¹² Instead of devoting a significant portion of its opinion to a factual investigation of the Forest Service's decision, the court simply deferred to the agency's assertion of NEPA sufficiency. Remanding to the agency on the administrative appeal rights issue,²¹³ the court then essentially made irrelevant its holdings that the appellants were entitled to an administrative appeal and a cause of action under the APA:

If the USFS finds that the EA was not previously challenged and that plaintiffs are time-barred from challenging it because they fail to allege changed circumstances or environmentally significant modification not addressed earlier, the USFS may so rule in rejecting plaintiffs [*sic*] claims. Until that time, the Court cannot review the adequacy of the EA or defendants' argument that plaintiffs are time-barred from raising the issue.²¹⁴

Unless appellants could show changed circumstances, their appeal would be denied, in effect sounding the death knell of their substantive claims.

²⁰⁹ 834 F.2d at 844.

²¹⁰ This is not to say that the material holding here—that the APA allows review of CWA violations—is improper. Subsequent case law has borne out the prudence of this holding. See, e.g., *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998); *Murphy v. City of Long Beach*, 914 F.2d 183 (9th Cir. 1990).

²¹¹ 834 F.2d at 852.

²¹² *Id.* at 846–47.

²¹³ A remand to the agency does not mean that the plaintiff will benefit or that better decision making will occur. *Glicksman*, *supra* note 180, at 249.

²¹⁴ 834 F.2d at 847 (emphasis added).

b. *Inland Empire Public Lands Council v. Schultz*

*Inland Empire Public Lands Council v. Schultz*²¹⁵ also demonstrated the court's failure to take a close look at the facts that allegedly supported the agency's decisions. On appeal, Inland Empire raised the issues of the right to an administrative appeal of an agency "decision" and the adequacy of the EA prepared for the Calispell timber sale.²¹⁶ The court held that "[b]ecause the Forest Service's administrative appeals process is not mandated by Congress, but has been implemented at the agency's discretion, we defer to its decision not to allow a second appeal."²¹⁷ The decision to deny an administrative appeal at the agency level clearly indicates a strong reluctance to allow public participation through additional procedure. In addition, the court's reasoning here simply did not reflect the plain meaning of the regulation, which establishes a clear right to appeal Forest Service decisions.

Claiming to apply the hard look standard of review, the *Inland Empire* court addressed the issue of the adequacy of the EA.²¹⁸ Although the court should have considered for itself whether the agency actually completed an in-depth assessment of the effects of the Calispell sale, instead it deferred to the agency's assurance that it had made such an analysis.²¹⁹ That analysis, however, included the conclusion that the watershed was already in a degraded state and that future harvest—including the Calispell sale—would further jeopardize the area.²²⁰ As in *ONRC*, the court eschewed the facts and the NEPA regulations in favor of upholding the agency's action, finding that the regulation²²¹ did not mandate the preparation of an EIS.²²²

This case is replete with examples of the court deferring to questionable decision making by USFS without a close examination of factual issues. Although the court certainly is not expected to replace the agency's

²¹⁵ 992 F.2d 977 (9th Cir. 1993).

²¹⁶ *Id.* at 977; see also *supra* notes 57–77 and accompanying text.

²¹⁷ *Id.* at 980. This sentence is ironic in light of the following sentence, which states, "We hold that [USFS's] *decision* to reoffer the sale was a final agency action." *Id.* (emphasis added).

²¹⁸ *Id.*

²¹⁹ *Id.* at 982. The court also deferred to USFS's assurance that it had considered the effects of future sales when it issued the FONSI for the Calispell sale.

²²⁰ *Id.* at 980–81. The court found this conclusion irrelevant, since USFS subsequently prepared computer models on the effects of the harvest. *Id.* at 982.

²²¹ 40 C.F.R. § 1508.27(a), (b)(7) (1998); see also *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (holding that an EIS is required when "facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor") (emphasis added).

²²² 992 F.2d at 982. The Ninth Circuit's interpretation of this regulation is interesting, because the burden to show that an EIS is not required falls on the agency, not on the plaintiff. 40 C.F.R. § 1500.1 (1998); see also *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). The Ninth Circuit, however, assumes the opposite: the agency's decision that the EA was adequate is found in the section titled "Council's Likelihood of Success on the Merits." 992 F.2d at 980. The likelihood of success in court is irrelevant to whether the EA is sufficient under NEPA.

judgement with its own, the court also should not discount the extraction-minded paradigm of USFS. Clearly the findings that the watershed was in bad shape and that more timber harvest would be disastrous should have been enough for the court to find USFS's decision to conduct logging in the area arbitrary and capricious—if not an abuse of discretion and contrary to law. Nevertheless, the court declined to check unreasoned agency decisions and to conduct a more searching examination of the facts and the law.

c. *Southwest Center for Biological Diversity v. United States Forest Service*

In *Southwest Center for Biological Diversity v. United States Forest Service*,²²³ the Ninth Circuit addressed the following issues: 1) whether the BE and BA prepared for the Rustler timber sale complied with the Salvage Rider of 1995, 2) whether the “No Effect” determination in those documents was arbitrary and capricious, and 3) whether the CE issued for the sale was arbitrary and capricious.²²⁴ In holding that USFS's CE and “No Effect” determination were not arbitrary and capricious, and that the BE and BA complied with the Salvage Rider, the circuit court once again interpreted the substantive and procedural statutes and regulations narrowly so as to avoid overturning the agency's decision.

The Salvage Rider required a BE under the ESA and an EA under NEPA.²²⁵ Theoretically, if the Ninth Circuit was true to judicial restraint, its inquiry should have ended with a strict interpretation of the Salvage Rider; an EA, and not a CE, was the only NEPA document that could have satisfied the Act. Nevertheless, the court explained that because USFS determined in the BE and BA that an EA was unnecessary, the CE was an appropriate proxy.²²⁶ Here, however, deference—and not a narrow construction—was at work. This high degree of deference is similar to that seen in *Inland Empire*, where the court accepted the Forest Service's interpretation of its legal obligation without independent review of the accuracy of that determination.

The *Southwest Center* court again deferred to USFS in holding that the “No Effect” determination was not arbitrary and capricious.²²⁷ USFS found in the BE and BA that there would be “No Effect” to the Mexican Spotted Owl from the Rustler sale, but the court did not discuss why this finding obviated USFS's duty to formally consult with the Fish and Wildlife Service (FWS).²²⁸ Although USFS may make an “initial determination” that the project will have no effect to a given species,²²⁹ if the species is pres-

²²³ 100 F.3d 1443 (9th Cir. 1996).

²²⁴ *Id.* at 1445; see also *supra* notes 78–98 and accompanying text.

²²⁵ 100 F.3d at 1447. The Salvage Rider made no allowance for the preparation of a CE. Pub. L. No. 104-19, 109 Stat. 194, 240 (1995).

²²⁶ 100 F.3d at 1447.

²²⁷ *Id.*

²²⁸ *Id.* at 1447–48.

²²⁹ *Id.* at 1447.

ent in the area,²³⁰ then the consultation process requires that USFS forward the BE or BA to FWS for an effects determination by that agency.²³¹ Once FWS issues a biological opinion (BiOp) regarding the effect of the project on the species, USFS theoretically is at liberty to accept or reject the advice of the consulting agency.²³² By failing to interpret the ESA regulations,²³³ though, the court never reached this issue.

Finally, the *Southwest Center* panel found the CE appropriate, even though the "Forest Service has not been . . . thorough in its analysis with respect to the Mexican Spotted Owl."²³⁴ Here, too, the court deferred to the "No Effect" determination of the agency; yet the court noted that USFS ignored the presence of owl habitat in the Rustler planning area and the sale's proximity to Protected Activity Centers.²³⁵ To support its holding, the Ninth Circuit cited *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,²³⁶ which defines the level at which an agency's conduct rises to a level of arbitrary and capricious decision making:

[If] the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,²³⁷

then the decision should not be upheld. The preposition "or" indicates that the court could find any of the foregoing situations to violate the arbitrary and capricious standard. In the present case, USFS failed both to consider the presence of Mexican Spotted Owls and their habitat in the planning area,²³⁸ and offered a rationale for its decision to issue the CE that was not based on the evidence before it.²³⁹ Instead of pointing to this fact, the court based its finding that the CE was reasonable on the statement that the "No Effect" conclusion is not 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'²⁴⁰ In fact, only a narrow reading of the case law and a high degree of deference allowed the court to find the CE reasonable.

²³⁰ As the rest of the opinion explains, USFS admitted that the birds and their habitat were present in the planning area. *Id.*

²³¹ See 16 U.S.C. § 1536(c) (1994).

²³² See *id.* § 1536(b); see also James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499, 543-44 (1991).

²³³ 50 C.F.R. § 402.14(a) (1998).

²³⁴ 100 F.3d at 1449.

²³⁵ *Id.*

²³⁶ 463 U.S. 29 (1983).

²³⁷ *Id.* at 43 (emphasis added).

²³⁸ Regulations established under NEPA require that an agency state in its decision if all information before the agency was considered in reaching the decision, and if not, why not. 40 C.F.R. § 1505.2 (1998).

²³⁹ 100 F.3d at 1448. Although USFS may or may not have had the benefit of the Beschta Report, *supra* note 85, the objections raised by FWS to salvage logging in the Rustler area were at the Forest Service's disposal.

²⁴⁰ 100 F.3d at 1449 (quoting 463 U.S. at 43).

What the previous three cases show is that although it had the opportunity to hold USFS to its hard look burden, the Ninth Circuit consistently found ways to condone uninformed agency decisions. The cases from *ONRC* to *Southwest Center* exemplify a court that did not apply the arbitrary and capricious standard of review to agency decision, but instead accepted the Service's mantra of "agency deference." In contradistinction to those cases, *Neighbors* and *Idaho Sporting Congress* represent proper judicial decisionmaking, coupling close factual and legal scrutiny with appropriate agency deference when the Forest Service's decisions met the hard look test.

2. *Neighbors* and *Idaho Sporting Congress*

a. *Neighbors of Cuddy Mountain v. United States Forest Service*

In *Neighbors*,²⁴¹ the appellants raised the following three issues: 1) consistency between the Grade/Dukes sale and the Payette Forest Plan, 2) the adequacy of the cumulative impacts analysis in the Grade/Dukes SEIS, and 3) the adequacy of the mitigation measures to protect aquatic species and habitat.²⁴² Here, the Ninth Circuit rejected the exceptionally restrained approach of earlier panels, holding that the sale violated NFMA's consistency and NEPA's mitigation requirements. Further, the cumulative impact analysis was insufficient, warranting the preparation of another supplement to the SEIS.²⁴³ The Ninth Circuit insisted on the agency's compliance with its hard look burden after reviewing (and finding inadequate) the facts before USFS.

Interpreting NEPA and NFMA more closely than it had done in previous cases, the Ninth Circuit held that the Grade/Dukes sale was inconsistent with the Payette Forest Plan.²⁴⁴ Addressing the complex issue,²⁴⁵ the *Neighbors* panel explained that the methodology used by USFS to determine the amount of old growth remaining on the Payette Forest was faulty, thus rendering USFS's conclusion that the sale was consistent with the Forest Plan incorrect.²⁴⁶ Although the methodology chosen by the agency is usually entitled to deference, the Ninth Circuit in *Neighbors* simply applied USFS's own method of calculating old growth to the facts and found that the Forest Service had incorrectly calculated the remaining habitat for the pileated woodpecker.²⁴⁷

²⁴¹ 137 F.3d 1372 (9th Cir. 1998).

²⁴² *Id.* at 1378; see also *supra* notes 99–131 and accompanying text.

²⁴³ 137 F.3d at 1376.

²⁴⁴ *Id.* at 1378.

²⁴⁵ Both parties extensively briefed the methodology issue, each developing different numbers of required old growth retention. See Appellants' Opening Brief at 19–24, *Neighbors* (No. 97–35654); Appellees' Response Brief at 20–25, *Neighbors* (No. 97–35654); Appellants' Reply Brief at 19–23, *Neighbors* (No. 97–35654).

²⁴⁶ 137 F.3d at 1377–78.

²⁴⁷ *Id.* at 1378. The court noted that the Payette Forest Plan required that the amount of old growth remaining in the forest be calculated within "each theoretical pileated woodpecker home range." *Id.* at 1377 (emphasis omitted). Having failed to indicate how many home ranges existed in the planning area, USFS "certainly could not have demonstrated that

The failure to correctly calculate the amount of old growth remaining after the sale contributed to the Ninth Circuit's holding that the cumulative impacts analysis was inadequate, requiring the preparation of another supplement to the EIS.²⁴⁸ Although USFS claimed that the SEIS adequately analyzed the depletion of old growth in the forest that would result from multiple sales, the court held that the "analysis provided was very general, and did not constitute the hard look that the Forest Service is obligated to provide under NEPA."²⁴⁹ Without providing statistics, percentages, or site-specific comparisons of the amount of old growth that would be depleted by the sales, USFS's analysis was incomplete.²⁵⁰

Using strong language, the court concluded that not only was it inappropriate "to defer consideration of cumulative impacts to a future date,"²⁵¹ but also that "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."²⁵² The court also refused to defer to the mitigation measures proposed by USFS. Again using strong language, the court stated that "the Forest Service's broad generalizations and vague references to mitigation measures in relation to the streams affected by the Grade/Dukes project do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide."²⁵³

In contrast to previous decisions, the court in *Neighbors* took USFS to task when the agency did not provide the type of baseline data that NEPA and NFMA require. Also, the court carefully assessed the agency's methodologies, concluding that USFS had incorrectly calculated the amount of old growth that would remain after the Grade/Dukes sale. In this case, the panel held the agency to a tough arbitrary and capricious standard.

b. Idaho Sporting Congress v. Thomas

The Ninth Circuit's rebuke of USFS continued in *Idaho Sporting Congress*. The appellants argued that 1) NEPA and NFMA required the preparation of an EIS, 2) the Miners Creek and West Camas Creek sales violated water quality standards, and 3) the sales were inconsistent with the Targhee Forest Plan.²⁵⁴ As in *Neighbors*, there were several opportunities

after the sale, a sufficient percentage of old growth would remain in each affected pileated woodpecker home range." *Id.* at 1378.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1379.

²⁵⁰ The Ninth Circuit explained that "to 'consider' cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide." *Id.*

²⁵¹ *Id.* (citing *City of Tanakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990)).

²⁵² *Id.* at 1380. Despite this language, USFS continues to prepare timber sales with this sort of vague "possible effects" language. See, e.g., COWLITZ VALLEY RANGER DISTRICT, U.S. DEP'T OF AGRIC., UPPER GREENHORN TIMBER SALE ENVIRONMENTAL ASSESSMENT 2-5 (1998).

²⁵³ 137 F.3d at 1381.

²⁵⁴ 137 F.3d 1146 (9th Cir. 1998); see also *supra* notes 132-75 and accompanying text.

in this case to curb earlier courts' tendency to defer to the agency without closely interpreting substantive law.

First addressing cumulative impacts, the *Idaho Sporting Congress* court did not accept the Forest Service's assurances that the 1985 and 1990 water quality reports sufficiently demonstrated that the effects of the sales would be minimal.²⁵⁵ Conceding that a successful challenges to the reports themselves was impossible, the court explained that the baseline data used to support the conclusions in the report must be disclosed to the public in a NEPA document.²⁵⁶ A literal reading of NEPA regulations also required that such a disclosure be made.²⁵⁷ Finally, the factual differences between the 1985 and 1990 reports indicated that USFS did not give the issue a hard look as required by NEPA.²⁵⁸

The Ninth Circuit then looked to the issues of mitigation and fisheries. As in *Neighbors*, USFS's reliance on best management practices—without analytical data to support them—rendered the proposed mitigation insufficient.²⁵⁹ Furthermore, USFS violated NEPA when it failed to disclose the presence of fish in the area.²⁶⁰ Although the Ninth Circuit could have accepted the finding that NEPA was satisfied by the statement in the Miners Creek EA that “[f]isheries—no significant concerns”²⁶¹ meant that USFS had taken a hard look at the question, the *Idaho Sporting Congress* panel held that this statement in fact “provide[ed] no analysis for the public to review.”²⁶² USFS's inadequate analysis of the cumulative impacts from the sales in the Miners Creek EA compelled the preparation of an EIS.

Turning next to water quality issues, the court held that the Idaho state water code was commensurate with the federal CWA.²⁶³ The court held that the internal conflict in the state law was best resolved by reading

²⁵⁵ *Id.* at 1150.

²⁵⁶ *Id.*

²⁵⁷ *Id.* Agencies are required to “identify any methodologies used and [] make explicit reference by footnote to the scientific and other sources relied upon for conclusions.” *Id.* (quoting 40 C.F.R. § 1502.24 (1998)) (alteration in original). Although this is a literal reading of the regulation—and therefore could be construed as a “narrow” one—in fact the preceding cases indicate that a literal reading of the statute or regulation often did not result in the broad application of it. For example, in *Southwest Center*, the requirement of a BE and an EA was eschewed for the Forest Service's interpretation that a CE would supplant the EA requirement. *Id.* at 1446. Thus, the reading given the regulation in the present case indicates a broader reading than would have been afforded in the past.

²⁵⁸ 137 F.3d at 1151.

²⁵⁹ *Id.* Indeed, the effectiveness of the mitigation measures could not be gauged until the EIS was prepared, because the effects of logging the area would not be known until that time.

²⁶⁰ *Id.* at 1152.

²⁶¹ *Id.* “The Miners Creek EA merely states: ‘Fisheries—no significant concerns. Soil and water analysis and applicable mitigation for protection of streams will mitigate possible effects.’” *Id.*

²⁶² *Id.* The Ninth Circuit in this case (as well as in *Neighbors*) is very concerned that USFS provide the public with an adequate amount of information on which to comment. Even though NEPA conventionally is seen as a disclosure statute, the court places an even higher value on the quality of the disclosure, not just on the mere fact of disclosure.

²⁶³ *Id.* at 1153.

the state code to invoke only the standards of the federal law.²⁶⁴ Although an "activist" court may have resolved the conflict in favor of the more strict standard, the Ninth Circuit's holding nevertheless allowed the claim to survive "until further studies [were] completed on the two streams [in the planning area]," reasoning that the court "lack[ed] sufficient facts to determine whether Idaho's antidegradation statute has been violated."²⁶⁵ This caveat is representative of the court's insistence that USFS obtain the data necessary to make a reasoned decision.

Finally, claiming that the Forest Service failed both to provide adequate habitat for and monitor population trends of trout, ISC maintained that the Forest Service violated NFMA's consistency requirements.²⁶⁶ The panel rejected this argument, and much as it had addressed the CWA/Idaho Code issue, stated that in order to use habitat as a proxy to satisfy NFMA's population requirements, USFS was required to survey for trout in the planning area.²⁶⁷

Similar to *Neighbors*, the *Idaho Sporting Congress* court refused to accept the Forest Service's legal conclusions without first investigating the factual basis for those conclusions. The Ninth Circuit explained that a literal reading of the law did not support the agency's actions, which were made without adequate scientific data. The fact that the court upheld the Forest Service's interpretation of its duty to survey for MIS further supports the contention that this court carefully read the law and evenly applied it to the facts at issue.

3. A Hypothesis

What *Neighbors* and *Idaho Sporting Congress* represent is a correcting effect within the Ninth Circuit. In most instances, the previous case law on timber sales has been, in a word, abysmal. These two cases, by contrast, provided environmental plaintiffs with strong language that would apply in almost any timber sale litigation. Instead of language that was fact-specific—as in *ONRC*, *Inland Empire*, and *Southwest Center*—the language from *Neighbors* and *Idaho Sporting Congress* is essentially a set of guidelines that USFS (or plaintiffs) can use to determine whether environmental documents and analysis are consistent with the law.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ The Targhee Forest Plan required USFS to monitor trout populations in the Forest. *Id.* at 1154. NFMA regulations also include a similar requirement with respect to species monitoring. 36 C.F.R. § 219.19 (1998). Furthermore, NFMA requires consistency between site-specific projects and forest-wide land management plans. 16 U.S.C. § 1604(i) (1994). Although the Ninth Circuit deferred to the agency's contention that habitat could be used as a proxy to estimate populations, this was not necessarily restrained behavior. Because stare decisis requires that a court defer to precedent set in other cases, the panel here was justified in deferring to the decisions made in cases such as *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 760 (9th Cir. 1996) (holding that habitat can be used as a proxy for population studies). Indeed, there is considerable difference between deferring to legal precedent and deferring to an agency's interpretation.

²⁶⁷ 137 F.3d at 1154. The Ninth Circuit noted that "[t]he Forest Service should address in an EIS the adequacy of the habitat maintained" after the sales. *Id.*

The court's decisions in *Neighbors* and *Idaho Sporting Congress* could be said to represent judicial activism. However, *Neighbors* and *Idaho Sporting Congress* are only roguishly activist if they are viewed in isolation and without a firm understanding of the precedent. *ONRC, Inland Empire*, and *Southwest Center*—and much of the cases that preceded them—were issued by courts that patently upheld agency decisions even in light of egregious conduct.²⁶⁸ Counteracting what had gone before them, the *Neighbors* and *Idaho Sporting Congress* panels looked closely at the Forest Service's rationale for its actions, evaluated the law, and forced USFS to offer legal timber sales.

Since the intent of NEPA, NFMA, the ESA, and the CWA is reasoned environmental protection, it cannot be said that *Neighbors* and *Idaho Sporting Congress* represent a maverick Ninth Circuit panel. *Neighbors* and *Idaho Sporting Congress* suggest that rather than acting as improperly activist, the Ninth Circuit made decisions in accordance with congressional intent. In both opinions, the court read the applicable requirements of the law rather than defer to the interpretation of the agency when the agency's decision was suspect. The Ninth Circuit then applied the law to the facts and found that USFS had violated the legal mandates of NFMA and NEPA. Such a process circumvents the Marbury Problem; here, the court said what the law was rather than accepting the government's version of it.

These decisions could be viewed as a policy preference elevated above the requirements of the law. However, the Ninth Circuit in *Neighbors* and *Idaho Sporting Congress* did not ban timber harvest; instead, it attempted to ensure that when timber is sold, is done so lawfully.²⁶⁹ Indeed, USFS prevailed on some of the issues in each case—the Ninth Circuit clearly felt that the Forest Service's analysis on some issues was sound. When the analysis elsewhere was flawed, however, the Ninth Circuit held USFS to the same tough hard look standard and found violations of the law.

V. THE LEGACY OF *NEIGHBORS* AND *IDAHO SPORTING CONGRESS*

Because *Neighbors* and *Idaho Sporting Congress* closely examined the law and found the agency's reasoning lacking in legal sufficiency, these cases represent the Ninth Circuit's attempt to correct the past failures to ensure that USFS had a reasonable factual basis for its findings. Previous Ninth Circuit panels did not hold USFS accountable under NEPA and NFMA. While some may consider these two opinions "radical," they are in fact the countervailing force that was required to bring the Ninth Circuit back to its intended purpose of interpreting the law and applying it fairly.

²⁶⁸ See, e.g., *supra* text accompanying note 79.

²⁶⁹ Although both *Neighbors* and *Idaho Sporting Congress* were remanded to USFS, plugging the holes identified by the Ninth Circuit could be done with relative ease by the agency. Certainly the preparation of an EIS slows down the process of timber sales, but it does not stop them.

The briefs for *Neighbors* and *Idaho Sporting Congress* resemble those of early cases such as *ONRC*. Thus, the lawyering, or the argument of the case, was unlikely to have prompted the court's change in analysis. Instead, *Neighbors* and *Idaho Sporting Congress* may illustrate the panels' belief that the Ninth Circuit was on the wrong track, deferring—almost without review—to USFS's implementation of the federal timber sale program. This contention, however, is unsupportable unless the cases that followed *Neighbors* and *Idaho Sporting Congress* bear out the trend of the Ninth Circuit's refusal to closely scrutinize agency decisions.

A. Friends of Southeast's Future v. Morrison

In *Friends of Southeast's Future v. Morrison*,²⁷⁰ the Ninth Circuit returned to the deferential approach it had employed prior to *Neighbors* and *Idaho Sporting Congress*. In 1991, in conjunction with the Alaska Pulp Corporation (APC),²⁷¹ USFS prepared a tentative operating schedule (TOS) for the Chatham Area of the Tongass National Forest in southeast Alaska.²⁷² The TOS included several logging projects, including one in Ushk Bay.²⁷³ In 1994, USFS prepared a final environmental impact statement for the Ushk Bay project, which could result in the harvest of sixty-seven MMBf of timber and over forty-two miles of new road construction.²⁷⁴

Friends of Southeast's Future filed an administrative appeal of the Ushk Bay project, and it was denied.²⁷⁵ Subsequently, the group filed suit in district court, claiming that 1) USFS should have prepared an EIS in 1991 for the TOS, 2) the 1994 EIS was inadequate, and 3) the 1994 EIS violated NFMA's consistency requirements.²⁷⁶ The district court found that USFS did not have to complete an EIS for the 1991 TOS, the 1994 EIS was adequate, and the sale violated the Tongass Forest Plan, in contravention of NFMA.²⁷⁷

Raising the same issues, both parties appealed to the Ninth Circuit. The court affirmed the district court's decision, holding that USFS did not

²⁷⁰ 153 F.3d 1059 (9th Cir. 1998). *Friends of Southeast's Future* was decided on September 3, 1998. On July 29, 1998 the Ninth Circuit decided *Oregon Natural Resources Council Action v. Bureau of Land Management (ONRC Action)*, 150 F.3d 1132 (9th Cir. 1998). In *ONRC Action*, another timber sale case, the Ninth Circuit held that the Bureau of Land Management (BLM) had not violated NEPA or the Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701–1785 (1994 & Supp. III 1997), in proposing timber sales before the Interior Columbia Basin Ecosystem Management Project (ICBEMP) had been adopted. *Id.* at 1134. ICBEMP was intended to be the counterpart of the Northwest Forest Plan for National Forest and BLM lands east of the Cascades.

²⁷¹ USFS was in a long-term contract with APC to provide the company with one hundred MMBf of timber per year. 153 F.3d at 1061.

²⁷² *Id.* No EIS was prepared for the TOS. *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 1062.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

need to prepare an EIS in 1991 and that the 1994 EIS was adequate.²⁷⁸ Citing *Neighbors*, the court also affirmed the district court's finding that the 1994 EIS was inadequate because it failed to conduct an "area analysis" of the Ushk Bay project as required by the Tongass Forest Plan.²⁷⁹

The Ninth Circuit held that USFS did not need to prepare an EIS in 1991 when it prepared the TOS, reasoning that the agency had not made an "irreversible and irretrievable commitment of resources"²⁸⁰ at that time, because it was still theoretically able to forbid timber harvest on the land surrounding Ushk Bay.²⁸¹ The court stated that if USFS found that the project would be unprofitable, for example, the Forest Service was "free to follow [the tentative operating schedule] or alter it as conditions warrant[ed]."²⁸²

Friends of Southeast's Future claimed that the 1994 EIS was unacceptable because USFS was already committed under the 1991 TOS, which foreclosed consideration of the no action alternative.²⁸³ The panel rejected this argument, holding that USFS did consider the alternative but failed to adopt it because it did not meet the purpose and need of the project.²⁸⁴ Under a reasonableness standard of review, the court held that eschewing the no action alternative in favor of the preferred alternative did not violate NEPA.²⁸⁵ Instead, USFS was entitled to wide latitude in defining the bounds of its project.²⁸⁶

Finally the Ninth Circuit turned to the contention that USFS had violated NFMA when it failed to conduct an area analysis for the Ushk Bay project.²⁸⁷ USFS claimed that it had completed this step of analysis in the

²⁷⁸ *Id.* at 1059.

²⁷⁹ *Id.* at 1069.

²⁸⁰ *Id.* at 1063. Although the Ninth Circuit maintained that "[o]ur previous decisions compel the conclusion that this schedule did not constitute an 'irreversible and irretrievable commitment' of resources," *id.*, those previous decisions are irrelevant to the instant case. The cases referred to by the court address water, mineral, and gas leases, not the sale of timber. *Id.* Once USFS signed a contract with APC, it was not free to back out of the deal. The Ninth Circuit neglected to discuss basic contract law in the *Friends of Southeast's Future* opinion. Furthermore, the "commitment" language cited by the court is from a NEPA regulation that discusses what types of effects must be discussed in an EIS. 40 C.F.R. § 1502.16 (1998). That language is not used to determine when an EIS must be prepared. See 40 C.F.R. § 1501.4 (1998).

²⁸¹ 153 F.3d at 1063.

²⁸² *Id.* However, contract law dictates that a party can change a contract provision only if the other party acquiesces. RESTATEMENT (SECOND) OF CONTRACTS § 286 cmt. a (1981). It is illogical to assume that APC would have found it acceptable for USFS to unilaterally decide that the contract was problematic for the agency, allowing the agency to "alter" its terms.

²⁸³ 153 F.3d at 1065. In rejecting this argument, the Ninth Circuit implicitly accepted that USFS was committed to the 1991 TOS. See *id.* at 1065-67. If USFS was committed to the TOS, then it was not free to "alter" it as the court had previously suggested. *Id.* at 1063.

²⁸⁴ *Id.* at 1067.

²⁸⁵ *Id.*

²⁸⁶ *Id.* The court conceded that this discretion was not unlimited. *Id.* at 1066 (citing *City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("[A]n agency cannot define its objectives in unreasonably narrow terms.")).

²⁸⁷ 153 F.3d at 1067-68. The Tongass Forest Plan required that such analysis occur before project implementation. *Id.* at 1068-69.

1994 EIS—thus, the area analysis requirement was moot.²⁸⁸ The court rejected this argument, indicating that the Forest Plan specifically required that the area analysis precede the EIS.²⁸⁹ The Ushk Bay project was enjoined until USFS conducted the proper analysis.²⁹⁰

Although the appellants succeeded in halting the Ushk Bay timber sale, *Friends of Southeast's Future* shows signs of the Ninth Circuit returning to its old ways. While the court may be less willing to overturn an EIS than an EA, the court nevertheless cursorily rejected Friend of Southeast's Future's EIS adequacy argument without a close review of the facts that prompted the complaint. Although the Ninth Circuit had an opportunity to evaluate the validity of all of the appellants' claims, thereby continuing the trend begun by *Neighbors* and *Idaho Sporting Congress*, the court failed to apply the factually informed standard illustrated in those two cases.

B. Kettle Range Conservation Group v. United States Forest Service

The Ninth Circuit returned to its deferential course in *Kettle Range Conservation Group v. United States Forest Service*.²⁹¹ In 1993, USFS released an FEIS discussing the environmental impacts from two proposed timber sales in the Colville National Forest in northeastern Washington, the Alec and Santim sales.²⁹² Shortly after the FEIS was released, wildfires swept through the area and burned over ten-thousand acres, including portions of the analysis areas for the two sales.²⁹³

USFS decided to prepare a supplement for the FEIS, supposedly designed to address the impacts of the fire on the planned timber sales.²⁹⁴ In the supplement, USFS proposed a salvage timber sale (the Copper Butte Salvage sale)²⁹⁵ of the burned areas as well as slight modifications to the Alec and Santim sales. However, the supplement specifically did not

²⁸⁸ *Id.* at 1069.

²⁸⁹ *Id.* The Tongass Forest Plan incorporated language from NEPA regulations stating that "tiering" can occur from small-scale projects to large-scale projects that address the same issues. See 40 C.F.R. § 1508.28 (1998). Under this concept, one must precede the other; both sets of analysis cannot occur at once. The panel here cited to *Neighbors* for the proposition that site-specific plans must be consistent with area Forest Plans. 153 F.3d at 1068 (citing *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998)).

²⁹⁰ USFS attempted to get around the area analysis requirement in an interesting manner. As the result of the district court's decision in 1997, the USFS issued a record of decision (ROD) that repealed the area analysis requirement. In so doing, USFS stated that "the Forest Service continues to believe that the Ushk Bay Timber sale satisfied all the requirements of the [Tongass Forest Plan] and has appealed the district court's decision. In any event, this Record of Decision and the revised [Forest] Plan remove any requirements for 'Area Analysis.'" *Id.* at 1070. Presumably, the Ninth Circuit did not look kindly on the attempt to circumvent the district court's holding.

²⁹¹ 147 F.3d 1155 (9th Cir. 1998).

²⁹² *Id.* at 1156. The two sales totaled eight MMbf. Appellants' Opening Brief at 3, *Kettle Range* (No. 96-36100).

²⁹³ 147 F.3d at 1156.

²⁹⁴ *Id.*

²⁹⁵ Appellants' Opening Brief at 9, *Kettle Range* (No. 96-36100).

discuss the impacts of the fire on those sales.²⁹⁶ Kettle Range administratively appealed USFS's refusal to incorporate an analysis of the fire on the existing sales, but the appeal was denied.²⁹⁷ Losing a motion for summary judgment in the district court, Kettle Range appealed to the Ninth Circuit.

On appeal, the appellants alleged that the supplemental final environmental impact statement (SFEIS) violated NEPA by failing to contain information regarding the effects of the fires on the Alec and Santim sales.²⁹⁸ In a two-page opinion, the Ninth Circuit dismissed all of appellants' claims.²⁹⁹ The Ninth Circuit first pointed out that "[a] circuit court lacks authority to decide which timber ought to be sold, and which left in place. The Forest Service decides that."³⁰⁰ The Ninth Circuit found that it must defer to an agency's decision if that agency took a hard look at the problem, and then the court held that USFS's stated scope of supplementation in a supplemental EIS is entitled to deference.³⁰¹

The Ninth Circuit rejected the appellants' argument that the SFEIS was in fact an EIS for a salvage sale and did not supplement the FEIS for the Alec and Santim sales, stating that "[w]e cannot square that assertion with what the document says."³⁰² The court explained that "the supplement says that the fire 'did not change . . . the analysis of effects provided,'"³⁰³ which meant that USFS "considered the entire area of the fire and considered how it affected the entire area of the sale."³⁰⁴ Because the Forest Service considered the effects of the fire in the SFEIS generally, direct analysis of the fire on the Alec and Santim sales was unnecessary and the agency's hard look burden had been satisfied. Moreover, because USFS was entitled to deference on the scope of its review, the court found that USFS was under no obligation to address the impacts of the fire on the Alec and Santim sales.³⁰⁵

The *Kettle Range* opinion demonstrates the violent swing away from the progress of *Neighbors* and *Idaho Sporting Congress*. The Ninth Circuit seems to forget that USFS does not have an option in preparing a supplemental EIS if there are significant changed circumstances such as a

²⁹⁶ 147 F.3d at 1156.

²⁹⁷ *Id.*

²⁹⁸ Appellants' Opening Brief at 10, *Kettle Range* (No. 96-36100). Specifically, appellants claimed that USFS had a duty to supplement the FEIS due to changed circumstances (40 C.F.R. § 1502.9(c) (1998)) and a duty to consider the cumulative impact of natural and non-natural events in a single EIS (40 C.F.R. § 1508.25(a)(2) (1998)). Appellants' Opening Brief at 10, *Kettle Range* (No. 96-36100).

²⁹⁹ The Ninth Circuit's contempt for this case is obvious in the tone of the opinion. For example, the court states in a footnote that "we are aware that specialists in environmental law use acronyms, such as FEIS, instead of English words, such as 'final environmental impact statement.' Acronyms facilitate error by obscuring meaning. We therefore use English." 147 F.3d at 1156 n.1.

³⁰⁰ *Id.* at 1156. As *Neighbors* and *Idaho Sporting Congress* suggest, however, the circuit court *does* have the authority to decide which timber is sold or left in place.

³⁰¹ *Id.* at 1157.

³⁰² *Id.*

³⁰³ *Id.* (quoting the SFEIS) (omission in original).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

large wildfire.³⁰⁶ Instead, the court relinquished its judicial review authority to the “wisdom” of USFS. The court’s high degree of deference is borne out in the length of the opinion—two pages—and the lack of thorough review of the factual record.

Similarly, although the issue of the sufficiency of the SFEIS was extensively briefed by both sides, the Ninth Circuit never even cites to NEPA, preferring instead to cite to a single case that dealt with wildfires that burned an area that had been approved for “an eight lane highway bisecting . . . Orange County.”³⁰⁷ The court deemed it acceptable for USFS to use one NEPA document, intended as a supplement for the Alec and Santim sales, as the NEPA document for an entirely different agency action—the Copper Butte salvage sale. *Kettle Range* is a classic example of killing two birds with one stone.³⁰⁸

C. Blue Mountains Biodiversity Project v. Blackwood

After *Kettle Range*, the decisions in *Neighbors* and *Idaho Sporting Congress* began to look like historical anomalies—accidents. The Ninth Circuit had returned to its previous path of taking a cursory look at USFS decisions implementing timber sales, deferring to those decisions, and issuing opinions that contained very little detailed analysis of the facts and the law. Notably, *Friends of Southeast’s Future* and *Kettle Range* were decided by other Ninth Circuit panels than the *Neighbors* and *Idaho Sporting Congress* courts. Yet, the lack of influence of *Neighbors* and *Idaho Sporting Congress* was evident in the two subsequent opinions. However, in the next timber sale case that came to the Ninth Circuit, *Blue Mountains Biodiversity Project v. Blackwood*,³⁰⁹ the Ninth Circuit again embraced factually informed judicial review in overturning unreasonable agency actions.

In August 1996 a massive wildfire swept across the Umatilla National Forest in northeastern Oregon.³¹⁰ The burn encompassed nearly fifty-one thousand acres of forest land, half of which was located in the basin of the North Fork of the John Day River, the only river basin in Oregon that remains undammed.³¹¹ In the wake of the burn, USFS prepared an EA to assess the opportunity for timber harvest in the area, eventually proposing the Big Tower project.³¹² In September 1997 USFS issued a DN and FONSI for the sale, which was appealed by the Blue Mountains Biodiversity Pro-

³⁰⁶ See 40 C.F.R. § 1502.9(c) (1998).

³⁰⁷ 147 F.3d at 1157 (citing *Laguna Greenbelt, Inc. v. United States Dep’t of Transp.*, 42 F.3d 517 (9th Cir. 1994)). Clearly, that case is factually far removed from the present one.

³⁰⁸ Or implementing two Forest Service projects with one SFEIS.

³⁰⁹ 161 F.3d 1208 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 2337 (1999).

³¹⁰ *Id.* at 1210. The fire was the largest wildfire in the recorded history of the Umatilla National Forest. *Id.*

³¹¹ *Id.*

³¹² *Id.* The Big Tower project was in fact three timber sales, totaling between 30 and 55 MMBf of timber. However, the EA referred only to the Big Tower sale and did not distinguish between Big Tower and the other two sales. Therefore, this discussion will group the three sales under the common name “Big Tower.”

ject (BMBP) and others.³¹³ In December of that year, the administrative appeal of Big Tower was denied, and BMBP filed suit in district court.³¹⁴ In district court, the plaintiffs' motion for summary judgment was denied, and they appealed to the Ninth Circuit.

On appeal,³¹⁵ the appellants claimed that USFS had violated NEPA when it failed to prepare an EIS for Big Tower, and that the EA was inadequate because it failed to analyze the cumulative impacts of the fire, timber harvest, and road building.³¹⁶ In agreeing with the appellants, the Ninth Circuit first noted that an EIS was required because the proposed action was controversial and the project would have unknown impacts.³¹⁷ Before the present case arose, the Regional Forester issued a memorandum to all National Forests in the Pacific Northwest Region, instructing them to consider an independent report known as the Beschta Report when dealing with timber harvest after severe fires.³¹⁸ Instead of heeding this advice, the Forest Service in the Big Tower EA completely ignored the report and recommended a substantial amount of timber harvest and road building in the area.³¹⁹ The court explained that although the failure to reference the Beschta Report was not a fatal error, it "lends weight to BMBP's claim that the Forest Service did not take the requisite 'hard look' at the environmental consequences of post-fire logging instead of letting nature do the healing."³²⁰

The court then looked to whether the project would have unknown risks that necessitated the preparation of an EIS. Noting that the EA "simply fails to persuade that no significant impacts would result from the Big Tower project," the panel cited the lack of data that USFS was able to gather on the impacts of the sale as reason enough that an EIS should have been prepared.³²¹ Quoting *Neighbors*, the court chastised USFS by declaring that "'general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more

³¹³ *Id.* at 1211.

³¹⁴ *Id.*

³¹⁵ By the time that this case was argued, 80% of the logging on Big Tower had occurred. *Id.*

³¹⁶ *Id.* at 1209.

³¹⁷ *Id.* at 1212; 40 C.F.R. § 1508.27(b)(4)-(b)(5) (1998). The court also agreed with the appellants that appellants' need only show that a project *may* have adverse consequences, not that they *will* occur. 161 F.3d at 1212 (citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)).

³¹⁸ 161 F.3d at 1213. The Beschta Report concludes that post-fire entry for salvage logging is imprudent and unnecessary, especially on sensitive soils. *See supra* note 85. The Big Tower area is in such a sensitive location.

³¹⁹ 161 F.3d at 1213.

³²⁰ *Id.*

³²¹ *Id.* In fact, the only data that USFS was able to gather for the potential sediment increase as a result of the harvest was invalid: the Forest Service had placed sediment collection boxes in streams in the Big Tower area, but they became buried under several feet of sediment. This admission was "buried" in a footnote in the EA. USFS explained that since they had no data on sediment input, there would be no impacts from logging. Appellants' Opening Brief at 28, *Blue Mountains* (No. 98-35738).

definitive information could not be provided.”³²² Such “general statements” appeared in the EA regarding the location and amount of roads, the number of stream crossings, mitigation measures, and the impact of the logging on water quality and fisheries.³²³ Furthermore, USFS could not escape its duty to prepare an EIS by claiming that the impacts of the Big Tower sale tiered to the Umatilla Forest Plan. The court noted that “nothing in the [NEPA] tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.”³²⁴

The court finally turned to the issue of whether the cumulative impact analysis in the EA was sufficient. In holding that the analysis did not meet the requirements of NEPA, the panel explained that no single document estimated the impact of a sale that would total “40–55 million board feet logged from the same watershed, require approximately 20 miles of road construction and involve tractor-skid logging on steep slopes.”³²⁵ The panel explained that this violated NEPA because “[s]ignificance cannot be avoided by . . . breaking [an action] down into small component parts.”³²⁶ Since all of the components of the Big Tower project were foreseeable and raised significant questions about their impacts on the environment, the court held that an EIS was required and that further harvest was prohibited until the Forest Service prepared such a document.³²⁷

The *Blue Mountains* decision has all of the traits of the meticulous review exemplified in *Neighbors* and *Idaho Sporting Congress*. Here, the Ninth Circuit rejected the Forest Service’s attempt to ignore important data that would have halted a profitable timber sale. The Ninth Circuit also looked to the data that had been before the agency when it made its decision on Big Tower, noting that the agency simply lacked the data to support its finding of no significant impact. Due to these inadequacies, the court reasoned that USFS did not carry its hard look burden.

VI. BEYOND *BLUE MOUNTAINS*

Blue Mountains confirms the hypothesis offered in Part III, that the court’s attention to factual and legal detail has made the difference in Ninth Circuit timber sale case law. Prior to *Neighbors* and *Idaho Sporting Congress*, the case law was dismal because the court refused to earnestly apply the hard look standard to agency decisions, instead deferring—with

³²² 161 F.3d at 1213 (quoting *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)).

³²³ *Id.* at 1214. The Ninth Circuit also faulted the Forest Service for failing to provide references in the EA to its scientific basis for its conclusions, in violation of NEPA. *Id.* (citing 40 C.F.R. § 1508.9(a) (1998)).

³²⁴ *Id.*

³²⁵ *Id.* at 1215.

³²⁶ *Id.* (quoting 40 C.F.R. § 1508.27(b)(7) (1998)) (alteration in original).

³²⁷ *Id.* at 1215. In dicta, the court observed that the fact that most of the logging in Big Tower was complete did not moot appellants’ claims. A remedy was still possible, and USFS had not yet sold the remaining timber sales in the burned area.

little factual analysis—to the Forest Service. Those two cases, however, represent the Ninth Circuit's necessary response to the decisions of previous panels, which went beyond agency deference to judicial rubber-stamping of USFS actions. Although agencies are entitled to substantial deference, that deference is not unlimited; agency decisions still must be reasonable and grounded in supportable fact. Up until the careful factual review in *Neighbors* and *Idaho Sporting Congress*, the Ninth Circuit had been expanding the hard look standard of review to the point where there was little—if any—meaningful judicial review of the facts upon which USFS based its decisions.

A situation in a federal circuit court such as that in the Ninth Circuit—where tension exists between a set of judges who neglect to engage in factual scrutiny and a set who believe that such an analysis is required—is problematic for several reasons. First, there is no clear consensus on what the law actually is in the Ninth Circuit. Some Ninth Circuit panels defer to USFS without careful review of the law or the factual setting of the case, whereas others engage in such an analysis. The reason why one panel produces different results in factually similar cases is based on the type of review conducted by the panel in an individual case.

Second, and most importantly, the present situation raises the question of whether *both* environmental plaintiffs *and* defendants can obtain an impartial decision maker who will carefully apply the law to the facts of the case. An old adage says that whether you win or lose in court depends on what the judge had for breakfast. The situation in the Ninth Circuit conjures a similar image.

This is not to say that *Neighbors*, *Idaho Sporting Congress*, and *Blue Mountains* are wrong or unfair decisions. Quite the contrary; the decisions represent the proper application of the arbitrary and capricious standard, which gives substantial deference to the agency while ensuring that the agency's conclusions are supported by a reasonable assessment of the facts. This collection of opinions demonstrates a pre-existing Ninth Circuit trend of showing the Forest Service unfettered discretion, and that it took a literal application of the law to correct that trend.

Ninth Circuit case law illustrates that unregulated deference to agency decisions is essentially equivalent to no meaningful judicial review at all. *Neighbors*, *Idaho Sporting Congress*, and *Blue Mountains* represent the proper application of the arbitrary and capricious standard of review, including the independent review of the facts behind the Forest Service's decisions. Only time will tell whether the Ninth Circuit will continue to engage in factually informed scrutiny of agency decisions and to strike the appropriate balance between agency deference on one hand, and assurance of agency compliance with environmental laws on the other, rather than indiscriminately condoning Forest Service actions under the guise of agency deference.