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Wild Wilderness v. Hurlocker—Forest Service did not act arbitrarily or capriciously in approving two timber-thinning and prescribed-burn projects under the Healthy Forest Restoration Act and without National Environmental Policy Act review

The United States Forest Service approved in 2018 timber thinning actions in the Hype Park Wildland Urban Interface Project and the Pacheco Canyon Forest Resiliency Project under the HFRA. Both projects lie northeast of Santa Fe, New Mexico, and cover in the aggregate 3982 acres. The actions consisted of tree thinning and prescribed burns "aimed to reduce the risk of high-intensity wildfires and tree mortality related to insects and disease." More specifically,

> [t]he thinning would target trees less than 16 inches in diameter. Trees larger than 16 inches in diameter would not be thinned except where disease or other unusual circumstances warrant it. The felled trees would then be piled. Subsequent prescribed burns would be utilized to reduce the thinned and piled material and otherwise treat the understory. These burns roughly approximate the effects of naturally occurring fires, which historically occurred every five to ten years, "clearing out the understory while the thick-barked, fire resistant over-story survived." ... Although not designed to affect the larger trees in the overstory, approximately 10 to 30 percent of the trees larger than 16 inches in diameter may succumb to the controlled burns.

In approving the actions, the Forest Service relied upon the Insect and Disease NEPA-review exclusion in HFRA, 16 U.S.C. § 6591b(a)(1), that provides "[e]xcept as provided in subsection (d), a project described in subsection (b) that is conducted in accordance with section 6591a(d) of this title may be ... considered an action categorically excluded from the requirements of Public Law 91-190 (42 U.S.C. 4321 et seq.)." None of exceptions listed in § 6591b(d) applied. Two environmental organization and individuals sought judicial review of the agency's actions under the Administrative Procedure Act, contending that "the Forest Service failed to comply with NEPA and its implementing regulations" and that the agency "violated the statutory requirements of HFRA." The Tenth Circuit rejected both claimed errors. *Wild Wilderness v. Hurlocker*, ___ F.3d ___, 2020 WL 3112652 (10th Cir. June 12, 2020).

The panel initially addressed Petitioners' argument that HFRA, by use of the term "categorically excluded," reflected "Congress's intent to incorporate the regulatory definition of 'categorical exclusion' and 'all that term entails' into the statutory provision." The NEPA-based definition, 40 C.F.R. § 1508.4, authorizes agencies to recognize such exclusions under limited circumstances but further requires that "[a]ny procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." The panel disagreed, reasoning that "[b]eginning with the text of the statute, the Insect and Disease exclusion omits any explicit requirement to perform extraordinary circumstances review. ... Where no explicit statutory requirements exist, we generally refrain from

reading any in." It added that two HFRA provisions, §§ 6554(d)(1) and 6591d(a)(2), created "extraordinary circumstances" exceptions to categorical NEPA-review exclusions, drawing the conclusion that "[w]here Congress intends extraordinary circumstances review to be required before an agency may rely on a statutory categorical exclusion, it says so explicitly." The panel then addressed Petitioners' argument that § 6591b obligated the Forest Service to consider the actions' cumulative impacts with respect to inventoried roadless areas because, "[a]ssuming, with deciding," such consideration was mandated, the agency's "conduct in this regard was sufficient under the APA—that is, neither arbitrary nor capricious." Thus, for example, "it considered the potential cumulative effects of the expected subsequent treatments in the project areas on sensitive species. It also considered the potential cumulative effects of thinning in multiple areas within the Fireshed on management indicator species and threatened and endangered species." The panel lastly rejected Petitioners' reliance on the potential impacts of future projects insufficient under the arbitrary, capricious standard given the projects' speculative scope.

The panel then turned to Petitioners' allegation that the Forest Service "violate[d] HFRA by failing to adequately (1) develop old growth, and (2) protect certain species of wildlife, namely the northern goshawk and the Abert's squirrel." As to the old growth consideration, it stated:

> The Forest Service classifies the forest in the project area as "young" based on the use of the Vegetative Structural Stage (VSS) methodology, which uses tree diameter most frequently represented to determine the age of a stand of trees. Where, as here, the forest contains a high prevalence of young trees, this method results in a classification of "young" despite the existence of older trees. Wild Watershed takes issue with this, arguing that because there are some ponderosa pines over 180 years-old—the threshold age to be considered "old growth" under the Forest Plan—in the area, it is nonsensical to classify the forest as young.

The panel first observed that Petitioners' position proved to much: "Under Wild Watershed's logic, the Forest Service would be precluded from classifying a forest as young due to the presence of a single older tree." But beyond that problem, the panel found itself precluded from "second guess[ing]" the agency's technical determination under the applicable APA standard teaching that "[w]here challenged agency decisions 'involve technical or scientific matters within the agency's area of expertise,' our deference to the agency is especially strong.'" It similarly rejected the assertion that the actions would "harm old growth development" in violation of HFRA, finding that "it is clear from the record that, left untreated, the forests in the project areas do not 'promote stands that are resilient to insects and disease'" and that "the Forest Service's decision to treat the forest in the project areas is consistent with HFRA's directives, even to the extent it has some impact on large trees." So, too, the actions' treatments were congruent with the relevant "Forest Plan's mandate to 'sustain as much old growth compositional, structural, and functional flow as possible over time at multiple-area scales' and enhance the attainment of old growth characteristics" given the fact that the treatments "will be beneficial in that they will 'encourage the remaining trees to grow into larger diameters.'"

As to wildlife, the panel deferred to the Forest Service's determination that "[t]he thinning will also allow medium size trees to 'become more healthy and thus increase their crown size,' resulting in increased canopy coverage and an improved [northern goshawk] habitat in the long term." The same conclusion applied with regard to the Abert's squirrel to the extent Petitioners were concerned over loss of canopy. And "[t]o the extent Wild Watershed is instead concerned about a lack of consideration of the squirrel itself, the Forest Service considered the projects' effects on

‘small mammals’ and many management indicator species whose habitat needs allow them to serve as surrogates for the Abert’s squirrel.”

Decision link: https://www.ca10.uscourts.gov/opinions/19/19-2106.pdf