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Oregon Natural Desert Ass'n v. U.S. Forest Service—USFS did not violate the National Forest Management Act in issuing grazing authorizations on Malheur National Forest allotments

The Oregon Natural Desert Association, together with other environmental groups, has engaged the United States Forest Service in litigation over grazing practices in the Malheur National Forest since 2003. Its fifth amended complaint alleged that the Forest Service violated the National Forest Management Act in issuing 11 grazing permits, five grazing permit modifications and 101 annual operating instructions on seven allotments adjacent to the Malheur and North Fork Malheur Rivers. Those rivers provide home for bull trout designated as a threatened species under the Endangered Species Act. ONDA specifically alleged that the Forest Service violated INFISH Standard GM-1 and Forest Plan Management Area 3A Standard 5. The first standard aims in part to “[m]odify grazing practices ... that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish” and the second to “[p]rovide the necessary habitat to maintain or increase populations of management indicator species: bull trout, cutthroat trout, and rainbow/reddband trout.” The district court adopted a magistrate judge’s findings and recommendations granting the agency’s amended motion for summary judgment. *Oregon Natural Desert Ass’n v. U.S. Forest Service*, No. 3:03-cv-0213-PK, 2018 WL 1811462 (D. Or. Apr. 16, 2018). The Ninth Circuit affirmed on May 1, 2020. *Oregon Natural Desert Ass’n v. U.S. Forest Service*, No. 18-35514, 2020 WL 2091108 (9th Cir. May 1, 2020).

The Ninth Circuit first rejected the Forest Service’s ripeness and mootness justiciability contentions. Recognizing that that the Supreme Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), “clarifie[d] that a party cannot challenge an entire agency management regime under the auspices of the APA[,]” the panel held that “[a]lthough ONDA pushes the boundary of ripeness by challenging a large number of grazing authorizations, the specifics of ONDA’s challenge persuade us that this lawsuit is sufficiently ripe.” A justiciable controversy existed notwithstanding the expiration of many of the challenged permits given ONDA’s concern over “the cumulative effect of grazing on bull trout habitats” and “a sufficiently live controversy which the court could address, for example, by ordering the Forest Service to suspend and/or minimize grazing on the allotments in question.”

On the merits, the panel found unpersuasive ONDA’s procedural challenge premised on the Forest Service’s alleged failure “to adequately ‘analyze and show’ [the grazing authorizations]’ consistency with Standards GM-1 or 5.” The precedent relied upon by ONDA, it reasoned, “all concern[ed] substantive violations of the NFMA contained within written analyses required by the National Environmental Policy Act ... review process. They do not stand for the proposition that the NFMA and the APA, on their own, require the Forest Service to ‘analyze and show,’ in a contemporaneous written document, that each of its actions conform to the applicable forest plan.” In contrast, prior circuit decisions have held “that ‘we [may not] impose ‘procedural requirements

[not] explicitly enumerated in the pertinent statutes.” ... We are mindful of the Supreme Court’s mandate that “[a]bsent constitutional constraints or extremely compelling circumstances the “administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’”” The Forest Service had not obligated itself “by statute, regulation, or caselaw to memorialize each site-specific grazing authorization’s consistency with the forest plan.”

ONDA’s substantive claims did not survive the APA’s deferential review standards. The panel “construe[d] ONDA’s appeal as implicitly challenging the substantive consistency of the challenged grazing authorizations” with the two standards. As to Standard GM-1, it could find no “clear error judgment” by the Forest Service in achieving such consistency:

It monitored riparian habitat conditions at local and watershed scales and considered the modification and suspension of grazing before, after, and during each year’s grazing season. Among other activities, it conducted annual monitoring in each allotment of several endpoint indicators (including stubble height, shrub browse, bank alteration, and upland utilization) designed to move stream characteristics toward RMOs; prepared Biological Assessments pursuant to the ESA at the allotment-level which explicitly analyzed conformity with RMOs and INFISH standards; analyzed RMO compliance through the PACFISH/INFISH Biological Opinion Effectiveness Monitoring Program (PIBO) throughout the entire period in question; and consulted informally in 2007 and formally in 2012 with the U.S. Fish and Wildlife Service (FWS), each time receiving FWS approval of the Forest Service’s determination that its proposed livestock management was “not likely to adversely affect” bull trout or bull trout critical habitat.

The panel added that “the grazing authorizations themselves contain specific measures protecting riparian habitats and make those measures subject to ongoing inspections and negotiations with Forest Service officers.” It further “defer[red] to the Forest Service’s expertise in determining whether, given the many factors at play, and given its extensive monitoring and enforcement activities protecting bull trout habitats, it must modify or suspend grazing activity in order to comply with Standard GM-1.”

The same reasoning applied to the consistency of the grazing permits with Standard 5:

Standard 5 requires that the Forest Service “[p]rovide the necessary habitat to maintain or increase populations of management indicator species: bull trout, cutthroat trout, and rainbow/redband trout.” ... [T]he record amply demonstrates that the Forest Service is actively engaged in protecting bull trout habitats from the effects of livestock grazing by monitoring the effects of grazing on various habitat indicators and implementing site-specific grazing limitations.

The panel “also note[d] that Standard 5 is a broad planning standard, one of fifty other standards that apply to this area, and thus it is challenging to enforce. Caselaw counsels against enforcing open-ended standards in fact-specific contexts.” The panel could not, moreover, “effectively mandate, as ONDA would have us do, that bull trout numbers increase, given the indirect language of Standard 5 and the causal complexity underlying the bull trout’s population decline.” Rather, “[t]he Forest Service’s ongoing site-specific monitoring, analysis, and enforcement activities aimed at protecting and improving bull trout habitats ... were reasonable means of ensuring consistency with Standard 5.”