

Endangered Species Act/National Environmental Policy Act: Federal Appellate Court Addresses Challenge to Bureau of Land Management Timber Sales



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a November 25th Memorandum a judicial challenge to the United States Bureau of Land Management (“BLM”) North Landscape Project (“North Project”) in the State of Oregon. See *Klamath-Siskiyou Wildlands Center, et al., v. Bureau of Land Management*, 2022 WL 17222416.

The judicial challenge alleged National Environmental Policy Act (“NEPA”) and Endangered Species Act (“ESA”) violations.

The North Project is described as BLM’s site-specific management approach for conducting annual timber sales in the Klamath Falls Resource Area in accordance with the 2016 Southwestern Oregon Resource Management Plan and Oregon & California Revested Lands Act.

The Federal Wildlife Service (“FWS”) is stated to have issued a Biological Opinion (“BiOp”) concluding that the North Project would not jeopardize the Northern Spotted Owl (“NSO”):

- as a species,
- modifying its critical habitat, nor
- result in an incidental take.

Further, BLM conducted an Environmental Assessment (“EA”) for the North Project, concluding that the action would have no direct effect on the NSO population and was consistent with its recovery as a species.

Klamath-Siskiyou Wildlands Center (“Klamath”) and others alleged:

- The BiOp violated the ESA
- The EA violated NEPA

A United States District Court rejected these allegations and Klamath appealed.

The Ninth Circuit upheld the United States District Court agreeing that neither NEPA nor the ESA were violated because:

- NEPA

- BLM took a hard look at the environmental consequences of the North Project
- The EA was not legally deficient when it tiered to the final Environmental Impact Statement because it contained project-level analysis such as potential loss of NSO habitat within the action area
- The revised EA provided BLM an analysis and separately evaluated new owl demographic data for the action area
- Indirect, direct, and cumulative effects on the NSO were assessed
- An EA was permitted (as opposed to an Environmental Impact Statement) because there was not an indication that the North Project was highly controversial or uncertain, establishing binding precedent, or adversely affecting the NSO
- ESA
- BiOp analyzed the North Project's impact on NSO critical habitat and conservation (i.e., which incorporates recovery of the species and is distinct from its mere survival)
- BiOp determined that the North Project would affect only a small portion of the NSO's critical habitat and less than 0.1 percent of NSO's total habitat
- The NSO's long lifespan, extensive range, and varied breeding ground were taken into account
- Deference to Fish and Wildlife Service scientific judgment and validity of its survey protocol was considered in upholding the determination of no incidental take
- Habitat degradation from adverse effects does not always equal harm sufficient to constitute incidental taking
- Klamath has not shown that survey protocol improperly deviates from past policy/practice and best available science (i.e., an individual biologist's preliminary determination that the survey protocol departed from prior procedure does not make the decision-making process arbitrary and capricious)

A copy of the Memorandum can be downloaded [here](#).