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Center for Biological Diversity v. Department of Interior: Proper Deference

INTRODUCTION

In *Center for Biological Diversity v. Department of Interior (CBD v. DOI)*, the Ninth Circuit held that the Bureau of Land Management (BLM) failed to comply with the National Environmental Policy Act (NEPA) and Federal Land Policy Management Act (FLMPA) in evaluating the environmental impacts of a proposed land exchange between the federal government and a mining company, Asarco, LLC.[1] The BLM assumed that mining would take place under both the no-action alternative and the proposed exchange. It thus neglected to consider the difference between the mining of public lands, which are subject to the Mining Law of 1872, and the mining of private lands, which are not.[2] Because of this omission, the majority reversed the district court's holding and concluded the BLM had not taken a "hard look" at the potential environmental impacts of the exchange, in violation of NEPA, and that the proposed land exchange was "arbitrary and capricious," in violation of FLPMA.[3]

In a strongly worded dissent, Judge Tallman claimed that the majority ignored the holding in *Lands Council v. McNair* (*Lands Council II*)[4] by not giving the BLM proper deference for such a complicated and lengthy decision.[5] While the court in *Lands Council II* attempted to provide a clear standard of deference, the plausibility of the dissent's argument in *CBD v. DOI* highlights the difficulty of establishing a bright-line standard. However, the level of deference afforded to the BLM in these two cases can be distinguished and justified by a closer look at the circumstances surrounding each particular agency action.

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1. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 581 F.3d 1063, 1072–76 (9th Cir. 2009).

2. *Id.*

3. *Id.* As FLPMA and NEPA contain no enforcement provisions, judicial review of actions taken under these statutes occurs under section 706 of the Administrative Procedures Act. 5 U.S.C. § 706(2)(E) (2009); *see also id.* at 1070.

4. Lands Council v. McNair (*Lands Council II*), 537 F.3d 981 (9th Cir. 2008) (en banc).

5. *Ctr. for Biological Diversity*, 581 F.3d at 1078 (Tallman, J., dissenting).

I. STATUTORY OVERVIEW

In *CBD v. DOI*, three statutes came into play: the Mining Law, NEPA, and FLPMA. First, under the Mining Law, private individuals are allowed to search for mineral deposits on public lands, lay claim to those deposits, and mine without purchasing the land or paying royalties.[6] However, the Mining Law requires those seeking to mine in any manner greater than a "casual use" to submit a Mining Plan of Operations (MPO) to the BLM.[7] The MPO must include information on the environmental impacts of the proposed mining activities and must satisfy a number of environmental standards to receive BLM approval.[8] Therefore, the need to obtain BLM approval of an MPO can "substantially affect the manner in which mining operations . . . occur."[9]

Second, Congress enacted NEPA with the goal of enabling people and nature "to exist in productive harmony."[10] NEPA sets forth procedures "that require agencies to take a hard look at environmental consequences" of a given agency action.[11] To satisfy NEPA's procedural requirements, agencies must prepare an Environmental Impact Statement (EIS) for all "major federal actions significantly affecting the quality of the human environment."[12] An EIS must discuss the "significant environmental impacts" of the proposed action, as well as "all reasonable alternatives."[13]

Third, FLMPA requires the BLM to manage public lands and resources in a way that recognizes the variety of values the land may have, including ecological and environmental values, and the possible uses of lands by the government and private individuals.[14] Thus, when considering a land exchange between the federal government and a private party, the BLM must draft a Record of Decision (ROD), weighing the advantages and disadvantages of the proposed exchange.[15] The BLM may only approve a land exchange when this analysis shows that "the public interest will be well served" by the exchange.[16] Therefore, both NEPA and FLMPA aim to ensure that agencies adequately evaluate the potential impacts of a given action prior to its approval.

6. *Id.* at 1071–72 (majority opinion); Scott W. Meier, *Mining Law, Approval of a Patent*, 30 LAND & WATER L. REV. 109, 1134-1-24 (1995).
7. *Ctr. for Biological Diversity*, 581 F.3d at 1072.
8. *Id.* at 1072–73; 43 C.F.R. § 3809.420 (2009).
9. *Ctr. for Biological Diversity*, 581 F.3d at 1073.
10. 42 U.S.C. § 4331(a) (2006).
11. *Ctr. for Biological Diversity,* 581 F.3d at 1070 (internal quotation marks omitted).
12. 42 U.S.C. § 4332(2)(C).
13. *Ctr. for Biological Diversity*, 581 F.3d at 1071; 40 C.F.R. §§ 1502.1, 1502.14(a) (2009).
14. *Ctr. for Biological Diversity*, 581 F.3d at 1075.
15. *See id.*
16. *Id*. at 1075–76; 43 U.S.C. § 1716(a) (2006).

II. BACKGROUND ON AGENCY DEFERENCE IN THE NINTH CIRCUIT

The Ninth Circuit addressed the issue of agency deference in a series of recent decisions. The court established an arguably low standard of deference in the 2005 decision of *Ecology Center v. Austin*,[17] which was overruled by an en banc clarification in *Lands Council II* in 2008.[18] The court continues to be divided on this issue, most recently in *CBD v. DOI*, where the level of deference given by the majority was staunchly rejected by the dissent as disregarding the holding in *Lands Council II*.[19]

A Forest Service old-growth habitat treatment plan, sparked by the 2000 wildfires in the Lolo National Forest, was at issue in *Ecology Center*.[20] The court held that the Forest Service's decision to permit logging on old growth forests and post-fire habitats was arbitrary and capricious.[21] The Forest Service failed to analyze how the logging would affect old-growth dependent species, as required by the National Forest Management Act (NFMA).[22] Because the EIS did not adequately address the uncertainties presented by the scientific evidence used by the Forest Service in making its decision, the proposal violated NEPA.[23] The court stated that an agency violates NEPA when its EIS is "so incomplete or misleading that the decisionmaker and the public can not make an informed comparison of the alternatives."[24] While the court noted that an agency is entitled to deference, it also ruled that there are "circumstances under which an agency's choice of methodology, and any decision predicated on that methodology, are arbitrary and capricious."[25]

The controversy in *Lands Council II* arose from a Forest Service approved logging proposal, which was to take place in the Idaho Panhandle National Forest.[26] Lands Council claimed that the proposal violated NEPA and NFMA, but the district court denied its request for a preliminary injunction. On appeal, a three-judge panel held in *Lands Council v. McNair (Lands Council I)* that Lands Council had proven a likelihood of success on the merits and irreparable injury, and thus reversed the district court.[27] The decision was revisited en banc, in order to "clarify some of [the] environmental jurisprudence with respect to [the

17. Ecology Ctr. v. Austin, 430 F.3d 1057, 1064–68 (9th Cir. 2005).
18. *Lands Council II*, 537 F.3d 981, 990 (9th Cir. 2008).
19. *Ctr. for Biological Diversity*, 581 F.3d at 1077.
20. *Ecology Ctr.*, 430 F.3d at 1061.
21. *Id.*
22. *Id.* at 1065.
23. *Id*.
24. *Id.* at 1067.
25. *Id.* at 1064.
26. *Lands Council II*, 537 F.3d 981, 984 (9th Cir. 2008) (en banc).
27. Lands Council v. McNair (*Lands Council I*), 494 F.3d 771, 780 (9th Cir. 2007).

court's] review of the actions of the . . . Forest Service."[28] This en banc decision held that the court is required to "defer to an agency's determination in an area involving a high level of technical expertise."[29] The court overruled *Ecology Center* and created a new standard of deference. A court should only overrule an agency decision if the agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency."[30]

III. *CBD V. DOI*: AN OVERVIEW

In *CBD v. DOI*, Asarco was already mining public lands, which the BLM sought to exchange for Asarco's private land.[31] Under the Mining Law, Asarco would still be required to submit an MPO to the BLM for approval before undertaking new mining operations on public lands, should the land exchange not take place.[32] On the other hand, if Asarco were to take fee simple in those public lands pursuant to the proposed exchange, Asarco would no longer be required to comply with the Mining Law, and so would not need to submit MPOs to the BLM for approval.[33] This difference was not recognized in the BLM's final EIS for the proposed land exchange, as required by NEPA; instead, the final EIS merely stated that the "foreseeable uses of the [public] lands are mining-related uses and are expected to occur under all alternatives."[34] Additionally, the ROD, required under FLMPA, erroneously concluded that "mining would be conducted in the same manner whether or not the exchange occurred."[35] The majority cited this omission as a failure to conduct the necessary comparative analysis, which led it to conclude that the BLM failed to take a "hard look" at environmental effects, and thus acted in an "arbitrary and capricious" manner.[36]

The majority opinion only noted in passing that it must give deference to a "fully-informed and well-considered" agency decision, but should strike down a "clear error of judgment."[37] The dissent, on the other hand, focused on the majority's failure to adhere to the standard of deference set down in *Lands Council II*: "the life of a canary in a coal

28. *Lands Council II*, 537 F.3d at 984.
29. *Id.* at 993 (internal quotation marks omitted).
30. *Id.* at 987 (quoting Sierra Club v. EPA, 346 F.3d 955, 961 (9th Cir. 2003)).
31. Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 581 F.3d 1063, 1066 (2009).
32. *Id.* at 1065.
33. *Id.*
34. *Id.* at 1068 (emphasis omitted).
35. *Id.* at 1069.
36. *Id.* at 1065.
37. *Id.* at 1070.

mine can be described in three words: short but meaningful. So too apparently was the life of our decision in *Lands Council* [*II*]."[38] The dissent argued that proper deference had not been given to the BLM's decision, as their failure to consider the difference between the land exchange and the no-action alternative was a "single exception" in a 15-year record.[39] Therefore, the majority incorrectly allowed this one exception to be "the linchpin" in the BLM's reasoning, resulting in a holding that "undermine[d] a complicated agency action."[40]

IV. ANALYSIS: PROPER DEFERENCE IN *CBD V. DOI*

The contentions made by the dissent point to the difficulty of establishing a clear rule of deference that is applicable across a spectrum of cases. While the argument that the majority did not give proper deference as outlined in *Lands Council II* is plausible, the two cases are distinguishable. The lower standard of deference in *CBD v. DOI* is consequently justified.

The dissent failed to note that the issue in *Lands Council II* concerned the validity of scientific information used in making an agency decision.[41] In contrast, the issue in *CBD v. DOI* was the lack of analysis itself, resulting in procedural inadequacy.[42] In *CBD v. DOI*, the "linchpin" that the dissent refers to is one of a legal nature—the BLM's failure to consider the actual state of the no-action alternative—and thus squarely falls within the discretion of the court.[43] Therefore, the very particular standard of deference to technical agency decisions established in *Lands Council II*, albeit instructive, is not necessarily binding in this instance.

Further, the majority in *CBD v. DOI* ruled in accordance with more general principles of deference outlined in *Lands Council II*.[44] The majority's main point of contention can easily be labeled a failure "to consider an important aspect of the problem," or an "explanation that runs counter to the evidence," which *Lands Council II* held could justify a court overturning an agency decision.[45]

38. *Id.* at 1077 (Tallman, J., dissenting).
39. *Id.* at 1078.
40. *Id.*
41. *See Lands Council II*, 537 F.3d 981, 988 (9th Cir. 2008).
42. *See Ctr. for Biological Diversity,* 581 F.3d at 1077.
43. *See id.* at 1078 (Tallman, J., dissenting).
44. *See Ctr. for Biological Diversity,* 581 F.3d at 1077; *Lands Council II*, 537 F.3d at 987.
45. *See Ctr. for Biological Diversity,* 581 F.3d at 1077; *Lands Council II*, 537 F.3d at 987 (quoting Sierra Club v. EPA, 346 F.3d 955, 961 (9th Cir. 2003)).

CONCLUSION

The majority in *CBD v. DOI* did not step beyond its bounds by acting "as a panel of scientists" in an agency action that required a high level of expertise, as was arguably the case in *Lands Council II*, but rather made a procedural legal analysis to determine whether or not the BLM made a "clear error of judgment."[46] While the Ninth Circuit may have intended to lay down a concrete standard of deference owed to agency decisions in *Lands Council II*, the dissenting opinion in *CBD v. DOI* highlights the difficulty, if not impossibility, of doing so.

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46. *Lands Council II*, 537 F.3d at 988, 993.

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.