Forest Guardians v. United States Forest Service: All Cattle, No Wildlife - Balanced Use of Range Land

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Revisiting the ever-controversial subject of cattle grazing on environmentally sensitive federal lands, the Ninth Circuit in *Forest Guardians v. United States Forest Service* deferred to the United States Forest Service’s (the Service) decision to remedy overgrazing on National Forest lands in Arizona by reducing grazing while allocating all available forage to livestock. The court rejected claims by environmental organizations (collectively Forest Guardians) that the Service violated federal statutory mandates and its own regulations by improperly issuing temporary permits and failing to balance grazing use with environmental concerns. Carefully parsing the statutes and deferring greatly to the Service’s authority in the matter, the court concluded that the continuation of known overgrazing patterns represents a sufficient “balance” between the needs of permit holders and foraging wildlife.

The Forest Service is responsible for managing 191 million acres of land in the National Forest System under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA) and the Multiple-Use Sustained-Yield Act of 1960 (MUSYA). The Service makes management decisions by developing a Land and Resource Management Plan (Forest Plan) for each unit of the National Forest System, and then implements it by approving or disapproving site-specific actions consistent with that plan. In developing the Forest Plan, the Service must “provide for multiple use and sustained yield” of forest products and services “in accordance with [the MUSYA] and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife conservation, and multiple uses.”
and fish, and wilderness."\(^7\) The NFMA also requires the Service to consider the "economic and environmental aspects of various systems of renewable resource management,"\(^8\) and to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives."\(^9\) Forest Plans must also comply with the National Environmental Policy Act of 1960 (NEPA)\(^10\) and the Endangered Species Act (ESA).\(^11\)

In 1996, in accord with its Forest Plan for the Apache-Sitgreaves National Forest, the Service began to develop Allotment Management Plans (AMPs) for six livestock grazing allotments. At that time grazing capacity estimates indicated overstocking and over utilization of vegetation on the rangelands by both livestock and wild ungulates,\(^12\) and the Service concluded that the grazing permits had to be revised to comply with the Forest Plan and applicable environmental laws. The Service therefore cancelled existing permits on two allotments and issued new permits with modified terms. The new permits provided for a gradual, three-year reduction of the number of cattle allowed to graze, allocated 100% of the available forage\(^13\) to the cattle, and reserved to the Service the power to issue temporary permits to vary the number of grazing cattle in order to "experiment" with the management strategy for the allotments.\(^14\)

A. Forest Guardians Challenged the Validity of the Service's Actions

Forest Guardians challenged the Services' actions on three grounds.\(^15\) First, they argued that the phased-in reduction and allocation of all available forage to the cattle violated the consistency provision of the NFMA, because the Forest Plan required balancing grazing capacity with use and environmental concerns.\(^16\) Second, Forest Guardians argued that the Service's own regulations did not permit it to issue temporary permits

\(^7\) 16 U.S.C. § 1604(e)(1).
\(^8\) § 1604(g)(3)(A).
\(^9\) § 1604(g)(3)(B).
\(^10\) Specifically, the Service must prepare an EIS for every "major Federal action [] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2000).
\(^12\) [1.e., hoofed animals such as deer, big horn sheep and elk.] Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1093 (9th Cir. 2003).
\(^13\) Available forage is that which can be "consumed or trampled by any ungulate, wild or domesticated, without damage to the environment." \textit{Id.}
\(^14\) \textit{Id.}
\(^15\) \textit{Id.}
\(^16\) On appeal, Forest Guardians also challenged the district court's refusal to admit monitoring evidence from 2000 that demonstrated overgrazing on two of the allotments, arguing that its ESA claims were not limited to administrative record review. \textit{Id.} at 1093-94. But, as explained \textit{infra}, because the Court of Appeals found that Forest Guardians' ESA claims were moot when brought, it also, without further analysis, dismissed as moot the monitoring data claim. \textit{Id.} at 1096.
for purposes of experimenting with management. Third, they argued that the Service's actions violated a 1999 Biological Opinion (BO) in which the U.S. Fish and Wildlife Service (FWS) determined that unless cattle grazing was significantly reduced and harmonized with use by wild ungulates, the resulting overuse would result in a "take" of the loach minnow and the Mexican spotted owl in violation of sections seven and nine of the ESA.

B. The Court Upheld the Service's Actions

The Service initially responded that all of Forest Guardians' claims were moot. It argued: (1) that the challenge to the phased-in reduction plan was moot because the three-year permits at issue had expired; (2) that the challenge to its proposal for issuing temporary permits in order to experiment with management techniques was mooted by a later Decision Notice announcing the Service's intention to comply with the regulations; and (3) that Forest Guardians' ESA claims were moot because they were based on an outdated BO, which had been superseded by Biological Assessment and Evaluations (BAEs) concluding that no take would occur from further grazing activity on the allotments in question. The Court of Appeals disagreed with the Service's first argument, but agreed with the latter two.

The court rejected the Service's first mootness defense, finding that the expiration of the grazing permits did not in itself moot Forest Guardians' claim because effective relief was still available to remedy the challenged activity. The court agreed, however, that the Service's later Decision Notice expressing its intention to comply with its regulations in issuing temporary permits mooted the challenge to its statutory authority to do so, rejecting the argument that the "voluntary cessation" exception to the mootness doctrine applied. The court also accepted the Service's argument that Forest Guardians' ESA claims were moot because the BOs relied on by Forest Guardians had been superseded by the 1998...
BAEs, which concluded that the allowed grazing would have either "no effect" on or was "not likely to adversely affect" listed species.\textsuperscript{22}

Turning to the substantive questions, the court rejected Forest Guardians' claims that the Service's actions failed to achieve the required balance between grazing capacity and environmental concerns. The court held that the Service's decisions to reduce grazing over a three-year period and to allocate 100% of available forage area to cattle at the expense of other wildlife were not inconsistent with the Apache-Sitgreaves Forest Plan, and therefore did not violate the NFMA.

Judicial review of agency decisions under the NFMA is governed by the Administrative Procedure Act, and the court proceeded under that statute's deferential, "arbitrary and capricious" standard of review.\textsuperscript{23} Under this standard, when an agency is interpreting its own regulations a court will limit itself to determining whether the agency's interpretation is "not plainly erroneous nor inconsistent with the regulation."\textsuperscript{24} Taking full advantage of this deferential stance, the Court of Appeals upheld the Service's actions.

The Ninth Circuit first disagreed with the district court's rationale that the phased-in reduction scheme was permitted by a provision of the Code of Federal Regulations\textsuperscript{25} authorizing the Service to modify the number of livestock allowed on a given allotment. Because the Service had cancelled the old permits, this modification provision did not apply.\textsuperscript{26} Rather, asserting its power to affirm on any ground supported by the record and briefed by the parties,\textsuperscript{27} the Court of Appeals found support for the Service's decision in a provision of the regulations authorizing the agency to issue permits with "[u]pper and special limits governing the total number of livestock for which a person is entitled to hold a permit."\textsuperscript{28} "The phased-in reduction scheme [was] thus," according to the court, and without further explanation, "a permitted limit on the number of livestock a permittee can graze on his allotment."\textsuperscript{29}

The court then determined that the Service's decision to make gradual rather than immediate reductions in grazing was consistent with the Forest Plan's requirement that capacity and permitted use be

\textsuperscript{22} Forest Guardians, 329 F.3d at 1096. Further, FWS had concurred with this conclusion in a 1998 letter, thereby satisfying the consultation requirement. \textit{Id.}

\textsuperscript{23} The court may overturn the agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2000); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1065 (9th Cir. 2002).

\textsuperscript{24} Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal cites and quotation marks omitted); Vincent v. Apfel, 191 F.3d 1143, 1148 (9th Cir. 1999).

\textsuperscript{25} 36 C.F.R. § 222.4(a)(8) (2003).

\textsuperscript{26} Forest Guardians, 329 F.3d at 1097.

\textsuperscript{27} U.S. v. Gonzalez-Rincon, 36 F.3d 859, 866 (9th Cir. 1994).

\textsuperscript{28} 36 C.F.R. § 222.3(c)(1)(vi)(E) (2003).

\textsuperscript{29} Forest Guardians, 329 F.3d at 1097.
IN BRIEF

balanced, simply citing MUSYA and the NFMA for the proposition that the Service is "required by federal law to consider the use of National Forest lands for grazing of livestock," and to consider permittee concerns in doing so.31

The court also rejected Forest Guardians' claim that a phased-in reduction impermissibly relied on "permittee hardship" for justification,32 noting that the Federal Land Policy and Management Act (FLPMA) requires the Service to develop AMPs "in careful and considered consultation, cooperation and coordination with the lessees, permittees and landowners involved."33 Although the Service admitted that overgrazing had occurred in the past on the very allotments on which it was now allowing continued grazing, the court found the phased-in reduction scheme to be a reasonable response to the agency's duty to balance capacity and permitted use, and to its "burden to consider the permittees when making management decisions."34

The court then turned its deferential focus on the remaining claim, that the Service's decision to allocate 100% of the available forage to cattle, despite the fact that elk and deer were known to inhabit the allotments and use the same forage, was inconsistent with the Forest Plan's requirement that the Service consider neighboring wildlife.35 The Service argued that it took account of the needs of ungulates through forage monitoring and projected use calculations, and that it could prohibit or remove livestock regardless of scheduled grazing periods depending on those projections.36 The court agreed that this arrangement was consistent with the NFMA, rejecting Forest Guardians' contention that the terms of the Forest Plan did not authorize the consideration of monitoring in setting grazing capacity.37

Forest Guardians contended that the Service's actions were inconsistent with its own definition of "grazing capacity," defined as the "maximum stocking rate possible without inducing damage to vegetation or related resources."38 Noting that the planned grazing period at issue was the ten-year duration of the grazing permits, that the Service had granted permission for enough livestock to graze or trample 100% of the

30. Id.
31. Id.
32. Id.
34. Forest Guardians, 329 F.3d at 1098.
35. Id.
36. Id.
37. Id.
38. Id. at 1098. "Stocking rate" is defined as "the number of specific kinds and classes of animals grazing or utilizing a unit of land for a specified time"; and, "overstocking" is defined as "placing a number of animals on a given area that will result in overuse if continued to the end of the planned grazing period." Id. at 1098-99.
available forage without even considering wild ungulates, and that the allotments in question had been overgrazed despite past monitoring programs, Forest Guardians argued that implementing the monitoring program was itself arbitrary and capricious. Nevertheless, the court found that the Service had "articulated a rational connection between the facts found and the choice made." Although monitoring had failed in the past and overgrazing had in fact occurred, there was no evidence that the failure of monitoring was the "but-for cause of that overgrazing." Recognizing the past overgrazing, "the Service maintained its efforts to monitor the use of the land, a rational decision given that wild ungulate populations and their effects on the land are extremely difficult to predict." The court went so far as to quote Justice O'Connor's famous remark that courts must be at their most deferential when an agency "is making predictions, within its area of special expertise, at the frontiers of science."

Dissenting from the majority's conclusion that allocating all available forage to livestock and monitoring the use of the land was consistent with the Forest Plan, Judge Paez noted that the Forest Plan required the Service to consider the grazing needs of wild ungulates in determining the amount of forage available for livestock, and that allocating 100% of forage to the cattle was inconsistent with this mandate, and thus with the NFMA. Apparently agreeing with Forest Guardians' argument that the monitoring was either contrary or irrelevant to achieving consistency with the Forest Plan, Judge Paez emphasized that the regulations and Forest Plan make it clear that the Service must determine "how many livestock and wild ungulates can graze on the land without damaging vegetation or related resources—prior to issuing the grazing permits."

Further, monitoring has a specific purpose under the Forest Plan, namely to "perform utilization studies... as needed to monitor accomplishments of stated multi-use objectives." Thus, the language of the Forest Plan suggests that the Service can only use monitoring to assess allotments after it has determined their grazing capacities, not to determine grazing capacity in the first place. Thus, Judge Paez

39. Id. at 1099.
41. Forest Guardians, 329 F.3d at 1099.
42. Id.
44. Id. at 1100 (Paez, J., dissenting in part and concurring in part).
45. Id. at 1101 (emphasis in original).
46. Id. (emphasis added by Paez, J.).
47. Id.
concluded that "allocating available forage to livestock and monitoring use of the land is inconsistent with the Forest Plan and is arbitrary and capricious."48

In Forest Guardians, the Service's own facts demonstrated that, despite past monitoring, allocating 100% of forage to cattle resulted in overgrazing of allotments inhabited by wild ungulates. Nevertheless, deferring to the Service's judgment in this area, the Ninth Circuit held that persisting in this approach represented a rational and "balanced" use of National Forest lands, and that the Service's actions were not clearly erroneous or inconsistent with statutory mandates. The court also held, without elaboration, that phased-in reductions are valid as "upper or special limits" on grazing permits.

That the Service is reducing grazing on National Forest Lands is commendable, and a tribute to the effectiveness of our environmental statutory framework. A three-year phased-in reduction is better than none, and perhaps the Service's monitoring will, in fact, result in an improved and better-managed Forest Plan. As Judge Paez made clear in his dissent, however, the conformity of this approach to statutory requirements remains questionable.

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48. Id.