

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH SISKIYOU WILDLANDS
CENTER, OREGON WILD, CASCADIA
WILDLANDS, and SODA MOUNTAIN
WILDERNESS COUNCIL,
Plaintiffs,

Case No. 1:19-cv-02069-CL

FINDINGS AND RECOMMENDATION

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT,
Defendant,

and

MURPHY COMPANY,
Defendant-Intervenor.

CLARKE, Magistrate Judge:

Plaintiffs Klamath Siskiyou Wildlands Center, Oregon Wild, Cascadia Wildlands, and Soda Mountain Wilderness Council (collectively, "Plaintiffs") moved for summary judgment against defendant Bureau of Land Management (BLM) on their two Administrative Procedures

Act claims for violations of the National Environmental Policy Act (NEPA). Defendant BLM and defendant-intervenor Murphy Company (Murphy) filed cross-motions for summary judgment, and oral argument was held on August 25, 2020. For the reasons stated below, each of the parties' motions should be granted in part and denied in part.

BACKGROUND

This action concerns the BLM's authorization of a timber sale in southern Oregon known as the Griffin Half Moon Vegetation Management Project ("the Project"). Authorized in August 2018, the Project allows 932 acres of commercial timber harvest on lands formally designated for timber harvest in the BLM's 2016 Resource Management Plan (RMP) and the Oregon and California Lands Act, 43 U.S.C. § 2601, *et seq.* Murphy, who moved to intervene on January 24, 2020, is as a timber supplier that will perform the commercial harvest authorized by the Project.

Under the Federal Land Policy Management Act (FLPMA), public lands must be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). The BLM is required to manage public lands to conserve and recover species listed by the Endangered Species Act (ESA). 16 U.S.C. § 1531 *et seq.* The BLM is also required to analyze and disclose the environmental consequences of its actions. Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1100 (9th Cir. 2010).

Pursuant to these obligations, the BLM adopted a RMP for the Griffin Half Moon Planning area, which includes the Project area, in 2016. The 2016 RPM governs the BLM's management of approximately 1.2 million acres of land, including lands in its Medford District. AR 6271. Under the 2016 RMP, the BLM designated about 20 percent of these lands as "harvest land base" to be

managed for timber production. The RMP also designated 31 percent of BLM-managed acreage as late-successional reserves, and another 15 percent as riparian reserves.¹

The Project at issue in this lawsuit is located on lands that are “checkerboarded,” meaning every other square mile of public, BLM-managed land alternates with land managed by other landowners, primarily industrial timberland companies. It authorizes logging on 932 acres of forest through ground-based harvest methods, and is expected to produce about 9 million board feet of timber. The harvest techniques authorized by the Project include commercial thinning and “regeneration harvest,” colloquially known as “clear cutting” because nearly all of the trees are cleared from the harvested area. The proposed harvest techniques will reduce the canopy cover retention by an average of 30 percent.

Before authorizing the Project, the BLM performed an environmental assessment (EA) of the Griffin Half Moon timber sale. This EA was published for public comment on June 8, 2018. Plaintiffs timely submitted comments on the EA, contesting the sale because of the Project’s anticipated effects on the habitats of the great gray owl and Pacific fisher. The Griffin Half Moon Planning Area is home to both species. In 1994 the BLM and the Forest Service listed the great gray owl as a “Survey and Manage” species due to concerns about their persistence. At the time, this designation required federal land management agencies like the BLM to survey for the species and protect it from disturbance with no-harvest buffers. At the time of the 2016 RMP, however, the great gray owl had no special status. The Pacific fisher is listed as a sensitive species.

After consideration of Plaintiffs’ comments and other public concerns, the BLM released a revised environmental assessment (REA) along with a Decision Record on August 15, 2018. The

¹ The BLM successfully defended its 2016 land management approach against a NEPA complaint in the Ninth Circuit in May 2020. Pacific Rivers v. U.S. Bureau of Land Mgmt., 2020 WL 2510759 (9th Cir. May 15, 2020).

REA does not mention great gray owls, but rather refers back to the RMP and its Final Environmental Impact Statement. The fisher is mentioned in the REA's Appendix C, which refers back to the RMP FEIS and suggests that the Pacific fisher will find other habitat while the Project's timber harvest takes place, stating: "fishers are highly mobile and, with large home ranges, they would likely move to another part of their home range while the activity is taking place." AR 003360.

Unsatisfied with the BLM's consideration of the Project's effects on the Pacific fisher and great gray owls within the planning area, Plaintiffs filed this action against the BLM on December 20, 2019. In their Complaint, they allege that the BLM's authorization of the Project was arbitrary and capricious, in violation of the National Environmental Protection Act (NEPA).

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, if any, show "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). Substantive law on an issue determines the materiality of a fact. T. W. Elec. Servs., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict or the nonmoving party determines the authenticity of the dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply when evaluating a summary judgment motion: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T. W. Elec., 809 F.2d at 630.

DISCUSSION

Plaintiffs allege that the BLM failed to address the Project's environmental consequences to great gray owls or to Pacific fishers and is therefore arbitrary, capricious, and not in accordance with NEPA. Because NEPA does not contain provisions for judicial review, Plaintiffs bring these claims under the Administrative Procedure Act (APA). Defendants both argue that Plaintiffs have not shown a fact issue for trial on either claim.

I. Legal Standards

The purpose of NEPA is twofold: (1) to ensure that agencies carefully consider information about significant environmental impacts in proposing actions, and (2) to guarantee relevant information is available to the public. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

"NEPA does not require particular environmental standards or mandate that agencies achieve substantive environmental results." Greater Yellowstone Coal v. Lewis, 628 F.3d 1143, 1150 (9th Cir. 2010). "NEPA merely prohibits uninformed—rather than unwise—agency action." Robertson, 490 U.S. at 351. Thus, NEPA "guarantees a particular procedure;" "the rights and obligations it creates are fundamentally unlike those of substantive land management statutes like the Federal Land and Policy Management Act." Pacific Rivers v. U.S. Bureau of Land Mgmt., 2018 WL 6735090, *7 (D. Or. Oct. 12, 2018). In general, courts are "most deferential when

reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." Native Ecosystems Council v. Weldon, 697 F.3d 103, 1051 (9th Cir. 2012).

Under the APA, a reviewing court will uphold an agency action unless it finds the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Ctr. For Env'tl. Law and Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1005 (9th Cir. 2011). This standard is "highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." Kern Cnty. Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006).

An agency action is arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

II. Great Gray Owls

Plaintiffs first challenge the BLM's approval of the Project because it failed to implement appropriate measures to protect great gray owls. Specifically, Plaintiffs allege that (i) the revised EA fails to contain a site-specific analysis of the Project's effects; and (ii) the 2016 RMP FEIS, to which the REA tiers, also fails to address the environmental consequences of the Project on great gray owls. Plaintiffs therefore claim that approval of the Project was therefore arbitrary and capricious, and not in accordance with NEPA. See Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43 (1983).

i. The Revised Environmental Assessment

NEPA requires that the BLM address all significant issues before approving a project. The BLM's own survey protocol explains that regeneration harvest and heavy commercial thinning – authorized in the Project – is “generally expected to result in significant negative effects on habitat, life cycle, microclimate or life support systems or persistence of Great Gray Owls at the project location.” AR 013960. Nevertheless, defendants argue that the Project includes sufficient protections for great gray owls in its revised EA. Here, the BLM states that the Project protects great raptor nest trees and seasonally restricts project activities within a quarter mile of known raptor sites. While the Project contains design features for the protection of raptors in general, which include the great gray owl, these features require only the seasonal protection of known nest trees.

In its briefing, the BLM also points to research in the administrative record suggesting that great gray owls are adapted to catching prey in open habitats and early forest successional stages and can likely persist within areas where there is timber harvest. However, the suggestion that the great gray owl *may* persist within the Project area does not constitute a site-specific analysis. This speculation and the provision of temporary, seasonal protections in the REA do not meet the NEPA standards of site-specific analysis. The REA thus does not adequately discuss the Project's direct, indirect, and cumulative effects on the three known great gray owl sites located within the planning area that were buffered by the BLM in previous timber sale planning efforts.

ii. 2016 Regional Management Plan Final Environmental Impact Statement

Defendants argue that the BLM complied with NEPA through its reliance on Appendix C to the REA, which refers to the NEPA analysis within the RMP and 2016 FEIS. The BLM contends that because it tiered to the existing NEPA analysis in the RMP and 2016 FEIS, requiring further

NEPA review for an undesignated species would run counter to NEPA's purpose to avoid unnecessary paperwork. 40 C.F.R. § 1500.4(c).

In Appendix C of the REA, the BLM tiered its analysis to the 2016 Final Environmental Impact Statement (FEIS) by reference. Tiering is the incorporation of a broad programmatic analysis into a subsequent site-specific analysis. Under NEPA, tiering is permitted when the broad programmatic analysis incorporated by reference conducts a site-specific analysis. 'Ilio'ulaokalani Coal v. Rumsfeld, 464 F.3d 1083, 1094-94 (9th Cir. 2006). The BLM argues that the 2016 FEIS examines the effects of timber harvest on great gray owls, and the Project, through tiering, implements this analysis, thus satisfying NEPA. Because it tiered to the 2016 FEIS, argue defendants, the BLM was therefore entitled under NEPA not to prepare further analysis regarding great gray owls.

Tiering is appropriate where a Resource Management Plan contemplates specific activities within a planning area. See Native Ecosystem Council v. Judice, 2019 WL 1131231 at *4 (D. Mont. 2019). "[W]hen a programmatic EIS does adequately consider the impacts of subsequent site-specific projects, a subsequent NEPA document need not repeat that analysis unless new and significant environmental impacts arise that were not previously considered." Native Vill., 432 F.Supp. 3d at 2015. Here, however, the Resource Management Plan FEIS adopted in 2016 does not consider the impacts of the site-specific Project on great gray owls. Instead, the 2016 FEIS considers the general consequences of adopting a land management plan that covers 2.6 million acres without any site-specific analysis of the Project area. AR 007197-98.

In 2016 the BLM discontinued the Survey and Manage provisions that once protected the great gray owl in favor of a different management framework, and the RMP eliminated substantive protections for great gray owls. Plaintiffs previously challenged this change in management policy

under NEPA but this Court rejected the challenge. Pacific Rivers, 2018 WL 6735090, at *8 n. 10. While the Ninth Circuit affirmed that the BLM provided a “reasoned explanation” for any change from its prior management approach under the NWFP, the issue in Pacific Rivers was neither the Survey and Manage program nor great gray owls. Pacific Rivers, __Fed. App’x__, 2020 WL 2510759, at *2. The BLM has yet to explain to this Court why it declined to protect the great gray owl in the RMP, and despite the great gray owl’s recent status as a Survey and Manage species, there is limited reference to the species in the 2016 RMP and FEIS.

The RMP and 2016 FEIS specifically discuss the great grey owl only to state that they are at risk and that the species’ status would be unknown after the termination of the Survey and Manage protocols. The 2016 FEIS refers to a prior, legally invalidated analysis of effects to great gray owls within the Planning area that concluded there would be insufficient habitat within the species’ range, and that persistence of the species was at-risk because of inconsistent protections in individual management plans. See Conservation Nw. v. Rey, 674 F.Supp. 2d 1232 (W.D. Wash. 2009); AR 008065-66. In all, the 2016 FEIS simply does not contain a site-specific analysis to assess the environmental consequences on great gray owls within the Griffin Half Moon Planning Area. Thus while defendants argue that by tiering to the 2016 FEIS the REA satisfied its NEPA requirements with respect to the great gray owl, the FEIS does not contain a site-specific, Project-level analysis, and therefore “cannot save” the REA. Klamath-Siskiyou Wildlands Ctr. V. Bureau of Land Mgmt., 387 F.3d at 997.

Defendants argue that because the 2016 FEIS addressed effects on the great gray owl across the entire planning area, which includes the BLM Medford District and its harvest land base acreages, they satisfied their duties under NEPA. The RMP provides explicit protections to great gray owls by delimiting enhanced reserve lands, a provision expected to increase the species’

habitat over time. The BLM's management of the species under the RMP, defendants argue, is thus provided not by protecting nest sites in the Harvest Land Base (where the Project is located) but by the protection of a large Late-Successional Reserve Network. AR 003341. Nearly two-thirds of the total known sites for great gray owls in the Planning Area are within this Reserve Network, and most "actual known sites" will therefore continue to be protected even after implementation of the Project. Unfortunately, however, the Project is not located in this late successional reserve land use allocation: it is located in the Harvest Land Base. Nothing in the law allows the BLM to rely on suitable habitat in reserve land use allocations as a substitute for conducting a site-specific project-level analysis. Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 997. The Reserve Network land allocation in the 2016 FEIS is therefore irrelevant to the specific effects of the Project on great gray owls within the Planning Area.

In sum, while the 2016 RMP allocates a large network of reserve lands for great gray owls and predicts a long-term increase in species habitat, it fails to contain a site-specific Project area analysis of effects on great gray owls. Great gray owls are a precarious species subject to high public interest. Although the Project implements a timber management plan directed under the 2016 RMP and FEIS, the BLM's approach to assessing effects on the great gray owl – within the REA and through tiering – is not supported under NEPA. The BLM's decision record contains no meeting notes, memos, reports, or other documentation showing that it looked at any effects analysis for great gray owls allegedly contained in the RMP or 2016 FEIS, or that they undertook an intentional examination of the site-specific environmental consequences of the Project on the species. Because the BLM failed to consider an important aspect of the problem of threats to great gray owls, its approval of the Project was arbitrary and capricious. Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43 (1983). For these reasons, both defendants' motions for summary judgment

should be denied as to Plaintiff's NEPA claim regarding the Project's effects on the great gray owl. Plaintiff's motion on this claim should be granted.

III. The Pacific Fisher

Plaintiffs next argue that the BLM failed to comply with NEPA in assessing the Project's effects on the Pacific fisher, a Bureau Sensitive Species. Plaintiffs specifically allege (i) the use of an appendix in the REA was illegal; (ii) the BLM improperly tiered to the 2016 FEIS and RMP; and (iii) the BLM ignored the perilous status of the Pacific fisher.

i. Appendix C to the Revised Environmental Assessment

In its revised EA, the BLM incorporated by reference its Pacific fisher effects analysis from the 2016 FEIS. The 2016 RMP environmental analysis to which the Project tiers analyzed the full effects of implementation of the BLM's forest management program on the fisher and found essentially no effect on the species. The BLM provided Project-specific information supporting its finding that further NEPA study was not required. The REA's reference to the fisher can be found in its Appendix C.

Plaintiffs argue that the BLM's use of an appendix to discuss the Project's effects on the Pacific fisher was technically illegal under 40 C.F.R. § 1502.18. 40 C.F.R. § 1502.18 however sets out rules for the preparation of an appendix within an environmental impact statement. Thus, 40 C.F.R. 1502.18 applies only in the context of an EIS, not an environmental assessment. In the Ninth Circuit, a NEPA regulation specific to an EIS does not apply to an environmental assessment. Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1020 (9th Cir. 2012).² While plaintiffs also point out that the BLM's NEPA regulations state that an appendix may be used in conjunction with an EIS, citing 43 C.F.R. § 46.430(a), Plaintiff's conclusion that an appendix is never permitted

² Plaintiffs also acknowledge that the information supporting an agency decision may be in the administrative record and referenced by the EA.

in an EA does not follow from this point. The location of the analysis of impacts to the fisher in an appendix to the REA was not inappropriate. 43 C.F.R. § 46.315(b) requires that “the portion of the document that analyzes the environmental impacts of [a] proposal and alternatives must be clearly and separately identified and not spread throughout or interwoven into other sections of the document.” Here, the BLM provides Appendix C, labeled “Issues Considered but not Analyzed in Detail.” The consideration of impacts to the Pacific fisher is thus clearly and separately identified, specifically located, and not spread throughout the REA. On this record, the BLM’s use of an appendix to locate its fisher effects analysis was not contrary to law.

ii. Tiering to 2016 FEIS

Plaintiffs next argue that tiering to the 2016 FEIS was inadequate to satisfy the BLM’s obligations under NEPA. In its 2016 FEIS, the BLM described the fisher’s range and habitat, providing a detailed quantified analysis of the effects of timber harvesting on the species, specifically within the harvest land base. The BLM also disclosed that the Griffin Half Moon timber sale would affect fisher habitat as “anticipated under the RMP.” AR 3360. The FEIS study discloses that fisher denning habitat would decline under the RMP but that habitat would increase in reserve lands, projecting that the fisher population would eventually increase beyond current levels. Thus the FEIS for the 2016 RMP analysis of the effects of full implementation of the BLM’s forest management plan on the fisher found essentially no effect on the species.

Plaintiffs again argue, citing Klamath-Siskiyou Wildlands Ctr., the BLM cannot rely on the existence of suitable habitat in reserve land use allocations as a substitute for conducting a site-specific project-level analysis. 387 F.3d at 997. Here, however, the BLM does not solely rely upon reserve land allocations. Instead, they rely upon an environmental analysis that included site-specific disclosures regarding the impacts of the Project on the fisher. In this analysis, the BLM’s

evaluation of potential impacts on the fisher are presented through the use of northern spotted owl habitat as a proxy for fisher habitat. The revised EA discloses that fishers “use similar habitat to” northern spotted owls, and states that over 97 percent of this habitat will remain untreated after Project implementation.³ AR 003312, 003315. This court has acknowledged the BLM’s discretion “to use northern spotted owl habitat as a surrogate for fisher habitat.” *Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, Civ. No. 06-3076-PA, 2007 WL 2688125, at *6 (D. Or. Sept. 10, 2007). On this record, the BLM’s analysis of impacts to the northern spotted owl habitat properly functions as a proxy for the required analysis of effects on the Pacific fisher.

iii. Perilous Status

Plaintiffs argue, finally, that the BLM ignored the “perilous status” of the Pacific fisher in its analysis of effects. At the time of the Griffin Half Moon NEPA process, however, the fisher was not proposed for Endangered Species Act (ESA) listing. Further, the proposal to list the fisher under the ESA was formally withdrawn by the FWS in April 2016, prior to the start of the Griffin Half Moon NEPA process.

The BLM signed the decision record for the Griffin Half Moon project on August 15, 2018; the FWS published a proposed rule to list the West Coast Distinct Population Segment of fisher as threatened in November of 2019, over a year later. While Plaintiffs rely on this post-decision development, the scope of review under APA allows the court to consider only the record before the BLM at the time of the challenged decision. Greater Yellowstone Coal v. Servheen, 665 F.3d 1015, 1024 n.2 (9th Cir. 2011). During the entire administrative process, the fisher was withdrawn from ESA listing. On this record, the BLM’s decision to authorize the Project is rational as it relates to the Pacific fisher. In sum, it was rational for the BLM to determine that the Griffin Half

³ In fact, even a full implementation of the RMP’s forest management plan would affect less than one percent of the fisher population within the first decade.

Moon timber sale would not exceed the predictions of effects to the Pacific fisher under the 2016 RMP or trend the fisher towards a further protective listing.

RECOMMENDATION

For the foregoing reasons, Plaintiffs' motion for summary judgment (doc. 31) should be granted in part and denied in part. Defendant BLM's motion for Summary Judgment (doc. 41) should be granted in part and denied in part. Defendant Murphy's motion for Summary Judgment (doc. 40) should be granted in part and denied in part.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 21st day of January 2021.



Mark Clarke
United States Magistrate Judge