IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

2002 JUN 13 A 9:42

WESTERN WATERSHEDS PROJECT and IDAHO CONSERVATION LEAGUE,	)	Civ. No. 01-0389-E-BLW
Plaintiffs,	)	
v.	)	MEMORANDUM DECISION AND ORDER
SAWTOOTH NATIONAL FOREST, BILL LEVERE, Sawtooth National Forest Supervisor, and UNITED STATES FOREST SERVICE,	)	
Defendants.	)	

INTRODUCTION

The Court has before it motions by the Forest Service for judgment on the pleadings and for summary judgment, and motions by plaintiffs (collectively referred to as ICL) for partial summary judgment on counts one and four. The Court heard oral argument on the motions and took them under advisement. The Court has now decided to deny the Forest Service's motions and grant ICL's motions in part. The Court's reasoning is explained below. The Court will not repeat the facts, which are well-known to the parties.

BACKGROUND

ICL asserts that the Forest Service has failed to do a proper environmental analysis of the impacts of grazing on the wolf populations in the Sawtooth National Recreation Area (SNRA).

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The SNRA lies within the Sawtooth National Forest in central Idaho. It was created by Congress in 1972 in the Organic Act, 16 U.S.C. § 460aa, *et. seq.* Congress charged the Secretary of the Agriculture, and thereby the Forest Service, with administering the SNRA. Congress listed specific values that it wanted conserved and developed, such as scenic, historic, and wildlife values. Congress also directed the Forest Service to manage the utilization of timber, grazing, and mineral resources, so long as that utilization did not "substantially impair" the other purposes of the SNRA.

About 4,470 sheep and 2,500 cattle are currently permitted to graze on 28 Forest Service allotments in the SNRA. This grazing is conducted pursuant to permits issued by the Forest Service, typically for 10-year periods. The permits are accompanied by Allotment Management Plans (AMPs) that set forth the terms and conditions governing the grazing. The AMPs are fine-tuned on an annual basis with Annual Operating Instructions (AOIs).

The AMPs and AOIs must be consistent with the SNRA Forest Plan, which governs the overall management of the Forest Service lands within the SNRA. The Forest Plan sets broad programmatic guidelines, while the AMPs and AOIs set the site-specific guidelines.

In the mid-1990s, Congress found that the Forest Service was not proceeding quickly enough to conduct environmental analyses of the impacts of grazing on the National Forest lands. As a remedy, Congress passed the Rescissions Act in 1995 to compel the Forest Service to set up a schedule to conduct a NEPA analysis on each grazing allotment in the National Forest System. The Forest Service submitted a schedule in 1995. At oral argument in this case, the Forest Service conceded that it had not completed the NEPA analysis on 7 allotments within the SNRA by the dates specified on that schedule.

In 1996, the gray wolf was reintroduced to land in central Idaho, including the SNRA. By the year 2000, as wolf populations increased, there were a number of instances of wolves killing sheep. To protect livestock operations, the U.S. Fish and Wildlife Service (FWS) is authorized to undertake wolf control efforts pursuant to the rules governing the Wolf Reintroduction Program. Through the year 2000, the FWS removed at least 15 wolves due to conflicts with livestock.

ICL asserts that since the wolves were reintroduced into the SNRA in 1996, the Forest Service has not done any analysis of the effects of grazing on the wolf populations under NEPA or the Organic Act. ICL brought this suit to compel the Forest Service to do that analysis in accordance with a schedule to be set by the Court.

ANALYSIS

1. Jurisdiction

The Forest Service asserts that this Court lacks jurisdiction because ICL is not challenging any final decision of the agency. The Court disagrees. ICL is attempting to force the Forest Service to abide by the Congressionally-mandated schedule set pursuant to the Rescissions Act. In addition, ICL seeks to compel the Forest Service to conduct an analysis under the Organic Act. In both instances, ICL asks this Court to order the Forest Service to take action unlawfully withheld. The Administrative Procedures Act (APA), 5 U.S.C. § 706(1), specifically grants jurisdiction to the courts to consider such claims. Moreover, the Ninth Circuit has consistently recognized this Court's jurisdiction to hear such claims. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000).

The Court further finds the claims ripe for review. The Forest Service's motion for

judgment on the pleadings due to lack of jurisdiction shall therefore be denied.

2. Rescissions Act

In count four of its complaint, ICL asserts that the Forest Service violated the Rescissions Act. More specifically, ICL claims that the Forest Service failed to comply with a mandatory schedule for completing an environmental analysis under NEPA of certain grazing allotments in the SNRA.

At oral argument, the Forest Service conceded that it failed to comply with that schedule for 7 allotments in the SNRA. The Forest Service argues, however, that it has interpreted the Rescissions Act "as providing reasonable discretion to depart from the schedule for NEPA compliance." *See Reply Brief* at 3. The Forest Service asserts that it should be allowed to extend the schedule's deadlines for a reasonable time to accommodate budget and manpower limitations.

The Court disagrees. The language of the Rescissions Act is unambiguous: It states that the Forest Service "shall establish and adhere to a schedule for the completion of [the NEPA] analysis" on all allotments within National Forests. *See* § 504(a), Pub. L. No. 104-19, § 504, 109 Stat. 194, 212-213 (1995). This language is expressed in mandatory terms, and says nothing about permitting discretionary variances. *See Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (Congress's use of "shall" constitutes "mandatory language"). While it is often appropriate for a court to defer to an agency's interpretation of an ambiguous statute, both the agency and the court must defer to the "unambiguously expressed intent of Congress." *Chevron USA v. NRCD*, 467 U.S. 837, 842-43 (1984).

This was the very conclusion reached in the recent decision of *Greater Yellowstone*

Coalition v. Bosworth, 2002 WL 981147 (D.D.C. May 13, 2002) (Report and Recommendation). There, the court held that "[t]he Rescission Act's plain language indicates without ambiguity that the [Forest Service] may not amend its § 504(a) schedule for NEPA compliance." *Id.* at *4. After finding that Congress had spoken clearly, the court concluded that it had no authority to modify that mandate: "For a court to permit the agencies to modify the schedule to which Congress demanded they adhere is a glaring example of a court substituting its judgment for Congress's." *Id.* at *5.

The Forest Service urges the Court to resort to legislative history to interpret this statute. This is likewise forbidden when the statute is clear. *See United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 241 (1989). The Forest Service counters that this rule of statutory interpretation does not apply when it would "compel an odd result." *See Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454 (1989). A literal reading of the statute produces an odd result, the Forest Service asserts, by "forcing the Forest Service to choose between violating NEPA by sacrificing analytical rigor to adhere to the schedule, and violating the Rescissions Act by departing from the schedule." *See Defendants' Consolidated Brief* at 20.

However, this "odd result" is nothing more than a restatement of the consequences of meeting a deadline -- such tough choices are inevitable under every deadline. This is not the type of "odd" or "absurd" result under *Public Citizen* that allows a Court to ignore the plain meaning of the statute. Indeed, the Ninth Circuit has reminded this Court on prior occasions not to depart from clear deadlines governing agencies overseeing grazing on public lands. *See Idaho Watersheds Project* v. *Hahn*, 187 F.3d 1087 (9th Cir. 1999).

The Court therefore finds that the Forest Service is in violation of the Rescissions Act for

failing to abide by the schedule for completing the NEPA analysis on 7 allotments in the SNRA. The Court will set a hearing to determine a remedy. In past cases, the Court has set its own timetable to ensure expedited consideration.

3. SNRA Organic Act

In count one of its complaint, ICL asserts that the Forest Service has failed to examine whether grazing "substantially impairs" the wolf populations of the SNRA. ICL seeks a partial summary judgment on this count.

In establishing the SNRA in the Organic Act, Congress directed the Forest Service to administer the SNRA "in a manner that will best provide . . . the conservation and development of scenic, natural, historic, pastoral, wildlife, and other values . . . ., and the management, utilization, and disposal of natural resources on federally owned lands such as timber, grazing, and mineral resources insofar as their utilization will not substantially impair the purposes for which the recreation area is established." *See* 16 U.S.C. § 460aa-1(a).

The statute is clear. Congress identifies, as one of the primary "values" of the SNRA, the conservation and development of "wildlife," which would include the gray wolf. Certain other values, including grazing, were to be developed conditionally – that is, developed only "insofar as their utilization will not substantially impair" the development of wildlife such as the gray wolf.

The Forest Service argues, however, that grazing is encompassed within the terms "historic" and "pastoral." This reading elevates grazing from a conditional value to a primary value, in direct contravention of the plain language of the Organic Act. The Forest Service's attempt to support this reading with legislative history, and an appeal for deference to its own

expertise, must fail in the face of a clear Congressional directive. *Chevron USA*, 467 U.S. at 842.

Thus, in addition to the NEPA analysis mandated by the Rescissions Act, the Forest Service must also evaluate (under the Organic Act) whether grazing is substantially impairing the conservation and development of the gray wolf. This analysis should be conducted at the same time the Forest Service is conducting the NEPA analysis mandated by the Rescissions Act. The Court will therefore grant ICL's motion for partial summary judgment on count one of its complaint.

4. Wolf Reintroduction Program

The gray wolf once roamed throughout North America, but was largely eradicated from the Rocky Mountain area by 1930. In 1973, it was listed as an endangered species under the Endangered Species Act (ESA).

In an effort to recover the Rocky Mountain wolf population, the Secretaries of Interior and Agriculture proposed to relocate gray wolves from Canada to Yellowstone National Park and central Idaho. The Secretaries prepared an Environmental Impact Statement (EIS) that proposed several reintroduction alternatives. Those alternatives included (1) relocating livestock from reintroduction areas to reduce incidents of wolves preying on livestock, or (2) classifying wolves as "nonexperimental species" so that they would receive full protection under the ESA.

Both of those alternatives were rejected. The alternative chosen by the Secretaries in the Record of Decision (ROD) issued in 1994 classified the wolves as "non-essential experimental" under § 10(j) of the ESA, which allowed for more flexible management. The EIS/ROD found that removal of the wolves rather than relocation of the livestock would do "more than stop the depredation; it relieves the pressures and antagonisms directed toward the total wolf population

by those incurring losses and other members of the public. . . . While some wolves will be removed from the population through control measures, removal of wolves demonstrating undesirable behavior will promote acceptance of wolves, will reduce overall impacts, and will allow population growth to recovery levels." *See A.R.* 00084 at 2-13.

The Fish and Wildlife Service (FWS) then issued what is referred to as the Experimental Population Rule in 1994. That Rule stated that once six or more breeding pairs of wolves were established in an area, (1) livestock owners may receive a permit from the FWS to kill or injure wolves attacking livestock on public grazing allotments, and (2) "no land-use restriction may be employed" to assist the wolves.

5. Reconciliation of Wolf Reintroduction Program and Organic Act

The State, as *amicus curiae*, argues that the FWS Rule "governing wolf-livestock conflicts cannot be replaced by a substantial impairment finding [under the Organic Act] and a remedy fashioned through a NEPA alternative." *See Amicus Curiae Brief* at 13. The State charges the ICL with using NEPA and the Organic Act to limit grazing and protect the wolves, an alternative rejected in the Wolf Reintroduction Program EIS/ROD. The State asserts that the EIS/ROD contains all the NEPA analysis that is necessary, and any contrary NEPA analysis done on an allotment-by-allotment basis cannot be permitted. *See Amicus Curiae Brief* at 6-10. The Forest Service does not go quite that far, asserting simply that the EIS/ROD findings that existing grazing practices should not be changed for the wolves "make[s] it unlikely that future site-specific NEPA analyses will alter grazing to reduce wolf/livestock interactions." *See Forest Service Brief* at 12.

In evaluating these arguments, the Court observes first that the EIS/ROD contains no

analysis directed specifically at the SNRA, and in fact never mentions the SNRA. Instead, it focuses on the broad region encompassing Yellowstone and central Idaho. Thus, in the context of examining the environmental impacts of grazing on 28 allotments in the SNRA, the EIS/ROD is a programmatic analysis that provides broad guidance but not the site-specific guidance necessary to satisfy NEPA. *See Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990) (holding that programmatic EIS did not satisfy duty to do site-specific analysis).

In conducting that NEPA analysis, the Forest Service will certainly rely on the EIS/ROD. The Court rejects, however, any argument that the EIS/ROD excludes consideration of the Organic Act. There is nothing in the EIS/ROD that so states, and no legal basis for holding that an EIS/ROD, or the subsequent FWS Rule, could overturn an act of Congress.

Thus, the Forest Service must consider both the EIS/ROD and the Organic Act. In those allotments where there are livestock/wolf conflicts, there is an undeniable tension between the two provisions. The Organic Act provides that grazing must not substantially impair the gray wolf population, while the EIS/ROD provides that wolves will generally be removed if they cause conflicts with livestock.

Nevertheless, the provisions are not irreconcilable. An irreconcilable conflict might arise if the Organic Act directed that grazing must have no impact whatsoever on the wolf, while the EIS/ROD mandated that the wolf must always give way to grazing. That is not how these two provisions read, however. Thus, while there is some tension, there is not intractable conflict.[1]

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[1] A more difficult issue may arise if livestock/wolf conflicts arise in an area where there are six breeding couples. The FWS Rule, discussed above, attempts to limit the application of land-use restrictions in that circumstance. Whether that Rule would restrict the Forest Service in its administration of the SNRA in such a situation is not now before the Court, and hence the Court expresses no opinion on that issue.

Moreover, neither provision trumps the other. The Forest Service must consider both. How difficult that might be is unclear since the Forest Service has not made any attempt to apply both provisions to any particular allotment with livestock/wolf conflicts. This Court cannot speculate about possible conflicts – without a concrete livestock/wolf conflict before it, the Court would be rendering an improper advisory opinion. *In re Estate of Dela Cruz*, 279 F.3d 1098, 1101 (9th Cir. 2002) (holding that federal courts have no jurisdiction to issue advisory opinions). Preferably, the issue would be raised on an appeal of a Forest Service decision on a particular allotment, where the Court would have the benefit of the Forest Service's expertise. The Court recognizes that the ICL may be seeking injunctive relief, to deal with specific livestock/wolf conflicts that might arise this summer. The Court expresses no opinion on that matter.

6. Conclusion

For the convenience of counsel, the Court will summarize below the rulings made by the Court in this decision:

(1) The Forest Service has violated the Rescissions Act, and the Court will set a hearing to establish a schedule to complete the NEPA analysis of the remaining SNRA allotments.

(2) The Forest Service has violated the Organic Act by failing to consider whether grazing is "substantially impairing" the wolf populations in the SNRA.

(3) For those allotments that have not yet had a NEPA analysis done, the NEPA analysis and the Organic Act analysis must be done together.

(4) For those allotments that have had a NEPA analysis, the Forest Service must go back and conduct an analysis under the Organic Act.

(5) The Organic Act does not include grazing as a "historic" or "pastoral" value.

(6) The Wolf Reintroduction Program EIS/ROD is a broad programmatic document that is relevant to, but not a substitute for, a site-specific NEPA analysis of each allotment in the SNRA.

(7) There is no irreconcilable difference between the Organic Act and the wolf EIS/ROD, and neither trumps the other – both must be examined by the Forest Service.

Based on these findings, the Court will grant ICL's motions for partial summary judgment on counts one and four. The Court will accordingly deny the Forest Service's motion for judgment on the pleadings and motion for summary judgment.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the defendant's motion for judgment on the pleadings (docket no. 11) and defendant's motion for summary judgment (docket no. 34) are hereby DENIED.

IT IS FURTHER ORDERED, that plaintiff's motion for partial summary judgment on first claim (docket no. 18) and motion for partial summary judgment on fourth claim (docket no. 20) are hereby GRANTED.

IT IS FURTHER ORDERED, that counsel shall contact the Court's Clerk LaDonna Garcia (208-334-9021) to obtain a hearing date for the purpose of setting a schedule for the NEPA and Organic Act analysis of the SNRA allotments.

Dated this 11th day of June, 2002.

B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES DISTRICT COURT

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United States District Court
for the
District of Idaho
June 13, 2002

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:01-cv-00389

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