



Analysis of Litigated Hazardous Fuel Reduction Projects:

The GAO Report and the Mark Rey Letter of August 29, 2003

September 9, 2003

In May of this year, the General Accounting Office (GAO) issued a report systematically examining adversarial delays in all Forest Service fuels reduction decisions made in fiscal years 2001 and 2002.¹ Because so few of the GAO-reported projects were litigated, Senator Dianne Feinstein asked Agriculture Under Secretary Mark Rey and Interior Assistant Secretary Rebecca Watson to explain whether changes to judicial review standards proposed by H.R. 1904 (the Healthy Forests Restoration Act of 2003) were warranted, how the bill would affect judicial review, and what lawsuits had occasioned unwarranted delays. Mr. Rey responded by letter dated Aug. 29, 2003. The gist of his response is that: (a) court-ordered delays in conducting needed forest restoration justify changes in judicial review; (b) current case law ignores the costs of inaction, and (c) H.R. 1904 would restore balance to litigation. He also appended a list of cases said to demonstrate how litigation imposes unwarranted delays on the Forest Service.

NRDC analyzed the 23 litigated projects reported by the GAO. We spoke with litigants and their lawyers, reviewed pleadings, and compiled a chart describing interim and permanent injunctions in the cases, their outcomes, project size, and factual backgrounds, and contact information for each. We have also reviewed the Under Secretary's claims about delay and the judicial process. In summary, we found that:

1. Only 2% of all the acreage slated for fuels reduction in fiscal years 2001 and 2002 by the Forest Service was litigated, and only about 1% was subject to any interim injunction.
2. Courts regularly consider the factors that the Rey letter claims they cannot. On a case-by-case basis, they allow the agency to proceed with logging it says is beneficial, even when they have found that logging plans were developed illegally.
3. Mr. Rey's list of supposedly delayed projects falls apart on inspection: nothing he lists as an active fuels reduction project has been delayed at all by court order.

¹ GAO-03-689R, Forest Service Fuels Reduction, May 14, 2003.

Litigation Delay

The over-riding fact that emerges from the GAO's systematic evaluation of Forest Service fuels reduction projects is the tiny fraction affected by litigation. The GAO found 762 project decisions in fiscal years 2001 and 2002, affecting 4.7 million acres, for which the agency claimed that fuels reduction was at least a partial purpose. Twenty-three of the 762 were litigated, affecting 2% of the total acreage (100,000 acres). Our independent review, detailed in the attached spreadsheet, shows that projects delayed by court order covered only half that acreage, or about 1 percent of the reported work. In short, both the number of projects the agency identified as fuels reduction activities, and the total acreage actually litigated — let alone delayed — were trivial compared to the numbers and acres left unchallenged.

Analysis of the GAO-reported projects definitively disproves Under Secretary Rey's assertion that H.R. 1904 is needed to end significant, unwarranted litigation delays. Few as the litigated projects GAO reported were in number, far fewer actually involved interim injunctive relief, the kind of remedy that H.R. 1904 would truncate. Nineteen of the 23 (83%) involved no temporary restraining order (TRO), preliminary injunction (PI), or stay pending appeal whatsoever.² Moreover, analysis of the four where interim injunctions issued shows that in all but one the illegality of Forest Service action was confirmed through a permanent injunction after a ruling on the merits or by explicit findings accompanying the interim relief that the agency had unequivocally violated the law.

The Rey letter further misleadingly asserts that implementation delays are magnified because they can cause a project to be delayed until the following year. This is a statement primarily about the agency's own appeals process, not litigation, given the extremely small percent of decisions litigated. But even as to appeals it obscures the true picture. While some appeals may push projects back longer than the actual appeal timeframe, many other appeals are started and finished during the Fall and Winter when logging operations would not commence anyway. They thus occasion no delay, let alone a magnified one. Similarly, when an appealed project is ultimately offered, there may be no bidders, so no implementation delay is attributable to the appeal.³ Moreover, all delays in the appeals process past the 45 day filing period are a function of agency choices and avoidable at agency discretion.

Judicial Standards

Mr. Rey is also wildly off-base in his core assertion that fuels reduction projects often cannot move forward during litigation simply because case law precedent will not allow it. Judicial precedent, in fact, unequivocally establishes that courts are authorized not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government

² Notably three of the GAO listed projects were not actually litigated at all. The Lone Dog project was initially included in the challenge to the McCully Restoration Project and other Wallowa-Whitman sales, but thrown out on procedural grounds. The Upper Slate project was never litigated, and Griffin Springs was withdrawn by the Forest Service and never went to court.

³ An instance of this from the litigated cases in the GAO report is the Monroe Mountain Ecosystem Project on the Fishlake NF. The judge in that case denied a PI, but the agency received no initial bids and does not expect to sell the project this year.

action allegedly in violation of NEPA might actually jeopardize natural resources.⁴ As recently as July of this year, a federal court in Arizona, though ruling that the Forest Service had plainly violated NEPA, denied the plaintiffs' request for an injunction against logging, finding that the work would provide a defense against future wild fires.⁵ Similarly in a recent Washington state case, the district court found that the public had a greater interest in the beneficial aspects of the Project, including reduced risks of catastrophic forest fires and the restoration of ecosystems than in maintaining the unlogged status quo, and it denied a preliminary injunction.⁶ Application of this rule to logging dates back at least to 1975, when the Ninth Circuit held that despite a project's potential for irreparable harm to wilderness eligibility the public interest will not be served by granting the injunction, because access is necessary to remove diseased timber and to prevent the insect infestation from spreading throughout the adjacent national forest lands.⁷

The Under Secretary makes no defense whatsoever of the provision in H.R. 1904 that would instruct judges to give weight to agency assertions about whether logging should be stopped during litigation. This determination is made by judges after hearing from all parties and weighing the evidence and the public interest. It is a core judicial function, the balancing of equities, that can determine whether a judge will be in a position to grant effective final relief and even whether he or she can keep jurisdiction over a case. Turning over some part of that determination to agencies would be as fundamentally foreign to our system of checks-and-balances as telling judges not just to determine whether agency decision-makers followed the law but to step into the officials' shoes and second-guess how they exercised their discretion.

Under Secretary Rey's Litigation List

The Under Secretary attached to his letter a list of lawsuits that ostensibly caused unwarranted delays, which upon inspection does not strengthen his case. In the first place, this is not a systematic list of litigation like the GAO's, from which the prevalence or magnitude of an asserted problem could perhaps be determined. It is a hand-picked collection with cases from as long ago as six years, and could therefore include only a subset of cases that supported one point of view and ignore those that disprove it. In fact, the list represents a wholesale mischaracterization, and does not support any change to existing law. Most strikingly, a careful review of Mr. Rey's category of open Hazardous Fuels Reduction cases shows that not a single one has experienced a court-ordered delay:

- BARK v. Larsen is stayed by stipulation of the parties, with the agency agreeing only to give 30 days notice before moving ahead with the project and conceding that in

⁴ American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983).

⁵ FCC v. USFS, CV-03-0054-PHX-FJM (D. Az.), Order of 7/9/03, page 7.

⁶ Land Council v. Vaught, 16 Fed.Appx. 768, 769 (unpublished Ninth Circuit opinion of 8/14/01) (the appeals court went on to find that the district court based its decision on an erroneous factual assessment of the project's actual impacts on fire risk and remanded for reconsideration, but nothing in its opinion challenges the general propriety of denying a PI because logging will reduce fire risks).

⁷ Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975).

the short term, all harvest areas would have an increased potential for ground-based fires (contact Chris Winter, 503-525-2725).

- Plumas Forest Project v. US Forest Service involved no PI or TRO, and has been settled by agreement of the parties (contact Chad Hanson, 530-273-9290).
- Native Ecosystems Council v. US Forest Service is awaiting a hearing in October; and no TRO or PI has issued (contact Sara Johnson, 406-285-3611).
- Utah Environmental Congress v. Bosworth is the case mentioned in footnote 3, in which the judge denied a PI but the agency was unable to sell the timber anyway (contact Denise Boggs, 801-466-4055).
- Tule River Conservancy v. Glickman was a challenge to a Sequoia NF program, in which no specific project was challenged and no TRO or PI was ever sought (contact David Williams, 510-647-1900).
- Californians for Alternatives to Toxics v. US Forest Service has only had a complaint filed; no TRO or PI has been sought and several of the named projects are being logged (contact Rachel Fazio, 530-273-9290).
- Wildlaw v. USDA is a recently filed challenge to agency rulemakings, in which no TRO or PI has been sought (contact Ray Vaughn, 334-396-4729).
- EPIC v. US Forest Service challenges a management plan, not projects, and no PI or TRO was sought; the judge has just ruled in plaintiffs favor but has not to date enjoined agency action (contact Debbie Sivas, 650-723-0325).
- Janklow v. US Forest Service is, comically, a pro-logging challenge asserting that the agency wrongfully failed to remove dead and diseased trees.
- Grant School District No. 3 v. Dombeck, like Janklow attempts to increase logging, not delay it.

Finally, Under Secretary Rey singled out for detailed treatment three of the cases in his list described as some of the more frustrating situations facing the Forest Service. The first is the Jimtown project, which proposes logging in old growth. No TRO or PI has been sought in the case. Rey says the agency voluntarily stayed the sale to avoid a likely PI, despite the strength of its case. However, a PI normally cannot issue unless the plaintiff has a good likelihood of success on the merits.⁸ Even then, as the section on Judicial Standards above shows, an injunction may be denied. Moreover, the agency's refusal to use the judicial process available to it is no grounds for Congress to change the process. Since the Forest Service never gave a court any chance to assess the veracity of its claims about why a PI would be harmful, Mr. Rey is in no position to argue that a miscarriage of justice requires Congress to alter one of the fundamental mechanisms of our judicial system.

Mr. Rey's second frustrating example is the Lolo Post Burn Project, a 35 million board foot mixed-purpose sale. A poorer case for interfering with preliminary injunctions would be hard to find. The case was decided with exemplary speed, with the entire time between issuance of a TRO and final judgment amounting to just 21 days.⁹ The court showed great

⁸ Specifically, to get a PI the plaintiff must show either probability of success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. Hoopla Valley Tribe v. Christie, 812 F.2d 1097, 1102 (9th Cir. 1986).

⁹ Sierra Club v. Austin, CV 03-22-M-DWM, Order of April 30, 2003, at 2 (TRO issued on April 9, 2003, PI granted on April 25, written summary judgment dated April 30).

deference to the agency¹⁰ but noting that [b]y the Forest Service's own estimates, fish are likely to be threatened by project impacts, halted the work pending development of TMDLs (Total Daily Maximum Load standards) to protect already-damaged streams in the area. The Under Secretary's letter complains that the judge's ruling has a large precedential effect, raising the specter that salvage logging throughout Montana national forests could have to wait many years until the state adopts TMDLs. The judge, however, expressly noted the availability of an expedited TMDL-designation process that U.S. EPA had urged the Forest Service to pursue during project planning.¹¹

Third, Under Secretary Rey complains about the Baca Ecosystem Management Project in Arizona, a giant plan that proposed logging tens of thousands of large ponderosa pine trees and predated the GAO study period. This was another case where no PI or TRO issued, but the Forest Service held up logging on its own. Plaintiffs in the case okayed the agency going ahead with 1300 acres in the wildland-urban interface. Despite this go-ahead, the agency proceeded at such a leisurely pace that only 300 acres — 23% — of the released thinning had been conducted when the project area burned. Since the agency had another thousand acres (of the kind of understory clearing near communities that is widely described as its highest priority) still to do when the Rodeo-Chedeski fire struck, it is far-fetched indeed to blame litigation for the fact that most of the project thinning hadn't been completed by the time the fire occurred.

Conclusion

The Rey letter asserts that H.R. 1904 does not in any way foreclose the public's ability to fully participate and be involved in project development, administrative review, or litigation. In fact, H.R. 1904 deprives the public of the ability to have alternatives to agency proposals studied for their potential environmental consequences. It eliminates administrative review as it currently exists. And it interferes with litigation standards and processes. Nowhere in his letter to Senator Feinstein does the Under Secretary offer support for this truncation and weakening of existing laws and legal standards.

For further information, contact:

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¹⁰ Id. at 17 (roadless area designation is a matter particularly within agency expertise. Plaintiffs motion for summary judgment on this issue is denied).

¹¹ Id. at 19.