



Ninth Circuit Strikes Down Land Swap

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The U.S. Court of Appeals for the Ninth Circuit has added further requirements under the National Environmental Policy Act (NEPA) for Environmental Impact Statements (EIS) that will add significant delay and further increase costs during the NEPA process. In reversing a lower court decision, the Ninth Circuit invalidated an EIS that analyzed the impacts of a land exchange between a mining company (Asarco LLC) and the Department of the Interior. *Center for Biological Diversity v. U.S. Dep't of the Interior*, -- F.3d --, 2009 WL 2914504 (9th Cir. 2009). The Department of the Interior proposed to exchange 10,976 of public lands with 7,300 private lands owned by Asarco, so that Asarco could consolidate and expand its copper and silver mining operations. *Id.* at *2. Asarco owns valid unpatented mining claims on the vast majority of the federal lands that it proposed to receive in the exchange.

In compliance with NEPA, the Bureau of Land Management (BLM) completed an EIS to analyze the impacts of the proposed land exchange. *Id.* at *3. In the EIS, because Asarco owned mining claims on the proposed lands, BLM assumed that the foreseeable uses of the lands would be for mining purposes regardless of whether or not the land exchange was ultimately approved. Accordingly, the EIS only contained a single analysis of the impacts of mining development under all four of the alternatives examined in detail and did not contain a comparative analysis between the alternatives. *Id.* at *4.

The Ninth Circuit held that BLM violated NEPA by failing to take a hard look at the impacts of the land exchange because BLM improperly assumed that the impacts of mining under the no action alternative and proposed action would be the same. *Id.* at *7. The Court based this decision on the fact that under the no-action alternative, Asarco would still have to comply with the Mining Law of 1872, NEPA, the Federal Land Policy and Management Act (FLPMA),

and the National Historic Preservation Act in obtaining BLM approval of Mining Plans of Operation (MPO). *Id.* *8-10 (explaining that approval of the land exchange would enable Asarco “to conduct its mining operations without being constrained in any way by the MPO process”). This lack of comparative alternatives analysis ultimately was the Court’s basis in finding violations of NEPA and FLPMA. *Id.* at *10-11.

The majority’s opinion completely avoids any attempt to distinguish the legal analysis of the Ninth Circuit’s *en banc* decision in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). In *Lands Council*, an *en banc* panel of the Ninth Circuit reversed two Ninth Circuit decisions regarding review of agency decisions, holding that courts should properly defer to the federal agencies expertise in NEPA decisions. *Id.* at 992-93. The decision in *Center for Biological Diversity* essentially ignores the *Lands Council* precedent, and imposes a substantive standard of review into agency-decision making, opening the door for courts to second guess agency environmental analyses.

In a scathing dissenting opinion, U.S. Circuit Judge Tallman is highly critical of the majority’s opinion, especially in light of the Ninth Circuit’s *en banc* decision in *Lands Council*. *Center for Biological Diversity*, 2009 WL 2914504 at *13 (“It has been said that the life of a canary in a coal mine can be described in three words: short but meaningful. So too apparently was the life of our decision in *Lands Counsel*...”). The dissent further states that the majority’s opinion “is irreconcilable with *Lands Council* which sought to rein in...judicial second-guessing in highly specialized areas” and which confirmed judicial deference to federal agencies in NEPA decisions. *Id.*

The dissent raises several interesting points: (1) Congress specifically approved this land exchange, as had every other federal agency since 1994 (*id.* at *13); (2) the majority creates a new NEPA standard that would have Asarco submit detailed MPOs before it even knows if will obtain the land and or how it would mine those properties (*id.* at *14); (3) the majority rejects, with no comment or analysis, the previous decision of the Arizona BLM State Director, Interior Board of Lands Appeals and the district court (*id.*); (4) the lands that would become under federal ownership have a greater environmental value than the lands Asarco would receive which largely border active mining operations (*id.* at n3); and (5) mining on private lands is subject to strict federal and state environmental regulations and the MPO is not the sole regulating backstop to mining operations (*id.* at 20). Judge Tallman notes that the majority did not specifically address these points.

In rejecting the basis for the majority’s holdings, the dissent notes that the

majority misconstrues BLM's statements regarding its assumption that impacts under the no-action and the proposed action would be similar. *Id.* at *18-19. The EIS does not assume that mining operations would be identical under both alternatives, but that mining would occur whether the land exchange is approved or not and the impacts would be similar. *Id.* at *19. In sum, the dissent criticizes the majority's opinion for going beyond review of agency action and beyond ensuring that the agency made no clear error of judgment. *Id.* at *21 ("It is certainly not for us as Article III judges to feign superior expertise in such specialized areas and to micro-manage agencies in executing their congressionally delegated administrative functions.").

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