Spotted Owl (US Forest Service)

For much of the past decade, the Department of Agriculture regulations governing land and resource management planning in the national forests have been a kind of political ping-pong ball, bounced back and forth between administrations, and between the executive branch and the courts. Now the U.S. District Court for the Northern District of California has taken another swat at that ball.

The planning rules are important because they govern the adoption of plans for individual units of the national forest system, and site-specific activities on those units must be consistent with the plans. The planning rules were first adopted in 1979, to implement the National Forest Management Act passed in 1976. They were revised but not fundamentally altered in 1982. In November 2000, two days before the election that ultimately made George W. Bush president, the Clinton administration finalized a major revision to the planning rules. The 2000 rules were challenged by both industry and environmental interests, but those challenges were stayed when the Bush administration postponed implementation of the 2000 rules, and eventually in 2005 issued its own major revision. In 2007, Judge Phyllis Hamilton of the Northern District of California tossed out the 2005 rules because they had been adopted without sufficient opportunity for public comment, without an environmental assessment or environmental impact statement, without consultation under the Endangered Species Act on their possible adverse effects on listed species.

The Bush administration responded to that decision by preparing an EIS, seeking public comment, and preparing a biological assessment concluding that the rule would not have any effect on listed species. In 2008, the USDA finalized a new version of the planning rule that is substantively nearly identical to the 2005 rule. A coalition of environmental groups challenged the 2008 rule in the Northern District of California, and this week Judge Claudia Wilken of that court ruled in their favor.

Judge Wilken first rejected the government's contention that the Supreme Court's ruling this term in Summers v. Earth Island Institute precluded standing for the plaintiffs in this case, concluding that plaintiffs had suffered a concrete injury when the 2008 rule was adopted without following legally required procedures. She noted that plaintiffs had submitted numerous declarations showing that their members have plans to visit specific sites within the national forest system. She refused to force plaintiffs to wait to bring their challenge until they could point to a site-specific proposal at one of those places:

> The overarching nature of the plan development rule makes it impossible to link the procedural injury at issue here to any particular site-specific project, whether now or in the future. Waiting to adjudicate the validity of the Rule until an LRMP is revised under it and a site-specific plan is later approved under that LRMP would not present the court with any greater a "case or controversy" with respect to the already-completed procedural violation than exists today. Rather, such an approach would insulate the procedural injury from judicial review altogether. If Citizens is forced to delay seeking redress for its procedural injury until a site-specific plan is approved under a revised LRMP, it would face a statute of limitations defense. The government might also argue that the procedural injury is not sufficiently tied to the project to confer standing. Moreover, it would be a waste of the government's resources if it were to revise an LRMP and approve a site-specific plan, only to have both declared invalid because the 2008 Rule pursuant to which the LRMP was created was procedurally defective.

Having concluded that the environmental plaintiffs had standing, the court went on to grant summary judgment for plaintiffs on their NEPA and ESA claims. Under NEPA, Judge Wilken found that the EIS prepared for the 2008 rule was defective because it failed to discuss the likely environmental consequences of the substantive changes made by the rule (such as eliminating the requirement that the Forest Service maintain viable populations of native vertebrate species). The same flaw infected the administration's attempt at ESA compliance. Rather than evaluate the extent to which forest planning under the new rule might produce different outcomes than planning under the old one, the USDA had simply asserted that only site-specific actions, not the planning governed by the rule, could affect listed species. Moreover (and interestingly, in light of the recent wrangling over the Bush administration's last-minute changes to the section 7 consultation rules), the court pointed out that the USDA had not, as required by the consultation rules, obtained the written concurrence of FWS with its conclusion that the new planning rules would not adversely affect listed species.

Because it found that the 2008 rule had been adopted in violation of NEPA and the ESA, the court vacated that rule, giving the agency the choice of reinstating the Clinton administration's 2000 rule or the 1982 rule in its stead. It will be interesting to see what path the Obama administration chooses.