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Editor's Note: This issue analyzes the decision in *Douglas Timber Operators v. Salazar and Pacific River Council*, addressing the Secretary of the Interior's 2009 withdrawal of the resource management plans for several Bureau of Land Management forests in Western Oregon, known as the Western Oregon Plan Revision.

We have reproduced the entire article below. Any opinions expressed in this article are those of the author alone. For those who prefer to view this article in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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Douglas Timber Operators v. Salazar and Pacific River Council

U.S. District Court of the District of Columbia (Civ. No. 09-174 (D.D.C.)) March 31, 2011.

By Brett Kenney, Tribal Attorney for the Coquille Indian Tribe

Overview:

The Court vacated and remanded the Secretary of the Interior's July 16, 2009 withdrawal of the Western Oregon Plan Revision (WOPR) because the Secretary failed to observe procedures developed under the Federal Land Policy and Management Act (FLPMA) mandating public notice and opportunity to comment before making FLPMA-authorized plan amendments.

Background:

On June 26, 1990, the United States Fish and Wildlife Service (USFWS) listed the northern spotted owl as a threatened species under the federal Endangered Species Act (ESA). The northern spotted owl's habitat includes late successional and old-growth forests in Oregon. The ESA requires federal agencies to consult with the USFWS or the National Marine Fisheries Services (NMFS) when a proposed federal action "may affect" an endangered or threatened species. 50 C.F.R. 402.1(a).

The listing of the northern spotted owl caused intensive litigation between timber companies, conservationists and the government. To relieve this gridlock, the BLM and the United States Forest Service adopted the Northwest Forest Plan.

The Northwest Forest Plan itself, however, was subject to several mid-1990s lawsuits. One suit of special note is American Forest Resource Council v. Abbey, Civ. No. 94-1031 (D.D.C.). This suit argued that the Northwest Forest Plan violated the terms of provisions of the Oregon & California Railroad and Coos Bay Wagon Road Grand Lands Act of 1937 (“O&C Act”) which provides for federal management of those lands and the sharing of timber revenues with affected Oregon counties. 43 U.S.C. 1181a. In 2003 the parties settled that lawsuit. Their settlement required the BLM, no later than December 31, 2008, to revise the resource management plans (read: the Northwest Forest Plan) for the Oregon districts at issue.

On December 30, 2008, the DOI adopted revised resource management plans for the six affected Oregon districts. These revised plans were known collectively as the Western Oregon Plan Revisions, or “WOPR”. Among its forest management changes, the WOPR would increase cutting of “old growth” trees on O&C and Coos Bay Wagon Road lands.

On July 16, 2009, however, the DOI Acting Assistant Secretary for Land and Minerals Management withdrew the WOPR records of decision, asserting that the BLM erroneously determined that the change from the northwest forest plan to the WOPR would have no impact on listed species or critical habitat, and that the BLM failed to complete adequate ESA consultation with USFWS.

Judicial Review:

The Douglas Timber Operators and other plaintiffs challenged the WOPR withdrawal on several legal grounds, including violation of regulations promulgated under FLPMA mandating public notice and opportunity to comment before adopting change to a resource management plan.

The Court granted Plaintiff’s motion for summary judgment, concluding that the DOI’s withdrawal of the WOPR violated the FLPMA regulatory requirement for public notice and opportunity to comment.

The FLPMA (43 U.S.C. 1701-87) governs the Bureau of Land Management’s (BLM) use of federal lands. The FLPMA governs the development and amendment of BLM resource management plans (like the WOPR). It authorizes the DOI, “with public involvement and consistent with the terms and conditions [of FLPMA], develop, maintain, and when appropriate, revise land use plans.” 1712(a). The FLPMA also requires the DOI to adopt regulations, “to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.” 1712(f).

The Secretary of the Interior (“Secretary”) has adopted regulations governing public notice and opportunity for participation in the resource management planning process. 43 C.F.R. 1610.1-8. These regulations require a formal plan amendment anytime a proposed action changes a term, condition, or decision of a resource management plan. Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549, 556-57 (9th Cir. 2006).

The government argued that the DOI possesses inherent authority to amend a resource management plan that contains a “legal error” (e.g. the BLM’s erroneous conclusion that the change from the Northwest Forest Plan to the WOPR would not affect listed species or critical habitat and its related failure to consult with USFWS on ESA issues). But the Court distinguished questions regarding the legal sufficiency of the WOPR development process from the issue before it: whether the Secretary’s decision to withdraw the WOPR without formal proceedings complied with FLPMA. Judge Bates concluded that the FLPMA public notice and comment regulations applied to the WOPR withdrawal. The Court also disagreed with the government’s contention of harmless error.

The Court vacated and remanded the Secretary’s decision to withdraw the WOPR.

Short Summary:

For now, it seems that the WOPR is reinstated, although the Obama Administration has provided no public statement regarding the WOPR’s status. On April 8, 2011, conservation groups filed suit in the U.S. District Court of Oregon in case the Administration chooses to let the WOPR stand.

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If you would like to contribute or have comments, please contact the E-Outlook Editor, Patrick Rowe, at prowe@sussmanshank.com or (503) 243-1651.