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National Parks & Conservation Association v. Bureau of Land Management

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National Parks & Conservation Association v. Bureau of Land Management, 606 F.3d 1058 (9th Cir. 2010).

John Wright

ABSTRACT

Landowners and conservation group brought suit against the Bureau of Land Management (BLM) over a proposed public-private land swap adjacent to Joshua Tree National Park to allow a private company to build and operate a landfill. The Ninth Circuit held that: (1) the BLM must evaluate the land's probable use in its highest and best use analysis to ensure fair compensation to the public; (2) the BLM failed to consider alternatives in specific detail to meet the public's need for long-term landfill demand; and (3) the BLM's environmental impact statement was deficient regarding the potential for eutrophication altering the desert environment. The court determined that the BLM's considerations leading to the land swap were deficient, disallowing the exchange. The case upheld the necessity of a transparent process in public land sales.

I. INTRODUCTION

The holding of *National Parks & Conservation Association v. Bureau of Land Management*[91] tightened Bureau of Land Management (BLM) procedures in a proposed private land exchange. The Ninth Circuit Court of Appeals held: (1) the BLM must evaluate the land's probable use in its highest and best use analysis; (2) the BLM failed to consider alternatives in specific detail to meet the need for long-term landfill demand; and (3) the environmental impact statement (EIS) was deficient in its analysis of potential eutrophication.[92] The Court also decided the EIS met the "hard look" requirement for impact on Bighorn sheep, overruling the district court.[93]

II. FACTUAL BACKGROUND

[91] *Natl. Parks & Conserv. Assn. v. Bureau of Land Mgt.,* 606 F.3d 1058 (9th Cir. 2010).
[92] See *Id*. at 1070. n. 8 ("Eutrophication, in this context, refers to the introduction of nutrients to the desert environment. The eutrophication discussion in this case focuses on two potential pathways: (1) landfill waste material; and (2) nitrogen bearing airborne emissions.").
[93] *Id.* at 1073.

From 1948 to 1983 Kaiser Eagle Mountain (Kaiser) operated a mine in Riverside County, California, near Joshua Tree National Park. Kaiser sought to turn the nonoperational iron ore mine into a landfill through an exchange of land with the BLM. The Kaiser mine comprised 5,000 acres, including a 429 acre townsite for mine employees (leased at the time for use as a correctional facility), and four large pits containing large quantities of unreclaimed tailings.[94]

Under the land swap, Kaiser would create a 4,654-acre landfill, which would be the largest in the United States.[95] Kaiser would also acquire the right of way over Eagle Mountain Railroad, Eagle Mountain Road, and 3,481 acres of BLM land.[96] In exchange, the BLM would acquire 2,846 acres of Kaiser's land, which was adjacent to BLM lands and served as a "critical habitat for the desert tortoise."[97]

The landfill was designed to receive waste from Southern California by rail, with additional waste delivered by truck.[98] The daily influx of garbage would peak at 20,000 tons per day, and the landfill was projected to be operational for 117 years with a total capacity of 708 million tons.[99] The landfill and the nonoperational mine would be located one-and-a-half miles from the Park boundary in an expansive desert area adjacent to Joshua Tree National Park.[100] The desert wilderness is a habitat not only for the desert tortoise, but also for the Bighorn sheep and other sensitive animal species.[101]

Prior to the land exchange, the BLM produced a Draft EIS, describing the project as a "Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; . . . an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain mine site . . . ."[102] The Draft EIS considered six alternatives to the

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[94] *Id.* at 1062.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1062-1063.
[102] *Id.* at 1063.

landfill, including taking “no action,” reduced capacity, “alternate road access,” “rail access only,” the landfill only on Kaiser land, and the landfill development without townsite development.[103]

The BLM commissioned an appraisal report on the land swap (Yerke appraisal).[104] Without taking any prospective landfill project into account, the Yerke appraisal determined that the “highest and best use” of the public lands for exchange was “holding for speculative investment.”[105] The Yerke appraisal valued the public non-townsite land at approximately $77 per acre, the townsite land at approximately $106 per acre, and the Kaiser land at approximately $104 per acre.[106] Kaiser would make up the shortfall in land value by paying the BLM $20,100.[107] The Los Angeles County Sanitation District subsequently entered into a provisional purchase contract for the landfill property for over $8,800 per acre.[108]

The BLM adopted its Final EIS in 1997 and issued a Record of Decision approving the land exchange.[109] The National Parks & Conservation Association and local landowners, the Charpieds, protested[110] The BLM denied the protests, and in September 1999, the Appeals Board affirmed the BLM decision, incorporating the Draft and Final EIS.[111]

<u>III. PROCEDUAL BACKGROUND</u>

Plaintiffs Conservation Association and the Charpieds (collectively Conservation Association) filed complaints in the United States District Court for the Central District of California under the Administrative Procedure Act alleging violations of the Federal Land Policy and Management Act (Management Act) and the National Environmental Protection Act (NEPA).[112] The claims were consolidated, and the district court ruled partially in favor of the Conservation Association, granting

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[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1063 n. 1.
[109] *Id.* at 1063.
[110] *Id.*
[111] *Id.*
[112] *Id.*

summary judgment.[113] The district court set aside the land exchange after looking only at the Record of Decision because:

> (1) the BLM did not give "full consideration" to whether the land exchange is in the public interest; (2) the Yerke appraisal failed to consider a landfill as a "highest and best use"; (3) the EIS's "purpose and need" statement was too narrowly drawn, with accordingly narrow potential alternatives foreordaining landfill development; and (4) the BLM failed to take a "hard look" at potential impacts on Bighorn sheep and the effects of nitrogen enrichment on the nutrient-poor desert environment.[114]

The BLM then appealed to the Ninth Circuit Court of Appeals.[115]

IV. HOLDING AND ANALYSIS

The Ninth Circuit Court of Appeals first determined the standard of review of the case: specifically, whether the BLM's Record of Decision or the Appeals Board decision constituted a "final agency action" for the land exchange.[116] The court overturned the district court's decision and ruled that the Record of Decision was not a final agency action.[117] The court broadened the scope of review beyond the Record of Decision to the Appeals Board decision, which included the EIS, because the Appeals Board granted a stay before the Record of Decision became effective.[118]

The court first considered whether the Yerke appraisal was adequate in its determination of the highest and best use mandate in the land exchange.[119] The court looked to whether the administrative remedies were exhausted by the Conservation Association in regards to the claim challenging the determination of the "highest and best use."[120] Generally, issues not appropriately presented to administrative proceedings will not be considered.[121] However, this rule has been interpreted broadly to provide notice to the agency and give the agency an opportunity to rectify alleged violations.[122] Claims do not need to be stated in specific terms as to the rule and the requirements, but only need to provide

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[113] *Id.*
[114] *Id.* at 1063-1064.
[115] *Id.* at 1064.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 1065.
[119] *Id.*
[120] *Id.*
[121] *Id*. (citing *Marathon Oil Co. v. U.S.*, 807 F.2d 759, 767-768 (9th Cir. 1986)).
[122] *Id*. (citing *Native Ecosystems v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)).

notice as to the issues.[123] The court was satisfied that the Appeals Board had sufficient notice as to the highest and best use issue, even though the Conservation Association did not use the specific "highest and best use" language in their Statement of Reasons for appeal.[124]

The court then looked to the merits of the highest and best use claim.[125] The Management Act mandates a BLM land appraisal prior to exchange.[126] The BLM appraisal must set forth an opinion based upon market information[127] and set a value that reflects a competitive and knowledgeable open market.[128] The appraisal must reflect the highest and best probable legal use based on market evidence and an appraiser's opinion.[129] The determination of the highest and best use involves evaluation of whether the project is: "(1) physically possible; (2) legally permissible; (3) financially feasible; and (4) [will] result in the highest value."[130] Here, the court determined that the Yerke appraisal did not adequately evaluate the "highest and best use" of the land.[131] The court found that at the time of the appraisal, Kaiser had already applied for county permits for the landfill.[132] Additionally, the Yerke appraisal clearly stated that no aspect of the proposed landfill would be taken into consideration in the appraisal.[133] The court affirmed the district court's decision on the Management Act highest and best use claim, concluding that the probable use of the land as a landfill was not taken into account.[134]

Next, the court determined the land exchange fell short of the public interest requirement under the Management Act,[135] and reversed the district court's decision. Public interest is determined by giving "full consideration" to the betterment of Federal land management, as well as the needs of State and the

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[123] *Id*. (citing *Great Basin Mind Watch v. Hankins*, 456 F.3d 955, 967 (9th Cir. 2006)).
[124] *Id*. at 1066.
[125] *Id.*
[126] *Id*. (citing 43 U.S.C. § 1716(d)(1) (2006)).
[127] *Id*. (citing 43 C.F.R. § 2200.0-5(c) (2010)).
[128] *Id*. (citing 43 C.F.R. § 2200.0-5(n)).
[129] *Id*. (citing 43 C.F.R. § 2200.0-5(k)).
[130] *Id*. at 1067 (citing Interstate Land Acq. Conf., *Uniform Appraisal Standards for Federal Land Acquisitions*, www.justice.gov/enrd/land-ack (Dec. 20, 2000).)
[131] *Id.*
[132] *Id.* (BLM and Kaiser did not contest the legality or feasibility of the landfill).
[133] *Id.*
[134] *Id.* at 1068.
[135] 43 U.S.C. § 1716(a) (2009).

local people.[136] The court reasoned that the BLM gave "full consideration" of the public interest as evidenced by the 1,600 additional pages in the Final EIS not considered by the district court.[137]

The court then looked at the NEPA claims, and first determined that alternatives to the landfill had not been adequately considered.[138] The court looked to whether the BLM considered reasonable alternatives to the accepted landfill project.[139] An agency has "considerable discretion" in selecting alternatives.[140] However, the alternatives considered cannot be unduly narrow.[141] In this case, the court looked to whether the goals were those of the BLM or those of Kaiser.[142] The court determined that alternatives other than Kaiser's landfill should have been reasonably considered in the BLM's purpose and need statement; however, the statement was so narrowly written it excluded any option other than a landfill.[143] The court affirmed the district court's decision, stating that the BLM put Kaiser's needs before the public's in the determination of "purpose and need" and "reasonable range of alternatives."[144]

Next, the court examined the NEPA issue that involved Bighorn sheep in the EIS, and found the "hard look" requirement satisfied.[145] The EIS must contain a "reasonably thorough"[146] discussion of environmental costs from the action; the standard of review is whether the BLM took a "hard look" at the environmental impacts.[147] The EIS included details of migratory patterns, habitat loss, water access and discussion of a buffer zone.[148] The court determined that the fifty-six-page report on Bighorn sheep was

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[136] *Id*. at 1069 (citing 43 U.S.C. § 1716(a)).
[137] *Id*. (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 843 (1984)).
[138] *Id.* at 1069-1070.
[139] *Id.* at 1070.
[140] *Id*. at 1070 (quotations omitted; citing *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998)).
[141] *Id.* at 1070 (Applying a "reasonableness standard" as defined in *Carmel-By-the-Sea v. United States Dept. of Transp.*, 123 F.3d 1142, 1155-1159 (9th Cir. 1997)).
[142] *Id.*
[143] *Id*. at 1072.
[144] *Id.*
[145] *Id.* at 1073.
[146] *Id*. (*California v. Block*, 690 F.2d 753, 761 (9th Cir.1982)).
[147] *Id*. (citing 40 C.F.R. § 1502.1(2009).
[148] *Id.*

not deficient, and though lacking some specifics, the required "hard look" concerning the habitat buffer zone was acceptable and reasonably complete.[149]

Finally, the court examined whether the EIS gave a "hard look" to eutrophication, and found the BLM's efforts deficient.[150] Again, the court applied the "hard look" standard to the BLM EIS.[151] The court looked at the EIS and found that while several of the issues relating to eutrophication, such as "Biological Resources" and "Air Quality" were addressed, there was no full discussion of the nitrate deposition into the environment.[152] The court reasoned that the cobbled-together discussion was deficient, and did not satisfy the "hard look" requirement as "reasonably thorough."[153] The court affirmed the district court's decision that the EIS was deficient on the issue of eutrophication.[154] Therefore, it was deficient enough in the area of eutrophication, therefore failing the NEPA requirements and impeding the swap.[155]

V. CONCLUSION

The court made the correct decision, though the analysis of the alternative uses for the land was incomplete. While it may appear that the highest and best use requirement mandating a landfill fulfills a private goal, the landfill serves a public goal providing landfill space to an already overburdened Southern California, evidenced by Los Angeles County's offer to purchase the landfill site for $8,800 an acre.[156] The court failed to consider that public and private goals regularly overlap, and that the goals that do not serve only the public should not be discarded. Despite this, the court made an important decision which upholds heightened transparency in federal land transactions.

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[149] *Id.* at 1073.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1073-1074.
[154] *Id.* at 1074.
[155] *Id.*
[156] *Id*. at 1063 n. 1.