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Reed v. Salazar

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Reed v. Salazar, ___F. Supp. 2d___, 2010 WL 3853218, 2009 U.S. Dist. Lexis 129845 (D.D.C. Sept. 28, 2010).

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ABSTRACT

Two environmental advocacy groups challenged the decision of the U.S. Fish and Wildlife Service (FWS) to grant operational management of the National Bison Range in western Montana to the Confederated Salish and Kootenai Tribes of the Flathead Reservation. The District Court for the District of Columbia held the Service's decision to classify the management agreement as a categorical exclusion to environmental review violated the National Environmental Policy Act. The Court held the management agreement be set aside, effectively returning control of the National Bison Range to FWS.

I. INTRODUCTION

Reed v. Salazar was decided on September 28, 2010 by the U.S. District Court for the District of Columbia.[333] The decision is the culmination of two separate but related suits challenging the U.S. Fish and Wildlife Service's (FWS) decision to grant administrative control of the National Bison Range (the Range) in western Montana to the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT). In a consolidated opinion, the court held that the FWS violated the National Environmental Policy Act (NEPA) by re-granting control of the National Basin Range to the CSKT without first performing an environmental assessment.[334]

[333] *Reed v. Salazar*, 2009 U.S. Dist. Lexis 129845 (D.D.C. Sept. 28, 2010).

[334] *Id*. at *55 (The dispute in this case is over the second grant of control given to the CSKT over the Range. For a history of CSKT management of the Range: see below).

As a result of this violation, the court returned the responsibility to manage the Bison Range to FWS.[335]

II. FACTUAL BACKGROUND

The National Bison Range Complex is a large preserve in western Montana that includes the National Bison Range, Swan Lake, Pablo and Ninepipe National Wildlife Refuges, and the Northwest Montana Wetland District.[336] The Range was created by President Theodore Roosevelt in 1908 to conserve populations of American bison that had been severely reduced over the past half century.[337] The range lies entirely within the borders of the Flathead Reservation, home to the Confederated Salish and Kootenai Tribes.[338]

In early 2003 the CSKT contacted the Secretary of the Interior indicating an interest in establishing an Annual Funding Agreement (AFA) for the operation and day-to-day management of the Range.[339] After a year of negotiations, the CSKT and the FWS reached an agreement, becoming effective on March 15, 2005.[340] The 2005 AFA required the CSKT to perform duties in five areas: general Range management, biological and habitat management, fire management, Range fence maintenance, and visitor services.[341] Although day-to-day operations were given to the CSKT and its employees, overall responsibility for the Range remained in the hands of a FWS Manager.[342]

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[335] *Id*. at *59.
[336] *Id*. at *14.
[337] *Id*.
[338] *Id*.
[339] *Id*. at*15 (Annual Funding Agreements are made between federal agencies and Indian tribes pursuant to the Indian Self-Determination and Education Assistance Act of 1975 and its amendments. The Act seeks to further the policy of Tribes administering the programs, services, and administrative duties that would normally be performed by the federal government. *Id*. at *5).
[340] *Id*. at *16.
[341] *Id*.
[342] *Id*.

One year after the 2005 AFA went into effect, the FWS Manager for the Range submitted a report on CSKT's implementation of the management plan.[343] The report indicated that only forty-one percent of the duties performed by the CSKT were rated as successful.[344] One month after the FWS Manger's report was submitted a FWS employee issued a memorandum listing several major deficiencies in the CSKT's management and operation of the Range.[345]

Despite the negative performance evaluations, the FWS decided to extend the 2005 AFA into the 2007 fiscal year.[346] In September 2006, seven FWS employees filed an informal grievance, alleging the CSKT had created a hostile work environment at the Range.[347] In December, the FWS Project Leader formally recommended the FWS reassume day-to-day control over food distribution to the animals.[348] The next day the FWS regional director requested the Secretary of the Interior to terminate the 2005 AFA and end all negotiations of extending management by the CSKT in the future.[349]

On December 11, 2006, the FWS formally notified the CSKT that the 2005 AFA would be terminated, and all negotiations for future management plans would stop immediately.[350] The termination notice listed several instances of major mismanagement by the CSKT as justification for the decision.[351] The CSKT appealed the FWS's decision to the Board of Indian Appeals,

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[343] *Id*.
[344] *Id*.
[345] *Id*. at *17
[346] *Id*.
[347] *Id*. at *18.
[348] *Id*.
[349] *Id*.
[350] *Id*. at *19.
[351] *Id*. (The notice cited specifically as grounds for termination: under-feeding of animals by CSKT employees; deficient fence maintenance that led to several escapes; and the death of a cow bison that became trapped in loose barbed wire and was stomped to death by another bison. *Id.* at *20).

claiming the FWS was required to give notice before terminating the agreement, and that reports by FWS employees alleging mismanagement by the CSKT were not accurate.[352]

While the appeal was pending, Deputy Secretary of the Interior Lynn Scarlett wrote a letter to FWS and Bureau of Indian Affairs officials expressing disappointment in how officials handled the termination of the 2005 AFA.[353] Deputy Secretary Scarlett directed the officials to immediately begin the process of renegotiating a new AFA for fiscal year 2007.[354] After a troubled start, negotiations were finally successful and, in June of 2008, CSKT was granted a new AFA for fiscal years 2009-2011.[355] The 2008 AFA gave the CSKT more control over management decisions and created a new "Refuge Leadership Team" consisting of officials from the CSKT and the FWS that would collaborate on management policy.[356]

III. PROCEDURAL BACKGROUND

Soon after the 2008 AFA became effective, two separate suits were filed challenging the act.[357] The first suit was filed by Public Employees for Environmental Responsibility (PEER), a group of public employees which counted as it members former FWS employees who had worked at the Range and local area ranchers whose land is adjacent to the Range.[358] This group of plaintiffs became known as the Reed plaintiffs.[359] The second suit was filed by The Blue Goose Alliance, a separate group of former and current FWS employees.[360] Both suits allege that the 2008 AFA and the process by which it was created violated several federal laws including the National Wildlife Refuge System Administration Act, the Indian Self-

[352] *Id*. at *21.
[353] *Id*.
[354] *Id*.
[355] *Id*. at *22.
[356] *Id*. (quotations omitted).
[357] *Id*. at *2.
[358] *Id*. at *36.
[359] *Id*. at *2
[360] *Id*. at *40.

Determination and Education Assistance Act, and the National Environmental Policy Act (NEPA).[361]

Both suits were filed in the District Court for the District of Columbia. All parties to the suit filed motions for Summary Judgment under Rule 56(c)(2) of the Federal Rules of Civil Procedure.[362]

IV. ANALYSIS OF THE COURT'S DECISION

A. Both the Reed plaintiffs and the Blue Goose Alliance plaintiffs had standing to challenge 2008 AFA.

The FWS and the CSKT challenged the standing for both plaintiff groups to sue in federal court. For the Reed and Blue Goose plaintiffs, the FWS claimed the parties did not have standing to challenge the 2008 AFA because they did not suffer any "concrete" and "particularized" injuries from the CSKT's management of the Range.[363] To assert standing, a plaintiff must show:

> 1. That they suffered injury in fact, which is the invasion of a legally protected interest that is:
> (a) *Concrete and particularized*
> (b) Actual or imminent, not conjectural or hypothetical;
> 2. That there is a causal connection between the injury and the conduct at issue, such that the injury is fairly traceable to the challenged act; and
> 3. That it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision.[364]

The court noted that in environmental cases, such as this one, the injury in fact is usually established by showing that the plaintiffs had a "recreational or aesthetic interest in [the]

[361] *Id*. at *2-3.
[362] *Id*. at *3 ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2)).
[363] *Id*. at *34-40.
[364] *Id.* at *32-33. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61) (emphasis added).

particular land that [would] be adversely affected by the challenged action."[365] Such a showing would indicate that the injury in fact is sufficiently concrete and particularized. The court, citing the troubled history of the CSKT's management of the Range, found that plaintiffs' aesthetic enjoyment of the Range would be harmed by future CSKT management.[366]

To establish that injury is imminent, the plaintiffs only needed to show a desire to visit the location in question.[367] However, "someday" intentions that lack any specification of when the day to visit will come would not support a finding of actual or imminent injury.[368]

Both the Reed plaintiffs and the Blue Goose plaintiffs provided depositions and affidavits from former FWS employees who had visited and worked in the Range and its adjoining preserves.[369] These testimonials indicated that the plaintiffs had regularly been to the Range in the past and intended to return to the range in the near future.[370] Both the FWS and the CSKT argued that these intentions to return were too speculative in nature to establish injury in fact.[371] The court soundly rejected this argument.[372]

Based on the history of management problems related to the CSKT and the substantial indications that several individual plaintiffs planned to return to the Range, the court held that the plaintiffs had met their standing requirements to challenge the 2008 AFA in federal court.[373]

B. The decision by the FWS to classify the 2008 AFA as a Categorical Exclusion to environmental review was arbitrary and capricious, and thus in violation of NEPA.

The plaintiffs argued that the FWS violated NEPA when they did not conduct an environmental analysis of the 2008 AFA before it became effective.[374] The FWS claimed that

[365] *Id*. at *35 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000)).
[366] *Id*. at *39.
[367] *Id*.
[368] *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564).
[369] *Id*. at *36-41.
[370] *Id*. at *36-41.
[371] *Id*. at *38.
[372] *Id*. at *39.
[373] *Id*. at *43.

the 2008 AFA could be classified as a categorical exclusion under NEPA, and thus did not require an environmental review.[375]

The major working provision of NEPA is the requirement that "all agencies of the federal government" prepare and publish a detailed environmental analysis for "major federal actions significantly affecting the quality of the human environment."[376] This analytic document is called an Environmental Impact Statement (EIS).[377] A full EIS is not required if a federal agency makes a determination through a lesser report, an Environmental Assessment (EA), that the proposed action would not significantly affect the environment.[378] The EA is "a concise public document" that makes the early indication of whether there is sufficient evidence to justify a full EIS on the action.[379]

An agency does not need to prepare an EIS or an EA if it determines the action is subject to a Categorical Exclusion (CE).[380] A CE is defined as a "category of actions which do not have a significant impact on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations."[381] If an agency finds that a particular action falls within a CE the agency is still obligated to determine if any "extraordinary circumstances" would nonetheless justify an environmental analysis.[382] Once a CE has been established and the agency has properly determined that no extraordinary

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[374] *Id*.
[375] *Id*. at *43-44.
[376] *Id*. at *8 (citing *Found. on Econ. Trends v. Hecker*, 756 F.2d 143, 146 (D.C. Cir. 1985)).
[377] *Id*.
[378] *Id*. (citing *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 81 (D.D.C. 2006)).
[379] *Id*. at *9 (citing *Dept. of Trans. v. Pub. Citizen*, 541 U.S. 752, 757 (2004)).
[380] *Id*.
[381] *Id*. (citing 40 C.F.R. §1507.3 9 (2010)).
[382] *Id*. at *11 (citing 40 C.F.R. §1508.49, 43 C.F.R. § 46.215 (2010)).

circumstances are applicable the decision will only be set aside by a court if the decision was arbitrary and capricious.[383]

The plaintiffs argued that the decision of the FWS to classify the 2008 AFA as a CE was arbitrary and capricious because the FWS failed to do any analysis prior to the classification.[384] The FWS argued that it was not required to conduct a new analysis because the prior analysis which led to CE status for the previous 2005 AFA was sufficient to grant a CE for the 2008 AFA.[385] The court, however, rejected this argument and determined that, the FWS had acted arbitrarily and capriciously in light of "substantial evidence in the record that an extraordinary circumstance may apply"[386] In support of its rejection of the FWS argument, the court cited substantial evidence of environmental harm during the CSKT's previous management of the Range. Such examples included the finding that only forty-one percent of duties performed by the CSKT were deemed successful; lack of electric fence maintenance by the CSKT that led to escapes and later the trampling of a cow bison; and, evidence that the CSKT had significantly underfed 64 bison that were awaiting transfer to another preserve.[387] The court held that the FWS decision was arbitrary and capricious because the FWS relied on its previous 2005 CE classification for the new 2008 AFA, and this 2005 CE did not include an evaluation of the mismanagement of the Range by the CSKT subsequent to the 2005 AFA.[388]

C. The proper remedy for the NEPA violation was rescission of the 2009 AFA and reestablishment of FWS control over the Range.

[383] *Id*. at *44 (citing *Back Co. Horsemen v. Johanns*, 424 F. Supp. 2d 89, 99 (D.D.C. 2006)).
[384] *Id*.
[385] *Id*. at *45.
[386] *Id*. at *55.
[387] *Id*. at *50.
[388] *Id*. at *55.

After finding that the 2008 AFA was in violation of NEPA, the court next determined the proper remedy.[389] The court held that the NEPA violation in this case was governed by the default remedy in the Administrative Procedure Act which states that a court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[390] The CSKT, however, argued that rescission of the 2008 AFA was not an appropriate remedy because: (1) such a ruling would threaten the "long-term contractual relationship" the CSKT had formed with the FWS; and (2) rescission would be major disruption to the operations and management of the Range.[391] The court however, held that it was not without discretion in issuing the proper remedy.[392] The court rejected the CSKT's remedy argument, stating that "this is not a case where 'the egg has been scrambled and there is no apparent way to restore the status quo ante.'"[393] The court held that the CSKT had not shown any compelling evidence that rescission of the 2008 AFA would be unduly disruptive to the day-to-day operation of the Range.[394] In fact, the court asserted that rescission will likely have little impact on the operations of the Range because the FWS staff already working on the Range could easily assume the duties performed by the CSKT.[395] The court therefore held, pursuant to the APA, that the 2008 AFA should be voided, and operational control of the Range should be given back to the FWS.[396] Because the court found the Secretary of the Interior, in approving the CE for the 2008 AFA, violated NEPA,the court determined that setting aside the CE approval was an adequate remedy to redress the plaintiffs' injuries. The

[389] *Id*.
[390] *Id*. (citing 5 U.S.C.A §706(2) (West 2007)).
[391] *Id*. at *57.
[392] *Id*. at *56.
[393] *Id*. at *58 (citing *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)).
[394] *Id*.
[395] *Id*.
[396] *Id*. at *59.

court thus dismissed the plaintiffs' other claims for violations of the National Wildlife Refuge System Administration Act and the Indian Self-Determination and Education Assistance Act.[397]

V. CONCLUSION

Depending on one's perspective *Reed v. Salazar* is either a solid victory or a striking defeat. From the environmental law perspective the case is another example of an advocacy group holding a federal agency accountable to NEPA and other federal rules. From an Indian law perspective the case is yet another example of Tribes attempting to manage their own affairs under the Indian Self-Determination and Education Assistance Act only to be stopped by outside interests. For the time being the Range is back under federal control. However, given the importance of the Range to both sides it is doubtful that *Reed v. Salazar* will be the final word on the management of the National Bison Range.

[397] *Id*. at *60.