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## Native Ecosystems Council v. Tidwell

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*Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010).

**Josh Nichols**

**ABSTRACT**

The United States Ninth Circuit Court of Appeals held that the U.S. Forest Service’s proxy-on-proxy approach, when considering livestock grazing levels in Southwest Montana’s Antelope Basin/Elk Lake Project in the Beaverhead-Deerlodge National Forest, did not comply with the National Forest Management Act. The court determined that the Forest Service failed to take a requisite “hard look” at environmental impacts, such as the impacts on sage grouse populations and the maintenance of diverse habitats for native wildlife, when it approved grazing allotment updates.

**I. INTRODUCTION**

In *Native Ecosystems Council v. Tidwell*,<sup>226</sup> the United States Court of Appeals for the Ninth Circuit held that the U.S. Forest Service’s (Forest Service) proxy-on-proxy approach did not comply with the National Forest Management Act (NFMA). The court determined that the Forest Service failed to take a requisite “hard look” at environmental impacts when it approved an update to grazing allotments in the Beaverhead-Deerlodge National Forest (BDNF) in Southwest Montana. The decision was a victory for those concerned that grazing practices contribute to declining sage grouse populations, while it was a setback for those with ranching interests who argued livestock management practices had not negatively impacted vegetation in the project area.

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<sup>226</sup> *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th Cir. 2010).

## **II. FACTUAL BACKGROUND**

The 48,000-acre Antelope Basin/Elk Lake project area forms the southeast portion of the Gravelly Mountain Range in Southwest Montana's BDNF.<sup>227</sup> Three activities allowed by the Forest Service have most impacted the project area's sagebrush ecosystem: (1) herbicide application, (2) controlled burning, and (3) livestock grazing.<sup>228</sup>

The Forest Service divided the project area into eleven grazing allotments as part of a National Environmental Policy Act (NEPA) environmental analysis used to determine appropriate livestock grazing levels.<sup>229</sup> The project proposed updating the ten-year-old Allotment Management Plans (AMP), which determine "where livestock can graze, when grazing would occur and what specific guidelines would be established to regulate the intensity of grazing."<sup>230</sup> The goal was to maintain diverse native wildlife habitat and provide domestic livestock grazing opportunities without compromising forest resources.<sup>231</sup>

The Forest Service issued a revised Environmental Assessment (EA) that addressed concerns about the project's impact on sage grouse.<sup>232</sup> Sage grouse are ground-dwelling, chicken-like birds that rely on sagebrush for roosting, cover, and food.<sup>233</sup> Sage grouse cannot survive in areas where sagebrush does not exist.<sup>234</sup> Three options for updating the AMPs included: (1) continuing the status quo, (2) modifying the AMPs to protect riparian habitat while continuing to allow grazing, or (3) banning grazing on the allotments.<sup>235</sup>

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<sup>227</sup> *Id.* at 929.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 930.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> U.S. Fish & Wildlife Service, *Sage Grouse Fact Sheet*, <http://www.r6.fws.gov/species/birds/sagegrouse/sagegrousefactsheet.pdf> (last updated Jan. 5, 2004).

<sup>234</sup> *Id.*

<sup>235</sup> *Native Ecosystems*, 599 F.3d at 930.

The second alternative was identified as the preferred alternative.<sup>236</sup> Some of the key changes proposed in the second alternative included reducing animal unit months from 11,225 to 10,453, excluding livestock from certain areas, changing boundaries to create a new allotment, limiting upland forage utilization to fifty percent, and limiting riparian forage to fifty-five percent.<sup>237</sup> Several structural improvements, including fencing, water troughs, and pipelines were also recommended in the second alternative.<sup>238</sup> The United States Fish and Wildlife Service then issued a Biological Evaluation which concluded that the preferred alternative would not adversely affect any listed species. In November, 2003, BDNF District Ranger Mark Petronie released a Decision Notice and Finding of Not Significant Impact that reflected the administrative decision to proceed with the second alternative.<sup>239</sup>

To maintain wildlife diversity, the Forest Plan designates certain wildlife as “management indicator species” (MIS), which are monitored to measure the impact different activities have on wildlife habitats.<sup>240</sup> The sage grouse, which is entirely dependent on sagebrush ecosystems, is an MIS for sagebrush wildlife habitat areas.<sup>241</sup> Only two sage grouse sightings had been reported in the project area in the previous fifteen years, though approximately 21,000 acres, or forty percent of the project area, were considered potential sage grouse habitat.<sup>242</sup> About 1,900 acres were considered to have potential nesting and early brood rearing habitat.<sup>243</sup>

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 931.

<sup>243</sup> *Id.*

In December 2004, the Forest Service issued a Supplemental Information Report concerning sage grouse, and it cited new information discovered in studies published after the environmental assessment.<sup>244</sup> The Forest Service requested that J.W. Connelly, one of the authors of *Conservation Assessment of Greater Sage Grouse and Sagebrush Habitats*, do a site-specific review.<sup>245</sup> Connelly concluded from his review that if the project were implemented, effects to sage grouse would be minimal.<sup>246</sup> Therefore, the District Ranger determined that the EA's conclusions remained accurate.<sup>247</sup>

### **III. PROCEDURAL BACKGROUND**

The District Ranger, with agency authority to waive an Environmental Impact Statement (EIS) if the EA concludes that the project poses no significant impact, decided that no EIS was warranted.<sup>248</sup> The Native Ecosystems Council (NEC) appealed the decision.<sup>249</sup> Regional Forester Abigail Kimbell upheld the District Ranger's decision, and NEC then filed a complaint in the United States District Court for the District of Montana.<sup>250</sup> The district court granted summary judgment to the Forest Service, and NEC appealed.<sup>251</sup> NEC argued the district court erred when it held that Forest Service's approval of a project updating grazing rights complied with NFMA and NEPA.<sup>252</sup>

### **IV. NINTH CIRCUIT COURT OF APPEALS DECISION**

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 929.

The court reversed the district court’s grant of summary judgment, holding that the Forest Service’s methodology violated both NFMA and NEPA.<sup>253</sup>

Under NFMA, the Forest Service has a duty to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area.”<sup>254</sup> The Forest Service must conduct an analysis of each “‘site specific’ action to ensure that the action is consistent with the Forest Plan.”<sup>255</sup>

The Forest Service used the proxy-on-proxy approach for the analysis, using habitat as a proxy to measure a species’ population, and then using that species’ population as a proxy for the population of other species.<sup>256</sup> Under the Forest Plan, sagebrush habitat was used to assess the viability of sagebrush species, and the sage grouse was designated as the MIS for sagebrush communities.<sup>257</sup> This meant that sage grouse were to be monitored to measure management activity effects on sage grouse habitat to ensure that viable populations of native and desirable non-native species were maintained.<sup>258</sup> Despite the designation, sage grouse were virtually non-existent in the project area.<sup>259</sup>

The court held that there was no basis to evaluate the Forest Service’s assertion that the sagebrush habitat was sufficient to sustain viable sage grouse populations when sage grouse were not found in the project area.<sup>260</sup> The court stated, “it is unfathomable how the Forest Service could meet its responsibility to maintain existing species by selecting as a proxy a species that is

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<sup>253</sup> *Id.* at 938.

<sup>254</sup> *Id.* at 932 (citing 16 U.S.C. § 1604(g)(3)(B)).

<sup>255</sup> *Id.* at 932, 940 (citing *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir.2002)).

<sup>256</sup> *Id.* at 933.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

virtually non-existent in the targeted area.”<sup>261</sup> The court held that the District Ranger’s determination that there would be minimal impacts on sage grouse was not derived from a reliable methodology.<sup>262</sup> Based on that reasoning, the court reversed the district court’s grant of summary judgment on NEC’s NFMA claims.<sup>263</sup>

The court also addressed the Forest Service’s failure to comply with the very guidelines it cited in making its argument.<sup>264</sup> The *Connelly Guidelines* require “quantitative data from population and habitat monitoring.”<sup>265</sup> The guidelines used by the Forest Service to argue that NFMA sage grouse population requirements had been met were not applicable because sage grouse did not exist in the project area.<sup>266</sup> The Forest Service also failed to consider evidence that sage grouse populations had declined for decades.<sup>267</sup> Such omission suggested that the agency “failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence in the record, and its decision is therefore arbitrary and capricious.”<sup>268</sup> Additionally, the Forest Service did not identify any nesting habitat in the project area, but the *Connelly Review* cited 1,900 acres of nesting habitat.<sup>269</sup>

NEPA exists to ensure a process and requires a federal agency to prepare a “detailed statement on the environmental impact” of federal actions that significantly affect the quality of the human environment.<sup>270</sup> If an agency concludes in an EA that the proposed project has no significant effect, the federal agency may issue a “no significant impact” finding in lieu of

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<sup>261</sup> *Id.* at 934.

<sup>262</sup> *Id.* at 935.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 934 (citing *Guidelines to Manage Sage Grouse Populations and Their Habitats*, John W. Connelly, Michael A. Schroeder, Alan R. Sands and Clait E. Braun, *Wildlife Society Bulletin*, Vol. 28 pp. 975-976 (2000)).

<sup>266</sup> *Id.* at 935.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 936.

preparing an EIS.<sup>271</sup> An EA is a more limited document than an EIS and is used to determine whether an EIS is necessary.<sup>272</sup> “If an agency decides not to prepare an EIS, it must supply a convincing statement” explaining why a project’s impacts are insignificant.<sup>273</sup>

The court held that the Forest Service’s use of sage grouse as an MIS to assess the project’s impact on all sagebrush species’ diversity was flawed because no sage grouse existed in the project area.<sup>274</sup> As a result, its overall study of the sage grouse habitat throughout the EA was similarly deficient.<sup>275</sup> The court noted that it could not conclude that the results of the EA would have differed if an appropriate MIS had been selected, but absent that analysis, the court determined the Forest Service must perform a new EA. The court therefore reversed and remanded the district court’s decision.<sup>276</sup>

## **V. CONCLUSION**

The court held that the Forest Service violated both NFMA and NEPA. The district court’s grant of summary judgment in favor of the Forest Service was reversed, and the case was remanded for the Forest Service to prepare a new EA.<sup>277</sup> The court noted that a revised EA, taking into consideration the issues addressed in the court’s decision, might lead to a different conclusion and necessitate the preparation of an EIS.<sup>278</sup> One of the key issues addressed in the decision was the Forest Service’s use of sage grouse as an MIS to assess the project’s impact when sage grouse did not exist in the project area. It was impossible to draw a conclusion on potential impacts of development when the MIS was non-existent, and the court’s assessment of

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<sup>271</sup> *Id.* at 937.

<sup>272</sup> 42 U.S.C. § 4232(C) (2006); *DOT v. Public Citizen*, 541 U.S. 752, 757-58, 124 S. Ct. 2204, 159 L.Ed.2d 60 (2004).

<sup>273</sup> *Native Ecosystems*, 599 F.3d at 937.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 938.

<sup>278</sup> *Id.*

the discrepancy was sound when it stated that “it is unfathomable how the Forest Service could meet its responsibility to maintain existing species by selecting as a proxy a species that is virtually non-existent in the targeted area.”<sup>279</sup> As a result of this decision, agencies using the proxy-on-proxy approach must make certain that the species selected as the MIS actually exist in the project area.

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<sup>279</sup> *Id.* at 934.