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## Forest Guardians v. United States Forest Service

Heather Baltes

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***Forest Guardians v. United States Forest Service*, 641 F.3d 423 (10th Cir. 2011).**

**Heather Baltes**

**I. INTRODUCTION**

In *Forest Guardians v. United States Forest Service*,<sup>1</sup> the Tenth Circuit Court of Appeals affirmed the U.S. District Court for the District of New Mexico’s judgment in favor of the U.S. Forest Service (USFS) rejecting the plaintiff-appellant’s (Forest Guardians) appeal. The court held: (1) Forest Guardians failed to exhaust administrative remedies under the Administrative Procedures Act (APA);<sup>2</sup> (2) USFS complied with the Best Available Science (BAS) standard;<sup>3</sup> (3) USFS did not violate the National Forest Management Act’s (NFMA) species diversity requirement;<sup>4</sup> and (4) Forest Guardians did not have a cognizable claim for failure to comply with monitoring requirements.<sup>5</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In 2000, the USFS significantly amended and replaced the 1982 planning regulations (1982 Rules) with the 2000 planning regulations (2000 Rules).<sup>6</sup> Planning regulations govern USFS management at both the program and project levels.<sup>7</sup> Rather than being immediately implemented, the 2000 Rules provided that until promulgation of a new, final rule, the USFS “must consider the best available science in implementing” a forest plan.<sup>8</sup> The 2000 Rules required the USFS account for BAS and remained in effect until new rules were implemented in 2005.<sup>9</sup>

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<sup>1</sup> *Forest Guardians v. U.S. Forest Service*, 641 F.3d 423 (10th Cir. 2011).

<sup>2</sup> *Id.* at 423, 427–28.

<sup>3</sup> *Id.* at 440.

<sup>4</sup> *Id.* at 443.

<sup>5</sup> *Id.* at 444.

<sup>6</sup> *Id.* at 428.

<sup>7</sup> *Forest Guardians*, 641 F.3d at 428.

<sup>8</sup> *Id.* at 429 (referring to 36 C.F.R. § 219.35(a) (2001)).

<sup>9</sup> *Id.* at 429 (quoting 70 Fed. Reg. 1023,1027 (Jan. 5, 2005)).

The 1986 Carson Forest Plan (Plan) was adopted in accordance with the 1982 Rules<sup>10</sup> and included a monitoring program that identified Management Indicator Species (MIS).<sup>11</sup> The Plan required USFS to monitor MIS population viability and trends for five years.<sup>12</sup> Proposed in 1992 and approved in June 2002, the Agua/Caballos Project (A/C Project) located in New Mexico consisted of site-specific silvicultural treatments, timber cutting and sales.<sup>13</sup> The USFS approved the A/C Project without citing the BAS Standard of the 2000 Rules.<sup>14</sup>

Forest Guardians successfully appealed the 2002 approval by alleging the MIS analysis was incomplete.<sup>15</sup> The USFS updated the forest-wide MIS assessment in 2003 and again approved the A/C Project in April of 2004.<sup>16</sup> Forest Guardians filed an administrative appeal on July 12, 2004, for failing to comply with the 1982 Rules and the appeal was denied in August 2004.<sup>17</sup>

Forest Guardians filed this action in the U.S. District Court for the District of New Mexico seeking declaratory and injunctive relief.<sup>18</sup> The district court denied relief and granted judgment in favor of the USFS.<sup>19</sup> Forest Guardians appealed and a Tenth Circuit panel affirmed the district court.<sup>20</sup> In a March 8, 2010, order the Tenth Circuit granted Forest Guardians' request for rehearing *en banc*.<sup>21</sup> However, after considering the parties' briefs and hearing oral argument the court voted to vacate the March 8, 2010 order, withdraw the previous opinion, and substitute the current opinion of the original panel in its place.<sup>22</sup>

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<sup>10</sup> *Id.* at 427–29 (referring to 36 C.F.R. pt. 219 (1999)).

<sup>11</sup> *Id.* at 427.

<sup>12</sup> *Id.*

<sup>13</sup> *Forest Guardians*, 641 F.3d at 427.

<sup>14</sup> *Id.* at 435.

<sup>15</sup> *Id.* at 427–28.

<sup>16</sup> *Id.* at 428.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 427.

<sup>19</sup> *Forest Guardians*, 641 F.3d at 472.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 426.

<sup>22</sup> *Id.*

### **III. ANALYSIS**

The Tenth Circuit reviewed the district court's decision *de novo* and the USFS's approval of the A/C Project as a final agency action subject to the "arbitrary and capricious" standard of the APA.<sup>23</sup> The court articulated that the USFS's decision would be "arbitrary and capricious" if it: (1) failed to consider an important aspect of the problem; (2) offered an explanation that ran counter to the evidence; or (3) was so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>24</sup> The court considered the relevant factors and circumstances in determining whether there was a clear error of judgment.<sup>25</sup>

#### **A. Forest Guardians failed to exhaust available administrative remedies.**

Forest Guardians argued in its administrative appeal that approval of the A/C Project was subject to the 1982 Rules.<sup>26</sup> On appeal, Forest Guardians did not dispute the district court's conclusion that the 2000 Rules applied.<sup>27</sup> Instead, Forest Guardians claimed the USFS failed to consider and apply the BAS standard and that exhaustion should be excused because it would be inequitable to expect Forest Guardians to know the 2000 Rules applied.<sup>28</sup> The court determined it was not inequitable because Forest Guardians had been provided notice by the plain language of the regulation.<sup>29</sup> The court concluded Forest Guardians' BAS argument was not entitled to judicial review for failure to exhaust administrative remedies.<sup>30</sup>

#### **B. The district court did not err in allowing the USFS to prevail based on the BAS standard.**

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<sup>23</sup> *Id.* at 428 (discussing Administrative Procedure Act, 5 U.S.C. §§ 500 et seq. (2006)).

<sup>24</sup> *Id.* (quoting 5 U.S.C. § 706(2)(A)).

<sup>25</sup> *Forest Guardians*, 641 F.3d at 428.

<sup>26</sup> *Id.* at 429.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 429–30.

<sup>29</sup> *Id.* at 434.

<sup>30</sup> *Id.* at 429–31.

Forest Guardians contend the district court violated *SEC v. Chenery Corporation*<sup>31</sup> by upholding the USFS’s decision when it did not consider, mention or apply the BAS standard of the 2000 Rules.<sup>32</sup> A review of the record led the court to disagree with the Forest Guardians’ contention.<sup>33</sup> The court held that evidence in the record indicated the USFS effectively complied with the BAS standard of the 2000 Rules when approving the A/C Project, even though the record did not explicitly reference the term “BAS.”<sup>34</sup> The court affirmed the district court’s reasoning that the USFS effectively complied with the BAS standard of the 2000 Rules.<sup>35</sup>

**C. The USFS did not violate NFMA in its duty to maintain species diversity.**

Forest Guardians alleged approval of the A/C Project violated NFMA’s requirement to maintain species diversity by failing to account for the Abert’s squirrel.<sup>36</sup> The court considered scientific evidence contained in the record to determine whether the USFS complied with the Plan and the NFMA’s species diversity requirement.<sup>37</sup> The court noted that the Plan emphasized implementation of forest practices that enhanced Abert’s Squirrel habitat to ensure its continued survival.<sup>38</sup> The USFS collected and evaluated data on the Abert’s Squirrel in its 2003 forest-wide MIS assessment, including effects of management activities on its habitat.<sup>39</sup> The court reasoned that the USFS’s approval of the A/C Project was not arbitrary and capricious because the USFS relied on the MIS assessment and Forest Guardians failed to present evidence that the USFS’s authorization of the A/C Project violated its NFMA duty to maintain species diversity.<sup>40</sup>

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<sup>31</sup> *SEC v. Chenery Corporation*, 318 U.S. 80 (1943).

<sup>32</sup> *Forest Guardians*, 641 F.3d at 435.

<sup>33</sup> *Id.* at 435–40.

<sup>34</sup> *Id.* at 436–37.

<sup>35</sup> *Id.* at 440.

<sup>36</sup> *Id.* (discussing 16 U.S.C. §1604(g)(3)(B)).

<sup>37</sup> *Id.* at 435–40.

<sup>38</sup> *Forest Guardians*, 641 F.3d at 441.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

**D. Forest Guardians did not have a cognizable claim for failure to comply with monitoring requirements.**

The court determined Forest Guardians did not have a cognizable claim for failure to comply with monitoring requirements because the Plan did not condition approval on the completion of a monitoring program. The court reasoned that while the Plan does say MIS should be monitored, it does not condition approval of any individual project on fulfillment of monitoring requirements.<sup>41</sup> The court concluded that Forest Guardians did not sufficiently demonstrate a connection between the monitoring requirements and A/C Project approval.<sup>42</sup>

**IV. CONCLUSION**

*Forest Guardians v. United States Forest Service* demonstrates the importance of determining which planning regulations apply before appealing an agency decision. The court clarified that the 2000 Rules apply to projects and plans proposed during the planning regulation transition period from 2000 to 2005. Accordingly, the court found Forest Guardians failed to exhaust their administrative remedies by not raising the BAS standard argument at the administrative level. The court dismissed Forest Guardians' claim that the district court improperly allowed the USFS to prevail based on the BAS standard and found that the USFS could have approved the A/C Project under the 2000 Rules as well. The court further held that the USFS did not violate its NFMA duty to maintain species diversity because Forest Guardians did not sufficiently show that Abert's Squirrel populations would be harmed by approving the A/C Project. Finally, the court found Forest Guardians did not have a cognizable claim for failing to comply with monitoring requirements.

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<sup>41</sup> *Id.* at 443.

<sup>42</sup> *Id.* at 444–45.