

# Public Land and Resources Law Review

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Volume 0 Case Summaries 2012-2013

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## Earth Island Institute v. U.S. Forest Service

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### Recommended Citation

Hansen, Clare (2013) "Earth Island Institute v. U.S. Forest Service," *Public Land and Resources Law Review*: Vol. 0 , Article 18.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss3/18>

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*Earth Island Institute v. U.S. Forest Service*, 697 F.3d 1010 (9th Cir. Sep. 20, 2012).

**Clare Hansen**

**ABSTRACT**

This case reviews challenges to the Forest Service’s project-level compliance with the Forest Plan’s population viability requirements and environmental assessment for the Angora Project in the Lake Tahoe area. The plaintiffs brought challenges under the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA), governed by the Administrative Procedure Act’s “arbitrary and capricious” standard. The Ninth Circuit affirmed the District Court for the Eastern District of California’s holding that NFMA did not require an assessment of the quantity and quality of habitat needed for the black-backed woodpecker, and the EA was not arbitrary and capricious pursuant to NEPA.

**I. INTRODUCTION**

In *Earth Island Institute v. U.S. Forest Service*,<sup>1</sup> the Ninth Circuit held that the Forest Service’s fire restoration project did not violate NFMA or NEPA.<sup>2</sup> Based on its prior case law, the court held that the discussion of the black-backed woodpecker’s habitat in the project record was sufficient to meet NFMA requirements.<sup>3</sup> The court relied on the less stringent requirements for an EA, as opposed to environmental impact statements, and concluded that the Forest Service’s EA was sufficient.<sup>4</sup>

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<sup>1</sup> *Earth Island Institute v. U.S. Forest Service*, 697 F. 3d 1010 (9th Cir. Sep. 20, 2012).

<sup>2</sup> *Id.* at 1011.

<sup>3</sup> *Id.* at 1018.

<sup>4</sup> *Id.* at 1023.

## II. FACTUAL AND PROCEDURAL BACKGROUND

In the aftermath of the Angora fire, the Forest Service created the “Angora Project” pursuant to the Lake Tahoe Basin Management Unit’s (LTBMU) Forest Plan.<sup>5</sup> The purpose of the Angora Project was to remove trees from portions of the forest to protect people from falling trees and lessen the likelihood of a future fire.<sup>6</sup> The Forest Service (Service) solicited public comments and prepared an EA.<sup>7</sup> After reviewing the comments, it issued a “Finding of No Significant Impact” (FONSI) and found the Project would not affect the distribution of black-backed woodpeckers in the area, *inter alia*.<sup>8</sup> Plaintiffs filed suit in 2011, arguing that the Project failed to comply with NFMA and NEPA.<sup>9</sup> The district court granted summary judgment to the Service; plaintiffs timely appealed.<sup>10</sup>

## III. ANALYSIS

Compliance with NFMA and NEPA is reviewed under the Administrative Procedure Act (APA).<sup>11</sup> The APA allows a court to set aside an agency’s decision only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>12</sup>

### A. NFMA

The Service’s 1982 planning regulations requiring the Service to ensure population viability of species through identification and monitoring of “Management Indicator Species” in forest plans were superseded in 2000.<sup>13</sup> Since 2000, the 1982 requirements only apply if they are

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<sup>5</sup> *Id.* at 1012.

<sup>6</sup> *Earth Island Institute*, 697 F.3d at 1012.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1013.

<sup>10</sup> *Id.*

<sup>11</sup> *Earth Island Institute*, 697 F.3d at 1013.

<sup>12</sup> *Id.* (quoting 5 U.S.C. § 706(2)(A)).

<sup>13</sup> *Earth Island Institute*, 697 F.3d at 1013.

incorporated into a forest plan.<sup>14</sup> Here, the LTBMU Forest Plan stated that “[t]he Forest Service *must* manage habitat to, at the least, maintain viable populations.”<sup>15</sup> Based on the Ninth Circuit’s prior holding regarding a plan with similar language, the court held that the LTBMU Forest Plan had not incorporated the 1982 viability requirements.<sup>16</sup> The court went on to point out that even if the Forest Plan had incorporated the 1982 viability requirements, they were only expressly included at the planning-level, and there was no such requirement at the project-level.<sup>17</sup> The Service correctly asserted that its only project-level duty as to management indicator species was to include a discussion of the relative and direct affects of the alternatives on the Angora Project habitat in the project record.<sup>18</sup>

The court relied on its prior case law to conclude that if a forest plan requires the Service to monitor a population trend at the project-level, the Service may substitute an analysis of the type and quantity of habitat necessary to support the species.<sup>19</sup> The Service’s decision to forego the population trend analysis was not arbitrary or capricious for two reasons. First, the LTBMU Forest Plan expressly excludes the monitoring requirement at the project level.<sup>20</sup> Second, the project record stated that half of the black-backed woodpecker’s habitat would be sustained and would not affect the distribution of the birds in the area.<sup>21</sup>

## B. NEPA

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<sup>14</sup> *Id.* at 1013-1014 (See *Ecology Center v. Castaneda*, 574 F.3d 652 (9th Cir. 2009)).

<sup>15</sup> *Earth Island Institute*, 697 F.2d at 1014.

<sup>16</sup> *Id.* (See *Earth Island Inst. v. Carlton*, 626 F.3d 462, 470–471 (9th Cir. 2010)).

<sup>17</sup> *Earth Island Institute*, 697 F.3d at 1014.

<sup>18</sup> *Id.* at 1015.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1016.

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

The court held the Service's preparation of the EA satisfied NEPA's four procedural requirements: scientific integrity, responses to dissenting opinions, consideration of proposed alternatives, and a requisite "hard look" at the impacts.<sup>22</sup>

First, the Service cited studies, including the California Partners in Flight 2002 report, regarding the historic geographic distribution of black-backed woodpeckers, which supported its claim the Project would not affect the species' population distribution.<sup>23</sup> Thus, the Service satisfied NEPA's requirement that it insure scientific integrity in its discussions and analyses.<sup>24</sup> Second, the court held that responses to dissenting opinions are only required in final environmental impact statements, and even if one had been required here, the Service sufficiently responded by discussing the findings of an opposing study and responding to opposing comments in the FONSI.<sup>25</sup> Third, under the less stringent analysis requirements for an EA, the Service properly considered the alternatives by discussing two options: no action and preferred action.<sup>26</sup> Fourth, the fact that the first three requirements were not arbitrary and capricious supports the conclusion that the Service took a "hard look" at the Angora Project's impacts on black-backed woodpeckers and future fires.<sup>27</sup>

#### **IV. CONCLUSION**

In this case, the Ninth Circuit applied the 2000 amendment to the Forest Service's 1982 planning regulations and its own prior case law. It applied these at the planning level versus the project level pursuant to NFMA. Following this evolution brought the court to the conclusion that the Service's decision was not arbitrary and capricious even though it only mentioned the

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<sup>22</sup> *Id.* at 1019.

<sup>23</sup> *Earth Island Institute*, 697 F.3d at 1019-1020.

<sup>24</sup> *Id.* at 1020.

<sup>25</sup> *Id.* at 1020-1021.

<sup>26</sup> *Id.* at 1021.

<sup>27</sup> *Earth Island Institute*, 697 F.3d at 1023.

habitat of the black-backed woodpecker and did not require any population trend monitoring.

Lastly, the court used the less stringent standards for environmental assessments to support its conclusion that the Forest Service's EA process in this case was not arbitrary and capricious.