Federal Judge Halts Klamath Road Reconstruction – A Precedent and a New Tool for Forest Activists

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In an important case with far-reaching implications and a useful precedent for road-rippers, the Klamath Forest Alliance (KFA) recently won their lawsuit challenging ERFO-funded road reconstruction on the Klamath National Forest (KNF). The District Court decision, explained below, is the first major victory for conservationists who have sought to stop ERFO's blanket exemption of environmental reviews.

Background About ERFO

Almost every year a federal disaster is declared somewhere in the United States. Often, a National Forest is located within the disaster area. When this is the case, the Forest Service (FS) is eligible for funding from the Federal Highway Administration to repair roads damaged during the disaster event. This program is known as ERFO or "Emergency Relief for Federally Owned" roads.

On January 1, 1997 a large, rain-on-snow event triggered over 724 road failures on the Klamath National Forest. Forests throughout Northern California and Southern Oregon were affected. Disaster areas were declared. The FS applied for over $100 million in ERFO funds for Region 5 (CA), $30 million on the KNF alone.

By Federal Highway Administration regulations, ERFO projects can be categorically excluded from NEPA. (Title 23 USC Sec.115 and 117) As a result, the FS did not complete Environmental Assessments or Environmental Impact Statements for these road reconstruction projects, even when "extraordinary circumstances" existed, like the presence of endangered species, steep slopes or unstable lands. [In 1997, Wildlands CPR was part of a lawsuit brought by the Hells Canyon Preservation Council to challenge just this type of categorical exclusion under ERFO. Gumboot Creek, in Hells Canyon National Recreation Area, was known habitat for a federally listed Snake River salmon species. Unfortunately the lawsuit failed, although the decision remained unpublished and left the door open for a successful challenge.]

Preparing to Sue

Ten days after the storm and after having surveyed extensive road failure and stream channel degradation in several watersheds, KFA wrote to Klamath National Forest managers urging them to consider the extraordinary circumstance of over 300 road site failures and 500 miles of stream

channel degraded by road-influenced debris torrents. We suggested the FS view the storm damage as an opportunity to decommission salmon-killing roads for which funding levels preclude adequate maintenance. We suggested the FS undertake watershed-based EAs which would consider transportation needs and environmental risks in order to decide which roads to reconstruct and which roads to decommission. We even provided the managers with an EA from the Mt. Hood National Forest which we suggested was a good model for how we believed KNF managers should proceed. However, FS managers instead decided to go into the back room and sort the 724 road sites into three categories. Where timber sale contracts existed, the contracts were modified and the roads were reconstructed immediately. The remaining roads were sorted into two classes: one large group would be repaired without environmental review; the second smaller group would later be considered in EAs for decommissioning. In other words, decisions that would impact aquatic and terrestrial ecosystems far into the future were made without analysis and without public input.

The Lawsuit

With representation from the Seattle office of Earthjustice Legal Defense Fund, the Klamath Forest Alliance challenged over 100 of the sites which the FS had decided (behind closed doors and without environmental review) to repair (KFA v. U.S. Forest Service, William M. Daley, and the NMFS, Civ. S-98-1451 WBS/GGH). Our lawsuit was filed in the Eastern District of California and we drew William B. Shubb as the judge.

The sites we challenged were all on level 1 and 2 roads (low maintenance levels and low recreation value) which FS biologists had identified as "likely to adversely effect" coho salmon, a species listed as "threatened" under the ESA. The roads also were located on steep, unstable slopes or in unstable stream gorges.

Our lawsuit had three claims, one under the Endangered Species Act, one under the National Environmental Policy Act and one under the Administrative Procedures Act. Under the Endangered Species Act, we challenged both the Forest Service and National Marine Fisheries Service for failing to implement conditions of the biological opinion and incidental take statement prepared by NMFS for post storm road reconstruction. Specifically, NMFS had imposed a mandatory condition that the FS "fully consider" the road decommissioning option. NMFS is required to set terms and conditions when a "take" is authorized. The entity authorized to take the species (in this case the FS) is then required to abide by the terms and conditions in the take permit (see Title 16 USC Sec.1536(b)(4)).

Under the National Environmental Policy Act we challenged the FS for failing to prepare an environmental assessment. Our argument was from Council of Environmental Quality (CEQ) and FS NEPA regulations [See 40 CFR Sec. 1507.3(b)(2)(ii), and FSM 1909.15 Sec. 31.1] These regulations specify that road repair may be "categorically excluded" from consideration in an EA. However, CEQ and FS NEPA regs also specify "extraordinary circumstances" which, when they occur, require preparation of an EA for projects that are ordinarily "categorically excluded" from the Environmental Assessment process. We argued that the existence of an ESA listed species (specifically mentioned as a likely "extraordinary circumstance" in both the CEQ and FS NEPA regulations) and the presence of steep, unstable slopes (specifically noted in the FS regs),

meant the FS was required at least to prepare an EA prior to proceeding with the repairs.

Under the Administrative Procedures Act (APA) we claimed that both NMFS and the FS, by not fully considering the decommissioning option, had acted in a manner that was "arbitrary and capricious" in violation of the APA (Title 5 USC Sec. 706(2)(A).

The Opinion

Judge Shubb found against us on the ESA mandatory "terms and conditions" cause of action and for us on the NEPA claim – finding the FS action "arbitrary and capricious" under the APA. The Court held that "(t)he Forest Service's explanation for its application of categorical exclusions ... runs counter to evidence in the administrative record that certain repair projects are likely to adversely affect the SONC coho salmon. A determination that a project is likely to adversely affect a threatened species indicates a possibility that the proposed action may have a significant effect on the environment, such that an EA would be warranted." Slip Op. at 13.

The judge enjoined the Forest Service from going forward on over 100 road repair projects until it complies with NEPA by preparing Environmental Assessments. However, as is typical, the court did not specify how the FS should organize the required environmental review. After discussions with us, FS managers decided to prepare ranger district-wide EAs for storm damage response actions for the enjoined sites as well as other damage sites which were "likely to adversely effect" coho salmon. These EAs are currently being prepared, and KFA will review them carefully. The EAs will be subject to appeal pursuant to FS regulations and there are indications that decommissioning decisions may be appealed by local anti-environmental groups, including People for the USA. KFA would likely intervene in any appeals filed to prevent decommissioning.

Conclusion

This lawsuit sets an important precedent in the use of ERFO funding. Prior to this suit the Forest Service routinely ignored NEPA regulations by categorically excluding nearly every ERFO road repair project. While it is still necessary to have extraordinary circumstances to supercede a routine CE, the legal teeth are now on paper. The Forest Service ordinarily receives $100-250 million in ERFO funding per year, which can be used to reconstruct roads to current standards or to decommission roads damaged in disaster events. While some reconstruction may be necessary, it is still critical that the FS analyze their impacts and that they fully consider the decommissioning option. ERFO regs are currently being rewritten to specifically mention options for road decommissioning and other "treatments" in addition to road repair and reconstruction. Given the large need for decommissioning and the relatively low level of Congressional funding for decommissioning, it is essential the FS view disaster events as opportunities to decommission roads that pose significant risks to the environment.

One word of caution: ERFO cases tend to be what lawyers call "fact rich." If you challenge post-disaster ERFO reconstruction, be prepared for long hours reviewing documents and constructing (or interpreting) databases. There is a reward, however: you'll learn much you didn't know about the roads on your national forest. Good Luck!

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