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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THE WILDERNESS SOCIETY,)	Cause No. _____
AMERICAN WILDLANDS, and)	
PACIFIC RIVERS COUNCIL,)	
)	
Plaintiffs,)	
)	
vs.)	COMPLAINT FOR
)	DECLARATORY AND
)	INJUNCTIVE RELIEF
MARK REY, Under Secretary of)	
Agriculture, Natural Resources and)	
Environment; ANN VENEMAN, Secretary)	
of Agriculture; and DALE BOSWORTH,)	
Chief, United States Forest Service,)	
)	
Defendants.)	
_____)	

1. This action challenges the defendants' issuance of new regulations that amend the notice, comment, and appeal procedures for National Forest System projects and activities in violation of the Forest Service Decisionmaking and Appeals Reform Act ("Appeals Reform Act"), Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (codified at

16 U.S.C. § 1612 note). The new regulations defy this Court's ruling in The Wilderness Society v. Rey, 180 F. Supp. 2d 1141 (D. Mont. 2002), by allowing the Secretary of Agriculture or Under Secretary, Natural Resources and Environment, to exempt any Forest Service project from administrative appeal merely by signing the record of decision for the agency. They also violate the Appeals Reform Act by imposing procedural barriers to public participation in Forest Service decisionmaking, and by shielding certain logging projects entirely from administrative appeal. The challenged regulations contravene the will of Congress and the judgment of this Court, and should therefore be invalidated.

PARTIES

2. The plaintiffs in this action are:

A. The Wilderness Society ("TWS") is a non-profit environmental organization founded in 1935, with its headquarters in Washington, D.C., and eight regional offices. TWS works to protect America's wilderness and to develop a nationwide network of wild lands, through public education, scientific analysis, and advocacy. TWS's goal is to ensure that future generations will enjoy the clean air and water, wildlife, beauty, and opportunities for recreation and renewal that pristine forests, rivers, deserts and mountains provide. Protecting National Forest areas is vital to achieving TWS's mission.

B. American Wildlands is a western-based, non-profit environmental organization with its headquarters in Bozeman, Montana. American Wildlands' mission is to use science and law to advocate for the protection, preservation, and restoration of

biological diversity. American Wildlands promotes these goals via advocacy of sustainable management of public lands in the Rocky Mountain West.

C. The Pacific Rivers Council (“PRC”) is a non-profit conservation organization dedicated to protecting and restoring aquatic ecosystems and the species that depend on them. Headquartered in Eugene, Oregon, PRC’s programs and its membership extend throughout the western states, including Montana and Idaho. PRC is a partner in the Western Native Trout Protection Campaign which seeks to protect and restore native western trout and their habitats throughout the West.

3. Plaintiffs and their members use the lands in the National Forest System for recreational, scientific, aesthetic, conservation and commercial purposes. Plaintiffs and their members have a strong interest in the notice, comment and appeal procedures for National Forest System projects and activities, as the opportunity to participate in the Forest Service administrative process is integral to plaintiffs’ ability to protect their recreational, scientific, aesthetic, conservation and commercial interests in National Forest lands. Plaintiffs and their members have frequently availed themselves of these procedures for the purpose of providing information and advancing positions to the Forest Service in the interest of better management of National Forest lands. Plaintiffs and their members also have sought to protect their interests in National Forest lands by appealing Forest Service projects that violated laws governing projects within the National Forest System.

4. The above-described aesthetic, conservation, recreational, commercial, scientific, and procedural interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely

affected and irreparably injured by defendants' violations of the Appeals Reform Act, as described below. Plaintiffs have no adequate remedy at law.

5. Defendant Mark Rey is the Under Secretary for Natural Resources and the Environment of the U.S. Department of Agriculture. Under Secretary Rey is sued in his official capacity.

6. Defendant Ann Veneman is the Secretary of the U.S. Department of Agriculture. Secretary Veneman is sued in her official capacity.

7. Defendant Dale Bosworth is the Chief of the U.S. Forest Service, an agency within the federal Department of Agriculture. Chief Bosworth is sued in his official capacity.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory judgment), and 2202 (further relief).

9. Venue lies in this district pursuant to 28 U.S.C. § 1391(e) because plaintiff American Wildlands maintains its principal place of business in this district.

THE APPEALS REFORM ACT

10. Congress adopted the Appeals Reform Act in response to a proposal by the Forest Service to eliminate most administrative appeals of project-level timber sales. Enacted in 1992, the Act demands that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans ... and shall modify the procedure for appeals of decisions

concerning such projects.” § 322(a), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note).

11. The Appeals Reform Act explicitly vests the public with a “right to appeal” projects and activities implementing National Forest System land and resource management plans. See § 322(c), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note). It provides that “[n]ot later than 45 days after the date of issuance of a decision of the Forest Service ... a person who was involved in the public comment process ... through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.” Id.

THIS COURT’S DECISION IN THE WILDERNESS SOCIETY v. REY

12. Notwithstanding the clear dictates of the Appeals Reform Act, the defendants in 2001 sought to eliminate the public’s right to appeal a major logging project in northwest Montana’s Bitterroot National Forest. The resulting controversy gave rise to this Court’s decision in The Wilderness Society v. Rey, 180 F. Supp. 2d 1141.

13. The issue in Rey was whether a Forest Service logging decision was shielded from the administrative appeals process because defendant Rey signed the project decision rather than a Forest Service official. Relying on the ARA’s explicit mandate that the public must have the opportunity to appeal “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans” for the National Forest System, § 322(a), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note), this Court concluded that “[t]he decision, not the signatory, is the operative fact for purposes of the Appeals Reform Act.” Rey, 180 F. Supp. 2d at

1148. The Court further explained that “[t]he Secretary may not escape her statutory duty to provide an appeals process by completing the signature line of a Forest Service record of decision,” and concluded that “[t]he Appeals Reform Act sets out a specific directive for the Forest Service; the agency may not circumvent it by attempting to create a new rule that any decision signed by the Undersecretary or Secretary is exempt from the statute.” Id. Accordingly, this Court issued a preliminary injunction against the challenged Bitterroot National Forest logging project. See id. at 1150.

THE NEW APPEAL REGULATIONS

14. In the wake of this Court’s Rey ruling, the defendant Forest Service initiated an effort to amend its regulations governing notice, comment, and appeal procedures for National Forest System projects and activities. The agency published proposed regulations in the Federal Register on December 18, 2002, took public comments on its proposal, and then published its final new regulations on June 4, 2003. The new regulations restrict the public’s opportunity to participate in Forest Service decisionmaking concerning projects and activities implementing land and resource management plans for the National Forests, and provide the defendants with greater opportunities to exempt their actions from public review and appeal.

15. First, the regulations adopt a new provision in direct contravention of this Court’s ruling in Rey. The new provision, 36 C.F.R. § 215.20(b), states as follows: “Decisions of the Secretary of Agriculture or Under Secretary, Natural Resources and Environment are not subject to the notice, comment, and appeal procedures set forth in this part. A decision by the Secretary or Under Secretary constitutes the final administrative determination of the Department of Agriculture.” This regulation reads

the Appeals Reform Act as entirely discretionary — if the Secretary or Under Secretary of Agriculture wishes to deny the public any notice and comment on, or appeal of, a Forest Service action he or she needs merely to sign the Record of Decision for any such action. Yet this Court concluded in Rey that the defendants “may not circumvent [the Appeals Reform Act] by attempting to create a new rule that any decision signed by the Undersecretary or Secretary is exempt from the statute.” 180 F. Supp. 2d at 1148. The defendants promulgated 36 C.F.R. § 215.20(b) in stark defiance of that ruling.

16. Second, the new regulations afford the right to appeal only to “[i]ndividuals and organizations who submit substantive written or oral comments” during the public comment period for a National Forest System project or activity. 36 C.F.R. § 215.13(a). By contrast, the Appeals Reform Act guarantees the right to appeal to “a person who was involved in the public comment process ... through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” § 322(c), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note) (emphasis added). The new regulation denies the right to appeal to persons who have notified the Forest Service of their interest in the proposed action, but have not submitted substantive comments. This provision is particularly prejudicial to public participation in the Forest Service decisionmaking process because the new regulations also allow the agency to schedule the statutorily required public comment period before any environmental analysis of a proposed project or activity is completed. See 36 C.F.R. § 215.5(a)(2). Thus, members of the public may not know that a project poses impacts that are likely to affect their interests, or how significantly a project may affect their interests, until after the opportunity for public comment has passed. By then, however, it will be

too late: Under 36 C.F.R. § 215.13(a), any persons who have not submitted substantive comments during the public comment process will be denied the opportunity to appeal, no matter how significantly a proposed project impacts their interests.

17. Third, the new regulations exempt from public notice, comment, and appeal all decisions for Forest Service actions that have been “categorically excluded” from environmental analysis pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., even when such decisions authorize commercial logging in the National Forests. See 36 C.F.R. § 215.12(f). Congress’ central concern in enacting the Appeals Reform Act was to ensure the public’s opportunity for notice and comment on, and appeal of, National Forest logging projects. In keeping with this statutory purpose, the Forest Service’s prior appeals regulations pursuant to the Appeals Reform Act provided for public notice, comment, and appeal of all National Forest logging projects, even those that were categorically excluded from NEPA review. See 36 C.F.R. § 215.3(b) (2001) (superseded). Yet the new regulation at 36 C.F.R. § 215.12(f) exempts logging projects from the appeals process if the Forest Service elects to categorically exclude them from NEPA analysis. This regulation threatens to exempt substantial Forest Service logging from the public notice, comment, and appeals process because the agency also has recently adopted a NEPA categorical exclusion for logging projects that may encompass as much as 1,000 acres of National Forest lands, and has announced plans to add further categorical exclusions for logging projects.

18. Both individually and collectively, these provisions exclude the public from participating in the management of the public’s National Forest lands. They increase the public’s burden of monitoring Forest Service activities, increase the public’s

burden of ensuring their right to appeal Forest Service projects, and authorize the complete denial of all public notice, comment and appeal of National Forest projects at the discretion of defendants Veneman or Rey. In so doing, they violate the Appeals Reform Act.

FIRST CAUSE OF ACTION

(VIOLATION OF APPEALS REFORM ACT)

19. Plaintiffs hereby reallege and incorporate paragraphs 1 through 18, supra.

20. The Appeals Reform Act guarantees public notice, comment, and appeal of all “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans” for the National Forest System. § 322(a), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note).

21. Defendants’ new regulation at 36 C.F.R. § 215.20(b) purports to exempt Forest Service actions from the public notice, comment, and appeal process whenever the decision on such actions is signed by the Secretary of Agriculture or Under Secretary, Natural Resources and Environment.

22. Defendants’ new regulation at 36 C.F.R. § 215.20(b) violates the Appeals Reform Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

SECOND CAUSE OF ACTION

(VIOLATION OF APPEALS REFORM ACT)

23. Plaintiffs hereby reallege and incorporate paragraphs 1 through 18, supra.

24. The Appeals Reform Act guarantees the right to appeal a Forest Service action to any “person who was involved in the public comment process ... through

submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action.” § 322(c), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note).

25. Defendants’ new regulation at 36 C.F.R. § 215.13(a) purports to deny the right to appeal a Forest Service action to persons who were involved in the public comment process by notifying the Forest Service of their interest in a proposed action, but who did not submit substantive written or oral comments.

26. Defendants’ new regulation at 36 C.F.R. § 215.13(a) violates the Appeals Reform Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

THIRD CAUSE OF ACTION

(VIOLATION OF APPEALS REFORM ACT)

27. Plaintiffs hereby reallege and incorporate paragraphs 1 through 18, supra.

28. The Appeals Reform Act guarantees public notice, comment, and appeal of all “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans” for the National Forest System. § 322(a), 106 Stat. at 1419 (codified at 16 U.S.C. § 1612 note). Congress enacted the Appeals Reform Act specifically to guarantee the right to public notice, comment, and appeal of all National Forest logging projects.

29. Defendants’ new regulation at 36 C.F.R. § 215.12(f) purports to exempt from public notice, comment, and appeal any National Forest logging project that has been categorically excluded from environmental analysis pursuant to NEPA.

30. Defendants' new regulation at 36 C.F.R. § 215.12(f) violates the Appeals Reform Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

REQUEST FOR RELIEF

Therefore, plaintiffs request that this Court:

1. Enter a declaratory judgment that defendants' promulgation and implementation of 36 C.F.R. §§ 215.20(b), 215.13(a), and 215.12(f) violates the Appeals Reform Act and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;
2. Enjoin the defendants from applying 36 C.F.R. §§ 215.20(b), 215.13(a), and 215.12(f) in violation of the Appeals Reform Act;
3. Award plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and,
4. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 28th day of July, 2003,

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