

No. 06-2306

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FOREST GUARDIANS and
CARSON FOREST WATCH,

Plaintiffs-Appellants,

v.

UNITED STATES FOREST SERVICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico, Judge James O. Browning
No. CIV 05-0372 JB/DJS

SUPPLEMENTAL BRIEF OF APPELLEE FOREST SERVICE

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INTRODUCTION

On May 21, 2008, the Court directed supplemental briefing regarding “where, with specificity, in the administrative record the United States Forest Service considered the best available science.” Accordingly, this brief will describe those portions of the administrative record that show the Forest Service’s consideration of the best available science regarding the issues raised in this appeal, in particular the effects of the challenged Agua Caballos Project on forest habitat used by Abert’s squirrel (aka “tassel-eared squirrel”).^{1/}

As shown below, the Forest Service has consistently identified the 1992 General Technical Report RM-217, entitled “Management Recommendations for the Northern Goshawk in the Southwestern United States,” by Reynolds, et al., as the best available science for managing habitat of the northern goshawk and its prey species, including Abert’s squirrel.^{2/} AR 1710-1801, Supp. App. 362-422. Moreover, it has consistently followed the recommendations made in that report,

^{1/} While the administrative record also shows consideration of the best available science relating to other issues (*e.g.*, water quality, soils, wildfire, etc.), we assume that the Court’s question is directed at the particular issues raised by Forest Guardians in this appeal and hence focus on the best available science relating to Abert’s squirrel and its habitat.

^{2/} On June 13, 2008, we filed an unopposed motion for leave to file a supplemental appendix (“Supp. App.”). We are providing copies of the proposed supplemental appendix with this brief. It contains relevant excerpts of the administrative record (“AR”) documents cited herein. For documents already reproduced in the Joint Deferred Appendix (“JDA”) we cite to that Appendix.

which were incorporated by amendment into the Carson Forest Plan. In addition, the Forest Service thoroughly considered, and continues to review, other scientific information that bears on managing habitat for Abert's squirrel and other species.

A. The Forest Service Recognizes the Reynolds Report as the Best Available Science Relevant to Managing Habitat to Protect Goshawk and its Prey Species. – Project decisions such as the Agua Caballos Project must be consistent with the relevant forest plan. 16 U.S.C. § 1604(i). The Agua Caballos project was designed to be consistent with the Carson Forest Plan. That plan, along with all other forest plans in Arizona and New Mexico, was amended in 1996 to include new standards and guidelines for protection of the northern goshawk and the Mexican spotted owl. AR 4859-4959, Supp. App. 423-40. This 1996 amendment explained that the Forest Service had drawn on the work of a scientific committee to establish new standards and guidelines. AR 4861; Supp. App. 424. The 1996 amendment explained that “[t]he best available scientific data and information on habitat needs for goshawk and Mexican spotted owl were used to develop and evaluate the proposed action and alternatives.” AR 4871, Supp. App. 432. In this connection, the Regional Forester noted that the “‘Management Recommendations for Northern Goshawk in Southwestern U.S.’ (RM-217) [*i.e.*, the Reynolds report] * * * contains the best known information on northern goshawk management in our Region.” AR 4866, Supp. App 428. The Regional

Forester noted that some public comments had pointed to other scientific information, but ultimately concluded that, “[t]here was no compelling proof that other information or recommendations offered were better than the science my resource specialists used.” AR 4863, Supp. App. 426.^{3/}

Following the 1996 amendment, the 1992 Reynolds report became the primary source of scientific guidance for habitat management for the goshawk and its prey species in large areas of the Southwest. The Reynolds report lists selected goshawk prey species in the Southwest, including the “tassel-eared squirrel.” AR 1726, Supp. App. 378. It explains that “[i]nformation on the distribution, habitat, special habitat needs, home range, and population density of these selected prey species were gleaned from the literature,” and that “[t]his information was used to identify a set of ‘desired forest conditions’ needed to provide abundant and sustainable populations of each of these species.” *Ibid.* Analysis of the

^{3/} The Final Environmental Impact Statement (FEIS) prepared in conjunction with the 1996 amendment was set aside in *Center for Biological Diversity v. Forest Service*, 349 F.3d 1157, 1168 (9th Cir. 2003). However, the court did not set aside the amendments to the forest plans in Arizona and New Mexico. Additional research was carried out by Reynolds in 2004 in response to the deficiencies found by the Ninth Circuit (see AR 12137-71, Supp. App. 466-73). As this update shows, the Forest Service continues to review evolving science on managing habitat for goshawk and its prey species. See, e.g., Supp. App. 472-73. The supplemental FEIS prepared to address the problems found by the Ninth Circuit is found at <http://www.fs.fed.us/r3/projects/ro/feis-supplement/index.shtml>.

tassel-eared squirrel (aka Abert's squirrel) and its habitat needs is found in the Reynolds report at AR 1787-89, Supp. App. 414-16.

B. The Agua Caballos Project Was Expressly Based on the Reynolds Report as Incorporated Into the Forest Plan. – The record of decision (ROD) for the Agua Caballos project explains that the project was initially developed in the early 1990s. Then, “in 1996, the decision to amend all forest plans for the Mexican spotted owl and northern goshawk went into effect in the Southwestern Region.” AR 12793, JDA 289. The ROD explains that since the original alternatives developed for the Agua Caballos project “were not consistent with the 1996 Forest Plan amendment, a second [Draft Environmental Impact Statement] with new alternatives was issued in 1999.” *Id.* The revised alternatives, including the selected alternative, were developed to be consistent with the 1996 amendment based on the Reynolds report. For instance, the ROD explains:

Outside of suitable habitat for the Mexican spotted owl, the Agua/Caballos EIS and this decision are principally based on managing for northern goshawk and its habitat – particularly through the application of goshawk standards and guidelines outlined in the 1996 “Region-wide Amendment of Forest Plans” and the “Management Recommendations for the Northern Goshawk in the Southwestern US” (Reynolds et al., 1992).

AR 12797, JDA 293. The ROD also explains that:

Along with a sufficient area set aside for development into old growth, all existing old growth will be allocated within the analysis

area. This allocation works toward the desired condition identified in the 1996 “Region-wide Amendment for Forest Plans.”

AR 12796, JDA 292. See also AR 12802, JDA 298 (“specific direction from the 1996 ‘Region-wide Amendment to Forest Plans’ is integrated in the decision”).

The environmental documentation for the Agua Caballos project similarly confirms reliance on the Reynolds report and the 1996 Forest Plan amendment as the best available science. Thus, the Final Environmental Impact Statement (FEIS) explains that:

Alternative G [the selected alternative] does not include any clearcutting or overstory removal. All action alternatives follow the “management Recommendations for the Northern Goshawk in the southwestern United States,” a credible management strategy to conserve the goshawk in the southwestern U.S. developed by the Northern Goshawk Scientific Committee.

AR 8869, Supp. App. 449. The Final Supplement to the FEIS (FSFEIS) describes how the project is designed to bring about a more even distribution of vegetation structural stages (VSS) by thinning smaller trees so that larger trees can move more quickly toward an old growth type forest. AR 12622, Supp. App. 481. Chapter 3 of the FSFEIS contains an extended discussion of Abert’s squirrel (AR 12626-37, Supp. App. 485-96) which explains how the Reynolds report was considered in framing management recommendations for the project that would benefit this species:

Thinning and group selections to create clumpy conditions and reduce competition can replace larger trees faster (Reynolds et al. 1992). Maintenance of clustered stands is essential in providing the canopy cover needed for truffle production, as well as cover and nesting sites. * * * Prescribed fire controls dense reproduction.

AR 12633, Supp. App. 492. The FSFEIS discussion of Abert's squirrel also explains that:

The desired VSS distribution for ponderosa pine, mixed conifer and spruce-fir on the Carson is based on the 1996 "Region-wide Amendment of Forest Plans" [193C] and the "Goshawk Management Recommendations" (Reynolds et al. 1992). Reynolds and others recommend striving for VSS classes equally distributed across the landscape to maintain biodiversity and healthy forests relatively safe from catastrophic fires and pests. Not only is an even VSS distribution beneficial to the northern goshawk, but it also provides for the needs of a wide variety of wildlife species.

AR 12621, Supp. App. 480.

The "Management Indicator Species Assessment for the Carson National Forest" prepared in 1993 further confirms that the Forest Service considered the Reynolds report as incorporated into the 1996 forest plan amendment. The MIS assessment explains that the 1996 plan amendment guidelines for management of northern goshawk habitat require that the Forest Service, "[m]anage for old age trees such that as much old forest structure as possible is sustained over time across the landscape, [s]ustain a mosaic of vegetation densities * * *, age classes and species composition across the landscape, [and] [p]rovide foods and cover for goshawk prey.'" AR 11584, JDA 199, quoting from 1996 amendment at 91. The

MIS assessment notes that the 1992 Reynolds report “describe[s] the Abert’s squirrel as an important prey species for the goshawk,” and includes habitat management recommendations for Abert’s squirrel that focus on such measures as retention of trees with interlocking crowns and areas of shaded overstory for fungi production. AR 11584, JDA 199.

In short, the record for this project shows that the Forest Service considered the best available science on Abert’s squirrel habitat needs and incorporated it into the project.

C. This Case is Governed by UEC v. Russell. – In two recent cases, this Court has recognized the 1992 Reynolds report as the best available science for informing Forest Service decisions regarding management of wildlife habitat in southwestern forests. See *Ecology Center v. USFS*, 451 F.3d 1183, 1188 (10th Cir. 2006) (noting “the unchallenged status of the Reynolds Report as the best available science”); *Utah Environmental Congress v. Russell*, 518 F.3d 817, 830 (10th Cir. 2008) (“Even this court has noted ‘the unchallenged status of the Reynolds Report as the best available science’”) (quoting *Ecology Center*). In *Russell*, the Court found that a project in the Dixie National Forest of Utah was based on consideration of the best available science where the relevant Forest Plan (along with all other forest plans in Utah) had been amended in 2000 to include a Utah Northern Goshawk Conservation Strategy that was based on the 1992 Reynolds

report. 518 F.3d at 822.⁴ The Court in *Russell* distinguished the situation in *Ecology Center*, where the Forest Service had departed, without explanation, from the Goshawk strategy. The *Russell* court found that:

The Decision Notice explicitly references the Goshawk Amendment, which itself bound the Forest Service to consider the best available science by its incorporation of the Conservation Strategy. We thus have no cause to remand for consideration of the Project under the appropriate standard as we did in *Ecology Center*.

518 F.3d at 830.

Here, as in *Russell*, there is ample evidence in the record that: (1) the Forest Service recognized goshawk management provisions based on Reynolds as the best available science for the management of habitat for goshawk and its prey species; and (2) the Forest Service consistently considered and followed the Reynolds report and the management guidelines of the 1996 plan amendment in deciding to approve the Project. Accordingly, as in *Russell*, the Forest Service here “considered the best available science,” as required under the 2000 forest planning regulation, 36 C.F.R. § 219.35(a) (2001), and there is no need for a remand.

D. The Forest Service Has Considered Other Available Science to Enhance its Understanding of Abert’s Squirrel. – While the Reynolds report and the forest plan amendment based on Reynolds contain the best available

⁴ The Conservation Strategy at issue in *Russell* was also based on a subsequent report on goshawk in Utah authored by Russell Graham, who was a co-author of the 1992 Reynolds report. 518 F.3d at 822.

science for habitat management purposes, other available science has contributed to the Forest Service's understanding of the needs of Abert's squirrels. The wide variety of scientific information considered is illustrated by the extensive lists of cited references found in the May 2003 MIS Assessment (AR 11590-92, JDA 205-207) and in the FSFEIS (AR 12772-86, Supp. App. 516-30).

The Forest Service considered, for example, published studies of Abert's squirrel expert David R. Patton in reaching its conclusion that "[m]anagement practices of thinning from below and group selections across the forest enhances Abert's squirrel habitat that in turn should assure its survival." AR 12633, 12779-80, Supp. App. 492, 523-24. The Forest Service also considered the work of N. L. Dodd, who has studied Abert's squirrel in Arizona. AR 12637, 12774, Supp. App. 496, 518. It explained that this project is consistent with Dodd's recommendations because it does not involve intensive thinning or work in stands that provide the best habitat for Abert's squirrel. *Id.*

The Forest Service also considered studies regarding population trends:

Available evidence suggests that populations of Abert's squirrels fluctuate both in the short- and long-term (Pearson 1950, Keith 1965, Farentinos 1972, Hall 1981), but there is no danger of extinction (UM 1997). Factors causing these fluctuations are not clear. A good and widespread mast crop brings an abundance of squirrels, whereas a year or so of scanty pine cone production results in a scarcity of these animals (Hoffmeister 1986).

AR 12636, Supp. App. 495. Additionally, as the FSFEIS notes, “Forest-wide monitoring for the Abert’s squirrel was initiated during the 2003 field season.” AR 12637, Supp. App. 496. Numbers were found to be low, most likely because of drought. *Id.* The Forest Service completed a thorough review of recent scientific information on Abert’s squirrel in reviewing the 2003 monitoring report. The Forest Service continues to consider scientific evidence regarding Abert’s squirrel populations, particularly from Frey’s ongoing monitoring. See AR S12951-53, JDA 336-338; AR S13012-25; JDA 339-45; see also Frey, “Abert’s Squirrel Monitoring on Carson National Forest, New Mexico, 2006,” attached to Appellants’ Motion to Supplement Administrative Record.

This consideration of a broad spectrum of scientific information further confirms the correctness of the finding in the ROD (JDA 291) that the EIS and the monitoring plan were based on the best available science.

Respectfully submitted,

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Certificate of Service

It is hereby certified that an original and seven copies of this supplemental brief were mailed to the Clerk by First-Class Mail on this 19th day of June, 2008, and that service of this brief was made on counsel for the appellants by sending them a copy by e-mail in PDF format, properly addressed to sugarman@bs-law.com, and two paper copies in an envelope properly addressed to them as follows:

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It is further certified that this brief has been submitted in PDF format by e-mail to esubmission@ca10.uscourts.gov; that all required privacy redactions have been made and, with the exception of those redactions, the digital submission of this brief is an exact copy of the written document filed with the Clerk; and that the digital submission has been scanned for viruses with the most recent version of a Computer Associates eTrust InoculateIT, version 6.0.96, updated through June 19, 2008, and, according to the program, is free of viruses.

_____/S/
David C. Shilton