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Organized Village of Kake v. United States Department of Agriculture

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Organized Village of Kake v. United States Department of Agriculture, 795 F.3d 956 (9th Cir. 2015)

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In an en banc rehearing, the Ninth Circuit, in *Organized Village of Kake v. United States Department of Agriculture*, determined that the Roadless Rule should apply to the largest National Forest, the Alaskan Tongass. The significant socioeconomic impacts on Southeast Alaska contrasted with important environmental roadless values make the management of the Tongass National Forest unique and controversial. The Ninth Circuit concluded that Alaska, an intervener, had standing to appeal and that the 2003 Tongass Exception to the Roadless Rule was arbitrary and capricious.

I. INTRODUCTION

Organized Village of Kake v. United States Department of Agriculture addressed two main questions.[1] First, the court asked if the State of Alaska had jurisdiction to appeal the suit as an intervener.[2] Second, it assessed whether the Tongass Exception violated the Administrative Procedures Act ("APA") by applying the policy change analysis used in *Federal Communication Commission v. Fox Television Stations, Inc.* to determine that a "good reason" was not provided to change the socioeconomic impact policy.[3] The court concluded that changes in the political tides were insufficient to explain the reversed decision in Tongass National Forest management.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

The United States Department of Agriculture's ("USDA") 2001 Roadless Rule set limits on timber harvest and road construction in "'large, relatively undisturbed [national forest] landscapes'" considered to have "'roadless values.'"[5] Roadless values are "a variety of scientific environmental, recreational and aesthetic attributes and characteristics unique to roadless areas."[6] Tongass National Forest is the largest United States National Forest,[7] and given its "unique importance" it was originally under consideration for designation in the Roadless Rule's national assessment.[8]

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1 Organized Vill. of Kake v. U.S. Dept. of Agric., 795 F.3d 956 (9th Cir. 2015).

2 *Id.* at 963-64.

3 *Id.* at 966-70; *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

4 *Kake*, 795 F.3d at 968.

5 *Id.* at 959 (quoting Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244, 3,245, 3,251 (Jan. 12, 2001)).

6 *Id.* (citing 66 Fed. Reg. at 3,245).

7 *Id.* (citing 66 Fed. Reg. at 3,262).

8 *Id.* at 960 (citing 66 Fed. Reg. at 3,248).

The USDA did not exempt Alaska's Tongass National Forest from the Roadless Rule, finding an exemption "'would risk the loss of important roadless area [ecological] values.'" [9] The USDA based its analysis on its Final Environmental Impact Statement ("FEIS"), which found the Roadless Rule would cause both short and long-term job lost in Southeast Alaska, as ninety-five percent of timber harvest in the Tongass would be eliminated.[10] To mitigate its socioeconomic impact, the Roadless Rule took a phased approach, allowing for limited road construction, timber harvest in previously altered areas, and previously planned timber harvests.[11] These exceptions were estimated to provide for seven years of market demand of timber.[12]

The USDA's intent for these initial concessions to the Roadless Rule was to reduce forest management litigation.[13] This goal was not realized, as lawsuits were immediately filed. [14] Two years later, using the same factual record compiled in 2001, the USDA reversed the Roadless Rule application, finding the Roadless Rule "'unnecessary to maintain the roadless values'" in the Tongass.[15] The Tongass National Forest's complete exemption from the Roadless Rule is challenged here.[16]

The Village of Kake ("Kake")[17] sued the United States Forest Service ("Forest Service") in 2009, an action in which Alaska intervened. [18] The complaint asserted National Environmental Procedures Act ("NEPA") and APA violations.[19] The United States District Court for the District of Alaska granted summary judgment to Kake, holding that the Tongass Exemption violated the APA and reinstated the Roadless Rule.[20] Alaska appealed to the United States Court of Appeals for the Ninth Circuit; the Forest Service declined to appeal.[21] By a divided three-judge panel, the Ninth Circuit reversed and remanded the

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[9] *Id.* (quoting 66 Fed. Reg. at 3,254).

[10] *Id.* (citing 66 Fed. Reg. at 3,254-55).

[11] *Id.* at 961 (citing 66 Fed. Reg. at 3,266).

[12] *Id*.

[13] *Id*.

[14] *Id*. at 961-62. Idaho, Wyoming, and California all joined the Tongass Wilderness in their own National Forest Lands suits, arguing violations of the National Environmental Procedures Act, the APA, the Endangered Species Act, and the Wilderness Act. The State of Alaska challenged the rule, in several times.) *See* Alaska v. U.S. Dep't of Agric., No. 3:01–cv–00039–JKS (D. Alaska Jan. 31, 2001) (settled); Alaska v. U.S. Dept. of Agric., 772 F.3d 899, 900 (D.C. Cir. 2014) (litigation remains pending).

[15] *Kake*, 795 F.3d at 962 (quoting Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003)).

[16] *Id*.

[17] *Id.* at 956 (Plaintiffs are the Organized Village of Kake; the Boat Company; Alaska Wilderness Recreation and Tourism Association; Southeast Alaska Conservation Council; Natural Resources Defense Council; Tongass Conservation Society; Greenpeace, Inc.; Wrangell Resource Council; Center for Biological Diversity; Defenders of Wildlife; Cascadia Wildlands; and Sierra Club).

[18] *Id.* at 962.

[19] *Id*.

[20] *Id*. at 962-63.

[21] *Id*. at 963.

decision with instructions to consider the NEPA claim.[22] Kake petitioned, and was granted, an en banc re-hearing, where the Ninth Circuit held that the Tongass Exemption violated the APA and reinstated the Roadless Rule.[23] Alaska submitted a petition for a writ of certiorari to the Supreme Court of the United States on October 14th, 2015.[24]

III. ANALYSIS

A. Jurisdiction

Although the parties did not raise the threshold question of jurisdiction, the Ninth Circuit first considered whether Alaska could appeal as an intervener. When the original defendant does not appeal, an intervener may do so only if they show "injury in fact," causation, and redressability to establish Article III standing.[25] Causation and redressability were satisfied by timbering limits eliminating federal profit from Alaska.[26] Alaska was able to establish "injury in fact" by the applying the "zone of interests" test, where Alaska received twenty-five percent of gross receipts of timber sales.[27] Additionally, the "'intervener's standing to pursue an appeal does not hinge upon whether the intervener could have sued the party who prevailed in the district court.'"[28] Consequently, Alaska presented enough evidence to show its "'interests have been adversely affected by the judgment.'"[29]

B. APA Violation

When a court evaluates a change in Forest Service policy, the APA "requires a court to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capacious, and abuse of discretion, or otherwise not in accordance with law.'"[30] The arbitrary and capacious standard is

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[22] Organized Vill. of Kake v. U.S. Dept. of Agric., 746 F.3d 970, 973 (9th Cir. 2014), *reh'g en banc granted*, 765 F.3d 1117 (9th Cir. 2014).

[23] *Kake*, 795 F.3d at 959.

[24] Pet. for Cert., *Alaska v. Organized Vill. of Kake* (filed Oct. 12, 2015) (No. 15-467).

[25] *Kake*, 795 F.3d at 963 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992))).

[26] *Id.* at 965.

[27] *Id*. at 963.

[28] *Id.* at 964 (quoting Didrickson v. U.S. Dep't of Interior, 982 F.2d 1332, 1338 (9th Cir. 1992)).

[29] *Id.* at 963 (quoting *Didrickson*, 982 F.2d at 1338).

[30] *Id.* at 966 (quoting 5 U.S.C. § 706(2)(A) (2012)).

not met when a decision "runs counter to the evidence before the agency"[31] and results in an "unexplained inconsistency."[32]

The court looked to *Federal Communication Commission v. Fox Television Stations, Inc.* to determine whether the policy changes in *Kake* conformed to the APA.[33] *Fox* established a four part test, whereby an agency must (1) show "awareness that it is changing position," (2) establish "the new policy is permissible under the statute," (3) demonstrate it "'believes' the new policy is better," and (4) provide "'good reasons' for the new policy . . . [including] a reasoned explanation . . . for disregarding the facts and circumstances that underlay or were engendered by the prior policy."[34]

The first three *Fox* requirements were easily satisfied as the Forest Service was aware it has changed it's position by "'treating the Tongass differently,'"[35] found the policy "'"permissible' under the relevant statutes,'"[36] and showed the policy was "'believed'" to be better since it was adopted.[37] However, the Tongass Exemption violated the APA by not providing a "good reason" for the new policy under the fourth requirement of the *Fox* test.[38] In 2001, the Record of Decision ("ROD") found the Roadless Rule's "'long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to [southeast Alaska] communities.'"[39] Using the same 2001 FEIS in 2003, the Forest Service issued another ROD, which came to the opposite conclusion, stating, "'the social and economic hardships to Southeast Alaska outweigh the potential long-term ecological benefits' of the Roadless Rule."[40]

The court was unconvinced that the Forest Service's three "good reasons" met the APA standards under the fourth *Fox* requirement.[41] First, the Forest Service reconsidered the Roadless Rule's socioeconomic impacts on rural communities in Southeast Alaska.[42] Using the same 2001 factual findings, the socioeconomic impacts were found to be more severe, running contrary to the previous conclusions.[43] The argument fell short, as these consequences were not new concerns, and the 2001 ROD specifically addressed them by considering "special mitigation measures."[44]

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[31] *Id.* (quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

[32] *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).

[33] *Id.*; *see generally Fox*, 556 U.S. 502.

[34] *Kake*, 795 F.3d at 967 (quoting *Fox*, 556 U.S. at 515-16) (emphasis removed).

[35] *Id.* (quoting 68 Fed. Reg. at 75,139).

[36] *Id.* (quoting *Fox*, 556 U.S. at 515-16; citing 68 Fed. Reg. at 75,142).

[37] *Id.* (quoting *Fox*, 556 U.S. at 515) (emphasis removed in original).

[38] *Id*.

[39] *Id.* (quoting 66 Fed. Reg. at 3,255) (bracketed text in original).

[40] *Id.* (quoting 68 Fed. Reg. at 75,141).

[41] *Id*.

[42] *Id*.

[43] *Id*. at 967-68.

[44] *Id*. at 968.

Even though an agency is able to reevaluate an issue using the same factual record,[45] the Forest Service did not provide the "'reasoned explanation'"[46] necessary to make "disparate findings."[47] The court acknowledged that policy change occurred within the context of new executive leadership, but concluded that such change does not allow an agency to "'simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.'"[48] The Tongass Exemption fails in the absence of a reasoned explanation for the "direct contradiction" in agency policy.[49]

The court found Alaska's other two "good reasons" to meet the APA standards under *Fox* similarly unconvincing. Secondly, the Forest Service cited "'comments received on the proposed rule'" to rationalize the Roadless Rule Exemption.[50] The 2003 ROD conceded the comments were not explanatory because they raised "'no new issues'" and were "'fully explored'" in the 2001 FEIS, therefore it was implausible they motivated the Roadless Rule Exemption.[51] Lastly, Alaska argued that the "litigation over the last two years would be reduced with the Roadless Rule exemption."[52] In its brief, Alaska conceded the Roadless Rule Tongass Exemption would "'obviously . . . not remove all uncertainty about the validity of the Roadless Rule, as it is the subject of a nationwide dispute'" tied to other lawsuits not specifically about the Tongass.[53] Unpersuaded, the court determined, "[a]t most, the [USFS] deliberately traded one lawsuit for another."[54] Subsequently, the court concluded these arguments did not constitute "good reasons" under *Fox*.

D. Judge Smith's Dissenting Opinion

United States Circuit Judge Milan D. Smith, Jr., accused the majority of selecting "what it believes to be the better policy, and substitute[ing] its judgment for that of the agency, which was simply following the political judgments of the new administration."[55] The 2003 policy interpretation occurred during the transition of executive administrations from President Clinton to President Bush.[56] According to Judge Smith, the Bush administration "simply concluded that the facts called for different regulations than those proposed by the previous

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45 *Id.*; *see* Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1038 (2012).

46 *Kake*, 795 F.3d at 968 (quoting *Fox*, 556 U.S. at 515).

47 Humane Soc. of U.S. v. Locke, 626 F.3d 1040, 1049 (9th Cir. 2010).

48 *Kake*, 795 F.3d at 969 (quoting *Fox* 556 U.S. at 537).

49 *Kake*, 795 F.3d at 968.

50 *Id*. at 969 (quoting 68 Fed. Reg. at 75,137).

51 *Id.* (quoting 68 Fed. Reg. at 75,139).

52 *Id.* at 970.

53 *Id*. (quoting Appellant's Opening Br. at 31-32, *Organized Vill. Of Kake v. U.S. Dept's of Agric.*, 795 F.3d 956 (9th Cir. 2015) (No. 11-35517)).

54 *Id*.

55 *Id*. at 981 (Smith, J., dissenting).

56 *Id*. at 980-81.

administration."[57] Presidents are elected on new policy platforms and their influence allows facts to be weighed differently.[58] Judge Smith interpreted *Fox* to envision counterintuitive policy changes to be valid "even if the agency gives an explanation that is of 'less than ideal clarity,' as long as 'the agency's path may reasonably be discerned.'"[59] Judge Smith considered this requirement to be "clearly met,"[60] as *Fox* did not require a demonstration to show why alternative policy reasons were better than the old ones, only that it "suffices that . . . the agency *believes* it to be better."[61] In this context, Judge Smith concluded that the decision was not arbitrary and capricious as the "good reasons" listed in 2003 were enough.[62] Judge Smith also contended the case should be considered under the NEPA instead.[63]

IV. CONCLUSION

Organized Village of Kake v. United States Department of Agriculture held that exempting the Tongass National Forest from the Roadless Rule application violated the APA's arbitrary and capricious standard by not providing a "good reason" for changing its conclusion. The Forest Service did not appeal the lawsuit, but Alaska, as an intervener, was able to further challenge the decision by establishing Article III standing. The court found the arguments for significant socioeconomic impacts, consideration of comments, and reducing litigation unconvincing as they relied on the same previous factual record or were previously addressed. Judge Smith's dissent concluded the Forest Service's renewed interpretation was altered by a change in executive leadership, and this was enough to justify the Forest Service's changes. The Ninth Circuit, en banc, determined the Tongass exception violated the APA, and therefore the Roadless Rule applied to the management of the Tongass National Forest.

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57 *Id.*
58 *Id.* at 981.
59 *Id.* at 982 (quoting *Fox* 556 U.S. at 513-14).
60 *Id.*
61 *Id.* at 983.
62 *Id.*
63 *Id.*