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When the “Hard Look” Is Soft:
Reconciling *Center for Biological Diversity v.*
Department of the Interior Within Ninth Circuit
Environmental Precedent

I. INTRODUCTION

A man is forcefully arrested for choosing plastic bags instead of paper. A home is raided when a search reveals a battery discarded in the curbside trash can. An “eco check” road block has officers inspecting the emissions of each car. These events might sound surreal and that is simply because they are *unreal*. They are all part of a recent satirical car commercial.¹ This Orwellian vision of strict environmental enforcement by the “Green Police” ends with the promotion of the manufacturer’s new clean diesel car. But with an initial viewing audience of over 115 million people,² a fair amount of controversy over this commercial has arisen on both sides of the “green” movement.³ In particular, many seem concerned with the notion of an environmental police body.

However, environmental regulations already exist on both individual actions—though not as extreme as depicted in this commercial—and on larger scale utilization of natural resources. These regulations are meaningless, however, without some means of enforcement. So, whether the commercial is amusing or alarming, it does tease out an important issue: namely, how are actions with environmental impacts actually policed?

Natural resources do not police themselves. Governmental agencies have been created and developed, each with a specific focus, in order to guarantee proper utilization and protection of resources considered to be held in the public domain. As such, natural

1. *Audi Green Police: Protecting and Conserving Earth*, http://www.youtube.com/watch?v=Wq58zS4_jvM (last visited Sept. 14, 2010).

2. *Doritos Super Bowl Spot was Most Watched Ad of All-Time*, NIELSEN WIRE, Feb. 9, 2010, http://blog.nielsen.com/nielsenwire/media_entertainment/doritos-super-bowl-spot-was-the-most-watched-ad-of-all-time.

3. Wendy Koch, *Audi’s “Green Police” Super Bowl Ad Stirs Controversy*, USA TODAY, Feb. 8, 2010, <http://content.usatoday.com/communities/greenhouse/post/2010/02/audis-green-police-ad-stirs-controversy/1>.

resources are not only typically under public ownership, but must also be administered in accordance with the best interest of the public. But the public's best interest does not necessarily equate to maintaining undisturbed resources. Agencies will sell, lease, or exchange land to private ownership for protection of critically important lands for wildlife or public access, for a balanced method of land management, to generate funding for other land under a "land for land" principle, and to generate additional funding for land conservation.⁴

While environmental protection groups are quick to scrutinize these agency actions, it is not moral beliefs or ideological values that police these uses of natural resources. Instead, statutorily imposed procedural requirements are the mechanisms that police the actions of the agencies, ensuring that any actions with environmental impacts comport with what Congress has established to be the best interest of the public.⁵ Challenges from environmental protection groups are therefore not based simply on the merits of the action. Rather, such challenges must be based on an agency's compliance with these statutorily imposed procedural requirements.⁶ Moreover, ensuing judicial review of agency action is consequently limited to evaluation of these statutory requirements alone.⁷ It cannot simply be argued that an agency action is bad or even unpopular. Natural resources suits brought by environmental interest groups, most often before the Ninth Circuit, are based on violations of procedural mechanisms in the Administrative Procedure Act ("APA"),⁸ the National Forest Management Act ("NFMA"),⁹ the Federal Land Policy and Management Act ("FLPMA"),¹⁰ and the National

4. See Federal Land Transaction Facilitation Act, Pub. L. No. 106-248, 114 Stat. 598 (2000).

5. Although "what is best for the public" could easily be debated given the context, Congress was concerned with "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man" with the creation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2009).

6. See *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996).

7. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2009) (allowing the reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

8. *E.g.*, *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003).

9. *E.g.*, *Ctr. for Biological Diversity v. Rey*, 526 F.3d 1228 (9th Cir. 2008).

10. *E.g.*, *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549 (9th Cir. 2006).

Environmental Policy Act (“NEPA”).¹¹ The requirements imposed by these statutes police agency actions and thus ultimately police the use of natural resources.

In *Center for Biological Diversity v. United States Department of the Interior*,¹² a three-judge panel of the Ninth Circuit was asked by environmental interest groups to rein in federal agency action that violated the procedural requirements of federal statutes, specifically NEPA. The sufficiency of the Bureau of Land Management’s (“BLM”) Environmental Impact Statement (“EIS”) was called into question and the three-judge panel majority agreed with the environmental groups and found that the BLM had violated the requirements of NEPA by not fully evaluating the alternatives when preparing its EIS.¹³ The outcome was surprising because the Ninth Circuit had seemingly reset deference in favor of agency actions just one year earlier in *Lands Council v. McNair*.¹⁴ In that case the court established that a ‘hard look’ requires only a fair discussion of impacts and that the court owes deference to agencies and their methodologies on technical and scientific matters. Petitions have already been filed for *Center for Biological Diversity* to be reheard by the Ninth Circuit en banc in hopes of correcting what some see as an inappropriate deviation by the panel.¹⁵ But while the majority holding in this case may at first seem incongruent with the Ninth Circuit’s precedent, closer examination shows that this is an appropriate and fitting refinement of the court’s analysis of agency actions. It serves as further clarification on the role of the judiciary in ensuring that agencies take the requisite “hard look” at environmental impact and—if the petition is granted—should be affirmed by the en banc court.

This Note will proceed by first giving background and contextual information regarding judicial evaluation of agency actions,

11. *E.g.*, *Geertson Seed Farms v. Johanns*, 541 F.3d 938 (9th Cir. 2008); *WildWest Institute v. Bull*, 547 F.3d 1162 (9th Cir. 2008); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003).

12. 581 F.3d 1063 (9th Cir. 2009).

13. *Id.* at 1077.

14. 537 F.3d 981 (9th Cir. 2008).

15. Petition for rehearing en banc by the Ninth Circuit was filed by Asarco LLC, joint party with the Department of the Interior, on October 29, 2009, and is still currently pending decision. MSLF—Legal Cases, *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, Mountain States Legal Foundation, http://www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=215 (last visited Sept. 14, 2010).

specifically cases coming from the Ninth Circuit and falling under NEPA. This background and context will be fairly extensive in order to properly frame the Ninth Circuit's evolving balance of deference given and demand required of agencies on matters of environmental impact analysis leading up to *Center for Biological Diversity*. Part III will discuss the facts and the procedural history and then turn to analysis of the majority's reasoning behind overturning the BLM's proposed land exchange and Judge Tallman's staunch challenge of the majority opinion as an unusable legal standard and contradictory to the Ninth's Circuit's en banc decision in *Lands Council*. Part IV discusses how the decision in *Center for Biological Diversity* can be viewed not only as congruent with the precedent in *Lands Council* but suggests that *Center for Biological Diversity* serves as a clarification of what constitutes a hard look at the environmental consequences of agency action across all manner of natural resources. Finally, Part V will conclude with a summary of the significance that can be taken from decision in *Center for Biological Diversity*.

II. BACKGROUND: THE NINTH CIRCUIT'S GRAPPLE WITH AGENCY ACTIONS

Federally owned lands constitute an average of 47.5% of the land within the states of the Ninth Circuit compared to an average of 9.1% in all other states.¹⁶ As a result, the Ninth Circuit continues its historic role as the predominant venue for matters related to publicly owned lands and agency actions affecting those lands.¹⁷ In order to properly frame an understanding of the significance and relevance of *Center for Biological Diversity v. United States Department of the Interior*, the requirements of NEPA and several cases ought to be discussed as either foundational elements of Ninth Circuit precedents or as specific cases cited in the majority and dissenting opinions of *Center for Biological Diversity*.¹⁸

16. Carol Hardy Vincent et al., *Federal Land Management Agencies: Background on Land and Resources Management*, in *FEDERAL LAND MANAGEMENT: CURRENT ISSUES AND BACKGROUND* 42 (Samuel T. Prescott ed., 1998).

17. See DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891-1941*, at 98 (1994).

18. The cases presented are not intended to be an exhaustive study, but rather to demonstrate several key instances of the Ninth Circuit's ruling on agency actions involving NEPA and impact statements.

NEPA is the most fundamental statutory safeguard against improper impacts of natural resources administration.¹⁹ In order to safeguard and protect the environment and our natural resources for the benefit of the public, NEPA contains several procedural requirements that agencies must follow in order to commence any action that might have environmental impact. The first of these requirements is the performance of an Environmental Assessment (“EA”), which is primarily focused on assessing the likely environmental issues that surround the proposed action or project and whether there is likely to be any significant environmental impact.²⁰ If there is a finding of “significant impact” the agency must then prepare a draft Environmental Impact Statement (“DEIS” or simply “EIS”) that, once published, opens up the action to public comment and inquiry. Following this public inquiry, the agency will prepare a Final Environmental Impact Statement (“final EIS”), which includes modifications based on the discussion of the draft EIS, before issuing its Record of Decision (“ROD”), which provides the agency’s final conclusions and its plans moving forward. Understanding the manner in which the courts have reviewed this process—specifically the evaluation of alternatives—is integral in understanding the framing of *Center for Biological Diversity*. The decision in *Center for Biological Diversity* is built upon the foundation of the following cases.

*A. Alternatives Are Required for a Complete EIS: Methow Valley
Citizens Council v. Regional Forester*

In preparation for the development and operation of a ski resort, Methow Recreation, Inc. applied for a special use permit from the United States Forest Service (“USFS”) to utilize national forest land in conjunction with adjacent private land to construct the resort.²¹ Suit was brought by a citizens council challenging the granting of the permit as failing to meet the requirements of NEPA, specifically a failure of the EIS to include plans for mitigation and a “worst case analysis.”²² A three-judge Ninth Circuit panel agreed, holding that

19. 40 C.F.R. § 1500.1 (describing NEPA as “our basic national charter for protection of the environment”).

20. *Id.*

21. *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 812 (9th Cir. 1987)

22. *Id.* at 813.

the EIS prepared by the USFS did not meet the requirements of NEPA because a “worst case analysis” was required.²³

The Supreme Court eventually reversed the Ninth Circuit in *Roberston v. Methow Valley Citizens Council*,²⁴ holding that an EIS does not require a mitigation plan or a “conjectural ‘worst case analysis.’”²⁵ Moreover, NEPA does not require selection of a more environmentally preferable alternative or mandate specific results “but simply prescribes the necessary process.”²⁶ In fact, it can be argued that the Supreme Court’s holding in *Roberston* effectively eliminated the prospect of interpreting NEPA as having “any substantive mandate in protecting the environment.”²⁷ However, the Court did not address the Ninth Circuit’s holding on the evaluation of the underlying need fulfilled by the action.²⁸ By evaluating only the single parcel as a potential site for the ski resort, and focusing all alternatives in the EIS solely on this parcel,²⁹ the USFS failed to present a complete EIS that properly presented sufficient alternatives to meet the underlying public need.³⁰

B. The “Hard Look” in Blue Mountain Biodiversity Project v. Blackwood

Following an unprecedented wildfire in the Umatilla National Forest region of Oregon, the USFS awarded several contracts for salvage logging operations in the considerable acreage affected by the wildfire.³¹ The salvage logging project called for the creation of

23. *Id.* at 817.

24. 490 U.S. 332 (1989).

25. *Id.* at 355 (quoting 50 Fed. Reg. 32237 (1985)); see also DIORI L. KRESKE, ENVIRONMENTAL IMPACT STATEMENTS: A PRACTICAL GUIDE FOR AGENCIES, CITIZENS, AND CONSULTANTS 162 (1996).

26. *Roberston*, 490 U.S. at 350.

27. CHARLES H. ECCLESTON, THE NEPA PLANNING PROCESS: A COMPREHENSIVE GUIDE WITH EMPHASIS ON EFFICIENCY 304 (1999).

28. *Methow Valley Citizens Council v. Reg’l Forester*, 879 F.2d 705, 705 (9th Cir. 1989); see also O.L. Schmidt, *The Statement of Underlying Need Determines the Range of Alternatives in an Environmental Document*, in ENVIRONMENTAL ANALYSIS: THE NEPA EXPERIENCE 47 (Stephen G. Hildebrand & Johnnie B. Cannon eds., 1993).

29. *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 815 n.7 (9th Cir. 1987).

30. Schmidt, *supra* note 28, at 47.

31. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1210 (9th Cir. 1998).

several miles of both reconstructed and new roads.³² Subsequently, a suit was brought by an environmental group to enjoin the USFS due to a failure to complete an EIS as required by NEPA.³³ The USFS had completed an EA of the project and then gave a "Finding of No Significant Impact" assessment.³⁴ As a result, the USFS declined to create an EIS. The court held that the USFS had in fact failed to take the "hard look" at the ramifications of the timber project as required by NEPA.³⁵

The court made clear in this case that, in its review of these types of agency actions, the court looks for evidence of more than just "cursory" investigation into environmental impacts. The USFS's EA for the logging project was inadequate in part because it contained only "general statements about 'possible' effects and 'some risk'" and these statements "do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."³⁶ Also an important factor considered by courts is the persuasiveness of the EA. Here, the USFS assessment "simply fail[ed] to persuade that no significant impacts would result from the [proposed] project."³⁷ This is not to say that an EA or an EIS is to be evaluated exclusively on persuasion, but rather suggests that the court take into account the information presented in assessments and statements issued by the agencies and make an evaluation on the sufficiency of the content. It is not a hard look simply because an agency says there is no significant impact.

*C. The "No Action" Alternative: Friends of Southeast's
Future v. Morrison*

In 1991, the USFS developed a "Tentative Operating Schedule" for the sale of timber from national forest lands in the Alaska area.³⁸ The tentative schedule proposed seven logging projects, which included a project on Ushk Bay. The USFS issued a notice of intent to prepare an EIS for Ushk Bay in May 1992, completed a draft EIS

32. *Id.*

33. *Id.* at 1211.

34. *Id.* at 1210.

35. *Id.* at 1216.

36. *Id.* at 1213 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)).

37. *Id.*

38. *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1061 (9th Cir. 1998).

in June 1992, and released a final EIS in September 1994.³⁹ In the final EIS, five alternatives were proposed for the Ushk Bay timber sale, but all alternatives only varied the size of the timber harvest.⁴⁰ And while the final EIS “considered a ‘no-action’ alternative,” ultimately this alternative was not adopted because “it would not meet the purpose and need of the project.”⁴¹ Following the Forest Supervisor’s ROD, an environmental interest group filed suit claiming that the USFS violated both NFMA and NEPA by not issuing an EIS with its original tentative schedule and by inappropriately excluding discussion of a no action alternative in the final EIS.⁴² While the Ninth Circuit did ultimately find the USFS in violation of NFMA, it did not find the USFS to have violated NEPA requirements with regard to either the timeliness of the first EIS or the failure to include a no action alternative in the final EIS.⁴³

Two important factors come from the court’s decision in this case. The first is the role of a no action alternative in the drafting of an EIS. The court is explicit in its expectation for complete consideration of alternatives within an EIS, particularly since “[t]he existence of reasonable but unexamined alternatives renders an EIS inadequate.”⁴⁴ Moreover, the “informed and meaningful consideration of alternatives—including the no action alternative—is . . . an integral part of” NEPA’s design.⁴⁵

Nevertheless, merely having a brief treatment or discussion of a no action alternative “does not suggest that it has been insufficiently addressed.”⁴⁶ Thus, an EIS must include discussion and consideration of a no action alternative to be adequate under NEPA, yet the court is not willing to require such an alternative to be given a specific amount of discussion or contemplation. This would almost

39. *Id.*

40. *Id.* at 1062.

41. *Id.*

42. *Id.*

43. *Id.* at 1070–71.

44. *Id.* at 1065.

45. *Id.* (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988)).

46. *Id.* (quotation omitted); *see also* *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990); *Oregon Natural Res. Council v. Lyng*, 882 F.2d 1417, 1423 n.5 (1989), *amended*, 899 F.2d 1565 (9th Cir. 1990).

suggest that any consideration of a no action alternative could be sufficient.⁴⁷

The second factor from the court’s decision in *Friends* is again the issue of the underlying purpose and need of the project, a factor the Ninth Circuit found important in *Methow* and which the Supreme Court left untouched in its subsequent reversal.⁴⁸ In the evaluation of an EIS’s treatment of a no action alternative, the court pays particular attention to the “purpose [or] need of the project.”⁴⁹ A challenge to the sufficiency of a no action alternative often derives from a claim that the underlying need and purpose of the project are too narrowly defined by the agency, effectively precluding any possibility of no action and thereby eliminating non-action from discussion.⁵⁰ The court gives considerable discretion to agencies in defining the scope of the need or purpose of a project,⁵¹ but that discretion “is not unlimited.”⁵² In fact, the court reaffirmed its earlier observation that “an agency cannot define its objectives in unreasonably narrow terms.”⁵³

Allowing for “unreasonably narrow” purposes or objectives would effectively allow agencies to circumvent the EIS mechanism required by NEPA.⁵⁴ In the end, the court made its decision based on an evaluation of the reasonableness of rejecting a no action alternative in light of the scope of the underlying purpose and need of the project. Therefore, the underlying purpose of a proposal is

47. *Friends*, 153 F.3d at 1065.

48. *Methow Valley Citizens Council v. Reg’l Forester*, 879 F.2d 705, 706 (9th Cir. 1989) (“The Supreme Court . . . reversed only in part the decision of this court. The other parts of this court’s decision regarding the EIS were neither challenged by the Forest Service nor considered by the Supreme Court.”).

49. *Friends*, 153 F.3d at 1067 (looking specifically to the reasonableness of the purpose and need of the project).

50. *Id.* at 1066.

51. *Id.*; see also *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986).

52. *Friends*, 153 F.3d at 1066.

53. *Id.* (quoting *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997)). In support of this original assertion on agency definition of objective, the court also cited to the opinion of then-Judge Thomas, in which he stated:

[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991), 502 U.S. 994 (1991).

54. See *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983).

essential to assessing the agency's treatment of a no action alternative.

D. Skeptic Judiciary: Ecology Center, Inc. v. Austin

In 2000, during the aftermath of the Lolo National Forest wildfires, the USFS set about to design a post-burn project and first prepared the required EIS, which included four detailed alternatives including the necessary no action alternative.⁵⁵ By July 2002, USFS selected a modified version of one such alternative that would involve commercial thinning of certain timber and controlled burning in old-growth area forest, as well as logging of insect-killed and burnt timber throughout the forest.⁵⁶ An environmental group, Ecology Center, filed suit against USFS, in part for the failure to satisfy NEPA's EIS requirement.⁵⁷ The court held that "[t]he EIS did not address in any meaningful way the various uncertainties surrounding the scientific evidence"⁵⁸ and the EIS "discusses in detail only the [agency's] own reasons for proposing" the project.⁵⁹ Additionally, the court held that the USFS violated NEPA by failing "to either adequately explain its impact assessment or provide the information that is necessary to understand and evaluate" the agency's decision.⁶⁰

While *Ecology* was subsequently overruled in *Lands Council v. McNair*,⁶¹ the decision remains useful in understanding the evolving role of scientific evidence in the court's evaluation of EIS based violations of NEPA. First, the court clearly weighed heavily the adequacy of the agency's scientific basis in the preparation of an EIS.⁶² Additionally, this case demonstrates that the court reasoned that an agency must either adequately explain its EIS or provide the information necessary to understand and evaluate its decision in order to meet the EIS requirement of NEPA.⁶³ While the role of the

55. *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1061 (9th Cir. 2005).

56. *Id.*

57. *Id.* at 1061, 1065.

58. *Id.* at 1065 (quoting *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993)).

59. *Ecology Ctr.*, 430 F.3d at 1065.

60. *Id.* at 1068.

61. 537 F.3d 981, 990 (9th Cir. 2008).

62. *Ecology Ctr.*, 430 F.3d at 1066–67.

63. *Id.* at 1067.

judiciary as an overseer and critic of the scientific evidence behind agency action was a large step, this role would not last terribly long.

E. Lands Council v. McNair

In 2002, the USFS decided to proceed with arrangements for management activities, consisting of a selective logging project, in a large region of the Idaho Panhandle National Forest.⁶⁴ Subsequently, the USFS issued a draft EIS, final EIS, and finally a ROD in June 2004 that upheld the project, but in light of a then-recent Ninth Circuit decision⁶⁵ the USFS issued a supplemental EIS and revised ROD in 2006.⁶⁶ An environmental group filed suit for preliminary injunction after the USFS denied its administrative appeal to stop the project.⁶⁷

A three-judge panel of the court originally ruled in favor of the environmental group, holding that the group was likely to succeed in claiming that the USFS violated NEPA by failing to "include a full discussion of the scientific uncertainty surrounding its strategy for" the project⁶⁸ and because the EIS was based on an assumption that the proposed project was inherently beneficial.⁶⁹ However, a petition for rehearing en banc was granted and the Ninth Circuit, sitting en banc, vacated the panel and affirmed the district court's ruling in favor of the USFS.⁷⁰

The court's en banc decision hinged on a reversal of *Ecology Center*, and the court pointed out several ways in which that majority opinion erred. One error was creating a requirement of

64. *Lands Council v. McNair*, 494 F.3d 771, 774 (9th Cir. 2007), *rev'd en banc*, 537 F.3d 981 (9th Cir. 2008).

65. *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004), *amended*, 395 F.3d 1019 (9th Cir. 2005).

66. *McNair*, 494 F.3d at 775.

67. *Id.*

68. *Id.* at 778.

69. *Id.* (citing *Ecology Ctr., Inc. v. Austin* 430 F.3d 1057, 1065 (9th Cir. 2005)).

70. *McNair*, 537 F.3d at 1005. It should be noted that Judge Milan D. Smith Jr. was a member on both the three-judge panel in the original Ninth Circuit hearing and the rehearing en banc. Judge Smith's concurring opinion in the panel hearing of this case is reluctant at best. He asserts that the decision in *Ecology Center* was "erroneously decided," that he is bound to the opinion's reasoning and holding, which "perpetuates the majority's faulty reasoning in *Ecology Center*," and "if the occasion arises" he would like to reverse the holding in *Ecology Center*. *McNair*, 494 F.3d at 781-82, 784. It would seem that his wish was granted, as Judge Smith was the author of the en banc opinion and was able to personally ensure that the majority's opinion in *Ecology Center* was thoroughly eviscerated.

agencies that was not based on any relevant regulation or statute.⁷¹ The hard look requirement imposed by NEPA does not require specific substantive steps by the agency—steps that would be subject to review by a court.⁷² Instead, the en banc court held that an agency “has taken the requisite ‘hard look’” when the EIS includes the components outlined in 40 C.F.R. § 1502.1 and the agency provides “a full and fair discussion of environmental impacts.”⁷³ Therefore, agencies do not need to affirmatively present every possible uncertainty in an EIS in order to take a “hard look” and be in compliance with NEPA.⁷⁴

Another point of error in *Ecology Center*, as noted by the court, was the proper deference the court owes agencies and the methodologies they use.⁷⁵ The en banc court disapproved of the judiciary’s increasing involvement in evaluating the scientific and technical aspects of agency actions.⁷⁶ The court returned to a review of agency action limited only to whether the action is “arbitrary and capricious” in nature.⁷⁷

Moreover, the court asserted that this return to limited review was in line with “law that requires [the court] to defer to an agency’s determination in an area involving a ‘high level of technical expertise,’” particularly because the court consists most definitely of “non-scientists.”⁷⁸ Nevertheless, the court reaffirmed that agencies must “acknowledge and respond to” questions of scientific uncertainty.⁷⁹ Therefore, a court is now to afford agencies the appropriate deference, particularly in matters of scientific evaluation of impact. The court did not, however, close the door on the need for agencies to respond to and address concerns over uncertainties in the EIS in harmony with NEPA’s regulations.⁸⁰

71. *McNair*, 537 F.3d at 991.

72. *Id.* at 992.

73. *Id.* at 1001.

74. *Id.*

75. *Id.* at 991.

76. *Id.* at 993.

77. *Id.*; *see also* *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Ecology Ctr., Inc. v. Austin* 430 F.3d 1057, 1075 (9th Cir. 2005) (McKeown, J., dissenting).

78. *McNair*, 537 F.3d at 993.

79. *Id.* at 1001.

80. *See, e.g.*, 40 C.F.R. §§ 1500.1(b), 1502.9(a), 1503.4(a), 1502.22.

III. *CENTER FOR BIOLOGICAL DIVERSITY V. DEPARTMENT OF THE INTERIOR*

A. Facts

In 1994, Asarco LLC (“Asarco”), which operates the Ray Mine complex in south central Arizona, proposed to the BLM a land exchange that would allow for the consolidation of holdings and expanded development of mining operations.⁸¹ The land exchange would convey to Asarco thirty-one parcels of public land (“selected lands”) in fee simple and the BLM would receive eighteen parcels of private land (“offered lands”) in return.⁸² Nearly 75% of the selected lands were owned by the United States and administered by the BLM, with the remaining 25% of the selected lands being owned and administered as split estates.⁸³ These selected lands also provided a variety of vital plant and wildlife habitat, were in close proximity to an area of “Critical Environmental Concern,” and contained several archeological sites suitable for registration.⁸⁴

Both Asarco and the BLM directly asserted five foreseeable uses of the selected lands: existing mining, production and support areas, transition, intermittent use, and long-range prospecting.⁸⁵ The selected lands were also encumbered by a total of 751 mining claims in accordance with the Mining Law of 1872, which included 747 claims held by Asarco.⁸⁶ Although every parcel except one was encumbered by at least one mining claim, these claims were unpatented and their validity had yet to be determined by the BLM.⁸⁷

In the period from 1995 to 1997, the BLM consulted with numerous entities regarding the proposed land exchange before publishing a DEIS in the latter part of 1998.⁸⁸ Upon review of the DEIS in 1999, the Environmental Protection Agency (“EPA”) sent

81. *Ctr. for Biological Diversity v. Dep’t of Interior*, 581 F.3d 1063, 1065–66 (9th Cir. 2009).

82. *Id.* at 1066.

83. *Id.*

84. *Id.*

85. *Id.* at 1066–67.

86. *Id.* at 1067.

87. *Id.*

88. *Id.* (citing consultation with “federal, state, and local agencies, elected representatives, nongovernmental organizations, tribal governments, and private individuals”).

a letter supplemented by thirteen pages of comments to the BLM asserting that the DEIS “did not appear to have evaluated all reasonable alternatives and strongly recommended that additional information regarding the alternatives be included in the DEIS.”⁸⁹ Moreover, the EPA contended that “all reasonable alternatives have not been evaluated and that impacts of foreseeable activities on the selected lands have not been sufficiently addressed.”⁹⁰ Consequently, the EPA rated the DEIS as Environmental Objections-Insufficient Information (“EO-2”).⁹¹

In June 1999, following public hearings on the DEIS and review of submitted comment letters, the BLM issued its final EIS, which differed only slightly from the DEIS.⁹² The final EIS elected to study in depth three alternatives: the “Buckeye Alternative” and the “Copper Butte Alternative,” which would each reduce the total acreage of the selected and offered lands, and the “No Action Alternative,” under which there would be no lands exchanged.⁹³

The final EIS also clearly stated that the “foreseeable uses of the selected lands are mining-related uses” and “are *assumed to be the same* for all alternatives” because Asarco held the majority of the mining claims and had the right to pursue mining-related development.⁹⁴ Under this assumption, the final EIS contained only a general analysis of the environmental consequences of mining and no comparative analysis of consequences under the alternatives.⁹⁵

The BLM, in April 2000, issued a ROD which changed FLPMA designations for two then-existing Resource Management Plans (“RMPs”)⁹⁶ and approved the proposed land exchange.⁹⁷ Although

89. *Id.* at 1067–68.

90. *Id.* at 1068.

91. *Id.* (“We have strong objections to the proposed project because we believe there is potential for significant environmental degradation that could be corrected by project modification or other feasible alternatives We continue to contend that a substantial amount of information should be added to the EIS.”)

92. *Id.*

93. *Id.* It should be noted that the “No Action Alternative” (upper case) was the name given to the alternative in this EIS that analyzed impacts if no exchange of lands occurred. This is more specific than the general “no action alternative” (lower case) that is the general designation for the alternative in any EIS that analyzes the status quo.

94. *Id.*

95. *Id.* at 1068–69.

96. These changes from “retention” to “disposal” were critical prerequisites because they no longer required the BLM to manage the lands under FLPMA’s “multiple-use lands.”

97. *Ctr. for Biological Diversity*, 581 F.3d at 1069.

FLPMA prohibits land exchanges unless the “public interest will be well served,”⁹⁸ the ROD used slightly inverse logic by asserting that the exchange was justified because the public would not be harmed in any way as a result of conveying the land to private ownership.⁹⁹ Just as the final EIS assumed, the ROD also concluded that there would be no harm to the public interest because mining would occur under any alternative as well as in the absence of the land exchange.¹⁰⁰ But this conclusion met opposition from the Sierra Club, the Federal Bureau of Indian Affairs, and the EPA.

Objections to the ROD, as summarized by the BLM, were that “[a] Mine Plan of Operation is necessary to complete analysis of the land exchange impacts” and that “BLM’s assumption is wrong that the foreseeable use reflects mining that would take place whether or not land exchange occurs.”¹⁰¹ The ROD failed to address these objections directly, instead only referring back to the final EIS.¹⁰² However, the final EIS only addressed the first objection, the necessity of a Mine Plan of Operation (“MPO”), and not the objection that the “assumption” that the same mining would happen regardless was wrong.¹⁰³ Despite this unanswered objection, the BLM considered the matter decided and concluded.

B. Procedural History

In July 2001, the Center for Biological Diversity, the Sierra Club, and the Western Land Exchange Project (“Environmental Groups”) filed both an administrative appeal and a request to stay the land exchange with the Interior Board of Land Appeals (“IBLA”). However, after the IBLA failed to act on the request within the statutorily required forty-five days,¹⁰⁴ the Environmental Groups filed suit in federal district court.¹⁰⁵ Shortly thereafter, the IBLA granted the request staying the exchange, pending its decision

98. 43 U.S.C. § 1716(a) (2006).

99. *Ctr. for Biological Diversity*, 581 F.3d at 1069.

100. *Id.*

101. *Id.*

102. The ROD cited final EIS General Response §§ 7.4.5 and 7.4.6 as having already addressed these objections.

103. *Ctr. for Biological Diversity*, 581 F.3d at 1069.

104. 43 C.F.R. § 4.21(b)(4) (2001).

105. *Ctr. for Biological Diversity*, 581 F.3d at 1069.

on the administrative appeal.¹⁰⁶ The federal district court also agreed to suspend any proceedings, pending the IBLA's decision.¹⁰⁷ The IBLA eventually denied the Environmental Groups' appeal in August 2004 and the district court subsequently granted summary judgment in favor of the BLM, denying the Environmental Groups' challenge to the land exchange.¹⁰⁸ The Environmental Groups then appealed the decision of the federal district court to the Ninth Circuit Court of Appeals.¹⁰⁹

C. The Court's Analysis

In the majority opinion, written by Judge Fletcher, two judges of a three-judge panel of the Ninth Circuit reversed the district court and held that the BLM failed to take a hard look at the proposed land exchange, thereby violating NEPA.¹¹⁰ Judge Tallman filed a dissenting opinion that challenged the majority opinion as having disregarded recent precedent.¹¹¹

1. Majority opinion

The majority opinion focused predominately on the provisions within NEPA for the basis of its decision. In fact, the majority reaffirmed the standard of review under NEPA, stating that the court "must ensure that the agency has taken a 'hard look' at the environmental consequences of its proposed actions" and "must defer to an agency's decision that is 'fully informed and well-considered.'"¹¹² NEPA, as the majority pointed out, "establishes 'action-enforcing' procedures that require agencies to take a 'hard look' at environmental consequences,"¹¹³ with the preparation of an EIS "[c]hief among" them.¹¹⁴ The court's significant valuation of an

106. *Id.* at 1069–70.

107. *Id.* at 1070.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1077 (Tallman, J., dissenting).

112. *Id.* at 1070 (majority opinion) (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (citation omitted)).

113. *Id.* at 1071 (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (citation omitted)).

114. *Id.*

EIS is not new or unfounded.¹¹⁵ In addition to being statutorily required for federal actions that affect human environmental quality, the Supreme Court has also established two important purposes of an EIS.

First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.¹¹⁶

While an EIS is the procedural mechanism to ensure that decisions and implementations are properly considered and well-informed, the “analysis of alternatives to the proposed action is ‘the heart of the environmental impact statement’”¹¹⁷ and the “existence of reasonable but unexamined alternatives renders an EIS inadequate.”¹¹⁸ This reasoning frames the majority’s view of the facts of this case. Specifically, in order for the BLM and Asarco to have complied with NEPA, they must have adequately fulfilled the procedural requirement of an EIS by including an analysis of any existing “reasonable” alternatives to the proposed land exchange. The final EIS issued by the BLM did examine the environmental impacts and three alternatives, including the statutorily required “no action alternative,” which is intended to “provide a baseline” for evaluating the action alternative.¹¹⁹ Under the “no action alternative,” the land exchange would not occur. However, the majority concluded that the final EIS assumption—that the

115. *See, e.g.*, *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008).

116. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (citations omitted).

117. *Ctr. for Biological Diversity*, 581 F.3d at 1071 (quoting *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008)). The term “heart of the environmental impact statement” is actually originally quoted from 40 C.F.R. § 1502.14 (2009).

118. *Ctr. for Biological Diversity*, 581 F.3d at 1071 (quoting *Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)).

119. *Id.* at 1071 (quoting *Friends*, 153 F.3d at 1065). “A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action.” *Id.*

environmental consequences of the land exchange and the no action alternative would be the same—was improper and “fatally undermined the analysis in the final EIS.”¹²⁰

The BLM’s “assumption” was largely based on mining claims already held by Asarco and the guarantee of the right to engage in mining on those lands under the Mining Law of 1872.¹²¹ Because Asarco already held claims on much of the land, the final EIS largely assumed that “mining” would occur in the same manner with or without the land exchange.¹²² However, the majority did not jump to the same conclusion. The majority pointed out that if the lands were retained in the public’s hands, the mining activities of Asarco would be subject to provisions of the Mining Law of 1872 that would require Asarco to submit MPOs to the BLM and receive approval for any operations “greater than a ‘casual use’ that would disturb more than five acres of land.”¹²³

Under the proposed land exchange, however, Asarco would have owned the lands in fee simple and would not have been subject to the same stringent MPO requirements of the Mining Law.¹²⁴ The majority thought it “highly likely” that the MPO process would “substantially” impact the mining operations on the lands.¹²⁵ Moreover, the majority pointed out that the record¹²⁶ indicated that both Asarco and the BLM have fairly specific and detailed knowledge about Asarco’s intentions for the exchanged lands and that such knowledge would be useful in preparing a final EIS that would

120. *Id.*

121. *Id.* at 1071–72; *see also* United States v. Shumway, 199 F.3d 1093, 1105 (9th Cir. 1999); Independence Mining Co. v. Babbit, 105 F.3d 502, 506 (9th Cir. 1997).

122. *Ctr. for Biological Diversity*, 581 F.3d at 1072.

123. *Id.* (citing 43 C.F.R. §§ 3809.11, 3809.21 (2010)). Casual use is defined as “activities ordinarily resulting in no or negligible disturbance of the public lands or resources.” 43 C.F.R. § 3809.5 (2010).

124. *Ctr. for Biological Diversity*, 581 F.3d at 1072.

125. *Id.* at 1073.

126. The majority cites to several sources indicating Asarco and the BLM’s knowledge. First, a 1999 EPA letter to the BLM, which objected to the DEIS, claimed that there seemed to be “fairly specific plans for the selected parcels.” *Id.* at 1074. Second, a separate concurrence of Administrative Judge Hammer in the IBLA decision, who noted that she was agitated by the claim that the “foreseeable consequences . . . are not possible to predict or are speculative” and that BLM’s information should have “made foreseeable impacts more easily presentable.” *Id.* And finally, the BLM’s final EIS itself included specific information regarding the intended activities, as well as the amount of land dedicated to each. *Id.*

analyze the likely MPOs that Asarco would submit under the no action alternative.¹²⁷

The "black letter law" of NEPA mandates comparative analysis of environmental impacts of the alternatives available to the agency, and for the EIS to satisfy NEPA, an agency such as the BLM must give "meaningful analysis of the likely environmental consequences of the proposed exchange by comparing the likely environmental consequences of mining under a regime of approved MPOs with the likely environmental consequences of mining on the lands without the constraints of the MPO process."¹²⁸ Quite simply, the majority pointed out, the "BLM has not done this," nor "even attempted to do this."¹²⁹ The BLM "improperly assumed" that the MPO process would have no effect and simplified the likely consequences under each alternative as both "mining" and "mining."¹³⁰ Because the BLM assumes that the mining under any alternative would yield the same consequences, the majority concluded that such an assumption is not only unsupported by the evidence, but it "flies in the face of the evidence in the record."¹³¹ Therefore, the BLM violated the requirements of NEPA because it failed "to take a 'hard look' at the environmental consequences of the land exchange."¹³²

2. Judge Tallman's dissent

In a strong dissent, Judge Tallman asserted that the majority had "inverted"¹³³ proper legal analysis, made "fundamental missteps"¹³⁴ in its analysis, and inappropriately expanded NEPA's procedural requirements, thereby making the decision "irreconcilable with *Lands Council*," and showing that the majority "disregard[ed] that precedent."¹³⁵ Judge Tallman stressed several ways that this sort of "judicial second-guessing" by the majority is wrong and is exactly

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1075.

132. *Id.*

133. *Id.* at 1078 (Tallman, J., dissenting).

134. *Id.*

135. *Id.* at 1077.

what the en banc court was attempting to “rein in” in *Lands Council*.¹³⁶

a. An inverted legal analysis. First, the dissent reasoned that the majority had “work[ed] backwards,” inverting its legal analysis in such a way that it has created bad law.¹³⁷ Asarco already possessed claims on almost the entirety of the proposed lands and it was FLPMA that governed the exchange, with NEPA as a procedural mechanism that factors into the BLM’s determination under FLPMA. Instead, the dissent pointed out that the majority focused almost exclusively on NEPA with FLPMA and the Mining Law consideration only being addressed “tangentially.”¹³⁸ This inversion of analysis did not give proper weight to what Judge Tallman contended to be the primary issues: serving the public interest and preexisting mining rights.¹³⁹

FLPMA allows the BLM to exchange lands provided that “the public interest will be well served by making the exchange” and while impact on the environment is “certainly a factor” in the public interest determination by the BLM under FLPMA, NEPA only sets forth the procedures required of agencies in considering the environmental impact of their actions and “does not dictate substantive results.”¹⁴⁰ The dissent therefore stressed that the public interest determination of FLPMA is paramount, and accordingly a NEPA evaluation serves as a factor—“unquestionably an important one”¹⁴¹—within the evaluation of that public interest, but it is not dispositive as a single deficiency within an EIS cannot be “sufficient to undermine” an agency action.¹⁴² Additionally, the dissent also gave several positive benefits derived from this type of land exchange both generally and specifically to this case.¹⁴³

136. *Id.*

137. *Id.* at 1078.

138. *Id.*

139. *Id.* at 1079–80.

140. *Id.* at 1079.

141. *Id.*

142. *Id.* at 1078–79.

143. *Id.* at 1079.

[Consolidated] lands can be managed efficiently, effectively, and economically for all sorts of beneficial uses—e.g., creation of parklands, wilderness areas, hiking and biking trails, environmental remediation and protection, or

The weight given to the Mining Law in the dissent is more driven by a notion of “practicality” than the straightforward relationship of FLPMA to NEPA.¹⁴⁴ This practicality stems from the fact that Asarco holds over 99% of the mining or mill site claims that encumber the entire selected lands.¹⁴⁵ Possession of a mining claim is not just an abstraction, but an “owner of a mining claim owns property.”¹⁴⁶ Moreover, not only are they entitled to “casual use” and development of the claims under the Mining Law of 1872, but Asarco can even apply for a patent on the land, which conveys fee title to the applicant if approved.¹⁴⁷ Proper consideration, according to the dissent, must therefore be first given to the mining rights that “predate the Land Exchange proposal, and will exist whether or not the Land Exchange goes forward.”¹⁴⁸

b. A series of fundamental missteps. The second error pointed to in the dissent was “a series of fundamental missteps” made by the majority. Specifically, the majority first misinterpreted the record to view that the BLM “blindly assumed” that the mining on the lands would be exactly the same. Second, the majority then made an “apparent finding of fact for the first time on appeal” that the BLM and Asarco had “detailed knowledge” and withheld this from the public. Finally, the majority built upon “these two highly questionable appellate findings” to improperly broaden NEPA to create a new “procedural hurdle.”¹⁴⁹ These missteps are underscored by the dissent’s enunciation of the “arbitrary and capricious”¹⁵⁰

improved stewardship of multiple-use lands and forests. It is undisputed [this exchange] would serve these very purposes, among others.

Id. “[F]rom an environmental standpoint, the selected lands are far inferior to the offered lands which would come under federal ownership through the Land Exchange. . . . Moreover, the less environmentally valuable selected lands . . . are apparently rich in copper and silver—minerals in high demand by our technology-driven economy.”

Id. at 1079–80 n.3.

144. *Id.* at 1080–81.

145. *Id.* at 1081; *see also id.* at 1067 (majority opinion).

146. *Id.* at 1080 (Tallman, J., dissenting) (quoting *United States v. Shumway*, 199 F.3d 1093, 1103 (9th Cir. 1999)).

147. *Id.* at 1080; *see also* 30 U.S.C. § 29 (2006).

148. *Ctr. for Biological Diversity*, 581 F.3d at 1081.

149. *Id.* at 1078.

150. *See* 5 U.S.C. 706(2)(A) (2006). The dissent also points out that agency decisions can only be arbitrary and capricious when:

standard, which authorizes and constrains the court's review of agency action.¹⁵¹

The dissent recognized that the majority did not dispute the foreseeability of mining activities nor propose an alternative foreseeable use for the lands, and did not fault them for that. Instead, it faulted the majority for misreading "the BLM's careful analysis" and fixating on an isolated phrase¹⁵² in the record to indicate the BLM's assumption "that the manner and intensity of mining would be 'the same' whether or not there was a land exchange."¹⁵³ The dissent asserted that this phrase from the EIS was taken "entirely out of context" because it was intended to demonstrate that a no mining alternative was unrealistic and impracticable.¹⁵⁴ The dissent instead contended that the manner and intensity of mining activity presumed in the BLM's environmental assessment was based on "the assumption that mining-related activity [in the absence of the exchange] . . . would be conducted in a manner consistent with Asarco's existing mining rights."¹⁵⁵

The next "misstep" by the majority came with the assumption that the BLM and Asarco had "detailed knowledge" about the intention. The dissent objected to the majority's "hypothetical" claim that Asarco's mining will "differ substantially," depending on whether or not there is a land exchange because it is "unaccompanied by any factual basis from the record" and "NEPA does not encompass all conceivable scenarios."¹⁵⁶ Moreover, the dissent attempted to deflate "an inflated portrayal of the MPO process" held by the majority.¹⁵⁷ As a properly submitted MPO can only be denied by the BLM for resulting in "unnecessary or undue

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Ctr. for Biological Diversity, 581 F.3d at 1081 (quoting *Sw. Ctr. For Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996)).

151. *Ctr. for Biological Diversity*, 581 F.3d at 1081.

152. "As explained above, foreseeable uses of the selected lands are assumed to be the same for all alternatives." *Id.*

153. *Id.* at 1082.

154. *Id.* at 1083.

155. *Id.*

156. *Id.*

157. *Id.*

degradation of public lands,”¹⁵⁸ the most significant controls in effect on the lands would be the federal regulations and safeguards that still bind private land owners¹⁵⁹ and were considered in the BLM’s final EIS.¹⁶⁰ The BLM evaluated the likely developments, but because an MPO is not required for a proposed land exchange, specificity was not needed and the majority’s determination, according to the dissent, was therefore conjecture and not based on facts in the record.¹⁶¹

The final misstep was the majority’s creation of a new NEPA requirement. The dissent argued that by seeking a discussion of MPO-related environmental impacts under the no action alternative, the majority created a “quasi-MPO requirement” of agencies under NEPA that is both “steeped in mystery” and without “legal basis.”¹⁶² This regulation of agency action “by judicial fiat” is inappropriate because it imposes the court’s “own notion of which procedures are ‘best’”¹⁶³ and “procedural requirements not explicitly enumerated”¹⁶⁴ in NEPA.¹⁶⁵ And by intervening with the decision making ability of agencies in this way, the dissent contended that that the majority opinion therefore ran counter to the court’s precedent.¹⁶⁶

c. Irreconcilable with precedent. Finally, the dissent maintained that the majority defied precedent, not only with its creation and application of a “novel, judicially created NEPA requirement,”¹⁶⁷ but more generally in its failure to “defer to an agency’s determination in an area involving a ‘high level of expertise.’”¹⁶⁸ The BLM, the dissent would argue, has the specialized knowledge and expertise in the area of mining rights and MPOs, such that they are the best to evaluate

158. 43 C.F.R. § 3809.411(d)(3).

159. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251 (2006); Clean Air Act, 42 U.S.C. § 7413 (2006).

160. *Ctr. for Biological Diversity*, 581 F.3d at 1084.

161. *Id.* at 1085.

162. *Id.* at 1085–86.

163. *Id.* at 1086 (quoting *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001)).

164. *Id.* (quoting *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)).

165. *Id.*

166. *Id.* at 1086.

167. *Id.* at 1078.

168. *Id.* at 1086 (quoting *Lands Council*, 537 F.3d at 993).

the potential consequence if the status quo was maintained. Indeed, the dissent pointed out that BLM considered a “Mining Plan of Operation Alternative,”¹⁶⁹ gave “meaningful discussion” on the foreseeable usage of the land,¹⁷⁰ weighed the inevitability of “mining-related activities” burdening the land,¹⁷¹ and presented “sound logic” in the ROD on how best to serve the public interest.¹⁷² The dissent plainly accused the majority of being “concerned about the unavoidable uncertainty regarding the ultimate environmental impacts that will occur,” basing their ruling “entirely on their suspicion,” and effectively “sacrific[ing] the integrity of [the court’s] precedent and the best interests of the public in order to achieve a particular outcome.”¹⁷³ Specifically, the majority’s opinion “embodies the type of judicial meddling in agency action that we intended to put to rest in *Lands Council*.”¹⁷⁴

IV. PUTTING THE PIECES TOGETHER: *CENTER FOR BIOLOGICAL DIVERSITY* AS CLARIFICATION RATHER THAN CONTRADICTION

The majority’s decision serves as a congruent and apposite clarification of the Ninth Circuit’s expectations for a “hard look.” Ultimately the primary challenge leveled by Judge Tallman’s dissent is that the decision in *Center for Biological Diversity* is blatantly counter to Ninth Circuit precedent. Arguably, inverted legal analysis and missteps of the majority aside, the dissent would have the majority overturned and the land exchange approved based on precedent alone because the BLM made the determination that the exchange would best serve the public interest, and under *Lands Council* the court must defer to agency determination in technical areas. In other words, the court’s analysis and missteps should never be reached because precedent mandates an affirmation of the action.

Moreover, it would seem that the dissent adamantly believed that this case creates such a rift with precedent that it is completely “irreconcilable.”¹⁷⁵ However, looking beyond the scope of *Lands Council* shows that majority decision in *Center for Biological*

169. *Id.* at n.7.

170. *Id.* at n.8.

171. *Id.* at 1088.

172. *Id.*

173. *Id.* at 1088–89.

174. *Id.* at 1090.

175. *Id.* at 1077.

Diversity is not only an appropriate and fitting refinement to the court’s analysis of agency actions—further clarifying the role of the judiciary in ensuring that agencies take the requisite “hard look” at environmental impact—but it also affirms standing Ninth Circuit precedent beyond that enunciated in *Lands Council*.

A. Alternatives and Purpose Cannot Be Too Narrowly Focused

In *Robertson v. Methow* and *Friends of Southeast’s Future v. Morrison*, the court criticized narrowness in both the presentation of alternatives and even the underlying purpose of the proposed action. The problem in *Methow* was that the forest service narrowed all alternatives to consider only a single parcel, and an EIS that does not present sufficient alternatives to achieve the underlying public need is incomplete.¹⁷⁶ The court faced a similarly narrow set of alternatives in *Center for Biological Diversity*. Undoubtedly, as the dissent pointed out, mining on the lands was inevitable. However, what was not inevitable was the “manner and intensity of mining” that would occur, depending on whether the land exchange took place.

While the majority was criticized for “the unavoidable uncertainty,” which the dissent admitted “could be substantial and perhaps different than estimated in the EIS,” it seems that the reason it questioned the alternatives presented was specifically because the majority did not believe the uncertainty was completely unavoidable. In fact, ensuring that the agency “will have available and will carefully consider, detailed information concerning significant environmental impact” is precisely one of the purposes of an EIS according to the Supreme Court.¹⁷⁷ Omitting alternatives from the EIS, even if carefully considered and dismissed by an agency, also circumvents the second purpose of an EIS—guaranteeing that “the relevant information will be made available to the larger audience.”¹⁷⁸ The BLM cannot claim that it evaluated the mining under the no action alternative off-the-record and dismissed the significance of its impact. Regardless of the agency’s intentions, the narrow presentation of alternatives makes an EIS incomplete.

176. *See supra* Part II.A.

177. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

178. *Id.*

In *Friends*¹⁷⁹ the underlying purpose and need of the Alaskan timber project was defined so narrowly that the no action alternative was omitted because it failed to fulfill that purpose and need. In *Center for Biological Diversity*, the BLM did not go so far as to omit the no action alternative from the EIS. In fact, the mining and private development that could occur under the no action alternative weighed in on the BLM's decision. However, the objective of the proposed land exchange could be construed as being so "unreasonably narrow" that it precluded the acceptance of a no action alternative, effectively omitting it from consideration despite inclusion in the EIS. If the desired benefits or purpose of the proposed land exchange are so narrow that the no action alternative is rendered unreasonable, the effect is much the same as if the alternative was completely omitted. The court can exercise discretion, as it did in *Friends*,¹⁸⁰ in evaluating the sufficiency of the no action alternative to ensure that the EIS process is not circumvented. However, as these examples indicate, precedent alone does not mandate that the court automatically affirm agency decisions, particularly when there are narrow alternatives or purposes at play in the proposed action.

B. Underlying Purpose Is Central to Examining Treatment of No Action Alternatives

Friends also speaks to the importance of considering the purpose of the action when examining the agency's handling of the no action alternative. In *Center for Biological Diversity*, the consolidation of lands, even if for the basis of more "efficiently, effectively, and economically" managed lands, seems to quite obviously preclude a no action alternative.¹⁸¹ The ROD points to several specific benefits derived from exchanging the apparently "mediocre" selected lands for the "superior" offered lands,¹⁸² but there is no mention in the record of any benefits, meeting the underlying purpose or otherwise, that would be derived from retaining the lands under a no action alternative.

179. *See supra* Part II.C.

180. 153 F.3d at 1066.

181. *Ctr. for Biological Diversity v. Dep't of Interior*, 581 F.3d 1063, 1079–80 (9th Cir. 2009).

182. *Id.* at 1089.

As stated above, under *Friends* the court has the discretion to evaluate the treatment of a no action alternative but in the context of the underlying purpose. In other words, the court must first look to the underlying purpose of the proposed action and then, provided the objectives are not “unreasonably narrow,” the court can decide if the treatment of a no action alternative is appropriate, considering that underlying purpose and its congruence with the requirements of NEPA. Therefore, the court is well within its discretion to make determinations on both the overarching objective of the proposed land exchange and adequacy of the no action alternative within the EIS, which in this case it found inadequately addressed the difference between the proposed exchange and the status quo.¹⁸³

C. The “Hard Look” Must Be Demonstrated

In both *Blue Mountain Biodiversity Project v. Blackwood*¹⁸⁴ and *Ecology Center, Inc. v. Austin*¹⁸⁵ the court specified that the “hard look” at environmental impacts required of agencies must actually be demonstrated. According to *Blue Mountain*, the court looks for evidence of more than a “ cursory” investigation into impacts and the persuasiveness of the agency’s determination as presented in the EIS. The court in *Center for Biological Diversity* was therefore well within its authority to evaluate the information—including the persuasiveness—contained within the issued statements and assessments and then base its decision on the adequacy of the EIS in fulfilling the “hard look” requirement. Moreover, the evaluation of the “hard look” does not require an examination of the potential benefits or public interest because “NEPA is a procedural mechanism,”¹⁸⁶ and the injection of a subjective valuation of benefits would be misplaced. Instead, the court only looks at the required steps the agency has taken and whether those steps—such as a complete EIS with a “full and fair discussion”¹⁸⁷ of all the reasonable alternatives—have been adequately fulfilled. Even “a single exception” to its thoroughness ought to be sufficient to render an EIS incomplete, especially when every EIS must “[r]igorously

183. *Friends*, 153 F.3d at 1066; see also *Nat’l Parks & Conservation Ass’n v. BLM*, 586 F.3d 735, 748 (9th Cir. 2009) (recently reaffirming the holding and analysis of *Friends*).

184. See *supra* Part II.B.

185. See *supra* Part II.D.

186. *Ctr. for Biological Diversity*, 581 F.3d at 1086 (Tallman, J., dissenting).

187. 40 C.F.R. 1502.1.

explore and objectively evaluate all reasonable alternatives.”¹⁸⁸ A failure to adhere to the procedural requirements at any stage is still a failure, regardless of any beneficial outcome of the action. Additionally, the internal machinations of agencies cannot rise to the level of a demonstration of the hard look to the court either, as the court does not conclude that the “hard look” at the environmental impacts was taken simply because the agency says there’s little to no significant impact.¹⁸⁹ Accordingly, the majority was correct in dismissing the BLM’s claim that it thoroughly explored the no action alternative beyond what was published in any EIS. Again, an EIS ensures that the agency has and considers detailed information as well as guarantees that such information is available to the public. Agencies must demonstrate taking the “hard look” through their issued assessments and statements. And when part of that information is missing, it logically cannot be considered “fully informed and well-considered.”

Ecology Center goes even further than *Blue Mountain* in specifying that the “hard look” must be demonstrated in the scientific methodology as well. In its short life, *Ecology Center* called into question the scientific methodologies utilized by agencies in arriving at their decisions, calling for demonstration that not only did agency discussion of the impacts demonstrate that they took the “hard look,” but that the techniques used to support their discussion also conform to a “hard look.”¹⁹⁰ It was this extension of the “demonstration” required of agencies under NEPA that the court eventually retreated from in *Lands Council*. But while *Lands Council* unmistakably snuffed out the requirement of demonstration in scientific procedure, it did not eliminate the need for agency demonstration of taking the “hard look” as established by *Blue Mountain*.

D. The “Hard Look” Only Examines the Discussion, Not the Science

Ecology Center was clearly a shocking turn in “hard look” precedent because it added “overly zealous scrutiny” to the

188. 40 C.F.R. 1502.14(a).

189. *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998)).

190. *See generally Ecology Ctr. v. Austin*, 430 F.3d 1057 (9th Cir. 2005).

demonstration required of agencies.¹⁹¹ But while *Ecology Center* was a faulty standard that swung the burden too far in the direction of agencies, it would be error to suppose that *Lands Council* swings it just as far in the opposite direction. In *Lands Council*, the NEPA violation asserted by Lands Council, and affirmed by the prior three-judge panel, is not regarding a deficiency of the EIS, but a failure by the Forest Service to address “scientific uncertainties” around its strategy or provide evidence as to how its strategy would accomplish its objective.¹⁹² In *Center for Biological Diversity* there is no question about scientific uncertainties or strategy, just what the majority finds to be an absence of a complete consideration of all reasonable alternatives. Perhaps *Lands Council* would be more directly fitting if the Environmental Groups challenged a determination or estimation produced by the BLM that projected the environmental impacts of the no action alternative. However, that is not the case here. Instead, the challenge presented in *Center for Biological Diversity* is that the BLM gives insufficient information and discussion on the environmental consequences under the no action alternative, not that the BLM’s use of scientific techniques or methods were deficient.

The deference owed agencies is in areas with a “high level of technical expertise,”¹⁹³ as the court is certainly made up of non-scientists, and yet even in the area of scientific methodology, agencies must respond to and address concerns, uncertainties, or objections—through an EIS—in congruence with the requirements of NEPA. *Lands Council* does not signify a shift to absolute agency deference, but is a return to agency deference on the science and internal regulations behind proposed actions. *Center for Biological Diversity* in no way contrasts this, but reaffirms the requirement, established in *Blue Mountains* and underlying *Lands Council*, that calls for “fully informed and well-considered” discussion of environmental impacts to demonstrate that the agency has taken the “hard look.” If the discussion demonstrated in the issued statements and assessments is deficient in part, logically the court can find that the agency’s look at environmental impacts is simply not “hard” enough.

191. *See supra* Part II.D

192. *Lands Council v. McNair*, 537 F.3d 981, 1002 (9th Cir. 2008); *see supra* Part II.E.

193. *Lands Council*, 537 F.3d at 993.

V. CONCLUSION

The decision in *Center for Biological Diversity* is not the radical departure from precedent that Judge Tallman's dissent suggests, nor is it incorrect for failing to focus on the benefits to the public interest. The majority accurately looks dispassionately at the procedural steps, resulting assessments, and statements in order to find that the BLM violated NEPA by failing to take the hard look at the environmental impacts. Furthermore, scrutiny of several key Ninth Circuit decisions leading up to and including *Lands Council* show that *Center for Biological Diversity* is a further clarification of the court's evaluation of how "hard" an agency must look at consequences and when the court can find that the agency's determination of environmental impacts has been too soft to be considered a "hard look."

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