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Where are we going to put all of this Junk? The Ninth Circuit Dismisses an Attempt to Construct a Large Landfill in Southern California. National Parks & Conservation Association v. Bureau of Land Management

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Where Are We Going to Put All of This Junk? The Ninth Circuit Dismisses an Attempt to Construct a Large Landfill in Southern California

National Parks & Conservation Association v. Bureau of Land Management[1]

I. INTRODUCTION

Seldom do people stop to consider where all of their junk and garbage end up. They discard tons of waste each year without a thought as to the landfill that will be the final resting place for their garbage. There is no doubt that these landfills pose serious hazards to their surrounding environment, but there has to be a place available to meet demands. Kaiser Eagle Mountain ("Kaiser") thought it had discovered the ideal place to construct the largest landfill in the United States with the capability of handling most of the waste from Los Angeles and Southern California. In order to implement this project, Kaiser needed to acquire certain federal lands. Although both Kaiser and the Bureau of Land Management approved this acquisition of the federal land, satisfying environmental laws proved too difficult.

In 1976, Congress passed the Federal Land Policy and Management Act[2] ("FLPMA"), partially to ensure public land disposals are in the best interest of the public.[3] Shortly before passing FLPMA, Congress passed the National Environmental Policy Act[4] ("NEPA") to "encourage productive and enjoyable harmony between [people] and [the] environment."[5] Kaiser's plan to achieve this harmony by providing a place to dump waste was rejected under these Acts. By denying this proposal that seemed environmentally sound, the court showed a commitment to apply environmental laws strictly, rather than achieving

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[1] 606 F.3d 1058 (9th Cir. 2010).
[2] 43 U.S.C. §§ 1701-1782 (2006).
[3] *Id.* § 1701.
[4] 42 U.S.C. §§ 4321-4347 (2006).
[5] *Id.* § 4321.

the balance between the people and the environment that the Acts aimed to fulfill.

II. FACTS AND HOLDING

Kaiser Eagle Mountain, Inc. developed plans to construct a landfill in southern California, one that would eventually be the largest landfill in the United States.[6] The proposed site rested on a former iron ore mine near Joshua Tree National Park that currently remains largely unused.[7] A portion of the former mine site, referred to as "Townsite,"[8] is currently leased by Kaiser to the federal government for partial use as a correctional facility, with the federal government retaining a reversionary interest in the Townsite property.[9]

The Bureau of Land Management ("BLM") owns land surrounding the former Kaiser mining site.[10] In 1989, as part of its plan to develop the landfill, Kaiser proposed to exchange certain parcels of land with BLM.[11] Under the proposal, Kaiser would acquire 3481 acres of land from BLM and the United States, the reversionary interest in Townsite, and permanent easements over dormant mountain roads.[12] In return, Kaiser proposed to give BLM 2846 acres of land.[13] These lands from Kaiser lay

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[6] *Nat'l Parks*, 606 F.3d at 1062. Kaiser's goals are to have the landfill accept solid waste for up to 117 years. *Id.* At its peak, the landfill would operate sixteen hours a day for six days a week and accept 20,000 tons of waste per day. *Id.*

[7] *Id.* Kaiser operated a mine on this land until 1983 covering over 5000 acres. *Id.* The proposed landfill will cover 4654 acres including several open mine pits. *Id.*

[8] Townsite was previously used by Kaiser as an area to house workers. *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* The primary purpose of the proposed exchange was to facilitate the future development of the landfill for Kaiser. The benefit to the government would include consolidating the acquired land with other BLM owned property as well as protecting threatened species contained in the acquired lands. *Id* at 1063; *see also* Opening Brief of Defendants-Appellants Kaiser Eagle Mountain, LLC and Mine Reclamation, LLC at 8, *Nat'l Parks*, 606 F.3d 1058 (No. 05-56814), 2007 WL 483725.

inside a critical habitat area that is home to threatened species including the desert tortoise and the Bighorn sheep.[14]

Because the proposed exchange involved federal lands, NEPA laws and regulations applied and forced BLM to analyze the exchange and produce an Environmental Impact Statement. ("EIS").[15] This EIS explained that the primary purpose of the proposed exchange was to develop a landfill to meet waste demands for southern California, to provide an income source from the landfill, to create an accepted use for by-products left at the old Kaiser mine site, and to further develop the largely deserted Townsite.[16] Focusing on these purposes, BLM considered the following six alternatives as options to the proposal: (1) no action; (2) a reduction in the size of the landfill; (3) increased access to the landfill by road; (4) access to the landfill by rail only; (5) the development of the landfill on Kaiser land only; and (6) landfill development without Townsite development.[17]

BLM also hired David J. Yerke, Inc. to appraise the value of the land exchange.[18] The appraisal (the "Yerke appraisal") based the value calculations on the assumption that the highest and best use of the BLM lands to be exchanged was continued holding of the lands for speculative investment.[19] In the end, the Yerke appraisal valued the Kaiser lands to be worth slightly less than the proposed land to be exchanged by BLM,[20] and therefore proposed that Kaiser pay the difference in the value of the exchanged lands.[21] As a result of these findings, BLM approved the proposed land exchange in 1997.[22]

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[14] *Nat'l Parks*, 606 F.3d at 1062-63.
[15] *Id.* at 1063; *see also* 42 U.S.C. § 4332(2)(C) (2006).
[16] *Nat'l Parks*, 606 F.3d at 1063.
[17] *Id.*
[18] *Id.*
[19] *Id.* By assuming that the best value of the land would come from continued holding, the Yerke appraisal ignored any consideration of possible value stemming from the possible landfill project. *Id.*
[20] *Id.*
[21] *Id.* The difference in value required Kaiser to pay $20,100 to BLM. *Id.*
[22] *Id.* Kaiser and BLM subsequently also considered a report conducted by the Herzog Group. *Id.* at 1067 n.5. This report included a consideration of landfill use as the highest and best use, but ultimately decided that such an endeavor was not a feasible use of the public land. *Id.* at 1097 (Trott, J., dissenting).

The National Parks Conservation Association, with Donna and Laurence Charpied (collectively "Conservation Association"), challenged the proposed exchange to BLM.[23] BLM denied the challenge and the Appeals Board[24] later affirmed BLM's decision.[25] The Conservation Association then filed suit in district court alleging violations of both the Federal Land and Policy Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA").[26] The Conservation Association argued that the land exchange should be set aside under the Management Act because the Yerke appraisal was inadequate in that "BLM failed to give 'full consideration' to whether the land exchange well serves the public interest."[27] The Conservation Association also argued that the EIS prepared by BLM did not meet NEPA standards because it failed to consider reasonable alternatives or to sufficiently discuss the impact on Bighorn sheep or eutrophication.[28]

The district court agreed with the Conservation Association and set aside the land exchange for four specific reasons: (1) BLM failed to fully consider the public interest; (2) the Yerke appraisal was flawed in that it did not consider landfill development as the best use of the land when determining the value of public lands; (3) the EIS was too narrow, thus precluding a full range of alternatives; and (4) the EIS failed to fully consider the impact of the proposal on Bighorn sheep and eutrophication in the environment.[29]

The Ninth Circuit affirmed the district court and set aside the exchange, holding that BLM's failure to consider the land for use as a landfill constituted a violation of FLPMA, which requires the consideration of the highest and best use of the land.[30] The court of

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[23] *Id.* at 1063 (majority opinion).

[24] This is in reference to the Board of Land Appeals within the Department of the Interior. 43 C.F.R. § 4.1(b)(3) (2009). Along with other duties, this Appeals Board renders decisions relating to the disposition of public lands. *Id.*

[25] *Nat'l Parks*, 606 F.3d at 1063.

[26] *Id.*

[27] *Id.* at 1065.

[28] *Id.* at 1070. Eutrophication describes the effects of introducing nutrients into the environment. In this case, the focus would be on landfill material and nitrogen emissions. *Id.* at 1070 n.8.

[29] *Id.* at 1063-64.

[30] *Id.* at 1068-69.

appeals disagreed with the district court that the EIS was insufficient in the evaluation of the impact on Bighorn sheep,[31] but agreed with the district court that the evaluation of eutrophication was insufficient.[32] The court of appeals also held that the EIS violated NEPA by being impermissibly narrow with respect to explaining the purpose of and need for the exchange and creating a reasonable range of alternative actions.[33]

III. LEGAL BACKGROUND

A. *Administrative Procedure Act and Scope of Review*

The Administrative Procedure Act ("APA") governs review of agency decisions.[34] Under the APA, "final agency action" is subject to review by the courts.[35] BLM is an agency within the Department of the Interior ("DOI"), which governs public lands.[36] Regulations promulgated by DOI state that no decision will become effective until the time period for appeals expires or until the Appeals Board either fails to act on a petition for stay or denies a petition for stay.[37] Final agency action under DOI comes from a decision by the Board of Land Appeals, the appellate review body for bureau decisions.[38]

B. *Federal Land and Policy Management Act*

FLPMA governs the management of public lands.[39] The policy goals of FLPMA include retaining all public lands unless disposal would "serve the national interest."[40] To ensure that policy is followed, FLPMA permits the exchange of public land for other lands only if there is a

[31] *Id.* at 1073.
[32] *Id.* at 1074.
[33] *Id.* at 1072.
[34] 5 U.S.C. § 704 (2006).
[35] *Id.*
[36] 43 U.S.C. § 2 (2006).
[37] 43 C.F.R. § 4.21 (2009).
[38] *Id.* § 4.403.
[39] 43 U.S.C. § 1701 (2006).
[40] *Id.* § 1701(a)(1).

determination that "the public interest will be well served by making that exchange."[41] When determining whether the interest will be served, the Secretary "shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, [and] food. . . ."[42] If the value of the land would be greater if it remained under federal control, the exchange cannot take place.[43]

FLPMA does not define "full consideration," but regulations promulgated by BLM give some guidance. Those regulations state that BLM's objective is to "encourage and expedite" exchanges of land that are found to be in the public interest.[44] Furthermore, the regulations provide that full consideration as to the public's interest in the exchange is given when there is consideration of the "opportunity to achieve better management of federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives" such as fulfilling public needs, protecting habitats, and consolidating land.[45] The regulations require the officer making the determination to find that the exchange satisfies two requirements.[46] First, the "resource values and the public objectives" that could be served by keeping the land must not be greater than the value of exchanging the land.[47] Second, the exchange must not "significantly conflict" with the management of other adjacent federal lands.[48]

The Supreme Court has held that agency interpretation of statutes will be upheld if the interpretation is based on "a permissible construction of the statute."[49] Agency decisions will be upheld if the record shows that the decision was reasonable and considered the requisite factors.[50]

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[41] *Id.* § 1716(a).
[42] *Id.*
[43] *Id.*
[44] 43 C.F.R. § 2200.0-2 (2009).
[45] *Id.* § 2200.0-6(b).
[46] *Id.*
[47] *Id.* § 2200.0-6(b)(1).
[48] *Id.* § 2200.0-6(b)(2).
[49] Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 843 (1984).
[50] Hjelvik v. Babbitt, 198 F.3d 1072, 1074 (9th Cir. 1999) (quoting Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992) *and* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

For a proposed land exchange to be approved, FLPMA also requires that the land be appraised.[51] This appraisal must be performed by an impartial third party and should take into account relevant market value.[52] DOI defines market value as "the most probable price in cash . . . that lands . . . should bring in a competitive and open market under all conditions requisite to a fair sale. . . ."[53] The key to this determination is that the appraiser must consider the "highest and best use" of the land to be exchanged.[54] "Highest and best use" refers to the "most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion."[55]

There are also Uniform Appraisal Standards that interpret the meaning of "highest and best use" which must be followed.[56] These standards call for the highest use that is "physically possible, legally permissible, [and] financially feasible" which results in the highest value.[57]

The Ninth Circuit has played a role in interpreting what constitutes "highest and best use." In *Desert Citizens Against Pollution v. Bisson*, the parties proposed a land exchange in which the public land would be used for a landfill.[58] The public land was located near a private mine expected to be abandoned fourteen years later. The parties contemplated that after the mine terminated, it would be used in conjunction with the acquired public lands as a landfill.[59] The appraisal concluded that the highest and best use of the public lands was for "open space" or "mine support" and determined that the values of the lands to be exchanged were nearly identical.[60] However, the Ninth Circuit held that this was not the proper

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[51] 43 U.S.C. § 1716(d)(1) (2006).
[52] 43 C.F.R. § 2200.0-5(c).
[53] *Id.* § 2200.0-5(n).
[54] *Id.* § 2201.3-2(a)(1).
[55] *Id.* § 2200.0-5(k).
[56] *See id.* § 2201.3 (stating that the parties shall comply with the Uniform Appraisal Standards for Federal Land Acquisitions as appropriate).
[57] APPRAISAL INSTITUTE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 17 (2000), *available at* http://www.usdoj.gov/enrd/land-ack/yb2001.pdf.
[58] 231 F.3d 1172, 1175 (9th Cir. 2000).
[59] *Id.*
[60] *Id.* The difference in the appraised values amounted to only $919. *Id.*

"highest and best" use of the public lands.[61] The court reasoned that the evidence showed that there was a market for the development of a landfill and there was an expectation that this land would be used as a landfill.[62] The court stated that the mere presence of high risk did not negate the opportunity for the land to be used in that high-risk venture.[63] Thus, the court ruled that use as a landfill was not speculative but was reasonably probable and therefore must "at the very least, have been considered as part of the highest and best use determination."[64]

C. *NEPA*

For every major action by an agency, NEPA requires that the agency give a statement discussing the alternatives that could be implemented instead of the proposed action.[65] One of the alternatives that must be considered is that no action be taken at all.[66] In addition, regulations under NEPA also require that the statement include the "underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[67] This statement has come to be known as the purpose and need statement.[68] When preparing these statements, the agency involved enjoys considerable discretion under a reasonableness standard.[69] Case law has maintained that in order to be reasonable, "an 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 [statement] would become a foreordained formality."[70] When creating this statement, courts

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[61] *Id.* at 1186-87.
[62] *Id.* at 1181.
[63] *Id.* at 1184.
[64] *Id.* at 1181.
[65] 42 U.S.C. § 4332(2)(C)(iii) (2006).
[66] 40 C.F.R. § 1502.14(d) (2009).
[67] *Id.* § 1502.13.
[68] Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1067 (9th Cir. 1998).
[69] *Id.* at 1066-67.
[70] *Id.* at 1066 (quoting Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991)).

have held that agencies must take into account private objectives along with public objectives.[71] In fact, DOI's NEPA handbook states that the private objectives may be a useful consideration but should not take the place of BLM objectives, which should be the objectives that dictate the purpose and need statement and the alternatives considered.[72]

Under NEPA, agencies must also create a detailed EIS.[73] The EIS must analyze the impact on the environment that the proposed action will bring, along with any "adverse environmental effects" that cannot be avoided if the action is implemented.[74] Regulations require that the EIS be clear, concise, and supported by evidence in order to inform the public of possible alternatives to the action.[75] Case law requires the EIS to contain a "reasonably thorough" investigation of environmental consequences. Appellate review focuses on whether the agency took a "hard look" at the consequences.[76] This "requires a reviewing court to make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation."[77]

Drawing on this legal background, the court addressed the issues in this case.

IV. INSTANT DECISION

A. *Standard and Scope of Review*

Judge Pregerson authored the majority opinion and began by determining which agency action was under review: the ROD or the

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[71] Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999).

[72] DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK 35 (2008), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

[73] 42 U.S.C. § 4332(C)(i) (2006).

[74] *Id.* § 4332(2)(C)(i)-(ii).

[75] 40 C.F.R. § 1502.1 (2009).

[76] California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).

[77] *Id.* (citing Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 552 (9th Cir. 1977)).

Appeals Board decision.[78] The court explained that only "final agency action" could be reviewed under § 704 of the APA.[79] Pointing to DOI regulations,[80] the court stated that a ROD would become effective only after the appeal period has expired and the Appeals Board either denies or takes no action on the petition.[81] In contrast, a decision of the Appeals Board becomes a final agency action as soon as it is rendered.[82] In this case, the majority stated that the ROD never became effective because the Appeals Board granted a stay of the case and thus the appeal period did not expire.[83] Thus, the court held that the Appeals Board decision - not the ROD - was the proper final agency action under review.

With the proper decision before it for review, the court addressed the FLMPA and NEPA claims. Regarding the FLMPA claim, the court concluded BLM did not adequately address the highest and best use of the public lands. Turning to the NEPA claim, the court concluded that under NEPA, the EIS insufficiently analyzed the purpose and use of the proposal and alternatives to the proposal.

B. *Federal Land and Policy Management Act Claims*

1. Highest and Best Use Claim

The court reviewed whether BLM was required to consider the use of the lands for landfill purposes when determining the value of the lands involved in the proposed transfer.[84] First, the court noted that under FLPMA, BLM was required to appraise the fair market value of the lands before agreeing to a land exchange.[85] This includes a determination of the

[78] Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1064 (9th Cir. 2010).
[79] *Id.*
[80] BLM is part of the Department of the Interior. *Id.*
[81] *Id.* (citing 43 C.F.R. § 4.21(a)(2)-(3) (2009)).
[82] *Id.* at 1064.
[83] *Id.* at 1065.
[84] *Id.* at 1066.
[85] *Id.*

highest and best use of the property along with the fair market value of the lands.[86]

In deciding whether BLM should have considered the possible use of the land as a landfill, the court compared the case to *Desert Citizens*, in which the court held that "uses that are reasonably probable must be analyzed as a necessary part of the highest and best use determination."[87] Since landfill use was reasonably probable, the court held that such use must at least be considered when determining the highest and best use of the land.[88] The court concluded that, as in *Desert Citizens*, BLM was required to consider landfill use when determining the value of the land because "the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange. . . ."[89]

2. The Public Interest Determination

First, the court noted that under § 1716(a) of FLPMA, before the land exchange can be approved, BLM is required to determine that "'the public interest will be well served' by [the] land exchange."[90] The court explained that this determination by BLM must give "full consideration" to the needs of the public and the environment.[91] The majority reasoned that the resource value of the public lands being exchanged could outweigh the resource values of the private land to be received.[92]

Second, the court explained that since FLPMA did not define "full consideration," the court was limited to evaluating whether "BLM's interpretation of the term [was] based on a permissible construction of the statute."[93] Following an evaluation of the record in its entirety, the court concluded that the voluminous final EIS approved by the Appeals Board

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[86] *Id.*
[87] *Id.* at 1067 (quoting Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1181 (9th Cir. 2000)).
[88] *Id.* at 1068.
[89] *Id.*
[90] *Id.* at 1069 (quoting 43 U.S.C. § 1716(a) (2006)).
[91] *Id.*
[92] *Id.* at 1069 n.6.
[93] *Id.* at 1069 (citing Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984)).

included sufficiently detailed analyses of the environment and contained reasonable consideration that the exchange would serve the interest of the public.[94]

C. *NEPA Claims*

1. Purpose and Need Claim

In analyzing whether the EIS was sufficient under NEPA, the court first explained that agency regulations promulgated under NEPA require the EIS to state the "underlying purpose and need for the proposed action."[95] The court stressed the importance of basing the purpose and need statement on broad terms with multiple alternatives as well as taking into account private goals.[96] While focusing on the importance of these factors when determining the purpose and need, the court also cautioned that private interests should not be the primary goals.[97] The majority insisted that DOI guidelines and regulations require BLM goals to dictate the purpose and need statement whereas private goals provide only useful background and consideration.[98]

The court further explained that the purpose and need statement is directly related to the range of alternatives considered.[99] Thus, the court reasoned that if the statement is overly narrow because it primarily considers private goals and objectives, then the corresponding list of alternatives will also be overly narrow "because when 'the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.'"[100]

The court then scrutinized the four goals that BLM set out in the purpose and need statement.[101] The court found that only the first goal of

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[94] *Id.*
[95] *Id.*
[96] *Id.* at 1070.
[97] *Id.*
[98] *Id.* at 1071 & n.9.
[99] *Id.* at 1071.
[100] *Id.* (quoting Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986)).
[101] *Id.* at 1072.

meeting long-term landfill demand was a BLM need.[102] The other three goals were found to be the purpose and need of Kaiser and thus private objectives.[103] The first of these was the goal of providing a long-term income source from a landfill.[104] The court found this goal to be solely a private goal because only Kaiser and its successors would receive any income from the proposed landfill.[105] The next goal of finding a viable use for mine by-products was also beneficial only to Kaiser.[106] The court reasoned that this goal would be attractive to Kaiser, but that it makes no difference to BLM whether the by-products of the mine have a viable use.[107] The court also found the last goal, creating development plans for Townsite, to be a private objective because Kaiser operates Townsite and only Kaiser will receive the benefit of such development.[108]

The court stated that the purpose and need statement, containing primarily private objectives, "unreasonably constrain[ed]" the range of alternatives for BLM to consider as required by NEPA.[109] The result, the court stated, was a list of six alternatives, all but one of which would result in the development of the landfill.[110] The court concluded that this list was unreasonably narrow and prohibited under NEPA.[111]

2. Bighorn Sheep

The court explained that NEPA requires that an EIS contain a "reasonably thorough" investigation of the environmental consequences that would result from the proposed action.[112] After looking over 56 pages dedicated to the proposed impact on bighorn sheep, the court concluded that the EIS contained sufficient analysis of the potential effect on the

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*; *see also supra* note 17 and accompanying text.
[111] *Nat'l Parks*, 606 F.3d at 1072.
[112] *Id.*

sheep.[113] Specifically, the court noted that any fences built would be built low enough to allow free movement by the sheep.[114] The court also noted that the proposal contained a 644-acre buffer zone around the landfill area that would remain open space.[115] This buffer zone would provide a safe habitat between the landfill and the areas where the sheep would be relocated.[116] On the basis of these findings, the court concluded that the EIS met the NEPA requirements by providing a reasonable discussion of the impacts on bighorn sheep.[117]

3. Eutrophication

The court then applied the same analysis to determine whether the EIS sufficiently considered the possible effects of eutrophication.[118] The court found that the EIS contained inadequate discussion of eutrophication.[119] The court explained that the issue was discussed only in unrelated scattered sections of the EIS and even then the conclusion dealt only with the effect on Joshua Tree and failed to address other surrounding areas.[120] As a result, the court concluded that this information was insufficient to allow informed public participation,[121] and thus there was not a reasonably thorough discussion as required under NEPA.[122]

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[113] *Id.* at 1073.

[114] *Id.* These fences would be built approximately eighteen inches off the ground so as to protect and restrict tortoise movement while still allowing the sheep free movement. *Id.* at 1073 n.12.

[115] *Id.* at 1073.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Specifically, the court found that the public would not have the advantage or ability of law clerks to "follow a tortuous map to the buried treasure of a eutrophication discussion." *Id.* at 1074 n.14.

[122] *Id.* at 1074. There was also a cross appeal in the case from the Charpieds alone who challenged the district court's dismissal of their claims for lack of standing to sue the National Park Service. *Id.* The court quickly dismissed this claim and affirmed the district court's dismissal for lack of standing, explaining that a favorable decision would not redress their injury because the National Park Service was not responsible for approving the proposal. *Id.* at 1074-75.

D. *Dissent*

Judge Trott filed a lengthy dissent arguing that environmental laws made this proposal impossible.[123] Judge Trott first argued that the purpose and need statement by BLM was not unreasonably narrow.[124] He claimed the EIS permissibly took into account both private and public goals.[125] Focusing on California's crucial need for landfill capacity, Judge Trott would have held that BLM did take into account the public need and concluded that the proposal would benefit both parties.[126] The dissent then argued that the proposal would greatly benefit the public in many ways.[127] The benefits include protecting endangered species, more efficiently managing federal lands due to the proximity between the would-be acquired land and current public lands, economically benefitting the area, and—most importantly—using encumbered land for a landfill that is desperately needed in the region.[128] As a result of these benefits, the dissent argued that BLM correctly decided that the preferred alternative is to build the landfill, and it should not matter what the other proposed alternatives included.[129] According to the dissent, the focus on the mutual benefit that long-term landfill capacity would bring did not result in a narrow purpose and need statement.[130]

The dissent continued by addressing both the eutrophication and highest and best use issues, first arguing that the EIS contained numerous discussions of eutrophication.[131] As to the highest and best use claim, the dissent first argued that the plaintiffs did not preserve this claim for appeal because they failed to argue the issue in the administrative proceeding.[132] The dissent then argued that even if the claim was preserved for review, the claim must fail because any defect was cured by the Herzog

[123] *Id.* at 1075 (Trott, J., dissenting).
[124] *Id.* at 1078.
[125] *Id.* at 1079.
[126] *Id.* at 1078.
[127] *Id.* at 1080.
[128] *Id.*
[129] *Id.* at 1085.
[130] *Id.* at 1079.
[131] *Id.* at 1088.
[132] *Id.* at 1092.

appraisal,[133] which was not addressed by the majority.[134] The dissent argued that in this second appraisal, BLM specifically instructed Herzog to consider the use of the land as a landfill when appraising the land.[135] This report concluded that use of the public lands as a landfill by anyone else but Kaiser was not financially feasible.[136] The dissent concluded that BLM cured any NEPA defects by considering the issue in this second proposal.[137] Thus, it was proper for BLM to dismiss the claim that landfill use was the highest and best use of the public lands.[138]

V. COMMENT

A. *An Epic Failure*

The land exchange proposed by Kaiser and ultimately accepted by BLM represented a huge endeavor. The landfill project itself was proposed in 1989, over twenty years ago.[139] With the expenses already exceeding $45 million, the landfill would have eventually had the capacity to handle 20,000 tons of garbage each day for at least 115 years.[140] The massive price was necessary because the landfill would serve most of the long-term waste removal needs for much of Southern California, including Los Angeles.[141]

To get the land exchange approved, and therefore the landfill approved, Kaiser faced hurdles with the legal system. The first step involved was gathering the necessary county permits and zoning changes.[142] This eventually led to challenges in state court, which, after two appeals and a redraft of the EIS by the U.S. Fish and Wildlife Service,

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[133] *Id.* at 1098-99; *see also supra* note 22.
[134] *Nat'l Parks*, 606 F.3d at 1099.
[135] *Id.* at 1097.
[136] *Id.* The dissent reasoned that only Kaiser could make the project feasible because it already owned the surrounding land and railroad. *Id.*
[137] *Id.* at 1099.
[138] *Id.*
[139] *Id.* at 1075.
[140] *Id.* at 1076.
[141] *See id.*
[142] *Id.*

led to a California Appellate Court ruling that California environmental laws were satisfied.[143] Next, Kaiser reached an agreement with the National Park Service regarding the protection and preservation of the neighboring Joshua Tree National Park.[144] Following investigation from engineers and public comment, an extensive EIS was produced, covering 2,500 pages of discussion regarding the environmental impacts of the proposal.[145] After this, the Interior Board of Land Appeals approved the exchange that prompted the same plaintiffs who brought the state claims to file federal claims.[146] After this lengthy and expensive battle, the district court denied the exchange and a record exceeding 50,000 pages was delivered to the Ninth Circuit, which ultimately affirmed the denial of the exchange.[147]

The above descriptions are only meant to show the time and effort involved in this futile attempt to construct a landfill. It is easy to focus on these facts and wonder why this effort was wasted, but it is important to remember that this case is actually about the federal review of the proposal that was prompted by FLPMA and NEPA. These laws and regulations ultimately doomed the project. In the words of the dissenting Judge Trott, "[o]ur well-meaning environmental laws have unintentionally made [this] endeavor a fool's errand."[148]

B. *Majority v. Dissent and Application of the Law*

This case contains a sharp disagreement between the majority and the dissent. The majority, focused on applying established law, seemed to have no choice but to strike down the deal. The dissent seemed to focus more on the result, believing that ultimately the exchange and the resulting landfill would be beneficial. It is hard to argue with either of these approaches.

The majority's conclusion that the highest and best use of the public land should be as a landfill seems aligned with established law.

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[143] *Id.* at 1077.
[144] *Id.*
[145] *Id.* at 1078.
[146] *Id.*
[147] *Id.* at 1075 (majority opinion).
[148] *Id.* (Trott, J., dissenting).

Under *Desert Citizens*, FLPMA requires the use of the land as a landfill to be considered when the lands are intended to be used for that purpose and the market indicates the potential for landfill development.[149] Although the expense for this project would be massive, the need for waste disposal in Southern California made it reasonably probable that the land would be ultimately developed into a landfill.

Furthermore, the majority seems correct to point out that the purpose and need statement focused too much on private goals rather than maintaining the focus on public goals and objectives. By primarily considering Kaiser's goals and objectives, BLM failed to consider alternatives that would meet the public goal of landfill demand. As a result, it appears the EIS failed to adequately address the public interest in the land exchange as required under NEPA.

The dissent, on the other hand, understood that logically the project was in the public's best interest. First, the private lands to be acquired by BLM contained habitats of endangered and threatened species, and public acquisition would serve the public interest under 43 C.F.R. § 2200.0-6 of protecting fish and wildlife habitats.[150] These acquired private lands were also close in proximity to other BLM-owned lands, and that proximity would serve the public interest of "more logical and efficient management" of federal lands.[151] Providing space for the disposal of over 100 years of waste would also serve the public interest and would meet the needs of residents.[152] The massive project would bring economic development to the area.[153] The project had the potential to create or save over 1,300 jobs for each of the next twenty years along with bringing a $3 billion economic benefit to the nearby area.[154] Also of importance is the fact that this project will use already damaged mine land and pits for the

[149] *Id.* at 1067 (majority opinion) (quoting Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1181 (9th Cir. 2000)).
[150] *Id.* at 1080 (Trott, J., dissenting).
[151] *Id.*; 43 C.F.R. § 2200.0-6(b) (2009).
[152] *Nat'l Parks*, 606 F.3d at 1080.
[153] *Id.*
[154] Reply Brief and Cross-Appeal Response Brief of Defendants, *Nat'l Parks*, 606 F.3d 1058 (No. 05-56908), 2007 WL 2426742.

landfill rather than using other non-damaged land as a landfill, thus providing a viable use for the mine by-products.[155]

With these benefits in mind, the dissent reached the correct conclusion that the public interest would be well served by completing the landfill project. Although the EIS may not have contained the necessary determinations regarding the public interest, the project itself does seem to meet the public's interest. Given the above considerations, coupled with the fact that trash must go somewhere, this site seems like a great fit. The proposal would have put an environmental hazard in a location with already existing environmental hazards.

C. *Policy Concerns*

The proposal appears to satisfy the policy objectives of both FLPMA and NEPA. Under FLPMA, the proposal seems to serve the national interest. By swapping lands with Kaiser, the U.S. could meet the waste needs for Southern California for the next 100 years while also stimulating economic growth in the area. Furthermore, the lands to be acquired by the U.S. would ensure better protection for endangered species and also promote efficient management of the lands given their proximity to other U.S. lands.

Further, the NEPA policy objective of achieving harmony between people and the environment would be satisfied. This harmony has twin aims: keeping the environment safe while infringing on the people and the economy as little as possible. The best way to achieve this harmony is to promote growth in an environmentally friendly manner. The proposal would achieve the desired harmony by acknowledging the growing needs of the people of Southern California and meeting those needs by building a large landfill in an already damaged environment with mine pits and surrounding unused lands. This ensures economic growth in the area while minimizing environmental harm.

The agency charged with evaluating these concerns in this project, BLM, conducted an extensive analysis and concluded the exchange would be in the best interests of the people and that the objectives of FLPMA and NEPA were met. Unfortunately, the environmental statutes and

[155] *Id.*

regulations got in the way of their very purpose. Bogged down by statutory and regulatory requirements, these laws doomed the very goals they were designed to promote and protect.

D. *Lessons Learned*

The above considerations show that application of the established law correctly prohibits the proposed exchange. Focusing on the "highest and best use" as defined under the Uniform Appraisal Standards, it is correct that the BLM should have considered landfill use as the highest and best use of the lands. The fact that Kaiser undertook the proposal and over $45 million was spent trying to implement the project is more than sufficient to show that the landfill was physically possible, legally permissible, financially feasible, and would result in the highest value.[156] Without the court getting in the way, the project likely would have been completed. With that in mind, BLM should have considered landfill use as the highest and best use for the public lands. Furthermore, under NEPA, the EIS prepared by BLM should have focused more on the public goals of the proposal rather than the private goals. Because the EIS failed to adhere to the requirements of FLPMA and NEPA, the court had no choice but to deny the transaction.

However, this outcome seems illogical and contrary to the policy objectives of both FLPMA and NEPA. The proposal itself seems like an environmentally safe way to meet the growing demands for waste disposal. Applying the rigid environmental laws, the court was forced to ignore an environmentally sound proposal and apply FLPMA and NEPA requirements to strike down the proposal.

This case sends a message to future applicants that, in order to avoid similar problems, the appropriate parties must ensure they follow all applicable environmental laws. The case was a necessary reminder of the important environmental protections this country has in place: environmental protection that must be followed in every case no matter how logical a transaction may be on its face.

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[156] APPRAISAL INSTITUTE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 17, (2000) *available at* http://www.usdoj.gov/enrd/land-ack/yb2001.pdf.

VI. CONCLUSION

FLPMA and NEPA are well-intentioned statutes meant to help protect the environment. When Kaiser approached BLM with its land exchange proposal, few would have predicted the long, expensive battle that lay ahead. After initially approving the exchange, the court struck down a seemingly environmentally friendly development under strict environmental regulations. This case is an important reminder that environmental protection can be very extensive. This protection will be applied in every case, no matter how the transaction appears, to ensure that the proposed action will be environmentally sound.

AARON SANDERS