
No. 05-56814

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS & CONSERVATION ASSOCIATION,

Plaintiff-Appellee,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants,

and

KAISER EAGLE MOUNTAIN, INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

Honorable Robert J. Timlin, District Judge, D.C. No. CV-00-00041-RJT

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF KAISER EAGLE MOUNTAIN, LLC
AND MINE RECLAMATION, LLC'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

M. REED HOPPER
BRANDON M. MIDDLETON
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

Additional Captions and Cause Numbers Inside Cover

No. 05-56815

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA CHARPIED, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants,

and

KAISER EAGLE MOUNTAIN, INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Honorable Robert J. Timlin, District Judge, D.C. No. CV-99-00454-RJT

No. 05-56832

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS & CONSERVATION ASSOCIATION,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants-Appellants,

and

KAISER EAGLE MOUNTAIN, INC., et al.,

Defendants.

On Appeal from the United States District Court
for the Central District of California
Honorable Robert J. Timlin, District Judge, D.C. No. CV-00-00041-RJT

No. 05-56843

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA CHARPIED, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants-Appellants,

and

KAISER EAGLE MOUNTAIN, INC., et al.,

Defendants.

On Appeal from the United States District Court
for the Central District of California
Honorable Robert J. Timlin, District Judge, D.C. No. CV-99-00454-RJT

No. 05-56908

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA CHARPIED, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable Robert J. Timlin, District Judge, D.C. No. CV-99-00454-RJT

CORPORATE DISCLOSURE STATEMENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt section 501(c)(3) organization formed to litigate nationwide in the public interest. PLF has participated as amicus curiae in numerous cases arising under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). PLF believes that this case raises important public interest questions about the requirements of a purpose and need statement under NEPA and how those requirements affect private parties and the public interest.

ARGUMENT

I

PANEL REHEARING OR REHEARING *EN BANC* IS MERITED BECAUSE THE PANEL MAJORITY MISREAD AND DEPARTED FROM NINTH CIRCUIT PRECEDENT REGARDING THE REQUIREMENTS OF A NEPA PURPOSE AND NEED STATEMENT

A. *City of Angoon v. Hodel* Does Not Support the Panel's Rejection of the Bureau of Land Management's Inclusion of Private Objectives Within the Purpose and Need Statement

In invalidating the Bureau of Land Management's (BLM) purpose and need statement under 40 C.F.R. § 1502.13, the panel majority engaged in a flawed reading of this Court's decision in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986) (*per curiam*). See *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 586 F.3d 735, 746-48 (9th Cir. 2009) (discussing *Angoon*).

Angoon concerned whether the Army Corps of Engineers (Corps) violated NEPA by failing to consider locating a timber harvesting facility on land that the project proponent (Shee Atika) did not own. *Angoon*, 803 F.2d at 1020-22. The opponents to the harvesting facility argued that the Corps' Environmental Impact Statement (EIS) was "inadequate because it [did] not consider in detail the alternative that Shee Atika could exchange its Admiralty Island [land] holdings for land elsewhere" and the district court agreed. *Id.* at 1020. The Ninth Circuit rejected the district court's holding that the alternatives analysis considering only Admiralty Island development was impermissible due to its observance of the "purpose for which Shee Atika sought the permit: 'safe, cost effective means of transferring timber harvested on their land to market.'" *Id.* at 1021. This Court admonished the district court for having "attacked the Corps' statement of the permit's purpose," "restated the purpose in terms of a broad, generic public benefit: 'commercial timber harvesting,'" and invalidated the timber harvesting facility permit. *Id.* at 1019-21.

In reversing the district court, this Court stated:

The district court erred when it adopted as the "purpose and need" the even broader concept "commercial timber harvesting." This formulation appears to make a broad social interest the exclusive "purpose and need." The Corps' statement is more balanced. . . . The preparation of [an EIS] necessarily calls for judgment, and that judgment is the agency's.

Id. at 1021 (brackets in original) (quotation omitted).

In contrast to *Angoon*, the panel majority has rejected BLM's balanced approach and effectively made a broad social interest the exclusive purpose and need by invalidating BLM's statement due to the inclusion of private objectives. According to the majority, BLM's purpose and need statement is too "narrowly drawn" because it "sets out three private objectives as defining characteristics of the proposed project." *Nat'l Parks*, 586 F.3d at 748.

This rejection of private objectives creates a conflict with *Angoon*, which declined to require a purpose and need statement that did not address a private entity's needs. *See Angoon*, 803 F.2d at 1021-22 (holding that to preclude the Corps from considering Shee Atika's needs "is to visit upon it a task that would involve almost endless speculation"). Further, the majority's analysis ignores the close relationship that often exists, as here, between private objectives and public needs. As the dissent recognizes, "[o]f course Kaiser has its own goals it hopes to accomplish . . . and of course it hopes to make a profit, but it seems blindingly apparent that its goals dovetail with the public's need for a landfill." *Nat'l Parks*, 586 F.3d at 759 (Trott, J., dissenting).

The panel majority's attempt to distinguish *Angoon* from this case fails. First, the majority noted that the issue in *Angoon* "was whether the Corps should issue a permit," as opposed to the land exchange at issue here. *See Nat'l Parks*, 586 F.3d at 747 (majority opinion) (citing *Angoon*, 803 F.2d at 1017-18). But this Court's

analysis in *Angoon* was based on BLM's purpose and need statement and not on the fact that the validity of a permit was ultimately at issue. *See* 803 F.2d at 1021.

Second, the panel majority compared Department of Interior (DOI) guidelines to the discussion of Corps regulations in *Angoon*, emphasizing that "DOI's NEPA handbook explains that the 'purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need.*'" *Nat'l Parks*, 586 F.3d at 747 (emphasis by panel majority) (quoting Department of Interior, Bureau of Land Management, *National Environmental Policy Act Handbook* (DOI Handbook) 35 (citing 40 C.F.R. § 1502.13))¹. But this emphasis on BLM's objectives does not foreclose consideration of private objectives, as that would render the handbook's interpretation of 40 C.F.R. § 1502.13 unlawful. *See Colo. Env'tl. Coal. v. Dornbeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies . . . are precluded from completely ignoring a private applicant's objectives.")² *See also Nat'l Parks*, 586 F.3d at 755 (Trott, J., dissenting). Such an interpretation stands in sharp contrast to the Council on Environmental

¹ 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 (last visited Dec. 22, 2009).

² Not only is the panel majority's interpretation of the 2008 DOI Handbook flawed, it is also entirely inapt, as those guidelines were promulgated more than eleven years after BLM completed the EIS. *See Defendants-Appellants' Kaiser Eagle Mountain, LLC and Mine Reclamation, LLC's Petition for Rehearing and Suggestion for Rehearing En Banc* at 7-8.

Quality's own guidance regarding NEPA regulations. *See* 48 Fed. Reg. 34,263, 34,267 (July 28, 1983) ("There is . . . no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives.").

In addition, the panel majority's reading of DOI's NEPA handbook is contradicted by its sample purpose and need statement that explicitly allows for consideration of private objectives. *See* DOI Handbook at 37.³ In any event, simply because an agency's purpose and need statement can be read in contrast to language in its guidebook should not render that statement unreasonable under NEPA. *Cf.* *Westlands Water Dist. v. United States Dep't of Interior*, 376 F.3d 853, 867 (9th Cir. 2004) (holding that a purpose and need statement that "does not follow the letter" of an agency's authorizing statutes does not make the statement "arbitrary and capricious" so as to invalidate it under NEPA") (citation omitted).

³ The DOI Handbook contemplates the following as a valid purpose and need statement:

An externally generated implementation action. The purpose of the action is to provide the owners of private land located in Township X South, Range X West, Section X, with legal access across public land managed by the BLM. The need for the action is established by the BLM's responsibility under FLPMA to respond to a request for a Right-of-Way Grant for legal access to private land over existing BLM roads and a short segment of new road to be constructed across public land.

DOI Handbook at 37.

Third, the panel majority took pains to point out that BLM's purpose and need statement led to the consideration of "only six alternatives in detail." *Nat'l Parks*, 586 F.3d at 748. But this Court has previously held that an EIS need only "discuss[] in detail all the alternatives that were feasible and briefly discuss the reasons others were eliminated. This is all NEPA requires—*there is no minimum number of alternatives that must be discussed.*" *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) (*per curiam*) (emphasis added).

Indeed, while the panel majority "points to some alternatives that might have been considered or discussed more fully, the 'detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable.'" *Laguna Greenbelt*, 42 F.3d at 525 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 551 (1978)). The panel majority's suggestion otherwise contradicts *Angoon* and other Ninth Circuit case law, and for this reason its decision should be revisited.

B. The Panel Majority Inadequately Considered a District of Columbia Circuit Decision That Serves as This Court's Guidance for the Reasonableness of a Purpose and Need Statement

The panel majority cited approvingly to the D.C. Circuit's analysis of the relationship between public and private objectives in a NEPA purpose and need statement as articulated in *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991). *Nat'l Parks*, 586 F.3d at 746-47 (citing *Burlington*, 938 F.2d at

196). The Ninth Circuit follows *Burlington*'s requirement that a NEPA purpose and need statement "may not define the objectives of [an] action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones . . . would accomplish the goals of the agency." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (quoting *Burlington*, 938 F.3d at 196). See also *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997), and *Westlands Water Dist.*, 376 F.3d at 865.

Here, the panel majority likewise noted that under *Burlington* "agencies must acknowledge private goals" and agreed with *Burlington*'s conclusion that agencies should always consider the views of Congress as expressed in statutory mandates. *Nat'l Parks*, 586 F.3d at 746-47. At that point in its analysis, however, the panel majority ceased consideration of *Burlington*. *Id.* The lack of further analysis of *Burlington* is highly relevant because *Burlington* upheld a purpose and need statement that was much more narrow than BLM's in this case. Had the panel majority conducted a proper analysis of a purpose and need statement as set out in *Burlington*, it would have concluded that BLM's statement is reasonable.

C. *Burlington* Contradicts the Panel's Conclusion That BLM's Purpose and Need Statement Is Unreasonably Narrow

In *Burlington*, the D.C. Circuit considered whether the Federal Aviation Administration's (FAA) stated objectives for an airport expansion in Toledo were

reasonable. *Burlington*, 938 F.2d at 193-99. The expansion plan involved FAA, the Toledo-Lucas County Port Authority (Port Authority), and Burlington Air Express, Inc., a private company that intended to relocate to Toledo pending the Port Authority's accommodation of its operations. *Id.* at 192.

Although FAA initially described several alternatives to the expansion project, the defined goal for the project resulted in the agency only considering two alternatives: approving the Port Authority's plan for expanding the airport, and no action by the agency at all. *Id.* at 197-98. As the court acknowledged, FAA eliminated alternatives that did not serve the Port Authority's interests in creating jobs and attracting Burlington Air Express and other companies to Toledo. *See id.* Writing for the majority, then-Judge Thomas noted that “[h]aving thought hard about these appropriate factors, the FAA defined the goal for its action as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy. The agency then eliminated from detailed discussion the alternatives that would not accomplish this goal.” *Id.* at 198.

Nonetheless, the court upheld FAA's purpose and need statement and explained why it was appropriate to consider the interests of the Port Authority and Burlington Air Express, not simply those of the FAA. First, while the court discussed the importance of an agency's discussion of “alternatives to the proposed action” under 42 U.S.C. § 4332(2)(C)(iii), it recognized that a purpose and need statement addresses

“[t]he problem for agencies . . . that the term ‘alternatives’ is not self-defining.” *Id.* at 194-95 (internal quotation marks omitted). An “unbounded understanding of alternatives” may be quite problematic for agencies, and for this reason a purpose and need statement may include “goals of an action [that] delimit the universe of the action’s reasonable alternatives.” *Id.* at 195.

Second, the court described how it should be left to the federal agency, not courts, to determine the appropriate mix of public and private goals in a purpose and need statement. *Id.* at 196. “[T]he agency should take into account the needs and goals of the parties involved in the application,” as well as the views of Congress as expressed in statutory mandates. *Id.* “Once an agency has considered the relevant [public and private] factors, it must define goals for its action that fall somewhere within the range of reasonable choices. We review that choice, like all agency decisions to which we owe deference, on the grounds that the agency itself has advanced.” *Id.*

Third, the court confirmed that agencies are permitted to establish objectives that account for a private entity’s needs. *Burlington*, 938 F.2d at 196-99. The court rejected the argument that FAA should have considered other ways in which Burlington Air Express could have built a permanent cargo hub, noting that “Congress did expect agencies to consider an applicant’s wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for

the applicant what the goals of the applicant's proposal should be." *Id.* at 199. FAA was not required to "canvass the business choices that Burlington faced when it considered leaving Fort Wayne" because federal agencies have "neither the expertise nor the proper incentive structure to do so (it has no shareholders who would suffer from mistaken judgments)." *Id.* at 197 n.6.

Here, rather than apply the above considerations to BLM's purpose and need statement, the panel majority ignored them. While BLM considered six alternatives compared to FAA's consideration of only two alternatives in *Burlington*, the majority admonished BLM for failing to consider "several alternatives that would have been responsive to the need to meet long-term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining, alternative Townsite locations, and alternative Townsite uses." *Nat'l Parks*, 586 F.3d at 748. The court's list of alternatives, however, has no discernable limit and contradicts *Burlington*'s holding that agencies may include "goals of an action [that] delimit the universe of the action's reasonable alternatives." *Burlington*, 938 F.2d at 195.

Further, although the panel majority noted that BLM included an "unquestionably . . . valid BLM purpose," it punished BLM for honestly acknowledging that Kaiser Eagle Mountain has interests and objectives in the land exchange as well. *Nat'l Parks*, 586 F.3d at 748. However, including private

objectives within a purpose and need statement is not sufficient to overturn an agency's NEPA analysis. *See Burlington*, 938 F.2d at 196.

Here, BLM's purpose and need statement cannot be invalid simply because it considered public and private objectives and then "define[d] goals for its action that fall somewhere within the range of reasonable choices." *Id.* This is especially so given the ramifications to BLM had it not disclosed Kaiser's objectives. As Judge Trott recognized, "Of course BLM acknowledged Kaiser's purpose—*the law requires BLM to do so!* For private, non-federal proposals, [a]gencies . . . are precluded from completely ignoring a private applicant's objectives." *Nat'l Parks*, 586 F.3d at 756 (Trott, J., dissenting) (internal quotation marks and citations omitted). Judge Trott observed that "[o]f course there is a private purpose driving this project. But the project benefits *both* parties, not just Kaiser. To isolate one without factoring in the other is patently illogical." *Id.* at 755.

The panel majority also expressed concern that most of the alternatives considered by BLM would result in Kaiser acquiring federal land. *Nat'l Parks*, 586 F.3d at 748 (listing alternatives and observing that "[a]ll of these options, save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur"). It ruled that BLM arbitrarily excluded the consideration of a landfill on other Kaiser property. *See id.*

The panel majority's opinion on where exactly the landfill should be located, however, conflicts with *Burlington* because agencies are not required to "canvass the business choices" faced by a private entity that has chosen to pursue a project. *See Burlington*, 938 F.2d at 197 n.6. If this was the correct reasoning, the FAA in *Burlington* would have been required to analyze the alternative of Burlington Air Express building a cargo hub somewhere else besides Toledo. Importantly, this view was explicitly rejected by the D.C. Circuit. *See id.* at 198-99.

Despite this contrasting reasoning, the panel majority believed its analysis was in line with *Burlington*. *See Nat'l Parks*, 586 F.3d at 746-47. However, the panel majority failed to fully apply *Burlington's* reasoning, demonstrating an unjustifiably limited and prejudicial reading of the D.C. Circuit's decision.

Indeed, as the above demonstrates, the panel majority's decision conflicts not only with *Burlington*, but also with several Ninth Circuit decisions following the D.C. Circuit's opinion. Accordingly, rehearing or *en banc* consideration is necessary in order to secure and maintain uniformity of this Court's decisions. *See Fed. R. App. P. 35(a)(1)*.

II

**THE PANEL’S ENABLING OF ENDLESS
ADMINISTRATIVE AND JUDICIAL HURDLES FOR
PRIVATE ENTITIES RAISES EXCEPTIONALLY
IMPORTANT PUBLIC POLICY ISSUES AND MERITS
PANEL REHEARING OR REHEARING *EN BANC***

The panel majority’s opinion has halted a landfill project that would have addressed “a critical need for ‘additional disposal capacity’” in Southern California. *Nat’l Parks*, 586 F.3d at 756 (Trott, J., dissenting). Not only would Kaiser’s project have benefitted Californian residents—the landfill would have been the first to comply with new Environmental Protection Agency guidelines as well as “one of the world’s safest landfills and a model for others to emulate.” *Id.* at 752, 776 (internal quotation marks omitted). In addition, the land given up by Kaiser under the land exchange would have enhanced contiguous federal land in Southern California that protects endangered and threatened species. *See id.* at 759.

Despite Kaiser cooperating with state and federal agencies for nearly two decades in order to achieve these laudable goals, the project’s status remains uncertain. *See id.* at 754-55. The panel majority has sent the parties “back to a Sisyphean hill which cannot be climbed in a lifetime.” *Id.* at 754. The delay in this case has already cost Kaiser millions of dollars and speaks ill of the administrative and judicial processes. *See id.* at 752-53 (noting that Kaiser’s “vain attempt to accomplish its goals” has cost it more than \$50,000,000). As Judge Trott poignantly asked,

“[h]ow many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full-employment for all swept along with or by it.” *Id.* at 754. *Cf. Angoon*, 803 F.2d at 1018 (noting that its decision reversing a district court’s invalidation of a purpose and need statement was “the latest episode in a twelve-year struggle which reflects badly upon the ability of the three branches of the federal government to resolve disputes reasonably expeditiously”).

Given the panel majority’s overturning of this vastly important and beneficial land exchange and the resulting delay it will bring to Kaiser, review of the majority’s opinion is necessary in order to heed the Supreme Court’s instruction that NEPA should not unnecessarily forestall worthy private initiatives. *See Yankee Power*, 435 U.S. at 551 (“Time and resources are . . . too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative . . .”).

The significance of leaving the panel majority’s opinion in place is best summarized in the opening lines of Judge Trott’s dissent: “What sane person would want to attempt to acquire property for a landfill? Our well-meaning environmental laws have unintentionally made such an endeavor a fool’s errand.” *Nat’l Parks*, 586 F.3d at 751 (Trott, J., dissenting). Judge Trott’s points are appropriate and relevant to Kaiser and all private entities that wish to work cooperatively with federal agencies. Navigating through the administrative state is difficult enough, especially when the

voyage is fraught with the uncertain specter of litigation. At a certain point, however, the current becomes too strong and a company will choose to go no further in the pursuit of a public objective.

CONCLUSION

Rehearing is merited because the panel majority failed to take the above into account. The extent to which courts may strike private goals in a purpose and need statement is a question of exceptional importance. *See* Fed. R. App. P. 35(a)(2). Left in place, the decision is likely to be used in other litigation as precedent, leading regulated entities to grow “weary . . . and throw in the towel, thwarted and defeated not by substance, but by interminable process.” *Nat’l Parks*, 586 F.3d at 754-55 (Trott, J., dissenting).

For these reasons, Kaiser’s petition for rehearing and rehearing *en banc*, if necessary, should be granted.

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Respectfully submitted,

M. REED HOPPER
BRANDON M. MIDDLETON

By /s/ Brandon M. Middleton
BRANDON M. MIDDLETON

Counsel for Amicus Curiae
Pacific Legal Foundation