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# Environmental Impact Statements - The Ninth Circuit Narrows the No-Growth-Inducing-Impacts Exception

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# ENVIRONMENTAL IMPACT STATEMENTS—THE NINTH CIRCUIT NARROWS THE NO-GROWTH-INDUCING-IMPACTS EXCEPTION

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IN *BARNES v. United States Department of Transportation*, the Ninth Circuit held that the Federal Aviation Administration (FAA) was required "to consider the environmental impact of increased demand" that could result from the construction of an additional runway at Oregon's Hillsboro International Airport (HIO).[1] Over Judge Ikuta's pointed criticism,[2] the majority appropriately narrowed the scope of the precedents set forth in *Morongo Band of Mission Indians v. FAA*[3] and *Seattle Community Council Federation v. FAA*[4] and required the FAA to take a "hard look" at the environmental effects of increased demand in cases involving "a major ground capacity expansion project."[5]

HIO, Oregon's busiest airport in number of airport operations, serves all sectors of the air transportation industry: general aviation, military, and a broad range of commercial air carriers including those with nine or fewer passenger seats.[6] Additionally, HIO serves as a reliever airport for Portland International Airport (PDX), relieving the congestion at PDX by "segregating [general aviation] aircraft from commercial airlines and air

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[1] Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1139 (9th Cir. 2011).

[2] *See id.* at 1143–47 (Ikuta, J., dissenting).

[3] 161 F.3d 569, 580 (9th Cir. 1998) (holding that the FAA need not "consider the 'growth-inducing' impact" of an arrival enhancement project designed to alleviate existing problems).

[4] 961 F.2d 829, 836 (9th Cir. 1992) (holding that the FAA need not consider the environmental effects of increased air traffic where the implementation of a new flight path was designed to "accommodate the *existing* demand" and alleviate existing delays).

[5] *Barnes*, 655 F.3d at 1138–39.

[6] *Id.* at 1127.

cargo activities."[7] In 2005, the need to plan for future aviation demand prompted the Port of Portland (the Port) to develop the HIO Master Plan, which, after exploring various alternative actions, determined that adding a new runway for the exclusive use by small general aviation aircraft would be "'the best means available'" to address the airport's growing need.[8] Because FAA grant money would fund, in part, the construction of the additional runway, the FAA would be required to approve the modifications and to prepare an environmental assessment (EA).[9] Rather than prepare its own assessment, however, the FAA adopted and published a Draft Environmental Assessment (DEA) that had been prepared by the Port.[10] A component of the approved draft included a forecast of future demand that was incorporated from the demand forecast in HIO's Master Plan, which the FAA included irrespective of the fact that a portion of HIO's demand forecast "was outside the FAA's recommended range of variation from its own forecast."[11]

After the Port's consideration of various options and determination that the construction of a new runway would not pose any cumulative significant environmental impact, the FAA made copies of the DEA available to the public, solicited public comment for forty-five days, and held a two-hour meeting where members of the public could speak and be heard.[12] Following the public meeting, the Port made some small changes to the draft and prepared a final environmental assessment, which the FAA approved, issuing a Finding of No Significant Impact (FONSI) on January 8, 2010.[13]

Following the FAA's approval of the EA and issuance of the FONSI, the petitioners filed a petition for review with the Ninth Circuit pursuant to 49 U.S.C. § 46110,[14] arguing the FAA violated the National Environmental Policy Act of 1969[15] (NEPA),

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[7] *Id.*

[8] *Id.* at 1127–28.

[9] *Id.* at 1129.

[10] *Id.*

[11] *Id.* at 1129 & n.7.

[12] *Id.* at 1130.

[13] *Id.*

[14] The statute in relevant part provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review . . . in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. § 46110(a) (2006).

[15] 42 U.S.C. §§ 4321 *et seq.* (2006).

with the Port intervening "as an interested party pursuant to 49 U.S.C. § 46109."[16] The petitioners raised five distinct claims,[17] four of which were dismissed as "not warranted,"[18] "harmless error,"[19] "unpersuasive,"[20] or "waived."[21] The remaining claim, which the Ninth Circuit deemed the petitioners' "main argument," asserted that "the FAA failed to consider the indirect effects of increased aircraft operations."[22] The court, applying an "arbitrary and capricious" standard of review,[23] held in a 2-1 ruling that, pursuant to 40 C.F.R. § 1508.8(b),[24] the FAA must consider environmental impacts of any increased demand that might result from the HIO expansion project.[25]

In order to reach this ruling, the court first needed to determine whether the potential existed for increased demand resulting from the addition of a new runway at HIO and, if so, whether the FAA and the Port (the agencies) had adequately addressed such potential increase in their analyses.[26] The court found that while the agencies asserted that aviation activity at HIO would "increase at the same rate regardless of whether a new runway is built or not," and that while such an FAA determination is traditionally afforded significant deference, there were no documents in the record that discussed "the impact of a third runway on aviation demand at HIO."[27] The next determination the court needed to make was whether the agencies were nonetheless permitted to omit a consideration of the effects of increased demand since the project's primary purpose was to alleviate existing demand, to which the majority responded that the agencies were not afforded such a privilege in this particular case, prompting Judge Ikuta's dissent.[28]

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16 *Barnes*, 655 F.3d at 1130–31.

17 *Id.*

18 *Id.* at 1141.

19 *Id.*

20 *Id.* at 1136.

21 *Id.*

22 *Id.* at 1130, 1136.

23 *Id.* at 1132.

24 This regulation in relevant part defines indirect effects, which are effects "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Such indirect effects "may include *growth inducing effects* and other effects related to induced changes in the pattern of land use . . . ." 40 C.F.R. § 1508.8 (2011) (emphasis added).

25 *Barnes*, 655 F.3d at 1139.

26 *Id.* at 1136–37.

27 *Id.* at 1136.

28 *Id.* at 1138.

The Ninth Circuit began their analysis by first considering the statutory background of the petitioners' claims, asserting that the purpose of NEPA was "'to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action.'"[29] While pointing out that "'NEPA imposes procedural requirements designed to force agencies to take a "hard look" at environmental consequences,'"[30] the court conceded that NEPA does not actually "contain substantive environmental standards" or require "particular substantive environmental results."[31] One of these procedural requirements mandates that federal agencies prepare an Environment Impact Statement (EIS) before engaging in "'major Federal actions significantly affecting the quality of the human environment.'"[32] In order to determine if an EIS is required, the agency first prepares an environmental assessment; if the agency finds that the project will not produce significant environmental impacts, it issues a FONSI, but if it finds that the environment will be significantly impacted, an EIS is mandated.[33] The court pointed out that an EIS is mandated where "'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor,'"[34] and "'an agency must use its best efforts to find out all that it reasonably can.'"[35]

The agencies, relying on the precedents established by the Ninth Circuit in *Seattle Community Council Federation* and *Morongo Band of Mission Indians*, argued that in the present case consideration of the impact of increased demand was not mandated because the purpose of the project was to alleviate current congestion and delay.[36] In *Seattle Community Council Federation*, the court held that despite an expected increase in air traffic, remand to the FAA to determine the effects of such an increase

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[29] *Id.* at 1131 (quoting Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005)).

[30] *Id.* (quoting Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003)).

[31] *Id.* (citing Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008)).

[32] *Id.* (quoting 42 U.S.C. § 4332(2)(C)).

[33] *Id.*

[34] *Id.* at 1136 (quoting Ocean Advocates v. U.S. Army Corps. of Eng'rs, 402 F.3d 846, 864 (9th Cir. 2005)).

[35] *Id.* (quoting City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975)).

[36] *Id.* at 1138.

was unnecessary because the project "'deal[t] with the *existing air traffic*'" and its "purpose was 'not to facilitate that expansion, but to ensure that safety and efficiency will be maintained.'"[37] Similarly, in *Morongo Band of Mission Indians*, the court held that:

> the FAA did not have to consider the impacts of an increase in air traffic resulting from a new flight arrival path because "the project was implemented in order to deal with existing problems; the fact that it might also facilitate further growth is insufficient to constitute a growth-inducing impact under 40 C.F.R. § 1508.8(b)."[38]

The court reasoned that the facts of the current case were substantially different from those at issue in *Morongo Band of Mission Indians* and *Seattle Community Council Federation* because the projects in those cases involved only changes to flight patterns or a flight arrival path, whereas the changes at issue in the present case "involve[d] a major ground capacity expansion project."[39] Citing the opinions of other circuits, the Ninth Circuit found "that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements."[40] In so holding, the Ninth Circuit appropriately narrowed the scope of the precedents set by *Morongo Band of Mission Indians* and *Seattle Community Council Federation*, providing that in projects involving major ground capacity expansions, agencies may not summarily omit a thorough investigation of potential growth-inducing effects.[41]

In her dissent, Judge Ikuta disagreed with the majority's application of the precedents set forth in *Seattle Community Council Federation* and *Morongo Band of Mission Indians*, arguing that the holdings in both cases established the rule that where the project is designed to address existing problems, the authorities need not consider any growth-inducing effects.[42] Ostensibly, this would be the case irrespective of a project's scope—whether it concerned the alteration of flight paths, the construction of an additional runway, or perhaps something of even greater scope. Additionally, Judge Ikuta cited the opinion in *City of Car-*

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[37] *Id.* (quoting Seattle Cmty. Council Fed'n v. FAA, 961 F.2d 829, 835 (9th Cir. 1992)).

[38] *Id.* (quoting Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 580 (9th Cir. 1998)).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1139.

[42] *Id.* at 1144–45 (Ikuta, J., dissenting).

*mel-by-the-Sea v. U.S. Department of Transportation*[43] that where the project's purpose is to address existing needs, consideration of growth-inducing effects is not mandated.[44] Finally, Judge Ikuta argued that, her former arguments notwithstanding, the petitioners' claim should be dismissed as having been waived because it was neither preserved in a way to alert the agency to the petitioners' contention, nor was it "so obvious" as to be preserved on its own merits.[45]

An analysis of the majority's reasoning involves a two-part inquiry of distinct but related considerations, both of which must be answered in the affirmative: (1) Was the majority's decision within the scope of the court's legal authority; and (2) that being the case, did the majority, nonetheless, arrive at the appropriate legal conclusion? Because the court's reasoning was based partly on statute and partly on case law, each will be considered in turn. Beginning with the statutory analysis, was the majority's decision within the scope of the court's legal authority? The answer to this inquiry is clearly yes. Pursuant to the Administrative Procedure Act, the court had authority to review agency decisions under NEPA.[46] Moreover, as NEPA provides procedural, rather than substantive, requirements, the court's imposition of a substantive-type standard on a procedural requirement—namely, that a hard look should be given to the growth-inducing impacts of major ground expansion projects—would certainly not be preempted by the statute.[47] But was the majority's decision the appropriate legal conclusion? Again, yes. By the statute's own language, one of its purposes is "to promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man."[48]

Squaring the majority's opinion with prior case law, the preliminary question of whether the court's decision in *Barnes* was

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[43] 123 F.3d 1142, 1162 (9th Cir. 1997) (holding that the construction of a freeway in an already well-developed area would not provide sufficient opportunity for additional development to merit closer consideration of the freeway's growth-inducing effects).

[44] *Barnes*, 655 F.3d at 1144 (Ikuta, J., dissenting).

[45] *Id.* at 1145–46 (internal quotation marks omitted).

[46] *See* 5 U.S.C. §§ 701 *et seq.* (2006).

[47] *See supra* notes 29–31 and accompanying text; *see generally* 42 U.S.C. §§ 4321 *et seq.* (2006).

[48] *See* 42 U.S.C. § 4321; *see also* 40 C.F.R. § 1500.1(c) (2010) ("The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

within the scope of its legal authority is easily answered. Both *Morongo Band of Mission Indians* and *Seattle Community Council Federation* were Ninth Circuit opinions, and while the rulings in each case may provide some precedential guidelines, the court was and is free to diverge from and narrow the scope of their previous holdings. Was the court's decision, nonetheless, the appropriate legal conclusion? Again, the answer must be yes. Unlike the facts in *Morongo Band of Mission Indians* and *Seattle Community Council Federation*, which involved only modifications to flight paths and flight plans,[49] the modifications called for in *Barnes* involved the full-scale construction of a brand new runway, which incidentally is a 50% increase from the number of runways the airport currently has.[50] Rather than a divergence from case law, as the dissent asserts,[51] the majority refined the law and narrowed the court's previous holdings to fit the particular facts in *Barnes* and arrive at a compromise that is both appropriate and responsible. The holding in *Barnes* provides that in some instances—for example, *Morongo Band of Mission Indians* and *Seattle Community Council Federation*—further inquiry into growth-inducing effects need not be warranted, while in others—cases, like *Barnes*, involving major ground capacity expansions—further inquiries into potential growth-inducing effects cannot be summarily dismissed without an adequate investigation.

While Judge Ikuta relied heavily on *Morongo Band of Mission Indians* and *Seattle Community Council Federation* to support her dissent, she would perhaps have had a stronger case had she relied less on those and more on *City of Carmel*, a case she mentioned only briefly. In *City of Carmel*, the Ninth Circuit held that construction of a freeway in an already well-developed area did not mandate an inquiry into any growth-inducing effects since any potential growth would be slight, if at all.[52] Like *Barnes*, the construction in *City of Carmel* involved a major ground capacity expansion project, as the highway was designed to alleviate current automobile congestion.[53] Unlike *Barnes*, however, the court in *City of Carmel* did not mandate further inquiry into any

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[49] *See supra* notes 37–40 and accompanying text.

[50] *See Barnes*, 655 F.3d at 1127–28.

[51] *Id.* at 1143 (Ikuta, J., dissenting).

[52] City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1162 (9th Cir. 1997).

[53] *Id.*

growth-inducing effects.[54] Although this may have been a good case for Judge Ikuta to emphasize more, it still would not have carried the day. The cases are distinguishable. While *City of Carmel* deals with the construction of a freeway in an already well-developed area, *Barnes* deals with the construction of an additional runway to accommodate increased airport activity. The capability of an airport to accommodate an increased number of aircraft with each additional runway cannot correlate directly with the capability of a freeway to prompt development in an area where the surrounding land is already well-developed. The singularity of land use in the latter scenario would allow for the renovation of preexisting development, but actual growth that might occur by any new development is limited by the amount of available, undeveloped land.

Would the Ninth Circuit rule the same today on *City of Carmel-by-the-Sea* as they did in 1997, when the case was decided? Perhaps yes, perhaps no. While these two cases are fully reconcilable, the Ninth Circuit's holding in *Barnes* may prompt the court in future cases to require a closer look at the growth-inducing impacts that surround *any* major ground capacity expansion project, not just with respect to airports.

By declining to extend the no growth-inducing effects precedents set forth in *Morongo Band of Mission Indians* and *Seattle Community Council Federation* to cover the construction of a new airport runway, the court appropriately narrowed the scope of these precedents and held that agencies must give a "hard look" to major ground capacity expansion projects. While the precedent established in *Barnes* will certainly be relevant to future airport expansion cases, the potential exists for application of the *Barnes* holding to a wider context.

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[54] *Id.*