Ecosystem Management Coordination

Court Decisions

1. Transportation & Wildlife | Region 3

The District of Arizona ruled favorably for the Forest Service on claims that the agency's use of the motorized big game retrieval (MBGR) exception under the Travel Management Rule on the Kaibab National Forest violated the Travel Management Rule (TMR), the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA) in ***WildEarth Guardians, et al. v. Provencio, et al.*** The MBGR exemption allows the responsible official to "'include in the designation [of routes] the limited use of motor vehicles within a specified distance of certain forest roads or trails where motor vehicle use is allowed, and if appropriate within specific time periods' for the purpose of retrieving a downed big game animal." On the Kaibab the MBGR is limited in the following ways: 1) only legally harvested bison or elk during seasons designated by the Arizona Game and Fish Department; 2) only one vehicle per harvested animal; 3) hunters are required to use the most direct and least ground disturbing routes; and 4) the exception is not allowed in any existing off-road travel restricted areas or where conditions are such that travel would cause negative resource impacts.

Plaintiffs claimed the Kaibab MBGR "violated the TMR because it failed to 'limit and sparingly apply' the MBGR exemption by allowing 'extensive' cross-country off-road motorized vehicle use for the purpose of big game retrieval." The court disagreed. **Noting the limitations placed on the MBGR and that agency analysis proved that only "a very small percentage of each district is expected to be actually impacted by MBGR," the court determined the Forest Service was not in violation of the TMR.**

On NEPA the plaintiffs raised two arguments: 1) the agency failed to take a "hard look" at "several categories of environmental effects"; and 2) the agency should have prepared an Environmental Impact Statement due to the presence of several significance factors. The court, however, found that the Forest Service's **Environmental Analysis (EA) adequately analyzed all the environmental effects listed by the plaintiffs** like the effects of MBGR with regard to wet conditions and the impacts on mule deer, elk, and

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pronghorn. The court also declined to rule the Forest Service should have prepared an EIS because the court found that no substantial questions that would trigger the need for further NEPA analysis were raised.

"NHPA requires federal agencies to 'take into account the effect of [an] undertaking on any historic property." Exempt from NHPA review are activities "not involving ground or surface disturbance." Plaintiffs claim that the agency's use of this exemption to implement the MBGR on the Kaibab was in violation of NHPA. The court, however, stated that as the record supporting the conclusion that only minimal surface impacts from MBGR would occur and would have "a very low likelihood of affecting cultural resources" it was not unreasonable for the agency to use the NHPA exemption. (16-8010, D. Ariz)

2. Property Rights | Region 4

The District of Nevada granted the Wilderness Society's (TWS), Intervenor, motion for summary judgment challenging a settlement agreement between the United States and Elko County, Nevada, in which they agreed not to dispute the existence of a Revised Statute 2477 right-of-way for Elko County to the South Canyon Road in the Humboldt-Toiyabe National Forest in *United States of America v. Carpenter, et al.* Originally initiated in October 1999, the United States sought declaratory and injunctive relieve against several individuals who, following 1995 storm, threatened to rebuild the South Canyon Road. In response, the County asserted a counterclaim seeking a quiet title to the road under, now-repealed, R.S. 2477. The United States and the County eventually entered into the settlement agreement which was at issue in this case.

TWS intervened in the settlement to assert that the settlement transfers or disclaims a federal property interest without complying with certain procedures in violation of the Federal Land Policy and Management Act (FLPMA) and NEPA. The court found that "unless Elko County can establish that it already owns a right-of-way through the South Canyon Road, the proposed consent decree would relinquish the United States' property to Elko County and would not comply with applicable laws and policies." As the court found that Elko County could not establish a right-of-way nor did Elko County argue otherwise, the court agreed with TWS and granted their motion for summary judgment. (99-547, D. Nev.)

3. Timber | Region 10

The District of Columbia ruled favorably for the Forest Service on multiple claims filed by the State of Alaska against the Roadless Area Conservation Rule (Roadless Rule) and its application to the Tongass National Forest in *State of Alaska, et al. v. United States Department of Agriculture, et al.* The Roadless Rule, finalized on Jan. 12, 2001, and applicable to 58.5 million acres of inventoried roadless areas (IRAs), prohibits road construction in IRAs subject to several exceptions. Plaintiffs argued "that the Roadless Rule was promulgated in an unrealistic time frame, without considering the needs of individual states and

without weighing the potentially devastating consequences to multiple-use management on national forest lands. The court ruled as follows:

- NEPA: The agency complied with its obligations under NEPA: the rule's Final Environmental Impact Statement (FEIS) contained extensive review of the rule's cumulative effects; while done quickly, the agency complied with NEPA in conducting its public comment and decision-making process; the Forest Service "considered the unique circumstances of the Tongass"; and the Forest Service adequately considered the economic impacts the Roadless Rule would have on Alaska; and
- Tongass Timber Reform Act (TTRA): "Under the TTRA, the Forest Service must seek to meet market demand for timber on the Tongass National Forest." Plaintiffs claim the Roadless Rule would make it impossible to meet timber demands. The court stated the TTRA did not obligate the agency to actually meet market demand, but to seek to meet demand consistent with its multiple-use management obligations. As the record, according to the court, revealed that the agency complied with its duty to seek to meet market demand while balancing the other competing land uses, the agency did not violate the TTRA.

(11-1122, D.D.C.)

Litigation Update

1. None to report.

New Cases

1. Minerals & Wildlife | Region 3

The Center for Biological Diversity (CBD) filed a complaint in the District of Arizona alleging Endangered Species Act (ESA) violations against the Fish and Wildlife Service's (FWS's) Biological Opinion (BO) for the Rosemont Copper Mine on the Coronado National Forest, and the Forest Service's reliance on that BO in their Record of Decision (ROD) in *CBD v. FWS, et al.* The mine, according to CBD, would use 3,653 acres of the Coronado, including a 955-acre open pit with associated facilities and use between 4,700 and 5,400 acre-feet of water per year for 20-25 years. CBD states that the effects of the Rosemont Mine "would permanently convert the hydrologic regime of the proposed site from a water source area to a terminal sink," "with potential adverse impacts to over 30 seasonal and perennial wetlands, and aquatic habitat dependent plants, fish, and wildlife." ESA listed species such as the jaguar, Gila chub, Gila topminnow, Chiricahua leopard frog, and the Pima pineapple cactus would all be adversely affected by the mine, according to CBD.

In analyzing the effects of this mine, CBD alleges, the FWS's BO violates the ESA because it fails to consider all relevant factors the mine would have on the recovery of affected listed species, relies on conservation and mitigation measures that are not "reasonably specific, binding, or certain to occur," applies inappropriate thresholds like the "high probability" standard instead of a "likely" standard regarding determinations for jaguar and other species with designated critical habitat, and fails to adequately explain why it is impracticable to express numeric population measures for the anticipated

incidental take for a number of listed species. The Forest Service, as per CBD, violates the ESA by relying on the allegedly unlawful BO for the mine and thus cannot ensure the agency will meet its "independent and substantive duty" to insure that the mine "is not likely to jeopardize the continued existence of any threatened or endangered species." (17-475, D. Ariz.)

Notices of Intent

1. None to report.

Natural Resource Management Decisions Involving Other Agencies

1. Fracking | Bureau of Land Management (BLM)

The 10th Circuit dismissed appeals of a decision by the District Court of Wyoming which invalidated a BLM regulation regarding fracking (Fracking Regulation) in *Wyoming v. Zinke*. Because BLM proposed to rescind the Fracking Regulation in July, the 10th Circuit found the appeals were not ripe for judicial review. Additionally, the 10th Circuit vacated the lower court's decision that BLM acted beyond its statutory authority because no statute authorized the BLM, or any federal agency, to regulate fracking. They further remanded the case to the district court with instructions to dismiss the underlying action without prejudice.

In May 2012, the BLM published the proposed Fracking Regulation aimed at regulating the use of hydraulic fracturing techniques in developing oil and gas resources on Federal and Indian Lands. After extensive public input, the Fracking Regulation was supplemented, eventually finalized, and published in March 2015.

Shortly before the Fracking Regulation was to take effect, two industry associations filed suit to block its implementation. Additionally, four states and the Ute tribe also filed challenges. The Petitioners alleged the Fracking Regulation was "arbitrary and capricious, an abuse of discretions, or otherwise not in accordance with law" and was also "in excess of statutory jurisdictions, authority, or limitations, or short of statutory right" under the APA. The Ute Tribe raised separate, tribe-specific arguments. The cases were consolidated for review by the U.S. District Court for the District of Wyoming, and the District Court set aside the Fracking Regulation in June 2016.

BLM and intervening environmental groups appealed the decision to the 10th Circuit. While these appeals were pending the BLM began rescinding the Fracking Regulation under Executive Order, No. 13,771 and No. 13,783. Under No. 13,771, BLM was directed to review its regulations "for consistency with the policies and priorities of the new Administration," and under No. 13,783, Interior Secretary Ryan Zinke issued Secretarial Order No. 3349 (March 29, 2017) instructing the BLM to take steps to rescind the 2015 Fracking Regulation.

Relying on Supreme Court decisions, the 10th Circuit declined to exercise Article III jurisdiction and rule on the merits of the case. By evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," they concluded that the issues at present were unripe for judicial review because the BLM clearly expressed its intent to rescind the Fracking Regulation and the only "harm" the Citizen Group Intervenors would suffer is the continued operation of oil and gas development on federal lands—which represents no departure from the status quo since 2015.

Lastly, the 10th Circuit acknowledged the difficult position that BLM was in, nonetheless they declined BLM's request to keep the appeals in abeyance during the rulemaking process concluding that "it is not the role of Article III courts to supervise or monitor the rulemaking efforts of an Article II agency." (10th Cir. 16-8068)