NFS Litigation Weekly

September 22, 2017

Ecosystem Management Coordination

Court Decisions

1. Land Use & Recreation | Region 2

The District of Colorado issued an order denying intervenor's, Leavell-McCombs Point Venture, motion to reconsider a decision setting aside the agency's approval of a land exchange on the Rio Grande National Forest for the purpose of providing access to an area adjacent to the Wolf Creek Ski Area in *Rocky Mountain Wild, et al. v. Dallas, et al.* In its decision, the court ruled that the Forest Service improperly "disclaimed the power to consider key aspects of the environmental analysis it was duty-bound to undertake" under the National Environmental Policy Act (NEPA) for the land being exchanged. The court concluded that the Forest Service's authority to regulate the use of federal land being conveyed in a land exchange for the purpose of providing access is directly analogous to the Forest Service's authority to regulate use of an access route like an easement. (15-1342, D. Colo.)

2. Timber & Wildlife | Region 5

The Eastern District of California ruled favorably for the Forest Service on NEPA and National Forest Management (NFMA) challenges to the Frog Timber Sale Project on the Sequoia National Forest in *Sequoia Forestkeeper v. Price, et al.* Plaintiffs asserted the agency failed to consider the impacts the project, which would thin trees on 1,620 acres, would have on Pacific Fisher, a listed sensitive species.

Under NEPA, Plaintiffs asserted the Forest Service: 1) failed to consider significant new circumstances from when the timber project was originally initiated; 2) failed to make an informed decision and failed to disclose its underlying data; 3) failed to consider reasonably foreseeable future actions; and 4) failed to consider the significance of the project in light of uncertain/unknown risks to the Pacific Fisher. The court, however, found that the agency did not violate NEPA. Through extensive analysis using several different methods and models covering a number of years and the inclusion of a number of design features to avoid impacts to Fishers during and after the project's implementation, the court determined the agency did everything required under NEPA.

Photo credit: https://www.fws.gov/cno/es/fisher/

For NFMA, Plaintiff argued the project failed to comply with the Forest Plan Standard that allows no more than 30 percent canopy cover reduction within each treatment unit. **The Court determined the agency's decision documents showed that reduction on canopy cover across the project's units would be "far less than 30 percent" and therefore did not violate NFMA**. (16-759, E.D. Cal.)

Litigation Update

1. None to report.

New Cases

1. Land Use | Region 6

The Forest Service Employees for Environmental Ethics (FSEEE) filed a NFMA and Administrative Procedure Act complaint in the Western District of Washington challenging the Forest Service's decision to grant a special-use permit to the U.S. Navy to conduct electronic warfare training on the Olympic National Forest in ***FSEEE v. United States Forest Service.*** Specifically, FSEEE asserts the agency: 1) failed to consider a private land option; 2) failed to explain how its permitting decision gives priority to the interests and needs of the general public over those of the Navy; and 3) failed to determine that the permitted activity is compatible, and in harmony with the surrounding landscape. All of these actions, according to the plaintiff, are required by the Olympic National Forest's 1989 Land and Resource Management Plan. (17-5747, W.D. Wash.)

Notices of Intent

1. None to report.

Natural Resource Management Decisions Involving Other Agencies

1. Minerals and Wildlife | Bureau of Land Management (BLM)

Environmental groups filed a NEPA complaint against the BLM in the District of Nevada challenging the agency's decision to lease approximately 195,732 acres of federal land in BLM's Battle Mountain district for oil and gas development in *Center for Biological Diversity, et al. v. BLM.* According to the complaint the lease area includes "rare and precious wetlands" which are home to several sensitive species, including ESA listed species Railroad Valley springfish and Lahontan cutthroat trout, as well as "crucial winter range for mule deer and pronghorn." **Plaintiffs contend BLM violated NEPA by minimizing "the impacts it analyzed** [in the agency's NEPA analysis] by unlawfully determining that few environmental effects results from the lease sale stage and that impacts would be avoided by subsequent environmental review processes. Consequently, the agency failed to analyze the nature, intensity, and extent of the lease sale's actual effects." The complaint further states that because the lease area "affects wetlands and 'ecologically critical areas', is 'highly controversial,' involves possible effects that are 'highly uncertain or involve unique or unknown risks,' is related to other actions with 'cumulatively significant impacts,' and 'may adversely affect an endangered or threatened species,'" **the BLM should have prepared an Environmental Impacts Statement** (EIS) rather than an Environmental Assessment for the lease sale. (17-553, D. Nev.)

2. National Security | Department of Homeland Security (DHS)

Environmental groups filed a complaint in the Southern District of California against DHS regarding the DHS's waivers of applicable federal and state laws and regulations under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to expedite the construction of a prototype border wall in the vicinity of the United States and Mexican border near San Diego and Calexico, California, in *Defenders of Wildlife, et al. v. Duke, et al.* These waivers, as per the complaint, "purportedly allow construction and related activities to transpire without adhering to legal protections Congress has established for, *inter alia*, endangered species, migratory birds, water pollution, historic preservation, safe drinking water, noise pollution, hazardous waste disposal, coastal zones, public lands, outdoor recreation, religious freedom and practice, and administrative procedures." Specifically, plaintiffs claim:

- "IIRIRA waiver authority applies only to the installation of new, 'additional physical barriers and road, … and cannot be used for the border wall replacement or the prototype border wall project included in the [waivers]";
- The Secretary of DHS did not consult with any of the entities required by IIRIRA before issuing the waivers;
- IIRIRA violates the Presentment Clauses express in Art. 1, Sec 7, Clauses 2 and 3 of the U.S. Constitution because it provides the Secretary of DHS de facto repeal authority by allowing him to nullify enacted statutes without passing Congress and without being presented to the President;
- IIRIRA constitutes an unconstitutional delegation of legislative power to an officer of the executive branch, in violation of both Art. I, Sec 1 and Art. II, Sec 1 of the U.S. Constitution and the doctrine of Separation of Powers; and
- IIRIRA Sec 102(c)(2)(A) violates Art. III, Sec. 1 and 2 of the U.S. Constitution which vests "[t]he judicial Power of the United States … in one supreme court," and "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," respectively, through the language "[t]he court shall not have jurisdiction to hear any claim not specified in this subparagraph."

(S.D. Cal.)

3. Minerals | BLM

The 10th Circuit reversed the District Court of Wyoming's decision and held that BLM failed to adequately consider the greenhouse gas emissions of four coal leases in Wyoming's Powder River Basin in *WildEarth Guardians v. BLM et al.* In its EIS and Records of decision (RODs), the BLM concluded that there was no difference between the greenhouse gas emissions under its preferred alternative and the no action alternative. BLM's conclusion was based on the "perfect substitution" theory, which suggests that due to a steady coal demand in the U.S., federal coal leasing has no impact on climate change because the same amount will be replaced from elsewhere.

Plaintiffs argued that the BLM's substitution assumption was arbitrary and capricious because it lacks support in the administrative record and contradicts basic economic principles of supply and demand. The court agreed with Plaintiffs finding that **"[t]he BLM did not point to any information indicating that the national coal deficit incurred under the no action alternative could be easily filled" by replacement coals**

either within the Power River Basin area or from outside the region. The court further stated that BLM's unsupported assumption did not provide "information sufficient to permit a reasoned choice."

Moreover, the court found that BLM's assumption was contradicted by the Energy Information Administration's 2008 Energy Outlook, one of the principal resources upon which BLM relied, by noting that while BLM agreed with the Energy Outlook's prediction that coal demand may decline in response to increased coal price, BLM indicated no evidence in the record that it considered the potential impact of increased price on demand. Instead, the BLM merely concluded that it would have no impact.

Accordingly, the 10th Circuit reversed the district court's decision and remanded with instructions to enter an order requiring the BLM to revise its EIS and RODs. The court declined to vacate the leases, however, finding that Plaintiffs challenge a narrow issue and not the entire FEIS and RODs, and that three leases issued were already being mined. (15-8109, 10th Cir.)