IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01342-RPM

ROCKY MOUNTAIN WILD;
SAN LUIS VALLEY ECOSYSTEM COUNCIL;
SAN JUAN CITIZENS ALLIANCE;
WILDERNESS WORKSHOP,

Plaintiffs,

v.

DAN DALLAS, in his official capacity as Forest Supervisor;
MARIBETH GUSTAFSON, in her official capacity as Deputy Regional Forester; UNITED STATES FOREST SERVICE, a Federal Agency within the U.S. Department of Agriculture;
UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency within the Department of the Interior,

Defendants,

and

LEAVELL-McCOMBS JOINT VENTURE,

Intervenor.

ORDER DENYING INTERVENOR'S MOTION TO RECONSIDER
ORDER SETTING ASIDE AGENCY ACTION

Intervenor Leavell-McCombs Joint Venture (LMJV) moves the Court pursuant to Fed. R. Civ. P. 59(e) to reconsider its Order Setting Aside Agency Action dated May 19, 2017. Defendants filed a response supporting LMJV's Motion, but did not separately move for relief under Rule 59. Plaintiffs filed a combined response to LMJV's and Defendants' arguments, and LMJV filed a reply. Upon review of the papers and the record, the Court has determined that oral argument is not necessary.

LMJV wants to build an all season resort village in the Rio Grande National Forest. In

1987, its predecessor persuaded the Forest Service to exchange lands owned elsewhere in Colorado for 420 acres of national forest land adjacent to the Wolf Creek Ski Area. The Forest Service decided that there was no need for an environmental impact statement at that time because the exchange would not result in any significant impact on the natural environment and that mitigation measures agreed to in principle combined with the regulatory authority of Mineral County would be sufficient to alleviate any indirect impacts.

The Forest Service did place some restrictions on the 420 acres by placing a "scenic easement" on them. Among other things, those restrictions prohibited numerous uses and imposed aesthetic limitations that were compatible with the ski area.

When the 1987 exchange was made, the area conveyed to LMJV was ultimately reduced to 300 acres to comply with applicable land exchange regulations. That change eliminated direct access to Highway 160, creating an inholding subject to ANILCA.

In 2004, Mineral County approved LMJV's plans for 2,200 residential units, 500,000 square feet of commercial space and up to 10,000 inhabitants. That approval was reversed in state court litigation because Colorado law required year-around vehicular access.

LMJV had attempted to meet that requirement by an application for a right of way in 2001. After an Environmental Impact Statement, the Forest Service granted a 750 foot corridor known as Snowshed Road to connect the private parcel to the highway and an extension of a road leading to the ski area parking lot.

That decision was successfully challenged in a NEPA action in which Judge Kane issued a preliminary injunction in 2007. The case was settled by an agreement requiring the Forest Service

to initiate a new NEPA process. That resulted in the ROD approving a new land exchange with LMJV conveying 177 acres of its existing parcel in exchange for 205 federal acres adjacent to the highway.

In a patent effort to circumvent its obligation to protect the natural environment of the Forest, the decision relied on ANILCA as requiring it to provide access considered to be adequate for the reasonable use and enjoyment of the property. The Forest Service expressly disclaimed any authority to limit the development ceding that authority to Mineral County and finding that there would be only indirect effects on the public lands.

The legal conclusion that the agency cannot control the use of the land conveyed in a land exchange is a clear error of law. It also resulted in the Forest Service failing to consider an important aspect of the decision before it. A conveyance to meet the access obligation of ANILCA must meet the requirement that it be for the reasonable use and enjoyment of the private owner of the inholding property. What use is reasonable is to be determined by the Forest Service. It exercised authority over the use of the original parcel by imposing the scenic easement on the 300 acres. LMJV acknowledges that those restrictions still apply to 123 acres of the original parcel but there are no federal restrictions on the newly acquired 205 acres.

The Forest Service cannot abdicate its responsibility to protect the forest by making an attempt at an artful dodge of its responsibility using ANILCA as a shield.

Defendants cannot escape the history of this effort to develop an urban center by pretending that LMJV had ANILCA rights as a property owner surrounded by public lands when the Forest Service itself created that inholding in the earlier exchanges and did so for the purpose

of permitting that development.

LMJV's arguments do not provide grounds for the Court to change its decision.

The Court did not apply an erroneous legal standard contrary to the APA. As the Court recognized in its Order, a court may set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Coalition of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dept. of Transp.*, 843 F.3d 886, 901 (10th Cir. 2016) (quoting 5 U.S.C. § 706(2)(A)). An agency's decision will be deemed arbitrary and capricious "if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *Id.* (citations omitted).

LMJV all but concedes that the FEIS and ROD were legally incorrect in stating that the Forest Service had no jurisdiction or power to regulate LMJV's future development activities on the federal land being conveyed to LMJV. LMJV argues that the Court applied an incorrect legal standard in holding that the Forest Service's reasoning and the resulting limitation of its environmental analysis were "contrary to law"—asserting that the Court somehow held the agency to an unwarranted standard of "legal perfection." That semantic argument ignores the substance of the Court's holding. The Forest Service did not merely err in some technical aspect of its legal analysis, it disclaimed the power to consider key aspects of the environmental analysis it was duty-bound to undertake. Whether that is couched in terms of entirely failing to consider an

important aspect of the problem, offering an explanation for its decision that runs counter to the evidence, failing to base its decision on consideration of the relevant factors, making a clear error of judgment, or acting "otherwise not in accordance with law," the conclusion is the same: the Forest Service failed to exercise the duties imposed on it by NEPA.

The purpose of the Court's review is to ensure that the Forest Service considered "every significant aspect of the environmental impact of [the] proposed action" and that the agency "will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Sierra Club v. U.S. Dept. of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002) (quoting *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 97 (1983)). The Court cannot ignore the agency's own statements concerning the scope of its environmental analysis, which demonstrate that it did not fulfill its obligations. The Court did not second-guess or fail to defer to the Forest Service's decision not to place restrictions on the property; it recognized from the record that the Forest Service had expressly failed to exercise its legal authority.[1]

The record does not support LMJV's connected argument that, despite disclaiming the power to regulate or restrict LMJV's development activities, the Forest Service actually did fully consider and reject, on the merits, imposing any restrictions. The FEIS and ROD repeatedly state that the Forest Service "has no authority to regulate the degree or density of development on private land" (FEIS at W10699 and 10761) and similar statements. In conclusory fashion,

[1] LMJV urges that the Forest Service's statements concerning its lack of authority "should be read as merely assuming that the Forest Service will lack general regulatory jurisdiction in the future over land that is being conveyed out of public ownership and into private ownership *without any restrictive reservations*." Doc. 71 at 6 (emphasis in original). The actual statements made by the Forest Service, in context, defy that *post hoc* rationalization.

Defendants completely deferred to Mineral County to regulate any future development on the federal parcel to be exchanged. *See, e.g.,* Response to Objections at W12550 ("The scenic easement is not necessary because all private land development and design (including building height) would be subject to Mineral County zoning and land use regulations…."). At the same time, they acknowledged that the level of any future development that may be approved by Mineral County is "unclear" and "unknown," and that the conceptual development scenarios submitted by LMJV will "likely vary" from what is ultimately approved. *See* FEIS at W10699, W10761.

This was a complete abdication of authority based on speculation and surmise concerning the possible scope of future development plans that LMJV might submit and that Mineral County might approve.[2] Neither LMJV nor Defendants have provided any record evidence to support the contention that the Forest Service substantively considered and explained to the public its reasoning for rejecting any restrictions on development of the federal land being conveyed to

[2] The record amply reflects the peril of assuming that LMJV's projections would remain constant, and/or that Mineral County or any other entity would necessarily apply the same standards or consider the same interests that the law requires the Forest Service to protect. In connection with the 1987 land exchange, LMJV's agent provided what it described as a "liberal but reasonable" and "worst case" development scenario of 208 units. W01316-17. Presumably the Forest Service relied on that representation in approving the transaction based only on an Environmental Assessment rather than a full NEPA review and EIS. By October 2004, the proposed project exceeded LMJV's "worst case" number by ten times, with the County's blessing: Mineral County approved a development plan—later overturned in state court—calling for 2,200 residential units and 500,000 square feet of commercial space. In connection with the current proposal, which is explicitly vague, the represented "maximum development density concept" considered by the Forest Service "could have 1,711 units, which may include two hotels with 200 units, 16 condominiums with 821 units, 46 townhomes with 522 units, 138 single family lots, and 221,000 ft^2 of commercial space." FEIS at W10763 (emphasis added).

LMJV and leaving regulation of development to Mineral County.[3]

LMJV also argues incorrectly that the Court—acting sua sponte and by "judicial fiat"—drew an "artificial distinction" between ANILCA access and the land exchange that the Forest Service approved in this case. Plaintiffs argued that the Forest Service erroneously assumed ANILCA does not give the agency the power to regulate development of private inholdings. Defendants responded that Plaintiffs' argument confused the Forest Service's "authority to place terms and conditions on the *mode and manner of access* across Forest Service land with the authority to place conditions on the use of the private lands themselves." Doc. 55 at 21 (emphasis in original).

The Order directly addressed Defendants' assertion, observing that their analysis is misplaced because, in this land exchange, the Forest Service would not be placing restrictions on LMJV's use of its existing private inholding, but rather on the federal property being conveyed to LMJV. Thus, any limit on the Forest Service's authority to regulate use of an existing private property in a "typical" ANILCA transaction—such as granting an easement—is simply inapplicable. Indeed, the Forest Service's authority to regulate use of an access route (e.g., an easement) is directly analogous to the Forest Service's authority to regulate use of the federal land being conveyed in a land exchange for the purpose of providing access. The Court's determination is not that ANILCA does not apply, as LMJV argues, but that ANILCA does not prevent

[3] LMJV asserts that the Court implied that Mineral County officials are incompetent or worse "in its broad statement that the Forest Service should not have placed any reliance on the zoning authorities in Mineral County." Doc. 71 at 8. In fact, the Order simply recognized that the Forest Service has certain duties to consider the public interest with regard to private matters affecting National Forest Service Lands, and that it cannot simply wash its hands of those duties by assuming that Mineral County will consider the same interests.

Defendants from regulating the use of the federal land being conveyed to LMJV.[4] This analysis gives weight to the Forest Service's powers and duties under both ANILCA and Forest Service land exchange regulations. Any other interpretation would effectively render the land exchange regulations meaningless when, as here, an exchange arises as an alternative to or in connection with an ANILCA access demand.

Regarding the lynx conservation measures agreed on by the FWS and LMJV to attempt to meet Endangered Species Act requirements, LMJV largely reargues points urged in briefing on the merits. LMJV also asserts that to the extent the agreed-upon measures are indefinite or uncertain, it has "clarified" its commitments at oral argument and in its motion for reconsideration, and "would welcome" a final order interpreting the conservation measures in a manner that renders LMJV's commitments more specific and binding than they appear on their face. The Court is bound by the record and cannot simply adopt counsel's reassurances attempting to resolve deficiencies in the measures actually negotiated and approved by the parties. *See New Mexico ex rel. Richardson v. Bureau of Land Management,* 565 F.3d 683, 704 (10th Cir. 2009) (review of agency decision under NEPA considers "only the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalization concocted by counsel in briefs or argument")(citations omitted). The Court did not find the measures to be "unclear"; it found them to be insufficiently definite as a matter of law. That cannot be cured by arguments and explanations of counsel after the fact.

[4] Defendants' counsel acknowledged this distinction at oral argument. *See* Transcript of April 19, 2017 Hearing at 39:22-40:1 ("And so under ANILCA the private landowner gets reasonable access to that land. Under a land exchange we have authority to say no we don't—we don't want to exchange land for you, we—we're going to put whatever conditions we want on the land."). LMJV thus argues without basis that the Order rests "on an interpretation that no party argued or anticipated…."

LMJV's other arguments also fail to provide grounds for relief under Rule 59(e). *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (stating that a motion for reconsideration under Fed. R. Civ. P. 59(e) "is not appropriate to revisit issues already addressed or advance arguments that could have been addressed in prior briefing").

Based on the foregoing, it is

ORDERED that LMJV's Motion to Reconsider is DENIED.

DATED: September 14, 2017

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch, Senior Judge