NFS Litigation Weekly

June 22, 2018

Ecosystem Management Coordination

Court Decisions

1. Minerals | Region 3

The District of New Mexico found against the Bureau of Land Management (BLM) and Forest Service's decision to lease thirteen parcels of federal mineral estate in the Santa Fe National Forest in *San Juan Citizens Alliance, et al. v. BLM, et al.* These parcels cover 19,788 acres and were first contemplated in the Forest's 1987 Forest Plan. In 2013, the Agency reviewed a 2012 environmental impact statement (EIS)analyzing the impacts of mineral leases in the area and concluded they were "adequate for offering lands for competitive leasing." Adopting this EIS, BLM issued a "Decision Record" and environmental assessment (EA) approving the 13 parcels for lease. Plaintiffs claimed BLM violated the National Environmental Policy Act (NEPA) by failing to take a hard look at the impacts of oil and gas development and failing to consider significant new information and circumstances.

The court found distinct areas of concern to the plaintiffs: the leases' expected impacts on greenhouse gas emissions and climate change; and 2) the impacts the lease sales will have on air quality and water quality. Looking at BLM's climate change analysis **the court found the agency did not adequately analyze the potential greenhouse gas emissions from the leases nor analyze emissions from the foreseeable consumption of the oil and gas produced at the wells**. For what climate change analysis the BLM did perform the court found the tools used outdated. For air quality the court found BLM's analysis adequately considered the cumulative effects of the lease sale along with other actions impacting air quality in the planning area. For water quality **the court determined BLM failed to estimate the quantity of water which would be used and failed to discuss the effects of such water use on the environment**. (16-376, D.N.M.)

Litigation Update

1. Nothing to report

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the most complete and accurate discussion of each case.

Photo credit: https://defenders.org/butterflies/basic-facts

New Cases

1. Grazing | Region 1

The 2-Bar Ranch challenge a "suspension of period of use" for a term grazing permit on the Beaverhead-Deerlodge National Forest in *2-Bar Ranch Limited Partnership, et al. v. USFS, et al.* 2-Bar had some resource use discussions with the USFS in 2016 regarding their salting locations and the condition of a neighboring ranch's fences. Then in 2017, USFS sent a letter of non-compliance, citing excessive streambank disturbances as an "excess of allowable use standards." Plaintiffs say there was no evidence cited in the letter, and the "remedies" provided were actually first-time instructions that should have been provided in the AOI. They met with the District Ranger, who gave them a 20% "suspension of period of use" without a discussion of alternatives. 2-Bar seeks a declaration that the new management plan is invalid. Plaintiffs claim the agency:

- Violated the National Forest Management Act (NFMA) by saying that the plan standards do not allow for approval of the Dry Cottonwood Allotment. Plaintiffs say they are entitled to clear, well-defined, achievable standards, of which they were denied.
- Violated NEPA and Federal Lands Policy Management Act by modifying Plaintiffs' term- permit for grazing to include an unsigned, undated, and otherwise invalid "allotment management plan" that is not consistent with the 2009 Forest Plan. Plaintiffs also say the Forest Service did not consult with them on the development of the management plan, and it is substantively invalid for several reasons.
- Violated regulations and agency guidance by issuing the Notice of Non-compliance without first attempting to resolve the issues informally, failing to provide detailed notice of the alleged issues, and failing to provide an opportunity to comply.
- Violated regulations and agency guidance by issuing a Notice of Noncompliance for the 2017 grazing season that fails to apply the allowable use standards required by law. Plaintiffs say there is no evidence to support allegations of non-compliance.

(18-33, D. Mont.)

2. Timber | Region 5

Conservation Congress filed a suit in the Eastern District of California challenging Lassen 15 Restoration Project ("Lassen 15 project") and Joseph Creek Forest Health Project ("Joseph Creek project") on the Modoc National Forest in *Conservation Congress v. USFS*. Plaintiff alleges that the Agency violated NEPA and NFMA when it approved these adjacent projects by using an EA and categorical exclusion, respectively.

Specifically, for Lassen 15 project, the plaintiff claims:

(1) The Agency failed to consider **cumulative impacts** because it did not describe the baseline conditions of cattle grazing within the project area and the impacts from grazing to riparian and upland areas;
(2) The Agency failed to take a hard look **by not considering the project's impacts on sensitive species** and their habitat;
(3) The Agency **failed to include mitigation measures**; and
(4) The Agency **failed to comply with the Sierra Nevada National Plan for American (Pine) Marten,** which sets a 30-inch diameter at breast height limit for logging and thinning.

For Joseph Creek project, the plaintiff claims:

(1) The **existence of extraordinary circumstances**—adverse impacts on the northern goshawk and the Golden eagle—precludes the use of CE;
(2) The Agency **failed to evaluate the cumulative impacts** in relation to other adjacent or overlapping projects, including the adjacent Lassen 15 project; and
(3) The Agency violated **standards and guidelines for minimum proportions of seral stages** and for average snag densities.

(18-1694, E.D. Cal.)

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

1. Office of Surface Mining, Reclamation and Enforcement (OSM) | Kayenta Coal Mine

Environmental groups filed a complaint in the District of Arizona challenging OSMs decisions regarding the operation of the Kayenta Coal Mine "that fail to lawfully permit or analyze permanent closure of the mine that will cease active mining operation on or before Dec. 22, 2019" in ***To' Nizhoni Ani, et al. v. DOI, et al.*** According to the complaint the coal mine "is an approximately 44,000 acre strip mine operation located on Navajo Nation lands in northeastern Arizona" and "is the sole provider of coal to the Navajo Generation Station (NGS)…" The mine has been in operation since 1973. In 2012 the mining company proposed extending the life of the mine from ending on Dec. 23, 2019 to Dec. 22, 2044. In 2017, NGS and the owners of the mine announced they did not intend to operate after Dec. 22, 2019. In Nov. 2017 the Bureau of Reclamation and the Bureau of Indian affairs approved a 35 year extension for the mine, providing a 5-year retirement process beginning on Dec. 23, 2019 and providing access for an additional 30 years for remediation and monitoring through 2054. Then, on Oct. 3, 2017, OSM issued an approval letter authorizing the mine to continue operations through July 6, 2020 claiming the mine's operation was "unchanged". Plaintiffs claim OSM's decision to allow mining to continue until July 6, 2020 violated the **Surface Mining Control and Reclamation Act by not considering the closing of the mine in its decision to**

mark the mine's operations as "unchanged" and violated NEPA by failing to analyze the closure of the mine and NGS as connected actions. (18-8128, D. Ariz.)

2. Environmental Protection Agency (EPA) | Clean Water Act (CWA)

Environmental groups filed claims in the Northern District Court of California challenging the EPA's and Corps' propagation of the "Clean Water Rule" (CWR) and the Delay Rule under the CWA in *Waterkeeper Alliance Inc., et al. v. Pruitt, et al.* The June 29, 2015 "Clean Water Rule" identified those waters that are subject to the CWA's safeguards. 80 Fed. Reg. 37054 (June 29, 2015). The "Delay Rule" makes no substantive changes to the definition, but delayed the applicability of the CWR by two years. 83 Fed. Reg. (Feb. 6, 2018).

Plaintiffs assert that several CWR provisions are "legally or scientifically indefensible because these provisions unreasonably exclude numerous waters over which the agencies have historic authority, deviate from best available science, or were promulgated without compliance" with the agencies' CWA, Administrative Procedure Act (APA), NEPA, and Endangered Species Act (ESA) obligations. Specifically, plaintiffs' claim:

- The Agencies violated NEPA and the APA by basing their analysis of the proposed CWR on incorrect assumptions, flawed economic data, and failing to consider last-minute changes to the rule
- The Agencies violated NEPA and the APA by failing to provide sufficient notice and comment opportunities.
- The Agencies' definitions of "tributary" and "adjacent," along with its exclusion from CWA jurisdiction of ditches and ephemeral features, groundwater, waste treatment systems, and "waters more than 4,000 feet beyond the High Tide Line…" in the CWR lacks a legal or scientific basis in violation of the APA.
- The Agencies violated the APA by abandoning CWA jurisdiction over "other waters" based on a mis-reading of a Supreme Court decision.
- The Agencies violated the ESA by failing to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service prior to promulgating the CWR or the Delay Rule.
- The Agencies violated NEPA and APA by failing to prepare an environmental impacts statement for the Delay Rule as it is a major federal actions that fundamentally alters CWA's regulatory landscape by denying most tributaries and wetlands per se protection.
- The Agencies violated the APA in issuing the Delay Rule violates the APA by failing to consider costs of delaying CWR, failing to support the stated basis for the rule in preserving the "status quo" to achieve certainty and predictability, and failing to meaningfully and substantively respond to comments.

(18-3521, N.D. Cal.)

3. Department of the Interior (DOI) | Federal Coal Management Program (FCMP)

The D.C. Circuit held in *Western Organization of Resource Councils v. Zinke* (15-5294 D.C. Cir.) that BLM did not have to supplement its programmatic environmental impact statement (PEIS) for the Federal Coal Management Program. The PEIS was completed in 1979, and supplemented in 1982 and 1985. Plaintiffs argued that BLM had a duty to supplement the PEIS under NEPA because new climate change data made the findings in the PEIS outdated. Plaintiffs also argued that statements in the original PEIS required the agency to update it to reflect new information on climate change.

The court affirmed that **NEPA's supplementation requirement does not apply to completed federal actions**. The court characterized the major federal action in this case as the adoption of the Federal Coal Management Program, which occurred in 1979. Thus, there was no further action associated with that major federal action. Furthermore, the court held **that BLM was not bound by the language in the 1979 PEIS to update the findings with new climate change data because the 1982 supplement removed language about the conditions that would trigger such an update**. The court suggested that Plaintiffs could challenge the sufficiency of the PEIS by challenging specific leases and projects. (14-1993, D.C. Cir.)