

Ecosystem Management Coordination



Court Decisions

1. Land Use | Region 3

The Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims' judgment that plaintiffs' allegation of a Fifth Amendment taking is not ripe for adjudication in *Martin, et al. v. United States*. The plaintiffs, who own patented mining and homestead claims inside the boundaries of the **Santa Fe National Forest**, claim the Agency's limiting of access to Forest Roads 89 and 268 following severe flooding occurring in the wake of a fire amounted to a takings. The Forest service stated that it would "continue to work with" the plaintiffs to ensure adequate access to their properties, but that **the plaintiffs would have to work with their neighbors to reconstruct the roads "subject to reasonable regulations."** Plaintiffs claim this **"deprived them of all meaningful access to their private property"** by requiring them 'to follow prohibitively expensive procedures in order to obtain special use permits' for road construction."

The Court of Appeals agreed with the Federal Circuits finding that **the costs of complying with a valid regulatory process does not constitute a taking** and "until there has been a final decision on whether – and under what conditions [the plaintiffs] will be granted permission to reconstruct Forest Roads 89 and 268, any claim for a regulatory taking remains 'abstract and conjectural.'" As the Court found the Forest Service to have not taken a final action the Court determined plaintiffs' case to not yet be ripe for review. (17-2224, Fed. Cir.)

Litigation Update

1. Nothing to report

New Cases

1. Nothing to report

Notices of Intent

1. Nothing to report

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Natural Resource Management Decisions Involving Other Agencies

1. U.S. Geologic Survey (USGS) | Federal Tort Claims Act (FTCA) & Wild and Scenic Rivers Act (WSRA)

The Ninth Circuit affirmed the District of Arizona's dismissal of plaintiffs' FTCA claims "on the grounds that the USGS's decision to not mark a cable, which allegedly resulted in the crash of a helicopter, was driven by policy considerations and fell within the discretionary function exception to the FTCA" in *Morales, et al v. United States of America*. In June 2012, a helicopter crashed in the Prescott National Forest killing the pilot and three passengers after striking an **unmarked cable** suspended forty feet above the Verde River. This cable was installed by the USGS as part of a cableway to enable the collection of streamflow measurements and water samples. After the crash, **the estate of the pilot filed this action claiming USGS was negligent for failing to mark the cable.**

The FTCA waives sovereign immunity for tort claims arising from negligent conduct of government employees acting within the scope of their employment. **If a claim is based on an agency or employee exercising a discretionary duty, however, sovereign immunity is not waived.** To determine whether this exception is applicable courts look to: 1) whether there is a **statute or policy directing mandatory and specific action**; and 2) whether the **action was susceptible to policy analysis** grounded in social, economic, and political concerns.

Looking at USGS' decision to not mark the cable the court found that **"no federal statute regulation, or policy specifically prescribed the marking of the Verde River cableway."** The cableway, the court found, fell within USGS' default policy not to mark cableways that did not meet the Federal Aviation Administration's criteria of exceeding 200 feet in height or located within proximity of an airport or heliport.

The court also found several economic, social, and political considerations exempting the USGS from the FTCA. The court noted that there was a **safety risk in marking the cableway which could confuse pilots** who expect to see such markers at a higher level, a **safety risk to USGS personnel tasked with the installation or maintenance of the markers**, the **costs of installing and maintaining the markers**, and the **knowledge of the Forest Service's objectives on the Verde River to minimize visual distractions to meet "scenic integrity objectives" given the river's designation as a "Wild and Scenic River" and bald eagle nesting area.** (17-15215, 9th Cir.)

2. National Park Service (NPS) | Federal Advisory Committee Act (FACA)

The Democracy Forward Foundation (plaintiff) filed suit in the District Court for the District of Columbia against the Department of the Interior (DOI) claiming the agency has violated the Freedom of Information Act in *Democracy Forward Foundation v. U.S. Department of the Interior*. According to the complaint, DOI created a FACA committee charged with advising DOI on services NPS provides within national parks "with a particular emphasis on the use of public-private partnerships in providing services to National

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Parks visitors.” This committee is comprised of 15 members, according to the complaint, comprised of outdoor recreation companies and industry groups. Most of the committee members, the plaintiffs claim, stand to gain if NPS chooses to privatize services offered to the public. “To understand and explain to the public the process by which Secretary Zinke selected individuals to serve on the committee” **plaintiffs claim to have filed a FOIA request on May 9, 2018.** While plaintiff states it received an acknowledgement on May 15, 2018, that their request was received, **plaintiff contends that as of the date of filing on July 16, 2018, DOI and NPS has failed to determine whether to comply with the FOIA request or produce the records plaintiff requested.** “By failing to respond to plaintiff’s request within the statutorily mandated 20 days” plaintiffs assert that DOI and NPS is in violation of FOIA. (D.D.C.)

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