Ecosystem Management Coordination

The Ides of March

Court Decisions

Recreation | Region 8

Larry Bailey v. United States of America, et al. (17-0090, D. Ky.; 19-5541, 6th Cir.) **Region 8**-On February 28, 2020, the 6th Circuit Court of Appeals issued an Order affirming the District Court of Kentucky's order in favor of the Forest Service concerning amenities at the **Marsh Branch Boat Launching Facility** in the **Daniel Boone National Forest** (DBNF). The Plaintiffs had sought to compel the Forest Service to repair a broken security light and place picnic tables at the facility on the DBNF under the Federal Lands Recreation Enhancement Act.

The 6th Circuit Court of Appeals found:

1. The district court's denial of discovery by plaintiff did not affect his substantial rights because the issues presented were not sufficiently related to the two questions to be resolved on remand and went beyond the parameters of the remand order
2. The district court did not err in not permitting Mr. Bailey to amend his complaint to add a claim that the Secretary was required to provide a light at Marsh Branch regardless of its designation and did not abuse its discretion
3. The plaintiff argued, insisting Federal Courts remand for reconsideration and defer to an Agency's interpretation of ambiguous regulations (Kisor). The Court finds the plaintiff failed to identify any alleged ambiguous regulations that pertain to the Marsh Branch's fee designation and therefore forfeited this assignment of error
4. The 6th Circuit found the argument of the district court acting unethically and biasedly against the plaintiff unfounded and based entirely on the Courts rulings, which is insufficient to establish judicial bias

Background

On April 30, 2019, the District Court of Kentucky issued an order in favor of the Forest Service concerning amenities at the Marsh Branch Boat Launching Facility on the DBNF. On June 27, 2018, the 6th Circuit Court of Appeals reversed the district court's dismissal of the plaintiff's complaint, and remanded the case back to the district court, and ordered parties to provide evidence about the designations of the facility.

Upon the district court's review of the administrative record, the court determined that it is clear the Forest Service's charge of an expanded amenity fee for the use of the facility acted within their discretion in declining to provide the requested amenities. The court determined that there is nothing to suggest that the Forest Service is required to install security light despite their willingness to do so voluntarily, or picnic tables at the site. The court concluded that because the facility is an expanded amenity site, the Forest Service is not required to maintain a light and picnic tables. The court granted the Forest Service's motion for summary judgement in the case.

Court Update

Nothing to Report

Litigation Update

Nothing to Report

New Cases

Range | Region 3

Neighbors of the Mogollon Rim, Inc., v. United States Forest Service, United States Fish and Wildlife Service (20-00328, D. Ariz.) **Region 3-**On February 12, 2020, the plaintiff filed a complaint against the Forest Service and U.S. Fish and Wildlife Service (FWS) regarding the new term grazing permit for the Bar X and Heber-Reno Sheep Driveway Allotments on the **Tonto National Forest (TNF)** alleging violation of the National Environmental Policy Act (NEPA) and Federal Land Policy Management Act (FLPMA) and the National Forest Management Act (NFMA). The Plaintiffs claim the Forest Service did not properly analyze the effects of grazing on the Mexican Spotted Owl (MSO) and Narrow Headed Garter Snake (NHGS), when changing the Allotment Management Plans (AMP), and issuing a new term grazing permit.

1. Violated NEPA for Failure to:
    - Prepare an EIS.
    - Consider an adequate range of alternatives, considering only two alternatives, none of which were a no action alternative.
    - To take a hard look, considering all direct, indirect and cumulative effects and ensuring the scientific integrity of the data and analysis.
2. Violated NFMA for Failure to:
    - To act consistently with the forest plan protecting resources.
3. Violated ESA for Failure to:

- Improperly determining a "not likely to affect" the MSO and NHGS claiming a flawed FWS concurrence by misleading information on baseline conditions.

The plaintiff claims the Forest Service has been allowing over grazing on the allotments over the last 10 years and when announcing the permission again in 2018, the plaintiffs filed suit claiming NEPA has never been completed to modify the grazing permit. The Forest Service agreed to conduct additional NEPA and completed an EA in the fall of 2019, signing a DN and FONSI finding a determination of "not likely to adversely affect" the MSO and NHGS based on concurrence from the FWS.

Forest Management/Travel Management | Region 1

DLCTM, LTD v. U.S. Forest Service (20-0550, D. Colo.) Region 2-On February 27, 2020, Plaintiffs filed a complaint against the Forest Service regarding the Fossil Ridge II Land Exchange on the **Gunnison National Forest.** The Plaintiffs allege violation of Administrative Procedures Act (APA), National Environmental Policy Act (NEPA) and Federal Land Policy Management Act (FLPMA), claiming the Forest Service's transfer of federal lands to Crested Butte Land Trust without the conditional land easement as agreed upon, denying vehicle and subsurface utility line access to plaintiff's Lot 18 will landlock and maroon Lot 18, rendering it undevelopable.

<u>Specifically Claims:</u>

1. The Forest Service's refusal to satisfy the replacement easement condition of the land exchange decision is agency action unlawfully withheld under 5 U.S.C. 706(1).
   - Forest Service has unlawfully withheld a discrete agency action it is legally required to take.
2. The Forest Service's refusal is contrary to law.
   - The plaintiff claims that the Forest Service's decision is a major federal action that triggers the duty to prepare an environmental review document under the NEPA.
3. The Forest Service cannot delegate the reciprocal easement to CBLT.
   - A Non-federal entity cannot grant, hold as successor-grantor or administer a ROW easement under FLPMA.

CE and DM from June 25, 2019, approving the exchange does list the outstanding rights to a reciprocal easement to be granted to plaintiff upon closing of the land exchange. The CE was based on a 2013 EA that was completed for the entire exchange project area.

The project completes the conveyance of the entire 960.15-acre Fossil Ridge inholding to the US from 2013. The purpose is for the FS to acquire the remaining portion abutting the congressionally designated Fossil Ridge Recreation Management Area. The parcel being conveyed to private entity is small and does not offer resources or recreation.

Notice of Intent

Nothing to Report

Other Cases Filed Against Another Agency/Entity

Western Watershed Project, and Center for Biological Diversity, v. Ryan Zinke, et al. (18-0187, D. Idaho) **Nationwide**— On February 27, 2020 the District Court of Idaho issued order against the Department of Interior (DOI) and the Bureau of Land Management (BLM) concerning the BLM's **instruction memorandum** (IM) issued in January 2018 concerning **oil and gas leases on Federal land**. The Forest Service is not named in this case.

Specifically, the district court granted partial summary judgement on the Fourth and Fifth Claims for relief in the complaint as follows:

- IM 2018-034's as-issue provisions are set aside and IM 2010-117's correspond ending provisions are reinstated until BLM completes a proper notice-and-comment rulemaking to govern its lease review process specifically enjoining:
  - "Parcel Review Timeframes"
  - "Public Participation"
  - "NEPA Compliance Documentation"
  - "Lease Sale Parcel Protests"

Relief applies only to oil and gas lease sales contained in whole or in part within the **Sage Grouse Plan Amendments**' **Planning Area Boundaries** and the Phase One lease sales from June and September 2018 lease sales in Nevada, Utah and Wyoming are set aside.

Defendants and Intervenors Motions for Partial Summary Judgment are **denied.**

The parties' arguments the district court discussed- Whether the 2018 IM is/if:

1. A final agency action-Defendants argued it was not a final agency decision. The district court determined the both prongs of a final agency action were met.
2. Procedurally and/or substantively invalid under APA, FLMPA, and/or NEPA-The Court determined that the IM is not a general statement of policy and is a substantive rule/policy.
3. 2018 IM's application to the Phase One lease sales restricted public comment- Plaintiffs claimed the IM improperly precluded meaningful public involvement consistent with NEPA and FLMPA in essence, both sides were arguing the "no harm no foul" argument and the district court agreed with the plaintiffs stating the limits drawn on public involvement by remodeling the IM demonstrated the 2018 IM restricted public involvement in the Phase One lease Sales.

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