Ecosystem Management Coordination

Happy Friday!

Court Decisions

Minerals Region 2

High Country Conservation Advocates, et al. v. United States Forest Service, et al. (17-03025, D. Colo.; 18-1374, 10th Cir.) **Region 2**—On October 2, 2020 the District Court of Colorado issued an order favorable to the Forest Service concerning the **West Elk Mine and the Colorado Roadless Rule's North Fork Coal Mining Area exception** (North Fork Exception) on the Grand Mesa, Uncompahgre and Gunnison National Forests. The plaintiffs filed a motion to expedite consideration of an emergency motion to prohibit the use of the newly constructed roads. The district court denied the plaintiffs' motion to enforce remedy and denied as moot the plaintiffs unopposed motion for entry of the 10th Circuit Court of Appeals' mandate. The court's order does not prohibit West Elks Mines use of new roads constructed in June 2020.

Plaintiffs' Emergency Motion to Enforce the Remedy applied by the district court vacating the North Fork Exception, as ordered by the 10th Circuit Court of Appeals that vacated the district court's judgement and remanded the case for entry of an order vacating the North Fork Exception.

The court concluded:

1. The 10th Circuit's March 2, 2020 order remanded with instructions to enter an order requiring Bureau of Land Management to revise its Environmental Impact Statement (EIS) but did not vacate the resulting leases. Here, the extent of the 10th Circuit's mandate was remand "for entry of an order vacating the North Fork Exception." The 10th Circuit's order contains no discussion of the effect that such an order would have on the lease modifications. Because the 10th Circuit's mandate contains no express or implied directive to vacate the lease modifications, the district court declines to do so.
2. The plaintiff's complaint includes eight causes of action, all of which allege NEPA violations in the process of promulgating both the North Fork Exception and the lease

modifications. However, all the plaintiffs' process challenges to the lease modifications have been resolved in the Agency defendants' favor. What plaintiffs raise now appears to be an entirely new claim, targeted not at the Agency defendants but at Mountain Coal. Whether or not a private entity's actions are prohibited under a regulation is a question that does not appear to be within the scope of this type of procedural review and must therefore be brought in some other posture that would permit review. Accordingly, the district court denies plaintiffs' motion.

Background

The Colorado Division of Mines modified its cessation order to allow certain activities to be conducted (i.e. drilling pad construction and venthole boring), The plaintiffs went back to the district court to ask for an expedited order on their motion to enforce (which focused on preventing the company from using the road for other drilling activities). The plaintiffs requested the same relief (to stop the company from conducting additional activity on the site), but the urgency returned because the company is no longer barred by the Colorado Division of Mines.

On June 19, 2020 the plaintiffs informed the district court that the Colorado Division of mines had ordered the company to cease activities in the area, and let the court know that there was no longer as much urgency to the motion to enforce.

On June 15, 2020 the district court entered the 10th Circuit's mandate and issued the following order, vacating the North Fork Exception entirely: **ORDERED that the Final Judgment [Docket No. 63] is VACATED. It is further ORDERED that the North Fork Exception, 81 Fed. Reg. 91,811 (Dec. 19, 2016), is VACATED.**

On June 12, 2020 the plaintiffs filed a motion to enforce the remedy because the mining company was planning to use its recently built road (the one built in between the 10th Circuit order and the district court's entry of the mandate) to build additional drilling pads and ventholes for methane venting.

On March 2, 2020 the 10th Circuit Court of Appeals concluded that the Forest Service acted arbitrarily and capriciously in its analysis for the North Fork Exception by failing to analyze in detail the Pilot Knob Alternative within the GMUG**.** The 10th Circuit vacated the District Court of Colorado's judgement and remanded the case for entry of an order vacating the North Fork Exception.

In April 2015, the Forest Service began a supplemental analysis process to reinstate the North Fork Exception into the Colorado Roadless Rule. On November 18, 2016, the Forest Service published the final EIS to reinstate the North Fork Exception. The final EIS analyzed three

alternatives: Alternative A – the Colorado Roadless Rule without the North Fork Exception; Alternative B – the Colorado Roadless Rule reinstating the North Fork Exception on 19,700 roadless acres; and Alternative C – reinstate the North Fork Exception for a reduced North Fork Coal Mining Area on 12,600 roadless acres. On December 19, 2016, USDA published the final rule reinstating the North Fork Exception.

High Country Conservation Advocates and others filed suit in the District Court of Colorado. During the public scoping effort, EarthJustice recommended the Forest Service analyze two different alternatives reducing the size of the North Fork Coal Mining Exception. One of those alternatives became Alternative C. The other alternative, known as the Pilot Knob Alternative, was considered but dismissed from detailed analysis. Plaintiffs alleged the Forest Service improperly dismissed the Pilot Knob Alternative from detailed analysis. The district court found in favor of the Forest Service and plaintiffs appealed to the 10th Circuit. The 10th Circuit found the rationale for not analyzing this alternative in detail to be insufficient.

In July 2012, The USDA promulgated the Colorado Roadless Rule, a state-specific regulation for management of Colorado roadless areas. This Rule addressed State-specific concerns while conserving roadless area characteristics. One State concern was maintaining ability to construct or reconstruct roads for exploration and development of coal resources on the GMUG. The Rule addressed this by creating the 19,100-acre North Fork Coal Mining Area, and an exception to the Rule that allows temporary road construction for coal-related activities in the area. In September 2014, the district court vacated this exception due to NEPA analysis deficiencies.

Forest Management & Timber | Region 1

Friends of the Bitterroot, v. Leanne Marten, et al. (20-19, D. Mont.) **Region 1**—On September 29, 2020 the District Court of Montana issued a decision generally favorable to the Forest Service concerning the **Darby Lumber Lands Phase II Project on the Bitterroot National Forest**. The district court found that the project's: temporary road construction was not prohibited by the Forest Plan; that the relocation of a permanent road within Area 8b was reasonable and supported by the record, and a small mapping error did not constitute a NEPA violation; and the Forest Service's conclusion that winter range for elk would be improved with increased stimulation of forage as a result of treatment activities in the project area, complies with the Forest Plan and NEPA. The court also found that Forest Service adequately explained that suspending the elk habitat effectiveness standards was necessary given the small size of watersheds in the project area. However, the court determined an unlawful minimum road system exists that does not necessarily follow that the project's Decision Notice (DN) and must be vacated and remanded for the Forest Service to try again. Thus, the court remanded without vacatur of the DN and instructed the Agency to strike any language in the DN which refers to the implementation of a minimum road system. The Plaintiffs claim alleged violations of the

National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Travel Management Rule (RMR), 2012 Planning Rule, and Administrative Procedures Act (APA).

The district court found:

1. Management Area 8b
   a. Temporary Road Construction: Because the Forest Plan specifically applies to "system" roads, it was reasonable for the Forest Service to conclude that the construction of temporary roads does not create National Forest System Roads and is therefore not prohibited by the Forest Plan—an interpretation that is entitled to "substantial deference."
   b. Permanent Road Construction: The Forest Service authorized the relocation of one segment of permanent road within Area 8b. The Forest Service's decision to use this road and reroute a portion of it is reasonable and supported by the record. Nor does a mapping error of less than .2 miles constitute a NEPA violation.
   c. Timber Harvest: The Forest Service's conclusion that "[w]inter range for elk would be improved with increased stimulation of forage" as a result of the treatment activities planned in Area 8b complies with the Forest Plan and NEPA.
2. Forest Plan Amendment

   The Forest Service explained that suspending the elk habitat effectiveness standards was necessary given the small size of watersheds in the project area. Without the amendment, the Forest Service explained that it would have to close additional roads which would, in turn, limit forest management access and conflict with other multiple use management objectives. The court indicated that the Forest Service's belief that small watersheds justify the amendment is reasonable, because the Agency "articulate[d] a rational connection between the facts found and the choices made," based on a site-specific characteristic. As for the hiding cover standard, the Forest Service asserted that "changes in the landscape"—presumably, the "widespread dense regeneration resulting from the 2000 Valley Complex Wildfire."
3. The Minimum Road System
   - The district court found that the forest-wide Bitterroot Travel Management Plan (TMP) does not contain any discussion of the legal requirements that guide the development of the minimum road system as the "the Travel Management Planning Project [does] not establish a 'minimum road system'." This means the Forest Service "did not consider every road, trail, and area for possible change of designation" and instead opted to "follow the regional strategy for identifying unneeded roads and trails through project level or watershed level analyses."
   - The Forest Service's contention that the Environmental Assessment (EA) may be tiered to the TMP's discussion of operation, maintenance, and funding of its road system, is inapposite as the TMP does not contain any discussion of these factors as applicable to the development of a minimum road system. Any analysis contained in the Darby

Lumber Lands Travel Analysis Report cannot cure any deficiencies in the (EA), because it is well settled that a site-specific project may not tier to a non-NEPA document.

- The district court determined an unlawful minimum road system exists that does not necessarily follow that the project's DN and must be vacated and remanded for the Forest Service to try again. Thus, the court remanded without vacatur of the DN and instructs the Agency to strike any language in the DN which refers to the implementation of a minimum road system. The court indicates that if the Agency wishes to adopt a minimum road system for the project area, it may do so in a supplemental EA or as a stand-alone project.

Background

On February 19, 2020 the plaintiff filed a complaint in the district court against the Forest Service regarding the project. The plaintiffs allege the Forest Service violated the APA concerning the Agency's EA, DN and Finding of No Significant Impact for the project. The plaintiff further allege that the Agency's decision violated the NEPA, NFMA, TMR, and 2012 Planning Rule. In the complaint the plaintiff indicated the Forest Service did not include a need: to identify a minimum road system for the project area; and to increase big game forage production or winter range habitat in its statement of propose and need for the project.

Lands | Region 9

Van McGibney, et al., v. Missouri Department of Natural Resources (17AM-CC00021, Cir. Oregon County, Missouri) **Region 9**—On September 24, 2020 the Circuit Court of Oregon County Missouri issued a decision unfavorable to the Missouri Department of Natural Resources (MDNR). The case concerns purchased lands by the state for a public park, which lands are located within the boundaries of the Federal Wild and Scenic Easement. The Forest Service is not named in this case but is interested in the outcome of the easement. The County lands are located near Mark Twain National Forest.
The Plaintiff claims the MDNR lacks the authority to purchase lands for a public park., that are located within the boundaries of the Federal Wild and Scenic Easement.

The Circuit Court of Oregon County Missouri found no public use for real property upon which there exists such restrictive easement as herein specifically excluding use by the public. The Scenic Easement Deed prohibits, by way of example only and not a complete listing, the following: uses (for) campsites, construction of roads or buildings, launching of watercraft, utility right of way, use of the easement to access the river, public entry, and public vehicle access. The court determined that the MDNR acquired lands, cannot under any reasonable interpretation be used by the public as park. As such its actions are unlawful. The court directs

the MDNR to divest itself of ownership of the lands within the bounds of the Wild and Scenic Easement.

Litigation Update

Nothing to Report

New Cases

Nothing to Report

Notice of Intent

Nothing to Report

Other Cases

Nothing to Report

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