Court Decisions

Land & Mining | Region 3

Apache Stronghold v. United States (21-50, D. Az.) **Region 3 –** This case concerns the conveyance of **Oak Flat Parcel** to Rio Tinto and BHP via their subsidiary Resolution Copper Mine, which is within the proposed "**Southeast Arizona Land Exchange** and **Resolution Copper Mine Project**" on the **Tonto National Forest**. On February 12, 2021, the District Court in Arizona denied the Plaintiff's motion for temporary restraining order (TRO) and preliminary injunction after a hearing on February 3, 2021 after first denying an emergency TRO on January 14, 2021 because plaintiffs could not show immediate and irreparable injury.

Plaintiffs originally alleged violation of First Amendment Right to Free Exercise of Religion, Right to Petition and Remedy, Fifth Amendment Right to Due Process, Statutory rights guaranteed by the Religious Freedom Restoration Act.

The district court found:

- Breach of Trust/Fiduciary duties
    - Standing: Plaintiffs lack standing to bring the breach of trust claim. Plaintiffs have not shown the treaty- or any other law-creates an individual trust duty the United States breached by authorizing the land exchange over the tribal right as a nation.
    - Merits: Plaintiffs are unlikely to succeed on the Merits. Plaintiffs do not point to any specific trust language regarding the land at issue in the 1852 Treaty or elsewhere. The 1852 Treaty did not create a trust relationship. The treaty generally agreed that they would, at a later date, designate territorial boundaries. Even if a trust relationship was created by the Treaty, Congress made clear its intent to extinguish997 that trust by passing Section 3003 of the NDAA.
- RFRA and First Amendment Free Exercise Clause (Substantial Burden)
    - The law at issue here section 3003 of the NDAA is a neutral law of general applicability. It merely authorizes the exchange of land with a mining company and although will affect the Apaches' religious practices deeply, that is not its purpose.
    - The Plaintiffs have not been deprived a government benefit, nor has it been coerced into violating their religious beliefs. Oak Flat does not provide the type of 'benefit'

required under RFRA jurisprudence. Building a mine on the land isn't a civil sanction provided under the RFRA

- First Amendment Free Exercise Clause (Intentional Discrimination)
    - The Court finds that the Plaintiff has not demonstrated a likelihood of success on, or serious questions going to, the merits of its other claims.
    - The land exchange is facially neutral and Plaintiff has not provided evidence of any discriminatory intent behind its passage. Because of Section 3003 being neutral, plaintiffs are unlikely to success on its Intentional Discrimination claim.
- Due Process and Petition Claims
    - Standing: Plaintiff likely lacks standing to contest the publication of the FEIS because Plaintiff cannot show that a favorable decision from this Court would redress its alleged injury. The Plaintiffs TRO Motion, Plaintiff's alleged injury stems from the land exchange, not the FEIS publication. The Apache Stronghold has not demonstrated its standing to bring the Due Process and Petition Clause Claims.
    - Merits: Even if they had standing, plaintiffs are unlikely to succeed on the merits. Plaintiffs claim they only had 11 days to contest the FEIS, but they had longer as the Forest Service published a notice of intent to prepare an FEIS on March 18, 2016. Plaintiffs had sufficient notice to contest the FEIS and because of that, will unlikely not be successful.

Conclusion: Plaintiff has not identified a likelihood of success on, or serious questions going to, the merits of its claims and accordingly, the Court need not address the remaining Winter Factors and deny the Preliminary Injunction and Temporary Restraining Order.

Background

On January 12, 2021, the plaintiff filed a complaint in the District Court of Arizona against the United States, U.S. Department of Agriculture, and the Forest Service, regarding the conveyance of **Oak Flat Parcel** to Rio Tinto and BHP via their subsidiary Resolution Copper Mine, which is within the proposed "**Southeast Arizona Land Exchange** and **Resolution Copper Mine Project**" and that the Forest Service is set to issue the final environmental impact statement (FEIS) on the exchange on January 15, 2021. The plaintiff alleges violation of their First Amendment Right to Free Exercise of Religion, Right to Petition and Remedy, Fifth Amendment Right to Due Process, Statutory rights guaranteed by the Religious Freedom Restoration Act and fiduciary duty owed to the plaintiff, with the conveyance of the Oak Flat Parcel. The plaintiff claims the Forest Service does not own the Oak Flat Parcel, and they claim to retain ownership of the parcel through their 1852 Treaty with the United States.

Land | Region 4

Western Watersheds Project, et al. v. Bernhardt, et al. (16-83, D. ID.) **Region 4** – BLM's decision to cancel the proposed mineral withdrawal of 10 million acres of federal lands located in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming, which had previously been identified as Sagebrush Focal Area (SFA) essential for the long-term health of **sage grouse**. On February 11, 2021, the Court Granted in part Plaintiffs' Motion on APA violation claims but denied their Motion on the NEPA violation claim. The BLM's cancellation of the application and proposal for the SFA Mineral Withdrawal was VACATED and remanded to the BLM for further proceedings and consideration of whether the withdrawal is needed for sage grouse conservation. Such proceedings shall include re-initiation of the NEPA process.

The court found:

- The BLM failed to provide a reasoned explanation for reversing its prior position that the SFA mineral withdrawal was needed.
    - The Court finds that the reasons given do not provide the reasoned explanation needed to support the BLM's change in position regarding the need for the withdrawal, rendering the cancellation decision arbitrary and capricious.
- The BLM failed to account for serious reliance interests (by the FWS) in cancelling its withdrawal application.
    - The record is clear that the FWS relied on the proposed withdrawal in making its 2015 finding that the listing of the sage grouse as a threatened or endangered species "is not warranted at this time."
    - FWS made comments on the DEIS submitted on March 2017 where they stated their reliance. Specifically, the "planned withdrawal was included and relied upon in the [FWS's] 2015 not warranted finding to show the reduction in risk of habitat loss and fragmentation due to locatable mineral development in GRGS habitat."
    - No argument or evidence was provided that indicated BLM considered FWS's reliance on the proposed withdrawal in its decision to cancel the withdrawal.
    - BLM had an obligation to take the FWS's reliance into account in changing its position regarding the need for the withdrawal and making the decision to cancel the withdrawal.
- The BLM failed to consider significant benefits of the withdrawal.
    - BLM's cancellation decision entirely failed to consider the following important environmental considerations:
        (1) Functional habitat loss
            - BLM did not consider functional habitat loss that could occur from locatable mining in making its cancellation decision.

    - The difficulty of quantifying functional habitat loss under various alternatives does not allow BLM to disregard and fail to consider impacts.
  - (2) Loss of population connectivity
    - There is no indication that BLM considered the impacts of locatable mining and exploration activity on genetic connectivity.
    - BLM failed to address the FWS's connectivity concerns.
  - (3) Possibly severe localized impacts
    - BLM failed to quantify or pinpoint where the localized impacts from future mining and exploration projects could occur.
    - BLM failed to consider altogether the localized impact that projects could have in a general way based on the information it did have.
- The BLM did not violate NEPA by making the cancellation decision before completing the EIS process.
  - There is nothing that requires the BLM to complete a final EIS before cancelling its application even though the process was started.
  - There was no proposed Federal action that would significantly affect the quality of the human environment, therefore no EIS was required.

Background

The original complaint was brought by four different environmental groups challenging fifteen Environmental Impact Statements (EISs) issued in 2015 that govern land covering ten western states. Plaintiffs' alleged the BLM and Forest Service artificially minimized the harms to sage grouse by segmenting their analysis into 15 sub-regions without conducting any range-wide evaluation—the agencies looked at the trees without looking at the forest.

Plaintiffs brought their claims under the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the National Forest Management Act (NFMA).

Plaintiffs argue that the cancellation decision must be reversed because (1) the BLM's cancellation decision was arbitrary and capricious under the APA; and (2) the BLM's cancellation decision violated NEPA because the BLM issued the decision before completing the EIS process. Defendants argue that their cancellation decision must be upheld because (1) the BLM adequately explained that its cancellation of the withdrawal application was based on new data and information; and (2) the BLM was not required to finish the NEPA process because it had cancelled the withdrawal proposal and there was thus no proposal before the agency.

Mining | Region 6

Cascade Forest Conservancy v. Hepler, et al. (19-424-HZ, (D. OR.) **Region 6 – Goat Mountain Hardrock Mineral Prospecting Permits** on the **Gifford Pinchot National Forest**. On February 15, 2021, The Court issued an order granting in part and denying in part the Parties cross motions for Summary Judgment (SJ) and Preliminary Injunction (PI). The Plaintiff's original Claims are the Defendants failure to comply with LWCFA and the Reorganization Plan No. 3 of 1946 and alleged six counts of violations of NEPA.

Plaintiffs originally alleged violation of Administrative Procedures Act (APA) in violation of the National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA)

The District Court found:

Claim 1: Reorganization Plan No. 3 and LWCFA

- Interference with Outdoor Recreation
  - The Defendants did not fail to make the required finding that the proposed project would not interfere with outdoor recreation as alleged by plaintiffs
  - USFS did not ignore the plain meaning of the statutory text nor applied an unlawful "temporary" exception to the statutory standard
  - Because of the temporary and limited nature of the project, it will not hinder the over-arching purpose of the lands procured under Land and Water Conservation Fund Act (LWCF) for recreational use
- Failure to Consider Recreation as Primary Purpose
  - Defendant USFS complied with the LWCF Act in making its determination that the proposed action is not inconsistent with the primary purpose
  - Defendant did not err in focusing on the temporary and limited nature of the Proposed Action and its effects on recreation
  - The separate consideration of mineral development in the consent decision does not render the USFS's analysis improper under APA
  - The Court and USFS recognizes that the parcels at issue have multiple primary purposes and the LWCF Act does not require that the land be used exclusively for outdoor recreation

Claim 2: NEPA

- Count 1: Reasonable Alternatives - FS
  - The Court finds that the 2017 EA gives an adequate explanation for eliminating the alternative that would limit prospecting.

- Count 2: Cumulative Impacts - FS
  - Future Mine
    - The 2017 EA concludes that a future mine is not a reasonably foreseeable future action based on the current state of mineral knowledge of the Area and the lack of existing decisions, funding or proposals for development of a mine in the Area
    - Defendants were not required to consider a future mine in their cumulative impacts analysis.
  - Renewal of Permit
    - Plaintiff does not point to any specific data providing the agencies with specific, quantifiable information about a future permit extension
    - Plaintiff relies on the mere existence of the permit renewal regulations
- Count 3: Hard Look
  - The 2017 EA contains an eight-page assessment of the impacts the Proposed Action would have on recreation
  - The chosen alternative, number 4, would reduce impacts on recreation by eliminating drill Pads 6 and 7 and the drill pads closest to the Horse Camp
  - Defendants did not err in limiting their analysis of the impacts on recreation to a five-month period
  - The Court agreed that the 2017 EA's analysis of the Project's impacts on recreation is often confusing and inconsistent, most notably is the vague analysis as to the extent of the exclusion of recreators from the Project Area.
- Count 4: Baseline Groundwater Analysis
  - The 2017 EA contains a substantial discussion of the topography, geology, and hydrogeology of the Project Area
  - The groundwater also included a metals related analysis as part of a 55 page baseline groundwater resources report
  - The Court still finds that, despite the extensive report, it is still inadequate under NEPA
  - The EA fails to explain why the three historical drillholes sampled once in 2014 are sufficient to establish an adequate baseline for the entire Project Area
- Count 5: Failure to Prepare an EIS
  - Court deferred consideration as to Count 5, failure to prepare an EIS violated NEPA and seeks further briefing on this issue along with the remedies
- Count 6: NEPA's Public Participation Requirement
  - The Agency did not violate NEPA when failing to respond to the public's timely requests for information

Conclusion: The Court grants Defendants' Summary Judgment on the Plaintiff's first claim and Counts 1, 2 and 6 of the second claim and denies the Plaintiffs on the same. The Defendants are denied Summary Judgment and Plaintiffs are granted it on Counts 3 and 4 of its second claim.

All parties must confer and file a joint status report to include a proposed briefing schedule for Count 5 of the Plaintiff's second claim within 30 days of the date of the order.

Recreation & Wildlife | Region 1

Friends of the Clearwater; Alliance for the Wild Rockies v. Jeanne M. Higgins and Stimson Lumber Company. (20-00243) **Region 1**. On February 23, 2021, the Ninth Circuit **DENIED** Friends of the Clearwater; Alliance for the Wild Rockies (FOTC) motions for judicial notice of extra-record material and **GRANTED** the Agency's motion to strike the material, without discussion. The Court affirmed the District of Idaho's decision denying appellant's motion for a preliminary injunction in its challenge to the Brebner Flats Project.

FOTC appealed the district court's denial of their motion for a preliminary injunction to prevent timber harvest and road construction by USFS and Stimson Lumber Company in the Brebner Flat Project in Shoshone County, Idaho.

The Court found that the district Court did not make a mistake by:

- Requiring a showing of harm to the species of grizzly bear, rather than harm only to the interests of FOTC's members.
- Finding that FOTC failed to establish that grizzly bears are likely to be irreparably harmed.
- Failing to adequately analyze (a) the cumulative effects of the Project on elk, and (b) the efficacy of the chosen mitigation measures for elk.
- In its assessment of FOTC's likelihood of success on the merits of their NEPA claims and irreparable harm on their ESA claim, the Court did not address the remaining Winter factors for each of FOTC's claims.
- The district court weighed the effect of the agency's misstatement on public participation and concluded that the EA's single sentence incorrectly stating the scope of the Project did not drastically undermine public participation as to make the USFS's action unlawful.

Background:

FOTC did not identify any record evidence that undermines the district court's finding that FOTC failed to show a definitive threat to grizzly bears because "no bears have ever been identified in the project area, there is no known bear population in the St. Joe Ranger District, and the project area is not in critical bear habitat." USFS was not required to engage in a fine-grained analysis of all historical details of past actions. The relevant National Environmental Policy Act regulations allow for an aggregate method of analyzing cumulative impacts. USFS's plan to implement a seasonal closure of an ATV trail with signage, gates, and gate monitoring to

increase the elk security habitat was reasonable. FOTC's ESA claim regarding the Canada lynx is moot so this was not addressed by the Court.

Timber & Travel Management | Region 10

Organized Village of Kake, et al. v. Shea, et al. (20-11, D. Alaska.) Region 10. On February 25, 2021, the District of Alaska granted defendant's motion to stay the case for 120 days from the date of the Order. However, the stay does not extend to motions to intervene filed during the stay and the Court may rule on such motions during the stay. Original allegation was violation of Alaska Roadless Rule.

Within 14 days after the end of the 120-day stay, or the Department of Agriculture having taken action regarding the Alaska Roadless Rule, whichever occurs first, the parties shall file joint or separate reports regarding future proceedings in this case.

Litigation Update

Nothing to Report

New Cases

Recreation | Region 6

Friends of the Columbia Gorge, Inc. v. USFS (21-239-AC, D. OR.) **Region 6** – The complaint alleges violations of the **Columbia River Gorge National Scenic Area Act** and the **Columbia River Gorge National Scenic Area Management Plan**. Plaintiffs are alleging a 65-acre logging project on private forestland violates federal protections for the Columbia River Gorge National Scenic Area.

On February 12, 2021, the plaintiff filed a complaint in the District Court of Oregon challenging the Forest Service's December 16, 2020 CRGNSA Consistency Determination, Synergy Forest Practice, CD-20-02-S (Consistency Determination). The Consistency Determination concluded that the proposed forest practices (logging) in the Burdoin Mountain Special Management Area Open Space (SMA Open Space) of the Columbia River Gorge National Scenic Area (Scenic Area) are consistent with the Columbia River Gorge National Scenic Area Act (CRGNSA Act) and the Management Plan for the Columbia River Gorge National Scenic Area (Management Plan). Plaintiff also alleges the Forest Service did not consider whether its decision will protect and enhance the natural resources of the Scenic Area.

The plaintiff claims:

1. Violations of the CRGNSA Act
   a. The Consistency Determination violates the CRGNSA Act's and the Management Plan's prohibitions against commercial forest practices on SMA Open Space lands.
   b. The Forest Service failed to consider whether the proposed logging activities are commercial forest practices.
2. Violations of the CRGNSA Act and the Management Plan
   a. Failure to consider the CRGNSA Act's and Management Plan's requirements to protect natural resources from adverse effects.
   b. Forest Service's review process failed to include field surveys within the project area for sensitive wildlife species.
      i. Failed to identify or verify precise locations of any sensitive wildlife nesting, roosting or perching sites.
      ii. Failed to determine if any wildlife areas or sites are currently active.
      iii. Failed to determine (based on biology and habitat requirements) whether the proposed use would compromise the integrity, function, or result in adverse effects (cumulative effects) to any wildlife areas or sites.
      iv. Failed to delineate appropriate buffers around wildlife areas or sites.
      v. Failed to ensure these steps occurred before the Agency terminated its review of the proposed project for the protection of natural resources or deemed the project consistent with the CRGNSA Act and Management Plan.

Notice of Intent

Timber | Region 1

On February 22, 2021, Friends of the Clearwater sent a 60 day Notice of Intent to sue to the U.S. Department of Agriculture (USDA), and the Forest Service claiming the approval of the "End of the World" Project (Project) on the Nez Perce National Forest in Idaho violated Section 7 of ESA and ESA's consultation regulations on the Nez Perce National Forest - Region 1. Complainants allege violation of Section 7 of the Endangered Species Act (ESA), regarding the Project. The Project is a 13-year logging project that the FS determined would have no effect on grizzly bear and thus never engaged in Section 7 consultation with the U.S. Fish and Wildlife Service. Complainants allege that there were grizzly bear sightings in the Project area and should have been determined as "may be present" and may be adversely affected by the increase in road density, noise, risk of human conflict and other impacts with logging 50,000 acres and construction 15 miles of roads.

Friends of Clearwater claim:

- ESA Violations:
  - FS violated Section 7 of ESA by failing to consult, formally or informally, with USFWS over the effects to grizzly bear in the Project area
  - USFWS Determined grizzly bear 'may be present' in the project area
  - FS determined 'no effect' on grizzly bear

Project: The Project encompasses 18,000 acres in the Nez Perce National Forest located on the Salmon-Clearwater Divide. On January 25, 2021 the FS signed a Decision Notice and Finding of No Significant Impact (DN/FONSI) authorizing the Project based on their Environmental Assessment (EA). The project approves logging, prescribed burning, road construction and other activities.