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***Theodore Roosevelt Conservation Partnership v. Salazar*
___ F.3d ___, 2010 WL 2869778 (C.A.D.C. July 23, 2010)**

Josh Nichols

ABSTRACT

In *Theodore Roosevelt Conservation Partnership v. Salazar*, the United States District Court of Appeals, District of Columbia, upheld a district court decision denying environmental groups' claims that the Bureau of Land Management's Record of Decision, accompanying environmental impact statement, and subsequent drilling permits violated the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act. The Court concluded that appellants failed to show any of the Bureau of Land Management's decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The decision was a victory for groups pursuing development of a mineral-rich region of south-central Wyoming.

INTRODUCTION

Groups pursuing development of a mineral-rich region in south-central Wyoming could continue moving forward with development plans after the United States District Court of Appeals, District of Columbia Circuit's decision in *Theodore Roosevelt Conservation Partnership v. Salazar*.²⁵⁷ The court upheld a district court decision in favor of the Bureau of Land Management denying environmental groups' claims that the agency's Record of Decision, an accompanying environmental impact statement, and subsequent drilling permits violated the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Administrative Procedure Act.

NEPA AND FLPMA

²⁵⁷ *Theodore Roosevelt Conserv. Partn. v. Salazar*, ___F.3d___, 2010 WL 2869778 (D.C. Cir. July 23, 2010).

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to consider environmental effects of proposed actions.²⁵⁸ In order to come to a “fully informed and well-considered decision” under NEPA, an agency must prepare and circulate for public review an environmental impact statement (EIS) that examines a proposal’s environmental impact.²⁵⁹ An EIS must assess the proposed project’s impact in conjunction with other projects in the surrounding area, and it must explain in detail adverse environmental impacts that would occur if the proposals were implemented.²⁶⁰ An EIS is not required if it is unclear whether an action will “significantly affect” an environment. Instead, agencies can prepare an environmental assessment (EA), a document intended to “briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact.”²⁶¹

The Federal Land Policy and Management Act of 1976 (FLPMA) requires the Bureau of Land Management (BLM) to manage public lands under “principles of multiple use and sustained yield.”²⁶² Interests of competing uses -- including recreation, range, timber, minerals, watershed, and wildlife -- must be balanced.²⁶³ The BLM uses a multi-step planning and decision-making process to fulfill the FLPMA mandate. First, the BLM creates a resource management plan (RMP) for a region. The plan describes an area’s allowable uses, goals for the land’s future condition, and specific next steps.²⁶⁴ Projects are reviewed and approved separately, but must conform to the RMP.²⁶⁵

FACTUAL BACKGROUND

²⁵⁸ 42 U.S.C. § 4321 (2006).

²⁵⁹ § 4332 (2)(C).

²⁶⁰ § 4332(2)(C)(ii).

²⁶¹ 40 C.F.R. § 1508.9(a)(1) (Westlaw current through Aug. 5, 2010).

²⁶² 43 U.S.C. § 1732(a) (2006).

²⁶³ § 1702(c).

²⁶⁴ *Theodore Roosevelt*, 2010 WL 2869778 at *2 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004)).

²⁶⁵ 43 C.F.R. § 1610.5-3(a) (Westlaw current through Aug. 5, 2010).

The BLM released a record of decision that established the Atlantic Rim Natural Gas Field Development Project in March 2007.²⁶⁶ The Atlantic Rim Project was designed to manage the resources of more than 270,000 acres of public and private land in south central Wyoming's Carbon County.²⁶⁷ The area contained valuable oil and natural gas deposits, wildlife habitat, grazing land, and big-game hunting opportunities.²⁶⁸ Several oil and gas wells already existed in the area and accounted for more than five percent of Wyoming's natural gas production.²⁶⁹

The Atlantic Rim Project lies within the 12.5 million-acre area in southern Wyoming governed by the Great Divide Resource Management Plan.²⁷⁰ That plan, released by the BLM in 1990, set forth long-term goals and objectives for the use and management of area resources.²⁷¹ Under the plan, the entire area was open to oil and gas leasing, but was subject to restrictions near historic trails, sage grouse breeding areas, and big game winter range.²⁷²

The Atlantic Rim Project's Record of Decision released in March 2007 projected the approval of 2,000 new natural gas wells in the area over the next 30 to 50 years.²⁷³ The drilling was projected to cause 13,600 acres of surface disturbance that would decrease soil quality, encourage erosion, diminish grazing land, and release gases that contribute to ozone pollution.²⁷⁴ The project would also impact the greater sage grouse, which the BLM has listed as a "Sensitive Species."²⁷⁵ This listing requires the BLM to "improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted."²⁷⁶

²⁶⁶ *Theodore Roosevelt*, 2010 WL 2869778 at *1.

²⁶⁷ *Id.* at *3.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at *2.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at *3.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

While the Record of Decision acknowledged the Atlantic Rim Project Area contains an abundance of sage brush well suited for sage grouse nesting and breeding, it also cited potential long-term declines in population resulting from surface-area disturbance.²⁷⁷

To mitigate potential damage from the project, the Record of Decision and final Environmental Impact Statement outlined conditions of approval for all drilling proposals.²⁷⁸ For instance, overall surface disturbance could not exceed 7,600 acres at a time, and total surface disturbance over the project's life could not exceed 13,600 acres.²⁷⁹ Also, drilling was not permitted within a .25 mile radius of sage grouse breeding grounds and was restricted in certain areas during certain times of year.²⁸⁰ While the Atlantic Rim Project outlined several conditions for drilling application approval, the Record of Decision left many specific management decisions regarding drilling applications to be decided on a case-by-case basis.²⁸¹ Each application to drill would require public notice, and the BLM would conduct an EA before approving each application.²⁸²

Shortly after it released the March 2007 Record of Decision, the BLM approved multiple permission to drill applications, known as plans of development, or PODs. The PODs specified where and how many wells were to be drilled, where supporting infrastructure was allowed, and precise mitigation measures. Two PODs were approved in one project unit for 39 wells, and two more PODs were approved in another unit for 51 wells. EAs indicating a finding of "no significant impact" accompanied each approval.²⁸³

PROCEDURAL BACKGROUND

²⁷⁷ *Id.*

²⁷⁸ *Id.* at *4.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

Theodore Roosevelt Conservation Partnership (TRCP) and several other environmental groups filed appeals to the Interior Board of Land Appeals challenging the validity of the Atlantic Rim Project Record of Decision and final EIS in June 2007.²⁸⁴ TRCP also filed a complaint in U.S. District Court requesting injunctive relief against the Department of Interior and BLM.²⁸⁵ The Court granted summary judgment in favor of the Department of Interior, and the environmental groups appealed.²⁸⁶ On appeal, TRCP made the following arguments:

1) the scope of the Atlantic Rim Project exceeded the scope of the Great Divide RMP; 2) the BLM's reliance on the "Scheffe method" to estimate ozone concentrations violated NEPA and was arbitrary and capricious; 3) the BLM's exclusion of possible future projects from its cumulative impact analysis was arbitrary and capricious and in violation of NEPA; 4) the adaptive management plan and other mitigation efforts in the Record of Decision were too vague and failed to satisfy NEPA; 5) the Atlantic Rim Project violated the multiple use and sustained yield goals of FLPMA; and 6) the BLM failed to provide sufficient public notice and opportunity for public comment on the environmental assessments for the PODs.²⁸⁷

U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT DECISION

1. Scope

The draft EIS for the Great Divide RMP anticipated about 1,440 wells drilled between 1987 and 2007. But during that 20-year span, the BLM approved 2,000 more wells than that original estimate.²⁸⁸ By the time the Atlantic Rim Project was approved, authorizing an additional 2,000 wells, more than 3,600 wells already had been approved in the Great Divide Resource Area. Appellants argued that the Atlantic Rim Project approved development so far in excess of the RMP projection that the project was inconsistent with the RMP, which was a violation of NEPA and FLPMA.²⁸⁹

²⁸⁴ *Id.*

²⁸⁵ *Id.* at *5.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at *6.

²⁸⁸ *Id.* at *7.

²⁸⁹ *Id.*

The court held that the project did not violate NEPA or FLPMA.²⁹⁰ Neither the EIS nor the Record of Decision had included a 1,440-well estimate. It simply stated the entire area was available for oil and gas leasing subject to environmental restrictions. Nevertheless, the Court noted even if the 1,440-well estimate had been included in the final decision, it was only an “estimate” and did not impose a cap on the actual number of wells that could be drilled in the area.²⁹¹ The Court acknowledged that appellants provided no evidence that the environmental impact exceeded the impact anticipated by the Great Divide RMP. Reasoning that exceeding the number of wells projected did not necessarily mean that the predicted environmental effects were exceeded, the Court held that it was reasonable for the BLM to conclude that the existing Great Divide RMP encompassed the Atlantic Rim Project proposed development, and therefore, the BLM’s decision did not violate NEPA.²⁹²

2. The Scheffe Method

The BLM used the Scheffe method to estimate the effect proposed development would have on ozone concentrations.²⁹³ Appellants argued that the method, a mathematical model developed in 1988, was outdated and therefore violated NEPA.²⁹⁴ Appellants asserted that the agency failed to take a sufficient “hard look” at ozone impacts and failed to ensure the scientific integrity of their EIS, which the law requires.²⁹⁵

The Court rejected both of appellants’ arguments. The Court believed that the BLM’s use of the Scheffe Method was justified because it was an “overly conservative” model that had the potential to overestimate ozone impacts.²⁹⁶ Also, the Record of Decision required ozone and

²⁹⁰ *Id.* at *8.

²⁹¹ *Id.* at *7.

²⁹² *Id.*

²⁹³ *Id.* at *8.

²⁹⁴ *Id.*

²⁹⁵ 40 C.F.R. § 1502.24 (Westlaw current through Aug. 5, 2010).

²⁹⁶ *Theodore Roosevelt*, 2010 WL 2869779 at *9.

other pollutant monitoring.²⁹⁷ Addressing the argument that the Scheffe method was outdated, the Court noted that the Atlantic Rim Project’s air quality analysis was completed one month before the BLM’s decision to use a different methodology for future air quality analyses.²⁹⁸ Reasoning that the BLM was required to ensure scientific integrity of an EIS under 40 C.F.R. § 1502.24, not the “best, most cutting-edge methodologies,” the Court held the BLM’s reliance on the Scheffe method did not violate NEPA requirements.²⁹⁹

3. Cumulative Impact Analysis

An EIS must not only reflect the direct impact of the proposed project, but the “cumulative effects” by incorporating the effects of other past, present and reasonably foreseeable future actions.³⁰⁰ Appellants asserted that the BLM acted arbitrarily and capriciously when it failed to include in its Atlantic Rim Project EIS effects of two other potential development projects in the area.³⁰¹ While the Hiawatha Regional Energy Development Project and the Continental Divide-Creston Natural Gas Project began much later than the Atlantic Rim Project, the development period for those two projects overlapped with the Atlantic Rim Project’s EIS consideration.³⁰²

The Court agreed with the District Court’s opinion that because the Continental Divide and Hiawatha projects were in their infancy when the Atlantic Rim Project was being finalized, it was difficult to predict the incremental impacts of those two projects.³⁰³ Demonstrating the uncertainty involved in predicting a project’s impact, the Court noted that proposed drilling ranged from 96 wells, to 3,380 wells, back to 2,000 wells through the EIS consideration

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 10.

³⁰⁰ *Id.* at *11 (citing 40 C.F.R. § 1508.7: *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C.Cir. 2002)).

³⁰¹ *Theodore Roosevelt*, 2010 WL 2869778 at *11.

³⁰² *Id.*

³⁰³ *Id.* at *12.

period.³⁰⁴ The Court went on to explain that even though an agency must consider the cumulative environmental impact of several concurrent proposals, an “agency need not revise an almost complete environmental impact statement to accommodate new proposals submitted to the agency, regardless of the uncertainty of maturation.”³⁰⁵ Accordingly, the Court held that the other two projects were too preliminary to estimate their cumulative impacts on the Atlantic Rim Project EIS.³⁰⁶

4. Adaptive Management Plan

Appellants argued that the Atlantic Rim Project adaptive management plan violated NEPA’s requirement to evaluate environmental impacts before actions are taken and failed to discuss mitigation measures in its EIS and Record of Decision.³⁰⁷ But the Court noted that the Record of Decision and EIS contemplated several mitigation techniques including surface disturbance limits of 7,600 acres at any time and disturbance limited to certain areas to protect wildlife.³⁰⁸ The plan also outlined performance goals including maintaining functional migration routes, providing undisturbed winter range for big game, and maintaining adequate water quality for sensitive fish populations.³⁰⁹

The adaptive management plan also incorporated a list of specific protective measures that a review team was required to consider for each drill plan.³¹⁰ Measures included requiring operators to surround drill pads with hay or mulch to reduce erosion, erect signs near pastures to warn vehicle operators, and limit short-term surface disturbance around sage grouse habitats.³¹¹

By setting forth fixed mitigation measures and an adaptive management plan, the Record of

³⁰⁴ *Id.*

³⁰⁵ *Id.* at *13.

³⁰⁶ *Id.* at *12.

³⁰⁷ *Id.* at *14.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at *15.

³¹⁰ *Id.*

³¹¹ *Id.*

Decision fulfilled NEPA’s mandate to consider mitigation measures.³¹² “Allowing adaptable mitigation measures is a responsible decision in light of the inherent uncertainty of environmental impacts, not a violation of NEPA.”³¹³

5. Multiple Use

FLPMA requires the BLM to “manage public lands under principles of multiple use and sustained yield.”³¹⁴ Appellants argued that the Atlantic Rim Project violated those principles by allowing natural gas development to the “permanent detriment of other uses.”³¹⁵ Nevertheless, because the BLM has substantial discretion to decide how to achieve multiple use, and “each individual project and parcel of land need not, and cannot, reflect all FLPMA’s purposes,” the Court held that the BLM fulfilled its FLPMA multiple use obligations.³¹⁶

6. Notice and Comment

Appellants argued that the BLM did not adequately involve the public in its development of EAs and approval of various Atlantic Rim Project Area drilling applications.³¹⁷ The public must have an opportunity to “play a role in the decision making process and the implementation of that decision” under NEPA.³¹⁸ The BLM posted notice of the drilling permit applications in the public reading room of the BLM’s regional office and posted EA preparation information on its website.³¹⁹ While the public notices lacked draft EAs or PODs and failed to provide any specific information regarding drilling, applications, such information was unnecessary.³²⁰ Reasoning that the BLM gave adequate public notice that it was considering drilling applications

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at *16 (citing 43 U.S.C. § 1732(a) (2006)).

³¹⁵ *Theodore Roosevelt*, 2010 WL 2869778 at *16.

³¹⁶ *Id.* at **16-17.

³¹⁷ *Id.* at *17.

³¹⁸ *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

³¹⁹ *Theodore Roosevelt*, 2010 WL 2869778 at *17.

³²⁰ *Id.*

and was preparing draft EAs, the Court held the BLM did not violate NEPA's requirement to include the public "to the extent practicable."³²¹

CONCLUSION

The United States Court of Appeals, District of Columbia Circuit, concluded that appellants failed to show that any of the BLM's decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³²² The Court affirmed the district court's decisions on all issues raised on appeal. Accordingly, the BLM's Record of Decision, the accompanying EIS, and subsequent drilling permits did not violate NEPA, FLPMA, or the Administrative Procedure Act.

³²¹ *Id.* at *18 (citing 40 C.F.R. § 1501.4(b) (Westlaw current through Aug. 5, 2010)).

³²² *Id.* at *19 (quoting 5 U.S.C. § 706(2)(A) (2006)).