Legal Trends in Land Use Planning

- Erica Niebauer

  Assistant Regional Solicitor

  Office of the Regional Solicitor

  Pacific Southwest

  Sacramento, CA

ESA SECTION 7 and LAND USE PLANNING

EMERGING LEGAL TRENDS

LUP ROD and BiOp

- The single most important document aside from the LUP ROD is the BiOp (biological opinion)

  If the BiOp fails, so does the ROD

- BLM has responsibilities under the ESA
- How does BLM protect itself from failed BiOps?

BLM'S RESPONSIBILITIES UNDER ESA SECTION 7

- Biological assessment
- Consultation to ensure no jeopardy and no adverse modification
- Conserve listed species
- 7(d) requirement
- Duty to reinitiate consultation

Biological assessment

- ESA sec. 7(c); 50 CFR 402.12: a BA is used to evaluate potential effects of an action on listed and proposed species and critical habitat to determine the likelihood of adverse effect; required for major construction activities
- Blake, 156 IBLA 280 (2002): a BA is a grazing decision subject to protest and appeal
- M-Opinion (2009): a BA is not a grazing decision; it is merely information for the ESA consultation process

Consultation under ESA section 7

- 16 U.S.C. 1536(a)(2): section 7 consultation is required to insure that any action authorized, funded or carried out is not likely to jeopardize listed species or destroy or adversely modify critical habitat.
- National Assoc. of Homebuilders, 127 S. Ct. 2518 (2007): consultation does not apply to non-discretionary action (The U.S. Supreme Court held that the no-jeopardy duty under the ESA only applied to discretionary actions and thus it did not apply to the permitting transfer approval which was mandatory under the CWA once the specified triggering criteria were met).
- Gifford Pinchot, 378 F.3d 1059 (9th Cir., 2004): court invalidates FWS regulatory definition of adverse modification; FWS regulation required an "appreciable reduction in both survival and recovery"; Court determined regulation was in violation of the ESA. In accord with 5th Circuit.
- Sierra Club v. United States Fish & Wildlife Serv., 245 F.3d 434 (5th Cir. 2001): the ESA requires consultation where an action affects recovery alone; it is not necessary for an action to affect the survival of a species.
- ESA regulations: Interagency Cooperation under the ESA (73 Fed.Reg. 76272, 12/16/08): expands "no effect" determination to include if "no take and wholly beneficial to the species", "no measurable effects", or "manifested through global processes", no consultation required.

Consultation and LUPs

- Pacific Rivers Council, 30 F.3d 1050 (9th Cir. 1994): LUPs are on-going agency actions subject to continuing ESA consultation; reaffirmed by 9th Cir. in 2005 with Washington Toxics Coalition, 413 F.3d 1024 (9th cir. 2005) decision.
- SUWA, 542 U.S. 55 (U.S. Supreme Ct. 2004): LUP approval is a major federal action under NEPA; it is complete when the plan is approved.
- Forest Guardians, 478 F.3d 1149 (10th Cir. 2007): approving, amending, revising an LUP requires consultation; once approved, the action ends.

Use of agency programs to conserve species

- Sierra Club, 156 F.3d 606 (5th Cir. 1998): agencies have a specific requirement to develop conservation programs; must consult on specific species; generalized consultation is not enough.
- Pyramid Lake, 898 F.2d 1410 (9th Cir. 1990): agencies have a general requirement to develop conservation programs, the specifics are discretionary; program cannot be insignificant.
- Fla Key Deer, 522 F.3d 1133 (11th Cir. 2008): the specifics of the programs are discretionary, but there must be a program to conserve species with reasonably likely conservation effects; anything less would amount to inaction.

7(d) prohibition against I/I commitments of resources

- Sierra Club, 816 F.2d 1376 (9th Cir. 1987): without a BiOp an injunction may issue; during consultation, 7(d) applies
- Pacific Rivers Council, 30 F.3d 1050 (9th Cir. 1994): "may affect" activities may not go forward without a BiOp; other activities may go forward if Court determines no I/I commitment of resources that preclude FWS formulation of reasonable and prudent alternatives.
- Washington Toxics, 413 F.3d 1024 (9th Cir. 2005): non-jeopardizing activities may continue pending consultation; agency must show the activity is non-jeopardizing.

7(d) prohibition continued

- National Wilderness Institute, 2005 U.S. Dist. Lexis 5159 (D.C. Cir. 2005): 7(d) ensures "status quo" is maintained during consultation; the issuance of a permit however does not violate 7(d) because it can be modified or rescinded; discharges were not 7(d) violations either because they would not I/I preclude formulation of alternatives.
- CBD v. BLM, 422 F. Supp. 2d 1115 (N.D.Cal.2006): until the FWS issues a BiOp that comports with the ESA, there is a continuing violation of the Act and an appropriately tailored injunction is appropriate; continuation of grazing OK but OHV use not OK based on "on the ground" conditions and harm to DT.
- Pacific Coast Fishermen, 2008 U.S.Dist. Lexis 98568 (E.D. Cal. 2008): only non-jeopardizing activity may take place during consultation

Duty to reinitiate consultation

- Sierra Club, 816 F.2d 1376 (9th Cir. 1987): all federal agencies must consult under section 7.
- 50 CFR 402.16: consultation criteria:
  - Amount or extent of taking is exceeded
  - New information reveals effects of the action not previously considered
  - Modification of the action previously consulted
  - Newly listed species or designated critical habitat

What to do if the BiOp is invalidated

- Reinitate consultation
- Comply with 7(d)
- Seek to retain as much of the BiOp as possible
- Continue to operate under negotiated terms

RS 2477 and Land Use Planning

- Uptick in litigation respecting RS 2477 claims
- The statute reads:

  > "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

- The question is what do we do with these claims.

FLPMA repealed RS 2477

- No RS 2477 can be created after October 21, 1976.
- Any RS 2477 ROW in existence before FLPMA was preserved.
- FLPMA had the effect of freezing the RS 2477 ROW as of the date of its passage.

How was an RS 2477 ROW established

- No administrative formalities are required

  no entry, application, license, patent, deed

  no “formal” act of public acceptance

- RS 2477 highways were constructed without any approval from the federal government and with no documentation to the public land records

construction

mechanical construction is not required

an RS 2477 ROW could be “constructed” by mere use of a route that brings it into existence.

highway

- The law of the state controls what is a highway
- Routes laid out or erected by the public, or dedicated to the public, are all public highways.
- A public highway continues until it is vacated or abandoned by order or operation of law.
- Proof of use for more than 5 years constitutes dedication of the land as a highway.

scope

- Must consider the condition of the county at the time of the grant
- Any doubt as to scope is resolved in favor of the federal government
- RS 2477 grants have no particular width, length or road surface
- An RS 2477 holder may only make “reasonable and necessary” improvements to meet the exigencies of increased travel if within traditional uses of the road
- Scope encompasses physical attributes

Departmental position on RS 2477

- Secretarial Memorandum March 22, 2006
- Attached guidelines
- Instruction memoranda
- Recordable disclaimers of interest regulations (43 CFR Subpart 1854)

Secretarial memorandum March 22, 2006

- Based upon SUWA v. BLM, 425 F.3d 735 (10th Cir. 2005)
- Directs agencies to issue guidance
- Interprets SUWA to hold:

  BLM can't make "binding determinations" of title re: RS 2477;

  BLM retains authority to make "non-binding determinations" of title for its planning purposes;

Secretarial memorandum March 22, 2006 continued

Federal law governs RS 2477 interpretations; but

State law determines whether a state/county has accepted an RS 2477;

A claimant must prove an RS 2477;

Continuous use over time establishes an RS 2477;

Mechanical construction and identifiable destinations are not required.

Secretarial memorandum March 22, 2006 continued

Secretary's guidance applies nationwide;

Secretary directs all Interior bureaus:

"to ensure that their administration of claimed and recognized rights of way upholds the Department's right and obligation to protect underlying and surrounding Federal lands it manages…"

Instruction Memos

- IM 2006-159 and attachment 2 to Secretary's memo: BLM "may make" NBDs for planning and management purposes; "may be appropriate" before closing or restricting routes
- IM 2008-174: use RMAs to maintain the status quo with the claimant
- IM 2008-175: consult w/claimant on proposed "improvements" to RS 2477 ROW or possible trespass

Ways to acknowledge RS 2477 rights

- NBD’s: for planning purposes only
- RMA’s: to maintain the “status quo”
- FLPMA Title V: official ROW grants
- RDI’s: similar to a quit claim; no title vests in claimant however
- QTA litigation: only definitive way to establish an RS 2477

RS 2477 in summary

- RS 2477 remains somewhat in flux
- New Administration has not yet weighed in
- For planning purposes, consider the status of RS 2477 assertions

Climate Change and Land Use Planning

- Massachusettes v. EPA, 549 U.S. 497 (2007): U.S. Supreme Court determines that the harms associated with climate change are serious and well recognized. Court holds that EPA has the authority under the Clean Air Act to regulate GHGs from motor vehicle emissions.

Climate change and NEPA

- CBD v. NHTSA, 538 F.3d 1172 (9th Cir. 2008): In addressing average fuel economy standards for light trucks, the court stated "climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control…[this] does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming".

- In favorably referencing another 9th Circuit case, this court quoted: "While [the agency] did the calculations necessary to determine how much extra carbon dioxide would be emitted, it failed completely to discuss…the global warming phenomenon itself, or to explain the benchmark for its determination of insignificance in relation to that environmental danger…Without some articulated criteria for significance in terms of contribution to global warming…grounded in the record and available scientific evidence…" a summary conclusion of insignificance is not enough to alleviate the need for a more thorough NEPA statement.

Climate change and NEPA continued

- Mosbacher, 488 F.Supp. 2d 889 (N.D.Cal. 2007): In a case challenging federal defendants financial support of international fossil fuel projects, defendants argued that the impacts of global warming on the domestic environment were too remote and speculative to be considered for NEPA purposes. The court disagreed finding it undisputed that the projects emit GHGs, the effects of GHGs on climate change are documented and contribute to global warming.
- The question then became whether defendants were a "but for" cause of these GHG emissions. Because the Court was unable to determine whether the fossil fuel projects would have gone forward without defendants' funding, it could not determine whether defendants could exercise control over the projects, and couldn't therefore determine whether defendants are a legally relevant cause of the alleged effects on the domestic environment.

Climate change and NEPA continued

- Mayo Foundation, 472 F.3d 545 (8th Cir. 2006): although the government admitted that the environmental effects of a proposed railway line extension would slightly increase national coal consumption and therefore only slightly increase GHG emissions, it argued that environmental effects of the project were too speculative to be determined at a local level because forecasting of existing information could only determine effects at a national and regional level. The court determined that the NEPA document was adequate in this regard because it had followed the CEQ regulations with respect to unavailable or incomplete information (40 CFR 1502.22(b)).

Climate change and NEPA continued

- The regulations require that if the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because exorbitant costs or the means to obtain it are not known, the agency must include the following information in the environmental impact statement:
  - (1) A statement that such information is incomplete or unavailable;
  - (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
  - (3) a summary of existing credible scientific evidence which is relevant to evaluating [such impacts], and
  - (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

Climate change and NEPA continued

Border Power Plant, 260 F.Supp.2d 997 (S.D.Cal. 2003): EA for transmission line permits across the US/Mexico border was inadequate because the potential environmental effects of CO_2 were not analyzed. Cites to Public Citizen.

Public Citizen, 316 F.3d 1002 (9th Cir. 2003): in a case involving cross-border motor vehicle entry, the court held that even a marginal degradation of air quality could easily be said to be a significant impact on the environment for NEPA purposes.

Climate change and NEPA continued

- DOT v. Public Citizen, 541 U.S. 752 (2004): overrules 9th Circuit Public Citizen case; Supreme Court holds that because the President, and not the agency, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because the agency has no discretion to prevent the entry, the agency’s EA did not need to consider environmental effects arising from the entry.

Climate Change, CEQA and Land Use Planning

- California v. San Bernardino County, CITE (April 2007): State of California sued one of its Counties alleging the County's LUP update failed to quantify and mitigate GHG emissions. State alleged the EIR did not comply with CEQA because it did not disclose GHG emissions reasonably expected to result from implementation of the plan.
- CBD v. San Bernardino County, No. 07-295 (April 2007): CBD claimed the County failed to address global warming in its LUP.

Climate change and ESA

- Pacific Coast Fishermen, 06-245, 2008 Lexis 31462 (E.D.Cal. 2008): FWS must address CC information received during section 7 consultation; failure to do so will result in remand of BiOp and BA. (BOR CVP operations)
- NRDC v. Kempthorne, 506 F.Supp.2d 322 (E.D.Cal. 2007): the failure of the FWS to respond to a comment that raised the issue of CC and its impact on delta smelt habitat invalidated the BiOp. In rejecting the FWS argument that addressing CC is "sheer guesswork", the court stated that the "absence of any discussion…is a failure to analyze a potentially 'important aspect of the problem'". Conclusions in a BiOp must be based on the "best data available"; an agency cannot ignore available information, and silence cannot be afforded deference.

Climate change and ESA continued

- CBD v. Kempthorne, 07-5109, 0874 (N.D.Cal. 2007): two cases, environmental group alleged Secretary of the Interior failed to address global warming in management decisions affecting sea animals, and failed to address environmental effects attributable to global warming under NEPA before authorizing incidental take of sea animals.
- WWP v. Servheen, 07-243 (D.Idaho, 2005): enviro group alleges delisting a DPS of the Yellowstone grizzly bear population is inappropriate b/c global warming increases destruction of white bark pine trees by beetles, an important part of the grizzly's diet.

Climate Change and ESA

- **ESA regulations**: Interagency Cooperation under the ESA (73 Fed.Reg. 76272, 12/16/08): regulations limit consideration of the impacts of climate change on listed species. Agencies need not consult if "the effects of the action are manifested through global processes" and "cannot be reliably predicted or measured at the scale of a listed species current range, would result in an extremely small, insignificant impact", pose only a remote risk of harm, or are not capable of being measured or detected in a manner that permits meaningful evaluation. Under litigation.

- **Solicitor's Opinion, M-37017**, Guidance on the Applicability of the ESA Consultation Requirements to Proposed Actions involving the Emissions of GHGs (10/3/08):

  - USGS 5/14/08: "it is currently beyond the scope of existing science to identify a specific source of CO2 emissions and designate it as the cause of specific climate impacts at a specific location"

  - FWS response: GHGs that are projected to be emitted from a facility would not, in and of themselves, trigger section 7 consultation … unless it is established that the emissions from the proposed action cause an indirect effect to listed species or critical habitat…"

  - Solicitor's opinion: Solicitor concurs with FWS; "where the effects at issue result from climate change potentially induced by GHGs, a proposed action that will involve the emission of GHG cannot pass the "may affect" test, and is not subject to consultation under the ESA…"

Climate Change and DOI

- Secretarial Order No. 3226 (1/16/09): recognizes the ability of DOI to identify changes that may result from climate change, references the 2007 DOI task force, and directs the bureaus to “consider and analyze potential climate change impacts” in long range planning” and/or when making “major decisions affecting DOI resources”, among other things.

Climate Change and DOI continued

DOI Task Force: Three subcommittees

- Land and Water Management Subcommittee
- Law and Policy Subcommittee
- Science Subcommittee
  - Each prepared a report
  - Each report is available to the public
  - IM 2008-171 (Draft) Guidance of Incorporating Climate Change into Planning and NEPA Documents (expires 9/30/09): supplements the NEPA Panning Handbook. IM 2008-171 (Draft) Guidance of Incorporating Climate Change into Planning and NEPA Documents (expires 9/30/09): supplements the NEPA Planning Handbook.

Climate change in summary

Climate change is here to stay (from a legal perspective)

Agencies need to pay attention and address these issues in their planning and implementation documents

Don’t stick your head in the sand; the courts will no longer accept the “its too speculative” argument

Phased NEPA

- Pit River Tribe v. USFS, 469 F.3d 768 (9th Cir. 2006): challenge to geothermal lease extensions for failure to conduct NEPA; EIS was required before extensions were approved b/c extensions did not reserve the right to absolutely preclude surface disturbing activities. BLM argued that the 1998 extensions were mandatory (extensions to be issued if certain prerequisites were met), and that they retained the "status quo" that had been authorized 10 years earlier when leases were approved; since leases were not subject to challenge, neither were the extensions.
- Court disagreed; extensions were a new point of commitment requiring NEPA review, and not status quo; without extensions, lease holder had nothing. In addition, absolute development rights had been extended in 1988 (with the leases) and again in 1998 (with the lease extensions); since the ability to absolutely preclude leasing had not been reserved by the agency, an EIS that addressed a true no action alternative was required.

Adequacy of Scientific Methodology

- Lands Council II, 537 F.3d 981 (9th Cir.2008): en banc reversal of its panel decision; FS logging project in the Idaho Panhandle NF; plaintiffs asked the court to act as scientists and tell the FS how to validate certain wildlife hypotheses, choose among various scientific studies, and order the FS to explain every possible scientific uncertainty with the project. The Court refused to adopt plaintiffs positions, but acknowledged that it had previously exceeded the proper standard of review.
- It basically overruled Lands Council I, and Ecology Center (limited those decisions to the facts of those cases), in which the 9th Circuit had determined that on-the-ground verification of scientific methodology was required. In this case, the Court restored deference to the agency to decide what evidence is or is not necessary to support scientific analysis. "…the FS must support its conclusions…with studies that the agency, in its expertise, deems reliable."
- FS must acknowledge and respond to comments that raise significant uncertainties, citing 40 CFR 1502.22

Conclusion

- **ESA:** engage with FWS in section 7 review; convince yourselves that the BiOp, and your programs are in compliance with the Act.
- **RS 2477**: consider incorporating these issues into LUPs; benefit- alleviate potential QTA/RDI litigation.
- **Climate change**: agency can no longer summarily claim the issue is "speculative"; ensure that comments received are adequately addressed; in NEPA documents, discuss uncertainty pursuant to the regulation.
- **Phased NEPA**: ensure that new points of commitment, such as lease or contract extensions, have an adequately assessed "no action" alternative.
- **Scientific methodology**: Judges are not scientists; the agency gets to determine what scientific methodology or study is reliable.