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Russell Country Sportsmen v. U.S. Forest Service,

2010 U.S. Dist. LEXIS 22211, 2010 WL 889870 (D. Mont. Mar. 10, 2010).

Dave Whisenand

ABSTRACT

In *Russell Country Sportsmen v. U.S. Forest Service*, the District Court for the District of Montana held that the Forest Service exceeded its authority under the Montana Wilderness Study Act (MWSA) and violated National Environmental Policy Act (NEPA) when it limited motorized access within the Little Belt, Castle, and North Half of the Crazy Mountains. The court held that because the MWSA requires maintenance of wilderness character that existed in 1977, the Forest Service violated the MWSA when it limited motorized access to a level below what was thought to have existed in 1977. Additionally, the Forest Service violated NEPA when it constructed a final alternative that was not identical to any of the draft alternatives.

I. INTRODUCTION

Across the country, the United States Forest Service (Forest Service) is revising its Travel Management Plans (TMP) for Forest Service forests. The Forest Service is comprised of hundreds of individual forests managed locally by Forest Supervisors. A TMP describes where and what forms of transportation are permitted in each forest. Each Forest Supervisor is responsible for overseeing revision of the forest TMP. This has resulted in many different

approaches that do not all comply with the law. Groups claiming there is too much or too little motorized access have appealed many of these plans. In *Russell Country Sportsmen v. U.S. Forest Service*,¹ motorized recreation groups sued the Forest Service, claiming violations of the National Environmental Policy Act (NEPA), the Administrative Procedures Act (APA), and the Montana Wilderness Study Act (MWSA).

The managing agency of a Wilderness Study Area (WSA) is required to manage and retain the wilderness character of that area.² The underlying objective for creating WSAs was to enable Congress, within five years of the creation of a WSA, to pass legislation designating the WSA as either Wilderness or for some other use.³ However, many WSAs have never been designated as such.⁴ Instead, the uses of most WSAs remain uncertain, and the Forest Service must deal with user groups complaining of too much or too little access.⁵

Passed in 1977, the MWSA designated almost 700,000 acres of WSAs in Montana.⁶ The Middle Fork Judith WSA is located within the Lewis and Clark National Forest and is included in the Forest Travel Plan revision at issue in this case.⁷ This case addresses whether proponents of motorized recreation can use the MWSA to prevent the Forest Service from restricting motorized use within WSAs.⁸ The case also confronts the extent of Forest Service discretion allowed when modifying an Environmental Impact Statement (EIS).⁹

¹ *Russell Country Sportsmen v. U.S. Forest Serv.*, 2010 U.S. Dist. LEXIS 22211 (D. Mont. Mar. 10, 2010).

² 16 U.S.C. § 1132 (2010).

³ Pub. L. No. 95-150, 91 Stat. 1243 (1977).

⁴ *Russell Country Sportsmen*, 2010 U.S. Dist. LEXIS 22211 at *10-11.

⁵ *Id.* at *11.

⁶ *Id.* at *10 (citing Pub. L. No. 95-150, 91 Stat. 1243).

⁷ *Id.* at **3, 6, n. 3.

⁸ *Id.* at **10-12.

⁹ *Id.* at **7-10.

The Montana Wilderness Association (MWA) sued under the MWSA in 1996, claiming the Forest Service violated the MWSA by allowing motorized recreation in WSAs including the Middle Fork Judith WSA.¹⁰ The Federal District Court for the District of Montana held the Forest Service violated the MWSA by allowing motorized recreation within WSAs.¹¹ The Ninth Circuit Court of Appeals affirmed the district court’s decision and the defendants applied for a writ of certiorari to the U.S. Supreme Court.¹² Certiorari was granted, and after the U.S. Supreme Court concluded in a similar case that section 706(1) of the APA did not provide for judicial review, the Ninth Circuit’s decision was vacated and remanded to the district court.¹³ The parties then reached a settlement agreement.¹⁴ Although the district court’s decision was vacated, the plaintiffs in the present case point out in their briefs that the “core of the plaintiffs’ claims regarding violations of duties under the MWSA” were upheld.¹⁵

II. FACTUAL BACKGROUND

In 1986, a Forest Plan divided the Lewis and Clark National Forest into geographically defined management zones, each with its own corresponding goals and standards.¹⁶ The management zone at issue in this case includes the Little Belt Mountains, the Castle Mountains, and the North Half Crazy Mountains.¹⁷

¹⁰ *Mont. Wilderness Assn. Inc. v. U.S. Forest Serv.*, 146 F.Supp. 2d 1118, 1127 (D. Mont. 2001).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Interv. Mot. Supp. Mem. 1-2 (Dec. 9, 2008).

¹⁶ *Russell Country Sportsmen*, 2010 U.S. Dist. LEXIS 22211 at *3.

¹⁷ *Id.*

The 1986 Forest Plan opened the forest to vehicle travel except for specifically restricted roads, trails, and other areas.¹⁸ In addition, a TMP was developed to analyze and direct activities within specific locations in the forest.¹⁹ In 2000, the Lewis and Clark National Forest initiated the TMP revision process by conducting outreach to determine public understanding surrounding the 1986 TMP.²⁰ Five years later, the Forest Service published a notice of intent in the Federal Register and compiled a list of “significant issues.”²¹ Beginning July 7, 2006, a Draft Environmental Impact Statement (DEIS) was distributed to agencies, organizations, and individuals of record in the project file.²² The DEIS presented seven alternatives.²³ A total of 1,783 comments were received and no preferred alternative was identified or made available for public comment.²⁴

In October 2007, the most recent Lewis and Clark National Forest TMP was adopted by a Record of Decision (ROD).²⁵ This TMP affected Forest Service lands totaling 1,050,110 acres, which is about 53% of the forest.²⁶ The ROD and Final Environmental Impact Statement (FEIS) were released at this time.²⁷ However, the final alternative selected by the Forest Supervisor was not one of the alternatives presented in the DEIS.²⁸ Instead, based on public comments, the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at **3-4.

²² *Id.* at *4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Forest Supervisor constructed an alternative that combined and modified some of the alternatives in the DEIS.²⁹

With the passage of the MWSA, the Middle Fork Judith area was designated a WSA in 1977.³⁰ Because the Middle Fork Judith area is in the management zone of the Little Belt, Castle, and North Half Crazy Mountains, it was included in the 2007 Travel Plan.³¹ Before 2007, the Middle Fork Judith area had 112 miles of roads, comprised of 54 miles of highway vehicle roads and 58 miles of ATV/trail bike routes.³² The FEIS designated thirty-eight miles of routes for motor vehicles: twenty miles for highway vehicles and eighteen for ATV/trail bike routes.³³

III. PROCEDURAL BACKGROUND

Plaintiffs sought review of the Forest Service's final decision approving the 2007 TMP for the Little Belt, Castle, and North Half Crazy Mountains.³⁴ The Plaintiffs' administrative appeals were rejected and the Appeal Reviewing Officer affirmed the Forest Service's decision.³⁵ Consequently, the Plaintiffs filed a complaint in the Federal District Court for the District of Montana.³⁶ MWA, an additional party, was joined as a defendant.³⁷ The court

²⁹ *Id.* at **4-5.

³⁰ Pub. L. No. 95-150, 91 Stat. 1243 (1977).

³¹ *Russell Country Sportsmen*, 2010. U.S. Dist. LEXIS 22211 at *6.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *2.

³⁵ Compl., *Russell Country Sportsmen v. U.S. Forest Serv.*, 2008 U.S. Dist. LEXIS 25788 at ¶¶ 49-52 (D. Mont. Sept. 2, 2008) (CV 08-64-GF-SEH).

³⁶ *Id.* at ¶¶ 1-5.

³⁷ *Russell Country Sportsmen*, 2010. U.S. Dist. LEXIS 22211 at *2.

granted summary judgment for the Plaintiffs based on violations under the APA of NEPA and MWSA.³⁸

IV. COURT'S ANALYSIS

NEPA requires agencies to follow specific procedures when analyzing the environmental impacts of their actions.³⁹ NEPA requires the preparation of an EIS for any federal action with a significant impact on the quality of the human environment.⁴⁰ An adequate EIS must consider all reasonable alternatives and provide detailed information on their impacts, but is not expected to consider every possible alternative.⁴¹ An unexamined but viable alternative renders an EIS inadequate.⁴² Additionally, if an “agency makes substantial changes in a proposed action that are relevant to environmental concerns,” a supplemental EIS is required.⁴³

The Forest Service “failed to consider, or to supplement, reasonable and viable alternatives in the DEIS as required by NEPA.”⁴⁴ The Forest Service initially presented seven alternatives, though before adopting the FEIS, the Forest Service modified the alternatives and ultimately selected an alternative that was different than any of the seven alternatives presented in the DEIS.⁴⁵

NEPA requires “all reasonable and viable alternatives be considered in the DEIS and that the public be afforded opportunity to make informed comments.”⁴⁶ Here, the public was able to

³⁸ *Id.* at *12.

³⁹ *Id.* at **7-8 (citing 42 U.S.C. § 4321 (2010)).

⁴⁰ 42 U.S.C. § 4332(2)(c).

⁴¹ *Russell Country Sportsmen*, 2010 U.S. Dist. LEXIS 22211 at *8 (citing *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

⁴² *Id.*

⁴³ *Id.* at **8-9 (quoting 40 C.F.R. § 1502.9(c)(1)(i) (2009)).

⁴⁴ *Id.* at *9.

⁴⁵ *Id.*

⁴⁶ *Id.* at **9-10.

comment on the alternatives presented in the DEIS, but the selected alternative was a combination or modification of those alternatives found in the DEIS.⁴⁷ Changes included an overall reduction in motorized routes, additional trail closures, a shortened snowmobile season, and removal of the 300-foot-off-road-travel rule in favor of a “vehicle plus trailer length” restriction.⁴⁸ While the defendants’ claimed that it was within the Forest Service’s discretion to modify and take pieces from each alternative based on public comment, the court determined that the Forest Service violated NEPA when it selected an alternative that was not the same as any one alternative presented in the DEIS.⁴⁹

Under the MWSA, WSAs “designated by this Act shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.”⁵⁰ Since most WSAs were never officially designated Wilderness, the Forest Service faced the dilemma of appeasing non-motorized users who “complain of creeping motorization,” and motorized users who fear “creeping designation.”⁵¹ Thus, the Forest Service was trapped between its “administrative obligation to reasonably balance competing land uses and the statutory requirement that it maintain the 1977 wilderness character.”⁵²

The court held that the Forest Service violated the MWSA by restricting motorized use within the Middle Fork Judith WSA below the amount thought to have existed in 1977.⁵³

Because the MWSA requires a managing agency to maintain the wilderness character that

⁴⁷ *Id.*

⁴⁸ *Id.* at *4.

⁴⁹ *Id.* at *10.

⁵⁰ *Id.* (quoting Pub. L. No. 95-150, 91 Stat. 1243 (1977)).

⁵¹ *Id.* at **10-11 (quoting *Mont. Wilderness Assn. v. McAllister*, 685 F. Supp. 2d 1249, 1253 (D. Mont. 2009) (citing *Mont. Wilderness Assn. v. U. S. Forest Serv.*, 146 F. Supp 2d 1118, 1120 (D. Mont. 2001))).

⁵² *Id.* at *12 (quoting *Mont. Wilderness Assn. v. McAllister*, 685 F. Supp. 2d at 1254).

⁵³ *Id.* at **12-13.

existed in 1977, and because there was motorized use within the Middle Fork Judith area prior to 1977, the Forest Service’s attempt at “enhancement or creation of wilderness character in the Middle Fork WSA” exceeded its authority under MWSA.⁵⁴

V. CONCLUSION

The court granted summary judgment to the Plaintiffs because the Forest Service violated NEPA and exceeded its authority under MWSA when it adopted the 2007 Travel Plan. Because of this decision, hundreds of miles of roads and trails have been opened to motorized access. This decision will be appealed to the Ninth Circuit Court of Appeals. If this decision is upheld, it will impose a duty on the Forest Service to not enhance or create wilderness character within WSAs, and it will limit Forest Service discretion in constructing a final alternative based on public comment.

⁵⁴ *Id.* at **6, 12-13.