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350 Montana v. Bernhardt

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350 Mont. v. Bernhardt, 443 F. Supp. 3d 1185 (D. Mont. 2020)

Ryan W. Frank

In its second trip before the District Court of Montana, the Bull Mountain Mine expansion was again halted, this time due to coal train derailments. The Bull Mountain Mine expansion, previously enjoined in 2015 for violating the National Environmental Policy Act, was revived in 2018 when the Office of Surface Mining Reclamation and Enforcement approved the expansion a second time. Here, the court found the Office of Surface Mining Reclamation and Enforcement did not comply with the National Environmental Policy Act on grounds that the Environmental Assessment failed to properly analyze the risk of train derailments.

I. INTRODUCTION

In *350 Mont. v. Bernhardt*,¹ 350 Montana and several other environmental organizations (collectively, “Plaintiffs”) filed suit and effectively delayed the approval of Signal Peak Energy, LLC’s (“Signal Peak”) Bull Mountains Mine (“the Mine”) expansion.² Following an Environmental Assessment (“EA”) and approval of the Mine expansion in 2018 by the Office of Surface Mining Reclamation and Enforcement (“Enforcement Office”), Plaintiffs filed suit against U.S. Secretary of the Interior, David Bernhardt, alleging the approval violated both the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”).³ Signal Peak joined Bernhardt in the suit as defendant-intervenor (collectively, “Defendants”).⁴ Specifically, Plaintiffs argued that Defendants violated NEPA because an Environmental Impact Statement (“EIS”) was not prepared, failed to take the requisite hard look at the environmental effects of the proposed action, and alternatives to the proposed action were not considered.⁵ Plaintiffs alleged Defendants violated the ESA when they concluded neither grizzly bears nor long-eared bats would be negatively affected by expanding the Mine.⁶ The court agreed with Plaintiffs that Defendants failed to satisfy their NEPA-required hard look obligations.⁷ The court vacated the EA, issuing summary judgment to Plaintiffs and remanded the issue back to the Enforcement Office.⁸

1. 443 F. Supp. 3d 1185 (D. Mont. 2020).
2. *Id.* at 1190.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1202.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Mine, operated by Signal Peak, is an underground coal mine located just north of Billings, Montana.⁹ The coal is transported by rail through Montana to Vancouver, British Columbia.¹⁰ Signal Peak first sought to expand coal production at the Mine in 2013.¹¹ Under the proposed Mine expansion, train traffic would increase and continue for nine more years.¹² The Enforcement Office completed an EA followed by a Finding of No Significant Impact (“FONSI”) where it determined expanding the Mine would not have a significant environmental impact and an EIS was not required.¹³

In 2015, Montana Environmental Information Center (“MEIC”) successfully challenged the Mine’s expansion by showing the Enforcement Office’s EA violated NEPA.¹⁴ The court in that case determined the Enforcement Office’s approval of the expansion violated NEPA because the EA ignored the environmental effects caused by increased train traffic and greenhouse gas emissions. The court then enjoined the expansion.¹⁵

In 2018, Signal Peak once again filed an expansion application, which after the Enforcement Office conducted an EA, was approved.¹⁶ The Enforcement Office again produced a FONSI in lieu of an EIS and approved the expansion.¹⁷

In January 2019, Plaintiffs filed suit, alleging the Enforcement Office violated NEPA and the ESA by approving the Mine expansion.¹⁸ In February 2019, Signal Peak intervened. Following the Signal Peak intervention, the parties filed cross-motions for summary judgment.¹⁹

III. ANALYSIS

A. *The Enforcement Office Did Not Fully Comply with NEPA*

The court found the Enforcement Office failed to sufficiently address the potential impacts of increased rail traffic and greenhouse gas emissions, and thus, violated its “hard look” obligation under NEPA.²⁰ Plaintiffs argued the Enforcement Office’s EA failed to properly consider

9. *Id.* at 1190.

10. *Id.* at 1192.

11. *Mont. Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1084 (D. Mont. 2017).

12. *350 Mont.*, 443 F. Supp. 3d at 1192.

13. *Mont. Env'tl. Info. Ctr.*, 274 F. Supp. 3d at 1084.

14. *Id.*

15. *350 Mont.*, 443 F. Supp. 3d at 1190.

16. *Id.*

17. *Id.* at 1196.

18. *Id.* at 1190.

19. *Id.*

20. *Id.*

the effect of increased rail traffic on grizzly bears, public health, and the risk of train derailments.²¹

Plaintiffs claimed the Defendants violated NEPA when they failed to analyze the risk of grizzly bears being hit by trains as a result of the increased rail traffic that would accompany expanding the Mine.²² Under NEPA, an agency is only required “to analyze effects that are reasonably foreseeable.”²³ Plaintiffs presented an EIS that was conducted in Washington State to support the argument that grizzly bears were at a greater risk of being hit by a train from increased rail traffic. The court found the EIS to be insufficient because it merely reached the common-sense conclusion that more trains lead to more collisions.²⁴

The court next considered Plaintiffs’ claim that the EA failed to consider the impact on public health. Specifically, Plaintiffs contended (1) that train emissions build up over time and are not transitory; (2) the EA should have considered the potential for increased cancer risks; (3) the EA failed to consider current air quality along the railroad but should have; and (4) the cumulative effects of increased emissions should be considered.²⁵ In challenging the EA, which concluded that train emissions are transitory, Plaintiffs relied on a study of particulate matter near rail lines in Washington state.²⁶ Because the results of the Washington state study were unique to the study area, the court held that the study was insufficient to override the Enforcement Office’s determination.²⁷ Plaintiffs next alleged that the EA did not properly address increased cancer risks for not quantifying the risks.²⁸ Plaintiffs’ argument relied on a proposed Columbia River coal terminal EIS that quantified cancer risks, but due to several differences between the proposed projects, the court found the Enforcement Office’s explanation of how increased cancer risks will be mitigated sufficient.²⁹ Plaintiffs next argued the EA did not properly consider current air quality along the railroad.³⁰ The court found the EA’s reliance on EPA data sufficient because the nonattainment areas in question had not exceeded the national standard in the past five years.³¹ The court said the Enforcement Office was justified in relying on the EPA data despite a contradicting American Lung Association report because courts give significant deference to agencies to determine what studies they will rely on.³² As for the public health cumulative impacts allegation, Plaintiffs contended that Defendants violated NEPA because the EA did

21. *Id.* at 1191-1200.

22. *Id.* at 1192.

23. *Id.* (citing 40 C.F.R. § 1508.7 (2020)).

24. *Id.*

25. *Id.*

26. *Id.* at 1192-93.

27. *Id.* at 1193.

28. *Id.*

29. *Id.* at 1193-94.

30. *Id.* at 1194.

31. *Id.*

32. *Id.* (citing *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051-52 (9th Cir. 2012)).

not consider rail emission and air quality effects independently from one another.³³ In addressing this claim, the court found the EA's discussion of coal dust to be sufficient because it also applied to emissions.³⁴

Plaintiffs' third and final claim regarding increased train traffic argued the EA failed to properly consider train derailment risks.³⁵ The Enforcement Office countered that NEPA analysis was not triggered because the possibility was too speculative.³⁶ However, the court determined that train derailments should have been analyzed because NEPA obligates agencies to describe severe impacts even when the likelihood of occurrence is remote.³⁷ The court vacated the EA on this claim.

Plaintiffs' next claimed that the EA failed to appropriately consider the effects of greenhouse gas emissions because the EA did not use the Social Cost of Carbon protocol.³⁸ The court, however, sided with the Enforcement Office because the EA referenced several reputable sources that essentially called into question the reliability of the Social Cost of Carbon protocol.³⁹ The court found this sufficient because NEPA promotes informed decision-making and, importantly, does not require an inspection of unhelpful sources.⁴⁰

Plaintiffs also alleged the Enforcement Office violated NEPA by issuing a FONSI in lieu of an EIS.⁴¹ To succeed on this claim, Plaintiffs needed to establish the presence of substantial questions regarding the Mine expansion's impact on the environment.⁴² In reviewing the decision to forgo an EIS, the court considered whether the Enforcement Office offered sufficient reasoning to support its assertion that the effects of the Mine expansion were insignificant.⁴³ The court assessed the context and intensity of the Enforcement Office's reasoning by looking at five sub-issues: (1) adverse impacts and public health; (2) uncertainty and controversy; (3) cumulatively significant impacts; (4) endangered species; and (5) Clean Water Act violations.⁴⁴ After reviewing the context and intensity sub-issues, the court concluded the Enforcement Office appropriately issued the FONSI.⁴⁵ The court found that Plaintiffs failed to prove the adverse impacts and public health sub-issue, and that the

33. *Id.* at 1194-95.

34. *Id.* at 1195.

35. *Id.*

36. *Id.*

37. *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989)).

38. *Id.* at 1195-96.

39. *Id.* at 1196.

40. *Id.* (citing *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)).

41. *Id.*

42. *Id.* (quoting *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011)).

43. *Id.* (citing *Barnes*, 655 F.3d at 1132).

44. *Id.* at 1196-1200.

45. *Id.* at 1196.

Enforcement Office was NEPA compliant because its reasoning appropriately considered how the Mine expansion and increased rail traffic would impact greenhouse gas emissions and public health.⁴⁶ Under NEPA, an EIS is required when the potential effects on the environment are highly controversial or highly uncertain.⁴⁷ The court found Plaintiffs' arguments unable to satisfy this threshold.⁴⁸ In order to find an action controversial, there must be a substantial dispute, which is present when the reasonableness of the decision is called into question by evidence.⁴⁹ Although Plaintiffs brought forward expert comments, the court found that these comments did not rise to the level of highly controversial.⁵⁰ Additionally, the court determined an EIS was not required because an EIS is only required when there is more than some uncertainty⁵¹ and the long-term effects of greenhouse gases does not satisfy this standard.⁵² Plaintiffs contended the FONSI's conclusion, that there were no significant cumulative effects, was arbitrary and capricious because the EA acknowledged the dangers posed by greenhouse gases.⁵³ The court, however, held that the argument was insufficient to reach the substantial questions threshold.⁵⁴ The court did not fully explore the endangered species sub-issue as it was covered by Plaintiffs' ESA violation claims.⁵⁵

Finally, the court addressed the Clean Water Act violations sub-issue. The court found Plaintiffs' argument that coal from the trains will violate the Clean Water Act insufficient to trigger an EIS because Plaintiffs were unable to show that the trains would violate the Clean Water Act.⁵⁶

B. The Enforcement Office Did Not Violate the ESA

The court next addressed Plaintiffs' claims that the Enforcement Office failed to comply with the ESA.⁵⁷ To prevent damaging threatened or endangered species or their habitat, the ESA requires agencies to first discuss with Fish and Wildlife Service or National Marine Fisheries Service.⁵⁸

46. *Id.*

47. *Id.* at 1196-97 (quoting 40 C.F.R. § 1508.27(b)(4)-(5)).

48. *Id.* at 1197-98.

49. *Id.* at 1197 (citing *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019)).

50. *Id.* (quoting *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997)).

51. *Id.* at 1198 (citing *WildEarth Guardians*, 923 F.3d at 673).

52. *Id.*

53. *Id.* at 1198-99.

54. *Id.* at 1199 (citing *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011)).

55. *Id.*

56. *Id.* at 1199-1200.

57. *Id.* at 1200-02.

58. *Id.* at 1200 (citing 16 U.S.C. § 1536(a)(2) (2020); 50 C.F.R. § 402.01(b) (2020)).

Plaintiffs first contended that increased rail traffic would effect grizzly bears, and that specifically, collisions were reasonably certain to occur.⁵⁹ The court classified the effect on grizzly bears as an indirect effect caused by the mine expansion, and reviewed it as such.⁶⁰ Indirect effects, under the ESA, are effects that are very likely to occur because of the proposed action.⁶¹ The Fifth Circuit Court of Appeals has established that the ESA “reasonably certain to occur” standard is equivalent to the NEPA “reasonably foreseeable” standard, and therefore, the court held that because collisions between grizzly bears and trains are not reasonably foreseeable under NEPA, they are not reasonably certain to occur under the ESA.⁶²

Plaintiffs next relied on a Wyoming study to allege the presence of northern long-eared bats (“the bats”) in the vicinity of the mine, contending that increased train travel would be highly detrimental to the endangered species.⁶³ The Enforcement Office supported their counterargument with the Montana Natural Heritage Program Field Guide determination that the Mine was not located within the bats’ territory.⁶⁴ Because the Enforcement Office utilized a Montana report for a project in Montana, the court found it reasonable to conclude that there is not suitable habitat for the bats near the mine.⁶⁵

IV. CONCLUSION

350 Mont. highlights in many ways the tight line NEPA creates for federal agencies when undertaking some action with potentially harmful environmental impacts and the substantial deference that courts give to federal agencies. As displayed in this case, the court frequently deferred to the Enforcement Office. However, despite this agency deference, the court vacated the EA on the grounds that the Enforcement Office violated NEPA when it failed to analyze the risk of train derailments. Ultimately, this ruling showed that although deference is given to the agency, NEPA plays a considerable role in guaranteeing an honest and thorough assessment of environmental impacts resulting from agency action.

59. *Id.* at 1200-01.

60. *Id.* at 1200.

61. *Id.* (quoting 50 C.F.R § 402.02 (2020)) (emphasis added).

62. *Id.* at 1200-01 (citing *Medina Cty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 702 (5th Cir. 2010)).

63. *Id.* at 1201.

64. *Id.*

65. *Id.*