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9th Circ.'s Take On A Recent Trend Of Enviro Groups

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On Oct. 22, 2012, the U.S. Court of Appeals for the Ninth Circuit ruled that the Bureau of Land Management and the U.S. Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA) by granting a right of way for the Ruby Pipeline project. Center for Biological Diversity v. Bureau of Land Management, No. 10-72356 (9th Cir. Oct. 22, 2012). The Ninth Circuit vacated the BLM's authorization for the project and an associated FWS biological opinion, finding that the biological opinion relied on "unenforceable" species mitigation measures and failed to account for groundwater pumping during pipeline construction.

This case is just one example of a recent trend by environmental groups of using environmental requirements such as ESA consultation, National Environmental Policy Act (NEPA) compliance and Clean Water Act (CWA) permits as a hook to challenge pipeline projects.

Ultimately, this case will make it more likely that environmental groups will argue that other pipeline companies should have conditions placed on pipeline construction that will be "enforceable under the ESA" and thus, enforceable by the FWS and more importantly, third parties such as the Center for Biological Diversity (CBD).

Background

To receive authorization for the Ruby Pipeline, a 678-mile natural gas pipeline extending from Wyoming to Oregon that would cross BLM land, Ruby Pipeline LLC applied for a Federal Energy Regulatory Commission certificate of public convenience and necessity, a right-of-way grant from BLM, and a temporary use permit from BLM. During the application review process, FERC initiated formal consultation with the FWS under section 7 of the ESA.

The FWS suggested a number of measures that would reduce impacts to listed species and suggested that the measures be included as part of the proposed "agency action" that was the subject of the consultation. FERC objected to including the conservation plan as part of its action, and the measures were instead incorporated in a separate letter of agreement between Ruby and the federal agencies. The letter of agreement was incorporated as a condition of the FERC certificate and the BLM record of decision.

Although the agreement was not part of the "agency action" under consultation, and Ruby had not committed to fully fund all of the species mitigation measures, the FWS relied on the

agreement in issuing a “no-jeopardy” biological opinion that concluded that the project would not violate the ESA's Section 7. The Ruby Pipeline was completed and put into service in July 2012.

The CBD brought suit challenging the project’s authorization on a multitude of grounds, including claims that the FWS biological opinion and the BLM’s authorization were arbitrary and capricious.[1] The Ninth Circuit concluded that because the species mitigation measures were not included as part of the agency action under the ESA consultation, ensuring the implementation of the measures would be left to the discretion of FERC and the BLM, and not to the FWS, the expert agency entrusted with administering the ESA.

Because the measures were not enforceable by the FWS, the court held that the biological opinion was arbitrary and capricious in its reliance on the agreement’s mitigation measures to conclude that no jeopardy to listed species would occur. The court noted that had the mitigation been included as part of the action under consultation, the measures would have been “enforceable under the ESA.”

In addition, the court held that biological opinion was arbitrary and capricious because the FWS failed to consider groundwater pumping for hydrostatic testing and dust abatement during pipeline construction in its assessment of potential impacts on listed species.

For both of these reasons, the court vacated and remanded both the FWS biological opinion and the BLM record of decision that relied on the flawed FWS biological opinion. If the Ruby Pipeline had not already been completed, the ESA violation would have likely stopped project construction.

Implications for Pipeline Projects

Under this opinion, species conservation measures that are made a condition of a FERC certificate are not considered “enforceable under the ESA.” Therefore, if such measures are relied upon by the FWS or other federal agencies in Section 7 consultation, to be enforceable, they must be made either part of the proposed project itself or as a term and condition of the biological opinion.

Accordingly, future pipeline projects may be required to incorporate into the project purpose species mitigation relied upon for purposes of the ESA's Section 7 compliance. In addition, this opinion raises questions about whether other environmental requirements, such as the CWA and the NEPA requirements, that are made conditions of the FERC certificate are similarly vulnerable to challenge.

Moreover, this decision is yet another example of the CBD and other environmental groups using environmental statutes as a vehicle for challenging pipeline projects. For example, earlier this year, in a case that is still pending, the CBD brought a challenge to the Keystone Pipeline Gulf Coast project, alleging that the corps violated the CWA and the NEPA by authorizing the project under nationwide permit 12 for utility lines. Sierra Club v. Bostick, No. 5:12-cv-00742 (W.D. Ok. filed June 29, 2012).