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Legal Issues in Outdoor Recreation: Trends in Litigation

Ted Zukoski

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LEGAL ISSUES IN OUTDOOR RECREATION: TRENDS IN LITIGATION

By Ted Zukoski

I. Need to Gather Information on Environmental Impacts.

- A. Sierra Club v. USDA, 116F.3d 1482 (7th Cir. 1997) (agency must gather more information concerning impacts of OHVs)
- B. Northwest Motorcycle Ass'n v. USDA, 18F.3d 1468 (9th Cir. 1994) (agency had gathered sufficient information to limit OHVs)
- C. Washington Trail Association v. US Forest Service, 935F.Supp. 1117 (W.D.Wa. 1996) (agency failed to gather sufficient information concerning wildlife impacts to permit new motorized trail)
- D. Hells Canyon Preservation Council v. US Forest Service, 883 F.Supp. 534 (D.Or. 1995) (agency gathered sufficient information to support decision to locate motorized trail)
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II. Limiting Recreation to Protect Wildlife, Plants, Wilderness, and Other Resources.

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- B. Southern Utah Wilderness Alliance v. Smith, Docket 94-CV-983 (10th Cir. Mar. 1997) (post hoc ESA "consultation" permissible) *but see* Southern Utah Wilderness Alliance, 142 IBLA 164 (Jan 15, 1998) (OHV use may not be consistent with wilderness study area status)
- C. Southern Utah Wilderness Alliance v. Dabney, 2:95-CV-0559 K (filed, no decision) (alleging OHV trail allocation violates Park Service organic act)
- D. Montana Wilderness Association v. US Forest Service, CV 96-152-M-DWM (filed, no decision) (alleging Forest Service violates Montana Wilderness Act by permitting snowmobiling in wilderness study areas)

- E. Lassen Motorcycle Club, 133 IBLA 104 (1995) (upholding BLM denial of permit for motorcycle race on existing trails because it would widen existing trail and impair wilderness suitability)
- F. National Wildlife Federation v. BLM, 140 IBLA 85, 101 (Aug. 21, 1997) (livestock grazing cannot take place unless it meets FLPMA/MUSY requirements that it “best meet the needs of the American people”)
- G. Personal Watercraft Industry Ass’n v. Department of Commerce, 48F.3d 540 (D.C. Cir. 1995) (regulations limiting personal watercraft use in Monterey Bay National Marine Sanctuary upheld).
- H. 62 Fed.Reg. 32153-32176 (June 12, 1997) (discussing potential limits on personal watercraft in Florida Keys National Marine Sanctuary for safety and natural resource protection)
- I. National Audubon Society v. Babbitt, C92-1641 (W.D. Wash) (filed Oct. 22, 1992, settled Oct. 20, 1993) (requiring agency to conclude compatibility determinations for, among other things, recreation activities)
- J. National Wildlife Refuge System Improvement Act, Public Law 105-57, 16, U.S.C. 668dd (requiring management planning and determinations of compatibility for certain recreation activities)
- K. Executive Order No. 12996—Management and General Public Use of the National Wildlife Refuge System (urging Refuge System to increase opportunities for certain types of recreation)

III. Limiting Recreation to Protect Air and Water Quality.

- A. Dubois v. USDA, 102F.3d 1273 (1st Cir. 1996) (snowmaking operations may require Clean Water Act NPDES permit)
- B. Fund for Animals v. Babbitt, (settled?) (challenge to Yellowstone National Park snowmobiling on, among other things, air pollution grounds)

IV. Limiting Motorized Recreation to Protect Safety.

- A. 63 Fed.Reg. 16181-16182 (April 2, 1998) (proposed regulations to limit watercraft mooring in congested areas of Lake Havasu)

V. **RS 2477: The Oldest, Newest Tool to Promote Motorized Recreation?**

- A. 43 U.S.C. 932 reclassified R.S. 2477
- B. Schultz v. Department of the Army, 10F.3d 649 (9th Cir. 1993) rehearing granted and opinion withdrawn and superseded, 96 F.3d 1222
- C. Rio Grande Forest Plan Appeals

OUTLINE
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I. BACKGROUND.

G. C. Coggins & R. L. Glicksman, Public Natural Resources Law, Clark Boardman Group: 1990 (see Ch. 17).

A. *Recreation as an Important Use of Federal Public Lands.*

Wilderness Act, 16 U.S.C. § 1131(c) (defines wilderness as an area providing "outstanding opportunities for solitude or a primitive and unconfined type of recreation"; "*may* also contain ecological, geological, or other features of ... value.").

National Park Service Act, 16 U.S.C. § 1 (NPS purpose is to "conserve the scenery and the natural and historic objects and wildlife therein and to provide for the enjoyment of the same in such manner ... as will leave them unimpaired")

National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd(a)(4) (recognizing "compatible wildlife-dependent recreational uses as the priority general public uses of the System.")

Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1702(c) (public lands shall be managed for "multiple use" including "recreation")

Multiple Use Sustained-Yield Act (MUSYA), 16 U.S.C. § 528 (National Forests "shall be administered for outdoor recreation").

II. NEPA – ENVIRONMENTAL REVIEW OF RECREATION DECISIONS.

National Environmental Policy Act, 42 U.S.C. § 4332 et seq.; 40 C.F.R. § 1500 et seq. (requiring preparation of environmental impact statements (EISs) for all federal actions that may impact the natural environment)

A. *Impacts of Trails/Roads on Forest Service Roadless Lands.*

Hells Canyon Preservation Council v. US Forest Service, 883 F.Supp. 534 (D.Or. 1995). USFS discovers road is located within wilderness boundary, and closes and relocates 1.5 miles of the road using a categorical exclusion (CE).

Plaintiffs alleged that (1) relocated road ran through an inventoried roadless area; (2) destruction of roadless area values was irreversible and potentially significant; and (3) road would harm wildlife. Therefore, Plaintiffs alleged that USFS must prepare of an EIS or environmental assessment.

Court held that USFS's use of a CE was not arbitrary and capricious: "While I agree that in many circumstances, the USFS may be required to prepare an EIS or EA before constructing a road in an area that an on-site evaluation demonstrates to be roadless and undeveloped, I conclude that the USFS's decision in this case complied with NEPA." Id. at 538.

Washington Trails Ass'n v. US Forest Service, 935 F.Supp. 1117 (W.D.Wash 1996).

USFS proposes to relocate rugged motorized trail now in an inventoried roadless area and to reconstruct it in same roadless area to permit an increase in the type and amount of motorized and other use. USFS undertakes a CE, not EIS or EA.

Plaintiffs alleged (1) USFS guidance prohibited use of CE; and (2) impacts of actions were likely to be significant, based on (a) USFS's failure to consider cumulative impacts of proposed action together with other proposed trail construction projects; (b) USFS failure to consider user allocation issues, which agency had failed to examine in Forest planning; (c) impacts on wildlife.

Court held that USFS's use of CE was arbitrary and capricious, based on (1) agency's misreading of plain language of its guidance; and (2) evidence in the record support Plaintiffs' claims regarding action's potential significance.

Forest Service Handbook, 1909.15 Section 20.6(3), 57 Fed. Reg. 43,180, (Sep. 18, 1992).

USFS guidelines define as a class of actions "that require preparation" of an EIS "proposals that would substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more." FSH 1909.15 Section 20.6(3), 43,200. Example: "Constructing roads and harvesting timber in a 56,000-acre inventoried roadless area where the proposed road and harvest units impact 3,000 acres [5.4%] in only one part of the roadless area." See also Smith v. US Forest Service, 33 F.3d 1072 (9th Cir. 1994) (setting aside USFS timber sale EA where USFS failed to account for impact of logging on roadless values); National Audubon Society v. US Forest Service, 46 F.3d 1437 (9th Cir. 1993) (same).

USFS guidelines define a class of actions for which the agency may undertake a CE to include: "construction and reconstruction of trails." FSH 1909.15 Section 31.2(1), 57 Fed. Reg. at 43,208.

USFS guidelines define set of “extraordinary circumstances” the presence of which prohibits agency from undertaking CE to include the presence of “inventoried roadless areas.” FSH 1909.15 Section 30.3(2)(e), 57 Fed. Reg. at 43,208.

B. *Agencies Must Examine Potential Impacts of Illegal Recreational Activity.*

Sierra Club v. US Department of Agriculture, 116 F.3d 1482, 1997 WL 295308 (7th Cir. 1997) (unpublished order).

USFS adopts an amended Forest Plan for the Shawnee that referenced “the minor effects of ATV use.”

Plaintiffs alleged, in part, that the EIS accompanying the Forest Plan amendment failed to consider the cumulative effects of various activities, including the likelihood that all terrain vehicles and off-highway motorcycles (ATVs/OHMs) engage in illegal activities. Plaintiffs alleged that EIS should have considered the likelihood of OHV use off-trail, and alleged that the USFS failed to acknowledge studies showing the prevalence of such off-trail use (as well as vandalizing, littering, and excessive use of alcohol) at one location, apparently within the Forest.

Court required the USFS to supplement its analysis, holding in part: “[t]he failure to acknowledge the problems at the Land Between the Lakes and to provide a meaningful analysis of the Forest Service’s plans to enforce its trail regulations is of great significance ... because the FSEIS’s environmental analysis is based largely on the assumption that ATV/OHM users will abide by the regulations” Court also noted that a neighboring national forest had banned all ORV use, and that the Shawnee failed to explain why it chose to take a different course. Court also held that the USFS failed to analyze cumulative impacts of ORV and other uses in combination. The lower court enjoined the USFS from undertaking any projects to facilitate ORV use.

C. *Alternatives Proposed by Conservationists.*

Dubois v. USDA, 102 F.3d 1273 (1st Cir. 1996) cert den. 117 Sup. Ct. 1712.

USFS proposed to permit New Hampshire ski area to expand, and to expand snowmaking operations using a natural lake.

Plaintiffs alleged, among other things, that the USFS had violated NEPA by: (1) failing to analyze an alternative proposed by conservationists; and (2) failing to supplement its EIS when it introduced, and then adopted, a new alternative in the Final EIS (without public review).

Court held that USFS alternative proposed by conservationists was reasonable, had been timely brought to the agency’s attention, and that the agency had failed to respond *at all* to the proposal, in violation of NEPA. Court also held that the alternative proposed for the first time in the final EIS (and then adopted by the agency) did not fall within the spectrum of previously considered alternatives, and since it entails substantial changes from the previous proposed action, a supplemental EIS was required.

Craig M. Weaver, Judith C. Shaw, 141 IBLA 276 (Nov. 21, 1997) (GFS(Misc) 7 (1998)).

BLM received request from Foundation for North American Wild Sheep to construct a water development to assist bighorn sheep populations. Foundation set parameters for its location based on drive time from Phoenix, and expressed the desire that the project provide “hands on sheep management work” for up to 200 people. BLM completed an EA and

concluded that the project selected an analyzed under NEPA “meets the criteria established by the Foundation.”

Appellants alleged, among other things, that the BLM failed to identify biologically superior sites for the project, and that the EA failed to address fact that the utility of the project for sheep was likely minimal.

IBLA upheld BLM’s decision, and held that Appellants had failed to show that relying on guidelines set by the Foundation was “unreasonable.”

III. FOREST PLANNING AND MANAGEMENT OF RECREATION.

A. *Background – the National Forest Management Act and Implementing Regs.*

C. Wilkinson & H. Anderson, *Land & Resource Planning on the National Forests*, Island Press: 1987.

J. Tuholske & B. Brennan, “The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute,” 15 *Public Land Law Review* 53 (1994).

National Forest Management Act, 16 U.S.C. § 1604 (generally requiring National Forests to complete and periodically revise Forest Plans); 16 U.S.C. § 1604(e)(i) (each plan must provide for multiple use, including coordination of recreation and other resources)

36 C.F.R. § 219.21 (Forest Plans shall provide, to the degree consistent with other requirements, a “broad spectrum” of recreation opportunities; requiring “apprais[al]” of current and future recreation demands; requiring that ORV use “shall be planned and implemented to protect public land and other resources ... and minimize conflicts with other uses”; and requiring trails be classified as motorized or non-motorized).

36 C.F.R. § 295 (requiring restrictions on vehicle use off roads where analysis shows “that the use of one or more vehicle types off roads will cause considerable adverse effects on the resources or other forest visitors”; further requiring ORV-use trails or areas “be located to minimize conflicts between [ORV] use and other existing or proposed recreational uses of the same or neighboring public lands”; further requiring public review and 60 days notice for decisions regarding ORV trails and/or areas; further requiring monitoring of ORV trails and immediate closures if “considerable adverse effects” on resources or users; further requiring “revision of [ORV] management plans.”)

B. *When Can One Challenge a Forest Plan?*

Ohio Forestry Ass’n v. Sierra Club, ___ U.S. ___ (No. 97-16) (May 18, 1998).

USFS adopted Forest Plan, calling for logging on over 60% of the Forest.

Plaintiffs alleged USFS adopted logging strategies that relied too heavily on clearcutting and that failed to designate properly unsuitable timber lands, in violation of NFMA.

Supreme Court found unripe the challenge to the Forest Plan, since Forest Plans “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold,

or modify any formal legal license, power or authority; they do not subject anyone to any civil or criminal liability.” Challenges to the Plan’s logging strategies could be made in challenges to individual timber sales. Supreme Court states that USFS admits that challenges to Forest Plans are ripe where the decision challenged has an immediate, on-the-ground impact, such as “a plan incorporat[ing] a final decision to close a specific area to off-road vehicles.”

C. *Resolving ‘User Conflicts’ under 36 C.F.R. § 295.*

Northwest Motorcycle Ass’n v. USDA, 18 F.3d 1468 (9th Cir. 1994)

Wenatchee National Forest issues Forest Plan closing an area to trail bikes and other ORVs largely on the grounds of “user conflicts,” per 36 C.F.R. § 295, based almost exclusively on comments from the public.

Plaintiffs alleged, in part, that the determination that “user conflicts” required closure of area for motorized use was arbitrary and capricious, in part because the agency failed to monitor for conflicts or verify truth of public comments.

Court adopted district court decision, which held for USFS. The Court noted that the USFS had received a large volume of comments asserting that motorized use conflicted with their enjoyment of the area, and found such comments “a very persuasive indicator of ‘user conflict,’” even though the majority of comments simply expressed a general dislike of ORVs. *Id.* at 1475. The Court also found no duty to monitor for conflict before a Forest Plan was adopted. The Court dismissed Plaintiffs argument that no conflicts existed on the grounds that the regulations permit the USFS to take action to halt “likely” conflicts and damage.

IV. WILDERNESS AND RECREATION.

A. *Managing Motorized Uses in Wilderness.*

County of St. Louis v. Thomas, 967 F.Supp 370 (D.Minn. 1997).

USFS adopts management plan for the 1 million acre Boundary Waters Canoe Area (BWCA) Wilderness in Minnesota, which includes several thousand portage-linked lakes. Plan attempts to address high visitor use in some areas. Statute creating wilderness area had implicitly permitted some motorized use on some lakes.

Both conservationists and motorized boat outfitters challenged the plan. Outfitters alleged that the plan violated the Americans with Disabilities Act (ADA), failed to provide opportunities for a wide range of disabled persons (as required by the BCWA Wilderness Act of 1978), and alleged violations of NEPA. Conservationists alleged quota system permitting motorized towboats in wilderness violated the Wilderness Act.

On outfitters claims, Court held that: (1) ADA provided no cause of action against the Federal government; (2) USFS had reduced use of BWCA Wilderness for all persons; (3) NEPA provided no redress for those seeking to redress economic injuries.

On conservationists claims, Court held that USFS properly interpreted BWCA Wilderness Act permitting differing quotas for differing craft.

Friends of Boundary Waters Wilderness v. Robertson, (8th Cir. 1992)

BWCA Wilderness Act calls for the elimination of motorized portages after 1984 unless there is “no feasible nonmotorized means” of transporting boats. USFS conducted tests with 3 person teams portaging canoes, and concluded that nonmotorized means were “not feasible,” even though the majority of 3 person teams were able to portage canoes.

Conservationists alleged that continued use of motorized portages violated the Wilderness Act, and that since “feasible” means “possible,” the USFS erred in its conclusion that nonmotorized portages were not feasible.

Court held that Wilderness Act and BWCA Wilderness Act reflected a clear intent to end motorized use at the three disputed portages, and held that nonmotorized portages were, in fact, “feasible.”

Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996) (Equally divided court lets stand a district court decision upholding USFS regulations limiting all motorized use of Michigan lake, of which 95% of the shoreline is within designated wilderness).

B. *When Can One Challenge a Wilderness Inventory?*

State of Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998).

BLM undertook a field review (inventory) of lands in Utah for their wilderness values in an effort to end a “stalemate” in Congress over a legislative proposal to protect 5.7 million acres of wilderness on BLM lands.

Plaintiffs made a number of allegations, including, among other things, that the inventory violated FLPMA’s Sec. 603(a) requiring that BLM complete a wilderness review for all lands by 1991, FLPMA’s public participation requirement, and NEPA by failing to prepare an EIS. Plaintiff also alleged that BLM had decided to manage certain non-WSA lands as WSAs without amending resource management plans, as required by FLPMA.

Court held that on the majority of claims Plaintiffs lacked standing, because merely conducting an inventory injured no one and did not amount to final agency action. “If Defendants later decide to recommend wilderness legislation for the lands being inventoried, they will be required to comply with NEPA.” *Id.* at 1209. Court did find that Plaintiffs did have standing to press claims concerning alleged change in management of non-WSA lands as WSAs because doing so could injure Plaintiffs’ procedural rights to public involvement.

C. *Can BLM Protect Areas from Petroleum Leasing While Reconsidering Wilderness Values?*

Marathon Oil Co. v. Babbitt, Civ. No. 97-AP-266 (D. Colo. June 16, 1997).

Colorado BLM deleted several oil and gas lease parcels from a competitive bid sale in November 1997 based in part on the fact that the areas occurred within land proposed for wilderness designation by conservation groups. The areas leased were within areas open to leasing pursuant to the BLM district’s Resource Management Plan (RMP). BLM noted that the Department of Interior was attempting to develop a policy addressing management of these lands.

Plaintiff alleged, in part, that the BLM was in violation of FLPMA because its failure to lease areas open in the RMP amounted to a de facto amendment of the RMP without public involvement.

Court dismissed the case on the grounds that Plaintiff lacked standing. Court adopted BLM's argument that Court could not redress Plaintiff's grievance, which was that BLM had failed to lease it a particular parcel. Court held that the Court did not have the power to order BLM to lease a particular area under the Mineral Leasing Act.

Marathon Oil Co., 139 IBLA 347 (July 25, 1997) (GFS (O&G) 23 (1997)).

Same facts as above.

Appellant alleged, in part, that the BLM was in violation of FLPMA because its failure to lease areas open in the RMP amounted to a de facto amendment of the RMP without public involvement. BLM responded that failing to lease an area to Appellant was not a decision subject to IBLA review.

IBLA held that it did have jurisdiction to review BLM's deletion of lease parcels from competitive bid. IBLA further held that BLM had the authority to remove areas from leasing on a site-specific basis, even when the RMP called for leasing. IBLA concluded that in order to delete parcels from lease sale, the BLM must undertake a site-specific review to justify its decision. While BLM had failed to do so, the IBLA noted that the BLM had established a process for reviewing the wilderness suitability of lands within the conservationists' proposal. IBLA remanded the matter to BLM and implicitly endorsed the wilderness review process.

D. *Managing Motorized Recreation in Wilderness Study Areas.*

Lassen Motorcycle Club, 133 IBLA 104 (July 20, 1995) (GFS (Misc) 34 (1995)).

BLM district manager denied an application by a motorcycle club for a one-day cross-country motorcycle race over existing 90 miles ways and trails, 4.75 miles of which pass through a Wilderness Study Area (WSA). Permit was denied because it would impair the suitability of the WSA for wilderness designation in violation of FLPMA Sec. 603(c), 43 U.S.C. § 1782(c)

Appellant alleged, among other things, that FLPMA's wilderness nonimpairment mandate was not controlling where BLM had not recommended a WSA for wilderness designation.

IBLA held for BLM. "BLM has interpreted the nonimpairment mandate of section 603(c) of FLPMA as requiring that nothing that will disturb the surface of lands under wilderness review will be permitted after the date scheduled for the Secretary's recommendation," to Congress concerning wilderness, even if the impairment can be rectified later. 133 IBLA at 106. IBLA held reasonable BLM's conclusion that there was a high probability that individuals would drive off existing narrow trails in passing other racers, thereby impairing wilderness suitability.

Southern Utah Wilderness Alliance, 142 IBLA 164 (Jan. 15, 1998) (GFS (Misc) 25 (1998)).

BLM approved management actions for the Moquith Mountain WSA that included some limits on, but not a prohibition of, motorized recreational activities.

Appellants challenged BLM's failure to undertake a review of the potential impairment of wilderness values in the WSA by the management actions.

IBLA held for Appellants, concluding that FLPMA Sec. 603(c) requires BLM to undertake a nonimpairment review prior to authorizing ORV use. While BLM's actions might limit ORV use, the agency failed to determine that ORV impacts at reduced levels would not impair wilderness values.

Montana Wilderness Association v. US Forest Service, CV 96-152-M-DWM (case pending).

Montana Wilderness Study Act of 1977 (MWSA), P.L. 95-150, 91 Stat. 1243 (Nov. 1, 1977) designated several hundred thousand acres of USFS land in Montana as "wilderness study areas", and provided that the USFS administer these areas "so as to maintain their presently existing wilderness character."

Plaintiffs allege USFS, by permitting snowmobiling activity in the WSAs, has violated the MWSA's provisions to "maintain" wilderness character of the areas.

Voyagers Region Nat'l Park Assn. v. Lujan, 966 F.2d 424 (8th Cir. 1992).

Conservationists challenged NPS decision to permit construction and use of snowmobile trails in a Voyageurs National Park area under review for wilderness recommendation, pursuant to 16 U.S.C. § 160f(b).

Court upheld agency decision, refusing to find it arbitrary and capricious, in part because Voyageurs Park enabling act demonstrated that Congress contemplated snowmobile use in Park.

V. WILDLIFE AND RECREATION.

A. *Wildlife in National Parks.*

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997).

NPS issued temporary, annual closure orders for areas of Voyageurs National Park, based in large part on a determination from the US Fish and Wildlife Service (FWS) that snowmobiling activity, unless so limited, would jeopardize the endangered wolf.

Appellants argued that biological opinion was not supported by the record, and must be set aside as arbitrary and capricious.

Court noted that snowmobiling is a prohibited activity in National parks, except where permitted by regulations, and only then when such "use is consistent with ... park management objectives, and will not disturb wildlife or damage park resources." 36 C.F.R. § 2.18(c); see also 16 U.S.C. § 160(h) (granting Interior Secretary with discretion to permit snowmobiling in national parks). Court declined to reach the issue of Endangered Species Act (ESA) compliance, concluding that NPS's regulations provided the agency with discretion to halt actions that may "disturb wildlife," and finding the agency record sufficient.

See also Mauslof v. Babbitt, 85 F.3d 1295 (8th Cir. 1996) (granting standing to intervene to environmental intervenors seeking to defend NPS's and FWS's decision to limit snowmobiling)

Fund for Animals v. Babbitt, 97 CV 01126 (EGS) (D.D.C. 1997), settled and dismissed, Oct. 28, 1997.

Yellowstone National Park grooms dozens of miles of snowmobile trail inside the Park, and has built lodges and warming huts that have encouraged 300,000 visitors each winter to visit the park, 90,000 on snowmobiles.

Plaintiffs alleged that NPS violated the ESA by failing to consult with FWS regarding impacts to the gray wolf and grizzly bear. Plaintiffs also alleged, among other things, that NPS had failed to prepare NEPA reviews of environmental effects of air pollution and cumulative effects, and had failed to ensure that winter activities complied with NPS regulations prohibiting the disturbance of wildlife from its natural state, 36 C.F.R. § 2.1(a)(1)(i).

Plaintiffs and Defendants settled and dismissed case, requiring the NPS to (1) prepare an EIS on winter visitor use and related activities; (2) prepare a biological assessment and request formal consultation concerning the impacts of activities of the wolf and the grizzly; (3) prepare an EA each year to consider closing some of the groomed trails.

Southern Utah Wilderness Alliance v. Dabney, 2:95-CV-0559 K, filed June 22, 1995 (case pending).

NPS adopted plan to designate about 285 miles of both ORV and four-wheel drive roads open for motorized use in Canyonlands National Park and part of the Glen Canyon National Recreation Area.

Plaintiffs allege (1) that NPS's designation of ORV routes in National parks violates 36 C.F.R. § 4.10 which prohibits the same; (2) that NPS violates NEPA by failing to consider the alternative of closing four wheel drive roads; (3) that NPS failed to consider whether designation of trails and roads conflicts with other park values, including preservation wildlife and scenic values.

See also Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445 (9th Cir. 1996) (upholding NPS regulations limiting bicycles in National parks to roads, unless otherwise authorized and only when consistent with protection of park values, park safety, and will not disturb wildlife).

B. *The Limited Federal Role in Managing Hunting.*

Fund for Animals v. Thomas, 127 F.3d 84 (D.C. Cir. 1997), affirming 932 F.Supp. 368 (D.D.C. 1996).

USFS adopted policy granting discretion to district rangers to prohibit "hunting practices" only where state regulations fail to protect forest resources, the viability of wildlife, if the effects of the hunting practice conflict with the Forest Plan, and if state laws violate the ESA.

Plaintiffs alleged that the USFS's decision to permit "bear baiting" conflicted with the agency's duty to protect the "primeval character" under the Wilderness Act, and thus required the agency to undertake a review of the practice under NEPA. Plaintiffs also alleged that the USFS violated the ESA by failing to consult with the FWS concerning possible impacts (i.e. accidental killing) of grizzlies.

Court held that (1) adoption of a policy that maintained the status quo was not a federal action requiring NEPA compliance; and (2) FWS and USFS had consulted "informally" and determined bear baiting would have no impact on grizzlies, thereby complying with the ESA.

C. *Recreation and Wildlife in National Marine Sanctuaries.*

Personal Watercraft Industry Ass'n v. Department of Commerce, 48 F.3d 540 (D.C. Cir. 1995).

National Oceanic and Atmospheric Administration (NOAA) adopted regulations (at 15 C.F.R. § 944.5(a)(8)) regulating use of the 4,000 square mile Monterey Bay National Marine Sanctuary that limits “thrill craft” (jet skis and the like) to four specified zones.

Plaintiffs alleged that regulation arbitrarily singling out personal watercraft from all other vessels without support in the administrative record.

Court held (1) that agency could properly regulate one threat to the marine sanctuary without regulating all of them; and (2) that there was ample record in the evidence supporting threats of personal watercraft (including reports of harassing marine mammals, destroying aquatic vegetation, and disturbing other visitors).

Florida Keys National Marine Sanctuary; Final Rule 62 Fed.Reg. 32153-32176 (June 12, 1997), see 15 CFR Parts 922, 929 and 937.

NOAA adopted regulations that did not prohibit personal watercraft, but that limited speed and operation of all motorized vessels by prohibiting them from operating above idle speed or creating a wake in specific areas.

D. *Recreation and Wildlife in National Wildlife Refuges.*

National Audubon Society v. Babbitt, C92-1641 (W.D. Wash) (filed Oct. 22, 1992, settled Oct. 20, 1993).

Plaintiffs alleged that FWS had violated the National Wildlife Refuge System Administration Act, 16 U.S.C. § 688dd(d), by failing to permit only those secondary uses on National Wildlife Refuges where such uses had been found to be “compatible” with the purposes of the Refuge, and by failing to analyze the environmental impacts of permitting such uses pursuant to NEPA.

Suit settled. FWS agreed to perform compatibility determination for all secondary uses on all refuges within a 14-month period.

National Wildlife Refuge System Improvement Act, Public Law 105-57, 16 U.S.C. §668dd - ee.

“The Secretary is authorized, under such regulations as he may prescribe, to ... permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established.” 16 U.S.C. § 668dd(d)(1).

Secretary of Interior shall

-- “recognize compatible wildlife-dependent recreational uses as the priority general public uses of the system ...” 16 U.S.C. § 668d(a)(4)(H).

-- “provide increased opportunities for families to experience compatible wildlife-dependent recreation, particularly opportunities for parents and their children to safely engage in traditional outdoor activities, such as fishing and hunting.” 16 U.S.C. §

668dd(a)(4)(K). See also E.O. 12996 (urging Refuge System to increase opportunities for wildlife-dependent recreation)

“The term ‘compatible use’ means a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.” 16 U.S.C. § 668ee(1).

VI. RECREATION AND OTHER MULTIPLE USES.

National Wildlife Federation v. BLM, 140 IBLA 85, 101 (Aug. 21, 1997).

BLM permitted livestock grazing in 5 canyons of the Comb Wash in Utah, which contained archaeological sites and delicate riparian areas, and had high scenic values for recreation. 140 IBLA at 89.

Plaintiffs alleged that the BLM (1) had failed to undertake a site-specific review to determine if the costs of livestock grazing to other multiple uses (including recreation) outweighed the benefits, in violation of the multiple use mandate of FLPMA, 43 U.S.C. §1732(a); and (2) had failed to undertake a site-specific environmental review pursuant to NEPA. Plaintiff introduced evidence in prior proceeding before IBLA’s Office of Hearings and Appeals (OHA) that outfitters and their customers no longer wished to visit areas degraded by grazing.

IBLA upheld OHA judge’s ruling enjoining livestock grazing in the canyons. IBLA ruled that BLM violated FLPMA when it permitted grazing in the canyons “without engaging in a reasoned and informed decisionmaking process showing that it has balanced competing resource values in order to best meet the present and future needs of the American people” as required by FLPMA. 140 IBLA at 86. IBLA also ruled that the BLM had failed to conduct site-specific NEPA review in violation of NEPA.

VII. POLLUTION CONTROL LAWS: LIMITING RECREATION TO PROTECT WATER QUALITY.

Dubois v. USDA, 102 F.3d 1273 (1st Cir. 1996)) cert den. 117 Sup. Ct. 1712.

USFS proposed to permit New Hampshire ski area to expand, and to expand snowmaking operations using a natural lake. USFS approved ski resort plan to increase snowmaking by transferring water from a river to a pond, from which it would pump water for snowmaking.

Plaintiffs alleged that the USFS was permitting the discharge of pollutants to the pond without first obtaining a NPDES permit allowing it to discharge pollutants to a water of the United States, in violation of the Clean Water Act (CWA) Sec. 301(a), 33 U.S.C. § 1311(a). Plaintiffs also alleged that USFS could not rely on improper certification by the state that USFS discharge met state water quality standards. See CWA Sec. 401, 33 U.S.C. § 1341 (requiring state to certify that “Any applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters” will not violate water quality standards.)

Court held that discharge of water from polluted river into a pond constitutes a discharge requiring a permit for purposes of the CWA. Court further held that Plaintiff could not challenge state's alleged improper certification in a suit against the USFS.

Oregon Natural Desert Association v. Green, 940 F.Supp. 1534 (D.Or. 1996).

Camp Creek allotment on USFS land in Oregon was being heavily grazed by livestock. Plaintiffs alleged that applicants for livestock grazing had failed to obtain certification from the state that grazing would not adversely impact state water quality standards, as required by CWA Sec. 401, 33 U.S.C. § 1341.

Court held that definition of “discharge” was not limited to “point source,” and that pollution caused by livestock grazing constitutes a discharge into the waters of the US, requiring state certification under Sec. 401. Court granted injunction prohibiting USFS from granting grazing permits until permit applicants receive state certification.

CWA Sec. 313, 33 U.S.C. § 1323, the “Federal facilities” provision.

Requires that each federal department having jurisdiction over property that may result in discharge or runoff of pollutants to waters of the US shall comply with all Federal, State, and local water quality requirements. Where runoff or discharges from public lands may result in degrading water quality such that it cannot achieve the “beneficial uses” designated by the state, the Federal activity may be required to halt.

CWA Sec. 303(d), 33 U.S.C. § 1313(d), the “TMDL” provision.

Requires that each state set “total maximum daily loads” (TMDLs) for pollutants (including thermal pollution) for all streams which do not meet State water quality standards and which have been designated as “water quality limited.”

VIII. LIMITING MOTORIZED RECREATION TO PROTECT PUBLIC SAFETY.

63 Fed.Reg. 16181-16182 (April 2, 1998), Notice of Proposed Rulemaking.

US Coast Guard proposes to establish a “Regulated Navigation Area” within Copper Canyon, Lake Havasu because “the extremely heavy traffic of recreational vehicles ... creates conditions hazardous to navigation and causes vessels carrying law enforcement and emergency response officials to reach all areas of Copper Canyon” Citing 33 C.F.R. 1.05 (general rulemaking authority).

IX. RS 2477: THE OLDEST, NEWEST TOOL TO PROMOTE MOTORIZED RECREATION?

43 U.S.C. 932 reclassified R.S. 2477. “The right of way for the construction of highways over public lands, not reserved for public use, is hereby granted.”

Shultz v. Department of the Army, 10 F.3d 649 (9th Cir. 1993) rehearing granted, opinion withdrawn and superseded, 96 F.3d 1222 (9th Cir. 1996).

Plaintiff wished to access property in Alaska through a purported right of way across Federal land (a US military base).

Plaintiff argued that Federal government had acquired title to property subject to valid existing rights, and that foot trail through land constituted a highway.

In its initial opinion (later withdrawn), Court determined that to establish RS 2477 right of way, it was sufficient to establish the location of termini, and not the exact route. In addition, Court found that “the barest foot trail may qualify” as a highway for RS 2477 purposes.

In its later opinion, the 9th Circuit simply affirmed the factual findings of the lower court, which held that the Plaintiff had failed to establish a “continuous” RS 2477 right-of-way route.

Como Lake-Blue Lakes Trail, Rio Grande National Forest, CO, 1996-97.

USFS closed a several mile stretch of a popular jeep trail on the Rio Grande National Forest to protect alpine streams and vegetation, after undertaking an EA under NEPA in early 1996. Jeep advocates filed an administrative appeal, arguing that a trail from mining claims in the area pre-dated the “reservation” of the land for Forest Reserve in about 1907, and thus constituted an RS 2477 right-of-way. Appeal was denied. Subsequent to appeal, County officials and jeep groups presented “mineral surveys” and “plenty of maps” to Forest Supervisor, who then “validated” the RS 2477 claim, concluding that the USFS would no longer exercise jurisdiction over the disputed trail. The Regional Forester disavowed the Forest Supervisor’s validation of the RS 2477 claim at about the same time that the Chief of the Forest Service issued a moratorium on processing RS 2477 claims.

X LITIGATION: NOT THE ONLY TOOL FOR RESOLVING RECREATION MANAGEMENT DISPUTES.

Citizens Committee to Save Our Canyons v. US Forest Service, Civ. No. 95-NC-068G (D. Utah Sep. 26, 1996).

Court set aside USFS approval of new lift at Snowbasin, UT based on agency’s failure to comply with NEPA (failure to evaluate properly cumulative impacts, and failure to consider the expert opinions on the difficulty of avalanche control).

Omnibus Parks Act, P.L. 104-333, Sec. 304.

Congress required USFS to trade land at the Snowbasin ski area to owner of base facility, effectively precluding NEPA review of development of skiing and other facilities.

Omnibus Parks Act, P.L. 104-333, Sec. 701.

Congress effectively eliminates NEPA review of renewal of ski area permits. “To reduce costs in administering the provisions of this Act, the reissuance of a ski area permit to provide activities similar in nature and amount to the activities provided under the previous permit shall not constitute a major Federal action for the purposes of [NEPA].”

H.R. 2400, Sec. 1212(v) (105th Congress).

Permits motorized portages in parts of the Boundary Waters Canoe Area, effectively de-authorizing the wilderness status of those areas.