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Lead NEPA Story: Environmentalists see court decision as chance to curtail leasing

(*Greenwire*, 5/10/2018) Dylan Brown, E&E reporter

Environmentalists hope a recent federal court ruling could effectively reinstate an Obama-era ban on new coal mining that the Trump administration lifted last year.

In March, the U.S. District Court for the District of Montana ordered the Interior Department to update resource management plans (RMPs) used by Bureau of Land Management field offices in Buffalo, Wyoming, and Miles City, Montana.

Judge Brian Morris found that the two RMPs, last revised in 2015, failed to properly account for climate change from leasing of coal and other fossil fuels — something environmentalists had claimed for years.

Green groups now are pushing to halt coal leasing there until BLM updates the RMPs, but the decision will be up to the court. It gave both sides until May 25 to make a case for what to do about fossil fuel development as the agency updates the RMPs.

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Endangered Species Act: Dems warn against potential change for threatened species

(*Greenwire*, 5/7/2018) Michael Doyle, E&E reporter

Senior Democratic lawmakers are launching a peremptory strike against a potential Fish and Wildlife Service change in how threatened species are protected.

The revisions to what insiders know as the "blanket 4(d) rule" are still in draft form and might never formally surface. The very idea, though, spooks some on Capitol Hill, and that, in turn, opens another front in the perpetual Endangered Species Act dust-up.

"We fear FWS' intention is actually not to better address the needs of threatened species, but rather to cater exclusively and completely to oil, gas and agricultural industries that must currently avoid harming species and their habitats," two Democrats wrote to Interior Secretary Ryan Zinke on Friday.

Underscoring their broader political message, Rep. Raúl Grijalva (D-Ariz.) and Sen. Tom Carper (D-Del.) cited the "track records" of acting Assistant Secretary Susan Combs, who the Democrats say is "known to have strong ties to ranching and oil industries," and Deputy Secretary David Bernhardt, who the Democrats say has "a long record of advocating to weaken the Endangered Species Act."

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Grijalva is the senior Democrat on the House Natural Resources Committee, and Carper is the party's ranking member on the Senate Environment and Public Works Committee.

The lawmakers oppose a proposed "Removal of Blanket Section 4(d) Rule" that was submitted last month for the White House Office of Management and Budget to review.

The ESA prohibits the "take" of species designated as endangered — myriad actions including those that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a species.

Section 4(d) of the law allows the agency to establish special regulations for threatened species. In 1978, FWS used this authority to extend the prohibition of take to all threatened species. This is known as the "blanket 4(d) rule."

This blanket rule can be modified by a species-specific 4(d) rule. Currently, for instance, FWS is considering a proposal for a 4(d) rule specifically tailored for the threatened Louisiana pine snake.

The snake inhabits open-canopy forests with a lot of ground-cover plants that provide forage for the Baird's pocket gopher. The snakes eat the gophers. In the absence of fire or mechanical thinning, dense forests become less hospitable.

Private-property owners worried they might be blocked from forest thinning if all taking of the Louisiana pine snake was absolutely prohibited, so FWS wrote a rule that allows for some potential short-term take of snake or habitat.

"Weyerhaeuser is appreciative of the Service's work to create a 4(d) rule that takes into account the needs of forest landowners to continue to manage their properties," the timber products company stated Friday during the pine snake public comment period that expires today.

Conservatives and private-property advocates have previously sought to scale back the broader, blanket 4(d) rule, with the Pacific Legal Foundation filing a petition in August 2016 on behalf of the Washington Cattlemen's Association.

"That regulation erodes the distinction between endangered and threatened species," the petition stated, adding that it "creates an incentive for litigation."

FWS says it is moving prudently, along with other federal agencies.

"NOAA Fisheries and the Fish and Wildlife Service are working to develop regulations that improve our implementation of the ESA so that it is clear, unambiguous, consistent and flexible to the greatest extent possible, and encourages collaborative conservation from a broad range of partners," FWS spokesman Gavin Shire said in a statement.

In a copy of the potential rule obtained by *E&E News*, FWS officials also stress they are looking at future actions rather than reversing prior decisions.

"Nothing in these proposed revised regulations is intended to require ... that any previous listing, delisting, or reclassification determinations or species-specific protective regulations be reevaluated on the basis of any final regulations," the proposed rule states.

NEPA: Spending bill would block court review of water project

(*Greenwire*, 5/15/2018) Michael Doyle, E&E News reporter

Federal courts would be blocked from digging into California Gov. Jerry Brown's (D) massive and controversial water tunnel plan under a House funding bill unveiled late yesterday.

In a move that could sideline opponents and speed construction of California's so-called WaterFix, allies of the tunnel project slipped in language declaring that its final environmental impact statement "shall hereafter not be subject

to judicial review under any Federal or State law."

The far-reaching ban on court review would extend beyond the environmental studies to cover "any resulting agency decision, record of decision, or similar determination" as well, according to the rider attached to the House's draft fiscal 2019 Interior and EPA appropriations package.

The overall 144-page legislation is being shepherded by Rep. Ken Calvert (R-Calif.), who has been sympathetic to the tunnel project and is chairman of the House Appropriations subcommittee that's responsible for Interior and EPA funding.

"This is a solution that is on the table," Calvert said of the WaterFix project during a May 25, 2016, House floor debate. "It has been thought out. It costs a lot of money. I know there are some questions that have to be answered."

Calvert added during the 2016 debate, when the Republican-controlled House rejected by voice vote an amendment to block the project, that "we are doing the best we can in the majority to make sure that we have water for the people in the Central Valley, and, by the way, for Southern California, where our economy is suffering."

Environmentalists, though, remain concerned about the project and unhappy about the apparently unexpected inclusion of the judicial review rider.

"Exempting an infrastructure project of this size from judicial review is shockingly irresponsible and could result in disastrous consequences for endangered salmon runs, the San Francisco Bay-Delta ecosystem, and local communities that would be affected by the project," Rachel Zwillinger, water policy adviser for Defenders of Wildlife, said today.

The rider could face a potential challenge on the House floor when the underlying bill comes up for consideration. The Senate is likely to be a trickier road to navigate.

Brown's current $17 billion WaterFix proposes two 40-foot-wide tunnels to carry water from the Sacramento River 35 miles south. Last week, the Santa Clara Valley Water District agreed to spend up to $650 million on Brown's plan.

The main volume of the final environmental study of the WaterFix twin-tunnel plan, which the House rider would put off-limits to judges, exceeded 16,000 pages when released in December 2016.

Beyond the California WaterFix, the House bill would also block judicial review of other actions including removal of the gray wolf in Wyoming from Endangered Species Act protection.

Reporter Kellie Lunney contributed.

Migratory Bird Treaty Act: Here's why words matter in migratory bird debate

(*Greenwire*, 5/11/2018) Michael Doyle, E&E reporter

Interior Secretary Ryan Zinke's lawyerly defense of the clipped Migratory Bird Treaty Act is no accident. With a brisk Capitol Hill exchange yesterday, Zinke illuminated the subtlety of words, the practice of spin and, not least, the crucial importance of a job opening he must try once again to fill.

And it all unfolded in under two minutes, toward the tail end of a long budget hearing, when Sen. Chris Van Hollen (D-Md.) pressed Zinke about the department's recast legal opinion that the MBTA covers intentional but not incidental "take" — harm or killing — of migratory birds.

"The change to the Migratory Bird Act had to do with 'accidental,'" Zinke said. "Now, what does that mean? Let's say an oil company [employee] is driving on a road in Montana and hits a bird in the windshield, accidentally. Now, should that individual be held criminally liable?"

The answer, of course, is "no," Zinke added, referring to a legal opinion rendered in December by Interior's solicitor office.

Van Hollen objected, noting that "there's been no case in the United States, ever, that's been brought in that kind of situation." The civil but pointed conversation then moved on, leaving behind some key questions that start with teasing apart any distinction between "accidental" and "incidental."

There is a difference, and it matters. Zinke's focus on a heavy-handed if theoretical prosecution for an accidental take minimizes the real impact of the controversial MBTA reinterpretation, critics believe.

"A driver hitting a bird could be called accidental, but an oil company leaving an oil pit uncovered after thousands of birds have died there certainly is not," Jason Rylander, senior staff attorney with Defenders of Wildlife, said in an interview today.

Instead, Rylander called the "killing of birds by industries like the oil and gas industry" an "incidental" take: something, he said, that is both unintentional and "entirely foreseeable and expected to occur."

The MBTA, first passed in 1918 and amended several times since, prohibits the unauthorized taking of roughly 1,000 species of migratory birds. Its language, though, leaves some room for interpretation.

Some observers have contended the law covers killing that is an "incidental" consequence of other activities, regardless of the intentions.

In 1998, for instance, the Moon Lake Electric Association Inc. in Colorado was charged with taking 12 golden eagles and other birds that had regrettably perched on electric power poles. The trial judge reasoned that "the MBTA does not seem overly concerned with how captivity, injury, or death occurs." Other courts have disagreed.

In January 2017, at the end of the Obama administration, Interior Solicitor Hilary Tompkins issued an opinion that the MBTA covers "take that is incidental to industrial or commercial activities," as well as intentional acts like poaching.

"'Accidental' is almost irrelevant to the analysis, because we weren't prosecuting take cases involving a bird flying into a windshield," Tompkins said in an interview today.

Even the incidental take coverage, Tompkins added, could count more for environmental leverage than for law enforcement.

"Having incidental take on the table would create a platform for the Fish and Wildlife Service and the industry to find ways to minimize take and undertake certain practices," Tompkins said, citing as an example "companies being incentivized to net their oil-and-gas pits."

Last December, Interior's new attorneys reversed course and determined that the MBTA covered only the intentional taking of a bird.

Tellingly, in its Dec. 22 legal opinion, the Interior's solicitor's office used the words "incidental" and "accidental" as if they referred to two distinct scenarios.

“Interpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions, threatening up to six months in jail and a $15,000 penalty for each and every bird injured or killed," the opinion stated.

The revised MBTA opinion was authored by Principal Deputy Solicitor Daniel Jorjani, the office's senior attorney in the absence of a Senate-confirmed solicitor.

Zinke must find a new solicitor candidate, with the announcement yesterday that prior nominee Ryan Nelson has withdrawn and instead has been nominated to a seat on the 9th U.S. Circuit Court of Appeals. And while the MBTA tussle has so far taken place without a Trump administration solicitor, it's underscored the importance of a post where words make a difference.

"They set the legal policy of the entire department, so it's a big job, a big responsibility," Tompkins said. "Whoever comes into the job needs to be prepared and astute on all of those issues."

NEPA: Utah Republican renews push for highway in conservation area

(*Greenwire*, 5/11/2018) Jennifer Yachnin, E&E reporter

Rep. Chris Stewart (R-Utah) is making a fresh attempt at securing a transportation corridor across conservation lands in southwestern Utah, banking that the addition of 6,865 acres of new desert tortoise reserve will clear the way for a five-lane highway and utility easement.

In late April, Stewart introduced H.R. 5597, the "Desert Tortoise Habitat Conservation Plan Expansion Act, Washington County, Utah."

The legislation aims to end a long-running dispute over building a new transportation corridor across 4 miles of the Red Cliffs National Conservation Area, which local officials have argued is necessary due to growth in the city of St. George.

The bill "adds 6,835 acres of new high-quality tortoise habitat," Stewart said in a statement to *E&E News*.

The Red Cliffs NCA, designated by Congress in 2009, includes 45,000 acres of BLM land. That NCA is also part of the larger Red Cliffs Desert Reserve, which encompasses an additional 14,000 acres of state land and 2,600 acres of private land as tortoise habitat.

Stewart also reiterated arguments he made last fall when he unsuccessfully pushed another bill, H.R. 2423, which would have allowed the road without the designation of new habitat.

Stewart has said the proposed Northern Corridor — also referred to as the Washington Parkway — was included in the wide-ranging Omnibus Public Land Management Act of 2009.

"This not only fully implements Public Law 111-11, which was signed by President Obama, but also benefits the people of one of the fastest-growing communities in the nation," Stewart said.

But Democrats insist the omnibus lands bill only directed the Interior secretary and BLM to evaluate the road and utilities corridor.

Environmentalists have slammed the proposal, asserting that it would bifurcate habitat for the desert tortoise as well as circumvent environmental reviews.

"The problem with it is they keep trying to do everything but comply with the law when it comes to managing the habitat conservation plan," said Southwest Utah National Conservation Lands Friends Director Susan Crook. "Really, you would overturn, you would gut the Endangered Species Act and [National Environmental Policy Act] just to get this 3- to 4-mile segment of highway?"

St. George resident Richard Spotts, a retired BLM employee and self-described "NEPA nerd," is also a vocal opponent of the Northern Corridor proposal and Stewart's legislation, similarly arguing it could set a precedent for counties to supersede habitat conservation plans (HCPs) when local development conflicts with endangered species or other concerns.

"Washington County is basically trying to put things in Congressman Stewart's current bill that would let the county have what they asked for but couldn't get through the BLM," said Spotts, who retired after serving as BLM's planning and environmental coordinator for the Arizona Strip District.

He added: "This, to me, is kind of like a Hail Mary pass, but in a really friendly football game."

St. George Mayor Jon Pike dismissed Spott's criticisms in an op-ed in the St. George News last month, asserting that Stewart's legislation and the current road proposal have been a collaborative process.

"We have worked together with local, state and federal stakeholders — including Fish & Wildlife biologists — to create a win-win for the desert tortoise, other protected species, public

lands access for hiking, biking and climbing, and for transportation," Pike wrote.

But Crook also argues that local leaders have failed to consider alternatives to building a large new road, such as expanded transit service or looking at other bypass routes.

"We don't believe that they have ever questioned the transportation plans and said, 'What are the alternatives?'" she said.

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Anti-coal activist Jeremy Nichols of WildEarth Guardians said he believes all leasing should be on ice until the RMP revisions are complete.

"If the plan is inadequate," he said, "they can't rely on the plan right now to justify the approval of those leases."

But BLM North Central Montana District spokesman Jonathan Moor said the court did not vacate the RMPs.

"Until the court rules on the remedies or the BLM reaches an agreement with the plaintiffs, the BLM will include comprehensive environmental analysis for any new or pending leases of coal, oil, or gas resources in the two planning areas," he said. "The processing of current leasing actions is ongoing during this time period."

After the Obama administration imposed the ban in 2016, it undertook a review of the federal coal program and concluded that, nationwide, it had not sufficiently taken climate into account. But within months of President Trump's inauguration, Interior Secretary Ryan Zinke lifted the moratorium, axed the review and sidelined climate considerations.

Morris' decision now forces the Trump administration to confront the climate issue, at least in the rural region known as the Powder River Basin in Montana and Wyoming.

For coal, nowhere could have a bigger impact.

Roughly 40 percent of the nation's coal is mined in the Powder River Basin, the vast majority of it on public land.

Of all currently pending leases nationwide, about 84 percent of the coal lies within the jurisdiction of the Buffalo and Miles City field offices.

"It's not everything certainly, but it's a very big piece of the picture in terms of coal in this country," said Kyle Tisdel, the Western Environmental Law Center attorney representing the environmental groups whose lawsuit triggered the RMP reviews.

Tisdel said he sees "the opportunity to significantly curtain coal development going forward in the Powder River Basin."

The ruling found flaws in the range of coal development scenarios considered by BLM.

"The [National Environmental Policy Act] requires [BLM] to conduct new coal screening and consider climate change impacts to make a reasoned decision on the amount of recoverable coal made available in the RMPs," Morris wrote.

Coal critics see more climate scrutiny translating to "keep it in the ground."

"Any remand is going to have to look at a full range of coal alternatives, which, in my mind, would include a no-leasing alternative," Tisdel said.

In court, the Trump administration has asked Morris to reconsider how far he asked BLM to go. Department of Justice attorneys argued that the court order requires a "substantive analysis" under the Mineral Leasing Act and the Federal Land Policy and Management Act.

"But Plaintiffs brought only NEPA claims and the Court found only NEPA violations," they wrote. "As such, the Order affirmatively enjoins BLM to take action under statutes that Plaintiffs have not challenged."

On the ground, coal companies say nothing has changed.

"Important to note that the ruling hasn't halted any leases or operations," said Cloud Peak Energy Inc. spokesman Rick Curtsinger.

Climate 'games'

Demand to lease coal has shrunk since the moratorium ended, though coal companies have applications pending for nearly 2 billion new tons nationwide. And significant expansion could be coming in the areas in question.

A trio of requests in the Buffalo Field Office total nearly 1.2 billion tons of coal. The Miles City Field Office has five pending leases containing 431.9 million tons.

Those leases involved only four companies.

Cloud Peak wants to expand all three of its major surface mines — Antelope and Cordero Rojo in Wyoming and Spring Creek in Montana. A total of 917.1 million new tons is about 48 percent of the coal up for lease nationwide.

Arch Coal Inc. has applied for another 24 percent with just one lease — 467.6 million tons at the Black Thunder mine in Wyoming and the nation's second-biggest coal producer.

In Montana, Lighthouse Resources Inc. is seeking another 12 percent, or 220.9 million tons, for its Decker mine, while Westmoreland Coal Co. has a small lease modification pending at its Rosebud mine.

All agency decisions made since the 2015 RMP revisions are vulnerable, environmentalists contend. That will make things complicated for oil and gas but more straightforward for coal, as no coal has been leased in Wyoming or Montana since 2015.

Coal companies already have stockpiled decades' worth of coal under lease, but any delay in processing new leases could jar their long-term planning.

"They do have a schedule, and any hiccup in that schedule is something they'll be worried about," Nichols said.

The question becomes how BLM will approach the task at hand.

"If they play more games, then they are going to be equally vulnerable moving forward," Nichols said.

"I definitely see how they could get it done right, but it means being morally and scientifically responsible," he added. "You've got to reap what you sow sometimes, and if you're going to turn your back on reality, you're going to face the consequences and it's not going to be pretty."

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