

COLORADO WILD, INC.
v.
UNITED STATES FOREST SERVICE

523 F. Supp.2d 1213
United States District Court, D. Colorado.

Oct. 4, 2007.

[KANE](#), Senior District Judge.
Plaintiffs Colorado Wild, Inc. and San Luis Valley Ecosystem Council challenge the decision of the Defendant United States Forest Service (“Forest Service”) to grant special use authorization for certain rights-of-way across National Forest System (“NFS”) lands. ***

Based *de novo* review, I grant Plaintiffs’ request for continued preliminary injunctive relief.

Background

The following facts are undisputed unless otherwise stated:

In June, 2001, Leavell-McCombs Joint Venture (“LMJV”) applied to the Forest Service for rights-of-way across NFS lands for access and utility corridors from U.S. Highway 160 to private land it owns within the Rio Grande National Forest. The private land to be served is a 287.5 acre parcel located near the summit of Wolf Creek Pass. It is entirely surrounded by NFS lands, but is currently accessible by vehicle from U.S. Highway 160 via Forest System Road 391 (“FSR 391”), a single-track gravel road open to public vehicular use from mid-June through September.

LMJV sought the additional access and utility corridors in order to facilitate the construction and operation of a year-round resort on its property to be known as the Village at Wolf Creek (“the Village”). LMJV requested that the Forest Service provide additional access to the planned Village by allowing the extension of an existing road, known as Tranquility Road, which serves one of the parking lots to the adjacent Wolf Creek Ski Area. LMJV also represented to the Forest Service and others that it could and would build and operate the Village as planned using FSR 391 if needed, without the

additional access and utility corridors it requested.

As conceived by LMJV, the Village at full build-out would consist of more than 2,100 residential and commercial buildings and house approximately 10,000 people. It would also include parking facilities for more than 4500 vehicles, two power plants and a wastewater treatment plant sufficient to serve a community of this size. Build-out would occur over a 20-year period. The Village would have ski-in, ski-out access to the Ski Area.

The proposed Village is located in Mineral County, a mostly rural county with a current population of less than 1000. In late 2004, while LMJV’s access application was pending before the Forest Service, the Mineral County Board of Commissioners approved the Village as described above as a Planned Use Development (“PUD”). This final subdivision approval was challenged in state court by Wolf Creek Ski Corporation, Colorado Wild and San Luis Valley Ecosystem Council on numerous grounds. In October, 2005, the state district court for Mineral County vacated the County’s approval upon finding that the limited access FSR 391 provided to the planned development was not adequate under state law. In its decision, the state court noted that the PUD approved by Mineral County anticipated that the main entrance to the Village would be through or parallel to the lower Ski Area parking lot, *i.e.*, the Tranquility Road access requested by LMJV, and that the current plat of the Village would have to be revised if the Forest Service selected another access alternative. The Colorado Court of Appeals recently affirmed the district court’s decision with directions that the matter be remanded to the County for further proceedings.

Meanwhile, in response to LMJV’s application for additional access to its property, the Forest Service had determined that an Environmental Impact Statement (“EIS”) analyzing the proposal and alternatives was required by the National Environmental Policy Act (“NEPA”), [42 U.S.C. §§ 4332 et seq.](#) * * *

In March 2006, following publication of a draft EIS and a public comment period, the Forest Service issued the Final Environmental Impact Statement (“FEIS”) prepared by Tetra Tech and its Record of Decision (“ROD”) on LMJV’s access application.

The FEIS focused on four alternative responses to LMJV's access request: (1) the NEPA-mandated "no action" alternative; (2) LMJV's request for a single additional access to the property via an extension of Tranquility Road; (3) a single access alternative using a new, to-be-constructed road, referred to as the "Snow Shed Road," which would connect with Highway 160 approximately 1/3 mile east of the current Tranquility Road-Highway 160 intersection; and (4) a dual access alternative that requires construction and use of both the Snow Shed Road and the extended Tranquility Road.

In the ROD, the Forest Service selected Alternative 4, the dual access alternative authorizing both the Tranquility Road extension and the new Snow Shed Road. For reasons of public safety and compatibility with Ski Area operations, the agency designated the Snowshed Road as the primary access for Village development and operation, and limited use of Tranquility Road during the ski season to emergency and mass transit use only. ***

LMJV then petitioned the Secretary of Agriculture, the Chief of the Forest Service and others to reverse this decision and amend the ROD, renewing its request that it be allowed to build and utilize the Tranquility Road extension on a year-round basis, and arguing that the Snow Shed Road access requirement should either be delayed or abandoned because of its cost and the significant amendments it would require to Village development plans. The Secretary denied the petition for lack of jurisdiction. Shortly thereafter, however, in a letter dated August 28, 2006, Forest Supervisor Clark responded to LMJV's petition by notifying LMJV that it could proceed with construction and unrestricted use of the Tranquility Road outside of the ski season, and could delay construction of the Snowshed Road until some undetermined later date. In October, 2006, the Forest Service acted on this determination by preparing to issue LMJV a Special Use Permit authorizing construction of the Tranquility Road extension.

In response, on October 19, 2006, Plaintiffs filed this action against the Forest Service, alleging that the FEIS and ROD, as well as the Forest Supervisor's August 28, 2006 decision allowing LMJV to proceed with construction and use of only the Tranquility Road, were arbitrary and capricious under the Administrative Procedures Act ("APA"), [5 U.S.C. §§](#)

[701 et seq.](#), and in violation of NEPA and its implementing regulations. Plaintiffs seek declaratory and permanent injunctive relief barring the Forest Service and LMJV from implementing the ROD until these violations are corrected by preparation of an EIS considering the proposed action and all connected actions, as well as a full range of alternatives and appropriate mitigation measures. LMJV requested and was granted leave to intervene.

On November 16, 2006, I granted Plaintiffs' request for a temporary restraining order prohibiting the Forest Service from authorizing any ground disturbing construction activity on the Snowshed or Tranquility Roads or FSR 391, from submitting applications or entering into agreements with Colorado Department of Transportation ("CDOT") for access permits for these roads or from taking any other action implementing the FEIS and ROD. ***

* * * Plaintiffs seek a continued preliminary injunction barring Defendants from implementing the FEIS and ROD.

Preliminary Injunction Standard

In order to receive a preliminary injunction, a plaintiff must establish the following four factors: (1) that the plaintiff will suffer irreparable harm if the preliminary injunction is denied; (2) that the threatened injury to the plaintiff outweighs any injury the opposing party would suffer under the preliminary injunction; (3) that the injunction is not adverse to the public interest; and (4) that the plaintiff has a substantial likelihood of success on the merits of the case. ***

Analysis of Preliminary Injunction Factors

A. Irreparable harm

In order to meet their burden in seeking preliminary injunctive relief, Plaintiffs must make a specific showing that this environmental harm results in irreparable injury to their specific environmental interests. * * * Plaintiffs have presented evidence that they will suffer irreparable injury to their

environmental interests, in the form of environmentally destructive road construction and construction of the Village, if the Forest Service and LMJV are permitted to act on the Forest Service's access decision before this case is decided. This showing satisfies the Plaintiffs' burden of demonstrating irreparable harm if the preliminary injunction is denied.

Defendants do not dispute that irreparable injury will occur if road and Village construction are allowed to proceed as contemplated by the ROD. They argue this conclusion is immaterial, however, because the irreparable injury analysis must be confined to the specific activities the Forest Service and LMJV seek to perform while this challenge to the ROD remains pending before the court. The activities Defendants seek to perform during this period consist of: (1) LMJV's design and construction of the Tranquility Road extension to the Village property; (2) LMJV's use of Tranquility Road until November 15, 2007 for up to 100 vehicle trips per month to the property for the purpose of investor relations and baseline engineering and design work; (3) LMJV and the Forest Service's application to CDOT for authorization for LMJV to use Tranquility Road in this manner; (4) LMJV's performance of engineering and design work for the Snowshed Road through issuance of special use permits by the Forest Service, and Forest Service review and approval for LMJV's engineering, design and construction plans for this road; and (5) LMJV and the Forest Service undertaking meetings and conducting further planning regarding the proposed Village, including preparation of applications to CDOT for access to U.S. Highway 160 via the Tranquility and Snowshed Roads as contemplated by the ROD. Defendants propose entry of a preliminary injunction order that permits these activities while enjoining any other ground-disturbing activities related to the Forest Service's access decision.

Defendants contend that allowing these specific activities to proceed under the ROD will not cause irreparable injury because, aside from construction of Tranquility Road, all involve minimal ground disturbance and thus minimal environmental harm. LMJV further asserts that the environmental harm that would result from construction of the Tranquility Road extension is not irreparable because the road can be demolished and the affected land regraded and

reseeded through use of a reclamation bond LMJV will post for this purpose in the event the Forest Service ROD is ultimately reversed.

Defendants understate the amount of on-the-ground harm that would result from construction and use of the Tranquility Road extension and the degree to which it may be reparable.^{FN4} More importantly, they ignore the primary injury that would result from allowing the proposed activities to proceed, which is the difficulty of stopping “a bureaucratic steam roller” once it is launched. All of the activities Defendants propose to undertake while this action is pending are based on and in furtherance of the decision that is being challenged, the Forest Service's decision to grant access to LMJV's property via the Tranquility Road and the new Snowshed Road. Each step taken by LMJV, the Forest Service, CDOT and other relevant governmental agencies to implement or in reliance on this decision “represents a link in the chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.” “Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to ‘redecide.’ ” Thus, the irreparable injury threatened here is not simply whatever ground-disturbing activities are conducted in the relatively short interim before this action is decided, it is the risk that in the event the Forest Service's FEIS and ROD are overturned and the agency is required to “redecide” the access issue, the bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service towards its original, non-NEPA compliant access decision.

^{FN4}. LMJV reports that construction of the 250 foot Tranquility Road extension will require placement of up to 5,000 cubic yards of fill material to be excavated and transported from LMJV's property, and the importation of up to an additional 500 cubic yards of rocks and boulders. LMJV's Proposed Order at 3-4. This is a significant amount of disturbance notwithstanding the relatively short length of the road. As to LMJV's assertion that the injury from this road construction is reparable, Plaintiffs have presented a declaration from Ryan Bidwell, who holds a BS in Environmental

Science and MS in Forest Policy and has professional experience in conservation of mountain environments, that the scarring, erosion and other effects of these construction activities would remain for many, many years due to the short growing season in this high mountain environment.

Plaintiffs have established that the threatened injury to them outweighs any injury the Forest Service or LMJV would suffer under the preliminary injunction.

The only possible harm asserted by the Forest Service is that Plaintiffs' proposed injunction might be read to prevent it from undertaking maintenance and other activities that are unrelated to implementation of the challenged access decision. The Forest Service acknowledges that this harm can be cured through the addition of language clarifying that the actions enjoined are those related to implementation of the FEIS and ROD, and Plaintiffs have proposed that such clarifying language be included in the preliminary injunction.

LMJV asserts the balance of harms tips against it and hence against issuance of the injunction because it will suffer pecuniary, lost opportunity and investment risks if it is prevented from constructing and using the Tranquility Road as proposed and from applying for the CDOT highway access permits required by the ROD. Such economic harm, however, is not irreparable and does not outweigh the serious risk that irreparable environmental harm will result if LMJV is allowed to proceed with road construction and other development-related activities in reliance on the Forest Service's access decision. ***

LMJV also argues it will be harmed if the injunction issues because it will deprive LMJV of its right, pursuant to section 1323(a) of the Alaska National Interest Lands Conservation Act ("ANILCA"), [16 U.S.C. § 3210\(a\)](#), to obtain access to its property across National Forest System lands "as the Secretary [of Agriculture] deems adequate to secure the owner the reasonable use and enjoyment" of its property "subject to such terms and conditions as the Secretary of Agriculture may prescribe." *Id.* Leaving aside for the moment the parties' contentions regarding the nature of this statutory right and the role it played in

the Forest Service's review and decisionmaking, it is undisputed that LMJV currently has direct, seasonal, vehicular access to its property via FSR 391. Nothing in the parties' arguments or the record to date indicates that LMJV cannot utilize FSR 391 for the limited seasonal purposes, *i.e.*, investor relations and baseline surveying and engineering studies, it seeks to perform while this Court decides the merits of Plaintiffs' claims.^{FN7} There is also nothing in the record indicating that LMJV and its engineers cannot access LMJV's property by simply walking the 250 feet from the current edge of Tranquility Road to the LMJV property line. Whatever inconvenience these modes of access might impose on LMJV, this inconvenience does not deprive LMJV of access to its property during the pendency of this action or otherwise constitute harm sufficient to outweigh the irreparable injury to Plaintiffs if the injunction is not issued. I am also at a loss to understand how LMJV could represent to the Forest Service during the EIS process that it could and would construct the Village utilizing only FSR 391 and now contend that it cannot even conduct preliminary survey, baseline engineering and design work for the Village unless it has vehicular access to the property via an extended Tranquility Road. For all of these reasons, I find the balance of harms supports issuance of the preliminary injunction.

^{FN7}. I need not decide at this time whether LMJV's use of FSR 391 for these purposes would require special use authorization from the Forest Service.

C. Adversity to Public Interest

I also conclude that the preliminary injunction sought by Plaintiffs is not adverse to the public interest. The public has an undeniable interest in the Forest Service's compliance with NEPA's environmental review requirements and in the informed decision-making that NEPA is designed to promote. The thousands of public comments submitted on the draft EIS, the majority of which reportedly opposed LMJV's access request and development plans, also demonstrate the public interest in maintaining the status quo by not allowing the Forest Service and LMJV to begin implementation of the ROD until this challenge to the Forest Service's decision is fully resolved.

D. Likelihood of Success on the Merits

The final prerequisite to continuation of the previously stipulated injunction is that Plaintiffs demonstrate a substantial likelihood of success on the merits of one or more of their claims. The magistrate judge found, and I agree, that Plaintiffs have established that the first three preliminary injunction factors “tip strongly” in their favor, so that they may establish this final factor “by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” In other words, Plaintiffs may carry their burden of demonstrating likelihood of success on the merits for preliminary injunctive purposes by demonstrating a “fair ground for litigation” of one or more of their claims.

2. Alternatives analysis

The requirement that agencies consider alternatives to the action under review is “the heart of the environmental impact statement.” As a consequence, NEPA’s implementing regulations require agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” [40 C.F.R. § 1502.14\(a\)](#).

In deciding whether an agency has adequately identified and considered all reasonable alternatives, “courts look closely at the objectives identified in an EIS’s purpose and needs statement.” “Where the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor.” Nevertheless, an agency may not “define a project so narrowly that it forecloses a reasonable consideration of alternatives.”

Plaintiffs argue that the Forest Service’s discussion of reasonable alternatives was deficient in several respects, most notably in its failure to consider any access alternatives that were not premised on full build-out of the Village. As a result, Plaintiffs

contend, the Forest Service did not consider a true “no action” alternative as required by NEPA and arbitrarily failed to consider alternatives that would provide adequate access for reasonable use and enjoyment of LMJV’s property that involves something less than the large-scale, year-round resort proposed by LMJV. Plaintiffs argue that the omission of these reasonable alternatives prevented the Forest Service from clearly and fully considering the range of choices and impacts that it could take in response to LMJV’s request for additional access to its property.

I find that this claim presents serious, substantial and doubtful questions presenting fair grounds for litigation. In the FEIS, the Forest Service stated that the purpose for its action was to provide road access and utility corridors to LMJV’s property compatible with Ski Area operations, and that this action was needed to meet ANILCA’s requirement that it “grant access across Federal lands as deemed adequate to secure the owners [of private in-holdings] the reasonable use and enjoyment of their land, subject to the Secretary’s rules and regulations.” It then employed three premises that affected its identification and analysis of reasonable alternatives to LMJV’s access proposal: (1) that LMJV could and would build the Village as approved by Mineral County in 2004 utilizing FSR 391 even if the Forest Service did not grant it additional access across NFS lands; (2) that “reasonable use and enjoyment” of LMJV’s property was full build-out of the Village as approved by the County; and (3) that FSR 391 did not provide adequate access for LMJV to build and operate the Village as proposed.

The mere statement of these premises reveals that the Forest Service’s alternatives analysis raises questions ripe for litigation and deserving of more deliberate investigation. First, there is an undeniable tension between the Forest Service’s acceptance of LMJV’s representation that it would build and operate the Village using FSR 391, a representation the Forest Service relied upon in analyzing the “no action” alternative, and the agency’s determination in the ROD that the FSR 391 was not, in fact, “adequate access” for this purpose. In the ROD, Forest Supervisor Clark also expressed considerable skepticism regarding LMJV’s representations on this point, a skepticism that was well-grounded given the current physical condition of this road, a single lane

gravel track with turn-outs that, according to the FEIS, only “allows for access by passenger cars at slow speeds,” and existing legal restrictions that limit the size and weight of vehicles and bar vehicular traffic entirely from October through mid-June. In fact, the Colorado district court had found months before the Forest Service issued the FEIS and ROD that it was not possible to construct and operate the proposed Village using the limited access provided by FSR 391, and that LMJV’s representations to the contrary contradicted its earlier statements, *id.* at 34.^{FN13} Defining and analyzing the “no action” alternative to include development of the Village based on LMJV’s use of FSR 391 was, therefore, highly dubious at best.

Second, the Forest Service’s decision to defer to Mineral County’s October 2004 approval of LMJV’s Village development plan to define the “reasonable use” of LMJV’s property, a precondition for the Forest Service to determining “adequate” access under ANILCA, raises several questions of consequence. These include whether the Forest Service abused its discretion in deferring to Mineral County’s PUD approval to define “reasonable use and enjoyment” of the property, either as a general matter, *see* [36 C.F.R. § 251.114\(a\)](#),^{FN15} or because the Forest Service was aware months before it issued the FEIS and ROD that the state district court had vacated the 2004 approval and remanded it to the County for further consideration and possible modification when and if the Forest Service granted additional access to the planned development. The Forest Service’s adoption of LMJV’s County-approved development plan as the reasonable use and enjoyment of the property essentially transformed the FEIS’s purpose and need for action to the provision of access adequate to serve LMJV’s full-scale development plans. It also drove the agency’s identification and analysis of “reasonable alternatives” to LMJV’s access proposal, and prevented it from considering any alternatives that involved “reasonable use and enjoyment” of the property other than full build-out of the Village as proposed. Whether the Forest Service acted within the bounds of its discretion in deciding the “reasonable use” question is, therefore, a substantial and serious question that goes to the heart of its NEPA review of LMJV’s access request.

^{FN15}. The Forest Service’s determinations

regarding “reasonable use and enjoyment” and access adequate for such use under ANILCA § 1323(a) are not, as LMJV asserts, a matter of the Forest Service rubber-stamping whatever use the landowner announces it intends to make of its property and then providing access adequate to meet this purpose. ANILCA § 1323(a) only requires the Forest Service to provide access “that the Secretary deems adequate for the reasonable use and enjoyment” of the property, “subject to such terms and conditions as the Secretary of Agriculture may prescribe.” [16 U.S.C. § 3210\(a\)](#). By the statute’s terms, therefore, the Secretary must determine what constitutes reasonable use and enjoyment of the lands, what access is adequate to allow for those reasonable uses and what, if any, terms and conditions should be placed on that access to meet other statutory and regulatory obligations and goals. Forest Service regulations governing ANILCA access requests reiterate these statutory requirements. *See* [36 C.F.R. § 251.114\(a\)](#) (requiring agency to determine what constitutes reasonable use and enjoyment of non-Federal lands and to authorize only the access needed for such use and enjoyment); *see also* Final Rule, [56 Fed.Reg. 27410, 27410 \(June 14, 1991\)](#) (ANILCA access determination “is a discretionary decision of the authorized officer based upon given circumstances”). The Forest Service has also acknowledged that ANILCA, while not authorizing direct control or use of non-Federal land, does “provide[] a basis for determining the appropriate private access use of Federally owned [land](#).” [56 Fed.Reg. at 27411](#), and “does not require the authorized officer to allow the construction of [an access] facility on Federal land that would be required for a use on the non-Federal land that the authorized officer considers to be an unreasonable use of the non-Federal land,” *id.* at 27410. Thus, the Forest Service has stated, its reasonable use determination under ANILCA may properly limit a landowner’s use of non-Federal land “to the extent that the facilities and modes of access authorized on Federal land limit the use and enjoyment of non-Federal land to

that which is determined to be reasonable by the authorizing officer.” [Id. at 27412.](#)

3. Improper ROD modifications

Plaintiffs have also satisfied their burden of showing a substantial likelihood of success on the merits of their claim that Forest Supervisor Clark's letter of August 28, 2006 constituted an unlawful and arbitrary modification of the ROD.

4. Decision based on improper influence and bias

Plaintiffs also claim the Forest Service's access decision was arbitrary and capricious because the FEIS and ROD are the product of an incomplete administrative record and bias as a result of an improper relationship that developed between Tetra Tech, the Forest Service's EIS contractor and agent, and LMJV, the project proponent. As evidence of this improper relationship, Plaintiffs point to email correspondence indicating that LMJV and Tetra Tech were in routine communication regarding the substance, scope and timing of the FEIS. Such direct communications and influence were prohibited by the Memorandum of Understanding between the Forest Service and LMJV regarding preparation of the EIS by a third-party contractor. Plaintiffs argue that the Forest Service was aware that LMJV was improperly communicating with and influencing Tetra Tech's work on the FEIS, and yet failed to collect and to investigate these communications and include them in the administrative record so it and the public could assess whether the LMJV-Tetra Tech relationship had violated the integrity of the NEPA and decision-making process.

I have examined the email communications referenced by Plaintiffs and agree with the magistrate judge that they raise serious, substantial, difficult and doubtful questions that are ripe for litigation and deserving of deliberative investigation. The ultimate question to be decided is whether any improper influence by LMJV and resulting contractor bias “compromised the objectivity and integrity of the NEPA process.” The referenced email communications certainly raise this question. While the Forest Service asserts that its supervision and review of Tetra Tech's work was sufficient to cure

any harm to the NEPA process caused by the Tetra Tech-LMJV relationship, this assertion is itself a question of fact requiring further development and investigation. ***

For the reasons stated above, I find Plaintiffs have satisfied their burden of demonstrating that the preliminary injunction should be continued.

IT IS SO ORDERED.

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