

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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FOREST GUARDIANS, a non-profit New Mexico corporation; SOUTHWEST ENVIRONMENTAL CENTER, a non-profit New Mexico corporation; and SIERRA CLUB, a non-profit California corporation,

Robert L. Puglisi
CLERK OF COURT

Plaintiffs,

CIV 01 0079 JP

v.

RICHARD L. PUGLISI

FEDERAL EMERGENCY
MANAGEMENT AGENCY,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The defendant Federal Emergency Management Agency ("FEMA") has violated the Endangered Species Act, 16 U.S.C. § 1533 et seq. ("ESA"), by issuing flood insurance in the Rio Grande and San Juan River floodplain areas through its National Flood Insurance Program ("NFIP") without first insuring that these actions are not likely to jeopardize endangered species with extinction, or destroy or adversely modify their critical habitats, through consultation with the Secretary of Interior ("Secretary"). 16 U.S.C. § 1536(a)(2). Providing this flood insurance facilitates development in floodplains that causes adverse impacts on endangered species and their critical habitats, including the Rio Grande silvery minnow, southwestern willow flycatcher, bald eagle, and Colorado pikeminnow.

2. FEMA has also violated the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (“NEPA”), by issuing flood insurance for the Rio Grande and San Juan River floodplain areas without first preparing an environmental impact statement (“EIS”), or at minimum an environmental assessment (“EA”), to assess the environmental impacts of these actions.

3. This suit requests an order declaring that FEMA has acted in violation of the ESA and NEPA, and enjoining FEMA from certifying communities containing the Rio Grande and San Juan River floodplains for NFIP eligibility or issuing any further flood insurance in these areas unless and until it completes an EIS or EA under NEPA, and completes consultation with the Secretary, to insure that administration of its NFIP program does not jeopardize any protected species under the ESA with extinction, or adversely modify such species’ habitat.

II. JURISDICTION, CAUSE OF ACTION, AND VENUE

4. This Court has jurisdiction over plaintiffs’ ESA claim pursuant to 16 U.S.C. § 1540(g)(1)(A), the citizen suit provision of the ESA, and over plaintiffs’ NEPA claim pursuant to 28 U.S.C. § 1331, the general federal question jurisdiction provision.

5. Plaintiffs’ cause of action for its ESA claim arises under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A). The cause of action for plaintiffs’ NEPA claim arises under the judicial review provision of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 et seq.

6. Venue in this court is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e), as plaintiffs reside in this judicial district, and because the alleged violations occur in this district.

III. PARTIES

7. Plaintiff FOREST GUARDIANS is a New Mexico non-profit corporation with its principal office in Santa Fe, New Mexico. Forest Guardians is actively involved in species and habitat protection issues throughout New Mexico and adjacent environs. Forest Guardians has members throughout the region, including areas encompassing the Rio Grande and San Juan river floodplains. Forest Guardians' members and staff include local residents with biological health, educational, scientific research, moral, spiritual and recreational interests in these floodplain areas, as well as the endangered species which inhabit them. Forest Guardians' members and staff also enjoy the biological, recreational and aesthetic values of these areas, and appreciate the complex interactions of species which indicate the health of this type of habitat. Forest Guardians' members and staff use the exact areas which make up these floodplain areas. Forest Guardians brings this action on its own behalf and on behalf of its adversely affected members and staff.

8. Plaintiff SOUTHWEST ENVIRONMENTAL CENTER ("SWEC") is a New Mexico non-profit organization, which is based in Las Cruces. SWEC has approximately 1,000 members, most of whom live in the Rio Grande valley. One of SWEC's primary goals is to protect and recover the Rio Grande as a living river, which is dependent in large measure upon protecting its floodplain areas. Public education and outreach, as well as advocacy, are vital parts of SWEC's mission. SWEC has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem. SWEC's members and staff use the exact floodplain areas described above, and are adversely affected when floodplains are developed in a manner which alters their natural state, especially without the environmental safeguards provided by the ESA and NEPA.

9. Plaintiff SIERRA CLUB is a California non-profit corporation of over 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has chapters and groups in New Mexico with approximately 6,000 members and maintains offices in both Albuquerque and Santa Fe, New Mexico. Sierra Club members regularly visit and enjoy the Rio Grande, Rio Grande Bosque, and San Juan River floodplain for purposes of outdoor recreation, photography, nature study, and enjoyment of the natural environment, and use the exact tracts of land that have been and continue to be adversely affected by FEMA's National Flood Insurance Program. Sierra Club members are affected by the adverse effects of implementation of the program on sensitive and endangered species such as the bald eagle, Colorado pikeminnow, southwestern willow flycatcher and the Rio Grande silvery minnow. The Sierra Club brings this action on behalf of itself and its members.

10. Defendant FEDERAL EMERGENCY MANAGEMENT AGENCY ("FEMA") is an independent, cabinet-level federal agency that administers the NFIP, and which is responsible for environmental compliance for the program.

11. The granting of flood insurance by FEMA facilitates development of floodplain areas, which harms endangered species, their habitats, and other floodplain lands in which plaintiffs have a legally protected interest. Therefore, plaintiffs have been and will continue to be irreparably damaged by FEMA's failure to comply with the ESA and NEPA, compliance with which would likely contribute to amelioration of harms to endangered species and floodplain lands. The above-described biological health, educational, scientific, aesthetic, conservation and

recreational interests of plaintiffs have been, are being, and will continue to be adversely affected and irreparably injured by FEMA's failure to comply with the ESA and NEPA.

IV. APPLICABLE FACTS AND LAW

12. The National Flood Insurance Program ("NFIP") is a federal program, administered and implemented by FEMA, which enables private property owners to purchase federal flood insurance in floodplain areas. The NFIP program was enacted "to provide previously unavailable flood insurance protection to property owners in flood-prone areas." 44 C.F.R. § 59.2(a).

13. The NFIP is based on an agreement between local communities and the federal government which states that if a community implements measures to reduce future flood risks to new construction in Special Flood Hazard Areas, the federal government will make flood insurance available within the community as a financial protection against flood losses which do occur. Before FEMA will make this insurance available, communities are required to adopt land-use ordinances designed to reduce future losses by restricting new development in flood hazard areas. 42 U.S.C. § 4002(b)(3) (1982).

14. The NFIP allows FEMA to make federal flood insurance available only in those areas where the appropriate public body of the community has adopted adequate land use regulations for its flood-prone areas. A "community," for purposes of the NFIP, is defined as "any state, area, or political subdivision ... which has the authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction." 44 C.F.R. § 59.1.

15. A community becomes eligible for NFIP insurance by submitting an application to FEMA showing that it is eligible to participate in the NFIP, followed by an approval or disapproval of the application. 44 C.F.R. §§ 59.22, 59.24. FEMA may suspend or rescind NFIP

eligibility for a community's failure to meet the eligibility requirements. Id.

16. Once FEMA qualifies a community for NFIP participation, property owners within such community may obtain NFIP insurance. Typically, FEMA itself issues the flood insurance policies, with the transactions handled by private insurance agents. Alternatively and less often, private insurance companies write and service the policies, while FEMA underwrites losses.

17. The communities in New Mexico containing endangered species floodplain habitat that have qualified for participation in the NFIP program include the City of Albuquerque, City of Aztec, City of Belen, Bernalillo County, Town of Bernalillo, City of Bloomfield, City of Bosque Farms, Village of Corrales, Dona Ana County, City of Espanola, City of Farmington, Village of Hatch, City of Las Cruces, Village of Los Lunas, Village of Los Ranchos, Town of Mesilla, City of Rio Rancho, Sandoval County, Sierra County, City of Socorro, City of Truth or Consequences, Valencia County, and the Village of Williamsburg. The value of the assets currently insured in these communities by the NFIP is in excess of \$600,000,000.00 (six hundred million dollars).

18. Based on FEMA's qualification of these communities for the NFIP, FEMA has committed to provide, and has provided, individual flood insurance policies to landowners in these communities, which has facilitated development of floodplain areas in endangered species habitat. An example is Bosque Encantada de C' de Baca, a large housing development containing approximately 108 home sites within the 100-year floodplain of the Rio Grande, in the town of Bernalillo. The expectation that the homeowners in this development will be able to obtain NFIP insurance has facilitated this development, whereas the cost of such insurance might otherwise be prohibitively expensive or completely unavailable, causing the project to not be built in the first place. Because mortgage lenders require property owners in flood-prone areas

such as the 100-year floodplain of the Rio Grande to obtain flood insurance, this development could not occur, or at least would be less likely to occur, were it not for the NFIP. Development of the Rio Grande floodplain at the site adversely affects the Rio Grande silvery minnow, bald eagle, and southwestern willow flycatcher.

19. The ESA is a federal statute whose purpose is to conserve threatened and endangered species and "the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b). To achieve this end, the ESA requires the Secretary to protect such species by listing them as either "threatened" or "endangered," and by creating "critical habitat" for each listed threatened or endangered species. 16 U.S.C. § 1533. Under these protections, no actions "authorized, funded, or carried out" by a federal agency may "jeopardize" a species with extinction, or "destroy or adversely modify" its critical habitat. See 16 U.S.C. § 1536(a)(2). Further, no agency or person may "take" individual members of a threatened or endangered species without a permit from the Secretary which contains specific restrictions protecting the species. 16 U.S.C. § 1538(a).

20. To carry out the mandate to federal agencies that they not "jeopardize" a species with extinction, or destroy or adversely modify its critical habitat, the ESA and regulations promulgated by the Secretary specify a consultation procedure that federal agencies must follow. 16 U.S.C. § 1536. The purpose of the consultation procedure is to allow the Secretary to determine whether the federal action is likely to jeopardize the survival of a protected species or result in the destruction or adverse modification of its critical habitat and, if so, "to identify reasonable and prudent alternatives" which will avoid the action's unfavorable impacts. 16 U.S.C. § 1536(b)(3)(A).

21. An agency must enter into consultation with the Secretary whenever an action “authorized, funded, or carried out” by the federal agency “may affect” a listed species. 50 C.F.R. § 402.14. The action may only go forward if the Secretary determines that jeopardy or critical habitat adverse modification will not occur. 16 U.S.C. § 1536(a)(2). Until consultation is complete, the agency may not allow “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” that would avoid jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(d).

22. The purpose of NEPA, “recognizing the profound impact of man’s activity on the interrelations of all components of the human environment, particularly the profound influences of population growth [and] high-density urbanization,” is to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a).

23. To this end, NEPA requires federal agencies to prepare EISs for all actions which they approve “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). EISs are detailed reports completed after a thorough analysis and study which report on the environmental effects of the action, and which describe alternatives to the action. Agencies may adopt categories of actions that normally do not have any significant impact on the environment and so need not be the subject of an EIS, which are called “categorical exclusions.” 40 C.F.R. § 1501.4(a)(2). If a proposed action is neither one normally requiring an EIS, nor fitting within a categorical exclusion, the agency must prepare a EA, which is like a small-scale EIS. 40 C.F.R. § 1501.4(b). An EA leads either to a “finding of no significant impact,” in which case no

environmental impact statement need be prepared, or to a finding that the project will have a significant impact, in which case an environmental impact statement is required. 40 C.F.R. § 1501.4(c) & (e). Until a Record of Decision based on an EA or EIS is issued, an agency may not carry out any activities that would “have an adverse environmental impact” or “limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a).

24. FEMA’s implementation of the NFIP includes the federal actions of certifying communities for NFIP eligibility, the ongoing oversight of communities’ eligibility for the program, and the granting of individual flood insurance policies in certified communities. Flood insurance provided by FEMA in the communities containing Rio Grande and San Juan River floodplains facilitates development in the habitat of the Rio Grande silvery minnow, southwestern willow flycatcher, bald eagle, razorback sucker, and Colorado pikeminnow, and/or adversely impacts these species. Actions implementing the NFIP are not categorically excluded under FEMA’s NEPA regulations.

25. FEMA has not entered into consultation with the Secretary over the effects of the NFIP program on listed species in the Rio Grande and San Juan River floodplains under the ESA. FEMA has not conducted an EA or EIS on the effects of granting flood insurance in the Rio Grande and San Juan River floodplains.

26. By letter dated, faxed, and mailed to FEMA and the Secretary on January 4, 2000, plaintiffs provided FEMA and the Secretary with notice of intent to sue under the ESA, pursuant to 16 U.S.C. § 1540(g)(2)(A).

FIRST CLAIM FOR RELIEF

ENDANGERED SPECIES ACT

27. The above paragraphs are incorporated here by reference.

28. Based on the above facts and legal obligations, FEMA has failed to consult with the Secretary to determine whether its implementation of the NFIP in the communities containing the Rio Grande and San Juan River floodplains jeopardizes any species listed under the ESA, or destroys or adversely modifies their critical habitats, in violation of the ESA, 16 U.S.C. § 1536(a)(2). Such implementation includes the certification of communities for NFIP eligibility, the ongoing control over community certification, and the granting of individual flood insurance policies in communities certified for NFIP eligibility.

SECOND CLAIM FOR RELIEF

NATIONAL ENVIRONMENTAL POLICY ACT

29. The above paragraphs are incorporated here by reference.

30. Based on the above facts and legal obligations, FEMA has failed to prepare any EAs or EISs regarding its implementation of the NFIP in the communities containing the Rio Grande and San Juan River floodplains, in violation of NEPA, 42 U.S.C. § 4332(C) and 40 C.F.R. § 1500 et seq. FEMA has thus unlawfully withheld required agency action, and has otherwise acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law, pursuant to the Administrative Procedure Act. 5 U.S.C. § 706.

REQUEST FOR RELIEF

FOR THESE REASONS, plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that FEMA is in violation of the ESA by failing to consult with the Secretary regarding whether implementation of the NFIP in the communities containing the Rio Grande and San Juan River floodplains will jeopardize species listed under the ESA, or destroy or adversely modify such species' habitat;

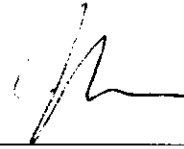
2. Declare that FEMA is in violation of NEPA by failing to prepare any EISs or EAs on the environmental effects of its implementation of the NFIP in the communities containing the Rio Grande and San Juan River floodplains;

3. Enjoin FEMA from certifying any new communities containing the Rio Grande and San Juan River floodplains for NFIP eligibility, and from issuing any NFIP policies in communities already certified for eligibility, unless and until FEMA first complies with NEPA and the ESA;

4. Grant the plaintiffs their costs of litigation, including reasonable attorney fees as provided by the ESA, 16 U.S.C. § 1540(g)(4) and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

5. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED January 19, 2001.



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