Think the executive branch is one big happy family under the benevolent direction of (any) president? Think again. Power struggles over turf and substantive outcomes are frequent, and success in those struggles depends on a lot more than just who has the ear of the president at the moment. Sometimes it takes litigation, which has to be brought by outsiders because executive branch agencies don't run around suing each other. The Ninth Circuit just resolved one such battle, between EPA and the Bureau of Land Management over the extent of environmental analysis needed before BLM could exchange lands in Arizona with copper mining company ASARCO. EPA won, thanks to a big assist from environmental groups.

BLM decided to enter into a land exchange with ASARCO. Such exchanges are not infrequent, nor are they necessarily cause for concern — they can regularize land boundaries, allow cities to grow while preserving other lands that are more useful for wildlife, and serve other legitimate functions. But moving lands from public to private lands takes them out of the scope of a number of laws that limit environmentally damaging development, so its important to study the potential environmental consequences of such land swaps.

In this case, ASARCO proposed the exchange so that it could expand mining and support operations at the Ray Mine complex, the third most productive copper mining operation in the US. According to EPA:

> Over the past several decades, approximately one billion tons of material have been excavated at the Asarco Ray complex. The proposed action would enable Asarco to excavate and process approximately three billion more tons over the next 40 years.

BLM did prepare an Environmental Impact Statement (EIS) on the proposed exchange, but its analysis was oddly truncated. BLM looked at the effects of mining on the lands ASARCO would get in the swap, but didn't compare those impacts to those of less mining or no mining. BLM claimed that the land swap would not increase the likelihood or intensity of mining, because ASARCO already held mining claims on most of the lands it would get. It did not consider conditioning the exchange on any restrictions on post-swap mining.

NEPA requires that all federal agencies send their draft EISs to EPA for comments. EPA objected vociferously to this one:

> We have strong objections to the proposed project because we believe there is potential for significant environmental degradation that could be corrected by project modification or other feasible alternatives . . . . We continue to contend that a substantial amount of information should be added to the EIS for BLM to meet its public disclosure obligation.

BLM was not impressed. It issued a final EIS essentially identical to the draft, and approved the land exchange. Again EPA objected, again to no avail. (For those who think only Republican administrations fall short on environmental consciousness, all of these events occurred while Bill Clinton was in the White House.)

At that point, EPA was essentially out of ammunition. But the Center for Biological Diversity, Western Land Exchange Project, and Sierra Club were not. They filed an administrative appeal of the decision. When that led nowhere, they wsent to court. When they lost at the trial court level, they appealed to the Ninth Circuit.

This week, that court handed environmental groups (and indirectly EPA) a victory. Judge William Fletcher wrote that BLM had violated NEPA by failing to take a hard look at the environmental consequences of the land exchange, and that its determination that the exchange was in the public interest (required by the Federal Land Policy and Management Act) was arbitrary and capricious.

Both prongs of the court's decision rested on its conclusion that BLM was wrong to say that ASARCO could engage in the same mining activities whether or not the exchange went through. If the land stayed in the hands of the US, ASARCO could only mine in accordance with the General Mining Law. If the lands became ASARCO's property through the exchange, however, the Mining Law would no longer apply. Although the General Mining Law is not as strong as environmentalists would like it to be, it does require that miners submit their plans in advance and comply with the Endangered Species Act, Clean Water Act, and other environmental standards, including FLPMA's general prohibition on "unnecessary or undue degradation."

Proper NEPA analysis in this situation, according to the court, requires a serious look at the regulatory differences between mining on public land and mining on private land, and analysis of the likely resulting differences in mining activity and environmental impacts. Furthermore, BLM could not properly decide whether the exchange would serve the public interest without accurately considering both the benefits of the exchange and its likely or potential environmental costs.

Judge Tallman dissented, accusing the majority of not giving adequate deference to BLM, respect to the state of Arizona, or consideration to the state and federal laws that would continue to apply post-exchange.

Judge Tallman vigorously argued that the detailed administrative record supports BLM's contention that mining activities were likely to be similar whether or not the exchange occurred. That objection misconstrues NEPA's functions. NEPA is supposed to insure both that federal agencies accurately understand the environmental trade-offs their decisions entail, and that they reveal those trade-offs to the public so that political accountability mechanisms can work. The consequences of transferring land out of federal ownership include loss of the many federal statutory authorities that apply only to federal land and federal decisions and the environmental protections those laws bring. Yes, some other federal laws and state laws will continue to apply. But those laws may or may not provide the same level of protection. Under NEPA, the agency is required to consider those differences, and the public is entitled to know what they are.

In this case, detailed evaluation of the extent to which the regulatory context for mining would be different following an exchange was both feasible and potentially useful. It could give the agency the opportunity to demand added legal protections as a condition of the exchange. BLM could have ensured, or the public could have demanded that it ensure, that the exchange would not reduce ASARCO's environmental responsibilities.

The majority is right in its analysis, and EPA was right to object back in 1999. It's a good thing the environmental plaintiffs were willing and able to pursue the issue to the point of vindicating the government's environmental watchdog, which in this context had bark but no bite.