

### Ecosystem Management Coordination



### Court Decisions

#### 1. Wildlife | Region 4

The District Court of Idaho enjoined the Forest Service and the Idaho Department of Fish and Game (IDFG) from using data collected in an elk collaring project in the Frank Church Wilderness in the Salmon-Challis National Forest in *Wilderness Watch et al. v. Vilsack et al.* Plaintiffs argued the project violated the National Environmental Policy Act (NEPA) and the Wilderness Act of 1964.

Due to declining elk populations in the Frank Church Wilderness, IDFG wanted to monitor elk to determine the factors contributing to their decline. IDFG specified that collaring was necessary to gather required information and that helicopters were essential to doing so given the remoteness of the wilderness. IDFG initially requested a multi-year authorization for using helicopters before submitting the request to the Forest Service for a single year of helicopter use. After developing an environmental assessment (EA), the Forest Service allowed IDFG to proceed with the project to collar only elk. Within two days of approval IDFG had collared 57 elk and 4 gray wolves over 112 helicopter landings.

- NEPA requires an environmental impact statement (EIS) be prepared for actions “significantly affecting the quality of the human environment.” Several Forest Service documents, the court found, stated that the Forest Service believed it reasonably foreseeable that IDFG would require a 10-year elk collaring period, which would have significant cumulative effects on the wilderness. That the Forest Service knew IDFG was planning for a longer term collaring project and only prepared an EA instead of an EIS on the request submitted by IDFG for a one-year project, the Court concluded, was a NEPA violation.
- Landing aircraft on land protected by the Wilderness Act, which includes the land at issue here, is banned except for a finding of ‘necessity’ by the Forest Service. The Court ruled that the Forest Service could not make an informed ‘necessity’ finding because it only looked at a one-year portion of a much larger long-term plan and thus violated the Wilderness Act.
- IDFG argued that the State did not need Forest Service approval to place the collars on elk or wolves. However, the court ruled that Congress made preservation of wilderness values “the primary duty of the Forest Service,” and that therefore IDFG must obtain approval from the Forest Service before undertaking a project in wilderness areas. Any actions taken by the IDFG, the court concluded, without Forest Service approval, like collaring the four wolves, were in violation of the Wilderness Act.

To redress the NEPA and Wilderness Act violations, the court determined that the Forest Service and IDFG could not use the data collected from the placed collars and that, as the possession of the data constituted an ongoing violation, the IDFG must destroy the data received on the elk and wolves collared in the project. (16-12, D. Idaho).

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Photo credit: <http://www.nwf.org/wildlife/wildlife-library/mammals/gray-wolf.aspx>.

## 2. Range | Region 6

The District of Oregon ruled on cross motions for summary judgement, finding partially for the plaintiffs and partially for the defendants, in a NEPA and ESA challenge to a grazing Allotment Management Plan on the Fremont-Winema National Forest in *Concerned Friends of the Winema et al. v. U.S. Forest Service et al.* The Chemult Pasture in the Fremont-Winema National Forest hosts cattle grazing, including the defendant intervenor's cattle, which have been permitted for over 100 years. The Oregon spotted frog, a species listed as threatened since 2014, lives in the pasture's creeks. When drought lowers water levels in the creek, the frogs live in smaller pools, which the plaintiffs argue are harmed when cattle also use the same small water pools.

Grazing on a designated area of land is managed by issuing a grazing permit, an Allotment Management Plan with a NEPA analysis, and an Annual Operation Instruction (AOI). Here, the Forest issued a ten-year grazing permit in 2006 for 379 cows for three months per year. The forest noted repeated trespassing cattle during 2012 and 2013, but did not issue a noncompliance letter until well into the 2013 grazing season. In 2014, the forest ordered Iverson LP to remove cattle one month early, and the 2015 AOI reduced the grazing period as penalty for violations. During this time, the forest also began revising the Allotment Management Plan with NEPA analyses. The plaintiffs challenge the annual grazing authorizations under NEPA and NFMA, as well as the BiOp issued by FWS on the Allotment Management Plan.

The court found for the Agency on the NEPA, and for the plaintiffs on NFMA and ESA.

- **NEPA:** The complaint claims that the environmental analysis for the Antelope Allotment in the Allotment Management Plan was deficient. The court found that while that trespassing cattle in the habitat of threatened species would constitute a significant change necessitating review under NEPA, the forest had prepared, and continues to prepare, NEPA documents analyzing the effects of these changes. The court found the AOIs are not subject to NEPA analysis independent of that done for the Allotment Management Plan, and the Agency has discretion on when to issue a new Allotment Management Plan.
- **NFMA:** The court found for the plaintiffs on the NFMA claims, holding that by reauthorizing AOIs despite consistent grazing violations was inconsistent with the standard in the Winema Forest Plan (which states that the land should be managed to maintain viable populations of existing plant and wildlife). The magistrate said that "current grazing" should include not only permitted grazing but also unauthorized excesses in grazing.
- **ESA:** The court held that the BiOp was arbitrary and capricious by failing to account for the non-lethal take and concluding that grazing would "not jeopardize" the frogs.

As relief, the court vacated and remanded the BiOp to reinitiate consultation. It did not vacate the 2016 grazing AOIs, but enjoined future issuances of AOIs to comply with the terms set out in the Order. (14-0737, D. Or.)

## Litigation Update

### 1. Wildlife | Region 1

On January 17, 2017, the Custer-Gallatin Forest Supervisor, Mary Erickson, withdrew the Record of Decision for the Greater Red Lodge Vegetation and Habitat Management project in *Alliance for the Wild Rockies et al. v. Marten*. The litigation was one of several impacted by *Cottonwood Environmental Law Center v. U.S. Forest Service*. The District Court of Montana had issued a preliminary injunction, halting the project, on November 22, 2016. The withdrawal letter stated that no ground disturbing activities had taken yet place, and any future ground disturbing activities would be accompanied by a new NEPA decision. (15-0099, D. Mont.)

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## New Cases

1. No new cases.

## Notices of Intent

### 1. Wildlife & Minerals | Region 9

**On January 26, 2017, the Center for Biological Diversity (CBD) and other environmental groups sent a Notice of Intent to Sue, alleging that the December 13, 2016, oil and gas lease sale in the Marietta Unit of the Wayne National Forest violated the Endangered Species Act.** CBD intends to file suit challenging:

- The Bureau of Land Management (BLM), the Forest Service, and Fish and Wildlife Service's (FWS) "failure to consult over the impacts of new oil and gas leasing . . . on the Indiana bat and Northern long-eared bat, as well as fanshell, pink mucket pearly mussel, sheepsnose, and snuffbox mussel";
- BLM, the Forest Service, and FWS's failure to reinitiate consultation on the 2005 Biological Opinion (BiOp) for the Forest Service's 2006 Land and Resource Management Plan for the Wayne National Forest (Management Plan), "in light of new information about fracking, climate change, and white-nose syndrome";
- BLM's and the Forest Service's "unlawful reliance on the outdated" BiOp for their authorization of the leasing;
- BLM's and the Forest Service's "failure to insure their authorization of new oil and gas leasing" was not likely to jeopardize the continued existence of the listed mussels, endangered Indiana bat, and Northern long-eared bat; and
- BLM and the Forest Service's "failure to maintain the status quo pending the completion of ESA consultation over the lease sale and Management Plan.

## Natural Resource Management Decisions Involving Other Agencies

1. No new decisions.

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