

### Ecosystem Management Coordination



### Court Decisions

#### 1. Timber | Region 1

The District Court of Idaho rejected a motion for preliminary injunction against the Tower and Grizzly Fires Salvage Projects, both of which relied on the Chief's authority to invoke an Emergency Situation Determination (ESD), on the Idaho Panhandle National Forest in *Alliance for the Wild Rockies v. Farnsworth*. Wildfires in 2015 burned 47,500 acres, resulting in two proposed timber salvage sales that were expedited using an ESD, which would allow for projects to bypass the 90-day objection period and implement the projects immediately. Time was of the essence because the burned trees would depreciate in value quickly. The Chief issued Emergency Situation Determinations, followed by the forest issuing a Decision Notice with the Environmental Assessment. Alliance for the Wild Rockies brought five NEPA-based claims.

Using the "sliding scale standard" of the four-factor *Winter* test for a preliminary injunction, under which a party may have a lesser showing of **likelihood of success on the merits** when it shows a stronger likelihood of **suffering irreparable harm absent preliminary relief**, the court **denied the plaintiff's motion for a preliminary injunction**. It found that the plaintiffs failed to raise serious questions as to three of their five claims.

The Chief may issue an Emergency Situation Determination under 36 C.F.R. §218.21(b) for:

- Relief from hazards threatening human health and safety;
- mitigation of threats to natural resources on NFS or adjacent lands; **or**
- avoiding a loss of commodity value sufficient to jeopardize the agency's ability to accomplish project objectives directly related to resource protection or restoration

In finding that the first and third triggers were properly invoked, the court noted that these projects posed a threat to human safety where there were burned trees along snowmobile trails, and there was nearly \$3 million in value at risk. The court rejected plaintiff's argument that the projects were not necessary because hazardous dead trees would be removed even without the sales, because the no-action alternative provided removal of the dead trees. **The court noted that this argument merely confirmed that a hazard is present, which is one of the three triggers for allowing and ESD.** The court also rejected the plaintiff's challenge to valuation estimates, noting that the real risk was finding a bidder at all.

*“In the West, fuel and climate are combining to create intense wildfires. Fuels are increasing at an alarming rate as invasive plant species spread across the landscape, while at the same time climate change is lengthening the fires season. This means burnt timber is becoming a major feature of our National Forests. If trees can be logged simply because they are burned, we will reap massive clear-cuts. But small projects, fully vetted and properly designated to mitigate impacts, may be valuable in reducing hazards and funding reforestation efforts.”* –the District Court of Idaho’s conclusion. (16-433, D. Idaho)

## Litigation Update

### 1. Wildlife | Region 4

**Plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit a District of Utah decision favorable to the Forest Service in *Utah Native Plant Society et al v. United States Forest Service et al.***

Reported in the Litigation Weekly on March 10, 2017, the District Court ruled favorably for the Forest Service on National Forest Management Act (NFMA) and National Environmental Policy Act (NEPA) claims against the presence of mountain goats in the Mount Peal Research Natural Area in the Manti-La Sal National Forest. Plaintiffs claimed the Forest Service violated NFMA and NEPA by refusing to take action to manage the goats’ occupation of the forest, neglecting to require the State to obtain a special-use permit for introducing the goats to land adjacent to the National Forest, and failing to conduct an environmental analysis. The court, however, found that **the Forest Service did not engage in any agency action so was not required to undergo any NEPA analysis and that to require the State to obtain a special-use permit “would disregard the Forest Service’s duty to work cooperatively with the State to manage wildlife.”** (16-056, D. Utah)

## New Cases

### 1. Land Use & Wildlife | Region 1

**Native Ecosystems Council and Alliance for the Wild Rockies (Plaintiffs) filed a complaint in the District of Montana against the Smith Creek Vegetation Management Project on the Custer Gallatin National Forest, a portion of the Clean-Up Amendment for the Forest Plan, the Northern Rockies Lynx Management Direction (Lynx Amendment), and the May 20, 2014 landscape-scale insect and disease designation for Montana under the Healthy Forest Restoration Act in *Native Ecosystems Council et al v. Erickson et al.*** The complaint alleges violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Healthy Forest Restoration Act (HFRA), and the Endangered Species Act (ESA). More specifically:

1. Implementation of a Farm Bill Categorical Exclusion (CE) to approve the Vegetation Management Project violated NEPA, NFMA, and ESA. The complaint believes that the **project would have significant effects on the environment, including on listed species, and thus cannot be approved through the use of a CE.**
2. The project impermissibly threatens Canada lynx in violation of ESA, NFMA, and NEPA. Plaintiffs believe **the Lynx Amendment violates the ESA by not using the best scientific information available and not requiring the maintenance of habitat connectivity between Canada lynx habitats.** The Forest Service’s reliance on Lynx Amendment to develop this project, therefore, the plaintiffs believe requires a level of NEPA analysis beyond a CE.
3. Approval of the project pursuant to the amended big game standards of the Forest Plan violates NFMA and NEPA. The complaint states that **the approval significantly reduced the quantity and quality of big game habitat, was not based on the best available science, and failed to demonstrate compliance with the Forest Plan’s standards for protecting moose.**

4. Approval of the project pursuant to the amended old growth standards of the Forest Plain violated NFMA and NEPA. **The Forest Service, as per the complaint, failed to consider the best available scientific information on the impacts of timber harvest on snag-dependent species** in approving the project.
5. The project **violates HFRA because the Forest Service failed to consider the best available scientific information for maintaining ecological integrity or to demonstrate that it had designed treatments in such a way as to maximize the retention of old growth and large trees.**
6. Approval by **utilizing an MIS that is no longer present in the project area violates NFMA and NEPA.**
7. Approval of the project without ensuring against the irreversible loss in soil productivity violates NEPA and NFMA. The plaintiffs assert that the **Forest Service failed to disclose the cumulative effects of logging, roads, grazing, and non-native species of plants on soil and land productivity.**

(D. Mont.)

## 2. Resources & Land Use | Region 9

Plaintiffs filed suit in the District Court for the Southern District of Ohio against the Forest Service and the Bureau of Land Management (BLM) claiming the agencies failed to comply with NEPA when authorizing oil and gas leasing in the Wayne National Forest’s Marietta Unit in *Center for Biological Diversity et al. v. U.S. Forest Service et al.* Plaintiffs make the two following claims:

1. **The Forest Service violated NEPA by failing to prepare a supplemental environmental review.** As per the complaint, before new leasing of federal oil and gas minerals can proceed the Forest Service must verify that leasing of specific lands is adequately addressed in a NEPA document and is consistent with the Forest Plan. The complaint asserts that since the last Forest Plan and NEPA analysis was done on the Wayne NF significant new information has come out about issues like hydraulic fracking, climate change, white-nose syndrome in bat populations, and the listing of new species under the ESA like the Northern long-eared bat that requires the preparation of additional environmental analysis. Accordingly, the Forest Service’s authorization of the leases without analyzing these issues the plaintiffs believes is a violation of NEPA.
2. **The BLM violated NEPA by preparing an unlawful Environmental Analysis (EA) and Finding of No Significant Impact (FONSI) and failing to prepare an Environmental Impact Statement (EIS).** According to the complaint the BLM failed to analyze the full scope of the effects of horizontal drilling and fracking on water resources, wildlife, air quality, public health, and climate change as well as erroneously assumed that the effects of new leasing would be mitigated by the 2006 Forest Plan. The plaintiffs believe that these asserted inadequacies of the BLM’s EA and FONSI along with the scope of the approved leases necessitate the preparation of an EIS.

(17-372, S.D. Ohio)

## Notices of Intent

1. **None to Report.**

## Natural Resource Management Decisions Involving Other Agencies

1. **None to Report.**