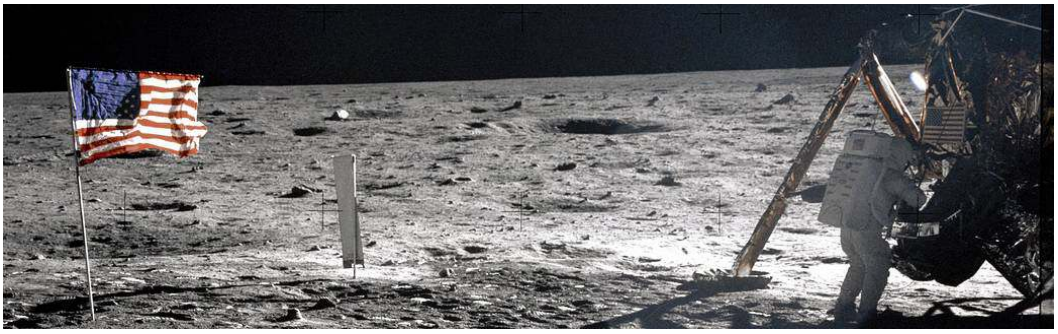
NFS Litigation Weekly

July 21, 2017

Ecosystem Management Coordination



Court Decisions

1. CERCLA | Region 3

The 10th Circuit ruled on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) case involving a molybdenum mine owned by Chevron Mining Inc. near Questa, New Mexico in *Chevron Mining Inc., v United States et al.* The mine was partially located on national forest land.

"Under [CERCLA] the owner of property contaminated with hazardous substances or a person who arranges for the disposal of hazardous substances may be strictly liable for subsequent clean-up costs." Anticipating cleanup costs exceeding $1 billion and seeking financial contributions for the clean-up, Chevron Mining filed suit against the United States asking for a declaration that the government is strictly liable for a portion of the clean-up costs as a potentially responsible party (PRP) as both an owner of portions of the site and as an arranger of hazardous substance disposal. The court concluded the United States is an owner, and therefore, a PRP, but the court also concluded the United States cannot be held liable as an arranger.

Looking at the term "owner," the court concluded "at a minimum, the term 'owner' covers fee title holders for the purposes of CERCLA liability." **As the court found it undisputed that the United States held legal title to relevant portions of the mining lands at the time of hazardous substance disposal, the court ruled the United States is a PRP and is strictly liable to contribute its equitably allocated share of the plaintiff's response costs.**

To be held liable under CERCLA as an arranger the United States must have owned or possessed the hazardous substance prior to the disposal and must have "by contract, agreement or otherwise," arranged the transport or disposal of the substances. **The court found that, while it can be argued that the United States may have arranged the transport of the hazardous substances through the sale of certain disposal sites and the approval of pipelines over public lands, the United States did not own or possess the hazardous substances, or the mining waste containing them.** "The moment th[at] ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the

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[person] whose labor, capital, and skill has discovered and developed the mine[,] . . . free from any lien, claim or title of the United States….” *Forbes v. Gracey*, 94 U.S. 762, 765-66 (1876). (15-2209, 10th Cir.)

Litigation Update

1. None to report.

New Cases

1. Recreation & Wildlife | Region 6

Plaintiffs, Central Oregon Landwatch, filed a complaint in the District of Oregon stating that the Ochoco Summit Trail System Project on the Ochoco National Forest violates both the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA) in *Central Oregon LandWatch v. Forson et al.* The project would authorize 137 miles of off-road vehicle (ORV) routs, including 53 miles of new construction. Specific allegations include:

NFMA:

1. The Forest Service violated the Ochoco Forest Plan standards and guidelines protecting Rocky Mountain Elk by failing to provide adequate road density calculations and analysis, failing to address ORV impacts on elk calving and wallows habitats through the use of stale data, and failing to place any restrictions on ORV use during either the elk calving or rutting seasons.
2. The Forest Service violated the Inland Native Fish Strategy (INFISH) standards protecting riparian areas by failing to demonstrate compliance, failing to prioritize riparian objectives over dispersed recreational needs, failing to explain why some standards did not apply to the project, failing to gather site-specific data to support the modification of standards, and the reliance on arbitrary statements.

NEPA:

1. The Forest Service failed to properly present an accurate and complete picture of the environmental baseline and the No Action Alternative by relying on stale data and failing to show the location of routes currently receiving unauthorized use.
2. The Forest Service failed to adequately disclose and consider direct/indirect impacts the project will have on the environment and failed to adequately address mitigation measures of those impacts.
3. The forest service failed to disclose and consider the cumulative impacts of reasonably foreseeable projects, grazing, and continued unauthorized ORV use in the project area.
4. The Forest Service failed to provide the public with critical data and key documents like specialist reports in a timely manner.

(17-01091, D. Or.)

Notices of Intent

1. Ochoco Summit Trail System Project | Region 6

Central Oregon LandWatch submitted a Notice of Intent to Sue on July 12, 2017 claiming a violation of the Endangered Species Act’s (ESA’s) consultation requirements for the Ochoco Summit Trail Project on the

Ochoco National Forest. According to the NOI, monitoring data shows gray wolves are present in the project area and the impacts from the project's implementation will impact the denning, foraging, and dispersing of the wolves as well as the presence of prey species. The NOI claims the Forest Service must initiate consultation with the Fish and Wildlife Service to ensure the project does not jeopardize gray wolves.

Natural Resource Management Decisions Involving Other Agencies

1. None to Report.