

### Ecosystem Management Coordination



### Court Decisions

#### 1. Minerals | Region 3

The District of Arizona found in the Forest Service's favor regarding National Environmental Policy Act (NEPA) claims against the Forest Service's approval of a project to gather environmental data related to the possible construction of a mine tailings storage facility (TSF) in the Tonto National Forest in *Concerned Citizens and Retired Miners Coalition, et al. v. United States Forest Service*. The TSF would support a large scale underground copper mine proposal (Main Mine) near the Town of Superior, Arizona, which would be constructed on land Congress has directed the Forest Service to trade in exchange for other land. As pointed out by the court, the approval to gather the environmental data under an Environmental Assessment "is limited in scope and duration" and "does not constitute approval of the Main Mine or the TSF."

Plaintiffs' first contention was that the Forest Service should have included the Main Mine project in its analysis of the data project as a connected action. The court disagreed. As the data project, the court noted, was being undertaken to inform the analysis of the mining project, **it would not make sense to make the agency "evaluate whether to collect data and, at the same time, use that data to perform [NEPA] analysis."**

Plaintiffs' next made multiple claims against the agency's cumulative impact analyses. Plaintiffs challenged the agency's analysis of the project's effects on ozone and air quality as well as the scope of the analysis as it pertained to the time-period, geographical boundaries, and other projects within the project area. The court ruled that **given the size of the project and its nominal effects on the environment, the agency adequately covered the issues raised by the plaintiffs to the extent required by NEPA.** (16-03115, D. Az.)

### Litigation Update

1. None to report.

## New Cases

### 1. Recreation | Region 4

Winter Wildlands Alliance and Wildearth Guardians filed suit in the Court for the District of Idaho challenging the publication of the Region 4 Over-Snow Vehicle Use Maps (OSVUM) for Payette, Boise, and Bridger-Teton National Forests in *Winter Wildlands Alliance and Wildearth Guardians v. United States Forest Service*. All three forests' OSVUMs had been grandfathered in under the Travel Management Rule Section C, and had not otherwise been updated since 1988, 1990, and 1990 respectively.

Plaintiffs' first claim **alleges that the OSVUMs were not grandfathered in compliance with the Travel Management Rule Section C**, as they did not minimize damage, the plans designated areas closed to Over Snow Vehicle (OSV) use rather than open to OSV use, and that the plans violated the intent of both the rule, and Executive Order 11644 (Use of off-road vehicles on the public lands).

Plaintiffs' second contention under the National Forest Management Act (NFMA) **alleges that the OSVUMs violated the forests' respective forest plans**, as they did not sufficiently protect threatened Canada lynx, Idaho ground squirrel, and grizzly bear, as well as candidate species wolverine in the Bridger-Teton National Forest. Plaintiff also **alleges that the route designations creates conflicts between OSV users and other, non-motorized, winter recreational users**.

Plaintiffs' third claim under the National Environmental Policy Act (NEPA) is that **either an environmental analysis or supplemental environmental analysis was necessary to take into account new information** as neither had been conducted regarding the OSVUMs since their creations in 1988, 1990, and 1990 respectively, and the plaintiffs allege that information, and circumstances, have changed since those times.

Plaintiffs' fourth claim, asserted under the Wyoming Wilderness Act, which is the act of Congress that created the Palisades and Shoal Creek Wilderness Study Areas, **alleges that the Bridger-Teton National Forest's Palisades and Shoal Creek Wilderness Study Areas (WSA) are threatened by OSV use which has increased since their 1984 designations**. The claim stems from the assertion that increased OSV performance has resulted in greater OSV presence in the WSA. (17-376, D. Idaho)

## Notices of Intent

1. None to report.

## Natural Resource Management Decisions Involving Other Agencies

### 1. First Amendment & Data | State of Wyoming

The 10th Circuit reversed a First Amendment decision by the District of Wyoming, in favor of advocacy organizations, who brought a facial challenge against subsections (c) of a pair of Wyoming's "ag-gag" statutes in *Western Watersheds Project, et. al. v. Michael*. The statutes at issue impose criminal and civil liability, respectively, on those who **trespass onto private lands to collect resource data on public lands**.

Plaintiffs contended that subsections (c) violate the free speech clause because the collection of resource data constitutes the protected creation of speech, which is indispensable to their participation in the formation of public policy.

Section 6-3-414(c) of the Wyoming statutes criminalizes the acts of persons “cross[ing] private land to access adjacent or proximate land where [they] collect[] resource data” and do not have an ownership interest in the private land or permission from the private landowner. Similarly, section 40-27-101(c) of the Wyoming Statutes states that persons commit civil trespass if they “cross[] private land to access adjacent or proximate land where [they] collect[] resource data” without having an ownership interest in the property or legal permission to cross the private land. **The phrase, “collects resource data” includes various public lands activities, such as writing notes on habitat conditions, photographing wildlife, or taking water samples, so long as an individual also records the location from which the data was collected.**

Relying on Supreme Court decisions and following its sibling circuits, the 10th Circuit court held that the resource data collection activities covered by the challenged statutes fell within the speech-creation category and is entitled to First Amendment protection (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Fields v. City of Phila.*, \_\_\_ F.3d \_\_\_, 2017 WL 2884391, at \*3 (3d Cir. July 7, 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017); *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015).

Additionally, the 10th Circuit found, provided that such land is adjacent or proximate to private property, that subsections (c) apply to the collection of resource data on public land because subsections (b) penalize unauthorized individuals who collect resource data on private land. Therefore, the statutes at issue prohibited plaintiffs from engaging in protected speech on public property. The court also referred to environmental statutes and regulations that require public input in crafting policy. *See, e.g.*, 40 C.F.R. § 1500.1(b) (under the National Environmental Policy Act, federal agencies must consider “[a]ccurate scientific analysis” in making environmental decisions, subject to “public scrutiny”); 43 U.S.C. § 1712(a), (f) (Federal Land Policy and Management Act requires land use plans be developed “with public involvement”).

Lastly, the challenged statutes carry heightened penalties that go beyond what Wyoming’s general trespass laws carry. The criminal statute at issue imposes a maximum of one-year imprisonment and a fine of \$1,000 (§ 6-3-414(d)(i)), whereas the general criminal trespassing statute imposes a maximum term of six months and a \$750 fine (§ 6-3-303(b)). The general criminal statute also contains a mens rea element (§ 6-3-303(a)), unlike its overlay. Plaintiffs challenged this differential treatment – seeking a declaration about what level of scrutiny should be applied and whether the challenged statutes would survive that review. However, the 10th Circuit remanded the case back to the district court to conduct these analyses for further proceedings consistent with its opinion. (16-8083, 10<sup>th</sup> Cir.)