

December 1, 2017

Ecosystem Management Coordination



Court Decisions

1. Grazing & Wildlife| Region 4

The District of Idaho granted a motion for a preliminary injunction (PI) against the Forest Service regarding domestic sheep grazing on the Snakey Canyon and Kelly Canyon Allotments in the Caribou-Targhee National Forest in *Western Watersheds Project, et al. v. U.S. Forest Service*. Plaintiffs claim the Forest Service violated the National Environmental Policy Act (NEPA) by issuing Authorized Operating Instructions (AOIs) for the two allotments prior to completing an Environmental Impact Statement (EIS) on the impacts of domestic sheep grazing on bighorn sheep in the area. Plaintiffs also claim the agency violated the National Forest Management Act claiming the authorization of grazing is inconsistent with Forest Plan which requires the agency to close the allotments on an “opportunity basis.” Their main concern is the potential of disease to spread from domestic sheep to the local bighorn sheep population.

For a court to issue a PI the plaintiffs must show: 1) a likelihood of success on the merits; 2) irreparable harm in the absence of a PI; 3) balance of hardships weighs in the plaintiffs’ favor; and 4) the PI is in the public’s interest. The court here found a PI was warranted. First, the court notes that **the Forest Plan requires the closure of the allotments when possible which the court found occurred when the agency started its NEPA analysis**. Second, the court determined that because of “the gregarious nature” of bighorn sheep and because bighorn sheep “are highly susceptible to the pathogens domestic sheep are known to carry” **there is a danger of irreparable harm**. Third, the court noted that **the only true hardship associated with issuing a PI would be locating alternative land to graze the domestic sheep**; as the sheep only actually use these allotments for part of the year the court determined this was not an insurmountable hardship. Lastly, the court notes that **the public interest tips in favor of preserving the bighorn sheep** over “the short-term burden of finding an alternative grazing location” for the domestic sheep. (17-434, D. Idaho)

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the most complete and accurate discussion of each case.

Photo credit: http://www.biologicaldiversity.org/species/plants/Huachuca_water_umbel/

Litigation Update

1. Wildlife | Region 4

Citing the fact the case could have been brought in the District of Wyoming, the locus of the dispute is in Wyoming, and that public interest factors support the transfer due to the localized nature of the controversy, the District Court for the District of Columbia granted the Forest Service's motion to transfer *Western Watersheds Project, et al. v. Tidwell, et al.* to the District of Wyoming. This case concerns a challenged to the agency's issuance of a special-use permit to the Wyoming Game and Fish Commission to undertake supplemental elk feeding activities on the Alkali Creek Feedground in the Bridger-Teton National Forest. (17-1063, D.D.C.)

New Cases

1. Mining | Region 3

Environmental groups filed a complaint in the District of Arizona against the Forest Service challenging the Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) for the Rosemont Copper Project on the Coronado National Forest in *Save the Scenic Santa Ritas, et al. v. U.S. Forest Service, et al.* Plaintiffs claim nearly 5,431 acres of land would be directly impacted by the placement of mine tailings, a mine pit lake, fences, roads, utility lines and rerouted trailheads. In addition, the mine would use ground water affecting future use of perennial streams and riparian vegetation resulting in a permanent drawdown of the water table ("dewatering"). These impacts, including the potential for direct discharges, would affect wildlife and the cultural/recreational values of the area. Allegations were outlined as follows:

- **Violation of Organic Act, Clean Water Act (CWA), and Implementing Regulations:** Plaintiffs assert that under the Organic Act the agency cannot approve a mining plan unless it demonstrates that all feasible measures have been taken to "minimize adverse impacts" and that its regulations mandate that the projects must comply with any applicable Federal and State water quality standards. Similar language can be found in the CWA. The complaint states that the project will not comply with applicable state water quality standards and as such violates these acts;
- **Failure to Protect Federal Water Rights:** According to the complaint, "the project will result in the elimination or severe reduction of the flows protected by 21 federal water rights." The Forest Service, the complaint states, has a duty to protect these rights and "to prevent their substantial impairments." The complaint asserts this project would violate this duty;
- **Illegal Assumption of Statutory Rights to Permanently Occupy and Develop Public Land:** Plaintiffs believe the Forest Service has taken the "illegal position" that the company with the mineral rights have a statutory right under the 1872 Mining law to permanently occupy and develop all of the lands at the mine site. Plaintiffs assert that "to satisfy the discovery requirement necessary for a valid mining claim, 'the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.'" According to the complaint this test necessarily includes the consideration of all costs in the development of the mine, including costs to protect

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the most complete and accurate discussion of each case.

public land and the environment. Plaintiffs state that the rocks at the Rosemont mine site are only common varieties of rock and therefore do not contain the requisite minerals for a valid claim;

- **Failure to Require a Right of Way (ROW) or Special Use Permit (SUP) for the Water Delivery Pipeline, Electrical Transmission Line, and Associated Road Across Public Lands:** According to the complaint Rosemont must obtain the requisite ROWs and SUPs for the facilities that will be built at the site as this infrastructure is not a right covered by the 1872 Mining Law. These ROWs and SUPs would, as per the complaint, have to satisfy all applicable laws, regulations, and policies;
- **Violations of NEPA:** Plaintiffs assert the Forest Service failed to determine whether the project will not violate relevant environmental laws and policies; failed “to adequately review” the direct, indirect, and cumulative impacts, and adequately involve the public in its review, associated with the transportation and smelting of the minerals at the mining site; and failed to initiate a supplemental environmental impacts statement in lieu of “significant new events” not analyzed in the FEIS such as several wildfires which occurred in the spring of 2017.

(17-576, D. Ariz.)

The Rosemont Project is also subject to an Endangered Species Act suit first reported in the Sept. 29, 2017 Litigation Weekly.

Notices of Intent

1. Wildlife | Region 1

Environmental groups WildEarth Guardians, Swan View Coalition, and Friends of the Wild Swan filed a Notice of Intent to Sue (NOI) for alleged violations of the Endangered Species Act § 7 regarding bull trout and road culvert monitoring on the Flathead National Forest. According to the NOI, in 2016 the Flathead requested the Fish and Wildlife Service (FWS) amend the terms and conditions of seven biological opinions (BOs) attached to projects on the Forest from requiring road culvert monitoring annually or biannually to every sixth year. The NOI states that there is evidence the Forest Service has not been monitoring the culverts at issue in the 7 BOs as the agency was required and that the request for a change in the terms and conditions evidence a need to reinitiate consultation with FWS. Additionally, the NOI states the initial BOs do not address the impact climate change will have on bull trout and its habitat which also necessitates a need to reinitiate consultation.

Natural Resource Management Decisions Involving Other Agencies

1. Federal Energy Regulatory Commission (FERC)

The New Jersey Conservation Foundation filed a complaint against FERC alleging the agency's issuance of certificates delegating the power of eminent domain in the absence of analyzing environmental impacts violate the Takings Clause of the Fifth Amendment of the Constitution in *New Jersey Conservation Foundation v. FERC, et al.* (17-11991, D.N.J.)

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the most complete and accurate discussion of each case.