

Ecosystem Management Coordination



Court Decisions

1. Wildlife | Region 5

The Eastern District of California ruled in the Forest Service's favor on Endangered Species Act (ESA), National Forest management Act (NFMA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA) claims against the Lava Hazardous Fuels Reduction Project on the Modoc National Forest in *Conservation Congress v. USFS, et al.* Plaintiff's concerns were that the agency did not adequately measure or consider the effects the project will have on the Northern Spotted Owl (NSO) or the gray wolf.

To reduce fuel loads, improve forest health, and provide for the long term protection and enhancement of wildlife habitat, the Forest Service conducted scoping for the Lava project in March 2011. The project, which spans 8,378 total acres and 1,674 acres of NSO habitat, contemplates "a combination of vegetation and fuels treatments designed to reduce fuel loading and competition between trees while maintaining or promoting old growth habitat." In its biological opinion for the Lava Project, the Fish and Wildlife Service (FWS) determined that while "there will be short and long term negative effects to [NSO] habitat, the proposed action will help sustain [NSO] habitat over the long term" and that the project "will not result in the destruction or adverse modification of critical habitat for the [NSO] as there will be no significant effects to critical habitat and critical habitat conservation functions will be maintained."

For gray wolf the Forest Service and FWS found that "there is no reason to believe that wolves will be drawn to the project area" and that even if a wolf wandered into the project area in the future, habitat quality would not be altered by project activities.

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Photo credit: <https://www.audubon.org/field-guide/bird/arctic-tern>

Looking at the records, the court found the agencies' decisions were amply supported, no further consultation was required for gray wolf or NSO, and the Forest Service's decision to not prepare further NEPA analysis was reasonable. (16-864, E.D. Cal.)

Litigation Update

1. Nothing to report

New Cases

1. Timber & Wildlife | Region 3

Environmental groups filed claims in the District Court of New Mexico Challenging the Hyde Park Wildland Urban Interface Thinning and Prescribed Fire Project on the Santa Fe National Forest in *Wild Watershed, et al. v. Hurlocker, et al.*

The project, encompassing 1,840 acres of which the plaintiffs claim 1,711 acres are situated in the Black Canyon and Thompson Peak Inventoried Roadless Areas (IRAs), was approved using the insect and disease categorical exclusion (CE) under Section 602 of the Healthy Forest Restoration Act (HFRA). Plaintiffs assert that this project is "part of an effort by the Greater Santa Fe Fireshed Coalition to change conditions across a landscape ... of more than 100,000 acres," and so does not fall into this CE. Plaintiffs also state the Agency didn't use the best available data in analyzing the fire ecology of the project area, the project's impacts on species like the Northern Goshawk and Abert's squirrel, or the impacts the project will have on climate change.

Specifically, plaintiffs' claims include:

- The Forest Service violated NEPA by using a Farm Bill CE for this project. "Because designating 'treatment areas' ... has the indirect effect of allowing projects in those areas to proceed under NEPA without an environmental assessment or environmental impact statement..., such designations could potentially have cumulatively significant impacts on the human environment" and thus the Agency should conduct further NEPA analysis across the entire fireshed before continuing with the project;
- The Agency violated NEPA and the APA by failing to examine the direct, indirect, and cumulative impacts of the project on the human environment. Plaintiffs claim the Forest Service must prepare a programmatic EIS "across the entire 107,000 acre fireshed";
- The project violates NEPA, NFMA, HFRA, and the APA because the Agency did not consider the best available science in designing the project, "especially in relation to the controversy surrounding fire ecology science, protecting human health, and providing for the diversity of plant and animal communities that would be most affected by treatments, including but not limited to Abert's squirrel, songbirds, and northern goshawk"

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- The project violates NEPA, the Wilderness Act, and the APA because **the cumulative effects of slashing and burning wildlife habitat in the IRAs and the IRAs’ potential for being construed as wilderness in the future was not considered in an EIS;** and
- The project violates HFRA and the APA because, **according to the complaint, HFRA was intended to apply to projects under 3,000 acres, but this project is just one in an unspecified number of projects across 107,000 acres.**

(18-486, D.N.M.)

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

1. Wildlife | Fish and Wildlife Service

The Natural Resources Defense Council and National Wildlife Federation filed a complaint in the Southern District of New York against the U.S. Fish and Wildlife Service alleging that the Department of Interior’s (DOI’s) 2017 legal conclusion that the Migratory Bird Treaty Act (MBTA) does not cover “incidental takes” violates the Administrative Procedures Act (APA) in *Natural Resources Defense Council, Inc. et al., v. U.S. Department of the Interior, et al.* Plaintiffs allege the legal opinion ignores decades of policy and judicial opinions that held that the MBTA does cover actions that result in incidental harm to migratory birds.

In December 2017, the Principal Deputy Solicitor of the Interior issued a legal memo altering the interpretation of the MBTA. The MBTA now applies only to actions, such as poaching or hunting, intending to harm or kill migratory birds. Plaintiffs argue the memo’s conclusion runs afoul to the purpose of the MBTA to create a strong regulatory regime that protects migratory birds. Plaintiffs also allege the memo ignores legal precedent in the Second Circuit, where the suit was brought. As a result of this opinion, **plaintiffs claim DOI is approving projects previously prohibited out of concern for incidental take to migratory birds, and harms plaintiffs’ interest in protecting and educating the public about these birds.** Therefore, they claim the opinion was arbitrary and capricious under the APA, and seek to vacate it. (18-4596, S.D.N.Y.)

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