

Ecosystem Management Coordination



Court Decisions

1. Timber | Region 5

The Eastern District of California granted the Forest Service's motion to lift an injunction on the Smokey Project on the Mendocino National Forest in *Conservation Congress v. U.S. Forest Service, et al.* The Smokey Project is a plan to administer fuel and vegetative treatments to further habitat and fire management goals on the forest and will also contribute to timber production.

In the court's initial February 17, 2017, ruling, the court ruled the agency failed to address reasonable alternatives like suggested diameter caps, was inconsistent regarding the operating period, and failed to show how its failure to do monitoring on other projects impact the Smokey Project. In all other respects, including on claimed Endangered Species Act (ESA) and National Forest Management Act (NFMA) violations, the court found for the agency. The court remanded the project to the Forest Service with instructions to prepare supplemental National Environmental Policy Act (NEPA) analysis to cure the project's violations and enjoined the agency from removing any trees with 20 inches dbh or greater. On November 27, 2017 the Forest Service issued a supplemental environmental assessment affirming its prior decision. The agency subsequently moved to lift the injunction.

In its arguments against the motion, plaintiffs claimed the agency's decision to allow the project was biased to financial interest in harvesting timber. The court found that **financial incentives were not the only factors driving the project**. Likewise, plaintiff argued the agency inflated its fire weather conditions to justify the project. Here the court noted **plaintiff failed to point to any requirement to use a different value**. Next, plaintiff claimed the project generated more cutting necessary for minimum economic viability. The court discounted this argument noting **the agency explained how treatments met the purpose and need for the project**. Next, plaintiff claimed the alternative assessed would result in significant tree mortality. Here the court noted this argument went beyond what the agency was instructed to fix in its analysis.

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Plaintiff also claimed the agency failed in its monitoring requirements. The court found **the agency met its monitoring deficiencies** and also noted this allegation was a new claim not in the scope of the court's order. Lastly, the court noted the agency clarified the length of operation season in the supplemental analysis (13-1977, E.D. Cal.)

2. Timber | Region 1

The Ninth Circuit affirmed the District Court of Montana's summary judgment order and order dissolving an injunction in an action challenging the Lonesome Wood Project on the Gallatin National Forest in *Native Ecosystem Council v. Krueger*. The District Court initially enjoined the project, but after twice remanding the case to remedy defects in the Biological Opinions concerning two listed species (lynx, grizzly) under the ESA, it granted the Forest Service's motion to dissolve the injunction. The Ninth Circuit in its ruling gave deference to the agency:

- **Lynx Thesis:** Lynx Amendments limit human activity in National Forests to protect Canada lynx habitat. However, the **Amendments contain an exemption for fuel treatment projects in the wildland urban interface**. Plaintiffs claimed the "exemption" was not based on best available science – did not consider recent research done by Ms. Kosternman. The panel found **the Forest Service reasonably explained why it did not reevaluate guidance and withdraw its 2012 Record of Decision (ROD)**.
- **NFMA:** The panel rejected the argument the Forest Service failed to comply with the obligations to ensure species viability. However, the court didn't agree with the agency interpretation of "goals" as aspirations under the Gallatin Forest Plan, imposing no obligations. Nevertheless it did not hold the project violated the goals in the plan – actions were not incompatible with the stated goals. They also rejected the argument the agency failed to comply with the Forest Plan obligation to monitor population trends for several management indicator species.
- **NEPA:** The panel rejected plaintiffs' challenges under NEPA concluding **the agency took a "hard look" at the project**, and did not act arbitrarily or capriciously. It was troubled with the agency's mistake when it described the populations of goshawk and pine marten as "stable to increasing" when the ROD stated population trends for goshawk cannot be determined from existing data. And for Pine Martin they were relatively stable or slightly declining. The court noted this mistake was not inconsistent with its having taken a "hard look" at the project.

(13-64, D. Mont.)

Litigation Update

1. Climate Change | WO

The 9th Circuit denied a writ of mandamus filed by the Government seeking an order directing the District Court of Oregon to dismiss a case brought by 21 plaintiffs alleging the Government contributed to climate change in violation of plaintiffs' constitutional rights in *USA v D. Or, Kelsey Juliana, et al*. The Government argued that allowing the case to proceed would result in burdensome discovery obligations that would threaten the separation of powers. The court held "[t]hat **mandamus relief was inappropriate where the** *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.*

district court had not issued a single discovery order, nor had the plaintiffs filed a single motion seeking to compel discovery” and “[t]hat any merits errors were correctable through the ordinary course of litigation.” The case is now back in District Court. (17-71692, 9th Cir., 15-1517, D. Or.)

New Cases

1. Timber| Region 5

Plaintiffs filed suit in the Eastern District of California challenging the Spear Creek Roadside Hazard Tree Mitigation Project under NEPA in *Sequoia ForestKeeper, et al. v. Carlson, et al.* According to the complaint this project proposes to allow the logging of 1,250 acres along 23 miles of road in the Cedar Fire area in the Greenhorn Mountains of the Giant Sequoia national Monument and “is directly linked to an identical proposal called the Bull Run Roadside Hazard Tree Mitigation Project, which would long an additional 3,500 acres along 50.2 miles of road.” To approve the Spear Creek project the Forest Service used to Categorical Exclusions (CEs): the repair and maintenance of roads CE and the timber stand and/or wildlife habitat improvement activities CE. Plaintiffs claim the project fits into the timber salvage CE which has a 250 acre limitation. Plaintiffs also assert the Forest Service has failed to address concerns regarding the impacts on Pacific fisher habitat connectivity and the impacts to California spotted owl due to the fire and planned logging under both the Spear Creek project and the Bull Run project which constitute extraordinary circumstances. **As the Spear Creek project is greater than 250 acres and has extraordinary circumstances attached which preclude the use of CEs, plaintiffs assert the Forest Service must complete at least an environmental assessment for the project, if not an environmental impact statement.** (18-157, E.D. Cal.)

The Bull Run project is being litigated by the same plaintiffs in *Earth Island Institute, et al., v Elliott* (17-1320, E.D. Cal.).

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

1. Department of Defense | Clean Water Act (CWA)

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