

Ecosystem Management Coordination



Court Decisions

1. Timber | Region 1

The District Court of Montana ruled in favor of the Forest Service in *Friends of the Wild Swan v. Kehr*, on National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) challenges to the Beaver Creek Landscape Restoration Project in the Flathead NF. The project implements forest thinning, logging, and prescribed burning and would require building temporary new roads. The Beaver Creek Project is directly adjacent to the Glacier Loon Fuels Reduction and Forest Health Project, and both implement similar thinning and logging treatments and require the construction of temporary roads.

The Court held that:

- NEPA: The two projects do not need to be analyzed in a single environmental impact statement (EIS) as **there was no indication that they were segmented to avoid comprehensive review.**
- NEPA: The **cumulative impacts analysis in the Beaver Creek environmental assessment (EA) was sufficient.** Specifically, the EA adequately considered and explained why the impacts on lynx would not be significant.
- NFMA: The project does not violate Amendment 19 of the Forest Plan because **the project moves the project area closer to compliance with the 5 and 10 year road density objectives.**
- NFMA: **Intermittent stored service roads comply with the definition of a reclaimed road** and the agency did not need to include those roads in the road density calculations.
- NFMA: The **agency's determination that elk moist areas would be located away from roads and contain high elk security was adequately explained** in the EA.
- Biological Opinion: A new Biological Opinion (BO) for several grizzly bear subunits was not required, because **although the 2014 BO for erroneously excluded application of the road**

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density objectives across those subunits, it did use the objectives in calculating baseline information, and it was therefore not new information.

(17-120, D. Mont.)

2. Recreation | Region 8

The Fourth Circuit upheld a grant of summary judgment in favor of the Forest Service dismissing claims arising from the Clay County shooting range in the Nantahala National Forest in North Carolina in *McGuinness et al. v. United States Forest Service*. Landowners challenged the Forest Service's EA and Finding of No Significant Impact for the shooting range, alleging violations of NEPA and North Carolina state law. The parties filed cross-motions for summary judgment, and the district court granted the Agency's motion, finding no violations of NEPA or state laws.

In affirming the district court's decision, the Fourth Circuit held **the Agency took a "hard look" at the project's alternatives, including a no-action alternative.** The court first determined that NEPA regulations for EAs do not explicitly require the Agency to consider a no-action alternative, then concluded the Agency nonetheless conducted adequate analysis of the alternatives. The court also deferred to the Agency's decision not to conduct an EIS, which petitioners claimed was warranted because of uncertainty around the noise impacts of gunfire from the shooting range. **The Agency's noise analysis, while critiqued by an expert hired by petitioners, was a sufficient basis for concluding there would be no significant impact.** Finally, the court deferred to the Agency's analysis of the project's impacts on nearby property values and road maintenance costs. (16-2406, 4th Cir.)

3. Land Use | Region 8

The Fourth Circuit remanded to the Forest Service and Bureau of Land Management (BLM) portions of their respective Records of Decision (RODs) adopting the EIS for the Mountain Valley Pipeline in *Sierra Club et al. v. United States Forest Service et al.* Under the proposed route, the pipeline would travel 3.6 miles through the Jefferson National Forest in West Virginia and Virginia. Petitioners alleged the Forest Service violated NEPA and NFMA, and BLM violated the Mineral Leasing Act (MLA) in approving the route.

The court held **the Agency violated NEPA by failing to conduct an independent review of the sedimentation and erosion analysis in the EIS.** This portion of the EIS was based on findings in a hydrologic report that the Agency expressed concerns about in meetings and written comments. The Federal Energy Regulatory Commission released the pipeline EIS before the release of an updated draft of the report that purported to address the Agency's comments by adding support for the disputed measurements. The court concluded **the Agency did not show in the ROD how "concerns with regard to the second draft had been alleviated, and did not explain how the EIS was an adequate statement**

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even though it relied on the second draft.” On remand, the court ordered the Agency either to explain how their concerns were addressed or conduct supplemental analysis.

On petitioners’ NFMA claim, the court held **the Agency incorrectly applied the 2012 Planning Rule by failing to apply the soil and riparian requirements of the Rule when the Agency amended the Forest Plan.** The court remanded to the Forest Service for proper application of the Planning Rule soil and riparian requirements to the Forest Plan Amendment.

Under the MLA, the court held BLM failed to apply the statute’s “impracticability” standard in analyzing whether the pipeline could use existing rights of way. **BLM should have, according to the court, analyzed whether utilizing existing rights of way would have been practical for the MVP project.** The court ordered BLM to analyze pipeline route alternatives using existing rights of way based on the MLA standard. (17-2399, 4th Cir.)

4. Timber | Region 1

The Ninth Circuit found partially for, and partially against, the Forest Service on the challenge to the East Reservoir Project on the Kootenai NF in *Alliance for the Wild Rockies (AWR) v. Savage*. The project involves logging, thinning, and road construction and maintenance in areas where two threatened species are present—the Canada lynx and Cabinet-Yaak grizzly bear. The Forest Service prevailed in the lower court in 2016, and AWR appealed two claims to the Ninth Circuit: (1) failure to reinstate consultation with the Fish and Wildlife Service (FWS) on the Lynx Amendment as directed by *Cottonwood*, and (2) failure to comply with the Motorized Vehicle Access Act (Access Amendments), which provides restrictions on road miles in grizzly bear habitat on Forest Service land.

The Ninth Circuit held:

- AWR’s claim that the Forest Service violated ESA in approving the project without reconsultation is moot because **FWS issued a new biological opinion for the Lynx Amendment, completing the reconsultation process.** The injunction previously issued is vacated.
- Because the information on total road miles was first revealed in the Final Environmental Statement, AWR did not waive its claim on Access Amendments and thus promptly raised its objection at the first available opportunity.
- Federal Defendants acted arbitrarily and capriciously **by failing to analyze whether the project would result in road mileage that exceeds the baseline established by the Access Amendments.** Specifically, the court noted that the Forest Service’s conclusion, which the FWS concurred, that the construction of 2.2 miles of new road would be more than off-set by decommissioning the existing roads fails to satisfy the Access Amendments because it did not determine whether the existing roads it measured were included in the Access Amendments baseline.

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Accordingly, the Ninth Circuit vacated the part of the district court’s summary judgment order addressing the Lynx Amendment and remanded to the Forest Service to correct its analysis. (16-35589, 9th Cir.).

Litigation Update

1. Climate Change | WO

The Supreme Court denied the government’s application for a stay in *Juliana, et al. v. USA, et al.* This case is based on claims of substantive due process rights to a stable climate under the Fifth and Ninth Amendments to the U.S. Constitution and under the public trust doctrine. The plaintiffs allege the federal government has significantly contributed to climate changes, infringing on the plaintiffs’ right to life, liberty, property, equal protection and public climate benefits. Plaintiffs seek to compel the Executive branch of the United States federal government to produce a stable climate via phasing out fossil fuel production and consumption and carbon removal from the atmosphere. (15-1517, D. Or.)

New Cases

1. FOIA | Region 3

The Center for Biological Diversity (CBD) filed claims in the District Court of Arizona challenging the ongoing failure of the USFS to timely provide request documents concerning the agency’s “Four Forest Restoration Initiative” (4FRI) on four national forests in Arizona in violation of the Freedom of Information Act (FOIA) in *Center for Biological Diversity v. USFS*.

CBD submitted a FOIA request to FS on March 14, 2018 seeking records related to 4FRI, including the proposed **Rim County EIS project on the Coconino, Apache-Sitgreaves, and Tonto National Forests**. The FS emailed CBD on March 14, 2018 requesting a date range and the CBD responded with 1/1/15 – until request is processed. CBD has not received a response or documents from the FS.

Specifically, plaintiffs’ claims include:

- FS failed to comply with the FOIA mandatory determination deadline and conducted an adequate search for responsive records.
- FS failed to disclose responsive records.
- FS unlawfully withheld and delayed actions FOIA requires.

(18-340, D. Az.)

Notices of Intent

1. Nothing to report

Natural Resource Management Decisions Involving Other Agencies

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1. Army Corps of Engineers | ESA

The District of Montana granted summary judgment in favor of the Army Corps of Engineers and Bureau of Reclamation (“the agencies”) in *Defenders of Wildlife et al. v. United States Army Corps of Engineers et al.* Plaintiffs and the agencies brought cross-motions for summary judgment, with the plaintiffs alleging the agencies violated the Endangered Species Act (ESA), the Clean Water Act (CWA), and NEPA by failing to adequately study the impacts on **pallid sturgeon** of a proposed dam and bypass channel in **the Lower Yellowstone Irrigation Project**. The pallid sturgeon is listed as endangered under the ESA. The district court previously granted two preliminary injunctions halting the dam on the grounds that the agency first failed to prepare an EIS, and then that the plaintiffs would likely succeed on their challenges to the EIS. The Ninth Circuit reversed the second preliminary injunction in April.

In granting summary judgment in favor of the agencies, the district court specifically held:

- The agencies **properly issued an incidental take statement** with a corresponding number of sturgeon that could be taken without jeopardizing the species and, if exceeded, would serve as a trigger for re-consultation with the US Fish and Wildlife Service (FWS)
- The agencies **properly studied the impacts of the project on pallid sturgeon populations**, and could use shovelnose sturgeon as a surrogate to measure effects
- The agencies **properly relied on the BO issued by FWS**, despite alleged deficiencies identified by plaintiffs
- The agencies **did not violate CWA’s permitting requirements** in selecting the project from among the alternatives proposed in the EIS

The court also dismissed without prejudice plaintiffs’ claim that the agencies’ continued operation of the current dam jeopardizes sturgeon, reasoning that if the new dam is not constructed, plaintiffs could reissue their challenge. The court also dismissed as moot a challenge to the agencies’ operation of the Fort Peck Dam also in the Lower Yellowstone Irrigation Project. However, the court found troubling the agencies’ failure to implement reasonably prudent alternatives proposed by FWS in the Fort Peck Dam’s previous BOs to ensure compliance with the ESA, suggesting that the agencies were “engaging in serial re-initiation of consultation” with FWS to avoid implementing these measures (15-14, D. Montana).

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