

Ecosystem Management Coordination



October is National Pizza Month Court Decisions

Minerals & Geology | Region 9

Water Legacy v. U.S. Forest Service, et al. [17-0276, 17-095, 17-0909, 17-0914 (Consolidated Cases); D. Minn.] **Region 9**— On September 30, 2019 the District Court of Minnesota issued an order dismissing the consolidated cases without prejudice, concluding the plaintiffs lacked standing, primarily because the plaintiffs were not able to demonstrate harm. The cases concern the NorthMet Project Land Exchange between the Poly Met Mining, Inc. and Forest Service on the Superior National Forest. The district court's standing decision could be appealed to the 8th Circuit Court of Appeals.

Lands & Realty | Region 8

Florida Defenders of the Environment, et al., v. U.S. Forest Service (17-01128, D. M.D. Fla.) **Region 8**—On September 30, 2019 the District Court of the Middle District of Florida issued an order dismissing the plaintiff's complaint with prejudice, favoring the Forest Service concerning the Kirkpatrick Dam, Rodman Reservoir, and Eureka Lock and Dam located, in part, in the Ocala National Forest (ONF) regarding the associated special use permit (SUP). The district court concluded that the enforcement action or inaction by the Forest Service regarding the 1994 SUP, and the Forest Service's decision on the related petition for Rulemaking is at the Agency's discretion, and not subject to judicial review.

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Wildlife / Sage Grouse | Regions 1, 2 & 4

Western Watersheds Project, et al. v. Janice Schneider, et al. (16-0083, D. Idaho) **Regions 1, 2, 4** —On October 2, 2019 the District of Idaho issued an order dismissing the Government’s motion to dismiss, or in the alternate to transfer, for improper venue. The case concerns the 2015-amendments to protect the Sage-Grouse on the Forest Service’s National Forest System lands and Bureau of Land Management (BLM) lands.

The Government has tried and failed to request change of venue on these Sage-grouse cases with the Court, and this case has resulted in the same outcome. The court’s order concludes that the district court is the proper venue for resolving the plaintiffs’ supplemental claims.

The original complaint in this case was brought by four different environmental groups challenging fifteen Environmental Impact Statements, issued in 2015 that govern land covering ten western states. The plaintiffs’ lawsuit alleges that BLM and the Forest Service artificially minimized the harms to sage grouse by segmenting their analysis into 15 sub-regions without conducting any range-wide evaluation. The plaintiffs brought their claims under the National Environmental Policy Act, the Federal Land Policy and Management Act, and the National Forest Management Act.

Forest Management |& Wildlife Region 1

Alliance for the Wild Rockies, v. Cheryl Probert, et al. (18-0067, D. Mont.) **Region 1**— On October 3, 2019 the District Court of Montana issued an Opinion and Order against the Forest Service. The case concerns the Pilgrim II project on the Kootenai National Forest (KNF). The district court granted the plaintiff’s motion for summary judgement.

The court concluded:

- Data since 2011 shows that road closures have been ineffective and have contributed to increases in linear road miles and potentially impacted grizzly bears in ways not previously considered.
- Re-initiation of consultation is required for both the Access Amendments and the Pilgrim II Project.
- A Supplemental EIS is necessary for the project.

In October 2013, the plaintiff brought an action against the Forest Service under NEPA, NFMA, and ESA arguing that the Pilgrim II Creek Timber Sale Project would create a net increase in

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linear miles of total roads in violation of Standard II (B) of the 2011 Access Amendments to the KNF Forest Plan. In 2014, the district court held that the project complied with the Access Amendments

In October of 2017, 9th Circuit affirmed and deferred to the Forest Service’s interpretation of the Access Amendments. The 9th Circuit warned that “any closure that fails to *effectively* prevent motorized access fails to comply with Standard II (B) of the Access Amendments.

Based on allegations of illegal use precipitated by ineffective closures, in April of 2018, the plaintiff brought claims under NEPA, NFMA, and ESA on the Pilgrim II Project. NFMA claims were dismissed as well as part of the NEPA Claims. This case arose from cautionary language in the 9th Circuit’s October 2017 opinion.

Litigation Update

Lands & Realty | Region 8 & 9

U.S. Forest Service, et al. v. Cowpasture River Assn., et al. [18-1584, Supreme Court (federal)], and **Atlantic Coast Pipeline, LLC v. Cowpasture River Assn., et al** [18-1587, Supreme Court (federal)] **Regions 8 & 9**—On October 4, 2019 the U.S. Supreme Court granted the petition for writs of certiorari. The cases are consolidated and a total of one hour is allotted for oral argument. The Supreme Court will provide the schedule in the near future. The cases concerns the Record of Decision for the Atlantic Coast Pipeline and the special use permit issued to the Atlantic Coast Pipeline, LLC on the Monongahela and George Washington National Forest.

On December 13, 2018, the 4th Circuit of Appeals issued an order in favor of the plaintiffs. The 4th Circuit determined the Forest Service decisions were in violation of NFMA, NEPA, and that Forest Service “lacked statutory authority pursuant to the Mineral Leasing Act to grant a pipeline right of way across the Appalachian National Scenic Trail.” The court ruled to vacate the Forest Service decisions, and remand for proceedings consistent with this opinion.

Forest Management / Forest Management | Region 5

Earth Island Institute, Sequoia Forestkeeper, Green peace Inc., and James Hansen v. Kimberly Nash (HUD), Janice Waddell (Cal. Housing and Community Development-HCD) and United States Forest Service (19-05792, N.D. Cal.) Region 5— October 7, 2019 the

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District Court of Northern California issued an order denying plaintiffs' Motion for Temporary Restraining Order. The district court concluded that the plaintiffs did not demonstrate that they would likely win on the merits of the case to justify a Temporary Restraining Order or even a request for a Preliminary Injunction. The district court's order also transferred the case to the District Court of Eastern California. The action of concern resides geographically within the District Court of Eastern California.

On September 16, 2017 the plaintiffs filed a complaint in the district court against the HUD, HCD and Forest Service. The plaintiffs claim HUD violated National Environmental Policy Act (NEPA) when authorizing the use of disaster relief funds to the Forest Service for clear cutting timber on the Stanislaus National Forest and construction of a new biomass power plant utilizing the timber as feedstock following the 2013 Rim Fire. Plaintiffs also allege violation of HUDs regulations regarding environmental review of HUD funded projects, the Disaster Relief Appropriations Act of 2013, P.L. 113-2, 127 Stat.4 and the Administrative Procedures Act.

New Cases

Forest Management & Wildlife | Region 5

Conservation Congress and Citizens for Better Forestry v. U.S. Forest Service, et al. (13-00934, D. E. Cal.) Region 5—On September 30, 2019 the plaintiffs filed an amended complaint in the District Court of Eastern California against the Forest Service and the U.S. Fish and Wildlife Service (FWS) concerning the Pettijohn Project on the Shasta-Trinity National Forest (STNF). The original complaint was filed on May 12, 2013. Since that time the STNF has re-consulted with FWS on the Northern Spotted Owl (NSO). The FWS issued a Supplemental Biological Opinion (BO) in 2018, and the STNF Forest Supervisor signed a Supplemental Information Report (SIR), which found that new information and changed circumstances did not warrant preparation of a Supplemental Final Environmental Impact Statement (FEIS) in 2019.

The amended complaint lists the following claims:

- 1) The Forest Service and FWS violated Endangered Species Act (ESA) Section 7(a)(2) and the Administrative Procedures Act (APA) for failure to use the Best Available Science (BAS) regarding NSO. The Forest Service relied on 2009 FWS guidelines for "evaluation of take for NSO on private timberlands in California's Northern Interior Region" and are not the BAS or even applicable. The suitable habitat values provided by the 2009 Guidelines are inconsistent with the Northwest Forest Plan (NWFP), the 2012 Critical Habitat (CH) Rule, and the 2011 NSO Recovery Plan.)

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- 2) The Forest Service and FWS violated ESA Section 7 (a)(2) and the APA for failure to avoid jeopardy to NSO and destruction or adverse modification of NSO Critical Habitat. By using a flawed and inaccurate baseline in the 2011 Biological Assessment (BA), 2012 supplemental BA, 2017 Wildlife SIR, and the 2018 Supplemental BO; and by failing to accurately account for historical losses to NSO suitable habitat.
- 3) The Forest Service and FWS violated ESA for failure to reinitiate consultation: “since the issuance of the FWS’ 2018 Supplemental BO, new information reveals effects of the Pettijohn Project on the NSO and/or its designated CH in a manner and or to an extent not previously considered”.
- 4) The FWS is in violated the ESA and APA for arbitrary issuance of an Incidental Take Statement.
- 5) The Forest Service violated NFMA and the APA for failure to satisfy forest plan standard for snags/downed logs.
- 6) The Forest Service violated NFMA and the APA for violation of old-growth retention standard.
- 7) The Forest Service violated NEPA and the APA for failure to take a hard look at the project’s direct, indirect, and cumulative impacts.
- 8) The Forest Service violated Healthy Forest Restoration Act (HFRA) and the APA for failure to maintain or restore old growth forests.
- 9) The Forest Service violated NEPA and the APA for failure to prepare supplemental NEPA analysis based on significant new information or circumstances.
- 10) The Forest Service violated NFMA and the APA because the project is not consistent with the 2012 NSO Revised Recovery Plan.

Recreation / Forest Management | Region 4

Mountain Pursuit v. U.S. Forest Service et al (19-0199, D. Wy.)-Region 4— On September 26, 2019 the plaintiff filed a complaint against the Forest Service alleging the Agency has allowed and encouraged heavy levels of mechanized mountain bike use on designated and undesignated trails on the Palisades Wilderness Study Area and mechanized and motorized all-terrain vehicle (ATV) use on designated and undesignated trails in the Shoal Creek Wilderness Study Area (WSA) that span the Bridger-Teton (BTNF) and Caribou-Targhee (CTNF) National Forests. The plaintiff claims the Forest Service’s actions are arbitrary, capricious, and an abuse of discretion, contrary to the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), the Forest Travel Management Rule (TMR), and the Administrative Procedures Act (APA) when defendants failed to comply with the Wyoming Wilderness Act of 1984 (WWA) in conjunction with administrative provisions of the 1964 Wilderness Act (WA). Plaintiff alleges these allowed uses diminish the potential of both WSAs to be included in the National Wilderness Preservation System (NPWS).

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Specifically, the plaintiff claims:

1. The Forest Service violated the WWA by failing to manage the WSAs consistent with Congressional direction and court decisions interpreting the 1984 WWA and similar acts.
 - i. The Forest Service designated and authorized construction, maintenance and use of mountain bike trails in the Palisades WSA without complying with the WWA.
 - ii. The Forest Service failed to meet its duty to manage the WSAs as to not authorize uses that would diminish the wilderness character or experience available to users in 1984.
2. The Forest Service failed to comply with NEPA or NFMA in designating trails open to mechanized uses in the Palisades and Shoal Creek WSAs by allowing mountain bike use absent required analysis, planning or public participation opportunities.
 - i. Plaintiff alleges the Forest Service's decision allowing mountain bike use significantly exceeds the volume and locations of uses in the 1984 WWA and is arbitrary, capricious and an abuse of discretion and contrary to the TMR, NFMA and NEPA pursuant to the APA.
 - ii. The Forest Service ignored the increased use of mountain bikes in the WSAs for two decades and claim the Forest Service 1990 BTNF Forest Plan abdicated the Forest Service's duty to manage the Palisades WSA consistent with 1964 WA and 1984 WWA in simply recognizing the mountain biking was occurring instead of analyzing it.
 - iii. The Forest Service recognized a dense set of mountain bike trails with the WSA without performing a comprehensive NEPA analysis claiming the only NEPA document is an outdated 2004 Categorical Exclusion and Decision Memo.
3. The Forest service failed to conduct adequate analysis in compliance with NEPA and NFMA when designating trails open to ATV and off-highway vehicle (OHV) use in Shoals Creek WSA.
 - i. The FS ignored increases in ATV and OHV use in the Shoal Creek WSA after the 1984 WWA was passed and failed to conduct required analysis in the decision in the 1990 BTNF Forest Plan as amended in 2015 and the Travel management Maps associated with the WSA.
 - ii. The Forest Service failed to take a hard look at motorized use in the WSA from analyzing alternatives to applying best available science and engaging the public.
 - iii. The Forest Service management decisions allowing motorized use on WSA trails over most of all of the year is arbitrary, capricious and abuse of discretion not in accordance with NFMA, NEPA or the Forest Plan.

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Notice of Intent

Recreation & Wildlife | Region 2

NOI (Dated September 15, 2019) Region 2—The Center for Biological Diversity (CBD) alleges the Forest Service violated the Endangered Species Act (ESA) Section 7 & 9 concerning the greenback cutthroat trout in the Bear Creek Watershed on the Pike and San Isabel National Forests (PSINF).

The CBD claims:

- Actions by the Forest Service have resulted in unauthorized take of a federally listed species, the greenback Cutthroat trout.
- The Forest Service failed to abide by its own proposed action to relocated motorized Trail 667 out of Bear Creek's Water Influence Zone (WIZ).
- The Forest Service and U.S. Fish and Wildlife Service (FWS) failed to reinstate consultation.

The CBD claims that through an intra-agency agreement with Forest and Trails unlimited, who were to perform the work on the trails, the Forest Service did not perform the work as it was presented in the Proposed Action in the 2015 Environmental Assessment (EA) or according to the Watershed Assessment recommendations or the action subject to the consultation with the FWS. The CBD claims the construction and maintenance of Trail 667 in a location not otherwise considered is causing continued and increase harm, jeopardy and harassment that constitutes take under Section 9 of ESA.

In the NOI the CBD stated that on November of 2012, a settlement agreement was reached by the parties, where the Forest Service agreed to:

1. Temporarily close the following trails to motorized use:
 - a. Trail 665, 668, 701, and 720 at the junction with 701 in their entirety.
 - b. Trail 667 at points A at the junction of 701 and B on the saddle on the trail.
2. Temporarily close the trails through a three-part process:
 - a. Administrative closure
 - b. Signage of the closures at the trailhead and/or at points on the trail
 - c. Installation of one fiberglass post in the middle of the trail.
 - d. Secondary post as necessary to display the Forest Order closing the trail to motorized use.
3. Complete an assessment of the watershed and ensure that any decisions arising from the assessment comply with all legal substantive and procedural requirements, including Section 7 consultation with the FWS.

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Lands & Wildlife | Region 1

NOI (Dated September 16, 2019) Region 1—The Alliance of the Wild Rockies and Save the Bull Trout allege the Forest Service has violated the Endangered Species Act (ESA) Section 7 & 9 concerning the U.S. Fish and Wildlife Service’s (FWS) Biological Opinion of the East Fork Creek Fish Screen on the Beaverhead-Deerlodge National Forest. On March 29, 2013 the FWS issued a BO and Incidental Take Statement (ITS) for the fish screen project that required the Forest Service to assume and implement the terms and conditions of the ITS in order to avoid section 9 violations. Subsequently, the Forest Service issued a Decision Notice (DN) and Finding of NO Significant Impact (FONSI) adopting the terms and conditions of the BO. The DN and FONSI states that the Forest Service would engage in section 7 consultation with the FWS to address the impact to bull trout, the Montana Department of Natural Resources and Conservation’s (DNRC) management of the reservoir to control water storage and the volume of water releases, the Montana DNRC’s management of the diversion head-gate to divert water to the Flint Creek Ditch, and the operation, evaluation, and maintenance of the fish screen.

The claim in the NOI is that the Forest Service has not complied with the DN & FONSI; and that the Forest Service’s and FWS’s actions are an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats.

Forest Management & Wildlife | Region 4

NOI (Dated October 2, 2019) Region 4—The WildLands Defense (WLD), Alliance for the Wild Rockies (AWR), Native Ecosystem Council (NEC), Kiesha’s Preserve and a private citizen, alleging the Forest Service and U.S. Fish and Wildlife Service (FWS) have violated the Endangered Species Act (ESA) Section 7 & 9 (pertaining to the Federally listed Canada Lynx) concerning the Record of Decision (ROD) on the Caribou-Targhee National Forest authorizing implementation of the John Wood Forest Management Project.

The NOI claims the Agencies must conduct ESA consultation for the Canada Lynx, because the Forest Service refused to complete informal ESA consultation with the FWS for the project. Thus, the Agencies actions represent an unlawful departure from their legally binding mandate to protect and recover imperiled species and their habitats.

The NOI further claims the Final Environmental Impact Statement made a preliminary determination of “no effect” to Canada Lynx for the project, and makes reference to a draft Biological Assessment, which was not disclosed at any time during the NEPA process, and that no further analysis was conducted with respect to existing Canada Lynx and its habitat.

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Forest Management & Wildlife| Region 1

NOI (Dated October 3, 2019) Region 1--The Alliance of the Wild Rockies and Native Ecosystem Council allege ESA violations if consultation for the 2011 Access Amendments is not completed for 46 projects on the Kootenai National Forest, 54 projects on the Idaho Panhandle National Forest and 46 projects on the Lolo National Forest. Alliance for the Wild Rockies is claiming the Agency must withdraw the Decisions for all the foregoing projects or otherwise formally suspend project implementation, until such time as consultation on the Access Amendment is complete.

In November 2011, the Forest Service amended the Forest Plans of the Kootenai, Idaho Panhandle and Lolo National Forests to include wheeled motorized vehicle access and security standards. The Access Amendments set standards for open roads, total roads, and core areas for Grizzly Bear Management Units within the Selkirk Recovery Zone on the Idaho Panhandle National Forest and the Cabinet-Yaak: Recovery Zone on the Kootenai, Idaho Panhandle and Lolo National Forests.

In *Alliance for the Wild Rockies v. Cheryl Probert et al.*, (18-67, D. Mont), dated October 3, 2019 (**Pilgrim II project**) the Court found that data over the last eight years demonstrates that illegal use of roads caused by ineffective road closure methods contributed to increases in linear road miles which potentially impacting grizzly bears in ways not previously considered. The court held that re-initiation of consultation under ESA Section 7 is required for the 2011 Access Amendments "as pervasive illegal road use has permitted incidental take to exceed baseline levels..." The court remanded to the agencies to reinitiate consultation for the Access Amendments impact on grizzly bears for the Kootenai, Idaho Panhandle and Lolo National Forests.

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