NFS Litigation Weekly
December 20, 2019

Ecosystem Management Coordination

Court Decisions

Forest Management | Region 1

Neighbors Against Bison Slaughter and Bonnie Lynn v. National Park Service, et al (19-128, D. Mont.) **Region 1**— On December 2, 2019, the District Court of Montana issued an order denying plaintiffs' motion for preliminary injunction. The plaintiffs claim the federal agencies (National Park Service and Forest Service) violated the Yellowstone Management Act, the Forest Service Organic Act, the National Environmental Policy Act and the Administrative Procedures Act when the **2019 Bison Hunt** was approved in December 2018 on **Yellowstone National Park and Custer Gallatin National Forest through Beattie Gulch**.

The district court determined the plaintiffs did not demonstrate it would likely suffer irreparable harm in the absence of a preliminary injunctive relief; and also determined the balance of hardship and public interests weighs in favor of the defendants. The court did not address the merits of the case.

Forest Management | Region 1

Friends of the Rapid River, v. Cheryl Probert (18-00465, D. Idaho) **Region 1—**On December 6, 2019, the District Court of Idaho issued a Memorandum Decision, Order, and Judgement in favor of the Forest Service. The case concerns the **Windy Shingle project** on the **Nez Perce-Clearwater National Forests** (NPCNF).

Judge's Conclusion:

- The court must affirm the agency action if a reasonable basis exists for its decision.
- The extensive record contains evidence of how the Forest Service attained the goals and objectives of the Forest Plan
- Plaintiffs have not presented evidence that the Forest Service failed to abide by the APA, NEPA, HFRA, the Forest Plan, or deviated from its Memorandum Decision.
- The Forest Service's actions were not arbitrary, capricious, an abuse of discretion, or other was not in accordance with the law.

Judge's Order

- Plaintiffs' Motion for Summary Judgement is DENIED
- Defendant's Motion for Summary Judgement is GRANTED
- Plaintiffs' Motion to Supplement Extra-Record Evidence is DENIED
- Court will enter separate Judgment (see document DC 33). The case is closed.

Background

The Case was filed in the District Court on October 25, 2018, by Friends of Rapid River and Friends of the Clearwater. Plaintiffs made the following claims:

1. Designation of areas in Idaho for Categorical Exclusion under the Farm Bill and the Windy Shingle project is in violation of the APA.
2. The project violates HFRA by incorporating the expansion of a gravel pit, that this activity is not permissible under Farm Bill CEs under HFRA and that effect of the expansion on fisheries was not considered
3. The project violates HFRA by failing to comply with the Nez Perce Forest Plan since the Decision does not maximize old growth
4. The project violates NEPA, NFMA, and the HFRA by failing to properly analyze the effects of the Rattlesnake Creek wildfire on old growth and wildlife since the fire created the potential for significant cumulative impacts to old growth stands.

Minerals | Region 2

Citizens for a Healthy Community, et al. v. United States Bureau of Land Management, et al. (17-02519, D. Col.) **Region 2**— On December 10, 2019, the District Court of Colorado issued its ruling on remedy concerning the **Bull Mountain Unit Master Development Plan**, the approval of the "**25-Well**

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Project" and associated approvals of the Application for Permits to Drill on the **Grand Mesa, Uncompahgre, and Gunnison National Forests**. The Court, after reviewing the government's submittals for further clarification, amended its March 26, 2019 Order, finding:

- The government did not fail to comply with NEPA by not taking a hard look at the cumulative impacts on mule deer and elk.
- Until the defendant agencies complete their analysis of the reasonably foreseeable indirect impacts of oil and gas, all related Applications for Permit to Drill (APDs) that have been approved are suspended and the government is enjoined from issuing any additional related APDs

Litigation Update

Nothing to report

New Cases

Realty | Region 1

State of Montana v. Talen Montana, LLC, Northwestern Corp., United States, Forest Service, Bureau of Reclamation and Bureau of Land Management (16-0035, D. Mont.) **Region 1—** On October 31, 2019, the State of Montana filed an amended complaint against the Defendants, in which the Forest Service is a party, claiming the State of Montana owns title to submerged lands owned by Defendants for former hydropower sites on the Madison, Missouri and Clark Fork Rivers.

The State of Montana alleges:

- Talen Montana LLC owned Hebgen and Madison hydropower dams on the Madison River and Hauser, Holter, Black Eagle, and Morony hydropower dams on the Missouri River, and the Thompson Falls hydropower dam on the Clark Fork River.
- The State owns the bed and banks of the segments of each of the foregoing rivers that are navigable for title purposes, on which all or some of the foregoing power sites are located.
- The banks and riverbeds were granted to Montana upon its admission to the Union in 1889 and lands granted to Montana under the Enabling Act.
- The State was never reimbursed for the value of the interest in the state lands upon which the power sites and its appurtenances are located and presently does not receive lease payments or other forms of compensation for the use of these state lands.
- The State maintains title to lands beneath navigable water bodies with its border to the high-water mark under the Equal Footing Doctrine of the United States Constitution. The US, as a riparian landowner, owns title to lands beneath non-navigable water bodies.

- With respect to the hydropower projects at issue, in 2011 the United States disclosed it charges rentals for the projects constructed on or which flood federal lands, a portion being for unspecified "riverbed" rather than flooded upland, related to the three rivers in this matter.
- To the extent the river segments at issue are navigable, any riparian land ownership of the US within or along each segment is subject to Montana's ownership as a result of the Equal Footing Doctrine. The Court has determined the US has an interest in the property at issue on the question of navigability for title and as a consequence of that question will determine which of the two sovereigns may charge rent.
- The United States assertion of title to the submerged lands conflicts with Montana's ownership and conflict with Montana's right to be compensated for such use and by reason of those assertions, the US claims in interest in real property is the subject of this action.

The State of Montana claims:

- Declaratory Relief-Montana claims entitlement to ownership rights under the Equal Footing Doctrine, The Enabling Act and the Montana Constitution and Montana statutes, including the Hydroelectric Resources Act, Mont. Code Ann. 77-4-201 and that the power sites in question occupy or submerged lands owned by Montana and Talen Montana LLC and NorthWestern must compensate Montana accordingly.
- Uncompensated use of State Lands-Talen Montana LLC and NorthWestern are obligated to pay Montana full market value for the use of the lands in the form of annual or semi-annual lease payment and an award of damages in the amount of unpaid leases and interest.
- Unjust enrichment-Montana suffered harm as a result of Talen Montana LLC and NorthWestern's unjust enrichment and is entitled to restitution and other compensation and interest.
- Quiet Title 28 U.S.C. 2409a- claims the rivers and segments at issue were navigable at the time of Statehood for title purpose and there were no withdrawals in effect for the submerged lands at issue therefore title transferred to Montana pursuant to the Equal Footing Doctrine. The State claims and request entitlement by the Court to Quiet Title to the submerged lands between the low water marks, underlying the rivers in issue along each segment in issue, free and clear of any ownership interest of the United States in conflict with the State of Montana, adverse to Montana's ownership or which places a cloud on Montana's title under any rentals the US may charge to owners or operators of hydropower projects at issue in this matter.
- Declaratory judgment-The State indicates the United States denies the navigability of the designated segments of the rivers at issue under the segment-by-segment test. The State claims entitlement to a declaration by the Court that the designated segments of the rivers in issue are navigable for title and any fee ownership of the United States to any riparian lands along the designated segments is subject to Montana's ownership including the right to charge rentals.

Range | Region 4

Western Watersheds Project v. U.S. Forest Service (19-00097, D. Utah) **Region 4**— On November 20, 2019, the plaintiff filed a complaint in the District Court of Utah against the Forest Service concerning the issuance of term and temporary grazing permits on the **Kingston, Forshea and Manning Creek Allotments** on **Monroe Mountain** within the **Fishlake National Forest** for the 2019 grazing season. The plaintiff claims the Forest Service violated the Federal Land Management Act (FLPMA), Administrative Procedures Act (APA), National Forest Management Act (NFMA), Organic Act of 1897 (OA), and the Forest Transfer Act of 1905 (FTA).

The plaintiff claims violations of FLPMA and APA, because the Forest Service:

- Cited 36 C.F.R. 222.3(c)(2)(i)(E), allowing temporary permits in the event of drought or other emergency of national or regional scope when no drought or emergency was present.
- Claimed authority to issue temporary permits, because of Agency flexibility pending resolutions of permitted grazing issues and employee safety without a basis in the plain language of the regulations governing temporary permits.
- Cannot identify a lawful basis for the issuance of temporary permits and did not act in accordance with the law and exceeded the bounds of the agency's statutory authority.
- Ignored past and on-going non-compliance by the Term Permittees when FLPMA states that only holders of expired permits who are in compliance shall be given first priority for new permits.

The Plaintiff claims violations of NEPA, because the Forest Service:

- Increased the number of cattle, reconfigured pastures, and eliminated rest-rotation on the Kingston and Forshea allotments without NEPA analysis.
- Admitted the allotment changes were not authorized by the 2007 Decision Memo for the allotments.
- Current management is not consistent with the relevant allotment management plan and annual operating instructions (AOI) or the 2007 Decision Memo.

The Plaintiff claims violations of the Organic Act of 1897 and the Forest Transfer Act of 1905, because the Forest Service:

- Failed to follow agency appeal regulations which lay out specific procedures the agency must follow to resolve appeals of livestock grazing permit decisions.
- Admitted the suspension and cancellation of the Manning Creek Allotment permittees was appealed.
- Has not demonstrated the permittees' appeal met the content requirements as specified in 36 C.F.R 214.8.
- Appeal deciding officer set aside normal timelines, the Agency extended the appeal period for 6 years from when the initial suspension and cancellation occurred.

- Appeal officer failed to dismiss the appeal and then failed to issue a decision based solely upon oral presentation and documentation and information in the appeal record.
- Overall failure to conform to agency appeal regulations, applicable laws, regulations, policies and procedures.

The Plaintiff claims violations of NFMA, because the Forest Service failed to incorporate any relevant sage-grouse protections into the recurring temporary permits nor into the current ten year permits on the Forshea and Kingston allotments in accordance with the 2015 plan amendment despite the presence of priority habitat on those allotments.

Forest Management | Region 1

Jerry O'Neil v. Chip Webber, et al. (19-140, D. Mont.) **Region 1**—On August 22, 2019, the plaintiff filed an original complaint, and on November 7, 2019, filed an amended complaint in the District Court of Montana against the Forest Service concerning the **Flathead National Forest 2018 revised Forest Plan** and the **Lolo, Helena-Lewis & Clark and Kootenai National Forests amended Forest Plans**. The plaintiff claims the Forest Service violated the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), the Travel Management Rule (TMR) 36 C.F.R. 212, Forest Planning Rules (FPR) 36 C.F.R. 219, Executive Order 11644, and the Administrative Procedure Act (APA) by revising and amending the forest plans.

The plaintiff claims the Forest Service did not consider the albedo effect when revising and amending the forest plans. The albedo effect is the reflectivity of an object in space, the amount of electromagnetic radiation that reflects away, compared to the amount that gets absorbed, which has a significant impact on climate.

The plaintiff claims the Forest Service:

- Failed to adopt plan components that provide the ecological conditions necessary to recover listed species, conserve proposed species and habitats.
- Failed to take a hard look at the direct, indirect, and cumulative impacts of the Flathead National Forest 2018 revised Forest Plan, and the Lolo, Helena-Lewis & Clark and Kootenai National Forests amended Forest Plans.
- Failed to look at the impacts of increasing the albedo effect through the implementation of the forest plan on wolverine, grizzly bear, Canada lynx, bull trout, to also include impacts on global warming.
- Failed to disclose high quality environmental information, accurate scientific analysis or expert agency comments regarding benefits and any negative consequences that might accrue from an increase of the albedo effect when managing federal forests in Montana.
- Failed to consider changing the status of any new additions of forest land to primitive recreational areas rather than to wilderness status.

- Failed to provide meaningful public comment opportunities during the implementation of the Flathead National 2018 revised Forest Plan.

Notice of Intent

Minerals | Region 1

NOI-On December 12, 2019, Earth Justice representing Rock Creek Alliance, Earthworks, Montana Environmental Information Center, Defenders of Wildlife, Center for Biological Diversity, Sierra Club, and Ksanka Kupaqa Xa'lcin sent a **renewed 60-day Notice of intent to Sue** pursuant to the Endangered Species Act (ESA) regarding the **Rock Creek Mine** project on the **Kootenai National Forest** (KNF). The respondent claims the 2019 Supplemental Biological Opinion is arbitrary, capricious and in violation of the ESA and its implementing regulations.

The respondent's first NOI claimed an illegal Biological Opinion regarding bull trout, designated bull trout critical habitat, and grizzly bear. In response the agencies completed a Supplemental Biological Opinion in November of 2019.

Plaintiff Ksanka Kupaqa Xa' ˀŁℭ (Ksanka Crazy Dog Society) filed a complaint against the project on January 25, 2019, claiming violations of ESA. Ksanka Kupaqa Xa' ˀŁℭ is an unincorporated organization based on the Flathead Indian Reservation in Montana. Ksanka Kupaqa Xa' ˀŁℭ is a traditional warrior society within the Ksanka Band of the Ktunaxa (Kootenai) nation.

Other Cases Filed Against Another Agency/Entity

Public Employees for Environmental Responsibility, et al. v. National Park Service, et al. (19-03629, D. D.C.) **National Park System** – On December 4, 2019, the plaintiffs filed a complaint in the District Court for the District of Columbia against the **National Park Service** (NPS) and the **Department of Interior** (DOI) concerning the **use of motorized electric bicycles** (**e-bikes**) **within the National Park System**. The plaintiffs are requesting the court prohibit the DOI and NPS from allowing "e-bikes" within the National Park System without first going through rule-making and environmental analysis required by the National Environmental Policy Act (NEPA). The plaintiffs further allege e-bike use in the National Park System creates qualitatively new risks, such as high speeds, increased likelihood of collision compared to non-motorized bicycles, and the startling and disturbance of hikers, runners, and horse and traditional bicycle riders. Their use also causes environmental impacts such as increased noise, trail damage, and disturbance to wildlife.

The plaintiffs claim the DOI and NPS:

- Actions that approved e-bike use throughout the National Park System was done without first amending the existing NPS regulations defining and governing bicycles use (36 CFR §§ 1.4 and 4.30), which violated those regulations and the Administrative Procedures Act (APA), and NEPA.
- Violated the and Federal Advisory Committee Act (FACA), when they promulgated the e-bikes policies at issue based on many months of deliberations in a non-FACA compliant advisory committee involving multiple industry representatives who promoted e-bike policies at issue
- Violated the Federal Vacancies Reform Act (FVRA), because the "acting" NPS Director purported to be "exercising the authority" of the Director, despite neither having been confirmed by the United States Senate nor appointed by President Trump as the "acting" NPS director.
- Violated the NPS Organic Act with Secretary of DOI's creation of the Deputy Director position of the NPS.