

## Ecosystem Management Coordination

*Be Safe!*

### Court Decisions

#### Forest Management | Region 6

*Bark et al v. United Forest Service* (19-35665, 9<sup>th</sup> Cir; 18-01645, D. Or.) Region 6—On April 3, 2020, the 9<sup>th</sup> Circuit Court of Appeals determined the Forest Service’s decision not to prepare an Environmental Impact Statement (EIS) for the Crystal Clear Restoration Project on Mount Hood National Forest was arbitrary and capricious and reversed the District Court of Oregon’s decision. The 9<sup>th</sup> Circuit did not rule on the plaintiffs’ National Forest Management Act (NFMA) claims. The plaintiffs appealed the District Courts May 2019 Summary Judgement in favor of the Forest Service on their claimed violations of the National Environmental Policy Act (NEPA) and the NFMA regarding the project.

The Court specifically found:

1. The effects of the project are highly controversial and uncertain, thus mandating the creation of an EIS.
2. The plaintiffs identify scientific evidence that the project’s primary purpose of reducing the risk of wildfires through thinning will not be achieved and the 9<sup>th</sup> Circuit found this raises substantial questions, thus requiring an EIS.
3. Substantial expert opinion disputes the Forest Service’s conclusion that thinning is helpful for fire suppression and safety.
4. The Forest Service failed to take a “hard look” by not considering contrary sources and engaging in the substantial body of research cited by plaintiffs.
5. The Forest Service failed to identify and analyze the cumulative impacts of the project.
6. There is nothing in the Environmental Assessment (EA) that could constitute quantified or detailed information about the cumulative effects of the project.

The 9<sup>th</sup> Circuit did not rule on the plaintiff’s NFMA claims, because an EIS is required and the findings in the EIS could prompt the Forest Service to change the scope of the project or the methods it plans to use.

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The 9<sup>th</sup> Circuit reversed and remanded back to the district court with the direction to remand to the Forest Service to prepare an EIS.

## Court Update

### Wild Horses | Region 5

Animal Legal Defense Fund, et al. and Front Range Equine Range Rescue, et al. v. Vicki Christiansen, et al. (18-6410 and 18-6531, D. N.D. Cal.) Region 5—On March 27, 2020, the plaintiffs requested dismissal of the complaints in the District Court of Northern California, concerning the gathering of wild horses on the Modoc National Forest. The dismissal is based on the new provision in the 2020 Interior-EPA Federal Budget authorization that prohibits the sale of wild horses without limitation by the Forest Service.

Specifically, the plaintiffs state “Congress enacted the Further Consolidated Appropriations Act of 2020, which explicitly prohibits Federal Defendants from “destroy[ing] [a wild] horse or burro in a manner that results in the destruction of the horse or burro into a commercial product”; “sell[ing] or otherwise transfer[ing] [a wild] horse or burro in a manner that results in the destruction of the horse or burro for processing into a commercial product”; or “euthaniz[ing] [a wild] horse or burro, except on the recommendation of a licensed veterinarian in a case of severe injury, illness, or advanced age.”

The plaintiffs also state, “Congress also directed that “[a]mounts appropriated by this Act shall not be available for (1) the destruction of any healthy, unadopted, and wild horse or burro under the jurisdiction of the Secretary concerned (including a contractor); or (2) the sale of a wild horse or burro that results in the destruction of the wild horse or burro for processing into a commercial product.”

### Lands | Region 2

Rocky Mountain Wild, et al. v. Dan Dallas, et al. (19-1512, D. Colo.) Region 2—On March 31, 2020, the District Court of Colorado issued an order granting partial motion to dismiss in favor of the Forest Service concerning the Village of Wolf Creek Access 2019 Record of Decision (2019 ROD) on the Rio Grande National Forest concerning ANILCA. Specifically, the court denied the plaintiffs claim that ANILCA is not limited to national forest land located in the State of Alaska. The court determined that ANILCA applies to federal lands nationwide. The plaintiffs claim is that the Forest Service failed to exercise its controls to regulate development on the private property, pursuant to ANILCA. The district court held that ANILCA does not provide

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any authority to regulate the use of private property. Finally, the court granted Leavell-McCombs Joint Venture's Motion for Leave to Intervene in this case.

### Background

On May 28, 2019 the plaintiffs filed a complaint in the District Court of Colorado concerning the Forest Service's Supplemental Information Statement adopting the 2014 Environmental Impact Statement (2014 EIS), and 2019 ROD granting the Leavell-McCombs Joint Venture (LMJV) with additional road access as part of the proposed Village of Wolf Creek on the RGNF. The plaintiffs' allege the Forest Service as part of the Administrative Procedures Act (APA) review violated the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), ANILCA, the Forest Service's National Forest System Land Exchange regulations (36 CFR § 254.3), Federal Records Act (FRA), and Freedom of Information Act (FOIA); and the FWS violated the Endangered Species Act (ESA) with issuance of a flawed Biological Opinion (concerning Canada Lynx) with the approval of the road access permit to the Village at Wolf Creek development.

## Litigation Update

### Nothing to Report

### New Cases

#### Wildlife and Forest Management| Region 1

Alliance for the Wild Rockies v. U.S. Forest Service and U.S. Fish and Wildlife Service (FWS), et al. (20-0029, D. Mont.) Region 1—On April 3, 2020, the plaintiff filed a complaint in the District Of Montana alleging violation of the Endangered Species Act (ESA), the Administrative Procedures Act (APA), National Environmental Policy Act (NEPA), and National Forest Management Act (NFMA) concerning the authorizations of the Elk Smith Project on the Lewis & Clark portion of the Helena-Lewis & Clark National Forest and the programmatic ESA consultation for the Wolverine. Plaintiffs also allege that grizzly bears and lynx may be present. The Elk Smith Project area is located within the portion of the Bear-Marshall-Scapegoat-Swan inventoried roadless area. The project area is also located in the Northern Continental Divide Ecosystem Grizzly Bear Recovery Zone/Primary Conservation Area within designated critical habitat for lynx. The project Decision Notice (DN) was signed on November 1, 2019, authorizing the implementation of Alternative 2 from the Environmental Assessment (EA). Helicopters will be used for prescribed burning as well as tree cutting with an anticipated project implementation is summer of 2021.

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The plaintiffs' claim the Forest Service:

- Failed to analyze project effects on the wolverine in the Biological Assessment (BA) and receive concurrence from the FWS in violation of ESA and APA.
- Failed to fully disclose available information to the public and take a hard look at potential effects of the project on wolverines in the EA in violation of NEPA and APA.
- Misrepresented in the EA of the characteristics of the project area and reliance of those misrepresentations to authorize tree cutting in an inventoried roadless area violates NEPA APA and the Roadless Rule.
- Misrepresented to the public, failure to use the Forest Plan Lynx Amendment Definition of wildland urban interface and failure to establish compliance with Lynx Amendment Standards VEG S2 and VEG S5 violates NEPA, NFMA and APA.
- Failed to disclose and demonstrate compliance with Forest Plan Appendix I requirements for grizzly Bears in violation of NEPA, NFMA and APA.
- Failed to reinstate programmatic ESA consultation on the wolverine in violation of ESA and APA.

**Wildlife and Forest Management| Region 4**

Center for Biological Diversity and Sierra Club v. Bernhardt, et al. (20-0855, D. D.C.) Region 4—On March 31, 2020, the plaintiffs filed a complaint in the District Court for the District of Columbia against the U.S. Fish and Wildlife Service (FWS) and the Forest Service concerning the Upper Green River Area Rangeland Project on the Bridger Teton National Forest, which plaintiffs allege unlawfully impacts the grizzly bear. Plaintiffs challenge the FWS issuance of, and the Forest Service reliance on, a flawed Biological Opinion (BO) regarding the negative impacts to grizzly bears that arise from the Forest Service's authorization of continued livestock grazing in prime grizzly bear habitat within the BTNF, in violation of the Endangered Species Act (ESA), and Administrative Procedures Act (APA).

The plaintiffs' specifically claim:

- The Forest Service relied on a flawed 2019 BO regarding the negative impacts to grizzly bears that arise from the Forest Service's authorization of continued livestock grazing in prime grizzly bear habitat within the BTNF. The FWS's Incidental Take Statement (ITS) allows for the take of up to 72 grizzly bears over the ten-year life of the project.
- The FWS's reliance on implementation of the conservation measures to conclude the project will not jeopardize grizzly bears is arbitrary, because the conservation measures are not "certain to occur."
- Because the no-jeopardy determination in the 2019 BO was arbitrary and unlawful and the Forest Service could not lawfully rely on that document to discharge that agency's

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own ESA responsibilities in connection with lethal removal of up to 72 grizzly bears in the project area.

- The Forest Service violated the ESA by arbitrarily and capriciously relying on FWS's unlawful 2019 BO to satisfy the Agency's duties under the ESA in connection with the anticipated killing of grizzly bears as a result of the project.

## Notice of Intent

### Travel Management | Region 1

NOI-On March 23, 2020, a 60-Day Notice of Intent to Sue was received by Alliance for the Wild Rockies (AWR), Region 1- Complainants claim the Forest Service violated the Endangered Species Act (ESA) regarding alleged violations of road restrictions over the prior five-year period on the Helena-Lewis & Clark National Forest. AWR claims the Forest Service has not properly monitored road use, violations of restricted road use and properly enforced mandated mitigation measures on various Ranges regarding effects on the habitat where threatened grizzly bears may be present. AWR claims there is over a hundred violations of road restriction use on restricted roads, temporary roads and use of motorized vehicles on non-motorized routes effecting the grizzly bear. They further claim the Forest Service has not properly accounted for and analyzed the additional use, which would in turn change the consulted upon mileage and effects on grizzly bears in the biological opinions (BO) and incidental take statements (ITS). AWR outlines the language in the BOs and ITS for the identified Ranges and claims the Forest Service identified the grizzly bear "may be present" in Zone 1 or Zone 2 Management Areas and as such is required to re-initiate consultation when the mileage conditions change in the identified Ranges and not doing so is in violation of ESA Section 7.

AWR claims the monitoring report requirements were not met as legally required by the BOs and ITSs.

#### Specifically:

- 2014 BO/ITS-Helena Forest Plan-Forest Service only conducted a monitoring report dated December 4, 2014, and it did not contain all of the required information; and did not use available new information regarding recurring illegal road use and its potential impact on grizzly bear.
- 2016 BO/ITS-Blackfoot Travel Plan-Forest Service failed to conduct any annual monitoring report as required; and did not use available new information regarding recurring illegal road use and its potential effects on grizzly bear.
- 2016 BO/ITS-Divide Travel Plan-Forest Service failed to conduct any annual monitoring reports on the effects on grizzly bear or information on road restriction violations; and did

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not use available new information regarding recurring illegal road use and its potential impact on grizzly bear.

- Furthermore, there are areas where grizzly bears may be present and the Forest Service has not conducted ESA consultation.
- Elkhorns Travel Plan-Forest Service has not provided a Biological Assessment (BA) or BO.
- North Belts Travel Plan-Forest Service Travel Plan for the North Belts in 2005 included ESA consultation for lynx, gray wolf and bald eagle, but not the grizzly, despite it being determined to be management zone 2 and “may be present.”
- South Belts Travel Plan-Forest Service travel plan for the South Belts in 1999. AWR submitted a FOIA for the BA and BO for the South Belts Travel Plan and the Forest Service did not supply either document despite the determination that it was management zone 2 for grizzly bears and “may be present”, thus requiring ESA consultation.

### **Recreation and Wildlife| Region 4**

NOI – On April 1, 2020, received a 60-day Notice of Intent by the Center for Biological Diversity (CBD) to sue the U.S. Fish and Wildlife Service (FWS) and the Forest Service concerning the expansion of the Lee Canyon Ski Area on the Humboldt-Toiyabe National Forest—Region 4-Complainants claim the FWS and the Forest Service failed to ensure that the expansion of the Lee Canyon Ski Area (LCSA) does not jeopardize the Mount Charleston Blue Butterfly (MCB Butterfly) or adversely modify its critical habitat. The FWS’s 2019 Biological Opinion (BO) and the Forest Service reliance on the BO in approving the plan by the LCSA to expand operations, including newly proposed summer operations, violates the Endangered Species Act (ESA).

The complainants allege the FWS underestimated the impacts of ski area development on the MCB butterfly and its critical habitat by limiting analysis to “core” and “non-core” areas rather than all of the butterfly’s critical habitat as it would be impacted by expanded construction and operation of the ski area as well as the construction footprint. FWS also failed to consider the impacts of newly proposed summer operations, such as disturbance to the butterfly and its habitat from the development of a significant network of mountain biking trails, and expanded winter operations. Additionally, FWS failed to consider the impacts from later phases of proposed development and the impact development will have on the butterfly’s recovery. Finally, FWS relied on inadequate and vague minimization measures proposed by the Forest Service and failed to adequately protect the species from excessive take.

#### CBD’s specific claims:

1. The FWS’s 2019 BO for the LCSA expansion, fails to adequately address the project’s impacts to the MCB Butterfly and its critical habitat. The 2019 BO:

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2. The 2019 BO fails to analyze the effects of the entire Forest Service action, when the Agency only considered Phase 1 of the project, and failed to consider the impacts associated with Phase 2.
3. The 2019 BO fails to meaningfully analyze the impacts of the action on the MCB Butterfly's recovery.
4. The 2019 BO's reliance on the Forest Service's minimization measures violates the ESA. The proposed measures must be reasonably specific, certain to occur, capable of implementation, subject to deadlines, and address the threats to the MCB Butterfly in a way that satisfies the jeopardy and adverse modification standard.
5. The 2019 BO Incidental Take Statement impermissibly permits the indefinite take of the MCB Butterfly, without adequate re-initiation trigger.
6. The Forest Service violated the ESA in relying on the FWS's 2019 BO.

### **Wildlife & Forest Management | Region 3**

NOI – On April 2, 2020, received a 60-day Notice of Intent by the Center for Biological Diversity (CBD) to sue the U.S. Fish and Wildlife Service (FWS) and the Forest Service concerning region-wide restoration projects impacts on the Mexican Spotted Owl (MSO)—Region 3. The complainants allege the FWS and the Forest Service continue to violate the Endangered Species Act (ESA) section 7 consultation for the Mexican Spotted Owl (MSO) in New Mexico and Arizona through coordinated and identical region-wide forest restoration projects. The CBD alleges the projects are jeopardizing the MSO and adversely modifying its critical habitat. The CBD claims the projects conflict with the best available MSO science.

The CBD claims the projects violate the law by widespread disregard for MSO Recovery Plan's best available science recommendations for canopy cover and its proxy management of MSO nesting/roosting habitat basal area and management of the percentage of basal area by large trees "emphasize that values shown are minimums, not targets." The Forest Service's disregard for the best science available recommendation for at least 10 years of post-treatment local monitoring. The Forest Service's disregard for the best science available recommendation and the legal requirement to provide for the region-wide habitat monitoring necessary for Recovery and for Jeopardy Analysis. CBD claims no MSO Biological Opinion (BO) can provide a Jeopardy Analysis without region-wide population and habitat monitoring as a Jeopardy Analysis must consider the Regional program projects' impact on recovery which is dependent upon non-existent range-wide monitoring. The Forest Service failed to heed Recovery Plan recommendations where the Recovery Team recommends mechanical treatment in protected activity centers (PAC) only if such monitoring occurs. The Forest Service's disregard for the best

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available MSO science in utilizing widespread mechanical thinning in PACs and in Recovery nesting/roosting habitat.

CBD's specifically claims:

1. FWS is obligated to implement regulations to project both a programmatic regional BO and an individual BO for each of the site-specific project actions.
2. FWS failed to provide a framework programmatic BO for the Forest Service Southwestern Regions Regional Program.
3. FWS and Forest Service have set forth a piecemeal site-specific evaluations designed to obscure widespread adverse cumulative effects on MSO and MSO habitat.

**Other Cases Filed Against Another Agency/Entity**

**Nothing To Report**

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