

Ecosystem Management Coordination

Happy Friday!

Court Decisions

Forest Management | Region 1

Helena Hunters and Anglers Association, et al. v. Leanne Marten, et al. (19-0047, consolidated with 19-0106, D. Mont.) Region 1—On July 1, 2020, the District Court for Montana issued an order against the Forest Service regarding the Tenmile South Project within two inventoried roadless areas, the Jericho Mountain IRA and the Lazyman Gulch IRA on the Helena-Lewis and Clark National Forest. The district court determined that the Forest Service's authorization of the project violates the Roadless Area Conservation Rule (Roadless Rule), the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA). The court also determined that project violates the Endangered Species Act (ESA), because the Biological Opinion (BO) failed to address the project's addition of recreational trails. The court vacated the portion of the project in the Lazyman Gulch IRA (except for the private land buffers), and the BO and authorization to construct recreation trails until additional ESA consultation is completed.

The district court found:

Plaintiff's (Helena Hunters and Anglers) Claims

- The court allowed supplementation of the administrative record and found that the agency engaged in bad faith by intentionally concealing the condition of existing routes in the IRA;
- The project violates the Roadless Rule and vacated portions of the project in the Lazyman Gulch IRA. It was arbitrary and capricious under the APA to conclude that the existing routes in the IRA could be used for mechanical equipment to implement the project without road construction;
- The addition of recreational trails to the selected alternative in between draft and Final Environmental Impacts Statement (EIS) did not require supplemental NEPA analysis. The addition of an alternative with mechanized logging in the IRA did require supplemental analysis; and
- Supplemental NEPA analysis was not required following a change in the requirements for elk security analysis.

Plaintiff's (Alliance for the Wild Rockies) Claims

- The forest did not violate NEPA by analyzing the Tenmile South Helena Project and the Telegraph Project separately;
- The Biological Assessment (BA) failed to consider the effects of added recreational trails to grizzly bears. The court states: "The Biological Assessment recognized that the Project's addition of "non-motorized trails" in grizzly bear secure areas was one of the Project's "effects" and that "grizzly bear survival is strongly linked to the availability of secure habitat." Therefore, the Biological

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Opinion's failure to recognize-much less analyze-the effects of building and improving recreational trails violates the ESA and the APA;”

- The agency adequately considered the effects of helicopter use on grizzly bear; and
- The project does not violate NFMA and is not in grizzly bear habitat under the forest plan.

Recreation | Region 4

Sawtooth Mountain Ranch LLC et al. v. United States Forest Service et al. (19-00118, D. Idaho) Region 4--On June 30, 2020, the District Court in Idaho denied the plaintiffs second expedited motion for preliminary injunction (PI) seeking to halt construction on the Stanley to Redfish Trail Project on the Sawtooth National Forest. The motion is premised on claims of violation of the Clean Water Act (CWA) and the Endangered Species Act (ESA) that were alleged in the plaintiffs’ second amended complaint filed on March 19, 2020. The district court found that plaintiffs failed to demonstrate the likelihood of success on the merits of either their CWA or ESA claims.

The District court concluded:

- Claim 8: Violation of ESA-
 - Plaintiffs did not demonstrate the likelihood of success on the merits:
 - Administrative Record (AR) demonstrates the Forest Service prepared a biological assessment (BA) in accordance with the consultation procedures for Section 7 of ESA.
 - AR demonstrates that a Level 1 intra-agency project team of a variety of experts met and determined that the BA did not need to come back to Level 1, concluding there is no significant effect on listed aquatic species.
 - AR shows the Forest Service considered non-motorized and motorized use of the trail if separated by seasons for snow machine use. The plaintiffs challenge the BA claiming the Forest Service didn’t list motorized use as a consideration.
 - Plaintiffs claim that project activities will occur closer to stream habitats than is stated in the BA. The district court found the plaintiffs are not persuasive in light of the Forest Service reasoning that construction occurring closest to critical habitat would be minimal because existing roads would be utilized.
 - Plaintiffs have not shown that the Forest Service incorrectly determined that the road crossings would have a negligible effect to the substantial distance from the Salmon River and the twin barriers of Highway 75 and other complex wetlands.
 - The district court determined there is little support for the plaintiffs’ assertion that the BA for the project should have considered the addition of new trails to the Redfish Lake complex and the Forest Service should have completed an EIS for the cumulative effects.
- Claim 9: Violation of CWA
 - The records before the district court indicate the Forest Service provided documentation of compliance with the CWA and the Army Corps of Engineers is only obligated to verify procedural compliance, not review assumptions made by the action agency with respect to findings under ESA for permitting.

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- The plaintiffs failed to prove their claim that the defendants did not disclose the nature of their rights in the property and that the project would be partially constructed on an easement owned by the United States.
- The district court finds plaintiffs have not demonstrated a likelihood of success on the merits on their claim under the CWA and the project does not qualify for coverage under NWP2.
- Remaining Preliminary Injunction (PI) Factors
 - A PI requires all four factors be met. The district court discussed the remaining three factors in its prior Order denying the first Motion for PI.
 - Plaintiffs raise similar arguments in this motion and the court’s analysis of the alleged irreparable harm, the public interest and the balance of the equities would not be substantially different.
 - The court finds that the plaintiffs’ motion for PI falls short of a substantial case for relief on the merits.

Forest Management & Recreation | Region 4

Sierra Trail Dogs Motorcycle and Recreation Club, et al. v. U.S. Forest Service (18-00594, D. Nevada) Region 4--On July 6, 2020, the District Court of Nevada issued a decision favorable to the Forest Service regarding Humboldt-Toiyabe National Forest’s Greater Sage-grouse Bi-State Distance Population Segment Forest Plan Amendment, concerning the off-highway vehicle (OHV) use standard. The district court concluded that the OHV standard adopted in the final record of decision (ROD) was a minor variation of the standard included in the final environmental impact statement (EIS) such that the Forest Service is not required to prepare a supplemental EIS.

The plaintiffs’ claim that the final ROD for the Humboldt-Toiyabe NF Forest Plan Amendment imposes significant restrictions on long-existing recreational access, preventing the agency from considering permits for OHV events in or near habitat for the Bi-State sage grouse. They also claim that the final ROD, final EIS, and special use permit do not comply with National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA). The court decision addresses the plaintiffs’ NEPA claims.

The district court found:

1. The changes in the OHV standard from the final EIS to the final ROD falls within the spectrum of alternatives discussed in prior draft documents and were not so substantial as to require supplementation of the EIS. The court concluded that the OHV Standard adopted in the final ROD was a minor variation of the OHV Standard included in the final EIS such that the Forest Service is not required to prepare a supplemental EIS.
2. The court determined that where the final approved action differs from the proposed action in the final EIS, courts consider the final EIS rather than the draft EIS as the relevant point of comparison.

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3. The court also rejects the other aspect of plaintiffs' argument that the Forest Service had to prepare a supplemental EIS because forcing the Mystery 250 Motorcycle Race to be held in July increases the risk of wildfire, which is that wildfires are relevant to environmental concerns. The court concluded that concern is best addressed in response to an application from the Sierra Trail Dogs for a special use permit to hold the motorcycle race in July.

Forest Management | Region 1

Friends of the Clearwater, and Alliance for the Wild Rockies v. Jeanne Higgins, et al. (20-cv-00243, D. Idaho) Region 1—On July 13, 2020, the District Court of Idaho issued an order favorable to the Forest Service that denied the plaintiffs' motion for a preliminary injunction (PI) concerning the Brebner Flat Project on the Idaho Panhandle National Forest. The court determined that the plaintiffs' generalized allegations of harm did not demonstrate a likelihood of irreparable injury, and thus denied their request for a PI. However, the court determined that the plaintiffs showed a likelihood of success on the merits on their Endangered Species (ESA) claims concerning the project's potential impacts on the grizzly bear and Canada lynx.

The district court evaluated the plaintiffs' motion for PI using the three prongs for granting a PI and found:

Likelihood of success on the merits

ESA: The court determined that the plaintiffs showed a likelihood of success on the merits on their Endangered Species (ESA) claims. The court determined that the Forest Service failed to prepare a biological assessment for grizzly bears or lynx as required by ESA.

NFMA and NEPA: The court determined the Forest Service considered the possible reduction of elk security habitat in unit 7-6, which is a low priority unit, and then decided to seasonally close ATV trails to increase elk security habitat. Because the court found the plaintiffs have not raised serious questions relating to the Forest Service's NEPA analysis of the cumulative effects on elk and the chosen mitigation measure the court also found that plaintiffs did not raise serious questions as to the NFMA claim.

WSRA and NEPA: The court determined that while the environmental assessment could have been more explicit that the project fell within the St. Joe Wild and Scenic River corridor, the plaintiffs did not raise serious questions on the merits of the Forest Service's compliance with the WSRA and NEPA.

1. Irreparable Harm: The court determined that the plaintiffs generalized allegations of harm did not demonstrate a likelihood of irreparable harm.

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- The plaintiffs concern about elk, bull trout, and sedimentation are negated by the courts finding that they have not raised a serious question going to the merits of their NFMA, WSRA, and NEPA claims. The Forest Service fully addressed the impacts of sediment from the project in the NFMS biological assessment. The Agency also considered impacts of the project to elk security habitat and elk population stability.
 - The plaintiffs did not demonstrate irreparable harm to the grizzly bear or Canada Lynx. The plaintiffs make general allegations that roads allow poachers to shoot grizzly bears, and that mother bears teach their cubs to stay away from roads; and make no specific allegations of harm with regard to lynx beyond their members' ability to enjoy lynx in the project area.
2. Public Interest and Balance of equities:
- The court determined the public interest and balance of equities favors the Forest Service. The project is designed to reduce hazardous fuels and the threat of wildfire in the wildland-urban interface of town of Avery Idaho and improve the ingress and egress routes should there be a fire. The project also contributes to the local economy and is broadly supported by the local community.

Litigation Update

Nothing to Report

New Cases

Timber | Region 1

Friends of the Clearwater and Alliance for the Wild Rockies v. Vicki Christiansen et. al. (20-cv-00322, D. Idaho) Region 1--On June 26, 2020, the plaintiffs filed a complaint in the District Court of Idaho against the Forest Service and National Marine Fisheries Service (NMFS) regarding the Record of Decision that was signed on July 1, 2019, and the Biological Opinion (BO) and Incidental Take Statements (ITS), authorizing the Lolo Insect and Disease Project on the Nez Perce-Clearwater National Forests. (non-HFRA) The Plaintiffs claim the FS and NMFS violated the National Environmental Act (NEPA), National Forest Management Act (NFMA), Endangered Species Act (ESA) and the Administrative Procedures Act (APA).

The project consists of 3,387 acres of commercial harvest, 0.74 miles of new road construction (including 24 culvert replacements), 37.3 miles of system road decommissioning, 4.1 miles of non-system road decommissioning, and 0.1 miles of new motorized trail.

Plaintiff's Specific Claims for relief include:

- Claim 1: Violation of Section 7 ESA: Failure to Reinitiate Consultation

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Duty to reinitiate was triggered by new information relating to recent dramatic decline in Snake River Basin steelhead numbers and the addition of new culvert replacements within the project boundary which are likely to affect the species not previously considered.

- Claim 2: Violation of ESA and APA: Failure to use best available science and data for the BO and ITS.
 - NMFS used a status review of steelhead which was published in 2016 and relied upon 2015 data.
 - NMFS did not consider or incorporate more recent data demonstrating serious decline of annual adult steelhead counts since 2016, especially in Lolo Creek.
 - Failure to consider the best available science to assess the status of the Snake River basin steelhead and is maladministration of ESA and violation of APA.
- Claim 3: Violation of Section 9 of ESA: Unlawful take of ESA-Listed Species.
 - Failure to reinitiate consultation renders the Revised ITS invalid and it no longer provides a safe harbor to the FS for taking of Snake River Basin steelhead.
 - Relying on this invalid ITS and planning to engage in activities that will result in taking of Snake River Basin steelhead is in violation of Section 9 of ESA.
- Claim 4: Violation of NFMA and APA: Failure to comply with Clearwater Forest Plan's Sedimentation Standards.
 - Forest Service sampled a non-representative segment of Eldorado Creek that is less sensitive to water resource changes than other locations and does not adequately reflect the effects of management in Eldorado Creek.
 - Forest Service measured cobble embeddedness in Eldorado Creek at the wrong place, in an unlawful attempt to avoid the prohibitions in the Forest Plan and the TWS Settlement on making a bad sedimentation problem worse.
- Claim 5: Violation of NEPA and APA: Failure to take Hard Look at Impacts to Eldorado Creek and Snake River Basin Steelhead.

Forest Service failed to take a hard look at existing conditions in Eldorado creek by measuring cobble embeddedness at the wrong place and failed to take a hard look at the Project's significant adverse environmental impacts, with a full and fair assessment of those impacts.
- Claim 6: Violation of NFMA and APA: Failure to Comply with the Clearwater Forest Plan's Soil Quality Standards.
 - The final EIS admits that in the Musselshell Meadows vicinity proposed for harvest (831 acres) all have existing impacts and the proposed activities will initially cause cumulative predicted detrimental disturbance to exceed the threshold of 15%, which is above the Region 1 Soil Quality Standard.
 - There are an additional 8 proposed units in addition to the Musselshell units that the cumulative DSD is predicted to exceed the 15% threshold.

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Timber | Region 1

Friends of the Bitterroot and Alliance for the Wild Rockies v. Matt Anderson et. al. (20-cv-00104-DLC, D. Montana) Region 1- On July 10, 2020, the plaintiffs filed a complaint in the District Court of Montana against the Forest Service regarding the Gold Butterfly Project on the Bitterroot National Forest, concerning violations of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Healthy Forest Restoration Act (HFRA), and Administrative Procedures Act (APA), when the Forest Service approved the project.

The decision notice was signed on November 15, 2019. The decision authorized 5,461 acres of commercial harvest, 4,854 acres of non-commercial thinning, and 1,294 acres of prescribed burning; as well as 6.4 miles of road construction, conversion of 0.22 miles of open public road to a motorized trail, 7.7 miles of temporary roads, 5.8 miles of system road decommissioning, 16.5 miles of non-system roads to be converted to system roads, 16.5 miles of non-system road decommissioning, storage of 5 miles of system roads, and relocation of two trailheads. The project also included a project specific Forest Plan Amendment to the 1987 Forest Plan to certain standards relating to elk habitat effectiveness and elk habitat objectives.

Plaintiff's claim violations of:

1. NFMA, NEPA and APA

- The Forest Service failed: to use the Bitterroot NF Forest Plan's definition of old growth using less protective data; and to fully disclose to the public the Environmental Impact Statement (EIS) that the Agency was applying an old growth definition significantly less protective than the plan's old growth definition; and
- The Forest Service's project specific Forest Plan Amendments regarding elk habitat is unlawful, because it decreases the habitat effectiveness for elk and does not use the best available science. The project area violates the plan's elk habitat effectiveness standard, and therefore, the Agency issued a Forest Plan amendment for the project, which eliminates the standard.

2. HFRA

The Forest Service's use of HFRA section 6591a(d) authority to approve the project, because it does not maximize the retention of old growth and large trees. The project EIS never discloses the HFRA Forest Plan's consistency requirement at 16 U.S.C. § 6512 (b) to the public, and therefore fails to take a hard look at whether HFRA authority can be lawfully used to approve the project.

Lands | Region 2

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Board of County Commissioners of the County of Pitkin Colorado, v. Rock Creek Association and United States Forest Service (20-01930, D. Colo.) Region 2—On July 1, 2020, the plaintiff filed a complaint in the District Court of Colorado against the Forest Service and Rock Creek Association (RCA) concerning public access to the Wild Rose Ranch Subdivision through a right-of-way on Pitkin County—Rock Creek Wagon Road and later portions of the old Crystal River Railroad grade on the White River National Forest. The plaintiff claims violations of the Quiet Title Act and with RS 2477 right-of-way rules.

The plaintiff claims the following:

- Limited fee: Plaintiff is entitled to a declaration pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201, et seq. that the Horoney QCD is a quiet claim deed and that the Horoney QCD is an attempt to convey a limited fee for the purposes stated therein, not a conveyance of fee simple absolute.
- After Acquired Title: Plaintiff is entitled to a declaration that use of the railroad track through Section 9 by the Crystal River Railway and Crystal River Railroad, at best resulted in the creation of a nonexclusive, prescriptive easement right to maintain track and operate a railroad line through Section 9.
- Abandonment and Sovereign Immunity: Plaintiff is entitled to a declaration that the RCA and its individual members do not have private prescriptive rights to a right-of-way through Section 9.
- Quiet Title – Public Highway: Plaintiff is not seeking a declaration or adjudication of rights with respect to the real property that was the subject of District Court, Pitkin County, Case No. 2003CV87 and Colorado Court of Appeals, Case No. 2007CA1499.

Notice of Intent

Nothing to Report

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