

## Ecosystem Management Coordination

*Happy Friday!*

### Court Decisions

#### Forest Management | Region 5

**Environmental Protection Information Center v. Carlson, et al.** (19-17479 & 20-15040, 9<sup>th</sup> Cir.; 19-06643, D. N. Cal.) **Region 5**—On August 3, 2020, the 9<sup>th</sup> Circuit Court of Appeals issued a decision against the Forest Service reversing the District Court of Northern California order that denied the plaintiffs preliminary injunction (PI) in the **Ranch Fire Roadside Hazard Tree Project on the Mendocino National Forest**. The case concerns the use of a categorical exclusion (CE) for road repair and maintenance in 36 C.F.R. § 220.6(d)(4), instead of relying on an Environmental Assessment or an Environmental Impact Statement for authorizing the project. The Plaintiffs alleged violations of the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA), when relying on the use of CE to authorize the project.

The 9<sup>th</sup> Circuit reversed the district court's denial of the requested PI and remanded back to the lower court for further proceedings not inconsistent with the opinion.

Specifically, the court concluded:

1. The plaintiff was likely to succeed on the merits of its claim that the Forest Service erred in relying on the CE for road repair and maintenance.
  - a. The 9<sup>th</sup> Circuit noted that the rationale for a CE was that a project that will only have a minimal impact on the environment should be allowed to proceed without an environmental impact statement or an environmental assessment.
  - b. The CE upon which the Forest Service relied authorized projects for such things as grading and resurfacing of existing roads, cleaning existing culverts, and clearing roadside brush.
  - c. Under no reasonable interpretation of the language of 36 C.F.R. § 220.6(d)(4) did the project come within the CE for “repair and maintenance” of roads.
2. The 9<sup>th</sup> Circuit held that the plaintiff submitted evidence of irreparable, although limited, harm.
3. The 9<sup>th</sup> Circuit held that the balance of equities and the public interest weighed in the plaintiff's favor.

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## Background

On December 4, 2019, the district court issued a decision denying the plaintiff's motion for a preliminary injunction, concerning the project on the Mendocino National Forest. The district court determined that that the plaintiff did not establish a likelihood of success on the merits or demonstrate the balance of hardship tips sharply in its favor. Subsequently, the court denied the plaintiff's request for a PI in this case.

## Litigation Update

### Nothing to Report

### New Cases

### Nothing to Report

## Notice of Intent

### Forest Management | Region 1

**NOI – Received July 21, 2020 (dated July 2, 2020): The Forest Service and the U.S. Fish and Wildlife Service (FWS) received a 60-day Notice of Intent by the Alliance for the Wild Rockies and Friends of the Bitterroot (AWR/FOB) to sue the Agencies regarding the Gold Butterfly Project on the Bitterroot National Forest.** AWR/FOB state the project area is within the habitat of the grizzly bear, wolverine, and bull trout. They claim the project consultation for the grizzly bear, and programmatic consultation for the bear was unlawful and fails to apply the best available science; and the project consultation for the wolverine, and programmatic consultation for the wolverine was unlawful and fails to apply new information in violation of the Endangered Species Act (ESA). They further claim the Forest Service must formally consult with the FWS concerning the project's impact on the bull trout, because the project may have adverse effects on the trout's critical habitat, based on sediment release from the project, and increased recreational use of a campground.

#### The AWR/FOB claims that:

- The project-level consultation for impacts on the grizzly bear:
  - Misrepresented how many new permanent road miles would be added to the Forest, and the amount exceeds the Incidental Take Statement (ITS) in the Forest Plan ITS.
  - Does not analyze whether there will be an increase in road density in the action area.
  - Misrepresented the actual open road density in the baseline.
  - Did not do a sufficient analysis of open road density in third-level drainages.
  - Did not do a sufficient analysis of the secure habitat.

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- Did not address the factor of total road density, which must include illegal use and administrative use of closed roads.
- Did not look at road density between secure habitat areas to determine the impact of the project of connectivity between the areas.
- The Forest Plan-level consultation for impacts on grizzly bear:
  - Does not analyze the road density on private and state lands in part of the Forest in the baseline and in the cumulative effects, which makes it difficult to anticipate how the Plan will impact grizzly bears' ability to move to the Bitterroot Recovery Zone.
  - Should have used Interagency Grizzly Bear Committee parameters for road density and core habitat to assess the impact of the plan on grizzly bear recovery and included all motorized uses of roads, as well as connectivity between secure habitat areas, but did not.
- The Forest Service did not prepare a BA for the project's impact on wolverines, which are in the project area.
- The Agencies cannot rely on a 2014 Plan-level consultation for analysis of impacts on wolverines, because that BA is based on outdated information, which concludes that land management activities do not affect wolverine, but more recent research shows that they do.
  - Agencies must reinitiate programmatic ESA consultation on wolverine, because there is **new information** that reveals the effects on wolverine that have not yet been considered.
  - Alternatively, or in addition, the programmatic ESA consultation violates ESA for failure to apply the best available science. And, the Agencies must address this **new information**/best available science during project-level consultation.
- The Agencies must formally consult because the project may have adverse effects on bull trout critical habitat, which based on sediment release from the project, and increased recreational use of a campground.

## Background

On July 10, 2020, the plaintiffs filed a complaint in the District Court of Montana against the Forest Service regarding the project, 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.

### 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

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- 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.

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