

October 23, 2020

## Ecosystem Management Coordination

*Happy Friday!*

### Court Decisions

**Nothing to Report**

### Litigation Update

**Nothing to Report**

### New Cases

**Lands | Region 10**

#### **Historic Wolf Creek Boatworks v. United States of America, et al (20-260, D. Alaska)**

**Region 10**—On October 13, 2020, the plaintiff filed a complaint in the District Of Alaska alleging the Forest Service failed to adequately address the plaintiff's request for their Conditional Use Permit (permit) related to their non-profit corporation known as Wolf Creek that include buildings on a parcel of land operated on the Tongass National forest. Wolf Creek has been in operations since 1939. The plaintiff claims the Forest Service violated 36 C.F.R. 251.54, the law for applying for a permit on National Forest system lands. The plaintiff claims the Forest Service is not extending/renewing their permit, because the Forest Service is in the process of finalizing a land swap with the Alaskan Mental Health Trust in 2021 without conveying the plaintiff's permit rights because there is no current permit in place.

The plaintiff claims:

- The plaintiff contacted the Forest Service to extend their permit in accordance with regulations.
- The plaintiff submitted all required paperwork, surveys, and all related materials as requested and needed.
- The Forest Service notified the plaintiff of pending eviction on December 15, 2020, but they were never denied an extension for over 7 years of attempting to extend their permit.
- The plaintiff claims their permit extension was withheld unlawfully and unreasonably delayed.

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- The plaintiff alleges the Forest Service intention to declare the plaintiff's tenancy invalid and lapsed without considering the attempted extension application for over 7 years is arbitrary, capricious and abuse of discretion and not in accordance with 5 U.S.C. 706 (2) (a).

## Notice of Intent

### Range and Recreation | Region 2

**NOI – Dated September 23, 2020, the Forest Service, Department of Interior (DOI), U.S. Fish and Wildlife Service (FWS), Bureau of Land Management (BLM), and National Park Service (NPS) received a 60-day Notice of Intent by the Center for Biological Diversity (CBD) Western Watershed Project (WWP) to sue regarding the Gunnison Candidate Conservation Agreement Biological Opinion (BO), for livestock grazing authorizations in the Gunnison Basin on the Grand Mesa, Uncompahgre and Gunnison National Forest.**

The CBD and WWP claim the Agencies have violated sections 7 and 9 of the Endangered Species Act (ESA) by failing to ensure that the adoption and continuing implementation of the Gunnison Basin Candidate Conservation Agreement (Gunnison Basin CCA) and its attendant BO authorizing development, recreation, and livestock grazing within occupied Gunnison sage-grouse (*Centrocercus minimus*) critical habitat in the Gunnison Basin does not jeopardize the continued existence of the species, or adversely modify its critical habitat, or result in unauthorized take.

The CBD and WWP claim the Agencies violated section 7 and 9. Specifically:

1. The Agencies must reinitiate consultation over the effects of grazing in the Gunnison Basin on Gunnison Sage-grouse. Specifically:
  - a. **New information** regarding the effects of grazing authorized by Gunnison Basin CCA requires immediate re-initiation of consultation: The NOI states that severe declines in Gunnison sage-grouse numbers demonstrate that activities like grazing covered by the Gunnison Basin CCA are likely impacting Gunnison sage-grouse in a manner not previously considered and constitute new information necessitating re-initiation of consultation.
  - b. The Agencies' failure to adhere to the terms and conditions of the BO requires immediate re-initiation of consultation: The Agencies' failure to adhere to multiple terms and conditions of the BO additionally requires the immediate re-initiation of consultation because this constitutes a change in the action to the detriment of the species.
  - c. The amount of take set forth in the BO has been exceeded: The Gunnison sage-grouse's population decline in Gunnison Basin far exceeds the amount of take set forth in the BO's incidental take statement.
2. The Agencies' continued authorization of grazing under the Gunnison Basin CCA, continued reliance on the BO despite the Gunnison Sage-grouse's decline, and failure to implement required

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- conservation measures jeopardizes the Gunnison Sage-grouse, adversely modifies its critical habitat, and results in unauthorized take.
3. The BO fails to ensure against jeopardy and the adverse modification of critical habitat and violates the ESA. Because it fails to adequately account for the effects of grazing on the Gunnison sage-grouse and its critical habitat and relies on inadequate conservation measures and unsupported assumptions regarding their efficacy to write off these impacts, the BO is arbitrary and capricious.

#### Background

The NOI states that the Gunnison Basin CCA was developed in 2013 following FWS's proposal to list the Gunnison sage-grouse as endangered and designate critical habitat. It was intended to provide coverage to the action Agencies for incidental take of Gunnison sage-grouse if the species was listed, as well as specify needed conservation measures and monitoring. After deciding to list the Gunnison sage-grouse under the ESA and designate critical habitat for it, FWS adopted its prior analysis of the Gunnison Basin CCA's effects in the BO.

#### **Other Cases**

##### **Land Management Planning | Region 1**

**Steve Bullock, et al. v. U.S. Bureau of Land Management, et al.** (20-00062, D. Mont.) **Region 1**—On October 16, 2020 the District Court of Montana issued a decision against the Bureau of Land Management (BLM). The plaintiffs alleged that Pendley unlawfully served as Acting BLM Director in violation of the Appointments Clause of the U.S. Constitution, the Federal Vacancies Reform Act of 1998 (FVRA), and the Administrative Procedure Act (APA). The district court agreed and declared that the Lewistown Resource Management Plan (RMP), Missoula RMP, and Miles City RMP amendment are unlawful and must be set aside under 5 U.S.C. § 3348(d)(1) and 5 U.S.C. §706(2)(A).

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