

Ecosystem Management Coordination

Happy Holidays

Court Decisions

Forest Management & Wildlife | Region 6

Alliance for the Wild Rockies v. United States Forest Service, et al. (19-00350, E.D. Wash.)
Region 6-On December 1, 2020 the Eastern District Court of Washington issued a favorable decision to the Forest Service and the U.S. Fish and Wildlife Service (FWS), regarding the **Mission Restoration Project and Forest Plan Amendment #59** on the Okanogan-Wenatchee National Forest. The district granted the Agencies' motion for summary judgment and denied the plaintiff's motion. The plaintiff had claimed the Forest Service violated the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Administrative Procedure Act (APA) and National Forest Management Act (NFMA) by approving the project and issuing a finding of no significant impact (FONSI).

The district court found the following:

1. **NFMA:** The project is not inconsistent with the Forest Plan and guidelines on deer habitat, snowplowing or soil compaction.
 - a. **Deer Habitat:** the court determined that the Forest Service provided a thorough analysis and emphasized the project will improve deer habitat over the long term, and found the Agency's analysis of MA 26, including impacts on the deer winter range, consistent with the Forest Plan.
 - b. **Snowplowing:** the court found that the plaintiff did not mention snowplowing in its First Amended complaint and concluded that the claims are not properly before the court on summary judgement.
 - c. **Soil Compaction:** the court determined that the Forest Service has shown the project is consistent with the Forest plan, and that the Agency conducted a thorough soil analysis and incorporated these findings in its final environmental assessment (EA).
2. **NEPA:** The Forest Service did not violate NEPA by failing to prepare and Environmental Impact Statement (EIS).
 - a. **Mitigation Measures:** The court found the Forest service supported its mitigation measures.

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- b. Environmental Impact on Soil: the court determined that the Forest Service took the requisite “hard look” at the project’s environmental impacts and provided various mitigation measures to effectively reduce those impacts on soil and does not need to prepare an EIS.
3. **ESA**: The Forest Service and the FWS are not required to reinitiate consultation on the grizzly bear since the species is not in the project area, and that the Agency adequately considered the project’s road-related impacts on the grizzly bear.
 - a. Re-initiation of Formal Consultation: the court determined that “new information” does not always require re-initiation of consultation. New studies require an action agency to reinitiate formal consultation only when the original consultation neglected to previously consider the effects that the new study reveals that the proposed action will create for a listed species or their critical habitat. The plaintiff has identified no “new information” revealing the project will create effects that may affect grizzly bears or their critical habitat in ways that the Forest Service has not previously considered. No documented grizzly bear population exists in the Forest, so any possible environmental effects stemming from the project cannot possibly affect a non-existent population of bears. Also, the plaintiff has cited no incidental take statement, much less one that the project might exceed for grizzly bears.
 - b. Challenge of Biological Assessment: the court found the rational connection between the facts found and the conclusions made regarding the road-related effects on grizzly bears. As a result, the Forest Service, in consultation with the FWS, did not violate the ESA when it determined the project “may effect” but “not likely to adversely affect” grizzly bears.

Background

On October 16, 2019, the plaintiff filed a complaint in the district court against the Forest Service concerning the recently approved the project and Forest Plan Amendment #59 which authorized extensive logging, burning, and road building in the Methow Valley Ranger District. The plaintiff claims the Forest Service violated NEPA, APA and NFMA by approving the project and issuing a FONSI. The plaintiff claims there will be significant adverse impacts to water resources and fish, vegetation, soils and wildlife.

Forest Management | Region 1

Friends of the Bitterroot v. Anderson, et al. (20-00104, D. Mont.) **Region 1**—On November 24, 2020 the District Court of Montana issued an order favorable to the Forest Service regarding the **Gold Butterfly Project** on the Bitterroot National Forest. The district court dismissed the case as moot for lack of jurisdiction, since the Forest Service withdrew the record of decision

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(ROD) on August 28, 2020, to provide additional review and analysis. The complaint had raised concerns that the approved project violated 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.

Findings:

The district court concluded that the lawsuit is moot, and that it lacks subject matter jurisdiction which results in the dismissal of the lawsuit without prejudice. Specifically:

- Since the project was fully withdrawn and the record does not indicate any affirmative conduct was undertaken to accomplish the project, the court could not provide any meaningful relief designed at remedying that conduct.
- Additionally, no project activities were started prior to the withdrawal, no injury was inflicted, and no damage was done requiring a judicial remedy.
- The court did not issue an advisory opinion as to the legality of a Forest Service project that was withdrawn, nor did it enjoin the defendants from implementing a project they no longer desire to implement.
- Subsequent authorizations of the project must proceed through proper administrative channels and will be subject to judicial review.

Background

On July 10, 2020 the plaintiff filed suit challenging the Gold Butterfly Project. The ROD approving the project was issued on November 19, 2019. Minimal implementation (4 acres of mastication) has occurred on this project and no other activities are planned until the summer of 2021. The complaint alleges violations of NEPA; Forest Plan compliance regarding old growth; NFMA and a project-specific amendment regarding elk habitat objectives, and HFRA. A Notice of Intent to Sue under the Endangered Species Act has also been served upon the Forest, alleging violations of the ESA in regard to wolverine, bull trout and grizzly bear. These claims will be added to the lawsuit following the 60-day notice period. A review of claims in this case by the Forest, the Office of General Counsel and the Department of Justice has revealed some concerns.

Forest Management | Region 4

Alliance for the Wild Rockies, et al. v. U.S. Forest Service, et al. (19-445, D. Idaho) Region 4—On December 3, 2020, the District Court of Idaho issued an unfavorable decision against the Forest Service and Defendant-Intervenors on the **Lost Creek-Boulder Creek Landscape Restoration Project on the Payette National Forest** denying Defendants Motion to alter or amend the Court’s Summary Judgment in favor of plaintiffs, resulting in the total vacatur of the

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2019 record of decision (ROD) that had authorized the project. On September 8, the Forest Service and Defendants-Intervenors submitted a motion for the court to alter or amend the August 11, 2020 judgment to clarify that “only project activities involving forest vegetation management on lands designated as Management Prescription Category (MPC) 5.2 are enjoined or vacated, and that all authorized project activities on lands outside MPC 5.2, and non-forest vegetation management activities within lands designated as MPC 5.2, may continue.”

Findings:

The district court states the Forest Service is attempting to relitigate the issue of proper remedy and further states:

- The vacatur remedy requested by the defendants was briefed when the court granted plaintiffs’ Motion for Summary Judgment.
- A rule 59(e) motion may not be used to relitigate old matters. defendants had ample time to brief the issue of vacatur of the entire 2019 ROD and they did.
- The Defendants fail to allege the discovery of new evidence, a change in controlling law, or clear legal error.
- While not explicitly discussed in its order, the court did consider the proper remedy, determining that it was vacatur of the 2019 ROD, as requested by plaintiffs.
- The court did not find then and does not find now that equity demands less than total vacatur of the 2019 ROD. Nor does it find that vacatur of the 2019 ROD would be manifestly unjust.

Background

On August 11, 2020, the district court issued an unfavorable decision against the Forest Service and Intervenors. The court stated the 2019 ROD does not satisfy the 9th Circuit’s instruction to address a flaw in the 2014 ROD whereby the Forest Service did not articulate how the switch from Management Prescription Category (MPC) 5.2 to MPC 5.1 moves all components toward their desired conditions. In its 2019 ROD, the Forest Service explained that the selected alternative would allow future options whereby the Agency could achieve its desired conditions.

The project was initiated in 2014 and a ROD was signed on September 5, 2014, authorizing 22,100 acres for commercial logging and 17,700 acres for non-commercial logging. On June 4, 2015 plaintiffs filed a complaint in the district court asserting the Forest Service’s project decision violated NFMA. The district court ruled in favor of the Forest Service on August 31, 2016, and against the plaintiffs’ motion for summary judgment. On October 12, 2016, plaintiffs appealed to the 9th Circuit, and the court ruled in favor of the plaintiffs under the claims of violation of NFMA and the project approval was inconsistent with the forest plan. The 9th Circuit remanded the case back to the district court with instructions to vacate the 2014 ROD and to hold further proceedings consistent with the 9th Circuit’s opinion. The plaintiffs claim the new Final

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Environmental Impact Statement and ROD, signed on November 1, 2019, is essentially the same as the 2014 project.

The plaintiff's original complaint claimed:

- The project threatens the preservation of the native biodiversity, native plant life, fish and animal life and the natural functioning ecosystems.
- The project disregards to the 9th Circuit Court of Appeals' opinion and mandate in *Alliance for the Wild Rockies v. United States Forest Service*, 907 F.3d 1105, 1109 (9th Cir. 2018), which ordered the Forest Service's decision on the project be vacated. And that the defendants are barred from re-litigating all issues that have already been decided by the 9th Circuit.
- That if the new management activities in the 2019 project proposal are different from the 2014 project, changed in order to comply with the 9th Circuit's opinion, then defendants are in violation of NEPA by not taking a hard look at the environmental effects of the new management activities, conduct a reasoned analysis of the best scientific information regarding impacts, or adequately analyze adverse impacts.

Nothing to Report

Litigation Update

Nothing to Report

New Cases

Forest Management & Grazing | Region 6

WildEarth Guardians and Western Watersheds Watch v. Kristin Bail, et al. (20-00440, E.D. Wash.) **Region 6**—On November 30, 2020, the plaintiffs filed a complaint in the Eastern District Court of Washington against the Forest Service, challenging the authorization of **domestic sheep grazing on seven allotments (Wenatchee Allotments)** within the Okanogan-Wenatchee National Forest, in violation of the National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA). The plaintiffs indicate that domestic sheep grazing could transmit disease to bighorn sheep, which would result in the die-off of bighorn sheep herds. The plaintiffs claim that under the NFMA, the Forest Service is required to protect viable populations of sensitive species like bighorn sheep and must reduce the risks of disease transmission from domestic sheep grazing on the Wenatchee Allotments; but that the Agency continues to issue annual authorizations that allow thousands of domestic sheep to graze in the high-risk allotments each summer.

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The plaintiffs claim the Forest Service does not plan to make any changes to grazing management on the Wenatchee Allotments due to a forthcoming Forest Plan amendment. Delays in the Forest Plan process further delay site-specific NEPA analysis to update Allotment Management Plans (AMP) and implement on-the-ground actions needed to create separation between the species. The Agency is likely to continue authorizing domestic sheep grazing on those allotments under the same terms and conditions as existing Annual Operating Instructions (AOI) for many years.

Specifically, they claim:

1. Violation of the NFMA:

In authorizing domestic sheep grazing on the high-risk allotments, the Forest Service has acted inconsistently with directives from the Forest Plan by issuing AOIs that have authorized domestic sheep to graze on the Wenatchee Allotments each year from 2016 to 2020 and will again act inconsistently by issuing the 2021 AOI. By allowing domestic sheep grazing on the allotments, permits a high and unacceptable risk of disease transmission to bighorn sheep herds on the Forest.

2. Violation of the NEPA:

- a. Failure to complete supplemental NEPA. NEPA requires the Forest Service to prepare an environmental impact statement for every major federal action that significantly affects the quality of the human environment. The Forest Service must also prepare a new or supplemental analysis where significant new information relevant to environmental concerns and bearing on a major federal action or its impacts arises. The Forest Service failed to complete this process at least nine years after it recognized the need to reduce the risk of contact between domestic sheep and bighorn sheep.
- b. By 2016, the Forest Service recognized the need to complete supplemental NEPA analysis for the Wenatchee Allotments due to new information, including the Risk of Contact modeling that showed seven allotments are high risk to bighorn sheep. It initiated a process to fulfill this requirement but has not begun the second step of site-specific allotment analysis. By authorizing grazing through the 2017–2021 AOIs, the Forest Service has made and continues to make an irreversible or irretrievable commitment of resources.

Background

According to the complaint, on May 17, 2019, the Forest Service issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) and an amendment to the Wenatchee Forest Plan to provide direction for addressing conflicts between domestic sheep grazing and bighorn sheep. The Agency estimated it would publish a draft EIS during the winter 2020 and issue a Final EIS in summer 2020. However, the complaint indicates that the Forest Service is several

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months behind schedule and in October 2020, the Agency announced that it was delaying the process, stating that it now expects to release a draft Forest Plan and EIS and allow public comment in February 2021 and then issue a final EIS for the Forest Plan amendment in November 2021.

Recreation & Grazing | Region 2

Center for Biological Diversity and Watersheds Watch v. U.S. Department of Interior, et al. (20-03580, D. Col.) **Region 2**—On December 7, 2020, the plaintiffs filed a complaint in the District Court of Colorado against the Department of Interior (DOI), U.S. Fish and Wildlife Service (FWS), Bureau of Land Management (BLM), National Park Service (NPS), and the Forest Service, regarding the Gunnison Basin Candidate Conservation Agreement’s (GBCCA) Biological Opinion (BO), for development, recreation, and livestock grazing authorizations in the Gunnison Basin, Grand Mesa, Uncompahgre and Gunnison National Forest. The plaintiffs allege the Agencies have done little to protect the Gunnison sage-grouse in the Gunnison Basin and its habitat from significant threat posed by development, recreation, and livestock grazing, by relying on outdated conservation measures from the GBCCA and BO. The plaintiffs claim the Agencies failed to ensure that the adoption and implementation of the GBCCA does not jeopardize the continued existence of the sage-grouse or adversely modify its critical habitat in violation of the Endangered Species Act (ESA). The plaintiffs further claim the GBCCA’s BO violates the ESA and is contrary to the best available science.

The plaintiffs specially claim:

1. The BLM, NPS, FWS, and Forest Service failed to reinitiate formal consultation on the BO in violation of ESA:
 - a. **New information** reveals that the effects of the activities authorized by the GBCCA, including livestock grazing within occupied critical habitat in the Gunnison Basin in a manner and to an extent not previously considered.
 - b. Failure to adhere to the BO’s annual reporting requirements, renewal of livestock grazing permits within occupied habitat without incorporating the GBCCA’s required terms and conditions and failure to modify grazing permits where sage-grouse habitat requirements were not met.
2. BLM, Forest Service, and NPS continued authorization of activities under the GBCCA and their continued reliance on the BO jeopardizes the sage-grouse and adversely modifies Its critical habitat:
 - a. Then BLM, Forest Service and NPS continue to authorize activities, including grazing, under the GBCCA despite new information revealing those actions affect Gunnison sage-grouse and its critical habitat to an extent not previously considered.

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- b. BLM, Forest Service and NPS continue activities including grazing under the GBCCA despite their failure to adhere to the BO and ITS annual reporting requirement and to implement the required conservation measures. BLM, Forest Service and NPS are liable for take caused by the GBCCA by failing to comply with ITS terms and conditions
3. FWS Issuance of and BLM, Forest Service, NPS reliance upon the BO is contrary to the ESA. The BO violates ESA for the following reasons:
 - a. Failure to adequately account for effects of grazing.
 - b. Relying on inadequate conservation measures and unsupported assumptions regarding their efficacy to write off these impacts.
 - c. Failing to adequately analyze the cumulative effects on the occupied critical habitat throughout its range.
 - d. Failing to meaningfully consider how the GCCA implementation will affect the Gunnison sage-grouse's recovery.
 - e. Failing to rely on the best available science at the time the BO was issued regarding conservation.

Background

On September 23, 2020, the Forest Service, DOI, FWS, BLM, and NPS received a 60-day Notice of Intent by CBD and WWP to sue regarding the Gunnison Candidate Conservation Agreement BO, for livestock grazing authorizations in the Gunnison Basin. 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 GBCCA and its attendant BO authorizing development, recreation, and livestock grazing within occupied Gunnison sage-grouse 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 Forest Service responded to the NOI, indicating the Agency will work with the GBCCA participants to review the conservation measures and consider appropriate changes to management using best available science.

Travel Management | Region 6

Conservation Northwest and WildEarth Guardians v. U.S. Forest Service, et al. (20-00450, E.D. Wash.) **Region 6**—On December 7, 2002 the plaintiffs filed a complaint in the Eastern District Court of Washington against the Forest Service regarding the **modification to the vehicle class use designations and the motor vehicle use maps**, which opens 117 miles of

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roads in the Colville National Forest to vehicle uses, including the use of wheeled all-terrain vehicles (WATV). The plaintiffs claim this action violates Section 7 of the Endangered Species Act (ESA) by failing to consider whether the new designations may affect imperiled wildlife. The plaintiffs further claim the Forest Service violated the National Environmental Policy Act (NEPA) by not providing sufficient public notice and opportunity to comment and to meaningfully consider the impacts of new road designations and violation of the Agency's Travel Management Rule (TMR) by not conducting a NEPA process to consider relevant criteria before revision of the designations.

The plaintiffs claim:

1. Violations of the ESA
 - a. Forest Service failed to satisfy Section 7 by not consulting with the Fish and Wildlife Service (FWS) before proceeding with the proposed action that "may affect" ESA listed species.
 - b. The 2020 use maps constitute **new information** that reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.
 - c. Since 2009, FWS listed new species under the ESA and issued new critical habitat on the Colville NF that may be affected by the decision and 2020 use maps.
 - d. Allowing motorized use on the Colville NF in ways that cause irreversible or irretrievable commitment of resources pending completion of a new consultation would violate ESA Section 7(d).
2. Violation of NEPA: *Failure to Provide Notice and Opportunity to Comment*
 - a. Forest Service must provide notice and public comment consistent with agency NEPA procedures on proposed vehicle use designations and revisions and are required to provide scoping in accordance with the requirements of 40 C.F.R. 1501.7 for all proposed Agency actions including those that may appear to be categorically excluded.
 - b. Forest Service failed to provide enough advance public notice or a sufficient opportunity for the public to comment before finalizing its decision and publishing the 2020 use maps.
3. Violation of NEPA: *Failure to Conduct NEPA Review*
 - a. The designation of a road, trail, or area for motorized travel is a project-level decision that requires site-specific analysis under NEPA.
 - b. The decision and the 2020 use maps constitute "proposed action[s]" subject to the NEPA requirements.
 - c. The decision and the 2020 use maps are not statutorily exempt from the requirements of section 102(2)(c) of NEPA and are not categorically excluded from NEPA.

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- d. Failure to review the decision and the 2020 use maps pursuant to NEPA including the failure to take a hard look at the impacts of or reasonable alternatives to its decision violates NEPA.
4. Violations of the TMR the Forest Service
 - a. Failed to provide notice and comment consistent with NEPA, including the requirements for scoping, before designating roads for new vehicle classes in its decision before publishing the 2020 use maps.
 - b. Failed to sufficiently consider how the new designations in the decision and published 2020 use maps affect National Forest System natural and cultural resources, public safety, provision of recreational opportunities, access needs, conflicts among uses, the need for maintenance and administration, and availability of resource for that maintenance and administration.
 - c. Failed to consider the specific criteria of speed, volume, composition, and distribution of traffic on roads, and compatibility of vehicle class with road geometry and road surfacing, before finalizing the decision and publication of the 2020 use maps.

Background

On September 14, 2020, the Forest Service and the FWS received a 60-day Notice of Intent by the WildEarth Guardians (WEG) and Conservation Northwest (CN) to sue the Agencies regarding the modification to the vehicle class use designations and the motor vehicle use maps for the Colville National Forest. WEG/CN allege the Forest Service violated section 7(a)(2) of the ESA by failing to reinitiate and complete consultation, or to reinitiate consultation, on the modifications to the vehicle use class designations and motor use maps for the Colville National Forest made in 2019 and 2020. They claim these changes have the potential to harm listed species on the Colville NF.

According to the NOI – Colville National Forest Motor Vehicle Use Map: The Forest Service requested informal consultation based on its 2008 Biological Evaluation that determined Amendment #31 was not likely to adversely affect gray wolf, grizzly bear, Canada lynx, woodland caribou, bull trout, and designated bull trout critical habitat, woodland caribou, western yellow billed cuckoo, and wolverine.

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Notice of Intent

Nothing to Report

Other Cases

Land and Wildlife | Region 9

Sierra Club, et al. v. United States Army Corps of Engineers, et al. (20-2039, D. West Virginia; 20-2042, 4th Cir.) **Region 9**—On December 1, 2020 the 4th U.S. Circuit Court of Appeals issued a stay on the use of a streamlined Nationwide Water Permit 12 (issued by the U.S. Corps of Engineers) for the Mountain Valley Pipeline in the Huntington, West Virginia District and Norfolk, Virginia District. On September 25, 2020, the Huntington District issued a verification, determining that the pipeline met the criteria for operation under the NWP 12, excusing the project from the individual permitting process. On the same day the Norfolk District issued a reinstatement of its prior verification allowing the pipeline to use NWP 12 in that district. The petitioners then filed petitions for agency review of the Verification and Reinstatement pursuant to the Natural Gas Act, 15 U.S.C. § 717r(d)(1) and filed the instant motions to stay.

Finding:

The 4th Circuit found the petitioners are likely to succeed on the merits of their petitions for review, and other equitable factors weigh in favor of granting the motions for stay.

Specifically, the court:

- Granted Petitioners' motions for a stay of the Huntington District's Verification and the Norfolk District's Reinstatement until it becomes time to consider the petitions for review on the merits of the case.
- Determined that verification was likely issued in disobeying applicable law, since the Army Corps impermissibly incorporated into NWP 12 a modified permit condition from the West Virginia Department of Environmental Protection. And that the verification was likely issued in contravention of law.
- Further determined that the reinstatement is likely defective, because it depends on the validity of the verification.

However, the 4th Circuit indicated that the petitioners are not likely to succeed on the merits of their challenges to the Army Corps' 2017 issuance of NWP 12 itself, because the Court likely lack jurisdiction to entertain such challenges.

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