Court Decisions

Oil and Gas | Region 4

WildEarth Guardians v. USFS, BLM et al (14-349-D. Utah) **Region 4**— Plaintiffs challenged BLM's proposed surface use plan of operations (SUPO) for an application for a permit to drill, and the Forest Service's approval of the SUPO for a 400-well oil and gas development project on the Ashley NF.

On February 5, 2021 the District Court of Utah issued an order finding that the Agency's action is not arbitrary and capricious, there has been no clear error of judgment, and denied relief to the Plaintiffs.

Plaintiffs allege violation of NEPA, NFMA, Mineral Leasing Act, Roadless Rule, Clear Water Act and APA.

The Court Finds:

1. The Agencies adequately assessed the Project's impact on Sage Grouse
    a. The Agencies did not violate NEPA with respect to the NTT Report
    b. The Agencies did not violate NFMA with respect to the NTT Report
2. The Agencies adequately assessed the Project's impact on inventoried roadless areas
    a. The agencies did not violate NEPA with respect to IRA's
    b. The agencies did not violate the roadless Rule
3. The Agencies adequately assessed the Project's impact on air quality
    a. The Agencies did not violate NEPA with respect to air quality
4. The Agencies adequately assessed the Projects Impact on Water Quality

Background: Original Complaint:

On 05/07/2014, plaintiffs filed suit in the District of Utah challenging the agencies authorization (SUPO and APDs) of a 400-well oil and gas development project on the Ashley NF. Plaintiffs claim the FS/BLM *"failed to take a hard look at the impacts of the project on sage grouse, roadless areas and air/water quality and, where the law requires it, to prevent and mitigate the project's adverse consequences."* Plaintiffs make 21 claims concerning violations of NEPA, NFMA, Reform Act, Mineral Leasing Act Regulations, Roadless Rule, Clean Water Act and Clean Air Act - Including failure to examine particulate (PM2.5 & PM10 PSD increments) concentrations; ozone impacts, emissions and concentrations; traffic problems; alternatives to

protect roadless areas; Utah water quality standards; protecting water quality and riparian areas; protection of sage grouse habitat; applying sage grouse conservation measures; applying an alternative to protect sage grouse; and, problems with the "may affect determination" for sage grouse which is not supported by the record.

Recreation & Travel Management | Region 4

Idaho State Snowmobile Association v. USFS, et al. (19-195, D ID) Region 4 – This case concerns snowmobile access to the Couch Summit to Fleck Summit Corridor and closure of 72,447 acres of public land in the northern portion of the Fairfield Ranger District on the Sawtooth NF.

On February 10, 2021, the District Court of Idaho issued a Memorandum Decision and Order granting the Forest Service's motion for summary judgment for Claim 1 (APA) and Claim 3 (NFMA) but denied Claim 2 (NEPA). The court reversed and remanded the decision to the agency for further analysis.

Findings:

The Court held the plaintiff had standing and its argument that the Agency had a duty to rely on better scientific evidence *includes* the assertion that the Agency should have prepared an EIS.

1. APA claim dismissed. Plaintiffs failed to raise the minimization criteria during the administrative process or in their complaint.
2. NEPA Claim upheld – Forest Service actions were not in substantial compliance with the requirements of NEPA.
3. The court found a lack of a reasonable connection between the research relied upon and the conclusions in the EA. The evidence suggests that lynx, wolverines, and mountain goats either are not present in the analysis area or would reasonably tolerate human interaction:
    a. Agency assumed there might be two wolverine dens in the Analysis Area – no evidence of dens in the record
    b. Agency found humans and mountain goats interact harmoniously, but determined alternative 2 had to be selected to limit those interactions
    c. No credible evidence that lynx had been observed in the analysis area
4. NFMA claim dismissed. The Agency's selected alternative supports the Forest Plan because it strove to balance "an array of winter recreation experiences, while mitigating conflicts between motorized and non-motorized use and wintering wildlife".

Because the Agency failed to articulate a rational connection between the evidence relied upon and the conclusions it reached, the Court reversed and remanded the decision to the Agency for further analysis consistent with the decision.

Background:

On May 29, 2019 the plaintiff filed a complaint in the District Court of Idaho against the Forest Service's **Over-snow Vehicle Travel Management in the Northern Portion of the Fairfield Ranger District on the Sawtooth National Forest** (SNF) concerning the Final Decision Notice (DN), Finding of No Significant Impact, and associated actions. The plaintiff claims the Forest Service violated the Administrative Procedures Act, National Environmental Policy Act and National Forest Management Act. The plaintiff alleges the Forest Service's DN prohibits snowmobile use on 85,266 acres of public land in the Fairfield Ranger District based on environmental concerns that are not supported by the record. The plaintiff further alleges the Agency's DN admittedly "assumes" that snowmobiling in the closed areas will have adverse environmental impacts without providing any solid scientific evidence.

Litigation Update

Nothing to Report

New Cases

Mining & Lands | Region 3

Arizona Mining Reform Coalition et al v. U.S. Forest Service et al. (21-122, D. Ariz.) **Region 3--** On January 22, 2021, the plaintiff filed a complaint in the District Court of Arizona against the United States, U.S. Department of Agriculture, and the Forest Service, regarding the conveyance of **Oak Flat Parcel** to Rio Tinto and BHP via their subsidiary Resolution Copper Mine, which is within the proposed "**Southeast Arizona Land Exchange** and **Resolution Copper Mine Project**" on the Tonto National Forest that was approved on January 15, 2021. The plaintiff alleges the project would pump and dewater groundwater and completely obliterate sacred land, Oak Flat, by creating a roughly two-mile-wide and 1,000-foot-deep crater. They allege the Final Environmental Impact Statement (FEIS) is faulty and deficient in numerous critical areas and violates multiple federal laws. They allege further violation of National Defense Authorization Act, Organic Act, Federal Land Policy Management Act and Administrative Procedures Act.

The plaintiff claims:

1. Claim 1: Violation of National Environmental Policy Act (NEPA)
    a. Plaintiffs allege the problems are: (1) legally erroneous "purpose and need" (2) failure to provide for and analyze a full range of reasonable alternatives (3) failure to provide a full analysis of the impacts of those alternatives (4) failure to apply the full scope of federal laws applicable to the project (5) improper regulation and review (6) failure to include any information or opportunity to comment on the appraisals as required by

Congress (7) failure to adequately analysis connected actions and direct, indirect and cumulative impacts and (8) take a "hard look" under NEPA.

2. Claim 2: Violation of Section 3003 of the National Defense Authorization Act (NDAA)
    a. Failure to fully protect all cultural and Native American resources from the Exchange and the Project and take the required "hard look" at the Exchange and the Resolution Project and comply with NEPA and Section 3003 of the NDAA
3. Claim 3: Violation of The Forest Service Organic Act
    a. Failed to uphold the law by issuing an inadequate FEIS as part of its review and approval of the Exchange and the Resolution Project contrary to the Organic Act regulations
4. Claim 4: Failure to Properly Review and Regulate the Resolution Project in Violation of the FLPMA, The Organic Act, and Public Land Laws
    a. The Agency did not review the Project under the "public interest" standard as required by 36 C.F.R. Parts 251 and 261 of the Organic Act, which govern uses on National Forests for special uses or FLPMA's Title V Right Of Way provisions, but instead reviewed it under Part 228A under the General Plan of Operations (GPO)
    b. The FEIS never discussed the statutory and regulatory requirements and did not review the Project under the constraints of issuing a Right of Way special use permit

Travel Management & Recreation | Region 1

Friends of the Clearwater v. Cheryle Probert, US Forest Service (21-56, D. Idaho.) **Region 1--** On February 4, 2021, the plaintiff filed a complaint in the District Court of Idaho against the Forest Service, challenging the October 2017 Travel Planning Record of Decision (ROD) for Recommended Wilderness Areas (RWAs) on the Clearwater National Forest. Three sets of Plaintiffs (Friends of the Clearwater being one of them) challenged the 2011 travel plan. The 2017 Travel Planning ROD was completed in response to a Settlement Agreement reached in one of the 2011 travel plan lawsuits. Plaintiff alleges the Forest Service failed to act in accordance with its travel management duties on the Forest for allowing continued motorized use within an area recommended for Wilderness designation. The ROD allows motorized use along the Fish Lake Trail (Trail 419) within a recommended Wilderness Area adversely affecting several imperiled species, landscapes and diverse ecosystems, specifically Elk, Bull Trout, and Grizzly Bears. All other trails in Clearwater NF Management Area B2 are closed to motorized use.

The Plaintiffs allege violations of National Environmental Policy Act (NEPA), 42 U.S.C 4321, Executive Order 11644 as amended by Executive Order 11989, Forest Service Travel Management regulations, 36 C.F.R Part 212, National Forest Management Act (NFMA), Administrative Procedures Act (APA and 5 U.S.C. 701.

The plaintiff claims:

1. Violations of NFMA: Inconsistency with Clearwater National Forest Plan
    a. The Forest Plan requires the FS manage lands in Management Area B2 to achieve 100% elk habitat effectiveness.
    b. The Fish Lake Elk Management area has not achieved 100% elk habitat effectiveness.
2. Violations of The Travel Management Rule, Executive Order 11644 as amended and the Administrative Procedures Act
    a. Failure to consider and comply with the Travel Management Rule and Executive Order 11644's Minimization Criteria.
        i. Fails to locate motorized routes to minimize damage to soil, watershed, vegetation, or other resources of public lands and minimized harassment of wildlife or significant disruption of wildlife habitats and minimize conflicts between off-road vehicle use and other recreational uses
        ii. The ROD did not explain how allowing motorized recreational use of the Fish Lake Trail minimizes impacts on Forest Resources.
    b. Failure to Prepare Legally Adequate Travel Management and Failure to Comply with the Court's March 22, 2015 Remand Order
        i. On March 22, 2015 the Court concluded the FS violated the law in finalizing a travel management plan for the Clearwater National Forest and remanded the "Travel Plan, Final EIS and ROD back to the FS for reconsideration and further evaluation consistent with the order.
        ii. The FS has not finalized any travel management decisions responsive to the Court's March 22, 2015 remand order.
3. Violations of the NEPA
    a. Failure to Take a "Hard Look" at the Direct, Indirect, and Cumulative Impacts of the ROD
    b. Failure to Prepare New or Supplemental Environmental Analysis
        1. There are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts, specifically with the confirmed presence of a male grizzly bear in or about the geographic proximity of the Clearwater National Forest.

Notice of Intent

Forest Management and Wildlife | Region 2

New NOI-On January 26, 2021, Western Watersheds Project and Rocky Mountain Wild (Complainants) sent a new NOI alleging violation of Section 7 of the Endangered Species Act

(ESA), regarding the Final Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) for the Thunder Basin National Grassland 2020 Plan Amendment and its failure to satisfy the agency's affirmative obligations under Section 7(a)(1) of ESA to use its authorities to carry out programs to conserve listed species. Specifically, they allege the Forest Service's Biological Assessment (BA) failed to satisfy the agency's obligations to thoroughly assess the potential effects on Black-Footed ferrets.

Complainants Allege Violation of Laws:

- Affirmative Duty to Conserve
    - The 2020 Plan Amendment continues a pattern of eroding projects for black-tailed prairie dogs and black-footed ferret reintroduction habitat on Thunder Basin National Grassland. Removal of Management Area 3.63 from the Reintroduction Habitat designation marks a clear turn away from science-based and legally valid conservation efforts.
    - Insignificant measures that do not reasonably likely conserve endangered species fail to satisfy federal agencies' Section 7 obligations.
    - The 2020 Plan Amendment does not meaningfully address the threat of plague to prairie dog colonies on the Grassland.
    - The 2012 Plan Amendment is inconsistent with the Forest Service Manual by ignoring the directive to place top priority on listed species' conservation and recovery, violates the 2012 Planning Rule, and will not contribute to the recovery of the black-footed ferret as required by the 2012 Plan Amendment.
- Biological Assessment
    - The BA for the 2020 Plan Amendment reached an arbitrary "no effect" determination because it did not consider impacts of the Amendment to reintroduction efforts or recovery of the black-footed ferret.
    - The "no effect" determination also runs directly counter to the FS's earlier determination that failure to designate Management Area 3.63 Black-Footed Ferret Reintroduction Habitat on national grasslands would be likely to adversely affect the species.

Other Cases

Mining | Region 1

Montana Environmental Information Center et al.'s vs. David Bernhardt et. al. and **Westmoreland Rosebud Mining LLC et al**. (19-00130, D. Montana), **Region 1** - Forest Service is not a named party in this litigation nor is any mining operations on NFS lands. Summary provided for information purposes.

On January 25, 2021, the District Court denied Plaintiff's Motion for Preliminary Injunction. There is no causal link between the harm alleged and the injunctive relief, making it inappropriate.

The Court finds that a preliminary injunction would not prevent environmental injuries and would do nothing to affect the level of water withdrawn from the Yellowstone River by the Power Plant. The Court does not see what harm a preliminary injunction could prevent since the excavation in Area F has been ongoing since May 2020 and coal extraction began in August 2020. Halting mining in Area F will have no effect on greenhouse gas emissions from the Colstrip Power Plant. Adequacy of reclamation efforts to return the land to its original state is moot. The Court determined the Plaintiffs fail on demonstrating a likelihood of irreparable harm, so the Court did not examine whether Plaintiffs have met their burden on the remaining three Winter factors.

Background

The case concerns the Rosebud Mine and stems for the Mine's attempt to expand operations again into a location called Area F. On December 18, 2020, the Court held an evidentiary hearing on mining expansion's effect on Pallid Sturgeon in the Yellowstone River. Supplemental authority was submitted by the Plaintiffs for the Court's consideration on December 23, 2020. The matter was ready for a decision to be made, which was to deny the motion after careful review of the documents and evidence submitted. Plaintiffs claimed the Federal Defendants unlawfully approved the Area F expansion because the FEIS fails to take a "hard look" at the impacts of the expansion required by NEPA. The FEIS failed to consider:

- the cumulative impacts of mining on local water resources
- a range of alternatives for mining in Area F
- the impacts of further water withdrawals from the Yellowstone River on the endangered pallid Sturgeon species

The mine expansion was approved in June 2019, Plaintiffs filed their motion for preliminary injunction on August 28, 2020.

Lands | WO Region

Gordon M. Price v. William P. Barr, U.S. Attorney General, et al., (19-03672, D. Columbia), **WO Region-**On January 22, 2021 the District Court denied the Defendants' motion for a judgment on the pleadings and Granted Plaintiff's cross-motion for a judgment on the pleadings. The Court entered a declaratory judgment and permanent injunction in favor of Mr. Price.

The Court issued a declaratory judgment stating that the requirements in 54 U.S.C 100905, 43 C.F.R Part 5 and 36 C.F.R 5.5 for those engaging in "commercial filming" must obtain permits

and pay fees are unconstitutional under the First Amendment. A permanent injunction enjoining the permit and fee requirements for commercial filming in 54 U.S.C. § 100905, 43 C.F.R. Part 5, and 36 C.F.R. § 5.5, and enjoining prosecution and the imposition of criminal liability was entered.

Article III Standing: The Court concluded that Mr. Price had established Article III standing only to challenge the permit requirements for "commercial filming" in § 100905 and its implementing regulations. The Court limited its constitutional review accordingly.

Claims under the Free Speech Clause of the First Amendment are analyzed in three steps. The Court held:

1. The Court concluded that filming a movie is a form of speech protected by the First Amendment.
2. Section 100905 And Its Implementing Regulations Restrict Speech in Public Forums. Section 100905 and its implementing regulations apply not only to traditional public forums like the National Mall, but also to designated public forums, like free speech areas within the national parks.
3. Section 100905 And Its Implementing Regulations Do Not Satisfy Heightened Constitutional Scrutiny. Section 100905 and its implementing regulations do not satisfy this heightened level of constitutional review and, therefore, run afoul of the First Amendment.
4. Filming A Movie Constitutes Expressive Speech Protected by The First Amendment. The Court held the implementing regulation imposed a content-based restriction on speech that does not pass constitutional muster and substantially burdens more speech than is necessary to achieve the government's substantial interest in protecting the National Parks. In issuing the injunction, the court noted that a more targeted permitting regime for commercial filming, which is more closely connected to the threat posed by large groups and heavy filming equipment, may pass constitutional muster in the future.

Wildlife | Region 5

Natural Resources Defense Council, Inc. v. United States Department of the Interior; U.S. Fish and Wildlife Service (21-cv-56, D. California), Region 5 -On January 25, 2021 Natural Resources Defense Council (NRDC), filed a complaint for Declaratory and Injunctive Relief in the District Court of California against the United States Fish and Wildlife Service's (Service) challenging the decision to remove the gray wolf from the list of threatened and endangered species, violating the Endangered Species Act (ESA) and Administrative Procedures Act (APA).

The Plaintiff's request the Court declare that Interior and the Service acted arbitrarily, capriciously, and contrary to ESA and its implementing regulations and in violation of the APA

in issuing the November 3, 2020 Rule; hold unlawful and vacate the November 3, 2020 Rule; Issue injunctive relief as necessary to prevent the implementation of the Rule. The plaintiff's claims for relief:

1. **Unlawful Analysis of Non-ESA Eligible Entities:**
The Service lumps together core populations of Great Lakes and Northern Rockies wolves with wolves in low-population areas across the lower 48 to form and delist the "lower 48 United States entity.
2. **Failure to Analyze Status of Pacific Coast Wolves:**
The Service's decision to graft Pacific Coast wolves onto an already delisted segment violates the law by committing the same fault the D.C. Circuit described in Humane Society of the U.S. v. Zinke—creating a distinct population segment in order to delist one group, leaving out less populated surrounding areas, and then attempting to delist the "remnant" population.
3. **Failure to Consider Species Status Through a Significant Portion of Its Range:**
The Service failed to analyze whether the gray wolf is endangered or threatened throughout a "significant portion of its range," as required by the ESA.
4. **Failure to Comply with Significant Portion of Its Range Policy:**
The Service has failed to give meaning to both "all of its range" and "a significant portion of its range." Caselaw requires both.
5. **Failure to Use Best Available Science in Range Analysis:**
The Service fails in the Rule to analyze physiological, ecological, or behavioral factors to evaluate discreteness as required by the Distinct Population Segment Policy despite the best available science in the biological report indicating their importance.
6. **Unlawful Exclusion of Wolves' Current Range in Threats Analysis:**
The Service excluded large portions of range currently known to be used by wolves. Even though the Service finds these wolves "may be in danger of extinction or likely to become so in the foreseeable future," Service ignores this threat because, according to the agency, these wolves are not "significant under any reasonable definition of that term,"
7. **Failure to Consider Impacts from Loss of Historical Range:**
Service never actually describe how it considered the effect of lost range or whether the causes of that loss are ongoing.
8. **Failure to Provide Fair Notice of Alternative Analysis:**
Commenters, including scientific peer reviewers, did not have notice that the Service would be examining the recovery status of Northern Rockies wolves or that the Service would create a new "lower 48 United States entity." Because the Service included this information and entity for the first time in the Rule, that rule is not a logical outgrowth of the Proposed Rule