

Ecosystem Management Coordination

Court Decisions

Range | Region 4

Western Watershed Project v. U.S. Forest Service, et al. (19-0097, D. Utah) **Region 4**—On June 2, 2021 the District Court of Utah issued a favorable decision to the Forest Service, granting the Agency’s partial Motion to Dismiss the plaintiff’s third claim challenging the Fishlake National Forest Supervisor’s decision not to suspend and cancel the **Kingston, Forshea and Manning Creek Allotments** on **Monroe Mountain** within the **Fishlake National Forest** for the 2019 grazing season permits. The court found it lacked jurisdiction because grazing permit decisions are enforcement decisions committed to Agency discretion and are unreviewable under the APA. The remaining claims concerning alleged violations of the Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), Administrative Procedures Act (APA) will proceed in court.

The District Court found:

- The plaintiff’s third claim alleges the Forest Service failed to follow its appeal regulations when the Forest Supervisor rescinded Kling’s 2013 suspension and cancellation of the grazing permits. The Forest Service argued that: (1) the plaintiff lacks standing to assert its third claim, because they were a non-party to the Agency appeal process; and (2) the court lacks jurisdiction over the claim because grazing permit decisions are enforcement decisions committed to agency discretion and are therefore unreviewable. The court agreed.
- The court determined that because the grazing permit decisions are committed to Agency discretion and are unreviewable under the APA, the Forest Service’s motion was granted.

Background

On November 20, 2019 the plaintiff filed a complaint in the District Court of Utah against the Forest Service concerning the issuance of term and temporary grazing permits on allotments on Monroe Mountain for the 2019 grazing season. The plaintiff claims the Forest Service violated FLPMA, APA, NFMA, Organic Act of 1897 (OA), and the Forest Transfer Act of 1905 (FTA).

Wildlife & Forest Management | Region 5

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

Unite the Parks, et al., v. U.S. Forest Service, et al. (21-0518, E.D. Cal.) **Region 5**— On May 28, 2021 the Eastern District Court of California issued a favorable decision to the Forest Service and the U.S. Fish and Wildlife Service (FWS), regarding 45 Forest Health Projects impacts on the Southern Sierra Nevada Pacific fisher located on the on the Sierra, Sequoia and Stanislaus National Forests, with the court denying the plaintiffs’ motion for a preliminary injunction (PI), based on the fact the plaintiffs are not likely to succeed on the merits.

Plaintiffs originally alleged violations of the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Administrative Procedures Act (APA).

The Projects were authorized through decision notices, and decision memos, and the FWS programmatic biological opinion (BO).

Of the 45 Forest Health Projects challenged, 24 projects are on Sierra National Forest, and 15 projects are on the Sequoia National Forest. The Pacific fisher was Federally listed, on May 15, 2020, in the southern Sierra Nevada, and the FWS’s programmatic BO was issued on June 10, 2020.

District Court Found:

Motion for Preliminary Injunction—Likelihood of Success on the Merits:

- a. Plaintiffs’ ESA claim based upon defendants’ failure to calculate the size of the current SSN Fisher population:
The plaintiffs did not identify or describe what better scientific evidence existed at the time of the 2020 or 2021 programmatic BOs that the Agencies should have used or relied upon.
- b. Plaintiffs’ ESA Claim Based Upon the Alleged Failure to Consider the Minimum Viable SSN Fisher Population Size:
The court concluded that it cannot order the government to prepare the minimum viable population study that plaintiffs desire because the ESA does not require an agency to conduct new tests or make decisions based on nonexistent data.
- c. Plaintiffs’ ESA Claim that Defendants’ Determination of the Long-Term Benefit to Fishers is Unsupported:
The court finds that plaintiffs have failed to show that they are likely to prevail on the merits of this aspect of their ESA claim or even that they have raised “serious questions” as to that likelihood.
- d. ESA Claim Challenging the 2021 PBO’s “No Jeopardy” Determination:

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

The court concludes that in seeking preliminary injunctive relief plaintiffs have failed to demonstrate their likelihood of success on the merits of this aspect of their ESA claim or even shown that they have raised “serious questions” as to that likelihood.

i. Plaintiffs’ NEPA Claim Against USFS

Plaintiffs have failed to show how Forest Service has not fulfilled its obligations under NEPA.

NOI- Dated June 10, 2021, the Forest Service and U.S. Fish and Wildlife Service (FWS) (Region 5) received a second 60 Day Notice of Intent to Sue by the Unite the Parks, Sequoia ForestKeeper, and the John Muir Project at Earth Island institute, concerning alleged violations of the ESA, regarding the conservation and recovery of the southern Sierra Nevada Pacific fisher listed May 15, 2020. The NOI alleges:

1. The Forest Service failed to utilize its authorities to further the species’ protection and conservation, as required under ESA section 7(a)(1). 16 U.S.C. § 1536(a)(1).
2. The FWS has not designated critical habitat for the Pacific fisher despite the mandatory May 15, 2021 deadline, in violation of ESA section 4(b)(6)(C). 16 U.S.C. § 1533(b)(6)(C).
3. The Forest Service is violating ESA section 9, which prohibits the taking of endangered species, to the extent that the Agency proceeds with logging and other management projects that may affect the Pacific fisher or its habitat without a valid concurrence or incidental take statement from FWS. 16 U.S.C.A. § 1538(a).

The NOI further claims the Forest Service’s and FWS’s failure to fulfill their legal obligations under the ESA deprive the Pacific fisher of important protections and put the species at further risk of extinction. If the USFS and FWS do not remedy these violations of ESA sections 7(a)(1), 4(a), and 9 within 60 days, the Environmental NGOs intend to pursue their judicial remedies under the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

Background:

On April 20, 2021 the plaintiffs filed a motion for PI in district court, seeking an injunction staying 31 one of the 45 proposed projects identified in their March 26, 2021 complaint.

On March 26, 2021 the plaintiffs filed a complaint in the district court asserting the following claims: (1) an alleged violation of ESA section 7(a)(2), its implementing regulations, and the procedural requirements of the APA, by the FWS in connection with the issuance of the 2020 Programmatic BO/Incidental Take Statement and the amended 2021 Programmatic BO; (2) an alleged violation of ESA section 7(a)(2) and 7(d) against the Forest Service for failing, following the 2020 wildfires, to reinstate programmatic consultation on its ongoing and proposed projects throughout the Sierra and Sequoia National Forests that “adequately and meaningfully evaluates both the survival and recovery of the species based on credible science and current data

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

concerning population size and viability”, and (3) an alleged violation of NEPA against the Forest Service due to its failure to prepare a supplemental cumulative impacts analysis.

On September 3, 2020, the Forest Service and the FWS received a 60-day NOI by Unite the Parks, Sequoia ForestKeeper, and the John Muir Project intend to sue, pursuant to the ESA and APA, to challenge the Agencies violations of the ESA regarding the federal listed Pacific fisher in the Southern Sierra Nevada District Population Segment impacted by commercial logging projects on the Sierra and Sequoia National Forests listed in the FWS’ programmatic BO. (24 projects on Sierra NF, and 15 projects on the Sequoia NF) The Pacific fisher was Federally listed, on May 15, 2020, in the southern Sierra Nevada, and the FWS programmatic BO was issued on June 10, 2020.

Lands | Region 1

Sandra Short, et al. v. Federal Highway Administration, et al. (19-00285, D. N.D) Region 1—On May 28, 2021, the District Court of North Dakota issued a favorable decision to the Forest Service dismissing the Agency from the case without prejudice, concerning the **Little Missouri Crossing Road and Bridge Project** that encroaches on and crosses the Little Missouri National Grassland of the Dakota Prairie Grassland. The Forest Service was named as a cooperating agency and did not sign the Record of Decision (ROD) or Final Environmental Impact Statement (FEIS) or provide written consent. The district court granted the Government’s motion to dismiss the Forest Service for lack of subject matter jurisdiction based upon there being no applicable waiver of sovereign immunity for suit against the Agency. Plaintiffs allege violations of the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA) and Section 4(f) of the Department of Transportation Act (DTA) of 1966 (Section 4f). However, the plaintiffs did not contend the Forest Service is subject to the Federal Highway Administration’s (FHWA) NEPA, and only claims the Agency is in violation of the section 4(f) of the DTA, which concerns preventing federal highway projects from unnecessarily destroying parks, wildlife refuges, and historic properties.

The project is a joint effort by the FHWA, Billings County, and the North Dakota Department of Transportation to construct a new crossing over the Little Missouri River in an area where the two nearest crossings are nearly 70 miles apart. It also involves the construction of some new roadway on either side of the new bridge to tie into existing roads.

Background

On December 27, 2019, the plaintiffs a complaint in the district court claiming violation pursuant to NEPA, NHPA and Section 4(f) of the DTA (Section 4f), concerning project. The project encroaches on and crosses the Grassland. The plaintiffs claim the FHWA violated NEPA, NHPA and Section 4f when signing the decision to approve the project. The project alignment would run from Belle Lake Road to Short Road. The plaintiffs claim the alignment of the project cuts

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

directly through the heart of the Short Ranch and will cause irreparable harm to the character, history, and function of the property. They claim this damage was not meaningfully considered in the DEIS or FEIS.

Travel Management and Wildlife | Region 1

Center for Biological Diversity, et al. v. U.S. Forest Service, et al. (20-0128, D. Idaho)
Region 1—On June 4, 2021, the District Court of Idaho issued a favorable decision to the Forest Service, concerning the **Bog Creek Road Project** on the Idaho Panhandle National Forest. The court granted the Forest Service’s motion for summary judgement. The court found the Forest Service’s interpretation of the Access Amendment is afforded substantial deference and that the Agency did not violate NFMA. The court determined the Forest Service’s change in designation of road use was made to better reflect reality on the ground, which was fully disclosed in the FEIS and is consistent with the Forest Plan. The court also determined that the Forest Service took the necessary hard look at road use in the Blue-Grass Bear Management Unit (BMU) and the Agency considered ways to accommodate both administrative needs with grizzly bear needs in the FEIS and did not violate NEPA.

The Forest Service and Customs and Border Protection issued the FEIS and final record of decision (ROD) on February 15, 2019.

The project consists of reopening the Bog Creek Road (FR 1013) for administrative use to provide an east-west route for the Customs and Border Protection use in monitoring the border with Canada. The authorization changed the road use designation on 22 miles of national forest roads from seasonally restricted to administratively open or seasonally open. And formally closed 26 miles of seasonally restricted roads through decommissioning and long-term storage. The project is located almost entirely within the BMU of the Selkirk Grizzly Bear Recovery Zone (SRZ).

District Court Found:

1. NFMA—
 - a. The 2015 Idaho Panhandle Forest Plan adopted the grizzly bear access amendment as a standard that is binding on future site-specific decisions.
 - b. The Forest Service’s interpretation of the access amendment is afforded substantial deference, and the court found the Agency did not violate NFMA.
 - c. The Forest Service never considered the Bog Creek Road as contributing to core area within the BMU. The court determined the Forest Service appropriately did not consider it as part of the core area within the BMU.

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

- d. The plaintiffs' claimed that the Forest Service failed to demonstrate the project will meet the access amendment standards (failing to account for high levels of illegal overuse). The court disagreed, and determine their claims were without merit.
- e. The court determined the Forest Service's changes in designation of road use were made to better reflect reality on the ground, which was fully disclosed in the FEIS and is consistent with the Forest Plan.

2. NEPA—

- a. The project's biological opinion (BO) supports the analysis of the FEIS, stating that while reopened Bog Creek Road may reduce movement, bears will still cross the road and move between the US and Canada. The court concluded that the Forest Service took a hard look at bear linkages and genetic connectivity.
- b. The FEIS conducted an in-depth analysis of the effects of the project open motorized route density (OMRD) total motorized route density (TMRD), and core area. The Forest Service went further and specifically analyzed human activity, fragmentation, and linkages, and impacts to habitat type.
- c. The FEIS took a hard look at road use in the BMU and the Forest Service considered ways to accommodate both administrative needs with grizzly bear needs.
- d. The court determined that the impacts to non-motorized recreation are speculative the Forest Service's consideration of the project's effects on trail use and is not contrary to law.

Forest Plans & Forest Management | Region 1

Jerry O'Neil v. Kurt Steele, et al. (19-0140, D. Mont.) **Region 1**—On June 8, 2021, the magistrate judge for the District Court of Montana issued a findings and recommendation favorable to the Forest Service regarding the **Flathead National Forest 2018 revised Forest Plan** and the **Lolo, Helena-Lewis & Clark and Kootenai National Forests amended Forest Plans**. The court determined that the Forest Service took the requisite “hard look” at the forest plans' climate change impacts and adequately considered the plaintiffs' concerns about the albedo effect.

The Plaintiffs' alleged violations of National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Travel Management Rule (TMR) 36 C.F.R. 212, Forest Planning Rules (FPR) 36 C.F.R. 219, Executive Order 11644, and the Administrative Procedure Act (APA) by revising and amending the forest plan.

The district court magistrate found that the Forest Service met its obligation under NEPA:

The Forest Service took the requisite “hard look” at the forest plan's climate change impacts and adequately considered the plaintiffs' concerns about the albedo effect. Specifically, the Forest Service:

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

1. Considered and responded to the plaintiffs’ objection regarding the albedo effect.
2. Thoroughly considered the impacts of the forest plan on climate change.
3. Considered the plaintiffs’ proposed alternative of increased timber harvest. (Alternative D would place greater emphasis “on the use of timber harvest and other mechanical means to achieve desired conditions. This alternative would have the most acres suitable for timber production and available for timber harvest as well as for motorized access.”)

Background

On August 22, 2019 the plaintiffs filed an original complaint, and on November 7, 2019 filed an amended complaint in the district court against the Forest Service concerning the Forest Plans. The plaintiffs claim the Agency violated NEPA, NFMA, TMR 36 C.F.R. 212, FPR 36 C.F.R. 219, Executive Order 11644, and APA by revising and amending the forest plans. The plaintiffs claim the Forest Service did not consider the albedo effect when revising and amending the forest plans. The albedo effect is the reflectivity of an object in space, the amount of electromagnetic radiation that reflects away, compared to the amount that gets absorbed, which has a significant impact on climate.

Litigation Update

Nothing to Report

New Cases

Forest Management | Region 1

Alliance for The Wild Rockies v. Pierson, et al (21-244, D. Idaho) **Region 1**—On June 7, 2021, the plaintiff filed a complaint in the District Court of Idaho against the Forest Service seeking judicial review under the administrative procedures act (APA) and the Endangered Species Act (ESA) claiming the Forest Service’s October 11, 2018 Decision Memo (DM) and May 28, 2021 Supplemental DM approving the **Hanna Flats Project on the Idaho Panhandle National Forest** is in violation of the law and an abuse of discretion. The plaintiff also claims the decision violates the National Environmental Policy Act (NEPA), and National Forest Management Act (NFMA), Access Amendment and Healthy Forest Restoration Act (HFRA). A Decision Memorandum (DM) was signed October 11, 2018 and Supplemental DM was signed on May 28, 2021 approving the Project.

The decision authorized 1,843 acres of commercial logging, 360 acres of precommercial logging and 149 acres of prescribed burning. Approximately 1,109 acres of the commercial logging is “regeneration harvest” and includes temporary road construction, excavated skid trail

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

construction, and road maintenance. Implementation of the project is anticipated to start by July 2, 2021.

The plaintiff claims:

1. The Forest Service failed to demonstrate compliance with the Forest Plans 2015 Access Amendment for grizzly bear in violation of the Forest Plan, NFMA, NEPA, HFRA and APA alleging:
 - a. The Forest Service is allowing a temporary increase in open roads by allowing known illegal public, motorized use to continue at least 30 miles of roads during the project implementation.
 - b. The use of the 30 miles of temporary roads does not comply with any of the three unequivocal restrictions for lawful temporary open road increases under the access amendment.
2. The Forest Service failed to establish that the project is in a “wildland urban interface” (WUI) as defined under the HFRA, therefore the Agency has not established that it may categorically exclude the project from NEPA analysis and administrative review. The Supplemental DM does not comply with the remand order from the earlier Hanna Flats case regarding this issue.
 - a. The Forest Service’s analysis for the project states that the entire project area is in the WUI and does not state that the project is in an area with “Condition Classes 2 or 3 in Fire Regime Groups I, II, III.”
 - b. The Forest Service did not independently map “at-risk community” as defined in HFRA for the project.
 - c. The Forest Service did not independently map “interface community” as defined by 66 Fed. Reg. 753 for the project. The definition and map of WUI used by the Agency for the project is inconsistent with the statutory definition under the HFRA and 66 Fed. Reg. 753.
 - d. The Forest Service failed to use the required HFRA definition for a WUI and renders the use of the HFRA CE unlawful.
 - e. In prior litigation the court issued a summary judgement in favor of the plaintiffs on this case. The court remanded to the Forest Service and suspended implementation of the project. The Forest Service supplemental decision does not comply with the remand order and is unlawful.

Background:

On April 27, 2021 the district court issued a Memorandum Decision and Order remanding (without vacating) the Forests Service’s DM for the Hanna Flats project and directed the Agency to issue a supplemental DM.

The DM for the project was signed on October 11, 2018 and utilized three CEs:

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

- The Insect and Disease provision of the HFRA (16 U.S.C. 6591b).
- Category 1 – construction and reconstruction of trails (36 CFR 220.6(e)(1)).
- Category 20 – activities that restore, rehabilitate, or stabilize lands occupied by non-system roads and trails (36 CFR 220.6(e)(20)).

On August 29, 2019 the plaintiff filed a complaint in the District Court of Idaho [AWR v. Higgins, et al. (19-0332, D. Idaho)] against the Forest Service regarding the project. The plaintiff claimed the Forest Service failed to demonstrate compliance with the Idaho Panhandle Forest Plan 2015 Access Amendment (baseline total and open road miles requirements) in violation of the Forest Plan, NFMA, NEPA, HFRA, and APA. Specifically, the plaintiff claimed the Forest Service:

- Failed to establish that the project is in the WUI as defined by HFRA; therefore, the Forest Service has not established that it may be categorically excluded from NEPA analysis and administrative review.
- Failed to conduct NEPA analysis for the Bonner County Community Wildfire Protection Plan, WUI definition, and/or WUI map before using the documents as the basis for the project constitutes illegal tiering under NEPA.

On August 9, 2019 Alliance for the Wild Rockies (AWR) filed an NOI under the ESA. The AWR alleged the Forest Service and US Fish and Wildlife Service (FWS) violated the ESA requirements pertaining to the project. Specifically, the AWR claimed:

- The Forest Service failed to demonstrate compliance with the Idaho Panhandle Forest Plan’s 2015 Access Amendment’s baseline total and open road miles requirements.
- The Forest Service and FWS failed to address the effects of reasonably certain future illegal road use within the Priest BORZ area, which is the action area that the Agencies chose for the assessment of effects on Grizzly bear, violates the ESA and its regulations.

Wildlife & Lands | Region 1

Save the Bull Trout, Alliance for the Wild Rockies v. U.S. Forest Service (21-0070, D. Mont.) **Region 1**—On June 4, 2021 the plaintiffs filed a complaint in the District Court of Montana against the Forest Service regarding the **East Fork and Rock Creek Diversion** on the Beaverhead-Deerlodge National Forest, alleging violations of section 9 of the Endangered Species Act (ESA), for ongoing unpermitted incidental take of bull trout. The plaintiffs claim the Forest Service is not in compliance with the last issued incidental take statement (ITS) for the bull trout entrained by the diversion dam and canal, and for suboptimal instream flow and thermal conditions caused by the dam and associated structure.

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

A Decision Notice (DN) and Finding of No Significant Impact (FONSI) approved the East Fork Creek fish screen and adopting the terms and conditions of the 2013 biological opinion (BO).

The plaintiffs claim:

Unpermitted incidental take of bull trout violates section 9 of the ESA. Specifically:

- The Forest Service does not have a current ITS for the incidental take of ESA-listed bull trout entrained by the diversion dam and canal, and for suboptimal instream flow and thermal conditions for bull trout caused by the dam and associated infrastructure.
- The Forest Service is not in compliance with the last issued ITS for the ESA-listed bull trout entrained by the diversion dam and canal, and for suboptimal instream flow and thermal conditions for bull trout caused by the dam and associated infrastructure.

Background

According to the complaint, on January 27, 2020, the plaintiffs issued a follow-up 60-day notice under the ESA's, notifying the Forest Service and U.S. Fish and Wildlife Service (FWS) that they had not completed consultation within 60 days as requested by the plaintiffs, and that the agencies remained out of compliance with the ITS issued in 2013, and are responsible for section 9 of ESA for unauthorized take of bull trout.

On November 15, 2019, the Forest Service requested formal re-initiation of section 7 consultation with FWS for the East Fork Rock Creek Reservoir and associated infrastructure and notified plaintiffs of the request.

September 16, 2019 Alliance for the Wild Rockies and Save the Bull Trout issued an NOI against the Forest Service and FWS alleging the Forest Service violated section 7 and 9 of the ESA, concerning the FWS's BO of the East Fork Creek Fish Screen. On March 29, 2013 the FWS issued a BO and ITS for the fish screen project that required the Forest Service to assume and implement the terms and conditions of the ITS to avoid section 9 violations. Subsequently, the Forest Service issued a DN and FONSI adopting the terms and conditions of the BO. The DN and FONSI states that the Forest Service would engage in section 7 consultation with the FWS to address the impact to bull trout on the Montana Department of Natural Resources and Conservation's (DNRC) management of the reservoir to control water storage and the volume of water releases, the Montana DNRC's management of the diversion headgate to divert water to the Flint Creek Ditch, and the operation, evaluation, and maintenance of the fish screen.

Notice of Intent to Sue

Range and Wildlife | Region 3

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

NOI- Dated June 4, 2021, the U.S. Fish and Wildlife Service (FWS) and Forest Service (Region 3) received a second 60 Day Notice of Intent to Sue by the Center for Biological Diversity (CBD) and Maricopa Audubon Society (MAS) (first NOI issued September 13, 2019) against the Forest Service and U.S. Fish and Wildlife Service (FWS) concerns continued inadequate enclosure fencing (and monitoring of fencing) has resulted in cattle from allotments entering protected areas that has resulted in destruction and modification of New Mexico Meadow Jumping Mouse (Jumping Mouse) critical habitat, and their loss in a manner and extent not considered in the 2021 biological opinions (BO) and letter of concurrence on the Lincoln National Forest.

The CBD's/MAS's NOI regards alleged violations of the Endangered Species Act (ESA) regarding (1) FWS's April 20, 2021, Biological Opinion (BO) on **Sacramento Allotment** grazing; (2) FWS's April 16, 2021 concurrence on **Agua Chiquita Allotment** grazing, and Forest Service's reliance on the BO and concurrence on the Lincoln NF.

The NOI claims:

1. The Forest Service's "not likely to adversely affect" (NLAA) determination, the 2021 Agua Chiquita NLAA concurrence, and the Forest Service's reliance on the 2021 NLAA concurrence violates sections 7 and 9 of the ESA.
 - Until formal consultation is conducted and completed, the Agencies are in ongoing violation of the ESA absent immediate suspension of the Forest Service's grazing authorization that relies on the fatally flawed 2021 Agua Chiquita NLAA Concurrence.
2. The FWS's 2021 BO, and the Forest Service's reliance on the 2021 Sacramento BO violates section 7 and 9 of the ESA.
 - Until formal consultation is conducted and completed, the Agencies are in ongoing violation of the ESA absent immediate suspension of the Forest Service's grazing authorization that relies on the fatally flawed 2021 Sacramento BO and removal from the allotment of the livestock that are continuing to take this species.
3. The Forest Service has violated, and is in ongoing violation of, section 7(a)(1) of the ESA.
 - Until the Forest Service in consultations with the FWS develops and implements a comprehensive program with measures necessary to conserve—i.e., *recover*—the jumping mouse two small existing populations are in grave risk of being wiped out.

Background

On September 13, 2020 the plaintiffs expressed an interest in settling the case [*CBD, et al. v. Christiansen, et al.* (20-0863, D. M.M0)], and on October 23, 2020 the Chief named Elaine Kohrman and Sandra Watts, the Southwestern Deputy Regional Foresters as Agency representatives for settlement discussion in the case.

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.

On August 27, 2020, the CBD, et al. (plaintiffs) filed a complaint in the District Court of New Mexico against the Forest Service and FWS [*CBD, et al. v. Christiansen, et al.* (20-0863, D. M.M0)]. The plaintiffs claim that re-initiation of consultation is required because inadequate exclosure fencing and monitoring of fencing has resulted in cattle from the allotments entering protected areas resulting in destruction and modification of New Mexico meadow jumping mouse critical habitat, and incidental take may have occurred in a manner and extent not considered in the 2018 Biological Opinion or letter of concurrence. The plaintiffs also challenge the continued authorization of grazing activities on the allotments because the thresholds for the jumping mouse in the incidental take statement appended to the 2018 Biological Opinion have been exceeded, in violation of the ESA.

On September 13, 2019 the CBD/MAS issued an NOI against the Forest Service that alleged inadequate exclosure fencing (and monitoring of fencing) has resulted in cattle from allotments entering protected areas that has resulted in destruction and modification of the Jumping Mouse's critical habitat, and their loss in a manner and extent not considered in the BO and letter of concurrence. The CBD/MAS requested reinitiation of ESA Section 7 consultation, enjoinder of further adverse modification on the allotments and for the Forest Service to obey its 'duty to conserve' the Jumping Mouse on the Forest. The CBD/MAS further alleged new evidence demonstrated anticipated incidental take has been exceeded, the authorized cattle grazing is being modified causing effects to the jumping mouse and its habitat that was not considered.

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.