Court Decisions

Forest Plan/Wildlife | Region 1

WildEarth Guardians, et al. v. Steele (19-0056, D. Mont.) and **Swan View Coalition, et al. v. Steele** (19-0060, D. Mont.) (member case) **Region 1**. On June 24, 2021 the District Court of Montana issued an unfavorable decision to the Forest Service and U.S. Fish and Wildlife Service (FWS) concerning the **2018 Revised Flathead Forest Plan, including Amendments 19 & 24** and supporting **2017 biological opinion (BO)**. The Forest Service prevailed on the NEPA claims. However, the plaintiffs prevailed on several ESA claims, specifically: (1) Grizzly bear — the 2018 Revised Flathead Plan is arbitrary and capricious to the extent it did not consider the impacts of its departure from Amendment 19's road density and reclamation standards, did not consider the impact on the entire grizzly population, did not adequately explain the adoption of the 2011 access conditions, and adopted a flawed road density and secure core habitat surrogate in its take statement. (2) Bull trout – the Forest Service departed from Amendment 19's culvert removal requirements violated the ESA. And (3) the Forest Service improperly relied on the flawed aspects of the 2017 BO. The court remanded 2017 BO back to the Forest Service without vacating.

Plaintiffs alleged violations pursuant to the APA for violations of NEPA, NFMA, Forest Service 2012 Planning Rule, and Executive Order (EO) 11644 (as amended), USDA travel management regulations (36 CFR, Part 212), and the ESA.

Specifically, the plaintiffs raised the following: (1) violated NEPA based on road density; (2) violated NEPA based on culverts; (3) violated ESA based on road density and reclamation requirements, the relevant grizzly population, access conditions, winterized motor travel, take statements, and reliance on the allegedly flawed BO; and (4) violated the Travel Management Rule.

Background
On April 2, 2019 the WildEarth Guardians filed suit in the district court against the Forest Service pursuant to the APA for violations of NEPA, NFMA, Forest Service - 2012 Planning Rule, and EO 11644 (as amended), and USDA travel management regulations (36 CFR, Part 212), concerning the Forest Service's decision finalizing the 2018 revised Flathead Forest Plan.

On April 14, 2019 t the Swan View Coalition filed a complaint in the district court against the U.S Fish and Wildlife Service (FWS) and the Forest Service for violations the ESA, NEPA, and APA on the Forest Service's decision finalizing the 2018 revised Flathead Forest Plan and the 2017 BO completed by the FWS.

On February 8, 2018 the plaintiffs issued to the Department of Interior Secretary and Forest Service a Notice of Intent to Sue to remedy for violating ESA in the 2018 Revised Flathead Forest Plan and in the 2017 BO on the Plan.

Lands | Region 1

Finnigan v. United States (18-00109, D. Mont; 19-35922, 9th Cir.) **Region 1**. On June 21, 2021 the 9th Circuit Court of Appeals issued a decision favorable to the United States affirming the District Court of Montana's October 25, 2019 decision concerning the Abandoned Railroad ROW Act of 1922 and Rails-to-Trails Act regarding **the abandonment of railroad ROW across plaintiff's land on the Kaniksu National Forest**. The 9th Circuit determined that abandonment of a railroad ROW across plaintiff's land was not judicially confirmed, ownership reverted to the United States under the Rails-to-Trails Act. The 9th Circuit held that physical abandonment alone does not suffice. To acquire an abandoned railroad ROW, an adjoining landowner must establish both physical abandonment and confirmation of such abandonment by Congress or a judicial decree before the 1988 enactment of the Trails Act.

The original complaint alleged violations of Quiet Title Act, Abandoned Railroad ROW Act of 1922 (ss912) and Rails-to-Trails Act enacted in 1988 (ss1248).

Findings: The 9th Circuit considered the question of whether the United States maintained its reversionary interest over the real property. Specifically, disputed is whether the abandoned ROW was controlled by the Abandoned Railroad ROW Act of 1922 (ss912) or the Rails-to-Trails Act enacted in 1988 (ss1248).

1. The court held that when it comes to transferring ROW to neighboring landowners, abandonment requires both physical abandonment and a judicial decree of abandonment.
2. The court rejected the plaintiff's argument that the judicial-decree requirement was met when another parcel that was also within the 20-mile segment of track obtained a judicial decree of abandonment, because that decree did not cover the parcel that the plaintiff sought to claim in this action.
3. The court held that 1248(c) applied and the ROW at issue reverted to the United States, save for the land used to establish a county road that Sanders County established within the railroad ROW that traversed the Finnigan property in the 1970s.
4. The plaintiff did not seek a judicial decree of abandonment at the time and for many years after, not until 1996 when the successor sought a quiet title action, in the meantime, Congress changed course from 1922 when in 1988 the Rails-to-Trails act was enacted.

Background
On October 25, 2019 the district court held that "abandonment" required both physical abandonment and a judicial or legislative decree of abandonment. Because the ROW at issue was not decreed abandoned until after 1988, the district court concluded that § 1248(c) controlled and that title had reverted to the United States. The district court entered summary judgment in favor of the government. The plaintiff timely appealed to the 9th Circuit.

On June 13, 208 the plaintiff filed a complaint in district court against the United States to quiet its title to the ROW across its property that Northern Pacific stopped using in 1958. The plaintiff argued that § 912 controlled, because Northern Pacific stopped using the right of way in 1958, even though the railway was not formally declared abandoned before the 1988 enactment of the Rails-to-Trails Act.

Litigation Update

Nothing to Report

New Cases

Forest Management | Region 5

Sequoia ForestKeeper, Earth Island Institute, v. U.S. Forest Service (21-715, E.D. Cal.) **Region 5**. On July 1, 2021 the plaintiffs filed a complaint in the Eastern District Court of California against the Forest Service concerning the **Plateau Roads Hazard Tree Project** on the Sequoia National Forest regarding the alleged improper use of the categorical exclusion (**CE 4**) for road repair and maintenance, in violation of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA), and breaking with the 9th Circuit Court of Appeal's recent holding in EPIC v. Carlson, et al. (19-17479 & 20-15040, 9th Cir.; 19-06643, D.N. Cal.) on the Mendocino National Forest.

Plateau Roads Hazard Tree Project authorizes felling and removal of hazard trees up to 200 feet from either side of 45 miles of Forest Service roads consisting of approximately 2,193 acres.

Claims:
1. The acreage limit of 250 is exceeded by the 2,193 acres authorized under the CE.
2. Choosing the "repair and maintenance of roads" language does not fit the type of activities proposed for these projects.

Recreation | Region 6

John and Nancy Murray and Spout Springs Mountain Resort v. United States of America (21-1492, Oregon) **Region 6.** On June 21, 2021, Plaintiffs filed a complaint in the United States Court of Federal Claims alleging a breach of contract. The plaintiffs' claim the Forest Service

attempted to force plaintiffs to operate under dangerous safety and financial risk created by the agency on the Umatilla National Forest; refusal of prohibiting dangerous snowmobile activity in a ski area parking lot and revoking Plaintiffs' permit in 2021, because they refused to operate under dangerous conditions allegedly created by Forest Service. Plaintiffs claim this is a break of contract.

Breach of Contract

- Forest Service refused to prohibit snowmobile activity in and around the ski area.
- Forest Service refused to remove hazardous conditions which could and did pose a significant risk of injury to ski area patrons and others.
- Forest Service improper revocation of the Ski Area Permit by letter on January 4, 2021.

Background

According to the complaint the Murrays took over the operations at the ski area in 1999 after purchasing the improvements from the prior operator and entering a Ski Area Term Permit with the Forest Service. The permit was issued on December 31, 1999 for a forty-year term. Section I.E. of the permit prohibited the Forest Service from allowing any other activities at the ski area which materially interfered with the rights and privileges provided to Spout Springs Mountain Resort under the Ski Area Permit. In addition, under Section V.B. of the permit, the Forest Service required Spout Springs Mountain Resort to fully indemnify the agency and hold it harmless if the agency was sued by anyone harmed in the ski area parking lot. At the time Spout Springs Mountain Resort began its operations at the permit area, no snowmobile activity was authorized in or around the permit area or its parking lot.

In 2004 and apparently for the convenience of snowmobile recreationists who owned private cabins across the street from Spout Springs Mountain Resort and did not have sufficient space to park their snowmobile trailers, the Forest Service asked if Spout Springs Mountain Resort would agree to allow certain limited snowmobile related activity occur in the ski area parking lot. To cooperate with the agency, Spout Springs Mountain Resort agreed but only subject to the caveat that if such activity became unacceptable to Spout Springs Mountain Resort, the activity would again be prohibited. Over time, the snowmobile related activity increased and started to become dangerous and began to interfere with Spout Springs Mountain Resorts' ability to plow the parking lot. In 2016, Spout Springs Mountain Resort requested that the Forest Service, pursuant to Spout Springs' prior caveat when initially agreeing to the snowmobile activity and the parties' obligations under the Ski Area Permit, no longer allow snowmobile related activity in the parking lot.

Notice of Intent to Sue

Engineering | Region 5

NOI- Dated June 21, 2021, the Forest Service (**Region 5**) received a 90 Day Notice of Intent to Sue under the Resource Conservation and Recovery Act (RCRA) by the Environmental Protection Information Center (EPIC) with their partners against the Forest Service. EPCI alleges violation of RCRA regarding trespass cannabis farms and the Forest Service's handling of these trespass sites, including solid waste discarded and left at grow sites, present an imminent and substantial endangerment to human health and the environment on the **Six Rivers, Shasta-Trinity, and Pumas National Forests.**

Claims: EPCI claims the Forest Service is engaged in a pattern and practice of handling, storing and/or disposing of solid waste at former grow sites on National Forest System (NFS) land. EPIC has identified sites that present an imminent threat to human health and the environment. Each site contains waste that poses a serious risk to human health and the environment that include carbofuran, carbaryl, malathon, and other pesticides.