Court Decisions

Forest Management | Region 5

Sequoia ForestKeeper, Earth Island Institute, v. U.S. Forest Service (21-1041, E.D. Cal.) **Region 5**—On July 23, 2021 the Eastern District Court of California issued an unfavorable decision to the Forest Service granting the plaintiffs motion for a temporary restraining order (TRO) against the **Plateau Roads Hazard Tree Project** on the Sequoia National Forest for use of the Road Hazard CE 4. The court: (1) found the plaintiffs have made a strong showing of likelihood of success. The *EPIC* case appears to be directly controlling, and the court finds the Forest Service is unable to convincingly distinguish it from the present case; (2) was persuaded that the plaintiffs would suffer irreparable, though limited harm; and (3) found the balance of the hardships in the case weighs in favor of granting some injunctive relief.

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.

The court concluded:

1. Likelihood of Success on the Merits
   The plaintiffs have made a strong showing of likelihood of success. The 9th Circuit *EPIC* case appears to be directly controlling, and the court finds the Forest Service is unable to convincingly distinguish it from the present case.
   a. While it is correct that the 9th Circuit in *EPIC* did not set a numerical limit on the size of project the Forest Service may rely upon CE 4 to authorize, the decision does appear to limit the Forest Service under CE 4 to fell only those trees likely to strike the roadway. This scope of this project, like that in *EPIC*, appears to be far, far broader than those limitations delineated in CE 4. Following the guidance and binding precedent of the 9th Circuit as articulated in *EPIC,* the Plateau Roads Project would similarly necessitate either an EIS or EA to comply with NEPA.
   b. The court reviewed the Agency's 2020 Hazard Tree Guidelines Addendum but does not find that it provides any basis upon which to depart from the controlling precedent or to justify the scope of the project under the authority of CE 4. Concerning the use of CE 13 and Green Hazard Trees, the court found the plaintiffs' remaining arguments not to be

persuasive or sufficient to demonstrate that their area "serious questions" as to whether they form a basis for a NEPA violation.

2. Irreparable Harm
   The plaintiffs in *EPIC* sought the same type of relief and carve out, and the 9th Circuit appears to have rejected defendant's argument in this regard as well in that case, finding that the plaintiff there would "suffer irreparable, though limited, harm" sufficient to justify reversing the lower court's denial of a preliminary injunction. Accordingly, the court was persuaded to grant injunctive relief to the plaintiffs.
3. Balance of the Hardships and Public Interest
   a. Because of the hardships that the public will face if the NEPA environmental analysis is not conducted, the court finds that the balance of the hardships in this case weighs in favor of granting some of the injunctive relief plaintiffs seek.
   b. However, as outlined at the hearing on the pending motion, the court is concerned that plaintiffs' requested relief with regard to prohibiting the removal of felled trees does not weigh in the public interest because of what in the court's view is the obvious associated fire risk.

Background

On July 1, 2021 the plaintiffs filed a complaint in the district court against the Forest Service concerning the project regarding the alleged improper use of the CE 4 for road repair and maintenance, in violation of the NEPA)and the APA, and breaking with the 9th Circuit'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.

Litigation Update

Nothing to Report

New Cases

Recreation | Region 6

Washington State Snowmobile Association v. U.S. Forest Service (21-3096, E.D. Wash.) **Region 6—**On July 27, 2021, the plaintiffs filed a complaint in the Eastern District Court of Washington alleging the Forest Service inappropriately issued a **special use permit to Wenatchee Mountain Alpine Huts, LLC** (Alpine Huts) to development commercial winter lodging at the top of Van Epps Pass on the Okanogan-Wenatchee National Forest. The plaintiff claims the Forest Service failed to conduct an environmental analysis in violation of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA) by not providing public notice and opportunity to comment on the proposed action.

The permit allows construction of temporary huts each year before the snow falls and removed each year after the snow melts. The permit allows Alpine Huts to operate for two years (expiring on December 31, 2022), and contemplates that it could be renewed for up to eight additional years.

The plaintiff Claims:

1. Violation of NEPA:
   a. Failed to conduct an Environmental Impact Statement or Environmental Assessment or failed to explain why a NEPA analysis was not needed when issuing the special use permit.
   b. Failed to notify the public of the intent to issue the special use permit, thus preventing the public to submit comments on the project.
2. Failure to Follow Forest Service Regulations:
   a. Failed to issue a Schedule of Proposed Actions (SOPA) as required by Forest Service NEPA Handbook (FSH 1909.15) informing the public about the proposed and ongoing Forest Service actions that may undergo environmental analysis.
   b. Failed to determine whether issuance of the permit to Alpine Huts would pose a serious or substantial risk to public health and safety from avalanches as a result of the increased use of the Van Epps Pass area and from increased interaction between motorized and non-motorized users, pursuant to 36 C.F.R. § 251.54(e).
   c. Failed to provide scoping for the project.

Forest Management | Region 1

Alliance for the Wild Rockies, et al. v. Randy Moore, et al (21-84, D. Mont.) **Region 1-**On July 26, 2021, the plaintiffs filed a complaint in the District Court of Montana against the **Greater Red Lodge Project** on the Custer Gallatin National Forest. The plaintiffs allege the Forest Service violated the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and Administrative Procedures Act (APA) when authorizing the project, and that the Agency failed to prepare an adequate environmental impact statement (EIS).

The project includes commercial logging, including thinning and clear-cuts, on 1,132 acres and non-commercial logging and prescribed burning on 675 acres in the Red Lodge Creek and Willow-Nichols Creek area. The project also, includes 25.7 miles of road construction, deconstruction, maintenance, and modified road designations in the project area.

The plaintiffs Claim:

1. Violation of NEPA and APA
   a. Forest Service failed to take a hard look at the project's adverse impacts to wildlife and habitat and failed to provide a full and fair discussion of those impacts.

b. The Final EIS and Supplemental EIS limited the temporal period considered for wildlife effects analysis for up to ten years. The Agency failed to adequately analyze cumulative effects taking into consideration the recent effects from the Palisades Timber Sale adjacent to the GRLA Project Area.

2. Violation of NEPA, NFMA
   a. The Forest Service should have prepared a NEPA analysis for the lynx habitat 2016 remapping as it is a major federal action and a Forest Plan amendment should have been prepared. The Project unlawfully tiers to the 2016 lynx map because no NEPA analysis was done on the 2016 remapping decision.
   b. The Project will cause significant adverse effects to lynx and their critical habitat.
   c. The Forest Service's use of the lynx amendment exemption for logging in the WUI is unlawful because all the project units do not fall within the WUI thus violating the Forest Plan and NFMA.
3. Violation of NEPA, HFRA
   a. The WUI used for the project does not meet the HFRA statutory definitions for WUI areas and at-risk communities.
   b. The mapping of WUI areas in the Carbon County Communities Wildfire Protection Plan is not consistent with the definition of WUI areas in HFRA.

Notice of Intent to Sue

Nothing to Report