

## Ecosystem Management Coordination

### Court Decisions

#### Regulatory | Region 8

**The Clinch Coalition, et al. v. United States Forest Service, et al.** (21-003, W.D. Virginia) **Region 8**—On December 6, 2021, The Western District Court of Virginia issued a decision regarding the plaintiffs Motion to Compel Completion of the Administrative Record (AR). The plaintiffs claim the Forest Service failed to provide the complete AR they relied upon in issuing their final rule pertaining to actions on National forests in the Southern Region. The Forest Service claims the AR is complete. The plaintiffs' motion is granted in part, denied in part—Specially, the court granted the plaintiffs request that the Forest Service supplement their AR to include the actual survey results it received in response to its inquiry for feedback related to categorical exclusions (CE) 3, 24, and 25. Otherwise, the plaintiffs' motion was denied. The Plaintiffs originally alleged violations of the National Environmental Policy Act (NEPA) and CEQ's revised NEPA regulations, and Administrative Procedures Act (APA).

#### The district court determined:

1. Survey Responses cited and relied upon in support of the final rule  
The Forest Service provided an incomplete AR. Without a complete AR, the court cannot determine whether the Forest Service's conclusions were justified by that record. The Agency is ordered to supplement the AR to include the missing survey responses that solicited feedback on projects and impacts.
2. Pre-Decisional, Deliberative Documents  
The court agreed with the Forest Service that because the documents sought by the plaintiffs are deliberative, pre decisional documents and are not part of the AR in the first instance, is also is not obligated to provide the privilege log for them to the plaintiffs. The plaintiffs failed to overcome the presumption of regularity regarding documents classified as pre-decisional and deliberative.
3. Post-Decisional Documents  
The court agrees with the Forest Service that the six documents that the plaintiffs list is not "post-decisional" because the rule became final for APA purposes after the dates on the documents. The court also found that the information in the six documents does not constitute a novel or post hoc rationalization for the Agency's conclusions.

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## Background

On January 8, 2021 the plaintiffs filed a complaint in the district court against the U.S. Department of Agriculture and Forest Service alleging violations of the NEPA and CEQ revised NEPA regulations, and the APA when approving the Forest Service’s NEPA regulations (Final Rule). The plaintiffs challenge the inclusion of three new and expanded CEs, specifically CE 25 for restoration projects, CE 24 covering up to two miles of permanent road construction for any purpose and CE 3 that allows special use authorizations on up to 20 acres. The plaintiffs allege the Forest Service ignored regional differences, relevant data and analysis, drawing conclusions contrary to the record and failed to allow the public to comment on elements of the Final Rule as required by law. The plaintiffs claim that removing procedural safeguards, the Final Rule will cause significant harms that otherwise could have been prevented or lessened by public involvement. The plaintiffs also name CEQ as defendants, alleging that CEQ’s NEPA regulations violate the APA for allowing the CEs that “normally” do not have significant impacts.

### **Lands and Grazing | Region 2**

**Ralph Round v. U.S. Forest Service (20-2092, D. DC) Region 2**—On December 1, 2021 the District Court of Colorado issued a favorable decision to the Forest Service granting its Motion to Dismiss the plaintiff’s complaint regarding government authority over the Rock Fall and Crooked Arroyo grazing allotments within the Pike and Isabel National Forest on the Comanche National Grasslands. The plaintiff asked the court to declare that he has ownership rights over allotments and the defendants are interfering with his ownership rights. Because the plaintiff has not invoked the Quiet Title Act (QTA), and because the QTA is the exclusive means by which a citizen may quiet title against the adverse interest of the United States, the court found it does not have jurisdiction over the action.

#### The district court found:

1. The plaintiff did not plead waiver under the QTA, and therefore the court lacks jurisdiction over this action.
2. Because there is no waiver of sovereign immunity against the Forest Service, claims against the Agency in the amended complaint must be dismissed.

## Background

On July 17, 2020, plaintiff filed a complaint in the district court for declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and Judicial Review pursuant to 5 U.S.C. 701 among many other claimed questions pertaining to 28 USCA 1331 under the Constitution and laws of the

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United States (General Land Law Revision Act, Forest Service Organic Act, NFMA, MUSYA, APA, Bankhead-Jones Farm Tenant Act, Farmers Home Administration Act, Stock Raising Homestead Act, and many more). Plaintiff claims violations of these laws, acts and statutes, allowing destruction of the plaintiff's private property, specifically upon the grazing allotments as well as the improvements thereon and cattle owned by the plaintiff.

### **Timber | Region 6**

**Cascadia Wildlands, Oregon Wild v. U.S. Forest Service (21-1225, D. Ore.) Region 6**—On December 3, 2021 the District Court of Oregon issued a decision granting the plaintiffs' request for a preliminary injunction against the Lang Dam and Hwy 46 Vegetative Management Projects on the Willamette National Forest. The District Court highly encourage the parties to discuss settlement with the Court's mediation judge.

#### Background

On October 12, 2021 the plaintiffs filed a motion for preliminary injunction to enjoin implementation of the Lang Dam and Hwy 46 projects until the Forest Service completes additional environmental review.

On September 13, 2021, the plaintiffs filed an amended complaint against the Forest Service for violations of the APA, NEPA and the ESA. The plaintiffs originally filed a complaint on August 18, 2021 regarding timber sale project areas including the Green Mountain Project and Lang Dam Project. This amended complaint adds the Highway 46 Vegetative Management Project to the previous complaint.

The July 17, 2021 NOI from the plaintiffs: Requests supplemental NEPA and reinitiating consultation under ESA. Also, Cascadia Wildlands and Oregon Wild claim the Forest Service is permitting some timber companies to engage in post-fire salvage logging associated with approved green tree logging projects, including the Green Mountain and the Lang Dam Projects. The logging components of the projects' NEPA analysis is based on green tree treatments and not post-fire logging.

### **Forest Planning | Region 1**

**Jerry O'Neil v. Kurt Steele, et al. (19-0140, D. Mont.) Region 1**—On December 6, 2021, the District Court of Montana issued a decision favorable to the Forest Service regarding the revised 2018 Flathead National Forest Plan and the amended Lolo, Helena-Lewis & Clark and Kootenai National Forests Forest Plans. The district court determined that the Forest Service took the requisite "hard look" at the forest plans' climate change impacts and adequately considered the

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plaintiffs' concerns about the albedo effect and did not violate NEPA, NFMA, TMR, Executive Order 11644 or the APA. 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. The court adopted the Magistrate's June 8, 2021 findings and recommendations over plaintiff's objections.

The district court determined:

1. Plaintiffs Motion to Defer/Suspend Adjudication to Permit Amendment of Complaint-Denied:
  - a. Permitting Mr. O'Neal to amend his complaint to advance entirely new claims would be prejudicial to the extent it would moot fully briefed cross-motions for summary judgment, substantively alter the nature of this case over two years after it was filed and render a 187,000-page administrative record assembled by the United States meaningless.
  - b. The constitutional claims Mr. O'Neil seeks to bring through an amended complaint, as described in his motion, are not cognizable and their inclusion would therefore be futile.
2. Cross Motions for Summary Judgement-Granted to Defendants, Denied to Plaintiffs:

The district court determined the Forest Service took the requisite "hard look" at the forest plan's climate change impacts and adequately considered Plaintiff's concerns about the "albedo effect".

Background

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 plan revised forest plan and 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.

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.

**Regulatory – Wildlife Management | Region 10**

**State of Alaska, Department of Fish and Game v. Federal Subsistence Board, et al.** (20-00195, D. Alaska) **Region 10**—On December 6, 2021 the District Court of Alaska issued a decision favorable to Federal Subsistence Board (FSB), including the Forest Service and BLM,

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regarding the FSB's delegation of regulatory authority, particularly for closing certain federal lands to non-federal qualified subsistence users. The court denied the State's challenge against a special rural subsistence hunt authorized by the FSB at the beginning of the COVID pandemic. The Southeast tribal government in Kake had organized the deer and moose harvest out of concerns about food security during the early months of the pandemic. The court concluded that it lacked jurisdiction over the issues associated with the Kake hunt because that portion of the State's claims are moot, and the FSB's decision to close Unit 13A and 13B to non-subsistence users was not arbitrary and capricious and did not violate OMA, ANILCA or APA.

The district court determined:

1. Sunshine Act: Because the Sunshine Act does not apply to the FSB, the court does not address the plaintiffs' arguments regarding whether FSB's actions would constitute a violation of the Sunshine Act and what the proper remedies for alleged violations of the Act are.
2. Kake Hunt: The court did not determine the allowance of the Kake Hunt by the FSB did not violate the APA, because the State's claims regarding the Kake hunt must be dismissed as moot.
3. Closure of Units 13A and 13B—The court determined:
  - a. Under section 815 of ANILCA, it is not improper for the FSB to mention "competition" when discussing its subsistence and public safety rationales for adopting the Wildlife Special Act (WSA) 20-03. The State asserted that noting in ANILCA or caselaw allows a closure to avoid competition from other hunters.
  - b. There was substantial evidence in the record to support the FSB's decision to adopt WSA 20-03. The State contended that the record lacks substantial evidence to support a conclusion that any closure was necessary to continue subsistence.
  - c. The revised press release does not inform the public that a non-federally qualified hunter is prohibited from taking a moose or caribou standing in navigable waters. The State contended that FSB improperly closed State lands.
  - d. The FSB's decision relied on proper grounds and was supported by the evidence. The State maintained that the FSB's approval of WSA 20-03 violated ANILCA because it impeded the State's ability to manage wildlife as required by the Alaska Constitution.
  - e. The FSB's reliance on the proposed reduced scope of the closure and the new data about moose harvest success is sufficient to constitute a reasoned explanation for departing from the factual findings underlying the Board's decision on the 2019 proposal. The State asserted that the FSB violated the APA because there was no new factual information before the FSB in 2020 to support an arbitrary change in position after denying an identical proposal in 2019.
  - f. Given the OSM's recommendation and the information in the record, it was reasonable for the FSB to conclude that two years was the "minimum time period . . . necessary

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under the circumstances.” The State contended that the FSB violated its own regulation by instituting a two-year closure instead of a shorter one.

### Background

On August 10, 2020 the State of Alaska, Department of Fish and Game filed a complaint in the District Court of Alaska against the FSB, USDA, including the Forest Service, and DOI, including BLM, regarding the FSB’s delegation of regulatory authority to in-season managers to open seasons for hunting, fishing, to authorize opening temporary hunting seasons, to close certain federal lands to non-federal qualified subsistence users, to delegate administrative authority to entities outside a federal agency, and to take action outside a public meeting.

According to the complaint, on April 9, 2020, the FSB approved a process to delegate broad authority to local federal land managers (“agency field managers”) throughout Alaska to adopt emergency, up to 60 days, or temporary regulations to open areas for hunting and fishing.

On July 16, 2020, the FSB met to address four proposals, including WSA 20-03, a temporary special action request seeking a one-year closure to moose and caribou hunting on federal lands with Unit 13 as an experiment to reduce hunter competition. The FSB adopted the proposal to temporarily close moose and caribou hunting in Subunits 13A and 13B to non-federally qualified users and made the closure for two years rather than the requested one year.

## Litigation Update

### Nothing to Report

### New Cases

### Wildlife Management | Region 4

**WildEarth Guardians and Western Watersheds Project v. U.S. Department of Agriculture, et al.** (21-508, D. Nevada) **Region 4**—On December 9, 2021 the plaintiffs filed a complaint in the District Court of Nevada against the U.S. Department of Agriculture, Animal and Plant Health Inspection Service-Wildlife Services, Bureau of Land Management (BLM) and Forest Service, regarding Nevada’s Wildlife Services’ 2020 Final Environmental Assessment (EA): Predator Damage Management in Nevada (PDM) and associated decision notice (DN) approving Nevada-Wildlife Services’ statewide predator damage management program. The plaintiffs claim: (1) Wildlife Services’ DN violated NEPA and the Animal Damage Control Act for authorizing the continued, as well as expanded program of aerial gunning, poisoning, trapping, and killing of coyotes, mountain lions, and ravens across Nevada without fully disclosing or adequately analyzing environmental impacts through an environmental impact statement; (3) BLM’s 2021 Annual Work Plan, associated DN and Minimum Requirements Decision Guide,

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violated the Wilderness Act, without demonstrating that the lethal PDM is necessary for valid wilderness purposes; and (4) Forest Service and BLM violated NEPA for authorizing Wildlife Services to annually kill native wildlife on federal land, without adequate site-specific environmental analysis. They also allege violation of the Lincoln County Conservation, Recreation and Development Act of 2004, The White Pine County Conservation, Recreation and Development Act, or Pam White Wilderness Act of 2006.

The plaintiffs claim:

1. Wildlife Services Failed to Prepare an EIS as Required by NEPA
  - a. Activities threaten violations of NFMA, FLPMA and the Wilderness Act because the agencies failed to establish the activities are consistent with government land management plans.
  - b. They individually and cumulatively demonstrate the activities constitute a major federal action that poses significant impacts on the environment and require preparation of an EIS.
2. Wildlife Services Failed to Take the Requisite “Hard Look” under NEPA
  - a. Failed to include quantified and detailed information such as baselines that contain reliable populations estimates and annual maximum sustainable harvest levels.
  - b. Failed to describe and explore reasonable alternatives designed to mitigate livestock conflicts and to ensure proposed activities are consistent with land management plans.
3. BLM’s and Forest Service’s Annual Work Plans Violated NEPA
  - a. Failed to conduct site-specific NEPA analysis to assess the effects of actions occurring on the lands.
  - b. Failed to provide for any public disclosure and comment on the activities by not conducting site-specific analysis.
4. Wildlife Services and BLM PDM Activities Violates the Wilderness Act
  - a. By authorizing an impermissible commercial enterprise within designated Wilderness areas.
  - b. By authorizing activities that offend the Act’s mandate to preserve the natural conditions that are part of the designated Wilderness Areas’ character.
  - c. Failed to adequately demonstrate activities are consistent with the relevant wilderness management plans and polices aimed at promoting healthy, viable and more naturally distributed wildlife populations within the applicable Wilderness Areas required by the White Pine and Lincoln County Statutes.
5. Wildlife Services’ Expanded Predator Killing is Ultra Vires
  - a. The Wildlife Services lacks the authority to act unless and until Congress confers the power upon it to do so under the Animal Damage Control Act.

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- b. In its 2020 PDM EA, the Services does not adequately establish that native predators like ravens and coyotes are injurious to those wild game or sage grouse populations that would allegedly be benefitted.

## Notice of Intent to Sue

### Forest Management & Wildlife | Region 6

**NOI – Dated November 26, 2021, the Forest Service and U.S. Fish and Wildlife (FWS)** received a second 60-day Notice of Intent to Sue from Kettle Range Conservation Group (KRCG) for violating Section 7 of the Endangered Species Act (ESA) regarding the **Sanpoil Project** on the Colville National Forest.

The NOI alleges the Forest Service and FWS violated ESA by failing to ensure the project does not jeopardize the Canada lynx and for failing to reinitiate consultation considering new information. Specifically, the NOI indicates the Colville National Forest in August 2021 developed a Sanpoil Project Lynx Analysis Supplement that includes information not considered in the initial consultation; and includes changed circumstances on the ground caused by the July 2021 Summit Trail Fire.

The NOI claims the Forest Service and FWS violated ESA because:

1. The formal consultation related to impacts of the 2019 Forest Plan on the Canada lynx was not based on the best available science.
2. The informal consultation related to impacts of the project on the Canada lynx was not based on the best available science. The consultation relied on a flawed BA that failed to use the best available science.
3. The Agencies failed to engage in formal consultation related to the impacts of the project on the Canada lynx. The NOI claims the impacts to the Canada lynx are not “insignificant and discountable” that requires formal consultation under ESA.
4. The Agencies failed to reinitiated consultation to reconsider changed circumstances related to the Canada lynx. Specifically:
  - Based on new information (August 24, 2021, Forest Service Zone Wildlife Biologist Kelsey Retich Sanpoil Project Lynx Analysis Supplement) not considered in the initial consultation that will change the evaluation of the impact of the project on the lynx.
  - Also, significant change circumstance on the ground caused by the Summit Trail Fire.

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## Background

On May 17, 2021, the Forest Service and FWS received the first 60-day Notice of Intent to Sue from KRCG for violating Section 7 of the ESA regarding the project.

## Other Agency Cases

### **Nothing to Report**

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