

Ecosystem Management Coordination

Court Decisions

Timber | Region 5

Mountain Communities for Fire Safety, et al. v. Elliott, et al. (20-55660, 9th Cir.; 19-06539, C.D. Cal.)

Region 5—On February 4, 2022, the 9th Circuit Court of Appeals issued a favorable decision to the Forest Service regarding the use of categorical exclusion (CE) 6 for thinning to reduce fire hazard for the **Cuddy Valley Project** on the Los Padres National Forest. The court held the use of CE 6 allows for thinning of larger commercially viable trees and is not limited to small saplings and affirmed the Central District Court of California’s decision that favored the Forest Service regarding the project’s thinning overcrowded areas in the Cuddy Valley within the Los Padres National Forest.

The 9th Circuit held that CE-6 allows for thinning of larger commercially viable trees and is not limited to thinning small saplings. The 9th Circuit affirmed the Central District Court of California’s decision favoring the Forest Service concerning the Agency’s proposed timber project of “thinning” overcrowded areas in Cuddy Valley within Los Padres National Forest. Specifically, the court found:

1. NEPA permits CEs to proceed without an environmental impact statement or an environmental assessment. The court held that CE-6 unambiguously allowed commercial thinning, and, therefore, it need not consider whether it must give deference to the Forest Service’s interpretation of CE 6.
2. CE-6 allows for commercial thinning. CE 6 does not limit activities based on tree age or size; rather it allows for timber stand improvement.
 - a. In addition, the phrase “timber stand improvement” itself does not limit tree age or size.
 - b. The court further held that the Agency was not bound by the 2014 Forest Service Manual definition of “stand improvement.”
 - c. The court rejected appellants argument that other categorical exclusions implicitly limited CE-6’s scope.
3. The Forest Service’s decision to apply CE-6 to the project did not violate NEPA.
 - a. Because the project authorized thinning to reduce “stand density, competing vegetation, and fuels” and will not require the use of herbicides or any road construction, the Agency reasonably determined that it fell within the scope of CE-6.
 - b. When analyzing whether extraordinary circumstances prevented the use of CE-6, the Agency did not have to examine the NEPA intensity factors listed at 40 C.F.R. § 1508.27.

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- c. The Agency adequately considered the resource conditions listed at 36 C.F.R. § 220.6(b).
- 4. The Forest Service did not violate NFMA in determining that the project tracked the Los Padres Forest Plan’s Aesthetic Management Standards.
 - a. The Agency Service did not have to issue explanatory documentation when the project was authorized.
 - b. Although NFMA regulations promulgated later require a document describing how proposed activities follow the forest plan, 36 C.F.R. § 219.15(d), such regulations do not apply to plans that predate their enactment; and the Los Padres Forest Plan predated those recent regulations.
- 5. The Forest Service’s articulated rationale was not a mere post hac rationalization. In addition, the Agency’s conclusion that the project met the Scenic Integrity Standards in the Forest Plan was not arbitrary and capricious.

Forest Management | Region 5

Los Padres Forest Watch, et al. v. Forest Service, et al. (20-55859, 9th Cir., 19-5935, C.D. Cal.) **Region 5**— On February 4, 2022, the 9th Circuit Court of Appeals issued an mixed decision to the Forest Service regarding the **Tecuya Ridge Shaded Fuel-break Project** on the Los Padres National Forest, ruling that the use of CE-6 was proper but that the Forest had not provided adequate substantiation for its determination that 21-inch dbh (diameter at breast height) trees are “generally small diameter timber” within the project area as required to meet the exception in the Roadless Area Conservation Rule(RACR). The court vacated the Central District Court of California’s decision and remanded the Forest Service’s decision back to the Agency to provide adequate substantiation for its determination that 21-inch dbh trees are “generally small diameter timber” within the project area. However, the court held: the Forester Service’s determination that the that the project will “maintain or improve” the IRA’s characteristics was not contrary to the law; and its decision to “categorically exclude” the project from review in an environmental assessment or environmental impact statement was not contrary to the National Environmental Policy Act (NEPA).

The 9th Circuit determined that the Forest Service failed to explain how its decision to approve the project complies with the requirements of the Roadless Area Conservation Rule. Specifically, the court:

Favorable to the Plaintiff

- 1. Vacated the district court’s decision and remanded the Forest Service’s DM back to the Agency to provide adequate substantiation for its determination that 21-inch dbh trees are generally small diameter timber within the project area.

Favorable to Forest Service

- 1. Held that the Forest Service’s determination that the project will “maintain or improve” the IRA’s characteristics was not contrary to the law.

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2. Held that the Forest Service’s decision to “categorically exclude” the project from review in an environmental assessment or environmental impact statement was not contrary to NEPA.
 - a. The Agency’s determination that CE 6 applied to the project was not contrary to NEPA.
 - b. The Agency’s determination that no extraordinary circumstances prevented its application of CE-6 to the project was not contrary to NEPA.
 - c. The Agency’s decision to locate the project in the “wildland zone” instead of the “threat zone” was not contrary to the law, because the Agency substantiated its decision with evidence in the record.

Background

On August 20, 2020, the district court issued a favorable decision to the Forest Service concerning the project. The Agency analyzed the project under CE 6. The court concluded that the Forest Service’s finding that the project was exempt from an environmental assessment and an environmental impact statement was not a violation of NEPA. The court determined that the Forest Service’s decision that exceptional circumstances did not warrant further environmental study was not contrary to NEPA. Also, the Forest Service's decision that the project was not likely to adversely affect the California condor was not a violation of the Endangered Species Act.

Forest Management | Region 5

Klamath-Siskiyou Wildlands, et al. v. Patricia Grantham, et al. (18-2785, E.D. Cal.) **Region 5**—On February 9, 2022, the Eastern District Court of California issued a favorable decision to the Forest Service regarding the **Seiad-Horse Risk Reduction Project** on the Klamath National Forest. The district court determined the Forest Service complied with the Aquatic Conservation Strategy (ACS) and the National Forest Management Act (NFMA) in authorizing the project. Also, the Agency complied with the National Environmental Policy Act (NEPA) in using an Environmental Assessment and concluding a Finding of No Significant Impact (FONSI) rather than doing an Environmental Impact Statement to analyze the environmental effects of the project.

The district court determined:

1. No Violation of NFMA
 - a. The project complies with the ACS and NFMA. The Forest Service interpreted the ACS to permit short-term negative impacts in pursuit of long-term improvements. The plaintiffs did not provide any authority holding short-negative consequences of the Agency action violating the ACS. The Agency clearly explained how the project complied with the ACS objectives 4, 5, and 6.
 - b. The Forest Service conclusions the snag retention complies with the applicable forest plans is subject to deference.

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- c. The Forest Service's record indicates compliance with the Northwest Forest Plan, basing the project on a thorough consideration of the relevant factors. The plaintiffs failed to convince the court It should not defer to the Agency's expert determination that the project left an appropriate number of snags to provide for the habitat needs of wildlife.
3. No Violation of NEPA
- a. The Forest Service did not violate NEPA by issuing the EA, FONSI, and DN rather than an EIS. The change in connectivity would be small and insignificant and the project would result in improved habitat connectivity relatively quickly.
 - b. The project's EA analyzed the anticipated effects on scenery and recreation and found neither would be significantly affected [see *Klamath-Siskiyou Wildlands Center v. Grantham*, No. 2:10-CV-02350-GEB-CMK, 2010 WL 4137351, at *5 (E.D. Cal. Oct. 19, 2010)].
 - c. The court deferred to the reasoned scientific conclusions of the Agency. The Agency's determination that the insignificant impact of the hazard removal on the Kangaroo Inventoried Roadless Area was reasonable.

Background

On January 25, 2019, the district court issued an order granting the plaintiffs' motion for preliminary injunctive relief on the project on the Klamath National Forest. In their October 16, 2018, complaint the plaintiffs claim the project will increase sediment delivery to streams, increase peak flows, and decrease streamside shade in violation of the ACS and the Klamath land resource management plans. The plaintiffs contend that the project violates the Forest Plan by removing economically valuable snags from the Johnny O'Neil Late Successional Reserve and that this will result in diminished habitat suitable for wildlife. The plaintiffs also claim that the Agency is required to prepare an EIS for the project because of the significant effects of the project on ecologically critical areas. The court granted plaintiffs' motion for a preliminary injunction/temporary restraining order.

On November 22, 2019, the 9th Circuit Court of Appeals issued an order reversing the district court's January 25, 2019, order granting preliminary injunction in this case. The 9th Circuit concluded the district court erred when they granted the motion for preliminary injunction by not considering all four mandatory factors. The 9th Cir. stated the district court's decision analysis only relied on two of the factors and ignored that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." (Winter, 555 U.S. at 24) The 9th Circuit further noted that giving proper consideration to all four factors and paying particular regard for the public consequences. The court agreed with the district court's analysis in the Stay Order, but an injunction was not warranted.

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Litigation Update

Nothing to Report

New Cases

Wildlife Management | Region 3

New Mexico Cattle Growers’ Association, et al. v. Tom Vilsack, et al. (22-086, D. NW) Region 3—On February 9, 2022, the plaintiff filed a complaint in the District Court of New Mexico against the Forest Service and Animal and Plant Health Inspection Service (APHIS) for violating Forest Service regulations and New Mexico state brand and estray laws, in permitting the use of helicopter to shoot feral cattle on the Arizona and New Mexico border in the Gila National Forest, within the Gila Wilderness starting February 8, 2022. In addition, prior to the action, the Agencies are required to comply with the National Environmental Policy Act (NEPA), complete an adequate analysis pursuant to the Wilderness Act. While a categorical exclusion under NEPA and a “Minimum Requirements Decision Guide” related to the Wilderness Act were completed, neither document analyzes the impact of leaving approximately 200 cattle carcasses in place after being shot which attracts endangered Mexican grey wolves to the area. Specifically, the Agencies failed to analyze the effects on the Mexican grey wolf of leaving livestock carcasses on the landscape, pursuant to section 7 of the Endangered Species Act (ESA).

The plaintiffs:

1. Claims the Forest Service and APHIS violated NEPA, the Wilderness Act, Forest Service regulations and the APA in authorizing the aerial gunning of livestock within the Gila National Forest and Gila Wilderness area.
2. Claims that the slaughter of 200-250 head of livestock has not been analyzed for its effect on the Mexican grey wolf, specifically concerning the leaving 200 head of livestock carcasses as a source of food for wolves, particularly in area where significant wolf depredation is already occurring.
3. Request the court issue a temporary restraining order immediately stopping the Defendants from gunning down livestock in the Gila Wilderness until adequate analysis is completed and private property (livestock) is protected. The temporary restraining order was denied by the District Court.
4. Request the court preliminarily and permanently enjoin the Defendants gunning down livestock without compliance with all required statutory authority.

Background

The Forest Service’s 2020 Decision Memo permits APHIS to remove feral livestock through whatever methods they determine are most effective. It further requires preparation of a Minimum Resources Decision if the method selected is not normally allowed in a Wilderness. Feral livestock are causing damage to riparian areas in the Gila Wilderness and are displacing wildlife. APHIS’s 2022 Cat. Ex.

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authorizes aerial shooting to remove unbranded/unauthorized cattle within the Gila Wilderness using non-toxic (copper) bullets.

Forest Management | Region 1

Cottonwood Environmental Law Center v. Erickson, et al. (22-05, D. Mont.) **Region 1**—On February 4, 2022, the plaintiff filed a complaint in the District Court of Montana against the Forest Service for violating the National Environmental Policy Act (NEPA) by implementing the 2022 Revised Custer Gallatin Land Management Plan on the Custer Gallatin National Forest without taking a hard look at its impacts of logging when combined with climate change and through site-specific old growth projects initially authorized under the 1987 Forest Plan.

The plaintiff claims the Forest Service violated NEPA by failing to take a hard look at the impacts of the Revised 2022 Forest Plan and its implementation:

1. Failing to take a “hard look” at the impacts the Forest Plan relative to climate change. The NEPA analysis for the 2022 Revised Forest Plan did not consider the 2017 National Academy of Sciences Article¹ that states “when thinning is combined with the expected warming, unintended consequences may ensue, whereby regeneration is compromised, and forested areas convert to non-forest.”
2. The Bozeman Municipal Watersheds, North Bridger, and North Hebgen Projects authorized under the 1987 Forest Plan, NEPA analysis did not consider the 2017 National Academy of Sciences Article that states “when thinning is combined with the expected warming, unintended consequences may ensue, whereby regeneration is compromised, and forested areas convert to non-forest.”

Notice of Intent to Sue

Nothing to Report

Other Agency Cases

Land and Realty | Region 8

Appalachian Voices, et al. v. U.S. DOI, et al. (20-2159, 4th Cir.) **Region 8**—On February 3, 2022, the 4th Circuit Court of Appeals issued an unfavorable decision to the U.S. Fish and Wildlife Service (FWS) regarding biological opinion (BO) and Incidental Take Statement (ITS) for the Mountain Valley Pipeline. The court found that the agency failed to adequately analyze the project's environmental context when

¹ Adapt to More Wildfire in Western North American Forests as Climate Changes, PROCEEDINGS OF NATIONAL ACADEMY OF SCIENCES, April 17, 2017.

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assessing the detrimental impacts to the Roanoke logperch and the candy darter. The court vacated the FWS's 2020 BO and ITS and remanded back to the Agency. Specifically, the court determined:

On September 4, 2020, the FWS issued a new BO and ITS. The FWS determined that the project was likely to adversely affect five listed species: a shrub called the Virginia spiraea, the Roanoke logperch, the candy darter, the Indiana bat, and the northern long-eared bat.

The 4th Circuit found that the FWS failed to adequately analyze the project's environmental context when assessing the detrimental impacts to the Roanoke logperch and the candy darter. Specifically, the court determined:

1. The FWS failed to adequately evaluate the environmental baseline cumulative effects and impacts of climate change on the two listed species. The environmental baselines are sparse and scattered.
2. The FWS failed to evaluate effects of past and ongoing human natural factors leading to the status of the species in the action area. The numerous post hoc rationalizations to show it evaluated these factors are impermissible and unpersuasive.
3. The FWS and Mountain Valley did not adequately explain how the 2020 BO can account for these impacts if the activities giving rise to them are never mentioned or never discusses stressors in the action area
4. The models used in the 2020 BO are general population level models and not well suited for evaluating conditions at the level of the action area for this project.
5. Though documents in the record suggest climate change poses a persistent threat to the candy darter, the FWS never mentions climate change in connection with the darter in the 2020 BO itself.
6. The FWS and Mountain Valley argue that it was not necessary to address climate change specifically since the darter and logperch models implicitly account for it, but the 2020 BO never explained it was relying on the models, thus, this is an impermissible post hoc rationalization.
7. FWS failed to incorporate its environmental baseline and cumulative effects findings into its jeopardy determinations for the logperch and darter.

Range/Timber | Region 6

Cascadia Wildlands, et al. v. U.S. Bureau of Land Management, et al. (22-00204, D. Oregon) **Oregon**— On February 8, 2022, the plaintiffs filed a complaint challenging the U.S. Bureau of Land Management's (BLM) authorization of the **Archie Creek Fire Salvage Harvest and Hazard Tree Removal Project** and issuance of an Environmental Assessment (EA), Finding of No Significant Impact (FONSI) and Decision Record (DR) in violation of the Administrative Procedures Act (APA), Federal Land Policy Management Act (FLPMA) and the National Environmental Policy Act (NEPA) by: (a) failing to prepare an Environmental Impact Statement (EIS) (b) failing to take a hard look at environmental impacts, and (c)

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conducting prohibited salvage logging within designated reserves. (Forest Service is not named in this case)

The plaintiffs claim the BLM:

1. Failure to prepare an Environmental Impact Statement (EIS) (NEPA)
 - a. Failed to prepare an EIS when several of NEPA's "significance" factors are present (1) the massive scale and impact of the project; (2) the logging of ecologically critical areas; (3) logging of Late Successional Reserves, riparian Reserves and a designated Wild and Scenic River corridor; (4) unknown and uncertain impacts in the wake of the 2020 fires compounding adverse effects to the northern spotted owl and the removal of critical habitat as well as to the Oregon Coast coho; and (5) cumulatively significant impacts.
 - b. Failed to take "hard look" at the impacts on the northern spotted owl "prey" such as flying squirrels and red tree voles and their habitats; aquatic impacts to stream temperature and sediment delivery to streams; impacts to wood in streams; to land slide risks, impacts related to the spread of invasive species and impacts related to fire hazard and risk and related road density and climate change.
2. Failure to comply with the 2016 Resource Management Plan (RMP) under FLPMA
 - a. The BLM authorization of salvage harvest in the Late Succession Reserves (LSR) in the form of "yarding corridors" or wedges violates the 2016 RMP. The BLM did not demonstrate there are not operationally feasible and economically viable alternatives to the proposed yarding corridors/wedges in the riparian reserves.
 - b. The BLM failed to conduct this analysis in compliance with mandatory RMP standards pertaining to salvage harvest in the Riparian Reserves and LSR in violation of FLPMA.

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