Ecosystem Management Coordination

Court Decisions

Lands | Region 1

Friends of the Crazy Mountains, et al v. Mary Erickson, et al (19-66, D. Mont.) Region 1- On February 18, 2022, a Magistrate Judge in the District Court of Montana recommended the (1) Plaintiffs Motion for Summary Judgement be denied (2) Defendants' Cross-Motion for Summary Judgement be granted and (3) Landowners' Cross-Motion for Summary Judgement be granted. The Project is on the Custer Gallatin National Forest and regarded the EA to relinquish public access rights on two NFS Trails in alleged violation of APA, NEPA, ESA, NFMA, FLPMA and the 2006 Travel Plan.

1. **Federal Land Policy Management Act:** The Court agrees that the Forest Service plainly believed it had a valid easement interest in the Porcupine-Lowline and North Fork Elk Creek trails. The US did not own any interest in the portions of the west side. At most, the Forest Service possessed a potential easement interest in private segments of the trails and a potential easement interest in private land is not "a tract of land or interests therein within the National Forest System. Therefore, FLMPA does not apply, and the claim fails.
2. **National Environmental Policy Act:** The Forest Service issued the 2006 Travel Management Plan which included a Final Environmental Impact Statement (EIS) and a Record of Decision (ROD). This addressed the Travel Planning Area of the Porcupine-Lowline trail. The analysis effects of the road and trail improvements were addressed during the 2009 Environmental Assessment (EA). The Court agrees that the 2009 EA did analyze environmental impacts of all proposed actions throughout the Forest, including the trail reroute. The plaintiffs failed to allege any specific insufficiencies in their claims.
3. **National Forest Management Act:** Plaintiffs assert the Forest Service failed to follow the Travel Management Plan of 2006 by not protecting public access to the closed trails. The Court states the Travel Plan guidelines are not binding but are instead "preferable or advisable" limits on management activities. The NFMA claim has the same defect as the FLPMA claim, it governs on Federal land not public land.

4. **Eastside Trails:** Plaintiffs claim the Forest service failed to maintain public access to the trails by allowing landowners to block access. There are no existing rights established for the Forest Service to protect. There is no valid legal interest in its potential easement interest. Plaintiffs failed to identify a discrete agency action that was required to take.

Background:

Friends of the Crazy Mountains, et al. v. Mary Erickson, et al. (19-00066, D. Mont.) **Region 1**— On June 10, 2019, the plaintiffs filed a complaint in the District Court of Montana against the Forest Service concerning **four National Forest System** (NFS) **trails (Porcupine Lowline Trail No. 267, Elk Creek Trail No. 195, East Trunk Trail No. 115/136, and Sweet Grass Trail No. 122) that provide access to the Crazy Mountains** on the **Custer Gallatin National Forest** (CGNF). The four trails have been used by the plaintiffs and other members of the public for commercial and/recreational activities. The plaintiffs claim the Forest Service violated the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Administrative Procedures Act (APA).

The plaintiffs challenge the Forest Service's: (a) decision to relinquish public access rights on two NFS trails on the west-side of the Crazy Mountains in the CGNF – the Porcupine Lowline trail (No. 267) and the Elk Creek trail (No. 195); and (b) decision to forgo completing a new NEPA analysis for a proposed trail "re-route" for the two west-side trails. The plaintiffs also challenge the Forest Service's decision and related failure to properly manage and protect public access rights on these two west-side trails, as well as two additional trails on the eastside of the Crazy Mountains – the East Trunk trail (No. 115/136) and Sweet Grass trail (No. 122).

Mining | Region 3

Grand Canyon Trust, et al v. Provencio, et al (20-16401, 9th Cir.; 13-8045, D. Ariz.) Region 3-On February 22, 2022, the 9th Circuit Court of Appeals affirmed the District Court's summary judgment in favor of the United States Forest Service in an action by the environmental groups challenging the determination that intervenors held a valid existing right to operate the Canyon Mine. The Canyon Mine is located within an area of public lands on Kaibab National Forest that have been withdrawn from new mining claims, but the Secretary of the Interior did not extinguish "valid existing rights" in the withdrawal.

On March 7, 2013,the plaintiffs filed complaint in the district court claiming NEPA (failure to supplement the 1986 EIS with new information, approving VER subject to withdrawal without NEPA), NHPA (failure to consult/reinitiate consultation under Section 106 on Red Butte TCP),

Organic Act (failure to minimize impacts), FLMPA/ mining law (failure to consider all relevant costs associated with valid existing rights determination, failure to modify the mines plan of operations to avoid, minimize and/or mitigate impacts) and APA concerning the Canyon mine.

The Court Finds:

1. The Court previously held the Plaintiffs had Article III standing with respect to its fourth claim- that the Forest Service violated federal law by failing to take various costs into account when determining whether Canyon Mine could be operated at a profit. The district court did not err in finding that the law of the case doctrine applied to the issue of standing. The government has not pointed to any circumstances that would trigger an exception to the general rule.
2. The Panel held it was not arbitrary and capricious for the Forest Service to rely on the DOI determination of VER and thus ignore sunk costs in determining that intervenors had a claim to "valuable mineral deposits".
3. The Panel held the DOI's interpretation of the Mining Act in which sunk costs are not considered was not arbitrary and capricious.

Background:

On May 22, 2020, the District Court of Arizona issued an order in favor of the Forest Service concerning the remaining claim which challenged the Agency's determination that Energy Fuels has "valid existing rights" (VER) at the Canyon Mine (when the Department of Interior withdrew public lands around the Grand Canyon from new mining claims). The ruling concerns the district court evaluation of the Federal Land Policy and Management Act (FLPMA) in determining prior existing rights based on the 9th Circuit Court of Appeals order (December 19, 2019) vacating back to the lower court for review.

The district court found:

1. Environmental Monitoring Costs: Even if it were to assume that certain environmental monitoring and wildlife conservation costs were not considered (specifically, elk habitat restoration and a potential net covering evaporation ponds to protect California condors), any error in not accounting for these items would be harmless.
2. Mitigation Costs: The Forest Service was not required to consider speculative future mitigation costs. The court generally agreed with federal defendants' and intervenors' contention, made at oral argument, that it need not consider alleged procedural errors in the harmless error analysis, at least in evaluating the VER determination.

3. Sunk Costs: The Forest Service was not required to consider sunk costs in making its determination, and in any event the plaintiffs did not show that any failure to consider sunk costs was harmless.
4. Intervenor Status: The court granted Intervenors' motion to seal plaintiffs' un-redacted versions of their briefs, which contain confidential cost information.

Lands & Recreation| Region 4

Sawtooth Mountain Ranch LLC, et al. v. United States of America, et al. (19-118, D. Idaho)
Region 4- On February 24, 2022, the District Court of Idaho issued a favorable decisions and orders denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. The alleged violations of APA, NEPA, ESA, NFMA, CWA, SNRA, and QTA were related to the Construction of the Stanley Redfish Trail on a conservation easement across plaintiffs' property on the Sawtooth National Forest and National Recreation Area.

The District Court found in favor of the Forest Service on all counts.

1. Claims 1 and 2 – Quiet Title Act – plaintiffs' motion for summary judgment were denied due to the statute of limitations for a claim having run. Plaintiffs argued that the statute of limitations started when they became aware of the Forest Service trail project being planned. The Court denied this given the timing of the Conservation Easement Deed.
2. Claim Three – The Court found that the arguments related to plaintiffs claim that the SNRA Act was violated were derivative of their other claims and found they had no merit.
3. Claim Four - The Court found that the Forest Service demonstrated ample evidence of consideration of, and compliance with, the Forest Plan and NFMA.
4. Claims Five, Six, and Seven – The Court found that the Forest Service considered the relevant factors when determining that no extraordinary circumstances existed requiring preparation of either an EA or EIS. The Court further found that the FHWA had entered into an agreement with the Forest Service related to the trail construction and was not required to conduct independent analysis.
5. Claim Eight - The court found that the "no effect" BA prepared was supported by evidence provided by Forest Service and fulfilled ESA compliance.
6. Claim Nine -The Court determined that plaintiffs failed to identify how the project exceeded the limitations of the NWP42 or the effluent standards.

Background:

On May 10, 2005, the Forest Service acquired a Conservation Easement encumbering plaintiffs' property to allow snowmobile, snow grooming equipment, bicycle, horse and foot traffic along a 30-foot wide right of way. On July 1, 2014, the Forest Service published notice of scoping for a project to construct a non-motorized trail connecting Stanley and Redfish Lake which would utilize the Conservation Easement. On June 6, 2017, the SNRA Ranger signed the Decision Memo approving the project. Plaintiffs filed suit on April 9, 2019 – Claims one and two were raised pursuant to the Quiet Title Act and claims under the Sawtooth NRA Act, NEPA, NFMA; they later added ESA and CWA claims in amended complaints in 2020. Motions for preliminary injunction and temporary restraining order both from Plaintiffs and Defendants were all denied.

Forest Management | Region 1

Cottonwood Environmental Law Center v. Gregory Gianforte, et al. (20- 36125, 9th Cir.; 18-00012, D. Mont.) **Region 1**— On March 2, 2022, the 9th Circuit Court of Appeals affirmed the District Court's denial of plaintiff's motion for a preliminary injunction and found that the District Court properly dismissed defendant Governor Gianforte of Montana. The Court also found that the District Court remand without vacatur is not a final order and dismissed that portion of the appeal. The projected alleged violation of NEPA in failing to supplement the Interagency Bison Management Plan in and around Yellowstone National Park.

The Court Finds:

1. The district court properly dismissed the Governor as a defendant because he is not subject to and therefore may not be enjoined under NEPA.
2. The district court did not abuse its discretion by denying the request for preliminary injunction.
3. The District Court remand without vacatur is not a final order, therefore the 9th Circuit lacks jurisdiction.

Background:

On 2/8/2018, plaintiffs filed suit in the Court for the District of Montana challenging the **Interagency Bison Management Plan** for the area in and around Yellowstone National Park. More specifically, plaintiff claims the Blackfeet Tribe has sent a Notice of Intent to hunt Yellowstone bison in 2018. This Notice of Intent constitutes significant new information that requires supplemental NEPA analysis because more bison hunters will be concentrated in the

small area north of Yellowstone. Plaintiff requested a TRO/PI to prevent the loss of human life associated with bison management activities as the defendants previously expressed concern that new hunting will exacerbate human safety concerns. The District Court denied the TRO/PI and dismissed the Governor of Montana as a defendant. The District Court also granted the defendant's motion for remand without vacatur for additional NEPA analysis.

Wildlife & Forest Management | Region 1

Friends of the Clearwater et al. v. Petrick, et al. (20-00243, D. Idaho) Region 1-On March 2, 2022, the District Court of Idaho granted summary judgment in favor of defendants on all but one claim. Specifically, the court found that, because the FWS did not provide an explanation for how it prepared the "may be present" overlay in IPaC, it could not conclude that it was based on the best scientific and commercial data. However, the court ruled that the Forest Service had no independent duty to determine what listed species are in the project area, other than by requesting a list from the FWS. Relative to claim two, the court determined the claim was moot. On claim three the court determined that the Forest Service's method for addressing impacts to the St. Joe Wild and Scenic River can be reasonably discerned and that the agency took the requisite hard look at the impacts, ruling in favor of the Forest Service. Finally, on claim 4, the court rejected the allegation that the Forest Service's analysis of the projects effects on elk violated NFMA and NEPA, granting summary judgment for the Forest Service. The project was remanded the project to the Forest Service for further analysis of the ESA species list but did not vacate the decision.

The Court Finds:

1. the FWS did not provide adequate explanation for how the species list was determined for the project. Further rejecting that the agencies' argument that the ESA Section 7(c)(1) is limited to major construction activities. However, the court determined that the Forest Service appropriately relied up on the list provided by the FWS.
2. since the Forest Service had provided a BA for the lynx subsequent to the filing of the case, rendering this claim moot.
3. the Forest Service's method for addressing Wild and Scenic River resources was reasonable discerned and that the agency had taken the required hard look.
4. the Forest Service analysis of effects to elk did not violate NEPA or NFMA. It held that EAs can reference outside documents without tiering to them directly. Further, it held that the Forest Service's planned mitigation was adequate.

Background

On May 20, 2020, the plaintiffs filed a complaint in the District Court of Idaho against the Forest Service for violations of the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), National Forest Management Act (NFMA), the Administrative Procedures Act (APA), and Agency Wild and Scenic River regulations concerning the Brebner Flat Project on the Idaho Panhandle National Forest. The plaintiffs claimed the Forest Service and U.S. Fish and Wildlife Service (FWS) failed to include grizzly bear and the Canada lynx in the project biological assessment (BA) and letter of concurrence violating ESA and APA. The Forest Service failed to take a hard look at the project impacts on the St. Joe Wild and Scenic River and address this issue in the project environmental assessment (EA) in violation of NEPA, the APA and Forest Service's Wild and Scenic River regulations. The Forest Service failed to take a hard look at cumulative effects on the declining elk populations in the project area and failed to address the efficiency of the proposed mitigation measures for elk security, in violation of NEPA, and requires an environmental impact statement. In addition, the proposed mitigation measure "a posted sign" will fail to effectively prevent motorized use on Road 1956 E; resulting in a net loss in elk security in violation of the Idaho Panhandle NF Forest Pan and the NFMA.

Litigation Update

Nothing to Report

New Cases

Travel Management | Region 5

Klamath Forest Alliance et al v. Tom Vilsack, et al (22-180, D. Oregon) Region 5-On February 3, 2022, Plaintiffs filed a complaint in the District of Oregon claiming the Forest Service violated the National Environmental Policy Act (NEPA) and Administrative Procedures Act (APA) when authorizing the paving of Forest Service Roads 20, 20A, 40S30 and 40S30A under a Categorical Exclusion (CE) on September 14, 2020, on Mt. Ashland/Siskiyou Peak Botanical Area.

Claims:

1. Violation of NEPA
    a. 36 CFR 220.6(d)(4) does not allow for paving of unpaved roads

b. The Forest Service incorrectly stated that the Project was routine maintenance and did not prepare an Environmental Impact Statement (EIS) or Environmental Assessment (EA)

Travel Management | Region 1

Capital Trail Vehicle Association et al v. U.S. Forest Service et al (22-15, D. Montana)
Region 1- On February 25, 2022, Plaintiffs filed a complaint in the District Court of Montana alleging violations of NEPA, NFMA, APA claiming the Divide Travel Plan on the Helena-Lewis and Clark National Forest has imposed restrictions and limitations on long-existing recreational access to the Helena National Forest reducing motorized access by 45%. Plaintiffs are challenging the Forest Service's decision to close 144 miles of roads in the HNF to all vehicle use. They also challenge the failure to properly maintain public access to large swaths of the HNF. Specifically claimed is the lack of analysis related to the environmental and social impacts of its final decision to close roads.

Claims

1. The Divide Travel Plan failed to give the required hard look required under NEPA of implementing Alternative 1 as the environmentally preferred alternative.
    a. No changes would have been made under alternative 1.
    b. The record indicates the forest service never intended to adopt Alternative 1. This is an unlawful predetermination and choosing alternative 5, an option that failed to minimize the adverse effects of the closures of the Sweeny Creek area
2. The Forest Service's decision to close year-round all motorized access to and within the Sweeny Creek is a decision that is arbitrary and capricious and otherwise not in accordance with the law, namely NFMA and NEPA.
    a. Alternative 5 was not originally proposed during scoping and comment period. It was developed late in the public process.
    b. The decision to close these routes at the last minute deprives the public from meaningful comment.
    c. The Travel Management Rule does not lawfully allow for consideration of ideological, philosophical, or personal preference for route designations.
    d. Failed to properly analyze and balance the needs of recreating public for use and access, violating the travel management rule.
3. Unlawful programmatic closure of areas of the HNF to motorized travel
    a. Designation of a road, trail or area for motorized travel is a project-level decision that requires site-specific analysis under NEPA.

b. The FEIS refers to the 3 State ROD and it fails to meet the site-specific analysis requirement for each and every existing motorized route.
c. Closure of 14 miles of travel along the Continental divide is in direct violation of the CSNT EIS and ORD.

4. Violations of the Travel Management Rule, NEPA, and NFMA due to the Forest Service's failure to take a "hard look" at the economic or social effects of its final decision to reduce public lands access and by its failure to sufficiently consider how the ROD and its associate use maps affect the provision of recreational opportunities, access needs and cultural resources.
    a. The record is devoid of any analysis as to the positive impacts on human environment from having a wide number and varied dispersed camping sites the recreating public often seeks secluded and isolated locations on public lands for express purpose of distancing themselves from other members of the public and enjoying some measure of solitude.
    b. Failed to take a hard look at the effects of tourism and the use of outdoors in light of the covid-19 pandemic.
5. The Forest Service's cumulative impact analysis is deficient
    a. The closures restricted access and use of roads that have not been previously closed yet have been heavily used. The closure of and cumulative effects will certainly demonstrate that the increased use on other access roads is high with impacts due to increase recreational use in other areas of the forest.
    b. Increased impacts on wildlife and fish by increased use of other areas of the forest was also not properly analyzed for cumulative impacts.
6. Illegal restrictions on dispersed campsites.
    a. The Final ROD and adopted travel plan does not conform to the 1986 then-existing Forest-Wide objective of emphasizing the ability of the public to engage in dispersed recreation opportunities. The challenged decision closes dispersed camp sites.
    b. The final analysis fails to adequately account for the loss of recreational and economic opportunities for the elderly and the disabled.
    c. The 30-foot allowance for parking next to a route and 70-foot buffer for campsites does not properly analyze safety for children and others while recreating.

Notice of Intent to Sue

Nothing to Report

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.

Other Agency Cases

Climate & Forest Management | Region 3

Komor v. United States et al (22-77, D. Arizona) Region 3-February 14, 2022, Plaintiff filed a complaint alleging violations of the Fifth, Ninth and Tenth Amendments for actions resulting in the generation of greenhouse gasses which inevitably accumulate in the atmosphere and continue to influence global temperatures and sequala for many hundreds to thousands of years. Despite defendant's own experts and scientific data, defendants continue to disrupt planetary temperature increasingly resulting in numerous and widespread harm to the natural systems on which life, liberty and property of Plaintiff depend and thus harm Plaintiff. (Font is different-not Times New Roman)

Claims: (Font is different-not Times New Roman)

1. Violation of The Due Process Clause of the **Fifth Amendment**
   a. The defendants fifth amendment rights have been infringed because the defendants directly caused atmospheric CO2 to rise to levels that dangerously interfere with a stable climate system required alike by our nation and plaintiff and continue to knowingly enhance that infringement by allowing fossil-fuel production, consumption and combustion at dangerous levels continuing to violate plaintiffs fifth amendment rights.
   b. The Defendants, through DOE, is depriving plaintiff of his fundamental rights to be free from the dangerous government acts, which infringe on his fundamental rights to life, liberty and property by requiring and giving approval for the exportation and importation of natural gas resources in the U.S. through 201 of the Energy Policy Act of 1992.
2. Violation of **Equal Protection Principles** Embedded in the Fifth Amendment
   a. Acts of the defendants in the areas of fossil-fuel production and consumption have caused and are causing irreversible climate change.
   b. A stable climate system is inherent in our rights to life, liberty and property and compelling because of the grave and continuing harm to children that results in discriminatory laws and actions that prevent a stable climate system.
   c. The Energy Policy Act section 201 creates a disproportionate impact on suspect classes.
3. The Unenumerated Rights Preserved for The People by the **Ninth Amendment**
   a. Liberties protected from government intrusion by the Ninth Amendment is the right to be sustained by our country's vital natural systems, including our climate system and defendants have caused and continue to materially contribute to dangerous levels of atmospheric and oceanic CO2 and destabilize the climate system.

4. Violation of The **Public Trust Doctrine**
    a. The defendant's acts in the fossil-fuel production have caused and continue to cause impairment to the essential public trust resources under the Public Trust doctrine secured under the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment and the Vesting, Nobility, and Posterity Clauses of the Constitution.

5. The defendants have failed in their duty of care as trustees to manage the atmosphere in the best interest of the present and future trust property in favor of the interest of private parties.