

Ecosystem Management Coordination

Court Decisions

Lands/Mining | Region 3

Apache Stronghold v. U.S Department of Agriculture, et al (21-15295, 9th Cir.; 21-50, D. Ariz.) **Region 3**-On June 24, 2022, the 9th Circuit Court of Appeals affirming the District Court of Arizona's decision denying plaintiff's motion for a preliminary injunction (PI) against **the Oak Flat Resolution Copper land exchange** on the Tonto National Forest. The case concerns the alleged violation of the Religious Freedom Restoration Act (RFRA), Free Exercise Clause of the Constitution's First Amendment, and a trust obligation imposed on the United States by the 1892 Treaty of Santa Fe between the Apache and the United States for allowing the land exchange. The court held that the plaintiff was unlikely to succeed on the merits of its RFRA claim, because the government is not imposing a penalty or depriving the plaintiff of a benefit. The court also held that the plaintiff was unlikely to succeed on their Free Exercise and treaty rights claims.

The Court found:

1. The court determined the plaintiff's RFRA Claim that the Land Exchange's effect its members falls outside of the *Sherbert/Yoder* framework and outside of RFRA's definition of a substantial burden. The court was not able to support the plaintiff's argument that the Land Exchange would hand the Oak Flat over to Resolution Copper for its mining plan, incidentally, making it impossible for their members to worship on the Oak Flat and thereby substantially burdening them.
2. The court disagreed that plaintiff and its members are deprived of the use and enjoyment of government land for religious exercise or would be subjected to penalties for trespassing. The court determined that the Land Exchange does not "condition" any government benefit on the plaintiff violating their religious beliefs. The court rejected plaintiff's argument that the Land Exchange subjected its members to penalties: liability for trespassing on land that will be private after the Exchange.
3. The court rejected the plaintiff's claim that the Land Exchange would violate the Constitution. The court held the Land Exchange was neutral in that the object was not to infringe upon the Apache's religious practices. The court concluded that the district court properly found the plaintiff was not likely to succeed on its Free Exercise claim.

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4. The court agreed with the government that in the record, the plaintiff did not establish the Treaty of Santa Fe imposes on the United States an enforceable trust obligation. The court concluded that the plaintiff's trust claim was unlikely to succeed.

Background:

On February 12, 2021, the district court in Arizona denied the plaintiff's motion for temporary restraining order (TRO) and preliminary injunction after a hearing on February 3, 2021, after first denying an emergency TRO on January 14, 2021, because plaintiffs could not show immediate and irreparable injury.

On January 12, 2021, the plaintiff filed a complaint in the district court against the United States, USDA, and the Forest Service, regarding the conveyance of Oak Flat Parcel to Rio Tinto and BHP via their subsidiary Resolution Copper Mine, which is within the proposed "Southeast Arizona Land Exchange and Resolution Copper Mine Project" and that the Forest Service is set to issue the final environmental impact statement (FEIS) on the exchange on January 15, 2021. The plaintiff alleges violation of their First Amendment Right to Free Exercise of Religion, Right to Petition and Remedy, Fifth Amendment Right to Due Process, Statutory rights guaranteed by the Religious Freedom Restoration Act and fiduciary duty owed to the plaintiff, with the conveyance of the Oak Flat Parcel. The plaintiff claims the Forest Service does not own the Oak Flat Parcel, and they claim to retain ownership of the parcel through their 1852 Treaty with the United States.

Forest Management | Region 5

Mountain Communities for Fire Safety, et al v. Kevin Elliott, et al (19-06539, 9th Cir.; 20-55660, C.D. Cal.) Region 5-On June 21, 2022, the 9th Circuit Court of Appeals denied petition for rehearing *en banc*. The case concerns the use of categorical exclusion 6 (for timber stand and wildlife improvement with commercial thinning) for the Cuddy Valley Project on the Los Padres National Forest. The alleged violations were NEPA, NFMA, and APA.

Background:

On February 4, 2022, the 9th Circuit issued a favorable decision to the Forest Servicer regarding the use of CE 6 (for thinning to reduce fire hazard) for authoring 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

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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.

Forest Management | Region 5

Earth Island Institute, Sequoia ForestKeeper, Greenpeace Inc and James Hansen, v Nash, et al (19-1420, N.D. Cal.) **Region 5**-On June 16, 2022, the Eastern District of California issued a favorable decision to the Forest Service. This case concerns the combined efforts of the State of California, U.S. Housing and Urban Development (HUD), and the Forest Service to hinder the impacts of forest fires such as the 2013 Rim Fire near and on the Stanislaus National Forest (regards the **2016 Rim Fire Recovery and Restoration Project** and **California Biomass Project**). The court determined the 2016 Rim Fire Project activities had already been completed and no new environmental impact statement (EIS) was needed by the State of California. The evidence on summary judgement establishes California's decision to analyze the logging project and biomass project separately was not arbitrary and the use of the relief act funding was permissible.

The district court found:

1. The original recovery project authorized salvage activities followed by removal activities. The salvage activities had already been completed and no new EIS was needed by California.
2. Supplemental EIS was not needed based solely on the fact that larger diameter trees would be harvested as not merchantable.
3. Plaintiffs do not cite any legal authority or material different from that cited and considered by their preliminary injunction motion and the Court will not depart from the denial analysis in that previous decision.
4. The Court determined the Biomass Project and Logging Project are not connected.
5. The Court agrees with Defendants that the Biomass plant is still in the planning phase and therefore exempt from environmental review under HUD regulations.
6. The Court determined the Logging Project constitutes a site improvement intended to restore infrastructure that is properly subject to funding at HUD's discretion as it determined in the previous motion for preliminary injunction denial decision.

Background:

On September 16, 2017, the plaintiffs filed a complaint in the district court against the HUD, California HCD and Forest Service. The plaintiffs claim HUD violated NEPA when authorizing the use of disaster relief funds to the Forest Service for clear cutting timber on the Stanislaus National Forest and construction of a new biomass power plant utilizing the timber as feedstock following the 2013 Rim Fire. Plaintiffs allege violation of NEPA, HUDs regulations government

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environmental review of HUD funded projects, the Disaster Relief Appropriations Act of 2013, P.L. 113-2, 127 Stat.4 and the Administrative Procedures Act.

New Cases

Nothing to Report

Court Update

Nothing to Report

Notice of Intent to Sue

Nothing to Report

Other Agency Cases

Park Management | Region 5

Earth Island Institute v. Cicely Muldoon, et al. (22-0438, E.D. Cal.) **Region 5**—On June 13, 2022, the plaintiff filed a complaint in the Eastern District Court of California against the National Park Service regarding its **Biomass Removal and Thinning Project** (for removal of hazardous fuels) to protect Sequoias in the **Yosemite National Park**. The plaintiff alleges the Agency improperly used a categorical exclusion (CE) in authorizing the project. The plaintiff claims the CE violates the National Environmental Policy Act (NEPA), NPS Organic Act and Administrative Procedures Act (APA). The complaint also claims the project approves the logging of trees, including an undisclosed amount of commercial logging, on over two-thousand acres in the Yosemite National Park and two-hundred feet from the centerline on both sides of the road(s).

The plaintiff claims:

1. Claim One: Violations of NEPA and APA
 - a. Count One: Failure to complete an EIS, EA or identify an appropriate CE.
 - i. The NPS did identify a CE to exclude the actions, but the proposed actions do not fit within that identified CE.
 - ii. The NPS's CE Form authorizing the action without first satisfying NEPA's procedural requirements was an agency action, finding or conclusion that was without observance of procedure required by NEPA in violation of APA.
 - b. Count Two: Reliance upon inappropriate NEPA documentation to authorize logging in violation of Fire Management Plan standards.
 - i. The NPS issued a CE Package to include the CE Form, Environmental Screening Form (ESF) and an Other Compliance/Consultation Form (OCC Form), but the forms themselves do not and cannot fulfill NEPA compliance according to the complaint.

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- ii. Logging of trees greater than 6" DBH in the Project area is not permitted by the FMP, as amended.
- c. Count Three: Improper tiering to outdated NEPA Document.
 - i. To the extent that NPS purports to tier to the 2004 FMP for the Project actions that ***differ from*** or ***may actually be analyzed in*** the 2004 FMP in order to authorize Project actions that do not fit within the stated CE, is arbitrary and in violation of NEPA and the APA because NPS itself has stated that the 2004 FMP is out of date and no longer accurately reflects or responds to on-the-ground conditions.
 - ii. Even if the 23004 FMP may properly be tiered to, NEPA does not contemplate categorically excluded actions tiering to other NEPA documents.
- 2. Claim Two: Violations of the NPS Organic Act and the APA.
 - a. The project activities are in violation of the approved park management plans resulting in the impairment of Park resources by removing trees that will take decades to regenerate.
 - b. The NPS's is violating the Congressionally mandated non-impairment standard.

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