

Ecosystem Management Coordination

Court Decisions

Forest Management | Region 1

Friends of the Clearwater v. Probert, et al. (21-00189, D. Idaho) **Region 1**—On June 24, 2022, the District Court of Idaho issued a mixed decision to the Forest Service, regarding the Agency’s approval of the End of the World and Hungry Ridge Projects on the Nez Perce-Clearwater National Forest. The plaintiff alleged the projects violate the National Forest Management Act (NFM), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Administrative Procedures Act (APA). The court determined: (1) the means the Forest Service considered the Forest Plan Old Growth and North Idaho Old Growth together, despite them having different requirements, was inconsistent with the Forest Plan; (2) there is ample evidence in the record that the Agency considered the cumulative impacts of the two projects when it viewed impacts to wildlife, fish, fisher, watersheds, and forest health in general, but not with respect to old growth; and (3) the Forest Service’s “no effect” finding is not arbitrary and capricious based upon the conclusion that, even though grizzly bears “may be present,” they do not “occupy” the project areas. The court: reversed and remanded the End of the World Project’s DN/FONSI and ordered preparation of an EIS relative to old growth; and remanded Hungry Ridge Project’s ROD/EIS for additional analysis relative to old growth. Both projects are enjoined.

The district court found:

1. NFMA – The court determined that plaintiff’s claims that the way the Forest Service considered the Forest Plan Old Growth and North Idaho Old Growth together, despite them having different requirements, was inconsistent with the Forest Plan.
2. Cumulative Effects/NEPA – the court found that there is ample evidence that the Forest Service considered the cumulative impacts of the two projects when the agency reviewed impacts to wildlife, fish, fisher, watersheds, and forest health in general, but not with respect to old growth.
 - Vegetation Treatments - the court found the methodology used and conclusions reached by the Forest Service were supported by adequate scientific data as set forth in the project records. They further determined

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.

that the Agency engaged with contrary science and drew reasonable conclusions.

- Fisher/Wildlife - the wildlife reports discussed the impact that all harvest treatments would have upon fisher habitat and habitat connectivity and the summary supports the Forest Service's determination that the project will not lead to a trend towards federal listing.
 - Steelhead - The Agency explained that its project activities will not impact all streams all at once for ten years and the court determined that the analysis and discussion of short- and long-term impacts upon Snake River steelhead were sufficient under NEPA.
 - Mill Creek - The court found the Forest Service's analysis regarding watershed conditions in Mill Creek complies with NEPA and adequately supports its conclusion.
 - Old Growth – the court determined that it could not find that the Forest Service took the requisite “hard look” at the impact of the two projects on the forest as a whole in relation to old growth.
 - End of the World – court found the EA and the DN/FONSI for EOW did not adequately discuss or analyze the cumulative environmental impact of the two projects in relation to old growth and, therefore, the Forest Service's FONSI (and no need for an EIS) was in error. The DN/FONSI was reversed and remanded, and the court ordered preparation of an EIS relative to old growth.
 - Hungry Ridge – ROD and FEIS were remanded for additional analysis relative to old growth.
3. ESA Claims - The court ruled in favor of the Agency relative to the “no effect” determination relative to grizzly bear. The court determined that the Forest Service's “no effect” finding is not arbitrary and capricious based upon the conclusion that, even though grizzly bears “may be present,” they do not “occupy” the project areas.

Recreation | Region 10

Romey, et a. v. United States, et al. (20-0014, D. Alaska) **Region 10**—On June 27, 2022, the District Court of Alaska issued a favorable decision to the Forests Service granting Defendant's motion to dismiss the case, regarding a special use permit for the Wolf Creek Boatworks on the Tongass National Forest. The court determined that the plaintiffs' lack standing to pursue either of their Administrative Procedures Act (APA) claims and dismissed the claims and the case.

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.

Because the claims are subject to dismissal on standing grounds, the court need not consider the Agency' arguments that the claims are moot.

The district court found:

1. The factual record regarding plaintiffs' 2015 permit request is inconclusive as to whether they were seeking a new special use permit or a renewal of the 2010 permit.
2. The court concluded that plaintiffs' 2015 request appears to fall within Section 251.64 of the Forest Service's special use permit renewal regulation and not an application for a "new" permit.
3. Plaintiffs can establish that they suffered an injury-in-fact by not having a special use permit on the 2017 date of the land exchange.
4. The injury is traceable to the Forest Service delay in considering the request for a special use permit.
5. The plaintiffs' injury-in fact cannot be redressed by the court invalidating the land exchange that has already taken place. The third element of 'standing' as to this requested form of relief cannot be met by the plaintiffs.
6. The plaintiffs (former holder of an expired permit) asked the court to set-aside the Forest Service's decision denying their request to renew the permit, due to unusual circumstances, and order the Agency to back-date any new decision on the permit. The court indicated that the plaintiffs did not identify any authority for the Agency to issue a retroactive permit and ruled that the permit was not a valid existing right.

New Cases

Range | Region 3

International Society for the Protection of Mustangs and Burros v. U.S. Department of Agriculture, et al. (22-8114, D. Ariz.) **Region 3**—On June 28, 2022, the plaintiff filed a complaint in the District Court of Arizona alleging violation of the National Environmental Policy Act (NEPA), Wild Free-Roaming Horses and Burros Act of 1971 (WFRHBA), and Administrative Procedures Act (APA), following a March 21, 2022, notice of a planned capturing and removal of up to 20 unauthorized livestock (feral horses) on the Apache Sitgreaves National Forest. The plaintiff claims the Forest Service violated: (1) NEPA by relying on the use of a categorical exclusion (CE) instead of an environmental impact statement (EIS); (2) WFRHBA by removing an unidentified number of horses from the NFS lands, irresponsibly categorizing them as unauthorized livestock; and (3) APA by not following NEPA, without first conducting a full investigation or study with independent specialists.

The plaintiff claims:

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.

Violation of NEPA

- a. Forest Service failed to complete an EIS by relying on a CE.
- b. The actions of capturing, permanently removing, and selling horses living on the Apache Sitgreaves National Forest constitute far more than just a civil or criminal investigative activity as it was determined to be by the Forest Service in a memo dated December 15, 2021
- c. The removal of the horses fails to fall within the definition of what constitutes a CE and have a significant effect on the surrounding environment.
- d. Forest Service failed to provide an analysis of any alternative options.

B. Violation of WFRHBA

- a. Forest Service has made uninformed and unilateral decision to remove an unidentified number of horses from the Forest, irresponsibly categorizing them as ‘unauthorized livestock’ without performing due diligence without an inventory or accounting of the horses to determine their status as wild or domestic trespass, branded versus unbranded.
- b. The Forest Service relies on the Assessment of Horses on the Apache National Forest to support the conclusion of the horses being unauthorized livestock, however plaintiff believes the assessment is premised on records indicating no wild horses were on the Forest at the time the WFRHBA was passed, and the Agency had not conducted an inventory prior to, at the time of, or for decades after the passage of the Act.
- c. Defendants failed to hold a public hearing for comment on the use of motor vehicles in the capture and transport of the horses.

C. Violation of APA

Defendants violated the APA by not following NEPA, without first conducting a full investigation or study with independent specialists.

D. The Horses are Wild Free-Roaming Horses entitled to Protection under the WFRHBA

Evidence indicates that Wild Free-Roaming horses existed as far back as 1910 on the Forest.

Forest Management | Region 1

Center for Biological Diversity, et al. v. U.S. Forest Service, et al. (22-0114, D. Mont.)

Region 1—On June 30, 2022, the plaintiffs filed a complaint in the District Court of Montana alleging violation of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and Administrative Procedures Act (APA), in authorizing the Black Ram Project on the Kootenai National Forest. The plaintiffs claim the Forest Service failed: (1) to take a hard look of the direct, indirect, cumulative, and recreational impacts of the project on grizzly bears, and climate change; (2) to prepare and EIS due to alleged significant harm to lands

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.

eligible for wild and scenic river designation, inventoried roadless areas, the Pacific Northwest National Scenic Trail, grizzly bear, old growth and mature forest stands; and (3) to ensure the project complies with the Forest Plan's desired conditions, standards, and guidelines. The plaintiffs also issued an NOI regarding project impacts on grizzly bear.

The plaintiffs claim:

1. Violation of NEPA and APA – For Failure to Take a Hard Look
 - a. Failed to take the required “hard look” to consider and disclose the project’s direct, indirect, and cumulative impacts, including impacts to grizzly bear and climate change.
 - b. Failed to take a hard look at the cumulative impacts of the project together with the other projects likely to impact grizzlies in the area.
 - c. Failed to take a hard look at project’s impacts on recreation, impacts to grizzly bear; from increased openings in forest vegetation, increased snow machine use, increased recreational opportunities through upgrade pedestrian and equestrian trails, and impacts on the Pacific Northwest National Scenic Trail that may increase human-bear conflicts.
 - d. Failed to disclose adequately climate change impacts. The EA fails: to disclose the impacts of the proposed alternative on carbon storage compared to the no action alternative; and to disclose the climate pollution impacts of project implementation, the use of fossil fuel engines to build roads, cut trees, and remove and transport logs to mills.
2. Violations of NEPA and APA: Failure to Prepare and Environmental Impact Statement
 - a. Project may significantly harm unique characteristics of the area, including lands eligible for wild and scenic river designation, inventoried roadless areas, the Pacific Northwest National Scenic Trial, grizzly bear, and old growth and mature forest stands.
 - b. Project’s effects on the environment are highly uncertain because the impact of the project seeks to forestall (beetle infestation and wildfire) that may never occur.
 - c. Logging mature and old growth forest that is already properly functioning habitat to maintain or improve resilience to drought, insect and disease outbreaks, and wildfire is highly controversial and involves a high degree of scientific uncertainty.
 - d. Project, when combined with past and reasonably foreseeable future neighboring timber sales may result in cumulatively significant impacts on the environment.
3. Violation of NFMA and APA—Inconsistent with Forest Plan
 - a. Failed to ensure the project complies with the Forest Plan’s desired conditions, standards, and guidelines, including the following failures:
 - i. Authorizing timber harvest in eligible wild river segments, prohibited by Forest Plan standard MA2-STD-TBR-01.

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.

- ii. Authorizing logging within 579 acres of old growth stands and 0.8 miles of new road construction through old growth forest, contrary to Forest Plan desired condition FW-DC-VEG-03, standard FWSTD-VEG-01, and FW-GDL, VEG-02.
- b. Failed to ensure compliance with the Forest Plan, the Forest’s action approving the project through EA/FONSI/DN are contrary to the law.

Notice of Intent to Sue

On June 30, 2022, the Center for Biological Diversity, WildEarth Guardians and Yaak Valley Forest Council issued a 60-day Notice of Intent (NOI) to sue the Forest Service and FWS, alleging the approval of the project violates the Endangered Species Act. The groups claim clearcutting and other forms of logging and bulldozing logging roads will destroy habitat for a largely isolated, fragile population of about 25 grizzly bears in the Yaak Valley. Constant truck traffic will expose bears to increased human conflict and death. The further claim the Forest Service concluded, and the FWS agreed, that the project will “likely adversely affect” the bears.

Court Update

Nothing to Report

Notice of Intent to Sue

See above

Other Agency Cases

Regulatory (Endangered Species Act)

Center for Biological Diversity, et al. v. Deb Haaland, et al. (19-06812, N.D. Cal.); **State of California, et al. v. Deb Haaland, et al.** (19-06013, N.D. Cal.)—On July 5, 2022, the District Court of Northern California issued a decision to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) granting their request for remand and granting plaintiffs’ request of vacatur of the 2019 Endangered Species Act (ESA) rules promulgated by the Trump Administration. The Biden Administration wanted the Trump rules remanded but kept in place until their new rule was promulgated. The ESA regulations now in effect are the ones that were in effect prior to the Trump amendments became final

The Court stated that because vacatur is an equitable remedy, the APA does not expressly preclude the exercise of equitable jurisdiction and does not preclude granting of vacatur without a decision on the merits.

- 1. May vacate an agency request for voluntary remand without first determination of the merits.

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.

2. Concluded that the fundamental flaws in the agency's decision to rescind the 2019 ESA rules, would not be adopted as the same upon remand.
3. Does believe that vacatur would cause any serious and irreparable harm that would significantly outweigh the magnitude of the agency's error.

Background

On October 21, 2019, plaintiffs filed a complaint challenging the regulatory revisions by the FWS and NMFS of August 12, 2019, that amended the regulations that implemented ESA Sections 4 and 7.

In August 2019, the Services enacted a series of regulations that modified how the Services implement the ESA (2019 ESA Rules). The Listing Rule, 84 Fed. Reg. 45,020, modified how the Services add, remove, and reclassify endangered or threatened species and the criteria for designating listed species' critical habitat. The Blanket Rule Repeal, 84 Fed. Reg. 44,753, eliminated the FWS's former policy of automatically extending to threatened species the protections against "take" that Section 9 automatically affords to endangered species. And the Interagency Consultation Rule, 84 Fed. Reg. 44,976, changed how the Services work with federal agencies to prevent proposed agency actions that could harm listed species or their critical habitat.

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.