

Ecosystem Management Coordination

Happy Valentine's Day

Court Decisions

Environmental | Nationwide

Juliana, et al. v. Unite States, et al. (15-01517, D. Ore.; 18-36082, 9th Cir.) **Nationwide**—On January 17, 2020, the 9th Circuit Court of Appeals panel reversed the District Court of Oregon's interlocutory orders in an action brought by an environmental organization and individual plaintiffs against the federal government, alleging climate-change related injuries to the plaintiffs caused by the federal government continuing to "permit, authorize, and subsidize" fossil fuel; and remanded to the district court with instructions to dismiss for lack of Article III standing.

The 9th Circuit panel indicated that it was beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches. The 9th Circuit panel concluded that the plaintiffs' case must be made to the political branches or to the electorate at large.

The 9th Circuit's decision blocks the suit from proceeding in the district court.

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Timber & Forest Management | Region 5

Environmental Protection Information Center v. Carlson, et al. (19-17479 & 20-15040, 9th Cir.; 19-06643, D. N. Cal.) **Region 5**—On January 23, 2020, The 9th Circuit Court of Appeals issued an order granting Sierra Pacific Industries Motion to Intervene in as an appellee in opposition to appellant’s motion for an injunction that was denied by the Northern District of California (19-06643) on December 4, 2019. The Plaintiff’s motion for preliminary injunction pending appeal was also denied by the District Court on December 4, 2019. The 9th Circuit also denied the appellant’s motion for injunctive relief on appeal filed on December 10, 2019.

Background:

On October 16, 2019, the plaintiff filed a complaint in the District Court of Northern California against the Forest Service concerning the **Ranch Fire Projects (Bartlett, Deer Valley, Pine Horse Valley, M3/Felkner and M5, and M10 Roadside Hazard Tree Maintenance Projects)** on the **Mendocino National Forest** and a portion of the **Berryessa-Snow Mountain National Monument**. The plaintiff claims violations of the National Environmental Protection Act (NEPA), and the Administrative Act (APA).

Recreation | Region 2

Thomas Alpern v. Brian Ferebee, et al. (19-1086, 10th Cir.; 17-00024, D. Colo.)—On February 7, 2020, the 9th Circuit Court of Appeals panel upheld the District Court of Colorado’s decision on a case involving the Recreation Enhancement Act (REA) and recreation user fees. Mr. Alpern claimed the Forest Service improperly charged him a fee when he entered Maroon Valley to park and hike. He cited a REA provision that he claimed prohibited charging a fee “[s]olely for parking[.]”. He argued that this prohibition overrides another REA provision that allows agencies to charge a fee when certain listed amenities are present, amenities such as picnic tables, security patrols, trash bins, and interpretive signs.

The Circuit noted that section 6802(d)(1)(A) of the REA prohibits charging fees “[s]olely for parking . . . along roads or trailsides[,]” something that Mr. Alpern did not do. Rather, he parked in a developed parking lot featuring all the amenities listed in § 6802(f)(4), not along a road or trailside. Mr. Alpern need not use all the featured amenities (he did park in a developed lot and received the benefit of security services, however). The Circuit noted that the REA allows the Forest Service to charge a fee for “Federal recreational lands” when the area includes six amenities. Nothing in the statute requires using all of them.

Wildlife & Minerals | Region 3

Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Service, et al. (17-00475, 17-00576, 18-00189, D. Ariz.) **Region 3**—On February 10, 2020, the District Court of Arizona issued a second consolidated cases Order against the U.S. Fish and Wildlife Service (FWS) (the Forest Service is also named in the case) concerning the **Rosemont Copper Company’s (Rosemont) large scale pit-mining**

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operation within the boundary of the **Coronado National Forest** (CNF). The district court found that the FWS did not adequately protect imperiled species including the jaguar from the mine’s impacts and ordered the FWS to redo three parts of its 2016 biological opinion. Also, the district court threw out a related challenge that Rosemont had filed seeking to overturn the FWS’s designation of the mine site as jaguar critical habitat.

Court Update

Nothing to Report

Litigation Update

Nothing to Report

New Cases

Grazing | Region 3

Center for Biological Diversity v. U.S. Forest Service, et al (20-00020, D. Ariz.) Region 3— On January 13, 2020, Center for Biological Diversity (plaintiff) a complaint in the District Court of Arizona, claiming violations of the Endangered Species Act (ESA) as a result of the U.S. Fish and Wildlife Service (FWS), and Forest Service’s final actions authorizing domestic livestock grazing on more than **30 Allotments** within the **upper Gila River watershed on the Apache-Sitgreaves and Gila National Forests** (NFs). Plaintiff indicates the riparian habitats of the upper Gila river watershed within the NFs’ are occupied by listed Threatened and Endangered (T&E) species: Yellow-billed cuckoo, Southwestern willow flycatcher, Chiricahua leopard frog, Gila chub, Narrow-headed and northern Mexican garter snakes, Spikedace, and Loach Minnow.

Plaintiff’s Claim:

1. Failure to reinitiate and complete ESA Section 7 consultation to ensure ongoing livestock grazing does not jeopardize listed species or destroy or adversely modify critical habitat.
2. Unlawful irreversible or irretrievable commitment of resources pending completion of consultation.

The plaintiff requests Forest Service be ordered to remove all cattle within the purportedly excluded riparian areas within ten days of the Court’s Order, order the Forest Service to remediate all damaged areas, commit to monthly monitoring, and reinitiate and complete consultation on the identified allotments.

Notice of Intent

Grazing | Region 4

NOI- On January 21, 2020, Center for Biological Diversity and Sierra Club (Collectively “CBD”) sent a 60-day Notice of Intent to Sue alleging violation of the Endangered Species Act (ESA) regarding the U.S. Fish and Wildlife Service’s (FWS) April 2019, Biological Opinion (BO) for the **effects to the Grizzly Bears** on the **Upper Green River Area Rangeland Project** on the **Bridger-Teton National Forest**, and its

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accompanying Incidental Take Statement (ITS). CBD claims the FWS violated the ESA by relying on Forest Service implementation measures concluding the grizzly bears would not be harmed even though the conservation measures are not reasonably certain to occur. The November 2019, Record of Decision states the purpose of the project is to authorize livestock grazing in a manner that maintains or improves resource conditions on the forest.

CBD states:

- ITS allows for lethal removal of up to 72 bears over the ten-year life of the Project, killing double the number of grizzly bears than were killed over the last 20 years, but in half the time.
- Forest Service reliance on the April 2019 BO is unlawful and an action agency cannot rely on a faulty BO to fulfill its substantive section 7 duties to ensure it does not jeopardize the continued existence of a listed species.

CBD will pursue injunctive, declaratory and other relief after sixty days through litigation in federal court including fees and expenses unless FWS and Forest Service immediately halt reliance on the April 2019 BO and ITS in the project area until the agencies reinitiate consultation under section 7 of the ESA.

Also Filed By: Alliance for the Wild Rockies, Yellowstone to Uintas Connection and Western Watersheds Project (Collectively “AWR”)

Forest Management | Region 1

NOI-On January 13, 2020, a 60-Day Notice of Intent to Sue was received by Alliance for the Wild Rockies and Native Ecosystems Council (Collectively “AWR”) claiming violation of the Endangered Species Act (ESA) regarding **the Elk Smith Project (Project)** on the **Helena-Lewis & Clark National Forest** on the Rocky Mountain Ranger District in **Region 1**. The NOI states the project involves the cutting and burning of vegetation on approximately 10,331 acres at higher elevations using helicopters; and falls within the Bear-Marshall-Scapegoat-Swan Inventoried Roadless Area Boundary and just east of the Bob Marshall Wilderness Complex. The NOI also states the project was approved on November 1, 2019, via decision notice.

AWR claims the project is within the MS-1 Grizzly habitat in the Northern Continental Divide Ecosystem Grizzly Bear Recovery Zone. AWR also states the agencies must reinitiate programmatic Endangered Species Act (ESA) consultation on the wolverine, because of new information.

Minerals | Region 4

NOI-On January 21, 2020, a 60-Day Notice of Intent to Sue was received by Alliance for the Wild Rockies (AWR), and the Yellowstone to Uintas Connection by Public Interest Defense Center, P.C. claiming violation of the Endangered Species Act (ESA) regarding **the Crow Creek Pipeline Project** on the **Caribou-Targhee National Forest (CTNF)** in **Region 4**. The NOI states the project authorizes a private

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company to construct an underground natural gas pipeline and a permanent clear-cut utility corridor across 18.2 miles of National Forest System lands. The project provides a 50-foot right-of-way during construction, and a permanent 20-foot right-of-way thereafter to maintain the pipeline. In addition to the pipeline and utility corridor, there will be above-ground facilities, such as valves and staging areas. The NOI also states the record of decision approving the project was signed November 1, 2019, by the CTNF Supervisor.

The AWR states the pipeline utility corridor provides a permanent 18.2 mile road: motorized vehicles will use the corridor in perpetuity to maintain and inspect the pipeline, which will permanently cut through six different National Forest Inventoried Roadless Areas and cause permanent vegetation removal, increased sight-lines for poaching, increased weed spread, and abundant new opportunities for illegal motor vehicle use.

AWR claims the Forest Service applied 2009 lynx critical habitat map in its biological assessment (BA) and ignored the more recent 2014 map. In the project BA the Forest Service addressed only lynx and wolverine and did not evaluate other listed species in the project area (grizzly bear, ute ladies' tresses orchid, and yellow-billed cuckoo).

Other Cases Filed Against Another Agency/Entity

Minerals | Region 1

Nez Perce Tribe v. Midas Gold Corp, et al (19-307, D. Idaho)-Region 1—On January 8, 2020, the District Court of Idaho issued an order in favor of the Nez Perce Tribe (plaintiff) concerning the **Stibnite Gold Mind Project** on the **Payette National Forest**. The district court denied the defendant's (Midas Gold Corp., Midas Gold Idaho, Inc., Idaho Gold Resources Company, LLC, and Stibnite Gold Company) Motion to Stay Litigation.

The Court found:

- Defendants have not demonstrated significant hardship.
- The plaintiff presented evidence that there will be real, tangible harm if the discharge of pollutants continues.
- There is no evidence that the Administrative Order of Consent (AOC) between the defendants and the Environmental Protection Agency (EPA) will be finalized in a reasonable time.

The district court stated that defendant's claim of hardship and the inconvenience and expense required to defend a lawsuit "does not constitute a clear case of hardship or inequity" and nothing in the record shows the defendant's claim of \$4.1 million quarterly operational delay costs would be due to the present suit. The district court further states that the ongoing environmental harm from the unregulated discharge of pollutants is real irreparable harm. Defendant asked for 180 day stay to make progress on the AOC negotiations, however, the court stated that defendant offered no timeline for

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completion and found that at best, there was only a rough draft of the AOC and there is no indication it would be completed in the next six months. The defendants have not offered any evidence to the contrary.

The district court found that the defendants have not met their burden to stay this litigation. Defendants are free to file another motion to stay if the AOC does become imminent in the future.

Note: The district court also heard arguments on defendants' Motion to Dismiss, which the court orally denied.

Wildlife | Nationwide

Center for Biological Diversity, et al., v. Margaret Everson, et al. and American Forest & Paper Association, et al. Defendant Intervenors (15-477, D. D.C.); and Defenders of Wildlife v. Margaret Everson, et al., and American Forest & Paper, et al. Defendant Intervenors (16-910, D. D.C.) Nationwide—On January 28, 2020, the District Court of the District of Columbia issued an opinion order that remanded the U.S. Fish and Wildlife Service's (FWS) listing decision of the Northern Long-Eared Bat (NLE Bat) back to the FWS, directing the Agency to make the decision consistent with the Courts Memorandum. In addition, the district court vacated the Significant Portion of the Range Provision of the NLE Bat listing decision, which means that provision is not in effect, until the FWS re-does the provision.

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