Ecosystem Management Coordination

Happy Friday!

Court Decisions

Forest Management | Region 5

Environmental Protection Information Center, v. Ann Carlson, et al. (19-6643, N.D. Cal; 19-17479, 9th Cir.) **Region 5**— On October 27, 2020, the 9th Circuit Court appeals denied the Forest Service's petition for panel rehearing and denied the intervenor's (Sierra Pacific Industries) petition for *en banc* rehearing, concerning the **Ranch Fire Tree Project** on the **Mendocino National Forest**. The Forest Service had sought a panel rehearing request regarding the 9th Circuit's decision that reversed the Northern California District Court order that denied the plaintiff's motion for a preliminary injunction (PI).

Because, the opinion was published, it is legally precedent-setting and can be cited in future cases. The regions rely heavily on the use of the road maintenance categorical exclusion to address hazard trees due to fires, drought, and disease, along roads. This decision will be difficult to distinguish in future projects that rely on the same marking guidelines and may weaken the ability of all the regions in the 9th Circuit, and other regions to rely on the categorical exclusion for large scale hazard tree abatement.

Background

On August 3, 2020 the 9th Circuit issued an unfavorable published decision against the Forest Service reversing the district court's order that denied the plaintiff's motion for a PI on the project. The case concerns the use of a categorical exclusion (CE) for road repair and maintenance in 36 C.F.R. § 220.6(d)(4), instead of relying on an Environmental Assessment or an Environmental Impact Statement for authorizing the project. The 9th Circuit reversed the district court's denial of the requested PI and remanded back to the lower court for further proceedings not inconsistent with the opinion. Specifically, the court concluded:

1. The plaintiff was likely to succeed on the merits of its claim that the Forest Service erred in relying on the CE for road repair and maintenance.

a. The 9th Circuit noted that the rationale for a CE was that a project will only have a minimal impact on the environment should be allowed to proceed without an environmental impact statement or an environmental assessment.
b. The CE upon which the Forest Service relied authorized projects for such things as grading and resurfacing of existing roads, cleaning existing culverts, and clearing roadside brush.
c. Under no reasonable interpretation of the language of 36 C.F.R. § 220.6(d)(4) did the project come within the CE for "repair and maintenance" of roads.

2. The 9th Circuit held that the plaintiff submitted evidence of irreparable, although limited, harm.
3. The 9th Circuit held that the balance of equities and the public interest weighed in the plaintiff's favor.

On December 4, 2019, the district court issued a decision denying the plaintiff's motion for a preliminary injunction, concerning the project. The district court determined that that the plaintiff did not establish a likelihood of success on the merits or demonstrate the balance of hardship tips sharply in its favor. Subsequently, the court denied the plaintiff's request for a PI in this case.

Travel Management | Region 1

Bitterroot Ridge Runners Club et al. v. Forest Service, et al. (18-35875, 9th Cir.) **Region 1**— On October 27, 2020, the 9th Circuit Court of Appeals issued a decision favorable to the Forest Service regarding **2005 Bitterroot Travel Management Plan.** On June 18, 2018, the District Court of Montana issued a decision favorable to the Forest Service regarding the 2005 Travel Management Plan on the Bitterroot National Forest. The plaintiffs appealed the district court's decision.

The 9th Circuit found:

- Restrictions of bicycle use in Recommended Wilderness Areas (RWA) and Wilderness Study Areas (WSA) is not arbitrary or capricious.
- There is an adequate record showing the agency's rational was based on objective evidence.
- Forest Service was justified in its reliance on certain studies as opposed to studies preferred by the appellant.
- The 9th Circuit rejected the appellants contention that personal or political preferences of employees improperly influenced the decision.
- The 9th Circuit affirmed the district court's conclusion that no supplemental environmental impact statement (EIS) was required as a result of a change that closed

additional miles of trails in WSAs because this change was a minor variation and qualitatively within the spectrum of alternatives reviewed in the draft EIS.

Background

On June 18, 2018 the district court remanded the 1987 Bitterroot Forest Plan to the Forest Service to conduct an objection response, consider the objections, and either modify the final EIS or show that the total 110 miles of mechanized use in WSAs is permissible. Other than this narrow procedural correction, the Forest Service prevailed.

The plaintiffs challenged the 2005 Bitterroot Travel Management Plan under NFMA, NEPA, and APA. The 2005 Travel Management Plan restricted snowmobile and bicycle access through WSAs in the Bitterroot National Forest. The district court found no issue with the 2005 Travel Management Plan on substantive grounds but reversed because the Forest Service failed to open a public comment period for the closure of 110 miles of WSA land to bicycling, thus violating NEPA and APA. Key findings include:

- Plaintiffs raise "predetermination" claims on the decision to prohibit motor vehicles and bicycles in the WSAs. Predetermination occurs when the agency has made "an irreversible and irretrievable commitment of resources" *based on a particular environmental outcome*, prior to completing its requisite environmental analysis (pg. 9). The district court said a preferred alternative does not equate to predetermination.
- Plaintiffs claim the 2005 Travel Management Plan illegally imposed *wilderness management standards onto two WSAs*. The district court upheld the Agency's decision, finding that it was proper to restrict motorized and mechanical use in order to maintain the area's 1977 wilderness character because the current motorized and mechanized use far exceeds the 1977 totals.
- Plaintiffs argued that the 2005 Travel Management Plan violated the Agency's *Travel Management Rule* because it "improperly fixated on subjective user preferences and personal values in reaching its decision about which areas to designate for quiet use recreation rather than objective motor vehicle use." The district court upheld the Agency's decision, reasoning that the policy behind the Travel Management Rule is to measure "conflicts," and that is best achieved by evaluating the public's preferences and personal values when recreating (pg. 24).

Mining | Region 2

High Country Conservation Advocates, et al. v. United States Forest Service, et al. (17-03025, D. Colo.; 18-1374, 10th Cir.) **Region 2**—On October 29, 2020, the 10th Circuit Court of Appeals granted the plaintiffs' Emergency Motion for Injunction Pending Appeal of the October 2, 2020, District Court of Colorado's order that had favored the Forest Service and Mountain Coal Company (MCC) concerning the **West Elk Mine and the Colorado Roadless Rule's**

North Fork Coal Mining Area exception (North Fork Exception) on the Grand Mesa, Uncompahgre, and Gunnison National Forests. The 10th Circuit's order prohibits MCC's West Elks Mines use of new roads constructed in June 2020.

The 10th Circuit order:

1. Vacates the temporary stay and grants the Emergency Motion for Injunction pending appeal.
2. Pending its consideration of the appeal, enjoins MCC "from Immediately bulldozing addition drilling pads on [the roads constructed after issuance of the 10th Circuit's April 24, 2020, mandate and drilling methane ventilation boreholes in preparation for coal mining the Sunset Roadless area.

Background

On October 2, 20202, the district court denied the plaintiffs' motion to enforce remedy and denied as moot the plaintiffs unopposed motion for entry of the 10th Circuit Court of Appeals' mandate. The district court found:

1. The 10th Circuit's March 2, 2020 order remanded with instructions to enter an order requiring Bureau of Land Management to revise its Environmental Impact Statement (EIS) but did not vacate the resulting leases. Here, the extent of the 10th Circuit's mandate was remand "for entry of an order vacating the North Fork Exception." The 10th Circuit's order contains no discussion of the effect that such an order would have on the lease modifications. Because the 10th Circuit's mandate contains no express or implied directive to vacate the lease modifications, the district court declines to do so.
2. The plaintiff's complaint includes eight causes of action, all of which allege NEPA violations in the process of promulgating both the North Fork Exception and the lease modifications. However, all the plaintiffs' process challenges to the lease modifications have been resolved in the Agency defendants' favor. What plaintiffs raise now appears to be an entirely new claim, targeted not at the Agency defendants but at Mountain Coal. Whether or not a private entity's actions are prohibited under a regulation is a question that does not appear to be within the scope of this type of procedural review and must therefore be brought in some other posture that would permit review. Accordingly, the district court denies plaintiffs' motion.

The Colorado Division of Mines modified its cessation order to allow certain activities to be conducted (i.e. drilling pad construction and venthole boring), The plaintiffs went back to the district court to ask for an expedited order on their motion to enforce (which focused on

preventing the company from using the road for other drilling activities). The plaintiffs requested the same relief (to stop the company from conducting additional activity on the site), but the urgency returned because the company is no longer barred by the Colorado Division of Mines.

On June 19, 2020, the plaintiffs informed the district court that the Colorado Division of mines had ordered the company to cease activities in the area, and let the court know that there was no longer as much urgency to the motion to enforce.

On June 15, 2020 the district court entered the 10th Circuit's mandate and issued the following order, vacating the North Fork Exception entirely: **ORDERED that the Final Judgment [Docket No. 63] is VACATED. It is further ORDERED that the North Fork Exception, 81 Fed. Reg. 91,811 (Dec. 19, 2016), is VACATED.**

Litigation Update

Nothing to Report

New Cases

Forest Management | Region 1

Alliance for the Wild Rockies, v. Leanne Marten, et al. (20-0156, D. Mont.) **Region 1—**On October 23, 2020, Alliance for the Wild Rockies filed a complaint in the District Court of Montana against the Forest Service and the U.S. Fish and Wildlife Service, concerning the authorization and inadequate environmental analysis regarding Environmental Assessment (EA), and Decision Notice (DN) for the **Soldier Butler Project** on the Lolo National Forest, in violation of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Administrative Procedures Act (APA).

The plaintiff claims that during project implementation, in addition to temporary road construction and use, currently closed to public motorized access would also be used for project implementation. With the use of these roads during the project will effectively make them the same as open roads in terms of the effects to grizzly bears, which are primarily displaced due to disturbance. The plaintiff also claims the project will impact the required Elk forage/cover ratio standard; and would impact four tributary watersheds within the project area. The plaintiff's claims for relief:

1. The Forest Service's inadequate impacts analysis violates NEPA and the APA. The Agency conducted an inadequate cumulative impacts analysis because it failed to consider the combined effects of the Frenchtown Face Project and Soldier-Butler Project, specifically the decision to reverse the Frenchtown Face Project's decision to decommission 70 miles of road in the Soldier-Butler Project area.

2. The Forest Service failed to demonstrate that the project complies with the Lolo National Forest Plan Standards, in violation of NFMA, NEPA, and the APA (specifically standards 4, 7, 25, and 28). Also, the Agency's failure to adequately address these issues in the EA and to demonstrate compliance with the Lolo NF Forest Plan violates NEPA. Specifically:
    - Vegetation Cover – Violation Standard 7 for Management Area 18 and 23 which requires the retention of a minimum Elk 50/50 cover/forage ratio.
    - No Winter Logging – Violation of Standard 4 for Management Area 18 which restricts logging and road building to summer and fall months.
    - Snags:
        - Violation of Forest-wide Standard 25 for snags because no snag survey was completed, which resulted in failure to determine the existing condition.
        - Violation of Standard 4 for Management Area 21 by failing to demonstrate compliance of stands 30-40 acres in size to contain snags with dead and downed material greater than 15 tons/acre and contain at least 15 trees/acre greater than 20" diameter at breast height which resulted in failure to determine the existing condition.
    - Aquatics: Failure to meet Forest Plan standard 28 which requires minimum impact on the aquatic ecosystem free from permanent or long-term stress.
3. The revised biological opinion (BO) is inadequate and is not in accordance with the law, in violation of the APA. The revised BO for the project uses methods and information that are not based on the best scientific and commercial data and excluded the best available scientific information on road density and secure core habitat. The revised BP is not in accordance with the ESA, in violation of the APA.

Background

Alliance for the Wild Rockies issued an NOI against the project on June 23, 2020, concerning the projects potential impacts on grizzly bear. The Forest responded to the NOI on August 10, 2020, where the Forest decided to reinitiate consultation on the Soldier Butler project and revise and amend the BO to more clearly address AWR concerns. The Forest further indicated no ground disturbing activities will occur until the re-initiation process is completed.

Roads that were closed in the Frenchtown Face project were authorized for re-opening in the Soldier Butler Project. The Frenchtown Face project was authorized in a Record of Decision on June 1, 2007. This project authorized activities including timber harvest, prescribed burning road construction, new road reconstruction, road decommissioning, new OHV road construction, fish habitat rehabilitation, and gravel pit development.

Flathead-Lolo-Bitterroot Task Force, v. U.S. Fish and Wildlife Service and Forest Service. (20-0157, D. Mont.) **Region 1—**On October 26, 2020, Flathead-Lolo-Bitterroot Task Force filed a complaint in the District Court of Montana against the Forest Service and U.S. Fish and Wildlife Service, concerning the authorization and inadequate environmental analysis regarding Environmental Assessment (EA), and Decision Notice (DN) and Finding of the No Significant Impact for the **Soldier Butler Project** on the Lolo National Forest, in violation of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Administrative Procedures Act (APA).

The plaintiff claims that during project implementation, in addition to temporary road construction and use, 40.3 miles of roads that are currently closed to public motorized access would also be used for project implementation. With the use of these roads during the project will effectively make them the same as open roads in terms of the effects to grizzly bears, which are primarily displaced due to disturbance. The plaintiff's claims for relief:

1. The Forest Service's inadequate impacts analysis violates NEPA and the APA. The Agency conducted an inadequate cumulative impacts analysis because it failed to consider the combined effects of the Frenchtown Face Project and Soldier-Butler Project, specifically the decision to reverse the Frenchtown Face Project's decision to decommission 70 miles of road in the Soldier-Butler Project area.
2. The revised biological opinion (BO) is inadequate and is not in accordance with the law, in violation of the APA. The revised BO for the project uses methods and information that are not based on the best scientific and commercial data and excluded the best available scientific information on road density and secure core habitat. The revised BP is not in accordance with the ESA, in violation of the APA.

Background

Flathead-Lolo-Bitterroot Task Force issued an NOI against the project on June 23, 2020, concerning the projects potential impacts on grizzly bear. The Forest responded to the NOI on August 10, 2020, where the Forest decided to re-initiate consultation on the Soldier Butler project and revise and amend the BO to more clearly address the plaintiff's concerns. The Forest further indicated no ground disturbing activities will occur until the re-initiation process is completed.

Roads that were closed in the Frenchtown Face project were authorized for re-opening in the Soldier Butler Project. The Frenchtown Face project was authorized in a Record of Decision on June 1, 2007. This project authorized activities including timber harvest, prescribed burning road

construction, new road reconstruction, road decommissioning, new OHV road construction, fish habitat rehabilitation, and gravel pit development.

Notice of Intent

Nothing to Report

Other Cases

Land and Wildlife | Region 6

NOI – Dated October 22, 2020, the Secretary of Energy, Bonneville Power Administration, U.S. Corps of Engineers, U.S. Department of Interior, U.S. Fish and Wildlife Service, Bureau of Reclamation, Secretary of Commerce, and NOAA received a 60-day Notice of Intent by EarthJustice intend to sue, pursuant to section 7 and 9 of the Endangered Species Act (ESA), to challenge the Action Agencies regarding the federal listed species in the Columbia River System Operations(pertaining to dams and hydropower operations) within the Columbia River Basin.

EarthJustice claims the Action Agencies have violated sections 7 and 9 of the ESA. Specifically the NOI claims the violations arise from the Action Agencies' failure to comply with the substantive and procedural requirements imposed by § 7 of the ESA, as well as the prohibition on "take" of listed species in § 9 of the ESA, in their coordinated operation and maintenance of federal dams, reservoirs, and related facilities, power marketing and other actions in the Columbia River basin as reflected in their Joint Record of Decision (ROD) for Columbia River System Operations (2020 ROD) dated September 28, 2020.

EarthJustice Claims the action Agencies:

1. Have failed to ensure that their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat.
2. Are taking actions that "may affect" listed species and their designated critical habitat without a valid biological opinion.
3. Have failed to comply with § 7(a)(1) of the ESA.
4. The action agencies are making irretrievable and irreversible commitments of resources, in violation of § 7(d) of the ESA.
5. The action agencies are "taking" listed species without an incidental take statement, in violation of § 9 of the ESA.