

## Ecosystem Management Coordination

*Happy Friday!*

**Court Decisions**

**Nothing to Report**

**Litigation Update**

**Nothing to Report**

**New Cases**

**Nothing to Report**

**Notice of Intent**

### **Forest Management & Wildlife | Region 1**

**NOI – Dated October 23, 2020, the Secretary of the USDA, Chief of the Forest Service, Secretary of the Interior and Director of the U.S. Fish and Wildlife Service (FWS) received a 60 Day Notice of Intent to Sue by the Alliance for the Wild Rockies (AWR) pursuant to the Endangered Species Act (ESA) regarding the revised Biological Opinion (BO) for the **Solder Butler Project** and the **Northern Continental Divide Ecosystem (NCDE) Forest Plan Amendment** on the Lolo National Forest.**

The AWR claims the Forest Service and the FWS violated Section 9 of the ESA and must reinstate consultation on the NCDE Amendments in the Lolo National Forest Plan. The NCDE Amendments were signed in December of 2018 as part of the Lolo National Forest Plan with standards to protect grizzly bears. The NCDE Amendment and corresponding BO and Incidental Take Statement (ITS) set forth reasonable and prudent measures and conservation measures that were necessary and appropriate to minimize the incidental take resulting from the proposed action. AWR claims the Forest Service and FWS ignored their duties under the ESA to ensure their actions do not jeopardize threatened and endangered species (particularly the grizzly bear), do not result in unauthorized take, failed to promote conservation and recovery of these

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endangered species. The Agencies' actions failed to follow their legally binding mandate to protect the species and their habitats.

AWR's claims:

The project results in an ESA section 9 violation, where the Forest Service and FWS must reinitiate consultation on the NCDE Amendment. The project does not comply with the 2017 NCDE Forest Plan Amendments BO's reasonable and prudent measures. The project exceeds the amount of take authorized in the NCDE Amendment BO and ITS in violation of ESA.

1. The project biological assessment and BO violate the ESA. The BA and BO and ITS are inadequate and not valid. The Forest Service must reinitiate consultation and adequately disclose baseline road data.
2. Forest Service and FWS must reinitiate consultation on Lolo National Forest regarding the project.
  - i. The Agencies failed to adequately disclose the impacts of reversing the decision of the Frenchtown Face Project on the grizzly bears.
  - ii. Cumulative impacts from both projects must be analyzed because the Forest Service chose to reverse decisions made in the Frenchtown Face Project, which invalidated the original baseline studies relied upon and required a new
  - iii. The Agencies failure to include important aspects of classification of roads as "undetermined" or "naturally decommissioned" results in the FS not being able to count the decommissioning of these roads toward the net reduction of roads
  - iv. The environmental assessment revealed that at least 137 miles of undetermined roads were discovered in the project area alone and authorizes the addition of 35 miles of undetermined roads. The addition of these new roads indicates a change in circumstances and constitutes **new information** that was not available at the time of consultation on the impacts to grizzly bears during the Solder Butler analysis and requires re-initiation on consultation.

### Background

The Forest Service signed the project's Final Decision Notice (DN) and Finding of No Significant Impact on April 17, 2020. On February 26, 2020, the FWS issued a BO and ITS for the project. On June 23, 2020, AWR filed a 60-Day NOI under ESA, alleging violation related to open road density and survival standards for female grizzly bears, the Forest Service failure to base its decision on the best scientific and commercial data, violations of ESA section 9 prohibitions on taking, its' failure to analyze the nexus between the Ninemile DCA and the Grizzly Bear Recovery Plan and Conservation Strategy, and the Forest Service's failure to consider other important aspects of the problem, such as the impact of illegal motorized use of administratively closed roads and a history of road closure violations.

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The Lolo National 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.

Subsequently, the Forest Service received two complaints in the District Court of Montana concerning inadequate environmental analysis regarding EA and DN for the Soldier Butler Project in violation of NEPA, NFMA, ESA and APA. **First, on October 23, 2020, by the AWR [Alliance for the Wild Rockies, v. Leanne Marten, et al. (20-0156, D. Mont.)]** and **Second, on October 26, 2020, by the FLBTF [Flathead-Lolo-Bitterroot Task Force, v. U.S. Fish and Wildlife Service and Forest Service. (20-0157, D. Mont.)]**. The complaints claim 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 plaintiffs also claim the project will impact the required Elk forage/cover ratio standard; and would impact four tributary watersheds within the project area.

### Other Cases

#### Land and Wildlife | Region 6

**Sierra Club, et al. v. United States Army Corps of Engineers, et al. (20-2039, D. West Virginia; 20-2042, 4<sup>th</sup> Cir.) Region 9**—On November 9, 2020 the 4<sup>th</sup> U.S. Circuit Court of Appeals agreed to pause developers' use of a streamlined water permit (issued by the U.S. Corps of Engineers) for the Mountain Valley pipeline. The stay does not halt work on the project, and construction will continue in upland areas of the pipeline's route.

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