

Ecosystem Management Coordination

Happy Thanksgiving

Court Decisions

Nothing to Report

Litigation Update

Nothing to Report

New Cases

Recreation & Wildlife | Region 4

Center for Biological Diversity v. Bernhardt, et al (20-2131, D. Nevada.) **Region 4**—On November 19, 2020, the plaintiff filed a complaint in the District Court of Nevada against the Forest Service and the U.S. Fish and Wildlife Service (FWS), concerning Phase I (implementation) of the Lee Canyon Ski Area Master Development Plan on the Humboldt-Toiyabe National Forest. The complaint alleges violations of the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and the Administrative Procedures Act (APA), when the FWS issued a Biological Opinion (BO), and the Forest Service issued a Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) authorizing construction of Phase 1. The plaintiffs claim the expansion would disturb hundreds of acres within the Spring Mountain National Recreation Area (SMNRA) for the first time, develop new summer recreation infrastructure including high-speed mountain bike trails and amusement-park-style attractions. Phase 1 would bring thousands of new summer visitors to NFS lands in Lee Canyon, significantly and adversely affect several imperiled wildlife species including the Mount Charleston blue butterfly.

The plaintiff claims:

1. FW's 2020 BO violates ESA and APA
 - a. Failing to consider all relevant factors in making its jeopardy and adverse modification determinations for the butterfly and failing to articulate a rational connection between the facts found and the choices made in making those determinations as well as to the potential effects of the expansion on the recovery of the critical habitat or setting a tipping point.
 - b. Failing to provide a reasoned explanation and analysis concerning the Agencies change in position from earlier documents on critical habitat designations and to analyze the effects of the entire agency action as required by ESA.
 - c. Failing to use the best scientific and commercial data available.

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2. Forest Service violated ESA in relying on FWS's 2020 BO
 - a. Plaintiff claims the BO is unlawful and the reliance is a violation of ESA, because the action cannot insure that the authorization and implementation of Phase 1 is not likely to jeopardize the continued existence of any threatened endangered species or result in the destruction or adverse modification of designated critical habitat.
 - b. Plaintiff claims the BA only considers impacts to so-called 'suitable' and 'non-suitable' butterfly habitat and ignored the vast majority of critical habitat acres within the project area and further divided them into 'core' and 'non-core' with the FWS consequently only considering impacts to suitable, core areas.
 - c. The BO reissued on June 15, 2020, made few changes from the original after reinitiating consultation at the request of the plaintiff. It restricts the analysis to the projects construction footprint and thus ignores the broader impacts of expanded recreation operations, including an increase of thousands of new summer visitors in the critical habitat.
 - d. The Forest Service cannot meet its ESA section 7 obligations for Phase 1 of the MDP with a legally flawed BO.
3. Forest Service violated NEPA and APA in Issuing and Relying on the FEIS
 - a. Forest Service did not analyze any action alternatives that would be consistent with current Forest Plan standards nor did it consider any action alternatives that would require fewer or less impactful changes to the Forest Plan.
 - b. FIES also fails to take a required "hard look" at the proposed action and analyze a purpose and need in a manner broad enough.
 - c. Failed to consider all relevant factors and articulate a rational connection between the facts found and the choices made.
4. Forest Service Violated NFMA and APA in amending the Humboldt-Toiyabe National Forest Land and Resource Management Plan
 - a. Forest Service has not adequately document that it used the best available scientific information to support its decision to amend the Forest Plan.
 - b. Forest Service failed to articulate a rational connection between the facts found and the choice made to enact a geographically limited, project specific Forest Plan amendment.

The project is located entirely on NFS Lands in the SMNRA and proposes to expand its operations. The FWS's BO was signed on June 15, 2020 for Phase 1, the Forest Service signed a FEIS on October 9, 2020 for Phase 1 with a ROD signed on November 9, 2020. Forest Service accepted the Development Plan in 2011 and agreed to process the proposed in December 2016 for Phase 1. Implementation is scheduled to begin in summer of 2021 with modifications and improvements to lifts and ski runs, snowmaking coverage, summer activities such as Mountain Coaster, hiking trails bike trail system and zip line.

Background

On April 1, 2020, received a 60-day Notice of Intent by the Center for Biological Diversity (CBD) to sue the FWS and the Forest Service concerning the expansion of the Lee Canyon Ski Area. The FWS underestimated the impacts of ski area development on the butterfly and its critical habitat by limiting

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analysis to “core” and “non-core” areas—rather than all of the butterfly’s critical habitat impacted by expanded construction and operation of the ski area—and the construction footprint. FWS also failed to consider the impacts of newly proposed summer operations, such as disturbance to the butterfly and its habitat from the development of a significant network of mountain biking trails, and expanded winter operations. Additionally, FWS failed to consider the impacts from later phases of proposed development and the impact development will have on the butterfly’s recovery. Finally, FWS relied on inadequate and vague minimization measures proposed by the Forest Service and failed to adequately protect the species from excessive take.

Notice of Intent

Nothing to Report

Other Cases

Land and Wildlife | Region 9

Appalachian Voices, et al v. U.S. Department of Interior, et al. (20-2159, 4th Cir.) **Region 9**—On November 18, 2020 the 4th U.S. Circuit Court of Appeals denied appellants motion for a temporary stay of activities where protected fish are located. However, this order does not lift a hold on permits issued by the U.S. Army Corps of Engineers on November 9, 2020, which prevents the Mountain Valley Pipeline from completing stream crossings. The project can continue work along protected fish areas, including construction work in upland areas of the pipeline route.

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