

Ecosystem Management Coordination

Happy Friday

Court Decisions

Wildlife | Region 1

Cottonwood Environmental Law Center, v. Bernhardt et. al. (20-cv-00019-DLC, D. Montana) **Region 1**-On December 10, 2020, the District Court of Montana issued an order that directed the Department of Interior, National Park Service, and Forest Service to conduct an additional National Environmental Policy (NEPA) analysis of the **Interagency Bison Management Plan** (IBMP) and issue final agency decision, which could include any of the review options articulated by the plaintiffs, including a revision of the current IBMP. The district court granted the request for voluntary remand without vacatur, but denied Federal Defendants request for stay, as well as denied the plaintiff's request for a preliminary injunction.

Federal Defendants asked the district court to remand the case to the agencies involved for and additional IBMP adopted in 2000 and leave the current IBMP plan in force until the NEPA analysis is complete. The court ordered Federal Defendants to conduct a NEPA analysis of the IBMP and they may adopt several alternatives and issue a final decision. The IBMP will remain in full force and effect pending issuance of a final decision. The stay was denied, and the plaintiff's preliminary injunction was denied as premature.

Background

Federal Defendants filed a Motion for Voluntary Remand on July 1, 2020. The plaintiff responded on July 9, 2020. On October 15, 2020, the 9th Circuit Court of Appeals dismissed the appeal and issued a mandate on December 7, 2020.

On April 30, 2020, Montana District Court Judge Sam Haddon denied Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining in part, denying the Temporary Restraining Order. The plaintiff's motion was filed on April 29, 2020. This case regards bison related activities.

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In July 2018, the plaintiff sued federal (Park Service, Forest Service, and Animal Plant Health Inspection Service) IBMP partners and the State of Montana (also a partner). Cottonwood alleged that these IBMP partners were violating NEPA by failing to supplement, or to determine whether they needed to supplement NEPA analysis for the IBMP. The District Court dismissed the complaint. The plaintiff appealed to the 9th Circuit in June 2019. As noted previously, the 9th Circuit reversed this dismissal and remanded the case to the District Court for further proceedings.

In 2014, the National Park Service issued a Notice of Intent in the Federal Register to conduct a Supplemental EIS or new EIS due to new information/changed circumstances. The Forest Service signed a Memorandum of Understanding to participate as a cooperating agency in the new NEPA analysis. The Forest Service's role in any new NEPA analysis arising from this case will be limited to acting as a cooperating agency.

Wildlife | Region 1 & 4

Western Watersheds Project et al v. USDA APHIS, USDA APHIS Wildlife Services (USFS and BLM) (20-213, D. Idaho.) **Regions 1 and 4**—On December 11, 2020, the District Court of Idaho granted **Animal and Plant Health Inspection Service** (APHIS) motion request to dismiss the case. The plaintiffs May 7, 2020 complaint alleged NEPA was violated by APHIS for failure to sufficiently analyze the environmental impacts of their predator control activities in Idaho and the operation of the Pocatello Supply Depot (PSD). The PSD was analyzed in a 1994 Programmatic Environmental Impact Statement (PEIS), which was reissued in 1997 with some corrections. The PEIS is the only public NEPA analysis of the PSD, and it addressed the PSD in cursory fashion. NEPA analysis was conducted when the PSD was federalized, or prior to issuance of Directive 3.115.

The district court found:

Agency Acton

The district court indicated that there are two separate actions that need to be analyzed:

- (1) Wildlife Services distribution of products internally from the PSD to other APHIS' offices. Here the court determined that internal distribution of products plaintiffs have not alleged agency action, or final agency action; and
- (2) The PSD's sales of products to non-federal third parties. Here the court can see how third-party sales may be akin to a license to use the products; but the plaintiffs have

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not identified a particular sale or sales that they believe should be subject to NEPA. Instead, they attack APHIS' general program of producing and selling these products.

NEPA

The court determined that there are no major federal actions yet to be completed at the PSD. The major federal action occurred when the PSD was constructed and began operating in 1940. This action is now complete. Because there is no planned, or proposed, action at the PSD there is no requirement that APHIS supplement its NEPA analysis.

Leave to Amend

Plaintiffs have not challenged specific sales of products from the PSD and have thus failed to allege final agency action. Further, the plaintiffs have not pled standing to challenge these sales nor that these sales are major federal actions. The court is skeptical that plaintiffs can overcome these hurdles but is not in a position to conclusively say that the claim cannot be saved by amendment. Therefore, the court grants the Defendants' motion to dismiss, but with leave to amend the complaint. The plaintiffs have 30 days from the date of the order to amend their complaint.

Background

On May 7, 2020, the plaintiffs filed a complaint in the District Court of Idaho against the APHIS concerning their predator damage management actions in the State of Idaho, without adequate and outdated environmental analysis in violation of the NEPA. The plaintiffs bring related claims against the Bureau of Land Management (BLM) and Forest Service, which authorized APHIS's aerial gunning of coyotes and other wildlife on federal lands [through Annual Work Plans (AWPs)], without adequate environmental analysis in violation of NEPA.

Forest Management & Land| Region 1

Cottonwood Law Center, v. Leanne Marten, et al. (20-00031, D. Mont.) Region 1—On December 17, 2020, the District Court of Montana issued a favorable decision to the Forest Service. The decision denied the plaintiff's Motion for Temporary Restraining Order (TRO) and Preliminary Injunction (PI) and granted the Agency's Motion to Dismiss regarding alleged violations of the National Environmental Policy Act, concerning the **1987 Custer Gallatin National Forest Plan** and the **Bozeman Municipal Watershed, North Hebgen, North Bridgers Projects** on the **Custer Gallatin National Forest**.

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The district court analysis:

1. Motion to Dismiss

The complaint fails to state a claim upon which relief can be granted.

2. First Claim

The plaintiff failed to present a plausible claim because Forest plans are general land management planning mechanisms that only require NEPA analysis when adopted or amended for major Federal actions where there remains major Federal action to occur. No ongoing major federal action exists that could require supplementation of the 1987 Forest Plan based on new information related to climate change or forest plan revisions.

3. Second Claim

- a. The plaintiff fails to present a plausible claim for relief for the North Bridger Project because the HFRA's statutory CE exempts the Project from NEPA analysis.
- b. The plaintiff fails to present a plausible claim for relief on the other two projects, because it fails to provide facts or case law that would support a claim that an announced forest plan revision by itself constitutes new information that affects the environment and triggers supplementation of the original forest plan EIS.
- c. The announcement of the plan revision does not similarly provide new information that would affect the quality of human environment in a significant manner.

4. Third Claim

The plaintiff fails to present a plausible claim for relief because the BMW Project already addressed the alleged new information regarding internal estimates of sediment reduction as a result of the City of Bozeman's installation of an upgraded water treatment plant according to the record. Based on the record, the plaintiff fails to allege how these already considered factors would constitute new information requiring further analysis under NEPA.

5. Fourth Claim

- a. The plaintiff fails to provide a plausible claim relating to the North Bridger Project alleging new information regarding the marking of trees after the projects were approved because the Project is exempt from further NEPA analysis under HFRA's statutory CE.
- b. The plaintiff fails to allege facts that show marking of trees constitutes new information requiring supplemental NEPA of the BMW Project citing no legal basis for its assertion.

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6. Motion for Temporary Restraining Order and Preliminary Injunction

The plaintiff fails to state a claim upon which relief can be granted, or to show that it will likely succeed on the merits.

Background

On September 10, 2020, the plaintiffs filed an amended complaint in the District Court of Montana against the Forest Service concerning the Agency's failure to supplement its National Environmental Policy Act (NEPA) analysis for the **1987 Custer Gallatin National Forest Plan** in light of new information and changed circumstances regarding climate change and forest management in the Wildland Urban Interface (WUI). The plaintiffs also challenge the approval of the BMW and North Bridger Forest Health Project (NBFH) under the 1987 Forest Plan and adds the North Hebgen Project to the case. The initial complaint was filed in the district court on July 21, 2020.

Wildlife | Regions 1, 2, 4

WildEarth Guardians, et al. v. U.S. Forest Service, et al. (19-00203, D. Idaho) **Regions 1, 2, 4**—On December 23, 2020, the District Court in Idaho denied the Defendant's motion to dismiss the case's remaining claim (Count I) for reinitiating consultation based on take of grizzly bear resulting from **black bear baiting for hunting** in national forests in Idaho and Wyoming. The district court granted the plaintiffs' motion to amend and supplement their complaint. The court determined that the case is not moot, and that it does have jurisdiction for the case to proceed. The plaintiffs alleged violation of the National Environmental Policy Act (NEPA), and Endangered Species Act (ESA).

The district court found:

- The cessation of the conduct complained of by plaintiffs supports their claims as long as effective relief may still be available to determine the conduct's detrimental effects.
- The Forest Service's argument that the plaintiffs have failed to state a claim for failure to reinitiate consultation under the ESA fails.
- The plaintiffs' proposal to supplement the complaint alleging of improper rescission of the 1993 BO and 1995 Letter of Concurrence are properly considered in connection with the challenge raised in Count I of the complaint under ESA. The Court finds, as it did in its prior memorandum decision, that the plaintiffs' have stated a plausible claim for relief.
- The court declined the Forest Service's suggestion to stay further proceedings and permit supplemental briefing and to rescind the consultation documents.

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Conclusion: The district court is not deciding the merits of plaintiffs’ claims, and the question whether there was “agency action” triggering the ESA consultation requirement. The present stay of proceedings will be terminated, and the plaintiffs may file the proposed amended and supplemental complaint and the Forest Service is directed to file an answer and compile the administrative records pertinent to the claims asserted in the amended and supplemental complaint. **The plaintiffs are to file their amended and supplemental complaint by January 6, 2021. The proposed scheduling order for these proceedings are due by January 20, 2021.**

Background

On May 7, 2020, the district court issued an order that granted the Forest Service’s motion to dismiss the plaintiffs’ claim that the Agency supplement the 1995 Environmental Assessment (EA) based on new information. However, the district denied the Forest Service’s and U.S. Fish and Wildlife Service’s motion to dismiss the plaintiffs’ claim for reinitiating consultation based on take of grizzly bear resulting from black bear baiting for hunting in national forests in Idaho and Wyoming.

Litigation Update

Nothing to Report

New Cases

Forest Management | Region 1

Alliance for the Wild Rockies and Native Ecosystem Council v. Leanne Marten, et al. (20-00179, D. Mont.) **Region 1**—On December 11, 2020, the plaintiffs filed a complaint in the District Court of Montana against the Forest Service and the U.S. Fish and Wildlife Service (FWS) challenging the **Stonewall Vegetation Project** and **Forest Plan Amendment #35** on the Helena-Lewis and Clark National Forest; claiming the Agencies are in violation of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Endangered Species Act (ESA), and Administrative Procedures Act (APA). The plaintiffs claim the Forest Service did not reinitiate ESA consultation for the project for the grizzly bear, Canada lynx or its critical habitat, bull trout or its critical habitat, based on **new information** that reveals effects of the action and/or modification of the project that causes effects not considered in the biological assessment (BA) or biological opinion (BO) concurrence from the FWS. The original BA and BO concurrence were prepared in 2016.

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The plaintiffs claim:

1. The Agencies failed to reinitiate ESA consultation for the project for grizzly bears. In 2018 the Forest Service amended its Forest Plan and added new management direction for grizzly bears. The BA and concurrence for the project failed to address several requirements that are in the 2018 plan. Additionally, there is **new information** regarding road density in one of the units. The baseline data is no longer accurate, and this was information the Forest Service relied on to make decisions on the impacts of grizzly bears.
2. The Agencies failed to reinitiate ESA consultation for the project for Canada lynx and its critical habitat. The Park Creek fire burned through the Project area in 2017 and significantly changed the baseline for lynx. In October 2017, the FWS issued a programmatic BO for the impact of the Northern Rockies Lynx Management Direction on lynx critical habitat after the 2016 concurrence was prepared.
3. The Agencies failed to reinitiate ESA consultation for the project for bull trout or its critical habitat. Post-fire conditions in the project area will result in a degraded baseline for bull trout or its critical habitat due to increased stream sedimentation and higher water temperatures from cover removal. The impacts of the project and the degraded baseline and new reasonably foreseeable sedimentation effects from the fire, the impacts to bull trout and critical habitat from this project would be different than those effects previously analyzed in the 2016 BA.
4. The project and its EIS analysis of elk and elk habitat violates NEPA, NFMA, and APA. The EIS misrepresents or fails to accurately disclose the findings of Montana Fish Wildlife and Parks regarding elk security and elk objectives on the Lincoln Ranger District, as well as the best available science regarding displacement of elk from degraded public lands onto private lands and the resulting impacts to hunting opportunities. The Forest Service has not demonstrated compliance with the Montana Elk-Logging Study Recommendation for Road Management as required by the Forest Plan.
5. The site-specific Forest Plan Amendment #35 and Agency practice of issuing successive site-specific amendments to evade analysis of a “significant” Forest Plan amendment violates the NFMA, NEPA, and the APA. The Forest Service failed to analyze a reasonable range of alternatives and assess the cumulative effects of reasonably foreseeable actions for the Forest Plan amendment, failed to demonstrate compliance with the 1982 planning regulation requirements, and practice of issuing successive site specific amendments to evade the analysis of what is actually a significant Forest Plan amendment.

On December 19, 2019, the Forest Service issued a Record of Decision authorizing the project and Forest Plan Amendment #35”, where alternative 4 from the Supplemental EIS was

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authorized. Alternative 4 consists of the remaining units within the project boundary that were not affected by the Park Creek fire.

Forest Management | Region 6

Blue Mountain Biodiversity Project v. Shane Jeffries, et al. (20-2158, D. Or.) Region 6—On December 11, 2020, the plaintiff filed a complaint in the District Court of Oregon against the Forest Service, concerning the **Walton Lake Restoration Project** on the Ochoco National Forest for approving the project in violation of the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA). The plaintiff alleges the project significantly shifts how the Forest Service manages the Walton Lake area. On December 7, 2020, the project was approved through a decision notice (DN), including Finding of No Significant Impact (FONSI), and underlying environmental assessment (EA). The plaintiff further claims the DN violates the National Forest Management Act (NFMA), in addition to NEPA.

The plaintiff claims:

1. Violations of NEPA and the APA for: flawed and illegal public involvement process; purpose and need statement is unreasonably narrow; failing to analyze and adequate range of alternatives; Forest Service’s continuing contract with T2 violates NEPA; project’s is “significant” under NEPA and requires and EIS; improperly limited geographic scope of cumulative impacts analysis; and improper soils analysis.
2. Defendants’ violations of NFMA and the APA: proposed site-specific Forest Plan Amendments violate NFMA; Forest Plan Amendments are significant under NFMA and require additional procedures, including an EIS; the EA and DN fail to give proper consideration to applicable 2012 Planning Rule factors for plan amendments; improper soils analysis; and final EA violates INFISH.

Background

The complaint indicates that the project challenges the Forest Service’s unlawful decision regarding Walton Lake in the past. A federal court issued a preliminary injunction against implementation of previous iteration of the project in 2016 (Walton Lake Project), and the Forest Service then withdrew the decision memo (DM) for the Walton Lake Project in order to do additional NEPA analysis. However, before the project was enjoined and the DM withdrawn, the Forest Service entered into a contract giving a private timber company the right to conduct the commercial logging authorized by the Walton Lake Project. This logging contract was not withdrawn or cancelled in 2016 and remained in place during all the Forest Service’s subsequent NEPA analysis and was still in place when the Forest Service made the project decision.

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The complaint indicates further that the project decision approves logging of hundreds of large trees and numerous very large old growth trees in the project area, including a predominately fir, old growth forest in the Walton Lake visual influence area. Implementation of the Walton Lake Restoration Project (the “Project”) will result in the loss of more than 500 old growth firs, destruction of visual quality provided by the old growth forest, degradation of excellent wildlife habitat, significant impairment to outdoor recreation in the Project Area, and negatively impact the aesthetics, social context, and biophysical aspects of Walton Lake’s current and beloved sense of place. Recreational activities in the project Area like hiking and bird watching will also be significantly impaired.

Forest Management | Region 4

Alliance for The Wild Rockies, Yellowstone to Uintas Connection, and Native Ecosystems Council v. U.S. Forest Service, et al. (20-570, E.D. Idaho.) **Region 4**—On December 16, 2020, the plaintiffs filed a complaint in the Eastern District Court of Idaho alleging violation of the National Environmental Policy Act (NEPA) for approving through decision memo (DM) the **Middle Henrys Aspen Enhancement Project** on the Caribou-Targhee National Forest, with use of the use of a Categorical Exclusion CFR 220.6(e)6 (CE) to improve timber stand and wildlife habitat. The plaintiffs also allege violations of the National Forest Management Act (NFMA) and Administrative Procedures Act (APA).

The plaintiff claims:

1. Violations of NEPA and APA: Failure to Conduct Environmental Review:
 - a. The Forest Service failed to acknowledge or consider multiple extraordinary circumstances related to the project.
 - b. Those circumstances require the preparation of an EA or EIS.
 - c. The Forest Service failed to take a hard look at the projects significant adverse environmental impacts and failed to provide a full and fair discussion of those impacts.
2. Violations of NFMA and APA: Failure to Comply with the Targhee National Forest Revised Forest Plan
 - a. The Targhee National Forest has not completed a reliable inventory of old growth and there is uncertainty regarding whether the Targhee Revised Forest Plan guideline for old growth has been met.
 - b. The project violates cavity nesting and snag habitat set out in the Forest Plan.
 - c. The project fails to demonstrate compliance with the lynx amendment for maintaining habitat connectivity in lynx linkage areas.

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Background

The project was authorized under a DM (signed July 9, 2020) using 36 CFR 220.6(e)6, “Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction.”

Forest Management, Lands, & Travel Management | Region 10

Organized Village of Kake, et al. v. Perdue, et al. (20-0011, D. Alaska) **Region 10**—On December 23, 2020, the plaintiffs filed a complaint in the District Court of Alaska against the Department of Agriculture (USDA) and the Forest Service, concerning the **2020 Exception that exempts the Tongass National Forest from the Roadless Area Conservation Rule** (Roadless Rule), in violation of the Administrative Procedures Act (APA), Organic Administration Act (OAA), National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and the Alaska National Interest Lands Conservation Act (ANILCA).

The plaintiffs claim that the final environmental impact statement (FEIS) assumes that opening 9.4 million acres of the Tongass to logging will not increase logging and therefore will not have any environmental effects beyond those analyzed in the EIS for the current Tongass Forest Plan; and that logging in remote roadless areas is not likely to be economic yet opens areas to logging for providing more timber sales. This analysis is contradictory, it assumes both the Exemption will benefit the timber industry and that it will have no effect on logging levels or the environment, which indicates the Forest Service’s decision is arbitrary and means the FEIS fails to provide an assessment of the full impacts of the Exemption. Also, the Agency failed in their draft EIS and FEIS, to make findings addressing the impacts of the decision on subsistence users, as required by ANILCA, and failed to consider alternatives that would meet the purpose of the rulemaking while reducing the environmental effects of the action.

Specific claims:

1. Violation of ANILCA: Failed to include in Exemption’s draft and final EIS findings about the Exemption’s potentially significant restriction of subsistence uses, which are not in accordance with the law. Also, Defendants failed to make an evidence-based and minimally rational determination about the necessity of the Exemption’s potentially significant restrictions on subsistence is not in accordance with the law.
2. Arbitrary and Capricious Decision making: The rationales Defendants provided for exempting the Tongass from the Roadless Rule are contradicted by the Agency’s own

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conclusions and evidence in the record. Also, Defendants did not provide an adequate explanation for rescinding the Roadless Rule without more effort to develop actual evidence to support its rationales. Therefore, the October 29, 2020 decision to exempt the Tongass from the Roadless Rule was arbitrary and capricious exercise of their authority and responsibility under the OAA and the NFMA.

3. Failure to Consider a Range of Reasonable Alternatives: Because the no action alternative considers these environmental-protection (such as considering alternatives that only opened roadless areas to the extent needed to respond to unique communities dependence on federal logging and milling) ways of responding to any unique dependence of communities on federal lands logging Defendants violated NEPA.
4. Arbitrary Analysis of Effects: Defendants relied on inaccurate assumptions in conducting their analysis of environmental impacts, failed to provide an informed estimate or analysis of the direct, indirect, and cumulative environmental effects of their decision to exempt the Tongass from the 2001 Roadless Rule, therefore violating NEPA.

Notice of Intent

Forest Management | Region 4

NOI- Dated December 14, 2020 (received December 30, 2020), Forest Service and U.S. Fish and Wildlife Service (FWS) received a 60 Day Notice of Intent to Sue by the Alliance for the Wild Rockies (AWR), Yellowstone to Uintas Connection (YUC), and Native Ecosystems Council (NEC) pursuant to the Endangered Species Act (ESA) regarding the **Middle Henrys Aspen Enhancement Project on the Caribou Targhee National Forest, and regarding reinitiation of consultation on the 1997 Forest Plan.**

The AWR, YUC and NEC claims the Forest Service violated section 7 and 9 of the ESA when the Agency's biological assessment (BA) failed to adequately and fully address the project's impacts to the grizzly bear (helicopter use); and the Agency failed to fully address the project's impacts on the Canada lynx. The Forest Service also failed to consider impacts the project would have on wolverines and their ability of the area to maintain suitable reproductive habitat for the species. In addition, the Forest Service must reinitiate/initiate consultation on the 1997 Forest Plan, regarding impacts to grizzly bears in the Island Park bear analysis unit (BAU), based on new information that shows the species has moved into the area.

The AWR, YUC, and NEC specifically claim:

1. Grizzly bear: The Forest Service's BA failed to adequately and fully address all impacts to the grizzly bear (helicopter use) and Canada lynx. The agencies analysis regarding the timber

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harvest impacts to grizzly bears is arbitrary. The Agencies fail to consider the fact that grizzly bears utilize areas within 500 meters of roads. The FWS must produce a biological opinion (BO) and incidental take statement (ITS) for the grizzly bear.

2. Canada lynx: The Forest Service failed to adequately and fully address all impacts to the Canada lynx. The project level consultation violates terms and conditions of the programmatic BO and resulting in illegal take of Canada lynx. The Forest Service determined that primary and secondary lynx habitat exists in the project area, according to the 2014 Lynx Analysis Map disclosed in the Targhee NF Lynx Analysis Units final environmental impact statement.
3. Wolverine: The Forest Service and FWS failed to consider the impacts the project would have on wolverines and the ability of the area to maintain suitable reproductive habitat. There is research over the past 3 decades that summarize the key components of wolverine ecology.
4. Forest Plan: The Forest Service must reinitiate/initiate consultation on the 1997 Forest Plan, regarding impacts to grizzly bear in the Island Park BUA. Since the 1997 Forest Plan consultation, grizzly bears are now present and residing in the Island Park BAU. This new information reveals the Forest Plan may affect the grizzly bear in ways that was not previously considered. The Forest Service and the FWS must reinitiate consultation on the Forest Plan's impact on the grizzly bear; failure to do so is a violation of section 7 of the ESA.

Forest Management | Region 1

NOI- Dated December 22, 2020, the Forest Service and U.S. Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM) received a 60 Day Notice of Intent to Sue by the Alliance for the Wild Rockies (AWR) and Native Ecosystems Council (NEC) pursuant to the to the Endangered Species Act (ESA) regarding the Castle Mountain Project on the Helena Lewis & Clark National Forest.

The AWR and NEC state that the FWS issued a rule proposing to list the whitebark pine under the ESA on December 2, 2020, and that whitebark pine is present in the project area. The AWR and NEC claim whitebark pine may be affected by damage from equipment and equipment trails, cutting, soil compaction and disturbance among various other actions that will take place in support of the Project. No discussion on the success rate of natural regeneration under these conditions is provided. The Forest Service does not disclose or address the results of its only long-term study on the effects of tree cutting and burning on whitebark pine named "Restoring Whitebark Pine Ecosystems", despite admitting some adverse impacts are possible.

The AWR and NEC specifically claim the effect of the project on the whitebark pine must be analyzed in the project's Biological Assessment (BA) and the FWS must issue a letter of concurrence since the species is present in the project area.

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The project consists of over 22,000 acres of logging and burning activities in the Castle Mountains and authorizes over 35 miles of road construction or reconstruction. The Record of Decision (ROD) was signed on December 19, 2019.

Other Cases

Nothing to Report

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