Court Decisions

Grazing | Region 3

Sacramento Grazing Association, Inc., et al. (04-786, U.S. Court of Federal Claims) **Region 3**—On July 23, 21, 2021 the U.S. Court of Federal Claims issued a mostly favorable decision to the Forest Service concerning the Agency's request for reconsideration of the court's 2017 liability determination that the Forest Service "effected a physical taking of plaintiffs right to beneficial use of stock water sources under New Mexico law in the **Sacramento Allotments** of the Lincoln National Forest. The court granted the Forest Service's motion that the plaintiffs have not met their burden to show that as the date of the alleged taking they possessed a water right recognized under state law. However, the court denied the Agency's motion that the plaintiff's clams are time-bared under applicable six-year statute of limitations.

The court's conclusions:

1. Court holds that the 2017 Liability Opinion correctly adjudicated the statute of limitations issue in this case and concludes that plaintiffs' physical takings claim began to accrue on May 5, 1998.
2. The Court found that the plaintiffs did not possess a right to beneficial use of stock water sources in the Sacramento Allotment under New Mexico law at the time of the alleged taking. Under the doctrine of prior appropriation, water rights, even those based upon pre-1907 rights, are simply not appurtenant to land and, as such, require a separate written conveyance – which plaintiffs do not possess. Accordingly, the 2017 Liability Opinion's property rights determination must be modified pursuant to RCFC 54(b).

Background

On August 26, 2020, the Forest Service filed its Motion for Reconsideration pursuant to RCFC 54(b), arguing that the 2017 Liability Opinion rests on fundamental errors of fact and law for the following reasons: (1) plaintiffs' claims are time-barred under the applicable six-year statute of limitations, and (2) plaintiffs have not met their burden to show that as of the date of the alleged taking they possessed a water right recognized under state law.

On November 3, 2017, the court found the Federal Government violated plaintiffs' rights under New Mexico law to beneficial use of stock water. (i.e., *"USFS's May 5, 1998 AOP* [Annual Operating Plan] *Amendment effected a taking under the Fifth Amendment to the United States Constitution…"* The Court directed parties to *"undertake a renewed effort to ascertain whether alternative water sources can be made available."* The decision did not enjoin or prohibit the United States from maintaining the exclosures, nor does it prevent the United States from implementing other needed protections for listed species.

On May 4, 2004, plaintiffs filed their initial complaint with the court, alleging both a physical and a regulatory Fifth Amendment Taking by the USFS of the Goss Ranch, which included plaintiffs' appurtenant water rights acquired by their predecessors-in-interest, forage rights, preference grazing rights, and range improvements. On September 6, 2005, plaintiffs filed their First Amended Complaint, identifying their specific water rights for their takings claim. On August 12, 2011, plaintiffs filed their Second Amended Complaint, withdrawing their regulatory takings claim and reiterating their physical takings claim of SGA's right to beneficial use of stock water sources on the Sacramento Allotment.

Forest Management | Region 1

Alliance for The Wild Rockies v. Pierson, et al (21-244, D. Idaho) **Region 1—**On July 23, 2021 the District Court of Idaho issued an unfavorable decision against the Forest Service granting a preliminary injunction (PI) on the **Hanna Flats Project** on the Idaho Panhandle National Forest. The court found there are, at minimum, serious questions as to whether the Forest Service adequately demonstrated that the project area falls within Healthy Forest Restoration Act's (HFRA) statutory definition of the wildland-urban interface (WUI), and thus whether our invoking of HFRA's categorical exclusion (CE) is unlawful. The court also determined a likelihood that irreparable injury will result if the project is allowed to proceed; and that the public interest and balance of equities tip in favor of the plaintiff and support the issuance of a PI.

The decision authorized 1,843 acres of commercial logging, 360 acres of precommercial logging and 149 acres of prescribed burning. Approximately 1,109 acres of the commercial logging is "regeneration harvest" and includes temporary road construction, excavated skid trail construction, and road maintenance. Implementation of the project is anticipated to start by July 2, 2021.

The court conclusion on granting the PI:

1. On the Merits: the court determined that the Forest Service failed to apply HFRA's definition of WUI in determining whether the project are is excluded from the NEPA requirements and instead relied exclusively on Bonner County's community wildlife protection plan's determination of the WUI. The county's WUI definition is inconsistent with HFR's definition and cannot provide a justification for a CE under HFRA. Specifically, the court:
    a. Indicated that missing from both the County Hazard Mitigation Plan and the Forest Service's Supplemental DM is any discussion or analysis of the project area using HFRA's definition of a WUI interface including whether the project is in or adjacent to an at-risk community as defined by HFRA.
    b. Disagrees that the Supplemental DM demonstrates that the communities of Nordman and Lamb Creek, both of which are mapped and identified in the Supplemental DM, comply with the HFRA definition of "at risk community."
    c. The Forest Service's argument that HFRA does not require the at-risk community to border the project area is unpersuasive.

d. The statement in the Federal Register was taken out of context and does not negate the explicit requirement of the subsection (ii) definition that to be an at-risk community, the community must be "within or adjacent to Federal Land."
e. Indicated that the communities identified in the Supplemental DM—Nordman and Lamb Creek—are three miles away and one mile away, respectively, from the project area. The communities do not, therefore, support the Forest Service's determination that the project area is entirely located within the WUI.

2. Irreparable Harm: the court determined the plaintiff makes the requisite showing that there is a likelihood that irreparable injury will result if the project is allowed to proceed without an evaluation of the environmental impact of the project or an adequate explanation of how the project area qualifies for a categorical exclusion under HFRA.
3. Public Interest and Balance of Equities: the court recognizes that there are strong public interests on both sides but finds that the public interest and balance of equities tip in favor of the plaintiff and support the issuance of preliminary injunctive relief.

Background

On June 7, 2021, the plaintiff filed a complaint against the project, where they seek judicial review under the APA and ESA claiming the Forest Service's October 11, 2018 DM and May 28, 2021 Supplemental DM approving the project is in violation of the law and an abuse of discretion. Specifically the plaintiff claims the Forest Service failed to: (1) demonstrate compliance with the Forest Plans 2015 Access Amendment concerning grizzly bear; and (2) establish that the project is in a WUI as defined under the HFRA, therefore we have not established that we may categorically exclude the project from NEPA analysis and administrative review. The plaintiff also claims that our supplemental DM does not comply with the court remand on the earlier Hanna Flats case.

On April 27, 2021 the district court issued a Memorandum Decision and Order remanding (without vacating) the Forests Service's DM for the Hanna Flats project and directed the Agency to issue a supplemental DM. The DM for the project was signed on October 11, 2018 and utilized three CEs: (1) the Insect and Disease provision of the HFRA (16 U.S.C. 6591b); (2) Category 1 – construction and reconstruction of trails (36 CFR 220.6(e)(1)); and (3) Category 20 – activities that restore, rehabilitate, or stabilize lands occupied by non-system roads and trails (36 CFR 220.6(e)(20)).

Litigation Update

Forest Plan | Region 1

WildEarth Guardians, et al. v. Steele (19-0056, D. Mont.) and **Swan View Coalition, et al. v. Steele** (19-0060, D. Mont.) (member case) **Region 1**—On July 22, 2021 the plaintiffs filed a motion to amend the District Court of Montana's June 24, 2021 decision by requesting the district court to vacate the unlawful provision of the **2018 Revised Flathead Forest Plan for the Flathead National Forest**. The plaintiffs request the court: (1) reinstate the former Forest Plan Amendment 19 that were repealed by

the unlawful provisions of the Revised Forest Plan in violation of the Endangered Species Act (ESA); and (2) amend the judgement by remanding the Revised Forest Plan to ensure that the Forest Service undertake meaningful reconsideration of the plan's unlawful provisions.

The motion is filed pursuant to Local Civil Rule 7.1(c)(1); and under Rule 59(e). The complaint raised claims pursuant to the APA for violations of NEPA, NFMA, Forest Service 2012 Planning Rule, and Executive Order 11644 (as amended), USDA travel management regulations (36 CFR, Part 212), and the ESA.

Background

On June 24, 2021 the district court issued an unfavorable decision to the Forest Service and U.S. Fish and Wildlife Service concerning the 2018 Revised Flathead Forest Plan, including Amendments 19 & 24 and supporting 2017 BO. The Forest Service prevailed on the NEPA claims. However, the plaintiffs prevailed on several ESA claims, specifically: (1) Grizzly bear — the 2018 Revised Flathead Plan is arbitrary and capricious to the extent it did not consider the impacts of its departure from Amendment 19's road density and reclamation standards, did not consider the impact on the entire grizzly population, did not adequately explain the adoption of the 2011 access conditions, and adopted a flawed road density and secure core habitat surrogate in its take statement. (2) Bull trout – the Forest Service departed from Amendment 19's culvert removal requirements violated the ESA. And (3) the Forest Service improperly relied on the flawed aspects of the 2017 BO. The court remanded 2017 BO back to the Forest Service without vacating.

New Cases

Fisheries | Region 1

Wilderness Watch, et al. v. Leanne Marten, et al. (21-0082, D. Mont.) **Region 1—**On July 22, 2021, the plaintiff filed a complaint in the District Court of Montana against the Forest Service regarding the **North Fork Blackfoot River Westslope Cutthroat Trout Conservation Project** on the Lolo National Forest. The plaintiffs claim the Forest Service violated the Wilderness Act when authorizing the project to conduct a large-scale helicopter-assisted stream poisoning to remove previously stocked fish, followed by the stocking of Westslope cutthroat trout in areas that were likely historically fishless. Also, the Forest Service violated the National Environmental Policy Act (NEPA) by not taking a "hard look" at the environmental consequences of the decision to categorically exclude the decision to authorize the project and not evaluate all reasonable alternatives.

The plaintiff claims:

1. Violation of the Wilderness Act and Implementing Regulations:
   a. The FS violates the Wilderness Act by authorizing a project that undermines the Act and the prohibited activities are not necessary to meet minimum requirements for the administration of the area.

b. Montana Department of Fish, Wildlife, and Parks (FWP) wildlife management objectives are antithetical to the preservation of wilderness character.
c. FS's reasoning is inherently arbitrary, and it is inadequate to overcome the Wilderness Act's strict protective provisions.
d. The presence of ESA protected bull trout below the falls would likely preclude the application of rotenone for similar purposes. The FS did not acknowledge or address these issues in its analysis.
e. The FS determination that helicopter assisted fish poisoning and stocking in the wilderness is the minimum action necessary for achieving that objective is arbitrary and unsupported.

2. Violation of NEPA, and Unlawful use of CE, Failure to Prepare an EIS and Adequately Evaluate Impacts and Alternatives:
   a. The FS arbitrarily disregards the actual scope of the FWP's planned action and the segmentation of the FWP's proposal also renders the DM unlawful.
   b. The selected CE 6 does not apply to the project and is unlawful, but even if it did, extraordinary circumstances render its application unlawful.
   c. The FS determined the project "may affect and is likely to adversely affect grizzly bear," which is an ESA listed species. These are extraordinary circumstances requiring thorough analysis.
   d. A reasonable range of alternatives were not analyzed, in violation of NEPA.
   e. FS failed to take a "hard look" at the impacts of rotenone on non-target species.

Notice of Intent to Sue

Nothing to Report

The NFS Litigation Weekly Newsletter is provided to Forest Service employees for internal, informational purposes and is not intended to provide a legal/policy opinion or interpretation of its subject matter. Information presented in the Litigation Weekly is publicly available via official court records. Official court records should be consulted for the post complete accurate discussion of each case.