

Ecosystem Management Coordination

Court Decisions

Forest Management | Region 2

Swomley, et al. v. Schroyer, et al. (20-1335, 10th Cir.; 19-1055, D. Col.) **Region 2**—On October 15, 2021, the 10th Circuit Court of Appeals issued a favorable decision to the Forest Service affirming the District Court of Colorado’s September 3, 2020 order regarding the **Upper Fryingpan Vegetation Management Project** on the White River National Forest. The Circuit upheld the Forest Service’s decision based on the plaintiffs’/appellants’ inadequate briefing of the issues. The three issues raised in appeal were: 1) failure to consider climate change impacts; 2) failure to consider impacts to fungi; and 3) an environmental impact statement (EIS) was required.

The 10th Circuit determined:

1. **Climate Change Impacts:** The petitioners claimed the Forest Service failed to consider the indirect and cumulative effects on GHG emissions and climate change, and the District Court erred in concluding otherwise: The 10th Circuit dismissed the claim because petitioners failed to adequately brief this issue on appeal. They presented arguments divorced from legal or factual predicates and failed to cite to the administrative record.
2. **Mycelium Impacts:** The 10th Circuit rejected the petitioners claim that the Forest Service failed to ensure the scientific integrity of the effects on *Mycelium* due to inadequate briefing. The studies cited by the petitioners were not included in their appendix and the court was not able to assess the rationale behind the Agency’s scientific findings.
3. **EIS Analysis:** The petitioners claimed that an EIS should have been done and the project’s impact is significant enough. The court rejected this claim because the petitioners failed to adequately brief the issue. The court also rejected the petitioner’s argument that the project is sufficiently controversial requiring an EIS.

Background

On September 3, 2020 the district court issued a favorable decision to the Forest Service concerning the project, where the court determined the plaintiffs failed to show that the Agency violated the NEPA or APA. The circuit court determined that the Forest Service adequately considered the project’s impacts on climate change; adequately considered scientific evidence

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regarding project's impacts to fungi; and was not required to prepare an EIS. The court dismissed the petition and granted judgement to the Forest Service on all counts.

Litigation Update

Nothing to Report

New Cases

Forest Management | Region 6

Umpqua Watersheds, Cascadia Wildlands, and Oregon Wild v. Sherri Chambers, et al. (21-1505, D. Oregon) **Region 6**—On October 14, 2021, the plaintiffs filed a complaint in the District Court of Oregon against the Forest Service regarding the **Archie Creek Fire Roadside Danger Tree Project** on the Umpqua National Forest. The plaintiffs claim the Forest Service violated the Administrative Procedures Act (APA), National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) with approving the project. Specifically, the Forest Service failed to articulate a rational explanation as to how a large-scale logging project constitutes routine road “repair and maintenance” with use of categorical exclusion 4 (CE 4). The plaintiffs claim the project warrants the preparation of an environmental impact statement (EIS) or environmental assessment (EA), taking a “hard look” at the project’s environmental impacts, trade-offs, and alternatives, disclose those impacts to the public, and consider public comment. The plaintiffs also claim the Agency’s authorization of salvage logging within the Late-Successional Reserves (LSR) and Riparian Reserves (RR) is inconsistent with the Northwest Forest Plan (NWFP) which violates of NFMA because the Agency has not explained how it can comply with NWFP standards and guidelines.

The plaintiffs claim:

1. NEPA and APA Compliance

- a. Unlawful Use of Inapplicable CE: The Forest Service’s use of CE 4 does not apply to logging projects the size and scope authorized by the Agency. The Forest Service promulgated a separate CE specifically for post-fire logging activities but stipulated that such activities cannot exceed 250 acres. The Forest Service’s failure to prepare an EIS or EA before approving the project violates NEPA.
- b. Arbitrary Conclusion that no Extraordinary Circumstances are Present: The Forest Service is required to prepare and EA or EIS because “extraordinary circumstances” warrant further analysis. The Agency admits that the project is “likely to adversely affect” Northern spotted owl, and “may impact” other sensitive and federally listed species and their habitat. The use of CE is inappropriate if there is the possibility that an

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action may have a significant environmental effect, thus the Agency must prepare an EA or EIS.

2. NFMA and APA Compliance:

- a. Salvage Logging in LSR: The Forest Service failed to make a rational determination that the project's logging operation, including commercial salvage in the LSR, are consistent with the NWFP which violates the NFMA.
- b. Salvage Logging in RR: The Forest Service failed to make a rational determination that the project's logging operations, including commercial salvage logging, in riparian reserves is consistent with the Aquatic Conservation Strategy which violates the NFMA.

Notice of Intent to Sue

Nothing to Report

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