

# National Forest Law Newsletter

by Ryan Woody

<http://www.nationalforestlawblog.com>

December 2007



*This monthly electronic newsletter is a service provided by Attorney Ryan L. Woody for the benefit of clients and forest stakeholders. The vagaries and complexity of the laws and current issues in National Forest Management have, for many lawyers, and professionals alike, made keeping current laws an arduous and laborious task. It is the goal of this electronic newsletter to assist in the dissemination of new legal developments as they occur within the National Forests. If anyone has co-workers, associates or other individuals who wish to be placed on this e-mail mailing list, please provide their e-mail addresses to Ryan Woody at [rw Woody@mwl-law.com](mailto:rw Woody@mwl-law.com). I appreciate your friendship and your business.*

## IN THIS ISSUE . . . .

### Case Notes

*Boundary Waters Litigation continued - Plaintiffs Appeal* . . . . . 1

*Sierra Club v. Bosworth, (D.Minn. Nov.15, 2007).* . . . . . 2

### Proposed Legislation

*The Hardrock Mining and Reclamation Act of 2007.* . . . . . 3

### Boundary Waters Litigation

## UPDATE: Plaintiffs Appeal decision in *Izaak Walton League v. Kimbell* (D.Minn. 2007)

By Ryan L. Woody

As reported here last month, the Minnesota district court decided *Izaak Walton League of America v. Kimbell* 06-CV-3357, (D.Minn.2007). You will recall that the court agreed with the Forest Service's interpretation that the Fowl lakes were not included within the Boundary Waters Canoe Area Wilderness. The court also upheld the agency's decision that the proposed snowmobile trail would not adversely impact the Canadian lynx population. However, the court did order that the Forest Service conduct an EIS to determine whether noise from the proposed snowmobile trail would adversely impact the adjacent wilderness area, which gives some credence to the idea that a "buffer zone" should exist adjacent to the wilderness.



On October 29<sup>th</sup>, 2007 the environmental plaintiffs filed a notice of appeal to the Eighth Circuit. These environmental groups, led by the Sierra Club, seek review only of the lower court's decision regarding impacts to Canadian lynx and inclusion of the fowl lakes within the BWCAW. The appeal, if successful, would reduce and/or eliminate motorboat usage on the Fowl lakes and likely put an end to the South Fowl lake snowmobile trail. However, the district court's opinion on these issues was sound and the plaintiffs will face tough odds at obtaining a reversal. It should be noted that the Forest Service did not appeal the most significant issue dealing with the "buffer zone" theory. It is likely that the agency will wait until after the updated EIS process is complete before engaging the environmental groups again over that issue. I would recommend all those concerned about this issue to monitor and participate in that environmental review process. The "buffer zone" issue will continue to rear its head in future litigation.

I will continue to follow this case and keep you informed of any significant developments. Should you have any specific questions, feel free to contact me at [rwoody@mwl-law.com](mailto:rwoody@mwl-law.com)

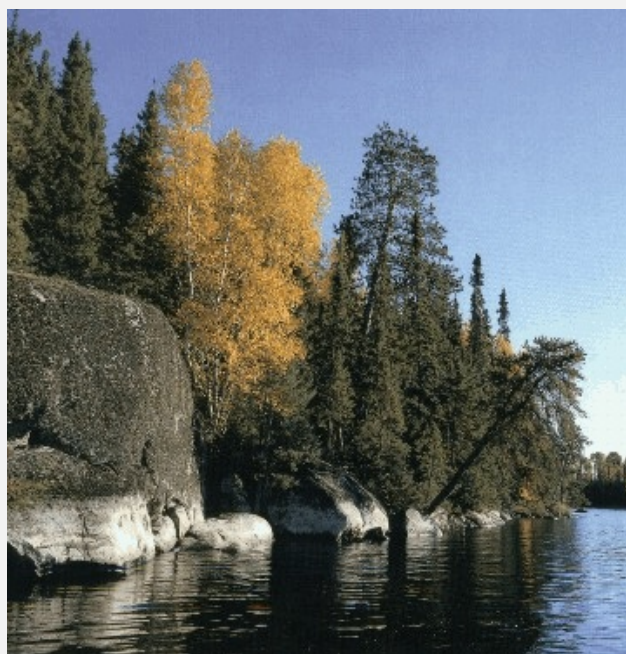
### Superior National Forest

In 2004, the Forest Service produced its final version of its updated Land Management Plan for the Superior National Forest in northeastern Minnesota. As required by the National Forest Management Act ("NFMA"), the 2004 Plan was set to replace the outdated 1986 Plan. Following the adoption of the 2004 plan, environmental groups, led by the Sierra Club and Defenders of Wildlife, challenged the legality of the new plan. The plaintiffs alleged that the new plan violated the NFMA and the National Environmental Policy Act ("NEPA"). On November 15, 2007, District Court Judge Patrick Schiltz issued his long awaited decision on the plaintiffs' NFMA claims.

At issue was the Forest Service's motion to dismiss the plaintiffs' NFMA claims only. The Forest Service argued that, unlike NEPA, plaintiffs cannot challenge the implementation of a forest plan under the NFMA.

Environmental groups claimed that the agency violated NFMA when it adopted the 2004 plan because (1) it reduced the number of Management Indicator Species (MIS) from 34 to 4; and (2) it used outdated and inadequate inventory of roads and trails. The issue for the court was whether the NFMA allowed plaintiffs to challenge these issues at the forest plan lever.

A forest plan document is designed to set management goals over a large area and over a span of many years. Generally, a plan does not make any decisions or commitments, instead allowing specific decisions to be left to NEPA analysis at a later date. Because forest plans are generally noncommittal, the United States Supreme Court held that plaintiffs are prohibited from challenging such plans. *Ohio Forestry Association Inc. v. Sierra Club*, 523 U.S. 726 (1998). Instead, under *Ohio Forestry* litigants must raise these challenges at the project or site-specific level. Legally, a challenge to a forest plan would not be "ripe" until it was implemented through a specific project. However, in this case, the plaintiffs argued that their challenges to the forest plan were ripe because they gave rise to an immediate procedural injury. Essentially, the plaintiffs argued that because the new forest plan would not direct the agency to keep data on all 34 of the previous MIS species the court needed to act immediately and could not wait until a site-specific project was proposed.



The plaintiffs found themselves in a bind as to their challenge, because a prior decision in the 8<sup>th</sup> Circuit had held that their MIS challenges were also non-reviewable at the site-specific level. See *Sharps v. U.S. Forest Service*, 28 F.3ed 851 (8<sup>th</sup> Cir. 1994). Therefore, the district court was faced with the problem of how to consolidate *Sharps* with *Ohio Forestry*. The district court recognized this confusion, writing, **“If Ohio Forestry requires the Sierra Club to bring its MIS challenge (a challenge to the forest plan) only in connection with a challenge to a site-specific projects, while Sharps forbids courts to consider MIS challenges in connection with site-specific projects, then how can the Sierra Club ever challenge an MIS designation?”** Fortunately, the court make quick order of this question by effectively overruling *Sharps*. It found that because *Sharps* was decided before *Ohio Forestry* and that many other courts had recognized site-specific MIS challenges, *Sharps*’ was no longer good law. Accordingly, the court dismissed the plaintiffs’ MIS claims holding that they could only be brought in the context of a future site-specific decision. Similarly, the court rejected the plaintiffs’ claims regarding the agency’s outdated road and trail data. It wrote, **“This Court will not blaze a new trail (so to speak) and allow litigants to argue that, when the Forest Service adopts a defective forest plan, the general public suffers the violation of a procedural right conferred by the NFMA.”**

While the court’s decision dismisses the plaintiffs NFMA claims, the case will continue in order to resolve additional claims against the plan brought under NEPA. The forest service will still need to show that its adoption of the Superior Forest Plan was not arbitrary or capricious. Additionally, whatever decision is eventually reached, the plaintiffs will undoubtedly appeal the court’s NFMA decision. On appeal, it will be very interesting to see how the 8<sup>th</sup> Circuit deals with the district court’s analysis of its decision in *Sharps*. The case presents an interesting question regarding when a dispute becomes justiciable. When should a litigant be able to challenge a defective plan? Why not allow litigants to challenge a plan immediately instead of waiting for site-specific decisions that occur 5, 10, or 20 years later? I am currently preparing an Amicus Curiae Brief for the Ruffed Grouse Society in this case, and will continue to provide updates of this interesting case.

Should you have any questions or comments please do not hesitate to contact me at [rwoody@mwl-law.com](mailto:rwoody@mwl-law.com)

---

PROPOSED LEGISLATION

---

**General Mining Law of  
1872 To Get Some  
Updating**

*By Ryan Woody*

H.R. 2262, entitled The Hardrock Mining and Reclamation Act of 2007 promises a major overhaul of the 1872 Act that was originally signed into law by President Ulysses Grant to spur western development. The proposed amendment was passed by the House and Representatives thanks to the work of its



sponsor, House Natural Resources Committee Chairman Nick Rahall of Wyoming.

Environmental and conservation groups have long criticized the 1872 law as outdated. Given the increasing recreational activity and environmental concerns associated with the Western public lands, the Mining Act's priority for mineral production has been heavily criticized. Specifically, environmental groups have attempted to highlight the damaging surface effects and impacts on associated wildlife and habitat. The new proposal would downshift mining's land use priority and give greater weight to environmental and recreational uses.

Another of the major concerns- the 1872 law fails to charge mining companies for the economic benefit of the resources they take and fails to account for the environmental degradation they cause. For example, the current law allows mining companies who have staked a claim on federal lands to produce minerals such as gold, silver, and copper without paying any royalties. Instead, the proposed amendment would charge an 8% gross income royalty on new mines and a 4% gross income royalty on existing operations. The royalty tax revenue would go into a cleanup fund for past abandoned mining operations and their communities. These new royalties are both an attempt to hold users economically accountable the damage done to the environment and a charge for the value of the extracted minerals.

The mining industry defends the existing law as promoting domestic exploration and use of minerals. In addition, the proposed royalties could reduce the incentive for domestic exploration by increasing the already high cost of mining. The new bill will face a tougher test in the Senate and President Bush has indicated he would veto the legislation. Republicans believe that the 2001 Surface Management regulations, 43 C.F.R. 3809 et seq., address the modern day concerns.

*Should you have any questions or comments about this or any other topic please do not hesitate to contact Ryan Woody at [rwoody@mwl-law.com](mailto:rwoody@mwl-law.com)*

This electronic newsletter is intended for the clients and friends of Attorney Ryan L. Woody. It is designed to keep our clients generally informed about developments in the law relating to National Forests and affiliated areas of practice and should not be construed as legal advice concerning any factual situation. Should you wish to be removed from this email list, please contact Ryan Woody at [rwoody@mwl-law.com](mailto:rwoody@mwl-law.com).

---