

# National Forest Law

## Newsletter

by Ryan Woody

<http://www.nationalforestlawblog.com>

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Happy New Year! We wish everyone a warm and happy holiday season.

*This monthly electronic newsletter is a service provided by Attorney Ryan L. Woody for the benefit of clients and forest stakeholders. Mr. Woody is an attorney and a member of the Forest Resources section of the American Bar Association. 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 [rwoody@mw-law.com](mailto:rwoody@mw-law.com). If you have been added by mistake and would like to be removed please let me know. I appreciate your friendship and your business.*

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## **Ninth Circuit Court of Appeals**

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### **Court Strikes Down Fuels Reduction CE Aimed At Protecting Communities From Fires**

By Ryan L. Woody

The Ninth Circuit Court of Appeals in San Francisco struck down the Forest Service's most recent attempt to prevent western forest fires through preventative thinning and burning of built up fuels. I can only imagine how frustrating it could be for any forest professional to read the court's decision in *Sierra Club v. Bosworth*, 05-16989 (9<sup>th</sup> Cir. Dec.5, 2007) (available as 2007 WL 4246103). It was equally frustrating reading for me.

The frustration with the decision is only apparent after one reads the entire decision, including Judge Kleinfeld's concurring opinion.



The dispute has its origins in the Bush administration's 2002 Healthy Forests Initiative. Prompted by the devastating 2000 fire season, the Initiative directed the Forest Service to streamline the regulatory process to provide for quicker decisions and better results in reducing the risk of catastrophic wildfires. As a part of this process, the Forest Service announced its plans for a new Categorical Exclusion ("CE") that would exempt from further NEPA review minor projects aimed to reduce the hazardous fuels that had built up in the forests. Instead of a lengthy EA or an even more burdensome EIS, the Forest Service need only produce a project file and brief decision memo explaining why extraordinary circumstances exist and a description of the public involvement. Prior to promulgating the CE, the Forest Service evaluated over 2,500 hazardous fuels reduction projects nationwide in order to determine the types of projects that had no significant impacts. Accordingly, the Fuels CE applied only to "hazardous fuels reduction

activities using prescribed fire, not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. FSH § 1909.15, ch. 30, §31.2(10). In addition, the Fuels CE was geographically limited to wildland-urban interface.

The instant case arose after the Forest Service approved four projects approved by the new Fuels CE in the Eldorado and Lassen National Forests in California. The four projects called for a grand total of approximately 6,700 acres of logging, burning and removal of wind thrown trees. The Sierra Club challenged these four projects and the agency's use of the Categorical Exclusion. The Sierra Club argued (1) that the CE improperly includes activities with "significant effects"; (2) data underlying the promulgation of the CE did not actually support the CE; (3) the agency did not adequately identify activities covered by the CE; and (4) the agency did not adequately determine there were no extraordinary circumstances that would counsel against a CE. The district court sided with the Forest Service and held that the agency was not required to produce an EA or an EIS and that the agency had properly documented the extraordinary circumstances that prompted the action. The Sierra Club appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit began its decision with a thorough review of the promulgation of the CE and the lower court's decision. The court then began its assault on the agency's decision. The court concluded, "*that because the Forest Service failed to demonstrate that it made a 'reasoned decision' to promulgate the Fuels CE based on all the relevant factors and information, its promulgation of the Fuels CE was arbitrary and capricious.*" Specifically, the court found that the decision used improper post-hoc decision-making. Essentially, the court found that the agency had made up its mind to go ahead with the Fuels CE *before* reviewing the data, receiving public input, and determining that the actions did not have individually or cumulative significant impacts. The court had latched onto one of the plaintiffs' favorite arguments - a defective cumulative effects analysis. Nearly every NEPA case, it seems relies in whole or in part upon the claim that an agency has failed to properly analyze the cumulative effects of its decision. As explained by the Ninth Circuit, the Forest Service cannot rely upon a project level analysis, but must instead "*consider impacts from past, present, or reasonably foreseeable future Fuels CE projects which may be located in close proximity, in the same watershed or endangered species habitat area.*" The problem with the impacts analysis is that it has no logical or measurable stopping point, which is why it has become so popular with plaintiffs. The Ninth Circuit's opinion only proves this point. It wrote:

*That an impacts analysis be done is on critical importance in a situation such as here, where the categorical exclusion is nationwide in scope and has the potential to impact a large number of acres. While dependent on the risk of wildfire, the Fuels CE could potentially be applicable beyond the wildland-urban interface to all units of the national forest system, totaling 192 million acres of land within 155 national forests and 20 national grasslands. (emphasis added)*

It is obvious from this excerpt how potentially difficult it is to fully analyze all of the potential cumulative impacts from an agency decision. It illustrates one of the most frustrating problems with the NEPA and explains why active management on the forest is so difficult.

The frustration for the Forest Service did not end there. The court went on to find that the agency erred in assessing significance by failing to consider that the Fuels CE was “highly controversial.” In my opinion this “highly controversial” test is a dubious legal standard that is subject to the winds and not fit for a courtroom. Nevertheless, the court cited opposition from environmental groups, the States of Arizona and California, and some negative comments from the Fish and Wildlife Service. (Only in Washington can one agency work to entirely undermine another!). Apparently, someone at the FWS decided to weigh in with their own political commentary by questioning the need for a Categorical Exclusion. The FWS wrote that it “*supports the intent of the Healthy Forests Initiative, but believes the existing NEPA processes are a useful and necessary tool to analyze the full environmental effects of most hazardous fuels reduction projects*” and that “*efforts to streamline these analyses should not results [sic] in a process counter to the basic premise of NEPA-public disclosure.*” Therefore, the court found that the project met the highly controversial test requiring further analysis. The court then continued to list further deficiencies within the Fuels CE, which according to the court resulted in a lack of “*requisite specificity to ensure that the projects taken under it achieve the objective of hazardous fuels reduction, but do not individually or cumulatively inflict a significant impact.*”

As a result of the decision, the court enjoined the Forest Service from utilizing the Fuels CE nationwide, with some exceptions for those projects already underway. What makes this decision even more painful is Judge Kleinfeld’s concluding comments in his concurring opinion. Kleinfeld wrote:

*I cannot bring myself to believe that a Forest Service decision to cut brush and use controlled burns to reduce forest fire danger near urban areas is arbitrary and capricious. And I cannot quite bring myself to believe that the categorical exclusion in this case, covering less than one half of one percent of federal land, will have a cumulative impact on our environment requiring years more research, analysis and report writing before we do anything to protect people from forest fires. As a matter of common sense, cutting brush and using controlled burns on parcels no larger than 1,000 acres and 4,000 acres respectively seems most likely to have the cumulative impact of reducing the catastrophic effect of forest fires on people...Nevertheless, the government’s brief does not point us to anything in the record that supports my intuitive view.*

The repercussions of this decision will be vast and will undoubtedly put communities and properties in further jeopardy from forest fires. It is unknown whether the Forest Service will seek a rehearing before the entire panel of the Ninth Circuit and/or appeal to the United States Supreme Court. However, chances on appeal or a rehearing en banc seem doubtful given the fact that even Judge Kleinfeld couldn’t articulate a way to find in the agency’s favor. It seems more likely the agency will head back to the drawing board.

I will continue to follow the ramifications of 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

### ***Minnesota to File Amicus Curiae Brief in Superior National Forest Plan Case***

Shortly after last month's newsletter was published, the State of Minnesota sought permission to file an amicus brief in the Superior National Forest Plan case, 06-CV-3334 (D.Minn.). As you may recall, the case involves the Sierra Club and Defenders of Wildlife's challenge to the updated Land Management Plan for the Superior National Forest in northeastern Minnesota. Last month, the court dismissed the plaintiff's National Forest Management Act (NFMA) claims, leaving the remaining National Environmental Policy Act (NEPA) claims for decision in the upcoming year.



The State of Minnesota's late filing is certainly welcome, albeit surprisingly tardy. The case has been pending for nearly two years. In that time, the Ruffed Grouse Society was granted permission to file an amicus brief and numerous parties intervened as defendants including, Lake County, Minnesota Forest Industries, Inc., Minnesota Timber Producers Association, All Terrain Vehicle Association of Minnesota, and the Blue Ribbon Coalition.

The State's presence in the litigation will certainly be helpful to the court given the State's significant stake in the outcome. Approximately 547,640 acres of state-administered lands are located within the Superior National Forest. These lands directly provide the State with needed revenue for its public schools. According to the State's filing, approximately \$20.9 million has been generated as income from timber sales from these lands in the last ten years. The State's ability to administer and manage these lands will be significantly impacted depending on the approval of the new Forest Plan, because many these lands are landlocked within the SNF and require a special use permit to gain access.

As an amicus party, the State will file a single brief that will assist the court by presenting ideas, arguments, or insights that are unlikely to be presented by the other parties. Clearly, the State will be able to offer a perspective on state land management that will not be presented by the other parties. Although a bit late to join the party, the State's input should be well received by the court. It appears as if the State's brief will be due in April.

I will continue to update this newsletter with the latest from this 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

### *Fee Repeal and Expanded Access Act of 2007*

*By Ryan Woody*

Senate Bill 2438, the Fee Repeal and Expanded Access Act of 2007, promises to reduce fees on many federally-managed lands. U.S. Senators Max Baucus (D-MT) and Mike Capo (R-ID) introduced the bill to amend certain provisions of the Federal Lands Recreation Enhancement Act (FLREA). According to its critics, the FLREA and its predecessor the “rec fee demo” program created incentives that resulted in unprecedented new recreational access fees throughout federal lands. The program charges user fees to pay for maintenance and improvements. Under the FLREA, these fees led to direct funding for those land districts. The proposed legislation would strip much the fee charging authority from these districts, and

require that any remaining fee revenue be returned to the national treasury as opposed to the local district.



Under the new bill, the National Park Service will continue to charge entrance fees, but those fees would be capped at \$25 per vehicle. The NPS will also continue to offer a Golden Eagle Pass with a cap of \$65, but the recently created America the Beautiful Pass will be scrapped. The Bureau of Land Management, Forest Service, and Fish and Wildlife Service will likely be more affected by this bill. The new bill will restrict their ability to charge fees at undeveloped campgrounds or backcountry permits. Gone should be parking fees, toll booths, and high impact recreation access fees.

While the new bill will certainly please those in the recreation community, who were previously forking over layer upon layer of access fees, it is unclear how the revenue will be replaced. The proposed bill provides no additional funding mechanism, although its sponsors “promise” to seek additional funding through the appropriations process. If alternative funding is not found, I imagine we can expect a reduction in the already sparse services available at many of these sites.

*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).