

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane**

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

DEC 14 2004

GREGORY C. LANGHAM
CLERK
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Civil Action No. 04-AP-1816

BIODIVERSITY CONSERVATION ALLIANCE,

Plaintiff,

v.

**RICHARD C. STEM, in his official capacity as Deputy Regional Forester of the
Rocky Mountain Region of the U.S. Forest Service, and
U.S. FOREST SERVICE, a Federal Agency within the U.S. Department of
Agriculture**

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

Kane, J.

Plaintiff, Biodiversity Conservation Alliance ("Alliance"), a non-profit corporation, filed a Complaint for declaratory and injunctive relief challenging the approval of a timber project in the Black Hills National Forest located in eastern Wyoming known as the Cement Project. Defendants ("Forest Service") issued a draft environmental assessment, a final environmental assessment, a decision notice and finding of no significant impact, and administrative appeal decision in 2003-2004. Plaintiff then filed its complaint pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §701-706 (1996).

On December 8, 2004, the Court held a hearing on Plaintiff Alliance's Motion For Preliminary Injunction to halt a pending timber sale implementing the Cement Project.

The Court heard statements and arguments of counsel, and has fully considered the record, briefs, and all exhibits. No witnesses were called by either party. For the reasons stated below, the Court grants Plaintiff's Motion For A Preliminary Injunction.

A. Preliminary Injunction Requirements

To obtain a preliminary injunction, the moving party must satisfy four requirements: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir.1980).

Where the movant prevails on factors (2) – (4), this court has adopted the "probability of success" requirement: "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-782 (10th Cir. 1964)(citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)); accord, *Lundgrin*,

619 F.2d at 63.

B. Equities

The Court concludes as a preliminary matter, the Plaintiff will suffer irreparable injury, that the threatened injury to Plaintiff outweighs whatever damage the injunction may cause the Forest Service, and that the injunction if issued would not be adverse to the public interest. Counsel for Defendants at oral argument appeared to concede Plaintiff's injury and/or harm.

Counsel for Plaintiff established that biological integrity of the area is at risk due to the Forest Service's apparent failure to collect population trend data for two Management Indicator Species ("MIS") pursuant to the requirements of the National Forest Management Act ("NFMA") and the alleged violation of the National Environmental Policy Act ("NEPA") by failing to provide a reasonable range of alternatives and examine the best available science on forest fragmentation. Further, given that this project will be a below-cost timber sale with a present net value of negative \$954,316.18, and that costs exceed benefits derived, there is no economic harm to the agency that would override public interest in preserving biological integrity.

C. Likelihood of Success on the Merits

Plaintiff provides four arguments as to why the Alliance is likely to succeed on the merits. Plaintiff alleges violations of NFMA, 16 U.S.C. §§1600-1614, and NEPA,

42 U.S.C. §§4321-4370f. Specifically, Plaintiff alleges that Defendants violated NEPA by failing to consider a reasonable range of alternatives and best available science on forest fragmentation, and violated NFMA by failing to collect quantitative population data for the management indicator species ("MIS") pygmy nuthatch and fringed myotis bat and failing to establish viability objectives for the sensitive species northern goshawk, black-backed woodpecker, and northern leopard frog.

Where, as here, the equities tip heavily towards the movant, Plaintiff need only raise questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation. The Alliance has provided more than adequate legal and administrative record support to meet its burden of probability of success.

Defendants rely upon *post-hoc* rationalizations that do not appear to be substantiated by the record or 10th Circuit precedent. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560, 1580 (10th Cir. 1994)(reversal is warranted where agency "relied on the *post hoc* rationalizations of counsel or attempted itself to supply a reasoned basis for agency action without regard to the contents of the administrative record."). Defendants offer new legal interpretations from Washington D.C. that appear to run counter to established 10th Circuit precedent on MIS. Further, Defendants provide multiple *post-hoc* arguments defending their failure to address science on forest fragmentation and collect actual population data for MIS that do not appear to be based on or substantiated by the record.

Additionally, Defendants do not appear to have adequately addressed or paid

attention to the concerns of citizens. Plaintiff provided reasonable alternatives to the agency during the NEPA process. It appears at this stage of litigation that such alternatives were not fully considered by Defendants. *See Davis v. Mineta*, 302 F.3d 1104, 1114 (10th Cir. 2002) ("In mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment.").

CONCLUSION

Plaintiff's Motion For A Preliminary Injunction against implementation of the Cement Project is therefore GRANTED. The Court issues this preliminary injunction in order to maintain the *status quo antebellum* while litigation proceeds forward. Based on my review of the arguments to date, I highly urge all parties to avoid protracted litigation and undertake efforts to settle this matter. This injunction hereby prohibits the Forest Service from taking actions on the ground such as constructing or reconstructing new roads and/or undertaking vegetative management treatments (i.e. cutting timber), and/or selling or awarding such timber by contract. This injunction does not prohibit the agency from undertaking meetings or conducting further planning regarding the Cement Project.

Dated this / 3 day of December, 2004.


John L. Kane, Senior District Judge

United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
GREGORY C. LANGHAM, CLERK

U. S. Courthouse
901 19th Street, Rm. A-105
Denver, CO 80294
(303) 844-3433

Date: December 13, 2004

Case No. 04-AP-1816

The undersigned hereby certifies that on the above date a true and correct copy of the preceding **ORDER** signed by Judge John L. Kane on December 13, 2004 was mailed to the following:

Brad Bartlett, Esq.
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Durango, CO 81301

John W. Suthers
United States Attorney

Roxane J. Perruso, Esq.
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Assistant United States Attorneys

December 14, 2004

GREGORY C. LANGHAM, CLERK


Deputy Clerk