

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FRONT RANGE NESTING BALD EAGLE STUDIES,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE SERVICE;
GREG SHEEHAN, in his official capacity as Acting Director of the United States Fish and
Wildlife Service; and
RYAN ZINKE, in his official capacity as Secretary of the Interior,

Defendants.

PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668c (“BGEPA”), makes it unlawful for anyone to kill or otherwise “take” bald or golden eagles without first obtaining a permit from Defendant U.S. Fish and Wildlife Service (“USFWS”). This case challenges the application of a “categorical exclusion” under the National Environmental Policy Act (“NEPA”) for USFWS’s issuance of a BGEPA “incidental take” permit under 50 C.F.R. § 22.26. The USFWS’s indiscriminate application of a categorical exclusion for this BGEPA incidental take permit—irrespective of the environmental effects caused by the permit—violates NEPA, BGEPA, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (APA), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

3. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

4. Venue is also appropriate under 28 U.S.C. § 1391(e)(1) because USFWS has offices in this district. Additionally, venue is proper pursuant to 28 U.S.C. § 1391(e)(2) because “a substantial part of the events or omissions giving rise to the claim” took place in Colorado.

PARTIES

5. Plaintiff Front Range Nesting Bald Eagle Studies (“FRNBES”) is a Colorado-based nonprofit membership organization dedicated to the study and conservation of nesting bald eagles, golden eagles, and other raptors in the Front Range region of Colorado. FRNBES’ members include raptor enthusiasts, photographers, and concerned citizens in the State of Colorado. FRNBES accomplishes its mission through scientific and recreational observation of eagles; the gathering, publication, and dissemination of data to USFWS, state agencies, and the public; the submission of comments and data on relevant permit applications and proposed actions that will take eagles; and through public education. Members of FRNBES have been observing and studying eagles and other raptors in the Front Range for several years; in fact, many FRNBES members are involved in a local bald eagle time budget study that compiles hundreds hours’ worth of observational data related to nesting bald eagle pairs, including nearly 200 hours observing the Stearns Nest pair in the past year alone. The members have gathered numerous hours of data regarding other nesting bald eagle pairs in Boulder and Weld Counties in Colorado. Over the course of several years, members of FRNBES have submitted numerous comments and have provided data to various state and federal agencies, including Defendant USFWS, seeking to protect Colorado nesting bald eagle pairs from disturbance and nest failure. Its members include wildlife enthusiasts, birdwatchers, amateur photographers, some of whom

have undergraduate and advanced degrees in biology and wildlife studies and have worked professionally in the field.

6. Plaintiffs' members have regularly observed and photographed numerous nesting bald eagle pairs in Boulder, Broomfield and Weld Counties. One such pair is the Stearns Nest eagle pair, an eagle pair that, as described herein, will be detrimentally and permanently impacted by the challenged BGEPA permit at issue in this action. Plaintiff's members observe (at least 6 to 8 times per month), conduct scientific studies and photograph the Stearns Nest eagle pair year round, at least several times a month, and have concrete plans to continue doing so for the foreseeable future. Plaintiff's members also volunteer to observe and record the activities of Boulder, Broomfield, and Weld County eagle pairs for the local bald eagle time budget study, and have concrete plans to continue doing so in the future.

7. Plaintiff and its members' aesthetic, recreational, scientific, and educational interests will be adversely affected and irreparably injured by Defendants' actions and inactions.

8. The eagles at stake in this litigation are afforded certain federal protections under BGEPA. Plaintiff and its members' injuries are actual, concrete, particularized injuries caused by Defendants' failure to comply with mandatory duties under federal laws.

9. The challenged BGEPA permit authorizes the disturbance of the Stearns Nest. Disturbance of the Stearns Nest will decrease the occurrence of future sightings of eagles by Plaintiff's members, negatively impacting their ability to observe, photograph, and study the eagles. Disturbance will also fundamentally alter the birds' typical activity patterns and essential biological functions such as breeding, feeding, and nesting, thereby negatively impacting Plaintiff's members' time budget study data. Disturbance of the Stearns Nest could also cause a repeat of a previous nest failure of this pair, depriving the members of the opportunity to view

the pair and their fledglings at the nest. Plaintiff and its members also suffer procedural and informational harm due to Defendants' violation of NEPA, BGEPA, and the APA, including the USFWS's failure to provide any notice and public comment opportunity concerning its authorization of this permit, which, if provided, would have resulted in Plaintiff submitting extensive, science-based comments advocating that USFWS deny this permit or at least impose far more stringent and empirically based permit conditions to avoid harm to these eagles. Plaintiff's injuries would be redressed by the relief sought.

10. Plaintiff has at least one member who resides in Broomfield County.

11. Defendant USFWS is responsible for issuing permits under BGEPA authorizing the take or disturbance of bald and golden eagles, including the permit challenged in this lawsuit. Accordingly, USFWS is responsible for the actions challenged herein.

12. Defendant RYAN ZINKE is being sued in his official capacity as Secretary of the Interior in which he is ultimately responsible for overseeing the work of USFWS, an agency within the Department of the Interior. He is sued solely in his official capacity.

13. Defendant GREG SHEEHAN is the Principal Deputy Director of USFWS and is being sued in his official capacity as Acting Director of USFWS. In that capacity, he is responsible for ensuring USFWS actions comply with NEPA and BGEPA. Accordingly, Mr. Sheehan is responsible for the actions challenged in this action, and he is sued solely in his official capacity.

LEGAL AND STATUTORY BACKGROUND

A. National Environmental Policy Act ("NEPA")

14. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It requires federal agencies to take a "hard look" at the environmental

effects of their proposed actions. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989). “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken [and] [a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). NEPA requires that all federal agencies “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Agencies “shall involve environmental agencies, applicants, and the public, to the extent practicable” 40 C.F.R. § 1501.4(b).

15. Under NEPA, federal agencies are required to consider the potential environmental impact of *all* agency actions. 42 U.S.C. §§ 4321-4370m. Agency action generally requires the preparation of an Environmental Assessment (“EA”), *see* 40 C.F.R. § 1508.9, an Environmental Impact Statement (“EIS”), *see id.* § 1502.9, or both. In addition, the Council on Environmental Quality (“CEQ”) regulations authorize federal agencies to identify categories of actions that under normal circumstances do not have a significant environmental impact, either individually or cumulatively; such actions may then be established as categorical exclusions, and agencies are not required to complete an EA or an EIS when undertaking those actions. *Id.* § 1507.3(b); *id.* § 1508.4; *see also* Department of the Interior (“DOI”) NEPA regulations at 43 C.F.R. § 46.205.

16. Under NEPA, agencies are tasked with developing procedures to implement NEPA. 40 C.F.R. § 1507.3. These procedures include the establishment of specific categorical exclusions for actions which do not normally require an EA or an EIS. 40 C.F.R. § 1507.3(b). The DOI has identified a number of departmental categorical exclusions, codified in 43 C.F.R. §

46.210 and also found in the DOI's Departmental NEPA Manual (the "NEPA Manual") at 516 DM 2, Appendix 1.

17. The NEPA Manual contains categorical exclusions specific to Defendant USFWS. 516 DM 8.5. One such categorical exclusion is for:

The issuance, denial, suspension, and revocation of permits for activities involving fish, wildlife, or plants regulated under 50 CFR Chapter 1, Subsection B, when such permits cause no or negligible environmental disturbance. These permits involve endangered and threatened species, species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), marine mammals, exotic birds, migratory birds, *eagles*, and injurious wildlife.

516 DM 8.5(C)(1) (emphasis added).

18. When appropriately established and applied, categorical exclusions allow federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs. However, any procedures addressing categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. The presence of "extraordinary circumstances" for a particular permit decision requires the preparation of either an EIS or an EA. *See* 40 C.F.R. § 1501.4.

19. Agencies have an independent obligation to ensure that extraordinary circumstances do not exist prior to issuing a categorical exclusion. As the DOI's NEPA Manual explains, "[a]ny action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action." 43 C.F.R. § 46.205.

20. The DOI has identified a number of such extraordinary circumstances, described in both 43 C.F.R. 46.215 and 516 DM 2, Appendix 2. Extraordinary circumstances include, in

relevant part, circumstances that meet any of the following criteria:

(b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.

(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

(d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

(i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

46 C.F.R. § 46.215(b)-(f).

B. The Bald and Golden Eagle Protection Act (“BGEPA”)

21. BGEPA prohibits the “take” of any bald or golden eagle “without being permitted to do so” by the USFWS. 16 U.S.C. § 668(a). “Take” is defined to include “wound, kill. . . . molest, or disturb,” *id.* at § 668(c). “Take” includes the incidental taking of, as well as intentional actions directed at, eagles. *Id.* USFWS may issue permits under BGEPA authorizing the take or disturbance of bald and golden eagles, but only if such take “is compatible with the preservation” of eagles. *Id.* § 668a.

22. BGEPA provides for two different types of permits. 50 C.F.R. § 22.26 controls the issuance of permits to take bald and golden eagles where the taking is associated with—i.e.,

incidental to—but not the purpose of, the permitted activity. This type of permit is frequently referred to as an “incidental take.” The second type of permit exists under 50 C.F.R. § 22.27 and controls the issuance of permits for removing eagle nests for specific purposes, such as to ensure safety to people and/or eagles, to otherwise benefit eagles, or to allow the use of a human-engineered structure. This second type of permit is not at issue in this action.

23. Pursuant to 50 C.F.R. § 22.26(f), USFWS may only issue an eagle take permit if it can demonstrate that the take is: “compatible with the preservation” of eagles; “necessary to protect an interest in a particular locality;” and “associated with, but not the purpose of, the activity.” Furthermore, the applicant must apply “all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles.” *Id.*

FACTUAL BACKGROUND

A. Stearns Nest



Photograph of Stearns Nest eagle pair. Dana Bove, January 2016

24. Upon information and belief, there is a bald eagle nest located approximately one-half mile from Stearns Lake, in western Broomfield County, Colorado (the “Stearns Nest”).

25. The approximate location of the Stearns Nest is 39.948766 N, -105.117806 W.

26. The Stearns Nest is located on a conservation easement within the City and County of Broomfield, Colorado.

27. The Stearns Nest is in a mature cottonwood tree, situated in or around an unnamed tributary to Rock Creek.

28. The Stearns Nest tree is located within a mile of several areas used by the Stearns Nest nesting eagle pair for their daily activities of perching, roosting, hunting, and foraging. Notably, the Stearns Nest is near two large prairie dog colonies.

29. The Stearns Nest was built in 2010; however, the 2012 breeding season was the first season the Stearns Nest eagles successfully fledged eaglets at the Stearns Nest, and other open foraging areas including one nearby lake containing fish they consume.

30. Thereafter, the Stearns Nest eagles successfully fledged every year through the 2015-2016 season, other than in the 2013-2014 season, when the nest failed.

31. Upon information and belief, as of the date of this Complaint, the eagle pair has been actively using the Stearns Nest since approximately September 2017, in preparation for the 2017-2018 breeding season.

32. Upon information and belief, the eagle pair historically lays eggs on or about February 15 of each year.

B. Retreat at Flatirons

33. The 2013-2014 breeding season at the Stearns Nest, during which the nest failed, coincided with construction of a multi-family housing development near the nest called the Retreat at Flatirons.

34. The Retreat at Flatirons development is located approximately 700 feet west of the Stearns Nest and thus construction activities occurred in close proximity to the Stearns Nest during development.

35. Upon information and belief, developers of the Retreat at Flatirons obtained a BGEPA permit under 50 C.F.R. § 22.26 to permit the disturbance of the Stearns Nest during construction of the Retreat at Flatirons.

36. Upon information and belief, this disturbance resulted in the 2013-2014 nest failure of the Stearns Nest.

C. Caliber at Flatirons Apartments Project

37. Upon information and belief, Garrett Construction Company, LLC D/B/A/ Caliber at Flatirons Apartments (hereinafter “Garrett”) intends to construct a multi-family housing development on a 16.6-acre site within close proximity to the Stearns Nest.

38. The Caliber at Flatirons project site is on a parcel of land adjoining the completed Retreat at Flatirons development.

39. Garrett submitted a BGEPA permit application stating that Garrett’s multi-family housing development will include 288 apartment units, a club house, swimming pool, park, and parking facilities (hereinafter the “Project”).

40. The Project boundary is located approximately 530 feet from the Stearns Nest.

41. Upon information and belief, buildings at the Project will be constructed within 660 feet of the Stearns Nest, while other Project construction activities will occur within 530 feet of the Stearns Nest.

42. In acknowledgement of the potential impact, Garret proposed in its BGEPA permit application to construct a hay bale wall to block sound that might reach the Stearns Nest, within the Project boundary, to purportedly act as a sound and visual barrier between the Stearns Nest and the Project construction activities.

43. Garrett also proposed in its BGEPA permit application that it will hire a qualified biologist to monitor the Stearns nest once per week between January 1 and March 4, 2018, three times a week between March 5 and March 9, 2018, and after severe weather events or during noisy construction activities that could disturb the nest.

44. Upon information and belief, Defendant USFWS issued the BGEPA permit to Garrett on February 6, 2018 (hereinafter the "Project Permit"). As explained herein, USFWS never notified the public of Garrett's permit application, solicited public comment on the permit application or any draft environmental review under NEPA in connection with the permit, or notified the public of the agency's final issuance of the permit.

45. The Project Permit requires Garrett to build the above-described hay bale sound wall 660 feet from the Stearns Nest

46. The Project Permit does not include specific buffer zones or other distance restrictions regarding Garrett's construction activities.

47. The Project Permit includes monitoring requirements for the Stearns Nest; specifically, Garrett, after an initial break, is required to monitor the nest site once per month, for the years 2018 through 2021, from January 1 to August 31 of each year.

48. The Colorado Division of Wildlife has published recommendations for setbacks from bald eagle nests in Colorado; those recommendations include: (i) no surface occupancy within a 0.25-mile “buffer zone” around active bald eagle nests, and (ii) seasonal restrictions to human encroachment within a 0.5-mile “buffer zone” around active nests from October 31 to July 31 each year. For the purpose of these recommendations, “surface occupancy” is defined by the Colorado Division of Wildlife as “[a]ny physical object that is intended to remain on the landscape permanently or for a significant amount of time.”¹ Examples include houses, oil and gas wells, tanks, wind turbines, roads, tracks, etc.” *Id.*

49. The Project may interfere with the normal breeding, feeding, or sheltering behaviors at the Stearns Nest to a degree that could cause a decrease in nest productivity, in a manner similar to the 2013-2014 breeding season when similar apartment construction 700 feet away from the Retreat at Flatirons caused a decrease in nest production and the nest failed.

50. The Project may interfere with the normal breeding, feeding, or sheltering behaviors of eagles at the Stearns Nest to a degree that could cause nest abandonment and or impair other essential biological functions.

D. Applying Categorical Exclusions to BGEPA Eagle Take Permits

51. USFWS has established the issuance of eagle take permits under BGEPA as a categorical exclusion so long as “such permits cause no or negligible environmental disturbance.” 516 DM 8.5(C)(1). USFWS has determined that in the absence of extraordinary circumstances, the issuance of eagle take permits does not have a significant environmental impact, either individually or cumulatively.

¹ “Recommended Buffer Zones and Seasonal Restrictions for Colorado Raptors,” Colo. Division of Wildlife, revised, 02/2008.

52. USFWS did not complete an EA or an EIS when issuing the Project Permit under BGEPA. The Project Permit does not even mention NEPA, let alone invoke any specific categorical exclusion and apply it to the facts of this Project. The Project Permit does not analyze whether any extraordinary circumstances exist that would require preparation of an EA or EIS for this Project, nor determine whether such circumstances are present under these facts.

53. The public was not notified by USFWS of, and had no opportunity to comment on, the Project Permit application or the subsequent issuance of the Project Permit.

E. Extraordinary Circumstances Exist Requiring Further Environmental Analysis

54. Any action that is normally categorically excluded must be subjected to sufficient environmental review to determine whether it meets any of the extraordinary circumstances described in 46 C.F.R. § 46.215(b)-(f), in which case further environmental analysis must be undertaken prior to the issuance of the permit.

55. As set forth below, at least six of the extraordinary circumstances exist with regard to the Stearns Nest and the issuance of Project Permit. As explained herein, USFWS's Project Permit does not even examine whether these extraordinary circumstances exist or ultimately reach a conclusion based on that legally required analysis.

FIRST CLAIM FOR RELIEF

(Violation of BGEPA and APA (“avoidance and minimization measures”))

56. Plaintiff hereby incorporates by reference all preceding paragraphs.

57. By issuing the Project Permit, USFWS acted arbitrarily, capriciously, or otherwise contrary to law within the meaning of the APA.

58. In issuing the Project Permit, USFWS violated 50 C.F.R. § 22.26(f)(1), which states that USFWS “must find that . . . [t]he direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors

affecting the eagle populations within the eagle management unit and the local area population, are compatible with the preservation of bald eagles and golden eagles” before issuing a permit. In the Project Permit, USFWS never made the legally required finding that this permit is “compatible with the preservation of bald eagles and golden eagles,” nor supplied any evidence that could support such a finding.

59. In issuing the Project Permit, USFWS also violated 50 C.F.R. § 22.26(f)(4), which states that USFWS must find that “the applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles” before issuing a permit. In the Project Permit, USFWS never made this legally required finding, nor supplied any evidence that could support such a finding.

60. Before issuing the Project Permit, USFWS failed to identify indirect effects, cumulative effects, and other additional factors affecting eagle populations in relation to the Project Permit. USFWS also failed to determine whether or not “all appropriate and practicable avoidance and minimization measures” had been considered and adopted by the Project Permit applicant sufficient to ensure that the Project Permit complies with all applicable statutory and regulatory provisions of BGEPA.

61. The Project Permit fails to include appropriate and practicable measures to reduce the impact to eagles, and is thus incompatible with the applicable legal standards in BGEPA and its implementing regulations

62. USFWS failed to include the full extent of monitoring requirements in the Project Permit that had been proposed by the Project Permit applicant.

63. USFWS violated BGEPA and the APA by failing to notify the public of the agency's decisionmaking process and by failing to solicit public comment concerning USFWS's authorization of the Project Permit and the appropriate terms and conditions that must apply to it.

64. USFWS's actions and omissions contravene the statutory safeguards for eagles under BGEPA and the decisionmaking provisions of the APA, and constitute agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or was undertaken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Plaintiff has been injured—and will continue to be injured—by USFWS's authorization of disturbance of the Stearns Nest.

SECOND CLAIM FOR RELIEF

(Violation of NEPA/APA - Failure to Prepare Adequate NEPA Analysis ("extraordinary circumstances"))

65. Plaintiff hereby incorporates by reference all preceding paragraphs.

66. USFWS did not prepare an EA or EIS for the Project Permit because it evidently relied on a NEPA "categorical exclusion" in approving the Permit.

67. USFWS did not prepare adequate written documentation in the Project Permit or in any other decision document specifically invoking any particular categorical exclusion, evaluating whether extraordinary circumstances exist, and ultimately determining whether this action can be lawfully excluded from NEPA review in light of an objective evaluation of the applicable "extraordinary circumstances" factors.

68. Even had USFWS analyzed the propriety of applying a categorical exclusion to this project, the Project Permit does not qualify for a NEPA categorical exclusion because several extraordinary circumstances exist here and thus require preparation of an EA or EIS.

69. USFWS did not independently acknowledge in the Project Permit the existence of extraordinary circumstances and also disregarded evidence of extraordinary circumstances in this case, in violation of 46 C.F.R. §§ 46.205 and 46.215.

70. At least six extraordinary circumstances exist with regard to the Stearns Nest and the issuance of the Project Permit. Specifically, the issuance of a BGEPA permit for the Project by USFWS:

- a. may have significant impacts on such natural resources as Stearns Lake, Rock Creek, migratory birds, and other ecologically significant or critical areas;
- b. may have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources;
- c. may have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks;
- d. may establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects; and/or
- e. may have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects;
- f. may violate a Federal law . . . or requirement imposed for the protection of the environment.

71. In erroneously relying on a categorical exclusion when issuing the Project Permit, USFWS circumvented public notification, review, and comment on its permitting decision in a manner that is inconsistent with NEPA and its express purpose of “insur[ing] that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1.

72. USFWS’s implicit reliance on a categorical exclusion in issuing the Project Permit, despite the existence of extraordinary circumstances, violates NEPA and its implementing regulations, neglects public input, is arbitrary, capricious, or otherwise not in

accordance with law, and occurred without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(A), (D). Plaintiff has been injured by this violation in the ways described herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that USFWS, Greg Sheehan, and Ryan Zinke have violated NEPA, BGEPA, and the APA;
2. Set aside and remand the challenged permit to USFWS consistent with the requirements of NEPA, BGEPA, and the APA;
3. Enjoin Defendants from authorizing Project construction until they have fully complied with all of their obligations under NEPA, BGEPA, and the APA;
4. Award Plaintiff its costs and expenses, including reasonable attorneys' fees, as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412; and
5. Grant Plaintiff such further declaratory, injunctive, or other relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted this 13th day of February, 2018.

/s/ Randall M. Weiner _____

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