

# *Budd-Falen Law Offices, L.L.C.*

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**VIA E-MAIL  
&  
U.S. MAIL**

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Re: Mexican Wolf and Local Government Litigation Victories

Dear Ed, Caren, Doug, Alex and Howard:

After many years of ranchers fighting a seemingly losing battle against the reintroduction of the Mexican gray wolf as a non-essential experimental population in Southeastern Arizona and Southwestern New Mexico, it is important to take note of two significant wins that have occurred in the past three months.

The first of these significant wins came in a challenge to the renewal of 26 grazing permits in the Gila National Forest. In 2007, the Wild Earth Guardians (then known as the Forest Guardians) challenged the United States Forest Service's ("USFS") use of categorical exclusions (CEs) under the National Environmental Policy Act ("NEPA") to renew grazing permits. This action, brought in the United States District Court for the

District of New Mexico, focused on 26 grazing allotments in the Gila National Forest. The New Mexico Cattle Growers' Association ("NMCGA"), the New Mexico Federal Lands Council, and the Arizona/New Mexico Coalition of Counties intervened in the case on behalf of the permittees for the 26 allotments. The Budd-Falen Law Offices, LLC represented the permittees and the counties.

NEPA analysis is typically required for major federal actions. However, many federal agencies, such as the USFS, are simply unable to conduct the required analysis on each grazing permit as it comes up for renewal due to lack of resources. For this reason, CEs have been used in some form since 1995 to ensure that the renewal of grazing permits is not delayed by the federal agency's inability to complete NEPA analysis. CEs are appropriate, and therefore the federal decision is excluded from documentation under NEPA, if (1) the decision continues current grazing management of the allotment; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan; and (3) the decision is consistent with agency policy concerning extraordinary circumstances.

In this litigation, the Wild Earth Guardians alleged that the presence of several threatened and/or endangered species on the 26 allotments constituted an "extraordinary circumstance" under which NEPA documentation was required. Although the Wild Earth Guardians initially raised several species, the group ultimately relied on the presence of the Mexican gray wolf to support its argument that the renewal of grazing permits could not take place without NEPA analysis. The WildEarth Guardians also claimed wilderness or wilderness study areas, roadless areas, wild and scenic rivers were also "extraordinary circumstances" eliminating the use of CEs.

In a detailed opinion issued at the beginning of October 2009, the federal court held that the USFS had acted reasonably when it issued the CEs and renewed the grazing permits for the 26 allotments, and that it had appropriately considered the presence of the threatened and/or endangered species present on the allotments. In particular, the court noted that the issues related to the Mexican gray wolf that the Wild Earth Guardians were attempting to raise were not at issue in the litigation, and that they would, in part, be decided by the United States District Court for the District of Arizona in a different lawsuit. The Court also noted that the USFS had properly considered all other circumstances but these did not eliminate use of the CEs.<sup>1</sup> The Wild

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<sup>1</sup> The same type of case challenging the USFS use of CEs in all other western states has also been filed in the Federal District Court in Northern California by the Western Watersheds Project ("WWP"). The WWP case impacts 26 permits in California, 11 permits in California, 11 permits in Arizona, 11 permits in Idaho, 11

Earth Guardians have appealed this decision to the Tenth Circuit Court of Appeals. The New Mexico permittees and Coalition of Counties have intervened in that appeal.

The second of these significant wins was in litigation between the Wild Earth Guardians and the Board of County Commissioners of Catron County, New Mexico. In that litigation, filed in 2007, in the United States District Court for the District of New Mexico, the Wild Earth Guardians challenged a county ordinance that gave the Catron County Board of County Commissioners the ability to issue findings of imminent danger to the United States Fish and Wildlife Service (“USFWS”) if it believed that Mexican gray wolves were causing danger to its citizens. Further, the Wild Earth Guardians alleged that actions taken by Catron County to protect its citizens from imminent danger – namely, the setting of a “Have-a-Heart” trap for the live capture of any Mexican gray wolves that were in the yard of a Catron County family, constituted a “take” and therefore violated the Endangered Species Act (“ESA”).

Catron County represented by Budd-Falen Law Offices, LLC immediately filed a Motion to Dismiss on the Wild Earth Guardians’ first claim, which alleged that the county ordinance was illegal. Wild Earth Guardians then filed a Motion for Summary Judgment on the same issue. In an order responding to both motions, the federal court held that Catron County had not violated the law when it passed its ordinance, and that the ordinance was legal and valid. The upholding of this ordinance constituted the first major win for local governments on the Mexican gray wolf issues since the reintroduction program began. Furthermore, the court held that the Wild Earth Guardians had not demonstrated that Catron County had violated the ESA through the evidence presented in its summary judgment brief, and that that issue would be determined at trial, if at all.

Catron County began to prepare for a vigorous defense on the alleged violation of the ESA. However, Wild Earth Guardians chose not to pursue this issue, and instead reached a settlement with the County that acknowledged the County’s right to protect its citizens from harm. The Settlement Agreement included the following concessions from the WildEarth Guardians:

3. The County has the right and authority “to provide for the safety, preserve the health, promote the prosperity and improve the morals, order,

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permits in Wyoming, 34 permits in Utah, 23 permits in Colorado and 4 permits in Washington - 120 permits total. While the New Mexico federal Court decision is not “binding” on the California Court, it can be cited as persuasive authority in the California case.

comfort, and convenience of any . . . [of] its inhabitants,” pursuant to NMSA 1978, § 4-37-1.

4. The County retains the authority to fully comply with all provisions of Amended Catron County Ordinance 001-2007, dated April 18, 2007.
5. The County is bound to comply with both 16 U.S.C. §§ 1531 et seq. and 50 C.F.R. § 17.84(k).
6. The County retains the ability to protect its citizens from imminent bodily harm from Mexican gray wolves as expressly allowed by statute and regulation.

Catron County the Coalition of Counties and the New Mexico Livestock Producers should be very proud of these decisions. They contain significant precedent which can and will be used in future litigation.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

/s/Karen Budd-Falen

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