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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONGASS CONSERVATION SOCIETY, et al., Plaintiffs - Appellants, v. UNITED STATES FOREST SERVICE, US Department of Agriculture, et al., Defendants - Appellees, VIKING LUMBER COMPANY, INC., et al., Intervenor-Defendants - Appellees.	No. 10-35232 D.C. No. 3:10-cv-00006-TMB MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, District Judge, Presiding

Argued and Submitted June 7, 2010
Seattle, Washington

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Tongass Conservation Society, Greenpeace, and Cascadia Wildlands (collectively, "TCS") claim that the district court abused its discretion in holding that TCS had a low likelihood of success on the merits of its National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) claims, and therefore erred in denying TCS's motion for a preliminary injunction to stop the Logjam Timber Sale Project ("Logjam"). Under our deferential standard of review, we affirm the district court. *See Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009).

NEPA Claims. The district court did not abuse its discretion in holding that TCS had a very low likelihood of succeeding on the merits of its claim that the Forest Service violated NEPA by failing to take a "hard look" at the impacts of the Logjam project on the aquatic environment, Alexander Archipelago wolves, and the Sitka black-tailed deer. *See, e.g.*, *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010). First, the record indicates that the Forest Service considered the impacts on the aquatic environment from open, stored, and decommissioned roads over the length of the project, and reasonably concluded that the impacts would be minor. The record likewise indicates that the Forest

Service considered these impacts in the context of the existing, degraded conditions of the affected watersheds.[1]

Second, the record establishes that the Forest Service took a hard look at the potential impacts of Logjam on wolves and discussed this issue extensively in the DEIS and FEIS. Although the DEIS erroneously stated that the Alaska Department of Fish and Game (ADF&G) did not have concerns about wolf mortality, the DEIS contained enough information to elicit extensive, detailed public comments on the wolf mortality analysis. Moreover, the Forest Service corrected its error in the FEIS. Because "the NEPA goals of public participation and informed decision-making occurred," *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 874 (9th Cir. 2004), TCS was unlikely to succeed on its claim that the Forest Service's consideration of the impacts on wolves fell short of NEPA's requirements.

Third, the district court's conclusion that the Forest Service took a hard look at Logjam's impacts to deer is supported by the record. The Forest Service adequately accounted for impacts to deer habitat on non-federal lands within the

[1] TCS's related claim that the Forest Service did not adequately analyze the impacts from the Logjam project in conjunction with the impacts from other reasonably foreseeable activities was not raised in the opening brief below and not developed in the reply brief below. Therefore, that claim was not preserved for appeal. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir.1990).

project area by analyzing a worst-case scenario. The Forest Service's decision to focus on impacts to deer winter habitat, rather than summer habitat, was a scientific determination within the Forest Service's area of expertise that is entitled to deference. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009). Further, the Forest Service adequately explained how it analyzed impacts on deer; the record discloses that the Forest Service considered both "high-value deer winter range" and acres of average-snow winter and deep-snow winter range. *See Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982).

NFMA Claims. The district court did not abuse its discretion in holding that TCS had a low likelihood of success on its claims that the Forest Service violated NFMA by failing to comply with the requirements of the Tongass Land and Resource Management Plan (the "Forest Plan") regarding red culverts, wolf habitat management plans, and modeling deer habitat. First, the Forest Service's determination to fix only eleven of the existing twenty-five red culverts did not conflict with the Forest Plan. The Forest Service's interpretation of its own plan as not requiring it to cure pre-existing problems as a condition of implementing a new project was a reasonable interpretation to which we defer. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009). Second, even if the Forest Service's interpretation

of the Forest Plan as requiring the implementation of a Wolf Habitat Management Plan (WHMP) only when the Forest Service itself is concerned about wolf mortality is unreasonable, we defer to Forest Service's reasonable determination that it did not have to prepare a WHMP in advance of implementing Logjam. *See id.* For this reason, the Forest Service's decision not to develop a WHMP did not violate the plan. Third, the Forest Service's determination that the Forest Plan allowed it to use "alternate analysis tools," including consideration of "[l]ocal knowledge of habitat conditions," for determining the impacts on deer was reasonable. *See id.* Moreover, the Forest Service did consider the output of the most recent deer habitat capability model as reported in the 2008 Forest Plan. Finally, the Forest Service's approval of a project that would result in less than eighteen deer per square mile was reasonable in light of the conflicting objectives of the Forest Plan. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002).

In sum, the district court correctly determined that TCS had a "very low likelihood of success on the merits" of its NEPA and NFMA claims. Therefore, even assuming the district court was correct in concluding that the balance of the hardships and the public interest tipped in TCS's favor, the district court did not

abuse its discretion in denying TCS a preliminary injunction. *See Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings
(December 2009)

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....*(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk