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JAN 02 2015

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES;
FRIENDS OF THE CLEARWATER,

Plaintiffs - Appellants,

v.

RICK BRAZELL, Supervisor of the Nez
Perce National Forest; FAYE KRUEGER,
Regional Forester of Region One of the
U.S. Forest Service; UNITED STATES
FOREST SERVICE, an agency of the U.S.
Department of Agriculture; U.S. FISH &
WILDLIFE SERVICE, an agency of the
U.S. Department of the Interior,

Defendants - Appellees.

No. 14-35050

D.C. No. 3:12-cv-00466-MHW

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Mikel H. Williams, Magistrate Judge, Presiding

Argued and Submitted December 8, 2014
Seattle, Washington

Before: HAWKINS, McKEOWN, and TALLMAN, Circuit Judges.

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

Plaintiffs-Appellants Alliance for the Wild Rockies and Friends of the Clearwater (collectively “Alliance”) appeal the district court’s grant of summary judgment in favor of federal defendants the United States Forest Service (“USFS”) and the Fish and Wildlife Service (“FWS”). Alliance argues that the district court erred when it affirmed USFS’s decision to implement the Little Slate Project (“Project”)—a 2,598-acre timber thinning sale within a 36,000-acre project area in the 2.2 million-acre Nez Perce National Forest. Alliance asserts that the agencies violated the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*—and therefore the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*—by failing to properly account for the impact of the Project on several species that live in the project area (fisher, goshawk, pileated woodpecker, and bull trout) and those species’ habitats. We disagree. We find that the federal agencies satisfied their obligations under NFMA, NEPA, the ESA, and the APA before implementing the Project to improve long-term habitat and the health of the forest. We, therefore, AFFIRM the district court’s entry of summary judgment in favor of the federal defendants.

USFS did not violate NFMA when developing the Little Slate Project. NFMA obligates USFS to comply with the Nez Perce Forest Plan when designing and implementing site-specific projects for the Nez Perce National Forest. *See* 16 U.S.C. § 1604(i); *Lands Council v. McNair*, 537 F.3d 981, 989 (9th Cir. 2008) (en banc). Although the Nez Perce Forest Plan requires USFS to monitor management indicator species (“MIS”) (including fisher, goshawk, and pileated woodpecker) populations at the forest level, nothing in the Plan requires USFS to conduct site-specific monitoring before implementing individual projects like the Little Slate Project. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1014 (9th Cir. 2012) (noting that “NFMA and its implementing regulations provide for forest planning and management at two levels: the forest level and at the individual project level”). USFS appropriately evaluated the impact of the Project on MIS by considering how the Project would affect those species’ habitats. *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 664–65 (9th Cir. 2009) (approving USFS’s use of the same methodology for monitoring MIS); *Lands Council*, 537 F.3d at 997–98 (same). Thus, USFS did not violate the Nez Perce Forest Plan or NFMA when it developed the Little Slate Project without conducting a population survey of MIS such as the fisher, goshawk, and pileated woodpecker.

Nor did USFS violate NEPA. NEPA requires federal agencies contemplating “major Federal action” to prepare an environmental impact statement (“EIS”) analyzing that action. *See* 42 U.S.C. § 4332(C). Reviewing courts evaluate the EIS to ensure that the agency has taken a “hard look” at the environmental consequences of the proposed action. *Ecology Ctr.*, 574 F.3d at 657. An EIS satisfies NEPA’s hard look requirement if it “provides a full and fair discussion of environmental impacts.” *Lands Council*, 537 F.3d at 1001.

After thoroughly reviewing the Little Slate Project Final EIS, we are satisfied that USFS took the requisite “hard look” at the Project’s potential impacts on the species. The Little Slate Project EIS closely examines the Project’s potential impact on fisher, goshawk, pileated woodpecker, and bull trout by considering how the Project will degrade or improve those species’ critical habitats. This discussion includes an analysis of any potential cumulative environmental impact to which the Project would contribute. That is sufficient to satisfy NEPA’s hard look requirement.

Finally, USFS and FWS satisfied their obligations under the ESA. The ESA prohibits federal agencies from taking any action that is “likely to jeopardize the continued existence” of any listed or threatened species or “result in the destruction or adverse modification” of those species’ critical habitats. 16 U.S.C.

§ 1536(a)(2). In its Biological Opinion relating to the Little Slate Project, FWS concluded that the Project would not jeopardize bull trout—the only listed species relevant here—or adversely modify its critical habitat. Consistent with the ESA, FWS based this conclusion on the “best scientific and commercial data available.” *Id.* This “no jeopardy” conclusion is supported by evidence in the record that shows that the Project, while temporarily disrupting some bull trout habitat in the short term, will have a long-term positive impact on many of the streams in which bull trout live and reproduce. For these reasons, FWS’s Biological Opinion is sufficient under the ESA. Thus, neither FWS nor USFS violated the ESA or the APA by developing or relying on FWS’s Biological Opinion.

In sum, we are satisfied—on an independent review of the administrative record as a whole—that USFS and FWS complied with NFMA, NEPA, the ESA, and the APA. The agencies followed all applicable law and did not “rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence . . . , or” come to a conclusion that “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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

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 www.ca9.uscourts.gov 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 www.ca9.uscourts.gov 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 www.ca9.uscourts.gov 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 www.supremecourt.gov

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:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ 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.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

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 <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* *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