

FILED

MAY 10 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRIENDS OF THE WILD SWAN;
SWAN VIEW COALITION; ALLIANCE
FOR THE WILD ROCKIES; NATIVE
ECOSYSTEMS COUNCIL,

Plaintiffs-Appellants,

v.

RICH KEHR, U.S. Forest Service Swan
Lake District Ranger; CHIP WEBER, U.S.
Forest Service Flathead National Forest
Supervisor; LEANNE MARTEN, U.S.
Forest Service Region One Forester;
UNITED STATES FOREST SERVICE,
an agency of the U.S. Department of
Agriculture,

Defendants-Appellees.

No. 18-35612

D.C. No. 9:17-cv-00120-DLC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted April 11, 2019
Seattle, Washington

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Before: W. FLETCHER, CALLAHAN, and CHRISTEN, Circuit Judges.

Appellants, four environmental nonprofits, sued to enjoin the United States Forest Service's Beaver Creek Project, arguing that it is inconsistent with the Flathead National Forest Land and Resource Management Plan ("the Forest Plan"). The district court granted summary judgment in favor of the Forest Service and appellants appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

The National Forest Management Act ("NFMA") requires that each National Forest develop a forest plan, and that all projects be consistent with the governing forest plan. 16 U.S.C. § 1604(a), (i); *Native Ecosystems Council v. USFS*, 418 F.3d 953, 961 (9th Cir. 2005). Similarly, failure to comply with provisions of the governing forest plan violates the National Environmental Policy Act ("NEPA"). *Id.* at 965.

Appellants argue that the Forest Service violated NFMA and NEPA by failing to ensure that the Beaver Creek Project would comply with the Forest Plan's road density objectives for grizzly bear habitat in the Buck Holland subunit. Amendment 19 of the Forest Plan provides road density objectives for grizzly bear habitat in Flathead National Forest and standards for evaluating Forest Service action impacting the forest. Appellants argue that the Buck Holland subunit is out

of compliance with Amendment 19's objectives. While that is correct, the Forest Service correctly argues that the Beaver Creek Project's legality does not depend on its compliance with the Amendment 19's objectives. Instead, the Beaver Creek Project complies with Amendment 19 if it satisfies Amendment 19's standard for actions affecting grizzlies. Because the Beaver Creek Project will "result in a net gain towards" the objectives in Amendment 19, the Project is not inconsistent with the forest plan's requirements in the Buck Holland subunit.

Appellants next argue that the Forest Service violated NFMA and NEPA by failing to demonstrate that the Beaver Creek Project would comply the Forest Plan's road density standards for grizzly bear habitat in the Beaver Creek subunit. With respect to the Beaver Creek Grizzly Bear subunit, appellants argue the Project does not comply with Amendment 19 because the Project will impermissibly increase road density in the Beaver Creek subunit. Appellants reach this conclusion by arguing that the Forest Service improperly excluded certain "reclaimed" roads from its calculation of road density following the Project.

Under Amendment 19, open and restricted roads both count toward total motorized access calculations. But "reclaimed" roads may be subtracted from road density calculations. Reclaimed roads are defined as roads that have "been treated in such a manner so as to no longer function as a road or trail[.]" Amendment 19

then goes into detail on the kinds of activities that must be undertaken to reclaim a road. The Project activities the Forest Service plans to undertake will render the roads at issue “reclaimed.” The Forest Service has thus demonstrated compliance with Amendment 19’s road density objectives in the Beaver Creek subunit. Therefore, the Project is consistent with the Forest Plan and does not violate NFMA or NEPA.

Finally, appellants argue that the Forest Service violated NFMA and NEPA by failing to demonstrate compliance with the Forest Plan’s road density standards for elk habitat in the Beaver Creek Project area. While this argument has significant force, we ultimately conclude that the Forest Service demonstrated compliance with the Forest Plan. The Forest Plan contains a standard that requires “[a]reas with ‘moist sites’” to be managed “with open road densities that average 1 mile or less per square mile” during the elk use period. Moist sites are defined as sites “found at the heads of drainages, bordering streams or marshy meadows, or occupying moist swales or benches.” The Forest Service admits that the Project’s Environmental Assessment (“EA”) did not expressly provide a specific determination about road density in areas near elk moist sites. Indeed, the Forest Service did not identify specific locations of elk moist sites. Ultimately, we conclude that the Project satisfies the Forest Plan based on the fact that a large

portion of the Beaver Creek subunit has an open road density of less than one mile per square mile and the Forest Service's explanation in the EA that "moist sites occur primarily . . . in roadless and wilderness areas[.]" While the Forest Service could have done a better job demonstrating its compliance with the elk habitat road density standards by mapping moist sites and showing that open road densities near those moist sites will meet the Forest Plan's standard, we nevertheless conclude that the Forest Service did just enough to comply with the Forest Plan, NFMA, and NEPA.

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; Eagan, MN 55123 (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
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 100%; height: 25px;" type="text"/>	<input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Supplemental Brief(s)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 100%; height: 25px;" type="text"/>
TOTAL:				\$ <input style="width: 100%; height: 25px;" type="text"/>

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov