

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

JUN 4 2019

FOR THE NINTH CIRCUIT

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

CONSERVATION CONGRESS,

No. 17-16153

Plaintiff-Appellant,

D.C. No.

v.

2:13-cv-01977-JAM-DB

UNITED STATES FOREST SERVICE;
UNITED STATES FISH AND WILDLIFE
SERVICE,

MEMORANDUM*

Defendants-Appellees,

TRINITY RIVER LUMBER,

Intervenor-Defendant-
Appellee.

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted May 16, 2019
Seattle, Washington

Before: HAWKINS and W. FLETCHER, Circuit Judges, and SEEBORG,**
District Judge.

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

** The Honorable Richard Seeborg, United States District Judge for the
Northern District of California, sitting by designation.

On cross motions for summary judgment, the district court largely rejected appellant Conservation Congress’s claims that appellees United States Fish and Wildlife Service (“FWS”) and the United States Forest Service (“USFS”) violated both the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”) when approving “the Smokey Project”—a plan to administer fuel and vegetative treatments to further habitat and fire management goals in the Mendocino National Forest in Northern California. The district court initially issued a “Final Judgment” that ordered a limited remand for USFS to prepare a supplemental NEPA analysis and enjoined the removal of trees in the project area having a diameter of 20 inches or greater. The district court subsequently issued an order granting appellee’s motion to amend the judgment and dissolve the injunction, which represents a final judgment over which we have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

We review de novo a grant of summary judgment. *See League of Wilderness Defs. v. USFS*, 689 F.3d 1060, 1068 (9th Cir. 2012). The agency’s compliance with the law, however, is reviewed under the Administrative Procedure Act’s deferential “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). To the extent the appeal implicates the district court’s lifting of the injunction, the court reviews for

abuse of discretion. *Native Ecosystems Council v. Marten*, 883 F.3d 783, 789 (9th Cir. 2018).

There was no error in finding that USFS’s clarification on remand that “Limited Operating Periods” (“LOPs”) applied only to “units” near known spotted owl activity centers, rather than to “all units,” did not constitute a “post-decisional elimination” of a “core mitigation measure” that would give rise to a NEPA violation. The record fully supports the district court’s conclusion that on remand USFS “provided a reasoned, clear, and thorough analysis for its conclusions,” and that the Project had not changed. The application of the LOPs was disclosed throughout the decision-making process, and whatever ambiguity may have been introduced by the erroneous inclusion of the phrase “all units” in one appendix did not cause prejudice or skew the results such that the clarification on remand could not cure the issue.

The district court also correctly determined USFS did not violate NEPA by analyzing the impacts of the Smokey Project in too limited of a geographical area. USFS’s environmental assessment (which incorporated the analysis of the FWS biological assessment), considered impacts in 35,023 acres comprising the treatment units and land within a 1.3-mile radius of those units. That scope was based on FWS’s recommendation to analyze impacts within the spotted owl’s “home range,” and appears to account for the location and movement patterns of

the spotted owls, thereby warranting deference to the agencies' judgment.

Conservation Congress's suggestion that a meaningful analysis required consideration of the entire Buttermilk late successional reserve reflects a different judgment as to the best way to evaluate the project, but it does not establish a NEPA violation.

The district court did not err in finding that USFS adequately analyzed potential alternatives to the project. On remand, USFS specifically considered alternatives with several different diameter cap limits on trees to be felled and concluded none were viable. Although Conservation Congress suggests the alternatives considered were arbitrary, it makes no attempt to show USFS's conclusions were unsound. Conservation Congress instead argues that USFS should have considered undertaking forest thinning at federal expense. Whatever arguments might support such a policy, however, Conservation Congress has not shown it is improper for USFS to carry out its forest management mandates by contracting with private parties for timber removal.

The district court also did not err in declining to require a full Environmental Impact Statement ("EIS") for the Smokey Project. The district court appropriately held the agency to its "hard look" obligations, *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 762-3 (9th Cir. 2014) (citing 40 C.F.R. § 1502.1), when it issued the limited remand. Conservation Congress has not shown how the

district court's subsequent determination that the injunction should be lifted without requiring a full EIS was erroneous.

Finally, the district court correctly found no ESA violation. Conservation Congress contends both that there is no valid biological opinion from the FWS and that USFS was required under ESA Section 7(a)(2) to re-initiate formal consultation with FWS upon clarifying the LOP requirements of the plan. Both arguments, however, rest on the premise that the LOP requirements were substantively modified on remand, a position that, as noted above, is untenable.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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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)

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

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