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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIANCE FOR THE WILD ROCKIES,

Plaintiff-Appellant,

v.

CHRISTOPHER SAVAGE, Kootenai  
National Forest Supervisor; et al.,

Defendants-Appellees.

No. 19-35035

D.C. No. 9:09-cv-00160-DWM

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Montana  
Donald W. Molloy, District Judge, Presiding

Argued and Submitted October 25, 2019  
Seattle, Washington

Before: CLIFTON, IKUTA, and BENNETT, Circuit Judges.

Alliance for the Wild Rockies (Alliance) appeals the district court's 2018 order dissolving the permanent injunction against the Miller West Fisher Project (Miller Project), and certain of the district court's rulings in its 2010 summary judgment order. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

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

The conclusion of the United States Forest Service (Forest Service) and the Fish and Wildlife Service (FWS) (collectively, the Agencies) that the Miller Project “may affect, but is not likely to adversely affect” grizzly bears in the Cabinet-Yaak recovery zone was not arbitrary and capricious. After the FWS issued a biological opinion and incidental take statement for the Forest Plan Amendments for Motorized Access Management (Access Amendments), the Agencies concluded that the Miller Project’s effects fell within the range analyzed within these Endangered Species Act (ESA) documents. To the extent the Miller Project would impose effects beyond what was previously analyzed, the Agencies determined that those additional effects were “not likely to adversely affect” grizzly bears. Therefore, the Forest Service was not required to obtain a biological opinion specific to the Miller Project’s activities that will occur in the Cabinet-Yaak recovery zone. *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1067–68 (9th Cir. 2004), *superseded on other grounds by* Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016).

We take judicial notice of *Alliance for the Wild Rockies v. Probert*, No. CV 18-67, 2019 WL 4889253 (D. Mont. Oct. 3, 2019), which held that the Agencies must reinitiate consultation regarding the implementation of the Access

Amendments because the Forest Service was exceeding the Access Amendments' incidental take statement in BORZ areas. *See* Fed. R. Evid. 201. Because the district court's 2018 order dissolving the permanent injunction was based in part on the Miller Project's compliance with the Access Amendments' incidental take statement in the Cabinet Face BORZ, *Probert's* conclusion that the Forest Service is not complying with that incidental take statement in the BORZ area potentially undermines the district court's ruling.<sup>1</sup> We "may remand a case to the district court for further consideration when new cases or laws that are likely to influence the decision have become effective after the initial consideration." *White Mountain Apache Tribe v. State of Ariz., Dep't of Game & Fish*, 649 F.2d 1274, 1285–86 (9th Cir. 1981). Accordingly, we remand to the district court for the limited purpose of reconsidering whether the Miller Project complies with the ESA in the Cabinet Face BORZ. *See id.* This limited remand is without prejudice, meaning Alliance is not precluded from filing a new action in district court challenging the

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<sup>1</sup> *Probert* is limited to the Access Amendments' environmental effects in BORZ areas. *See* 2019 WL 4889253, at \*6. Therefore, *Probert* does not cast doubt on the district court's dissolution of the permanent injunction against the Miller Project's activities that will occur in the Cabinet-Yaak recovery zone.

Forest Service's environmental compliance. We will retain jurisdiction over any subsequent appeals.<sup>2</sup>

We reject Alliance's argument that the Forest Service's analysis of the Miller Project does not comply with the National Environmental Policy Act (NEPA). In preparing the environmental impact statement (EIS) and supplemental EIS for the Miller Project, the Forest Service aggregated the impacts of road closure breaches into its analysis of the environmental baseline, and concluded that road closure breaches were not a fundamental factor. Alliance has pointed to no evidence in the record that the Miller Project will increase the frequency of road closure breaches. Therefore, the Forest Service could reasonably conclude it was not required to provide a separate analysis of the cumulative impacts of road closure breaches. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014).

**AFFIRMED IN PART; REMANDED IN PART.**<sup>3</sup>

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<sup>2</sup> Alliance's motions to take judicial notice are DENIED (Docket Entry Nos. 13 and 43). The Agencies' motion to submit a declaration is DENIED (Docket Entry No. 54).

<sup>3</sup> Each party shall bear its own costs.

## 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](http://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](http://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](http://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](http://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.

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