

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

MAY 18 2020

FOR THE NINTH CIRCUIT

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

CONSERVATION CONGRESS, A Non  
profit Organization,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 19-15753

D.C. No.

2:13-cv-01922-TLN-DMC

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Troy L. Nunley, District Judge, Presiding

Argued and Submitted May 5, 2020  
Portland, Oregon

Before: SCHROEDER, WATFORD, and HURWITZ, Circuit Judges.

In this Administrative Procedure Act action against the Forest Service and the Fish and Wildlife Service (“FWS”), Conservation Congress challenges the agencies’ actions in connection with the approval of the Bagley Hazard Tree Abatement Project (“Project”), designed to identify and remove fire-damaged trees

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

that pose a danger to users of the Shasta-Trinity National Forest's roadways. The district court granted summary judgment to the Forest Service and FWS. We have jurisdiction over Conservation Congress' appeal under 28 U.S.C. § 1291, and reviewing de novo, *see Conservation Cong. v. Finley*, 774 F.3d 611, 617 (9th Cir. 2014), we affirm.

1. The Forest Service adequately considered the impact of post-fire logging on private land in its Environmental Assessment. *See Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004); 40 C.F.R. § 1508.7. The Forest Service estimated the reasonably foreseeable impact of private-land logging on the forest in general and on northern spotted owl habitat in particular, and developed an “environmental baseline, against which the incremental impact of a proposed project [was] measured.” *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015). The Forest Service detailed the methodology used to quantify the impact of the Project, providing both the underlying data and illustrative maps. The record does not disclose a “clear error of judgment” by the agency. *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) (citation omitted).<sup>1</sup>

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<sup>1</sup> Because this method of analyzing the impact of private-land logging satisfied the National Environmental Policy Act, the Forest Service was not required to consider notices of emergency timber operations in its analysis. *See League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008). We deny Conservation Congress' motion, **Dkt. 9**, for

2. Under the National Environment Policy Act, an Environmental Impact Statement (“EIS”) is required for “major” actions “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Here, the Forest Service reasonably concluded that the Project did not require an EIS, but rather only an Environmental Assessment. *See* 40 C.F.R. § 1501.4. The Project would affect a small percentage of suitable owl critical habitat in the Shasta-Trinity National Forest, target only a narrow range of trees near open roads, and remove only damaged trees hazardous to roadway users. Although the Project would involve felling hazardous trees within two Inventoried Roadless Areas (“IRAs”) and one Late Successional Reserve (“LSR”), the Forest Service reasonably concluded that the impact on these areas was not significant, as only a small portion of the IRAs and LSR would be affected.

3. The Forest Service did not err in refusing to adopt Conservation Congress’ proposed alternative, which was to conduct no logging or felling within IRAs, LSRs, and northern spotted owl critical habitat. Almost all of the Project area falls within one of those areas, and complete inaction in those areas would conflict with the Project’s objective of making existing roads safe for use. *See N. Alaska*

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judicial notice of these California state notices of emergency timber operations. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-03 (9th Cir. 2014) (stating that a reviewing court is generally limited to “the administrative record already in existence” (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))).

*Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (holding that an agency is not required to discuss alternatives that are “inconsistent with the basic policy objectives for the management of the area” (cleaned up)).

4. In issuing its concurrence letter, the FWS did not violate the Endangered Species Act by failing to follow the 2011 Northern Spotted Owl Recovery Plan. “The Endangered Species Act does not mandate compliance with recovery plans for endangered species.” *Cascadia Wildlands*, 801 F.3d at 1114 n.8; *see also Finley*, 774 F.3d at 620. Even assuming that the FWS was required to “work toward the goals set in its recovery plan,” *Friends of Blackwater v. Salazar*, 691 F.3d 428, 437 (D.C. Cir. 2012), the agency did just that. The concurrence letter noted that FWS had considered the Recovery Plan and detailed why the Project was consistent with its goals.

**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](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.

**Signature**  **Date**

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