

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 22 2021

FOR THE NINTH CIRCUIT

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

FRIENDS OF THE CLEARWATER;  
ALLIANCE FOR THE WILD ROCKIES,

Plaintiffs-Appellants,

v.

JEANNE M. HIGGINS, Idaho Panhandle  
National Forest Supervisor; et al.,

Defendants-Appellees,

and

STIMSON LUMBER COMPANY,

Intervenor-Plaintiff-  
Appellee.

No. 20-35623

D.C. No. 2:20-cv-00243-BLW

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Idaho  
B. Lynn Winmill, Chief District Judge, Presiding

Submitted February 4, 2021\*\*  
Seattle, Washington

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

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: GRABER, McKEOWN, and PAEZ, Circuit Judges.

Plaintiffs-Appellants Friends of the Clearwater and Alliance for the Wild Rockies (“FOTC”) appeal the district court’s denial of their motion for a preliminary injunction to prevent timber harvest and road construction by Federal Defendants-Appellees (“USFS”) and Intervenor-Appellee Stimson Lumber Company in the Brebner Flat Project (“Project”) in Shoshone County, Idaho. We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review the “district court’s denial of a preliminary injunction for abuse of discretion.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). We affirm.<sup>1</sup>

1. FOTC raises two arguments in support of their claim under the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(c)(1). Neither is persuasive.

First, FOTC contends that the district court erred by requiring a showing of likely harm to the *species of grizzly bear*, rather than harm only to the *interests of FOTC’s members*. Not so. Plaintiffs who seek to enjoin a violation of the ESA must show a “definitive threat of future harm to protected species.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818–19 (9th Cir. 2018) (internal quotation marks omitted). Harm to FOTC’s members’ interests can suffice, but only if they “adequately show[] harm to themselves *as a result of harm*

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<sup>1</sup> The parties agree that FOTC’s ESA claim regarding the Canada lynx is moot. Thus, we need not address it.

to listed [endangered species].” *Id.* at 820 (emphasis added).

Second, FOTC argues that the district court clearly erred in finding that they failed to present sufficient evidence of irreparable harm to grizzly bears. As support for this argument, FOTC relies on the same record evidence that the district court characterized as “general allegations,” too “speculative” to show a definitive future threat to grizzly bears. FOTC does not identify any record evidence that undermines the district court’s finding that FOTC failed to show a definitive threat to grizzly bears because “no bears have ever been identified in the project area, there is no known bear population in the St. Joe Ranger District, and the project area is not in critical bear habitat.” Thus, the district court did not clearly err in finding that FOTC failed to establish that grizzly bears are likely to be irreparably harmed.

2. FOTC argues that the district court erred by failing to analyze adequately (a) the cumulative effects of the Project on elk, and (b) the efficacy of the chosen mitigation measures for elk. We disagree.

(a) FOTC contends that USFS was required to disclose in the Environmental Assessment (“EA”) historical declines in the elk population in the project area due to past activities such as logging and road building. However, USFS was not required to engage in such a fine-grained analysis of all historical details of past actions. The relevant National Environmental Policy Act (“NEPA”) regulations

allow for an aggregate method of analyzing cumulative impacts. 36 C.F.R. § 220.4(f) (providing that cumulative effects analyses need not “catalogue or exhaustively list and analyze all individual past actions”); *see also Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1111–13 (9th Cir. 2015). We agree with the district court that USFS’s proposal to increase cumulative elk security beyond *baseline levels* was reasonable and therefore was not an abuse of discretion.

(b) The district court concluded that USFS’s plan to implement a seasonal closure of an ATV trail with signage, gates, and gate monitoring to increase the elk security habitat was reasonable. FOTC’s only substantive argument to the contrary relies on a spreadsheet purporting to show a USFS survey of its gate closures, indicating a high failure rate. The spreadsheet, however, was never presented to the district court, and therefore provides no basis for FOTC’s argument. *See* 9th Cir. R. 10-2.

3. Finally, FOTC argues that the misstatement in the EA that the “project area . . . does not include . . . the [St. Joe] [W]ild and [S]cenic [R]iver corridor” constituted a “failure to fully inform the public,” that deprived the public of an opportunity to “offer meaningful comments” on the agency’s analyses in violation of NEPA.

The district court weighed the effect of the agency’s misstatement on public participation and concluded that the EA’s single sentence incorrectly stating the

scope of the Project did not so drastically undermine public participation as to render the USFS's action unlawful. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090–91 (9th Cir. 2014). We agree.

4. Because the district court did not err in its assessment of FOTC's likelihood of success on the merits of their NEPA claims and irreparable harm on their ESA claim, we need not address the remaining *Winter* factors for each of FOTC's claims. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 958, 966 (9th Cir. 2014) (discussing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

**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>*

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

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