

FILED

NOT FOR PUBLICATION

NOV 19 2015

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

DESERT PROTECTIVE COUNCIL, a
California non-profit corporation; et al.,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF THE
INTERIOR; et al.,

Defendants - Appellees.

No. 13-55561

D.C. No. 3:12-cv-01281-GPC-
PCL

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted November 3, 2015
Pasadena, California

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

Plaintiffs appeal the district court’s judgment denying Plaintiffs’ motion for summary judgment and granting Defendants’ motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

We review agency compliance with the National Environmental Policy Act (“NEPA”) and the Federal Land Policy and Management Act (“FLPMA”) as outlined in the Administrative Procedure Act (“APA”). *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). Under the APA, we may set aside an agency action only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The district court also reviewed this Bureau of Land Management (“BLM”) action under the arbitrary and capricious standard. We review *de novo* the district court’s grant of summary judgment. *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011).

1. NEPA requires federal agencies to follow certain procedures and take a “hard look” at environmental consequences. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). NEPA regulations require agencies to make “environmental information . . . available to public officials and citizens before decisions are made,” 40 C.F.R. § 1500.1(b), and “insure the . . . scientific integrity[] of the discussions and analyses in environmental impact statements [(“EIS”)],” § 1502.24. NEPA also requires agencies to discuss appropriate mitigation measures in an EIS “in sufficient detail to ensure that environmental

consequences have been fairly evaluated.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

The district court did not err in determining that the BLM complied with NEPA, because the BLM sufficiently evaluated and disclosed the environmental impacts of the Ocotillo wind energy facility project (the “Project”). Plaintiffs contend that they were not provided with an opportunity for public comment on 34 raptor studies that were cited in the final Avian and Bat Protection Plan (“ABPP”), but not in the draft ABPP. A mitigation plan, such as the ABPP, does not need to be in final form to comply with NEPA’s procedural requirements. *See Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000). The draft EIS concluded that raptor use of the Project site was low and provided supporting evidence.¹ Plaintiffs commented on the draft EIS and did not take issue with this conclusion. The final EIS was available for comment during the 30-day protest period, and Plaintiffs did not comment on the final ABPP’s comparison of raptor data, despite submitting comments on other aspects of the

¹The draft EIS included the results of raptor migration count and avian point count surveys, and a Biological Technical Report, which concluded that the collision risk of special status raptor species was low. The draft and final EIS also cite the *California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development* (2007), a publicly available document that contains much of the data from the 34 raptor studies cited in the final ABPP.

final EIS. Accordingly, Plaintiffs have not shown that the BLM acted in an arbitrary and capricious manner by not including certain raptor studies in the draft ABPP.

Similarly, Plaintiffs have not shown that the methodologies used by the BLM in conducting migration surveys were arbitrary or capricious. While Plaintiffs question the BLM's methodologies as they relate to the timing of raptor migration surveys, the final EIS contains a reasoned analysis of the migration and presence of Swainson's hawks and other raptors at the Project site. We are "most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA" and will not "impose [ourselves] as a panel of scientists." *See Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (internal citations and quotation marks omitted). Further, the BLM included a reasonably complete discussion of mitigation measures in the final EIS. It was not arbitrary and capricious for the final EIS to require turbine curtailment for golden eagles and not other raptors, because the special legal status of golden eagles justified different mitigation measures.

2. FLPMA authorizes the Department of Interior to grant rights-of-way across public lands for various purposes, including for "systems for generation, transmission, and distribution of electric energy." 43 U.S.C. § 1761(a)(4). These

grants must “require compliance with State standards for . . . environmental protection . . . if those standards are more stringent than applicable Federal standards.” § 1765(a)(iv). The grants must also include terms and conditions that “minimize damage to . . . fish and wildlife habitat and otherwise protect the environment.” § 1765(a)(ii).

The BLM did not act arbitrarily and capriciously in granting a right-of-way for the Project. The right-of-way explicitly requires compliance with state law. Contrary to Plaintiffs’ argument, the California Department of Fish and Wildlife has not interpreted the California Fish and Game Code as requiring wind energy facilities to prevent all bird and bat fatalities. The right-of-way also includes terms and conditions minimizing damage to wildlife habitat and protecting the environment. The right-of-way was not required to include turbine curtailment for all raptor species as a mitigation measure. The Project adopted sufficient mitigation measures designed to minimize damage to wildlife habitat.

3. “[B]ecause the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement,” we do not need to determine whether the Laborers’ Union lacked organizational standing. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). The Laborers’

Union's claims and arguments were nonetheless fully presented to the district court by its member Plaintiff.

4. In its initial complaint, Plaintiffs did not adequately plead certain NEPA claims. Nonetheless, the district court made a merits determination on all of Plaintiffs' unpleaded claims during the summary judgment process. Defendants also fully responded to all of the claims. Therefore, the district court did not abuse its discretion in refusing to grant Plaintiffs leave to amend the complaint to add these claims. Such amendment would have been futile and subject to dismissal. *See Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

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; St. Paul, MN 55164-0526 (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

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
Excerpt of Record	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Answering Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
Other**	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk