

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 13 2009

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

SWAN VIEW COALITION; et al.,

Plaintiffs - Appellants,

v.

CATHY BARBOULETOS; et al.,

Defendants - Appellees,

PYRAMID MOUNTAIN LUMBER,
INC.; et al.,

Defendant-Intervenors -
Appellees.

No. 08-35484

D.C. No. 9:05-cv-00064-DWM

MEMORANDUM*

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

Argued and Submitted October 8, 2009
Seattle, Washington

Before: D.W. NELSON, SILVERMAN and IKUTA, Circuit Judges.

Appellants Swan View Coalition and Friends of the Wild Swan, Inc., appeal
the district court's grant of summary judgment in favor of the Forest Service and

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

Fish and Wildlife Service. This case involves the impact of the Robert-Wedge and West Side Reservoir Post-Fire Projects' motor vehicle restrictions on threatened grizzly bears in the Flathead National Forest. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the summary judgment de novo and the Endangered Species Act and National Environmental Policy Act claims under APA arbitrary and capricious standards. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891-92 (9th Cir. 2002). We affirm.

1. Claims against the Fish and Wildlife Service

The FWS Biological Opinions did not arbitrarily exclude *unmet* forest plan access management objectives from the environmental baseline. Rather, FWS properly used *actual* habitat conditions. This is specifically required by *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Nor were the incidental take statements arbitrary. The Biological Opinions specifically linked motor vehicle access and density to grizzly habitat and survival to define incidental take through ecological habitat conditions as permitted by *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1250 (9th Cir. 2001). The incidental take statements also contained sufficient triggers for reinitiated consultation; the Forest Service's failure to meet any of the numerous

reasonable and prudent measures by specified dates will trigger reinitiated consultation. This, too, is allowed under *Ariz. Cattle Growers' Ass'n. Id.*

The Biological Opinions did not fail to consider whether the projects were consistent with Interagency Grizzly Bear Guidelines. The Guidelines are not binding on FWS, *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 942-43 (9th Cir. 2006), but FWS did indeed consider them (and the best scientific data upon which the Guidelines were created), including evidence that “large contiguous blocks of unroaded habitat are important to survival” of grizzly bears.

2. Claims against the Forest Service

As for the Forest Service, its Final Environmental Impact Statements did not violate NEPA. Both Statements took “a hard look” at the forest-wide cumulative effects of the projects in the context of other projects, grizzly bear populations, the Grizzly Guidelines, forest plan objectives and state and private lands. For example, the Forest Service analyzed such cumulative effects in Rg-5, which is referenced in both Final Environmental Impact Statements. This is sufficient under *Ecology Center v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009) (requiring “a sufficiently detailed catalogue of past, present, and future projects” and “adequate

analysis about how these projects, and differences between the projects, are thought to have impacted the environment”).

AFFIRMED.