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OCT 23 2018

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILDEARTH GUARDIANS and NEW
MEXICO WILDERNESS ALLIANCE,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant-Appellant,

and

SAFARI CLUB INTERNATIONAL; et
al.,

Intervenor-Defendants.

No. 17-16677

D.C. No. 4:13-cv-00392-DCB

MEMORANDUM*

WILDEARTH GUARDIANS and NEW
MEXICO WILDERNESS ALLIANCE,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF

No. 17-16678

D.C. No. 4:13-cv-00392-DCB

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

JUSTICE,

Defendant,

NEW MEXICO CATTLE GROWERS'
ASSOCIATION; et al.,

Intervenor-Defendants,

and

SAFARI CLUB INTERNATIONAL,

Intervenor-Defendant-
Appellant.

WILDEARTH GUARDIANS and NEW
MEXICO WILDERNESS ALLIANCE,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant,

SAFARI CLUB INTERNATIONAL,

Intervenor-Defendant,

and

NEW MEXICO CATTLE GROWERS'

No. 17-16679

D.C. No. 4:13-cv-00392-DCB

ASSOCIATION; et al.,

Intervenor-Defendants-
Appellants.

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted October 9, 2018
Seattle, Washington

Before: FERNANDEZ, N.R. SMITH, and CHRISTEN, Circuit Judges.

The United States Department of Justice (“DOJ”) and Intervenor Safari Club International and New Mexico Cattle Growers’ Association appeal the district court’s order granting summary judgment to WildEarth Guardians and New Mexico Wilderness Alliance (collectively “WildEarth”). We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand to the district court with instructions to dismiss for lack of standing.

WildEarth brought claims under the Administrative Procedure Act, challenging the DOJ’s *McKittrick* policy as arbitrary and inconsistent with the Endangered Species Act (“ESA”). Under the *McKittrick* policy, prosecutors are directed to request jury instructions with a heightened *mens rea* requirement in prosecutions under the ESA, even though this court has already held that a

heightened *mens rea* requirement is not required under the statute. *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998). According to WildEarth, this policy decreases the deterrent effect of the ESA's prohibition against taking protected Mexican grey wolves, thereby leading to an increased number of wolf killings.

We find that WildEarth lacks standing to bring this challenge. To establish standing, WildEarth must show (1) a concrete and particularized injury that (2) is traceable to the challenged conduct and (3) would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). WildEarth asserts that it and its members are injured by the increased number of Mexican wolf killings and the *McKittrick* policy's adverse impact on Mexican wolf conservation. The DOJ does not dispute that this constitutes an injury. But even assuming that WildEarth has suffered a cognizable injury, it has failed to show both that the injury was fairly traceable to the *McKittrick* policy and that its requested relief would actually redress that injury by decreasing the number of Mexican wolves that are killed.

WildEarth asserts that without the *McKittrick* policy, there will be additional prosecutions of unlawful wolf takings, which will then deter members of the public from purposefully or accidentally killing wolves. Yet as WildEarth's counsel

acknowledged during argument, WildEarth is not aware of any specific instance where the DOJ has declined to prosecute a wolf killing because of the *McKittrick* policy. The court therefore cannot conclude that eliminating the policy would trigger additional prosecutions, a greater deterrent effect, and fewer Mexican wolf killings.

Moreover, WildEarth's conclusion necessarily rests upon several layers of speculation. For example, to find that fewer wolves would be killed in the absence of the *McKittrick* policy, the court would, at a minimum, need to speculate about: how the U.S. Fish & Wildlife Service would allocate its resources and the extent to which it would investigate and refer wolf shootings to the DOJ; how the DOJ would prioritize prosecutions of unlawful wolf takings given its own policies and limited resources; whether individual prosecutors would choose to indict and prosecute particular cases of wolf killings; whether the circumstances surrounding any wolf killing would otherwise preclude prosecution (e.g., if the government is unable to identify the shooter); and the extent to which members of the public would be aware of the additional prosecutions (especially if there is only a modest increase) and would change their behavior by shooting fewer wolves. In effect, on the record before us WildEarth's contention that eliminating the *McKittrick* policy would decrease wolf killings requires speculation about how a series of

independent entities would respond to the change. This is insufficient to support standing under Article III. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413-14 (2013) (no standing where the court would have to rely on “speculation” or “guesswork as to how independent decisionmakers will exercise their judgment.”); *see also Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (no standing to challenge tax change because it is “speculative” whether a court-ordered reinstatement of tax benefits for indigent services would cause hospitals to resume providing services to the indigent).

We therefore vacate the district court’s order granting WildEarth summary judgment, and remand to the district court with instructions to dismiss WildEarth’s complaint for lack of standing.

The parties shall bear their own costs for this appeal.

VACATED AND REMANDED

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; 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

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