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United States Court of Appeals
Tenth Circuit

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PATRICK FISHER
Clerk

I

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WYOMING SAWMILLS INCORPORATED,
a Wyoming corporation, Amici Curiae.

Plaintiff-Appellant,
v.

UNITED STATES FOREST SERVICE;
and ANN M. VENEMAN, Secretary,
U.S. Department of Agriculture;
DALE N. BOSWORTH, Chief, U.S.
Forest Service; RICK D. CABLES,
Regional Forester, Region II,
U.S. Forest Service; and BILL
BASS, Supervisor, Bighorn National
Forest, all in their official
capacities,

Defendants-Appellees,

and

MEDICINE WHEEL COALITION ON SACRED
SITES OF NORTH AMERICA,

Defendants-Intervenors-Appellees.

NATIONAL CONGRESS OF AMERICAN
INDIANS AND NATIONAL TRUST FOR
HISTORICAL PRESERVATION; BECKET
FUND FOR RELIGIOUS LIBERTY AND
VARIOUS CHRISTIAN, JEWISH AND
MUSLIM ORGANIZATIONS,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 99-CV-0031-J)

William Davis Thode, Esq., (William Perry Pendley, Esq., with him on the brief) Mountain States Legal Foundation, Lakewood, Colorado, for Plaintiff-Appellee.

David C. Shilton, Attorney, (Kelly A. Johnson, Acting Assistant Attorney General, Environment and Natural Resources Division, Matthew H. Mead, United States Attorney, Carol A. Statkus, Assistant United States Attorney, E. Anne Peterson, Attorney on the brief) United States Department of Justice, Washington, D.C., for Defendant-Appellees.

Jack F. Trope, (Andy Baldwin, Baldwin & Crocker, P.C., Lander, Wyoming, with him on the brief) Association on American Indian Affairs, Rockville, Maryland, for Defendant-Appellee.

Steven J. Gunn, Jerome N. Frank Legal Services Org., New Haven, Connecticut; R. Echo-Hawk, Jr. and Steven C. Moore, Native American Rights Fund, Boulder, Colorado, and Paul W. Edmondson, Elizabeth S. Merritt, and Anita C. Canovas, National Trust for Historic Preservation, Washington, D.C., filed an Amicus Curiae Brief in support of Appellees.

Anthony Picarello, Roman Storzer, and Derek L. Gaubatz, The Becket Fund for Liberty, Washington, D.C., and Robert L. Greene, The Law Offices of Robert Greene, New York, New York, filed an Amicus Curiae Brief for The Becket Fund for Liberty, in support of appellees.

Before HENRY, HOLLOWAY and MURPHY, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff-appellant Wyoming Sawmills Incorporated brings this appeal from the district court's order dismissing plaintiff's claim of violation of the Commerce Clause and holding against plaintiff on the merits of its claim under the National Forest Management Act.⁽¹⁾ Plaintiff commenced this action in 1997 after the United States Forest Service had rejected plaintiff's challenges to the Preservation Plan issued by the Forest Service for the management of the Medicine Wheel National Historic Landmark and Vicinity. Named as defendants in the complaint are the Forest Service, the Secretary of Agriculture (who is the cabinet officer with the Forest Service), and three individual officers of the Service, all of whom are referred to herein as the Forest Service or just the Service. The Medicine Wheel National Historic Landmark and Vicinity was permitted to intervene in the district court and the Forest Service as an appellee in this court.

The Medicine Wheel National Historic Landmark was created in 1969 to protect the Medicine Wheel, a prehistoric stone circle about 80 feet in diameter that was used by the aboriginal peoples of North America. The wheel includes a large cairn

(1) The district court's opinion is published at 179 F.Supp.2d 1279 (D. Wyoming, 2000). The opinion includes a more detailed description of the background of the litigation.

28 radiating spokes of rocks. Although the age of the structure is unknown, archaeological evidence indicates that human presence in the area goes back for 7,500 years. Tepee rings, trails, and other artifacts and traces of human habitation are scattered throughout the area. A number of Native American tribes consider the Wheel to be sacred.

The Medicine Wheel is located on Medicine Mountain in the Bighorn National Monument in north central Wyoming. In 1957, approximately 200 acres in the Bighorn National Monument were set aside for the preservation of the Wheel, and designation as a National Historic Landmark followed twelve years later. In the 1980s, the Forest Service began to increase the level of protection afforded the area. An increase in the number of visitors to the monument had raised concerns of visitor safety and concern that the features of the monument were at risk. On the other hand, apparently some officials were of the view that the needs of visitors should be facilitated.

In 1991, the process resulted in the publication of a Draft Environmental Impact Statement (DEIS) which set out management alternatives. The preferred alternative in the DEIS called for road construction and improvements to allow unrestricted access except during times of ceremonial use of the Wheel, construction of a parking lot adjacent to the Wheel, and so forth. The Forest Service received many comments on the DEIS, many of which were critical and called for an approach more sensitive to the concerns of Native Americans.

In response, the Service withdrew the proposal and began a more intensive

consultation process with the Wyoming State Historic Preservation Officer and the Advisory Council on Historic Preservation.(2) The Big Horn County Commission, the Big Horn County Medicine Wheel Coalition on Sacred Sites of North America, the Medicine Wheel Coalition, and the Federal Aviation Administration(3) also became "Consulting Parties" to the development of plans for management of the site. The Consulting Parties entered into a Memorandum of Agreement (MOA) which established that "the management and protection of the Medicine Wheel are its protection and continued traditional use, and that management consistent with Section 110(f) of the [National Historic Preservation] Act."

The Consulting Parties comprised a committee for planning management of the site. Plaintiff notes that no representative of commercial interests was involved in the process. The Forest Service agreed in the MOA to close a portion of Forest Development Road 12, which provides access to the Medicine Wheel; an exemption to the closure of the road to meet the "special needs of traditional religious practitioners" to reach the site; and to address the alleged impact on logging of the decision to close FDR 12 is important to the action). The term of the MOA appears to have been quite brief; it appears

in mid-1993 and provided that it was to expire on January 1, 1994.

On August 29, 1994, the Forest Service published a Programmatic Agreement with the Consulting Parties, the stated purpose of which was to develop a plan for

(2) The Service is required to consult with other federal, state, and local tribes by the National Historic Preservation Act, 16 U.S.C. 470h-2(a)(2).

(3) The FAA was involved because it has operated a radar site on the monument

management of the Medicine Wheel and Medicine Mountain. As part of this agreement, the Forest Service prohibited, temporarily, any new "undertakings" in an area within the monument at Medicine Wheel, including any new mining or timber harvesting, until the area is included in a National Historic Preservation Plan could be completed and adopted.

In September 1996, the Service adopted the long-term plan now at issue in this case, the Historic Preservation Plan for the Medicine Wheel National Historic Landmark and Medicine Mountain (the HPP). The Service implemented the HPP on October 7, 1996, by Amendment 12 to the Bighorn National Forest Plan;(4) Amendment 12 included a "Notice and Finding of No Significant Impact," and Environmental Assessment. App. 573 et seq.

The HPP provides that the Forest Service will consult with the other parties to the HPP for any project within an "Area of Consultation" around the monument. The "Area of Consultation" is considerably larger than the National Historic Landmark, covering an estimated 18,000 to 20,000 acres. The purpose of the consultation environment is to facilitate the consideration of means to minimize impacts to historic and traditional cultural use.

The HPP recognizes explicitly that the cultural and historic importance of the Medicine Wheel is, for many Native Americans, an element of their religious

(4) A forest plan, or land and resource management plan, is a planning document that guides natural resource management activities in a national forest over a period of 10 years. See 16 U.S.C. 1604.

Indeed, plaintiff points to the fact that the first page of each of the HPP includes this statement: "The purpose of this HPP is to ensure that the Big and Medicine Mountain are managed in a manner that protects the integrity of the sacred site and a nationally important traditional cultural property." E.g.

The Forest Service points out that preservation of the Medicine Wheel with the Service's responsibilities under a number of statutes. The Environmental Assessment produced to evaluate the environmental effects of the HPP recites:

The Forest Service is required by law to protect and preserve National Landmarks and historic properties. These laws include the Antiquities Act of 1906, the Historic Sites Act of 1935, the National Historic Preservation Act of 1966, the Archaeological and Historic Resources Preservation Act of 1969, the American Indian Religious Freedom Act of 1978, the Archaeological Resources Act of 1979 (all as amended). In addition, Executive Order 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.

III Aplt. App. 582.

Plaintiff Wyoming Sawmills is a commercial timber company located in Big Horn County, Wyoming. It has been the primary purchaser of timber from the Big Horn Forest for over 30 years. In addition to challenging the HPP, plaintiff's lawsuit addressed the Forest Service's decision not to hold one particular timber sale proposed. The Service had, in September 1997, advertised for bidding on a timber sale in an area referred to as Horse Creek. The Service canceled the sale after receiving no bids before opening the bids, citing a "procedural error" in having failed to

the parties to the HPP. Internal documents indicated that the Service had intended to advertise the sale and to proceed with it. However, after consulting with the HPP and after further deliberations, the Service identified several potential problems with the proposed sale, including "process violations, conflicting data, and inconsistent data." [Environmental Policy Act] analysis." As a result, the Service never conducted a timber sale from the Horse Creek area; on the other hand, the Service did not decide to permanently cancel the project.

II

The Forest Service and intervenor defendant Coalition moved to dismiss plaintiff's complaint, and alternatively moved for judgment as a matter of law. As relief from the appeal, the district court addressed issues of standing for plaintiff's First Amendment claim and addressed on its merits plaintiff's claim of violation of the National Historic Preservation Act.

The district court concluded that plaintiff did not have standing to litigate its First Amendment claims. We discuss below the concept of standing generally and then apply the concept of standing that the judge found were satisfied. The judge held that plaintiff lacked standing as to the First Amendment claims because the court could not remedy the constitutional wrongs plaintiff had alleged. The judge first determined that the legal harm was, essentially, the loss of the opportunity to bid on timber sales, an injury caused by the decision to close FDR 12, to withdraw the Horse Creek timber sale, and

put in place by the HPP. The judge concluded that this injury could not be remedied because, even if the HPP were declared constitutionally invalid, the Forest Service would be under no obligation to sell any timber from the Area of Consultation. See *Timber Mountain Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994); *Wyoming v. Lujan*, 877 F.2d 1377 (10th Cir. 1992); *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868 (10th Cir. 1992).

Baca v. King, 92 F.3d 1031 (10th Cir. 1996).

The district judge then considered plaintiff's claim that the Forest Service's own regulations and the National Forest Management Act (NFMA) in adopted by means of Amendment 12 to the Forest Management Plan. After concluding that plaintiff had established standing to advance that claim, the judge ruled on the merits. The gist of the district court's ruling on this claim is that the protections which plaintiff had invoked were not, in fact, required because they were not a "significant" alteration of the Forest Management Plan.(5)

III

A

We review de novo the district court's determination that plaintiff lacks standing to pursue its First Amendment claims. See Hackford v. Babbitt, 14 F.3d 1457, 1994).

(5) The district court also held that the plaintiff lacked standing to bring the complaint under the National Environmental Policy Act, and ruled against the plaintiff on the merits of its claim under the Federal Advisory Committee Act. Plaintiff has appealed the holdings of the district court.

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). The burden is on the plaintiff, as the party asserting jurisdiction, to establish each element at 561. Further, "each element must be supported in the same way as any other element, which the plaintiff bears the burden of proof, i.e., with the manner and degree of proof required at the successive stages of the litigation." Id.

The district court held that plaintiff had met its burden at the pleading stage by showing an injury in fact because plaintiff had pleaded that it had lost timber contracts as a result of the adoption of the HPP. The complaint also alleged that the deprivation of opportunity was a constitutional injury because it was based on the government's decision to manage Medicine Mountain as a sacred site in violation of the First Amendment Establishment Clause. Plaintiff asserts on appeal that the district court's determination was correct but that the court erred in rejecting plaintiff's argument that it was "directly affected" by the management of Medicine Mountain as a sacred site. We address this latter point first.

(6) In the district court plaintiff also claimed other injuries, but it limited to the two alleged injuries stated in the text.

B

Plaintiff contends that it has standing to complain of the alleged violation of the Establishment Clause "independent of the alleged loss of opportunity to bid for timber" which is discussed *infra* "because it is "directly affected" by the Service's HPP, representing the decision to manage Medicine Mountain as a sacred site." Plaintiff relies on *Abbington School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963), including two cases from this court, *Robinson v. City of Edmond*, 68 F.3d 1212 (10th Cir. 1995), and *Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1995).

The Forest Service, in its brief, expresses doubt as to whether a for-profit entity can sustain a non-economic injury under the Establishment Clause. Whatever the answer to that question may be, we conclude that this plaintiff has not alleged such injury. Plaintiff attempts to explain how it has been directly affected, but plaintiff repeatedly fails to explain the restrictions on timber cutting which it says will follow from the HPP. Plaintiff claims it is directly affected "by the loss of the right to have federal land classed as a sacred site under the Establishment Clause and the loss of the opportunity to bid for timber." Plaintiff-Appellant's Opening Brief at 20. Similarly, plaintiff says that the complaint against . . . the decision of the Forest Service to close 50,000 acres to timber harvesting" as a result of the adoption of the HPP. *Id.* at 21, n.8. Elsewhere, plaintiff similarly asserts that "the lost opportunity to bid demonstrates that Wyoming is 'directly affected' by the HPP and therefore has standing." Plaintiff-Appellant's Brief at 4.

at 4.

We discern no allegation of cognizable injury separate from the alleged loss of opportunity for profitable logging. Plaintiff's invocation of such religious injury, as in *Foremaster* is unpersuasive. As an artificial person, plaintiff has not experienced the kind of constitutional injury that has been found in such cases. Plaintiff's arguments repeatedly refer to and rely on the alleged economic injury. We conclude that plaintiff's claim for standing must turn on the alleged economic injury, the loss of opportunity for logging, to which we now turn.

C

We consider here the question whether plaintiff has suffered an economic injury. The district judge held that the loss of the opportunity to bid on future timber is in fact sufficient to satisfy the first prong of the standing analysis and that the injury was caused by the defendant's conduct. On appeal, the Forest Service argues, as a ground for affirming the judgment below, that plaintiff has not pleaded an injury. We have previously observed that "each of the three standing elements blends together." *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 875 (10th Cir. 1992), and we think the district judge cannot be faulted for his holding that the plaintiff's attempt to establish standing faltered at the third requirement rather than the first. In previous cases we have applied the standing analysis in this manner, and the district judge faithfully followed the precedents.

In *Ash Creek* the plaintiff was a coal mining company which desired to mine in an area under federal control. The Secretary of the Interior had decided

from competitive coal leasing so that the tract could be used in a property plaintiff's attempt to prevent the exchange had previously been rejected or there was no final agency action. The exchange was effected and the plaintiff a legal challenge. We held that the loss of the possibility of obtaining a mining was an "injury not redressable by a favorable decision" and so did plaintiff standing to object to the exchange of lands. 969 F.2d at 874. In the issue so clear cut that we noted "detailed discussion" was not necessary. *Wyoming v. Lujan*, 969 F.2d 877, 880-82 (10th Cir. 1992).

In *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994), we held that plaintiffs who merely hoped to obtain a contractual benefit, but entitlement to the benefit, lacked standing "because their injuries are not favorable decision." Plaintiffs in that case had previously held the right House on top of Mount Evans, a facility that provided food and souvenir sales services. The Crest House had been destroyed by fire, and the Forest Service not to rebuild on the summit. Plaintiffs filed suit to challenge that decision a decision in their favor would require the Service to rebuild, which would opportunity to compete for the concession contract. Citing *Ash Creek*, we made argument, noting that even if a new facility were to be built as plaintiffs

"no guarantee" that plaintiffs would be the successful bidder for the concession that no court could order the Service to award them the contract. *Id.*

We cited *Ash Creek* and *Mount Evans* with approval in *Baca v. King*, 92 F.3d 1036-37 (10th Cir. 1996), in which we held that the plaintiff's alleged injury was not redressable because the only two actions that would remedy the alleged wrong for the government to sell the disputed land to the plaintiff or an order of government to renew the plaintiff's grazing permit, neither of which were available of the courts to impose because either action was completely within the discretion of the Secretary of the Interior.

Plaintiff's arguments on this issue are not persuasive. Plaintiff complains of wrongful denial of the opportunity to bid competitively for federal contracts on basis for standing, citing *Aderand Constructors, Inc. v. Pena*, 515 U.S. 200. Plaintiff misstates the holding of that case. *Aderand* involved a federal program where contractors were given financial incentives to hire subcontractors controlled by economically disadvantaged individuals, "with 'race-based presumptions' in the process for identifying such subcontractors." 515 U.S. at 204. The Court's holding in cases of this kind is that a "discriminatory classification prevent[s] them from competing on an equal footing." *Id.* at 211 (quoting *Northeastern Fla. Chamber of Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)). For that case, the Court said, "the aggrieved party need not allege that he would have

benefit but for the barrier in order to establish standing.'" *Id.* (quoting *Aderand* at 666). Plaintiff *Wyoming Sawmills* has not alleged that it was treated differently than other timber company. *Aderand* is thus inapposite.

Plaintiff asserts that *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980), supports the proposition that standing is established if the plaintiff seeks to bid for a benefit that will become available." But again, we find that plaintiff has stated the holding in overly general terms and that the holding does not support plaintiff's claim in this matter. The facts of that case are not at all analogous to the facts of this case. They are rather unusual and complicated, but it is sufficient to say that the plaintiff sought to purchase lands that the Court held would "likely" become available if the plaintiff prevailed. *Wyoming Sawmills* has not shown that a timber lease would "likely" become available on the lands within the area of consultation if plaintiff were to prevail. As in *Baca*, the federal agency has complete discretion as to whether the opportunity sought by the plaintiff, and accordingly the courts do not have the only relief that would rectify the alleged injury.

Plaintiff similarly contends that the loss of an opportunity to bid was to confer standing in *Watt v. Energy Action Educational Foundation*, 454 U.S. Again, we disagree with plaintiff's characterization of the holding of the Court noted that the State of California claimed standing on two grounds -- "involuntary `partner'" with the Federal Government in oil and gas leasing,

a competitor with the Federal Government in the same endeavor. The Court in California had standing on the first basis and did not consider the second contrary to Wyoming Sawmills' description of the case. Wyoming Sawmills do to be an "involuntary partner" with the Forest Service, and its argument is *Watt*.

Wyoming Sawmills also relies on *Arkla Exploration Company v. Texas Oil Corp.*, 734 F.2d 347 (8th Cir. 1984). Of course, we are bound by our precedents *supra*, and so would not be free to follow *Arkla* if it supported plaintiff's also note that the case is distinguishable. The plaintiff in that case sought lands which had been offered. 734 F.2d at 353-54.(7)

We therefore affirm the district court's holding that plaintiff Wyoming not have standing to bring its First Amendment claim.

IV

A

In its complaint, plaintiff alleged that Amendment 12 to the Bighorn Plan (the mechanism by which the HPP was implemented) was a de facto change in the designation of lands within the Area of Consultation which were previously designated as

(7) In its reply brief, plaintiff cites two cases which do support its position. *Timber Industry Ass'n v. United States Forest Service*, 80 F.Supp.2d 1245 (D.C. Cir. 1999) and *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1997) are, of course, bound by our precedents. We note that our position is consistent with another circuit in a case relied on by the Forest Service, *Region 8 Forest Purchasers Council v. Alcock*, 993 F.2d 800, 808-09 (11th Cir. 1993).

wood fiber production (i.e., logging).(8) Plaintiff alleged, and argues that the Forest Service failed to inquire into and disclose the effects of the HPP when it issued its comment on the HPP. Plaintiff also maintains that the Service failed to follow the Service Handbook standards for amending the Forest Plan, in violation of the National Forest Management Act (NFMA) and the Administrative Procedure Act (APA).

The district court first found that plaintiff had standing to assert its claim. 734 F.Supp.2d at 1297-98. The judge noted that, because the NFMA does not provide for judicial review of decisions by the Forest Service, the general provisions of the APA, Under the APA, a person "suffering legal wrong because of agency action" may seek judicial review. 5 U.S.C. 701. The Forest Service did not dispute that Amendment 12 were final agency actions, nor that timber interests are within the scope of interests protected or regulated by the NFMA. The judge then noted that the

requirement of redressability is applied less strictly when, as with this case, the plaintiff is seeking to enforce a "procedural right." See *id.* at 1298 (citing and quoting *Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

The intervenor-appellee, Medicine Wheel Coalition on Sacred Sites of the West, challenges plaintiff's standing to bring its claim under the NFMA, although the Forest Service does not contest the district court's ruling on this point. We see no error in the district court's holding on this point, however, and proceed to review the merits of the claim.

(8) Plaintiff alleged that a de facto change of designation was also in effect for areas outside the Area of Consultation which were serviced by FDR 11.

B

Our standard of review is a deferential one, and we will reverse the district court's action only if it is "arbitrary, capricious, otherwise not in accordance with law, or not supported by substantial evidence." *Citizens' Committee To Save Our Canyonlands v. Forest Service*, 297 F.3d 1012, 1021 (10th Cir. 2002) (quoting *Hoyle v. Forest Service*, 13 F.3d 1377, 1382 (10th Cir. 1997)). No deference is due to the district court's review of the agency's action, however. *Id.*

The National Forest Management Act (NFMA) provides that once enacted, forest management plans may "be amended in any manner whatsoever." 16 U.S.C. 1604(f)(4). The court explained in some detail two years ago, if

an amendment to a forest plan would be "significant," however, then NFMA mandates substantial public involvement, planning, and input, requiring, in essence, the Forest Service "to conduct the same complex planning process that is applicable to promulgation of the original plan." *Sierra Club v. Carlsbad Forest Service*, 36 F.3d 1545, 1551 (10th Cir. 1993) (Seymour, J., dissenting); see 36 C.F.R. 219.10(f). Among other things, for significant amendments, NFMA requires the Forest Service to "mak[e] plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption." 16 U.S.C. 1604(d).

Citizens' Committee, 297 F.3d at 1032-33 (footnote omitted). We have noted that the Act does not provide guidance as to what amendments are "significant." *Carlsbad Forest Service*, 36 F.3d at 1548.

Indeed, applicable regulations "expressly commend[] the determination of the significance of an amendment to the Forest Supervisor's judgment." 36 C.F.R. 219.10(f).

According to the regulations, "Based on an analysis of the objectives, purposes, and guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant change to the plan." 36 C.F.R. 219.10(f) (emphasis added). If the Forest Supervisor concludes that an amendment is nonsignificant, "[he] may implement the amendment following appropriate public notification and satisfactory

completion of [National Environmental Policy Act] procedures." Id. (emphasis added).

Citizens Committee, 297 F.3d at 1033.

In the absence of specific direction from Congress, the Forest Service guidelines in its Forest Service Handbook (FSH) for consideration of the significance of amendments to a forest plan:

Although the Forest Supervisor has wide discretion in deciding whether an amendment is significant, the FSH outlines factors the Supervisor must consider when assessing the significance of a proposed amendment, including: 1) the timing of the proposed change relative to the expiration or next scheduled revision of the Forest Plan (the shorter the remaining life of the plan, the less significant the amendment); 2) "the location and size of the area involved in the change" in comparison to the "overall planning area"; 3) the long-term significance of the project relative to the goals and objectives of the forest plan; and 4) the impact of the amendment on "management prescriptions." FSH 1909.12 5.32(3)(a)-(d). Whether the change applies only to a specific situation or whether it will affect future decisions as well.

Id. (footnote omitted). In this appeal, plaintiff accepts these criteria and argues in their terms. Accordingly, our review will also focus on these factors.

Although as explained we review the agency's decision deferentially but with deference to the district court's holdings, in this instance we see no error in the district court's analysis. The first factor set out above from the FSH is the timing of the amendment. On this point, Wyoming Sawmills does not challenge the district court's observation

that the amendment came late in the planning period, after the period's first decade. Wyoming Sawmills dispute the conclusion that this factor favors a finding that the amendment was not significant.

Wyoming Sawmills does contest the agency's, and district court's, conclusion on the second factor, the size of the affected area compared to the overall planning area. The district court agreed with the agency that the size of the affected area is small, observing that the Area of Consultation is only 18,000 acres or only 1.6% of the National Forest. Plaintiff disputes this conclusion by asserting that it is a small portion of the entire forest in the comparison and by contending that Amendment 12 in fact affects more than 18,000 acres.

First, plaintiff contends that the overall planning area which should determine the relative significance of the affected area should not be the entire National Forest, but the slightly more than 200,000 acres that are deemed "available" for timber production. But plaintiff offers neither reason nor authority to persuade us that the Forest Service's discretion in using the acreage of the entire forest in its analysis. The Forest Service does not permit us to find an abuse of discretion on this point.

Plaintiff emphatically contends that the decision to implement the HPI in the Area of Consultation is an area much greater than the 18,000 acre Area of Consultation. Plaintiff bases its argument on the assertion that the decision to close FDR 12 and to bar the use of other roads through the Area of Consultation effectively closes an additional 30,000 acres

north and west of the Area of Consultation.

The Forest Service and the intervenor Coalition offer several points which severely undercut the impact of plaintiff's argument. First, we note that the Forest Service explained how it has determined that an additional 30,000 acres are affected by Amendment 12. The district court observed that plaintiff had not shown that FDR 12 had ever been used for timber hauling; plaintiff has not countered this point. Third, the Forest Service expressly in the HPP that it would "continue to explore opportunities for a timber harvest on the 30,000 acres to National Forest System lands north of the Medicine Wheel," an effort which

as the "long term goal" of its management efforts. II Aplt. App. 318. Per significantly, the Service determined that implementation of the HPP "will significant changes to those levels of outputs projected under the current Forest Plan." III Aplt. App. 626.(9)

The HPP does not prohibit logging in the Area of Consultation. At least within the consultation area are not barred to timber hauling, although the a consultation process for approval of their use. Id. at 571. More generally did not change any actual management allocations (for timber or livestock for example) but added standards and guidelines to be followed in pursuit of the allocations. Of the 18,000 acres in the Area of Consultation, only about 10,000 are deemed suitable for timber production. Id. at 347.

(9) We note that the withdrawal of the Horse Creek timber sale was not an action; accordingly, that decision may not be reviewed at this time.

As we have noted, the third factor is the long-term significance of the change to the goals and objectives of the forest plan. Plaintiff's inability to show that the Forest Service abused its discretion in its determination of the size of the Area of Consultation is doubly important because its argument on the third factor rests entirely on the fact that the decision does affect a much larger area than just the Area of Consultation. Plaintiff's argument on the fourth factor is based largely on the same assumption as the deference due to the Service's determination, we hold that plaintiff has not shown that the Service abused its considerable discretion in finding that Amendment 1 is a "significant" change to the overall forest plan.

This holding disposes of plaintiff's NFMA claim. Plaintiff's allegations of deprivation of procedural rights are all dependent on the more stringent procedural requirements applicable to significant amendments.

Conclusion

The judgment of the district court is AFFIRMED.