NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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

PROTECTING ARIZONA'S RESOURCES AND CHILDREN; FOOTHILLS COMMUNITY ASSOCIATION; FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION; CALABREA HOMEOWNERS ASSOCIATION; SIERRA CLUB; PHOENIX MOUNTAINS PRESERVATION COUNCIL; DON'T WASTE ARIZONA, INC.; GILA RIVER ALLIANCE FOR A CLEAN ENVIRONMENT,

Plaintiffs-Appellants,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff,

v.

FEDERAL HIGHWAY ADMINISTRATION; KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration; ARIZONA

No. 16-16586

D.C. Nos. 2:15-cv-00893-DJH
2:15-cv-01219-DJH

MEMORANDUM*

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

DEPARTMENT OF TRANSPORTATION,

Defendants-Appellees.

GILA RIVER INDIAN COMMUNITY,

Plaintiff-Appellant,

and

PROTECTING ARIZONA'S RESOURCES AND CHILDREN; FOOTHILLS COMMUNITY ASSOCIATION; FOOTHILLS CLUB WEST COMMUNITY ASSOCIATION; CALABREA HOMEOWNERS ASSOCIATION; SIERRA CLUB; PHOENIX MOUNTAINS PRESERVATION COUNCIL; DON'T WASTE ARIZONA, INC.; GILA RIVER ALLIANCE FOR A CLEAN ENVIRONMENT,

Plaintiffs,

v.

FEDERAL HIGHWAY ADMINISTRATION; KARLA PETTY, in her official capacity as the Arizona Division Administrator of the Federal Highway Administration; ARIZONA DEPARTMENT OF TRANSPORTATION,

No. 16-16605

D.C. Nos. 2:15-cv-00893-DJH
2:15-cv-01219-DJH

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted October 19, 2017
San Francisco, California

Before: W. FLETCHER and TALLMAN, Circuit Judges, and HOYT,[**] District Judge.

Protecting Arizona's Resources and Children ("PARC"), additional advocacy groups, and the Gila River Indian Community ("GRIC") (hereinafter "Appellants") appeal the district court's order granting the Federal Highway Administration's, *et al.* (hereinafter "Appellees") motion for summary judgment. Appellants claim that Appellees' evaluation and subsequent approval of the Loop 202 South Mountain Freeway ("South Mountain Freeway") violates the National Environmental Policy Act ("NEPA") and Section 4(f) of the Department of Transportation Act. We have jurisdiction under 28 U.S.C. § 1291 and review the district court's order de novo. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Our review of Appellees' compliance with NEPA and Section 4(f) of the Transportation Act is governed by the deferential

[**] The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

standard of the Administrative Procedure Act, 5 U.S.C. § 701–06. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005). *Amici*'s argument for a "heightened standard of impact assessment because American Indian populations are affected" has been waived, as it was neither briefed nor raised by Appellants or Appellees. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176 n.8 (9th Cir. 2009).

An environmental impact statement ("EIS") should "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Appellees' purpose and need statement examined projected population growth, housing demand, employment growth, transportation mileage, and transportation capacity deficiencies. These metrics were then used to establish the "underlying purpose and need" and to determine whether a previously proposed freeway was still necessary. *See Honolulutraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230–31 (9th Cir. 2014) (upholding a purpose and need statement based on objectives previously identified in a Transportation Plan). The Ninth Circuit provides agencies "considerable discretion" when defining the purpose and need of a project. *Id*. at 1230 (quoting *Nat'l Parks & Conservation Ass'n v. Bureau of*

Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010)). Under this standard, Appellees' purpose and need statement complied with NEPA.

An EIS must analyze reasonable or feasible alternatives to the proposed freeway project. *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (citing 40 C.F.R. § 1502.14(a)–(c)). It is not required to consider an infinite range of alternatives. *Id*. Appellees used a multivariable screening process to evaluate reasonable alternatives over the course of thirteen years. Appellees identified three alignment alternatives for the Western Section of the freeway, one alignment alternative for the Eastern Section of the freeway, and a no-action alternative for detailed study. Appellees utilized the "Modal Method" to evaluate each non-freeway alternative, ultimately concluding that the non-freeway alternatives would not address an adequate percentage of the transportation capacity need. When Appellees eliminated an alternative from detailed study they provided reasons for the elimination. 40 C.F.R. § 1502.14. We therefore conclude that Appellees' EIS complied with NEPA in its analysis of alternatives.

A no-action alternative may consider the impact of "continuing with the present course of action until that action is changed." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997) (quoting 46 Fed.Reg. 18026, 18027). Appellees' no-action alternative analysis

assumed that "[e]xisting residential land use patterns and trends would be maintained," and then modeled the effects if the freeway were not built. *See Carmel-By-The-Sea*, 123 F.3d at 1162–63. Planning agencies may rely on state assessments in drafting an EIS, *see Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 525–27 (9th Cir. 1994); *HonoluluTraffic.com*, 742 F.3d at 1231, to generate growth predictions. Appellees used a transportation planning report previously issued by the Maricopa County Association of Governments ("MAG"). The MAG report assumes some future expansion of highways, but does not explicitly rely on the "preferred alternative." Because Appellees explained the basis for their decision to rely upon the socioeconomic projections of the MAG report and disclosed their reliance on the projections, we conclude that their examination of the no-action alternative was not arbitrary or capricious. *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016).

Though Appellees declined to analyze the potential impact of a hazardous materials spill, their discussion of hazardous spills was sufficient. An EIS must "discuss the extent to which adverse effects can be avoided," and must include "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52 (1989). However, an EIS need not discuss the potential environmental

consequences of adverse effects that are remote or highly speculative. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030 (9th Cir. 2006). Appellees determined that "the probability of a spill of hazardous cargo is low," and discussed the extent to which a hazardous spill could be avoided or mitigated. Appellees noted that the potential for such an accident already exists for portions of the Phoenix metropolitan areas and is governed by existing regulations. Appellees outlined Arizona's Department of Transportation's ("ADOT") coordination with emergency services providers responsible for responding to such spills, and Appellees discussed ADOT's ongoing assessment and evaluation of hazardous material restrictions.

Appellees adequately considered the proposed freeway's potential impact on children's health. We give deference to an agency's judgment when the agency undertakes "technical scientific analysis." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016). Appellees performed the conformity analyses mandated by the Clean Air Act, 42 U.S.C. § 7506(c), and concluded that the proposed freeway project would not exceed National Ambient Air Quality Standards ("NAAQS") standards throughout the Study Area. Because NAAQS are set at levels designed to protect sensitive populations, including children, Appellees concluded the South Mountain Freeway would cause no negative health

impact on the general population in the Study Area. In coming to this conclusion, Appellees produced a full Air Quality Technical Report, and performed a quantitative "hot spot" analysis for particulate matter ("PM10") and carbon monoxide ("CO"). "The hot-spot analysis show[ed] that the Preferred Alternative would not cause new violations of the PM10 and CO NAAQS, exacerbate any existing violations of the standard, or delay attainment of the standards or any required interim milestones." Final Environmental Impact Statement ("FEIS") at 4–75 (citing 40 C.F.R. § 93.116(a)).

Appellees adequately analyzed Mobile Source Air Toxic ("MSAT") emissions, in compliance with NEPA. Appellees' MSAT analysis conformed to the FHWA's guidance for roadway projects. Appellees modeled MSAT emissions using the EPA's latest model, documented the Freeway Project's MSAT impacts in the Study Area and two subareas, and provided reasoning for their determination that an analysis of near-roadway emissions was not necessary.

Appellees adequately considered mitigation measures. An EIS should disclose any environmental effects that cannot be avoided and discuss the extent to which steps can be taken to mitigate adverse environmental consequences. *Laguna Greenbelt*, 42 F.3d at 528 (9th Cir. 1994) (citing *Methow Valley Citizens Council*, 490 U.S. at 351–52). Appellees' FEIS proposes several project-specific mitigation

measures to address any direct impacts, cumulative impacts, and secondary impacts from the freeway project. Chapter 4 of the FEIS discusses the South Mountain Freeway's potential impact on biological resources and the contiguous nature of the community. Appellees' FEIS proposes mitigation measures to reduce the amount of dust and noise pollution generated from the construction of the freeway project, including the use of watering trucks, windbreaks, dust suppressants and rubberized asphalt. The FEIS examines the wildlife located in the Study Area and discloses that the South Mountain Freeway will fragment the habitats of many species. The FEIS explains that the freeway project will enhance bridges and drainage structures to maintain wildlife connectivity in the affected area. The FEIS also examines the potential displacement of households and businesses, proposing, advisory services for displaced residents, rental assistance for eligible individuals, and land acquisition and relocation assistance pursuant to the Uniform Relocation Act, 42 U.S.C. §§ 4601, *et seq.*, among other measures. "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." *Laguna Greenbelt*, 42 F.3d at 528 (citing *Methow Valley Citizens Council*, 490 U.S. at 352). The record thus does not bear out the contention that

the fifteen percent design level hindered Appellees from sufficiently detailing and discussing mitigating measures.

Appellees permissibly determined there was no feasible and prudent alternative to the South Mountain Park Preserve ("SMPP") route of the project, in compliance with Section 4(f). An agency's Section 4(f) evaluation "shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property." 23 C.F.R. § 774.7(a). Chapter 5 of the FEIS identifies the Section 4(f) properties within the Study Area, describes alternatives that avoid the Section 4(f) properties aside from the SMPP, and concludes that all alternatives avoiding the SMPP are not feasible or prudent. The FEIS further concludes that the no-action alternative will not meet the freeway project's purpose and need and, as a result, is not prudent. *HonoluluTraffic.com*, 742 F.3d at 1232 (quoting 23 C.F.R. § 774.17) (explaining that an alternative is not prudent if, among other things it compromises the project's ability to address the purpose and need to an unreasonable degree). The FEIS determines that alternatives north of South Mountain, including US 60 extension to 1-10, US 60 extension to I-17, and I-10 spur, would adversely affect portions of I-10, US 60, SR 101L, and SR 202L and would cause extensive displacement, in addition to not

meeting the project's purpose and need. It concludes that alternatives south of GRIC land, including the SR 85/I-8 alternative, were neither feasible nor prudent because of their connecting distance from downtown Phoenix. Finally, because about two-thirds of the Riggs Road alternative would cut through GRIC land and GRIC would not allow development on its land, the FEIS determines the Riggs Road alternative is neither feasible nor prudent.

Appellees conducted planning to minimize harm to the SMPP, related cultural resources, and the GRIC well sites. "[A]ll possible planning to minimize harm" must be conducted for 4(f) compliance. 49 U.S.C. § 303(c)(2). The record bears out that Appellees' fifteen percent design completion did not hinder them from conducting such necessary planning. Chapter 5 of the FEIS details measures to minimize harm to the SMPP, including fencing off sacred areas, providing an alignment for community access, and consulting with GRIC members during the design phase to continue to attempt to reduce the SMPP land needed for the South Mountain Freeway. Appellees also document that they entered into a Programmatic Agreement that documents "legally binding commitments to the proper treatment and management of cultural Section 4(f) resources and by Section 106" of the National Historic Preservation Act. *See HonoluluTraffic.com*, 742

F.3d at 1234 (citing 73 Fed.Reg. 13368-01, 13379-80 (2008) (recommending such an agreements as "appropriate and desirable")).

Finally, the FEIS contains a thorough discussion of the South Mountain Freeway's potential impacts to GRIC groundwater wells. Appellees included in the design and construction contract a binding agreement that requires the contractor to "avoid and preserve the GRIC well properties, GRIC's legal access to GRIC well properties, and the water, wells, pipes, and ditches located therein." Further, pursuant to 23 C.F.R. §§ 771.129 and 771.130, Appellees may re-evaluate and, if necessary, prepare a supplemental EIS if any alterations to the freeway alignment due to avoidance of the wells would result in significant environmental impacts that were not previously evaluated.

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; 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.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

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** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	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			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *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