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FILED
United States Court of Appeals
Tenth Circuit

SEP 20 2004

PATRICK FISHER
Clerk

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
Mountain States Legal Foundation, Lakewood, Colorado, for Plaintiff-Appel

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

Jack F. Trope, (Andy Baldwin, Baldwin & Crocker, P.C., Lander, Wyoming, w
the brief) Association on American Indian Affairs, Rockville, Maryland, f
Appellee.

Steven J. Gunn, Jerome N. Frank Legal Services Org., New Haven, Connectic
R. Echo-Hawk, Jr. and Steven C. Moore, Native American Rights Fund, Bould
Colorado, and Paul W. Edmondson, Elizabeth S. Merritt, and Anita C. Canov
Trust for Historic Preservation, Washington, D.C., filed an Amicus Curiae
National Congress of American Indians and National Trust for Historical P
support of Appellees.

Anthony Picarello, Roman Storzer, and Derek L. Gaubatz, The Becket Fund f
Liberty, Washington, D.C., and Robert L. Greene, The Law Offices of Rober
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 district court's order dismissing plaintiff's claim of violation of the Establishment Clause and holding against plaintiff on the merits of its claim under the National Forest Management Act.⁽¹⁾ Plaintiff commenced this action after the United States Forest Service had rejected plaintiff's challenge to a Preservation Plan issued by the Forest Service for the management of the National Historic Landmark and Vicinity. Named as defendants in the complaint are the Forest Service, the Secretary of Agriculture (who is the cabinet officer for 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 Sites of North America was permitted to intervene in the district court as a party to the Service as an appellee in this court.

I

The Medicine Wheel National Historic Landmark was created in 1969 to preserve 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 (1999) and includes a more detailed description of the background of the litigation.

28 radiating spokes of rocks. Although the age of the structure is unknown, the evidence indicates that human presence in the area goes back for 7,500 years. Archeological evidence includes tepee rings, trails, and other artifacts and traces of human habitation. 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 its designation as a National Historic Landmark followed twelve years later. In the 1980s, the Forest Service lowered 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 more 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

sensitive to the concerns of Native Americans.

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

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

The Consulting Parties comprised a committee for planning management Plaintiff notes that no representative of commercial interests was involv The Forest Service agreed in the MOA to close a portion of Forest Develop 12, which provides access to the Medicine Wheel; an exemption to the clos the "special needs of traditional religious practitioners" to reach the s the alleged impact on logging of the decision to close FDR 12 is importan action). The term of the MOA appears to have been quite brief; it appare in mid-1993 and provided that it was to expire on January 1, 1994.

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

(2) The Service is required to consult with other federal, state, and 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

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

In September 1996, the Service adopted the long-term plan now at iss Historic Preservation Plan for the Medicine Wheel National Historic Landm Mountain (the HPP). The Service implemented the HPP on October 7, 1996, Amendment 12 to the Bighorn National Forest Plan;(4) Amendment 12 include Notice and Finding of No Significant Impact," and Environmental Assessmen App. 573 et seq.

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

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 HPPs includes this statement: "The purpose of this HPP is to ensure that the Medicine Mountain and Medicine Mountain are managed in a manner that protects the integrity of the sacred site and a nationally important traditional cultural property." E

The Forest Service points out that preservation of the Medicine Wheel is consistent with the Service's responsibilities under a number of statutes. The Environmental Impact Assessment produced to evaluate the environmental effects of the HPP requires that the Forest Service is required by law to protect and preserve National Historic 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 1966, the Archaeological and Historic Resources 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 Teton 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 also addressed the Forest Service's decision not to hold one particular timber sale proposed. The Service had, in September 1997, advertised for bidding on 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 advertised the sale and to proceed with it. However, after consulting with the HPP and after further deliberations, the Service identified several problems with the proposed sale, including "process violations, conflicting data, and [under the Environmental Policy Act] analysis." As a result, the Service never conducted the timber sale from the Horse Creek area; on the other hand, the Service did not permanently cancel the project.

II

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

The district court concluded that plaintiff did not have standing to pursue its First Amendment claims. We discuss below the concept of standing generally and the concept of standing that the judge found were satisfied. The judge held that plaintiff's First Amendment claims because the court could not remedy the wrongs plaintiff had alleged. The judge first determined that the legal injury, 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, an

injury caused 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 *Mount Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994); *Wyoming v. Lujan*, 877 F.2d 877 (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 regulations and the National Forest Management Act (NFMA) as amended 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 the amendment was not a "significant" alteration of the Forest Management Plan. (5)

III

A

We review de novo the district court's determination that plaintiff did not have standing to pursue its First Amendment claims. See *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994).

(5) The district court also held that the plaintiff lacked standing to pursue the complaint under the National Environmental Policy Act, and ruled against plaintiff on the merits of its claim under the Federal Advisory Committee Act. Plaintiff's First Amendment claims are barred by 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, (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"

injury will be "redressed by a favorable decision."

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

The district court held that plaintiff had met its burden at the pleading 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's deprivation of opportunity was a constitutional injury because it was based on the decision to manage Medicine Mountain as a sacred site in violation of the Establishment Clause. Plaintiff asserts on appeal that the district court's determination but that the court erred in rejecting plaintiff's argument because it was "directly affected" by the management of Medicine Mountain. We address this latter point first.

(6) In the district court plaintiff also claimed other injuries, but 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 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 1195 (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 plaintiff can sustain a non-economic injury under the Establishment Clause. Whatever that question may be, we conclude that this plaintiff has not alleged sufficient injury to attempt to explain how it has been directly affected, plaintiff repeatedly complains of 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 on the Establishment Clause and the loss of the opportunity to bid for timber contracts." 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 harvesting "as a result of the adoption of the HPP." *Id.* at 21, n.8. 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

opportunity for profitable logging. Plaintiff's invocation of such religion as Foremaster is unpersuasive. As an artificial person, plaintiff has not experienced the kind of constitutional injury that has been found in such 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 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 was in fact sufficient to satisfy the first prong of the standing analysis caused by the defendant's conduct. On appeal, the Forest Service argues, as ground for affirming the judgment below, that plaintiff has not pleaded a claim that has previously been observed that "each of the three standing elements blends with the economic injury." *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 875 (10th Cir. 1992), and the district judge cannot be faulted for his holding that the plaintiff's attempt to bid on timber standing faltered at the third requirement rather than the first. In applying the standing analysis in this manner, and the district judge follows 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 to lease from competitive coal leasing so that the tract could be used in a proper manner. Plaintiff's attempt to prevent the exchange had previously been rejected and there was no final agency action. The exchange was effected and the plaintiff brought a legal challenge. We held that the loss of the possibility of obtaining timber mining was an "injury not redressable by a favorable decision" and so did plaintiff have standing to object to the exchange of lands. 969 F.2d at 874. 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 were not entitled to the benefit, lacked standing "because their injuries are not redressable by a favorable decision." Plaintiffs in that case had previously held the right to use the Crest House on top of Mount Evans, a facility that provided food and souvenir services. The Crest House had been destroyed by fire, and the Forest Service was 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 give plaintiff the opportunity to compete for the concession contract. Citing *Ash Creek*, we held that plaintiff's argument, noting that even if a new facility were to be built as plaintiff

"no guarantee" that plaintiffs would be the successful bidder for the contract, 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 were for the government to sell the disputed land to the plaintiff or an order for the government to renew the plaintiff's grazing permit, neither of which were available to 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's claim of a wrongful denial of the opportunity to bid competitively for federal contracts is not a basis for standing, citing *Aderand Constructors, Inc. v. Pena*, 515 U.S. 211. Plaintiff misstates the holding of that case. *Aderand* involved a federal contractor who was 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

in cases of this kind is that a `discriminatory classification prevent[s] competing on an equal footing.'" Id. at 211 (quoting *Northeastern Fla. C Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993)). case, the Court said, "the aggrieved party `need not allege that he would

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

Plaintiff asserts that *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980) proposition that standing is established if the plaintiff seeks to bid for become available." But again, we find that plaintiff has stated the holding overly general terms and that the holding does not support plaintiff's claim this matter. The facts of that case are not at all analogous to the facts 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. Wyoming Sawmills has not shown that a timber lease would "likely" available on the lands within the area of consultation if plaintiff were set aside. As in *Baca*, the federal agency has complete discretion as to whether 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 to confer standing in *Watt v. Energy Action Educational Foundation*, 454 U.S. 208, 214 (1981). Again, we disagree with plaintiff's characterization of the holding of the Court. 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 to be an "involuntary partner" with the Forest Service, and its argument in *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 precedent *supra*, and so would not be free to follow *Arkla* if it supported plaintiff's claim. We 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 Sawmills does not have standing to bring its First Amendment claim.

IV

A

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

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

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

The district court first found that plaintiff had standing to assert F.Supp.2d at 1297-98. The judge noted that, because the NFMA does not pr judicial review of decisions by the Forest Service, the general provision Under the APA, a person "suffering legal wrong because of agency action" judicial review. 5 U.S.C. § 701. The Forest Service did not dispute tha Amendment 12 were final agency actions, nor that timber interests are wit interests protected or regulated by the NFMA. The judge then noted that requirement of redressability is applied less strictly when, as with this seeking to enforce a "procedural right." See *id.* at 1298 (citing and quo *Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

The intervenor-appellee, Medicine Wheel Coalition on Sacred Sites of challenges plaintiff's standing to bring its claim under the NFMA, althou Service does not contest the district court's ruling on this point. We s district court's holding on this point, however, and proceed to review th

(8) Plaintiff alleged that a de facto change of designation was also 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 action only if it is "arbitrary, capricious, otherwise not in accordance supported by substantial evidence.'" *Citizens' Committee To Save Our Can States Forest Service*, 297 F.3d 1012, 1021 (10th Cir. 2002) (quoting *Hoyle F.3d 1377, 1382 (10th Cir. 1997)*). No deference is due to the district c review of the agency's action, however. *Id.*

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

an amendment to a forest plan would be "significant," however, then mandates substantial public involvement, planning, and input, requir

essence, the Forest Service "to conduct the same complex planning pr applicable to promulgation of the original plan." *Sierra Club v. Ca* F.3d 1545, 1551 (10th Cir. 1993) (Seymour, J., dissenting); see 36 C 219.10(f). Among other things, for significant amendments, NFMA req the Forest Service to "mak[e] plans or revisions available to the pu convenient locations in the vicinity of the affected unit for a peri three months before final adoption." 16 U.S.C. § 1604(d).

Citizens' Committee, 297 F.3d at 1032-33 (footnote omitted). We have not Act does not provide guidance as to what amendments are "significant." C 1548.

Indeed, applicable regulations "expressly commend[] the determinati significance of an amendment to the Forest Supervisor's judgment."

According to the regulations, "Based on an analysis of the objective guidelines, and other contents of the forest plan, the Forest Superv determine whether a proposed amendment would result in a significant in the plan." 36 C.F.R. § 219.10(f) (emphasis added). If the Forest concludes that an amendment is nonsignificant, "[he] may implement t 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 Servi guidelines in its Forest Service Handbook (FSH) for consideration of the amendments to a forest plan:

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

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

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

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

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

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 slightly more than 200,000 acres that are deemed "available" for timber. But plaintiff offers neither reason nor authority to persuade us that the discretion in using the acreage of the entire forest in its analysis. The Service does not permit us to find an abuse of discretion on this point.

Plaintiff emphatically contends that the decision to implement the H area much greater than the 18,000 acre Area of Consultation. Plaintiff bases on the assertion that the decision to close FDR 12 and to bar the use of through the Area of Consultation effectively closes an additional 30,000

north and west of the Area of Consultation.

The Forest Service and the intervenor Coalition offer several points severely undercut the impact of plaintiff's argument. First, we note that explained how it has determined that an additional 30,000 acres are affected. The district court observed that plaintiff had not shown that FDR 12 had ever timber hauling; plaintiff has not countered this point. Third, the Forest Service expressly in the HPP that it would "continue to explore opportunities for to National Forest System lands north of the Medicine Wheel," an effort was as the "long term goal" of its management efforts. II Aplt. App. 318. Plaintiffs 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 through a consultation process for approval of their use. *Id.* at 571. More generally did not change any actual management allocations (for timber or livestock example) but added standards and guidelines to be followed in pursuit of allocations. Of the 18,000 acres in the Area of Consultation, only about deemed suitable for timber production. *Id.* at 347.

(9) We note that the withdrawal of the Horse Creek timber sale was no action; accordingly, that decision may not be reviewed at this time.

As we have noted, the third factor is the long-term significance of to the goals and objectives of the forest plan. Plaintiff's inability to Forest Service abused its discretion in its determination of the size of doubly important because its argument on the third factor rests entirely 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 as the deference due to the Service's determination, we hold that plaintiff that the Service abused its considerable discretion in finding that Amend "significant" change to the overall forest plan.

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

Conclusion

The judgment of the district court is AFFIRMED.

