

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

FEB 26 2020

FOR THE NINTH CIRCUIT

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

WISHTOYO FOUNDATION; CENTER  
FOR BIOLOGICAL DIVERSITY;  
VENTURA COASTKEEPER, a Program of  
Wishtoyo Foundation,

Plaintiffs-Appellees,

v.

UNITED WATER CONSERVATION  
DISTRICT,

Defendant-Appellant.

No. 19-55380

D.C. No.  
2:16-cv-03869-DOC-PLA

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
David O. Carter, District Judge, Presiding

Argued and Submitted February 12, 2020  
Pasadena, California

Before: BERZON, TALLMAN, and R. NELSON, Circuit Judges.

United Water Conservation District (“United”) appeals the district court’s grant of judgment to plaintiffs (collectively, “Wishtoyo”) on their Endangered Species Act claim regarding take of Southern California Steelhead. We affirm.

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

1. The district court properly held that the National Marine Fisheries Service (“NMFS”) and other regulatory agencies were not necessary parties under Federal Rule of Civil Procedure 19(a)(1). The district court was careful to structure the injunction to provide relief to Wishtoyo without requiring the agencies’ participation in the case. *See* Fed. R. Civ. P. 19(a)(1)(A).

United points to one sentence of the injunction providing that “NMFS shall respond promptly to a request for . . . assistance” when stranded fish need to be hauled or handled. In the context of the order as a whole, we do not read the district court’s use of the word “shall” as ordering NMFS to take certain action but rather as recognizing that the agency can be expected to respond promptly when fish are stranded.

NMFS and the other regulatory agencies also have not claimed an interest relating to the subject of the action. *See* Fed. R. Civ. P. 19(a)(1)(B); *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1204–05 (9th Cir. 2020).

2. The district court did not err in relying on NMFS’s incidental take statement in the biological opinion as one source of evidence that United’s operations were taking steelhead. The incidental take statement explained that “[o]perating the Vern Freeman Diversion Dam, even with the reasonable and prudent alternative, is expected to cause incidental take of the endangered Southern California DPS of steelhead,” and it specified the nature of the takes that were

expected. This “expected” language demonstrates that NMFS considered that takes of steelhead are “reasonably certain” to occur. *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000). We therefore need not decide whether it would be proper to rely on a less definite incidental take statement as evidence of take in a citizen suit under section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B).

3. The district court did not abuse its discretion in admitting into evidence NMFS’s biological opinion and the testimony of NMFS officials. The introduction of the biological opinion was proper under the public records exception to the hearsay rule. Fed. R. Evid. 803(8). The district court relied on the biological opinion as one data point among others, not to establish United’s liability. The NMFS officials were asked to testify by the district court; they were not expert witnesses for Wishtoyo who had not been disclosed. *See* Fed. R. Evid. 614(a).

4. United does not challenge the district court’s award of attorney’s fees and costs to Wishtoyo except to request that this court vacate the fee award if it vacates the judgment. Because we affirm the judgment, we do not vacate the fee award.

5. We deny Wishtoyo’s motion for leave to file a surreply (Dkt. 41) and deny as moot Wishtoyo’s motion to strike United’s response to the proposed surreply (Dkt. 46). The district court’s findings of fact and conclusions of law did

not rely upon the trial exhibits at issue; nor do we. So there is no need, for purposes of this appeal, to clarify whether they were admitted.

The judgment is **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](http://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](http://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](http://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](http://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  
Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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