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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DENNIS D. MURPHY, PH.D,

Plaintiff,

v.

UNITED STATES FOREST SERVICE;
THOMAS TIDWELL, in his
official capacity as Chief of
the United States Forest
Service; and NANCY J. GIBSON,
in her official capacity as
Forest Supervisor of the
United States Forest Service,

Defendants.

No. 2:13-cv-02315-GEB-AC

**ORDER DENYING DEFENDANTS'
DISMISSAL MOTION**

Defendants United States Forest Service; Tom Tidwell, who is sued in his official capacity as Chief of the Forest Service; and Nancy Gibson, who is sued in her official capacity as Forest Supervisor (collectively, "the Forest Service") move for dismissal with prejudice of the four remaining claims in Plaintiff's Second Amended Complaint ("SAC"), under Federal Rule of Civil Procedure ("Rule") 12(b)(6).¹ Plaintiff alleges in the SAC that the Forest Service's Upper Echo Lakes Hazardous Fuels Reduction Project (the "Project") violates provisions of the National Environmental Protection Act ("NEPA"). The Forest Service argues: "Plaintiff waived any legal challenge to the [P]roject by failing to comment during the public comment period

¹ Plaintiff previously dismissed three claims that were alleged under the federal Endangered Species Act. (Stipulation of Dismissal 2:4-7, ECF No. 37.)

1 [and failing] to exhaust available administrative remedies by not
2 appealing the challenged [Project] decision as required by 7
3 U.S.C. § 6912(e), [and] 36 C.F.R. part 215. . . ." (Defs.' Not.
4 Mot. 1:22-26, ECF No. 38.) Plaintiff opposes the motion,
5 contending:

6 [T]he Forest Service's attempt to
7 characterize an *ad hoc* appeals process as a
8 prerequisite for seeking judicial
9 review . . . fails as a matter of law because
10 the agency failed to follow rulemaking
11 procedures when adopting the process. Thus,
12 the [administrative] appeal process cannot
13 provide the basis for depriving [Plaintiff]
14 of the opportunity to seek judicial review.

15 (Pl.'s Opp'n to Defs.' Mot. to Dismiss ("Opp'n") 2:9-14, ECF No.
16 39.)

17 **I. INFORMATION CONSIDERED IN DECIDING THE DISMISSAL MOTION**

18 The Forest Service cites in its dismissal motion its
19 November 15, 2012 Decision Memo, in which it decided to implement
20 the Project ("Decision Memo"). (See Defs.' Mem. P.&A. in Supp.
21 Mot. to Dismiss ("Mot.") 2:13-28, 5:9-11, ECF No. 38-1.)

22 In ruling on a [Rule] 12(b)(6) motion, a
23 court may generally consider only allegations
24 contained in the pleadings, exhibits attached
25 to the complaint, and materials properly
26 subject to judicial notice. However, . . . a
27 court may [also] consider a writing
28 referenced in a complaint but not explicitly
incorporated therein if the complaint relies
on the document and its authenticity is
unquestioned.

29 Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007) (per
30 curiam). In addition, "a district court may take judicial notice
31 of [a] of public record." U.S. v. 14.02 Acres of Land More or
32 Less in Fresno County, 547 F.3d 943, 955 (9th Cir. 2008)
33 (internal citations omitted). Such matters "may be consider[ed]

1 without converting a Rule 12 motion into one for summary
2 judgment." Id.

3 The SAC expressly references the Forest Service's
4 Decision Memo, and "[its] authenticity . . . is not in dispute.
5 Therefore, [the Decision Memo may be] properly considered [in
6 deciding] the 12(b)(6) motion[]." Swartz, 476 F.3d at 763.

7 Plaintiff requests that judicial notice be taken of the
8 Forest Service's March 29, 2012 Guidance Letter ("Guidance
9 Letter"). (Pl.'s Req. Judicial Notice ¶¶ 7, 10, ECF No. 40, Ex.
10 7, 40-7.) Plaintiff argues the Guidance Letter does not indicate
11 that administrative remedies have to be exhausted "as a
12 prerequisite for seeking judicial review of Forest Service
13 decisions to invoke categorical exclusions." (Opp'n 14:2-3.)
14 "Judicial notice is appropriate for records and reports of
15 administrative bodies." United States v. 14.02 Acres, 547 F.3d
16 943, 955 (9th Cir. 2008) (internal quotation marks and citation
17 omitted). Therefore, Plaintiff's request is granted. Plaintiff
18 also requests judicial notice be taken of other documents but has
19 not shown that decision is required on those documents.

20 II. BACKGROUND

21 The following allegations in Plaintiff's SAC and
22 information in the Decision Memo and Guidance Letter concern the
23 motion.

24 "Beginning in January 2011, the Forest Service listed
25 the [Project] on its website." (SAC ¶ 27.) "[O]n July 15, 2011,
26 the Forest Service circulated a scoping letter and [P]roject area
27 map describing the [P]roject as a fuel reduction treatment on up
28 to 100 acres to include cutting and burning trees and brush."

1 (Id.) The "scoping letter and [P]roject area map were mailed to
2 14 agencies, individuals and organizations [that same day and
3 sought] public comment[]." (Decision Memo 7.) "In addition, a
4 news release about the project was posted on the [Lake Tahoe
5 Basin Management Unit ("LTBMU") of the Forest Service's] website
6 and was sent out to local media on July 15, 2011." (Id.)

7 "On November 15, 2012, the Forest Service issued the
8 [D]ecision [M]emo . . . indicat[ing] its determination to
9 implement the [Project]." (SAC ¶ 29.) The Decision Memo
10 "concluded that the [P]roject is categorically excluded from the
11 need to prepare an [Environmental Assessment ("EA") or
12 [Environmental Impact Statement ("EIS") under NEPA]." (Id.)
13 Actions that have been categorically excluded are defined as an
14 "'action[] which do[es] not individually or cumulatively have a
15 significant effect on the human environment,' and 'for which,
16 therefore, neither an [EA] nor an [EIS] is required.'" Alcoa, Inc.
17 v. Bonneville Power Admin., 698 F.3d 774, 795 (9th Cir. 2012)
18 (citations omitted). The Decision Memo described the
19 administrative remedies for challenging the Project, stating:
20 "[o]nly those who provided comments during [the] comment period
21 are eligible to appeal the decision[,]" and any "[a]ppeals,
22 including attachments, must be filed within 45 days from the
23 publication date of th[e] notice in the Tahoe Daily Tribune, the
24 newspaper of record." (Decision Memo 9-10.)

25 Plaintiff alleges in his SAC that the Forest Service
26 violated the NEPA by (1) failing to comply with scoping
27 requirements; (2) failing to comply with requirements for
28 invoking a categorical exclusion; (3) failing to re-visit its

1 decision to invoke a categorical exclusion for the Project after
2 it was made aware of new information concerning the Sierra Nevada
3 yellow legged frog ("SNYLF"); and (4) failing to re-visit its
4 decision to invoke a categorical exclusion for the Project after
5 the Project was implemented contrary to the description in the
6 Forest Service's Decision Memo. (SAC ¶¶ 64-96.)

7 **III. DISCUSSION**

8 **A. Whether the Forest Service has Shown that Plaintiff was**
9 **Required Under 7 U.S.C. § 6912(e) to Exhaust the Project's**
10 **Available Administrative Remedies.**

11 The Forest Service contends that Plaintiff's claims
12 should be dismissed with prejudice, arguing:

13 [Plaintiff] waived any legal challenge [to
14 the Project] by failing to [timely] comment
[within the comment period].

15

16 [Further,] all of Plaintiff's claims are
17 barred because he failed to exhaust
18 administrative remedies as required by
19 statute. In adopting 7 U.S.C. §
20 6912(e), . . . Congress has made it
21 especially clear that no person may sue the
22 Forest Service unless he first exhausts the
23 appeal process: "Notwithstanding any other
24 provision of law, a person shall exhaust all
25 administrative appeal procedures established
26 by the Secretary or required by law before
27 the person may bring an action in a court of
28 competent jurisdiction" 7 U.S.C. §
6912(e)

24

25 Regulations governing Forest Service
26 programs in 2012 and 2013 provided the
27 "administrative exhaustion appeal procedures"
28 contemplated by 7 U.S.C. § 6912(e). See 36
C.F.R. Part 215, *Notice, Comment, and Appeal
Procedures for National Forest System
Projects and Activities*. . . . And, as
explained in the Decision Memo and the

1 newspaper publication announcing it, the
2 procedures set forth in 36 C.F.R. § 215
3 applied to this proceeding. It is thus clear
4 that there were "administrative appeal
5 procedures" available for the decision
6 challenged here. Because Plaintiff failed to
7 exhaust the available administrative
8 remedies, his claims are barred by 7 U.S.C. §
9 6912(e), and must be dismissed with
10 prejudice.

11 (Mot. 1:19-20, 3:22-5:13 (citations omitted).)

12 Plaintiff counters, *inter alia*,

13 Although the Forest Service claims that
14 the regulations previously codified at 36
15 C.F.R. Part 215 provided the administrative
16 exhaustion appeal procedures applicable to
17 the Project, in truth, those regulations
18 never included procedures for commenting on
19 or appealing a decision by the Forest Service
20 to invoke a categorical exclusion. Indeed,
21 the regulations explicitly excepted
22 categorical exclusion decisions from the
23 comment and appeals process. 36 C.F.R. §§
24 215.4(a), 215.12(f). . . .

25 In addition, to the extent the
26 regulations included procedures for
27 commenting and pursuing an appeal, they only
28 included procedures for doing so where an
environmental assessment or environmental
impact statement was prepared. . . .
Therefore, [the Forest Service's] claim that
"the procedures set forth in 36 C.F.R. § 215
applied to this proceeding" cannot be squared
with the regulations.

29 The regulations were enjoined, in part,
30 in March 2012 [in Sequoia Forestkeeper v.
31 Tidwell, 847 F. Supp. 2d 1244, 1246 (E.D.
32 Cal. 2012)], which held that the Forest
33 Service could not exclude categorical
34 exclusions from notice, comment, and appeal
35 procedures. Whereas the Court enjoined 36
36 C.F.R. §§ 215.4(a) and 215.12(f), it did not
37 affirmatively establish notice, comment, and
38 appeal procedures for categorical exclusions
analogous to those set out in Part 215 for
environmental assessments and environmental
impact statements. Nor did the Court
authorize the Forest Service to adopt
mandatory appeal procedures without complying
with the requisite notice and comment

1 procedures mandated by the Administrative
2 Procedure Act [("APA")].

3 (Opp'n 12:19-24-13:23 (citations omitted).)

4 Sequoia Forestkeeper enjoined the Forest Service from
5 implementing 36 C.F.R. §§ 215.4(a) and 215.12(f), the regulations
6 that exempted from the notice, comment, and appeal process
7 projects categorically excluded from preparing an EA or EIS. In
8 response to this injunction, the Forest Service issued the
9 Guidance Letter, in which it states: "effective March 19, 2012,
10 all units shall refrain from applying the[enjoined] exemptions,"
11 and "the Forest Service will offer notice, comment and
12 administrative appeal opportunities for categorically excluded
13 decisions as provided for in the District Court's [injunction
14 issued in Sequoia Forestkeeper]." (Guidance Letter 1) (emphasis
15 in original). Plaintiff argues:

16 [T]he contents of the [Guidance Letter] were
17 not subject to the [APA's] rulemaking
18 requirements. 5 U.S.C. § 553 (requiring,
19 among other things, publication in the
20 Federal Register of the rule as adopted). The
21 [APA] "was adopted to provide, inter alia,
22 that administrative policies affecting
23 individual rights and obligations be
24 promulgated pursuant to certain stated
25 procedures so as to avoid the inherently
26 arbitrary nature of unpublished ad hoc
27 determinations." *Morton v. Ruiz*, 415 U.S.
28 199, 232 (1974). To the extent the Forest
Service argues that the ad hoc determination
of the Chief set out in internal agency
guidance is binding on an entire class of
people, including [Plaintiff], it is contrary
to the [APA] and longstanding precedent.

(Opp'n 14:8-18 (citation omitted).)

26 The Forest Service replies, "[c]ontrary to Plaintiff's
27 claim, the administrative appeal procedures in place at the time
28

1 of the decision challenged here allowed for and required an
2 appeal of the decision that the [P]roject was categorically
3 excluded from an environmental impact statement." (Defs.' Reply
4 ("Reply") 5:2-4, ECF No. 41.) The Forest Service argues:

5 The availability of an administrative appeal
6 was made plain in the [Decision Memo], in the
7 legal notice published in the newspaper, and
8 in a memorandum announcing that all
9 categorical exclusion decisions would be
10 subject to the appeal process. Plaintiff
11 seeks to avoid this conclusion by focusing
12 only on the regulations themselves, which did
13 not originally provide for appeal of
14 categorical exclusion decisions. But §
15 6912(e) is not so limited. It requires
16 exhaustion of "all administrative appeal
17 procedures." . . . Because Plaintiff failed
18 to exhaust "all administrative appeal
19 procedures," 7 U.S.C. § 6912(e), he may not
20 maintain this suit.

21 (Id. at 5:4-19.)

22 7 U.S.C. § 6912(e) prescribes, in pertinent part:
23 "Notwithstanding any other provision of law, a person shall
24 exhaust all administrative appeal procedures **established by the**
25 **Secretary or required by law** before the person may bring an
26 action in a court of competent jurisdiction" (emphasis
27 added). The Forest Service has not shown that the administrative
28 remedies it asserts Plaintiff failed to exhaust were
"administrative appeal procedures established by the Secretary or
required by law." 7 U.S.C. § 6912(e). Therefore, this portion of
the Forest Service's motion is denied.

**B. Whether the Forest Service has Shown that Plaintiff's Claim
Alleging the Project Cannot Proceed Without Further
Environmental Analysis Should be Dismissed.**

The Forest Service seeks dismissal of Plaintiff's

1 claim, in which he alleges the Forest Service violated the NEPA
2 by failing to re-visit its decision to invoke the categorical
3 exclusion for the Project after it learned new information
4 concerning the SNYLF. The Forest Service argues, notwithstanding
5 decision on its administrative exhaustion argument, this claim
6 should be dismissed since "further environmental [analysis] is
7 only required if there are significant environmental impacts not
8 previously evaluated or considered[,] and possible impacts to
9 the [SNYLF] were already considered and found to be non-existent
10 or insignificant as part of the original decision." (Reply 8:4-5,
11 9:1-2 (internal quotation marks and citations omitted).)

12 Plaintiff contends "[the Forest Service] improperly
13 demand[s] that the Court dismiss [this claim] on the basis of a
14 series of factual arguments that are not ripe for resolution at
15 the pleading stage." (Pl.'s Supp. Br. 4:12-13, ECF No. 45.)

16 The Forest Service's dismissal argument is based upon
17 evidence that has not been shown appropriate to consider when
18 deciding a 12(b)(6) dismissal motion. See Swartz, 476 F.3d at 763
19 (stating "[i]n ruling on a [Rule] 12(b)(6) motion, a court may
20 generally consider only allegations contained in the pleadings,
21 exhibits attached to the complaint, and materials properly
22 subject to judicial notice."). Therefore, this portion of the
23 motion is denied.

24 **C. Whether the Forest Service has Shown that Plaintiff's Claim**
25 **Challenging Project Implementation Should be Dismissed.**

26 The Forest Service seeks dismissal of Plaintiff's
27 claim, in which he alleges the Forest Service violated the NEPA
28 by implementing the Project in a manner contrary to its

1 description in the Decision Memo. The Forest Service argues,
2 "[e]ven if the [Project's] exhaustion requirements c[an] be
3 avoided[,]"

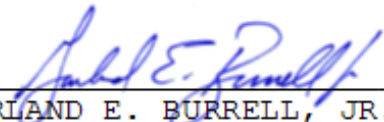
4 [T]he [P]roject['s] implementation . . . is
5 not even subject to challenge under the
6 Administrative Procedure Act ("APA"). The APA
7 only permits challenges to "agency action."
8 . . . Because the placement of a particular
9 slash pile or the cutting of a particular
10 tree is not "agency action" within the
11 meaning of the APA, [Plaintiff's fourth claim
12 should be dismissed].

13 (Reply 7:9-14, 7:25-26) (citations omitted.) Plaintiff contends:
14 "Courts have consistently held that federal agencies have a
15 continuing duty to undertake environmental review so long as
16 major [f]ederal action remains to occur and new information
17 indicates that such action may significantly affect the quality
18 of the human environment." (Pl.'s Supp. Br. 2:18-22.)

19 The Forest Service has not shown that this claim should
20 be dismissed. Therefore, this portion of the motion is denied.

21 For the stated reasons, the Forest Service's dismissal
22 motion is denied.

23 Dated: March 30, 2015

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GARIAND E. BURRELL, JR.
Senior United States District Judge