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HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FOREST SERVICE EMPLOYEES FOR ENVIRONMENTAL ETHICS,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

CASE NO. C17-5747-RBL

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DKT. ##22, 23

**INTRODUCTION**

THIS MATTER is before the Court on Plaintiff Forest Service Employees for Environmental Ethics’ [Dkt. #22] and the United States Forest Service’s [Dkt. #23] Cross Motions for Summary Judgment. This suit arose as a result of the Forest Service’s decision to grant a special use permit to the United States Navy allowing the Navy to conduct electronic warfare training in the Olympic National Forest. FSEEE challenges this decision on two grounds.

First, FSEEE contends that the Forest Service lacks congressional authorization to grant permits for the purpose of military training. According to FSEEE, use of national forest land is



1 One way that the Navy does this is through the use of trucks hauling the necessary  
2 equipment to emit an electromagnetic signal. AR177871. These trucks are basically Ford F-350s  
3 carrying trailers with large antennae. AR177872. To conduct training, the Navy drives these  
4 trucks to pre-selected locations and energizes the emitters, after which aircraft fly overhead and  
5 try to detect the signals. AR177871. According to the Navy, these trucks are important for  
6 electronic warfare training because they challenge aviators by simulating the mobility of an  
7 actual enemy. AR177875.

8 On March 16, 2015, the Navy submitted a revised application to expand the use of  
9 mobile emitter trucks in the Olympic National Forest. AR205704-20. During the comment  
10 period, FSEEE objected three times. [Compl., Dkt. #1, at ¶¶ 14-16, Ex. 3-5]. However, on July  
11 31, 2017, the Forest Service issued its decision granting a special use permit pursuant to 36  
12 C.F.R. § 251.50, which regulates the Forest Service’s permitting process. AR205606.

13 The permit allows the Navy to park mobile emitter trucks at 11 designated sites alongside  
14 logging roads within the national forest. AR205579. On a typical day, three trucks will be  
15 present in the national forest at a time. AR205579. Once a truck is parked, Navy personnel set up  
16 a safety zone around the truck using warning tape and signage. AR205579. They then begin  
17 operations for an average of 12 hours each day, 250 days of the year. AR205579, 205586. All  
18 mobile emitter sites are within the Olympic Military Operations Areas, which is airspace  
19 designated for Department of Defense training. AR188404.

## 20 DISCUSSION

### 21 A. Summary Judgment Standard

22 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on  
23 file, and any affidavits show that there is no genuine issue as to any material fact and that the  
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1 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether  
2 an issue of fact exists, the Court must view all evidence in the light most favorable to the  
3 nonmoving party and draw all reasonable inferences in that party’s favor. *Anderson v. Liberty*  
4 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).  
5 A genuine issue of material fact exists where there is sufficient evidence for a reasonable  
6 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether  
7 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so  
8 one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. The moving party bears  
9 the initial burden of showing that there is no evidence which supports an element essential to the  
10 nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

11       Once the movant has met this burden, the nonmoving party then must show that there is a  
12 genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the  
13 existence of a genuine issue of material fact, “the moving party is entitled to judgment as a  
14 matter of law.” *Celotex*, 477 U.S. at 323-24. There is no requirement that the moving party  
15 negate elements of the non-movant’s case. *Lujan v. National Wildlife Federation*, 497 U.S. 871  
16 (1990). Once the moving party has met its burden, the non-movant must then produce concrete  
17 evidence, without merely relying on allegations in the pleadings, that there remain genuine  
18 factual issues. *Anderson*, 477 U.S. 242, 248 (1986).

19 **B. Congressional Authorization of Military Training as a Use of National Forest Land**

20 *1. Sufficiency of FSEEE’s Pleadings to Raise the Congressional Authorization Argument at*  
21 *Summary Judgment*

22 FSEEE argues that the Forest Service could not grant the Navy a permit to conduct  
23 training on national forest land because no congressional statute authorizes such a use. However,  
24 the Forest Service counters that FSEEE is procedurally barred from raising this legal theory

1 because the complaint makes no mention of it. Instead, the Forest Service contends that the  
2 complaint states only one claim for relief under the NFMA, and focuses solely on the facts  
3 underlying that claim. [Compl., Dkt. #1, at ¶¶ 11-20]. As a result, the Forest Service argues that  
4 it was not put on notice of a claim based on congressional authorization.

5 FSEEE responds that the only fact necessary to support its congressional authorization  
6 claim is that the Forest Service issued the Navy a special use permit to carry out training, and  
7 this fact was pled. [Compl., Dkt. #1, ¶ 17]. Further, FSEEE argues that the complaint  
8 incorporates the FSEEE’s objection to the draft decision to grant the permit, which lays out the  
9 congressional authorization argument. [Compl., Dkt. #1, at ¶ 16, Ex. 5]. Finally, FSEEE argues  
10 that, by invoking jurisdiction under the APA and stating that the Forest Service “violated the  
11 NFMA,” the complaint implicitly claims that the agency exceeded its authority. [Compl., Dkt.  
12 #1, at ¶¶ 6, 20].

13 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain  
14 statement of the claim showing that the pleader is entitled to relief.” The Ninth Circuit has  
15 explained that where “the complaint does not include the necessary factual allegations to state a  
16 claim, raising such claim in a summary judgment motion is insufficient to present the claim to  
17 the district court.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079–80 (9th Cir. 2008).  
18 Following this logic, the court held that the plaintiffs failed to adequately present a claim that the  
19 NEIS did not consider certain risks when authorizing the use of artificial snow at a ski resort. *Id.*

20 The Ninth Circuit came to a similar conclusion in *Coleman v. Quaker Oats Co.*, where  
21 the plaintiff attempted to raise a disparate impact theory at summary judgment that was not pled  
22 in the complaint or raised during discovery. 232 F.3d 1271, 1292 (9th Cir. 2000). The court held  
23 that allowing the plaintiff to assert such a new theory would prejudice the defendant by forcing  
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1 them to develop entirely new defenses that were not explored through discovery. *Id.*; *see also*  
2 *Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 951–52 (9th Cir. 2018) (relying on *Coleman*).

3 Here, like *Navajo Nation*, the plaintiff raises a new argument at summary judgment  
4 challenging an agency action. The Court determines that the Forest Service was not adequately  
5 put on notice of this claim. The complaint’s “Factual Background” section focuses on the Navy  
6 and Forest Service’s failure to conform to the Forest Plan in granting the permit. [Compl., Dkt.  
7 #1, at ¶¶ 11-19]. The “Claim for Relief” section likewise states only that the Forest Service  
8 violated the NFMA by failing to meet the LRMP’s requirements for special-use permits.  
9 [Compl., Dkt. #1, at ¶ 20]. Nowhere in the complaint does FSEEE mention congressional  
10 authorization or the limited permissible uses of national forest land.

11 FSEEE’s arguments to the contrary are unpersuasive. While it is correct that the  
12 complaint likely contains sufficient facts underlying the congressional authorization argument,  
13 the legal theory itself was not pled or raised before summary judgment. *See Coleman*, 232 F.3d  
14 at 1292 (affirming the district court’s refusal to allow the plaintiffs to go forward with a new  
15 legal theory at summary judgment). The complaint’s mere references to the APA in the  
16 “Jurisdiction and Venue” section and the NFMA in the “Claim for Relief” section are  
17 insufficient to inform the Forest Service of the specific congressional authorization argument.  
18 *See OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1024 (9th Cir. 2018)  
19 (holding that citing section 43 of the Lanham Act, 15 U.S.C. § 1125, was not specific enough to  
20 put the defendant on notice of an unregistered trade dress claim).

21 FSEEE’s reference to and attachment of its objection to the Forest Service’s draft  
22 decision is also insufficient to put the Forest Service on notice. [Compl., Dkt. #1, at ¶ 16, Ex. 5].  
23 Although the objection lays out the congressional authorization argument, FSEEE’s choice to  
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1 leave that theory out of its complaint may well have led the Forest Service to believe FSEEE had  
2 consciously abandoned that argument in its judicial action. *See Navajo Nation*, 535 F.3d at 1080  
3 n.27 (“A party may raise a claim at the administrative proceedings, but forego that claim on  
4 judicial review.”).

5 Because the Forest Service was not on notice of FSEEE’s congressional authorization  
6 theory, the proper course of action would have been for FSEEE to move to amend its complaint  
7 before moving for summary judgment. However the Court would likely allow FSEEE to amend  
8 its complaint at this stage of litigation, and the parties have fully argued the congressional  
9 authorization issue in their briefs. Consequently, the Court will address the merits of the  
10 argument below.

11 2. *The Merits of FSEEE’s Congressional Authorization Argument*

12 Section 551 of the Organic Act states that the Secretary of Agriculture may “make such  
13 rules and regulations and establish such service as will insure the objects of [national forests],  
14 namely, to regulate their occupancy and use and preserve [them] from destruction.” 16 U.S.C.A.  
15 § 551. The Court must decide whether this authority allows the Forest Service to grant special  
16 use permits for purposes not specifically identified by Congress.

17 FSEEE argues that a series of statutes identify the closed universe of purposes for which  
18 national forest land may be used. The broadest purposes are laid out in two statutes. Section 475  
19 of the Organic Act states that national forests shall be “controlled and administered” to “improve  
20 and protect the forest within the boundaries,” to secure “favorable conditions of water flow, and  
21 to furnish a continuous supply of timber.” 16 U.S.C. § 475. MUSYA expands these to include  
22 “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C.A. §  
23 528. Several other statutes also provide specific requirements for the establishment of  
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1 communication facilities, archaeological exploration, and the construction of vacation buildings,  
2 public buildings, and pipelines. *See* 43 U.S.C. §§ 931, 1761; 16 U.S.C. §§ 432, 497; 30 U.S.C. §  
3 185. FSEEE argues that the Forest Service cannot regulate uses beyond these purposes.

4 For support of its interpretation, FSEEE relies on the canon *expressio unius est exclusio*  
5 *alterius*, which means “when one or more things of a class are expressly mentioned others of the  
6 same class are excluded.” According to FSEEE, the specific purposes that Congress identified  
7 would be meaningless if the Forest Service could grant a permit for any use it deems worthy.

8 FSEEE points to *Rainsong Co. v. F.E.R.C.*, 106 F.3d 269, 274 (9th Cir. 1997) and *U. S. v.*  
9 *New Mexico*, 438 U.S. 696, 706 (1978) for the proposition that the Forest Service may not decide  
10 the purposes of national forest use. In *Rainsong*, the plaintiff challenged the Federal Energy  
11 Regulatory Commission’s procedures in denying a hydroelectric license. Under § 4(e) of the  
12 Federal Power Act, FERC may only grant a license on national forest land when it is not  
13 inconsistent with “the purpose for which such reservation was created or acquired.” 16 U.S.C. §  
14 797(e). The court held that FERC erred by deferring to the Forest Service’s 1990 management  
15 plan to determine the purpose for which the forest was created, and should have instead relied on  
16 congressional statutes. *Id.* at 274.

17 In *New Mexico*, the Supreme Court addressed whether the United States had reserved the  
18 use of river water for recreation and other purposes when it set aside the Gila National Forest.  
19 438 U.S. at 697-98. The Court applied the “reserved rights doctrine” to determine that water on  
20 national forest land may only be impliedly reserved for a purpose under which the national forest  
21 could be established. *Id.* at 718. In reaching this conclusion, the Court found that national forests  
22 established before MUSYA could be “reserved for only two purposes-‘[t]o conserve the water  
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1 flows, and to furnish a continuous supply of timber for the people.” *Id.* at 707, 713 (quoting 30  
2 Cong.Rec. 967 (1897) (Cong. McRae)).

3         The Forest Service counters that its authority to regulate “occupancy and use” of national  
4 forest land explicitly allows it to permit uses unrelated to those identified by Congress. *See* 16  
5 U.S.C.A. § 551; *see also* *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). In the alternative,  
6 the Forest Service argues that even if the Organic Act is ambiguous, its interpretation of the  
7 statute is reasonable. *Chevron*, 467 U.S. at 844. In addition, the Forest Service asserts that the  
8 *expressio unius* canon should not be applied where an agency is interpreting a statute it  
9 administers. The Forest Service cites to several cases from the D.C. Circuit in support of this  
10 proposition. *See, e.g., St. Marks Place Hous. Co. v. U.S. Dep’t of Hous. & Urban Dev.*, 610 F.3d  
11 75, 82 (D.C. Cir. 2010) (“[T]he *expressio unius* canon has little force in the context of challenges  
12 to an agency’s interpretation of a statute.”) (internal quotations omitted).

13         When confronted with an agency’s interpretation of a statute it administers, the Ninth  
14 Circuit follows the two-step approach from *Chevron U.S.A. Inc. v. Natural Resources Defense*  
15 *Council, Inc.*, 467 U.S. 837 (1984). *Latino Issues Forum v. U.S. E.P.A.*, 558 F.3d 936, 941 (9th  
16 Cir. 2009). According to the first step, the Court must apply the “traditional tools of statutory  
17 construction” to determine whether Congress has unambiguously addressed the issue. *Id.*  
18 (quoting *Chevron*, 467 U.S. at 843 n. 9). If Congress’s intent is clear, it must be given effect. *Id.*  
19 at 941-42. However, if Congress has left a gap, step two requires that the court defer to the  
20 agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”  
21 *Id.* at 942 (quoting *Chevron*, 467 U.S. at 844).

22         In addition, a “court’s prior judicial construction of a statute trumps an agency  
23 construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its  
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1 construction follows from the unambiguous terms of the statute.” *National Cable &*  
2 *Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). However,  
3 where a judicial interpretation pre-dates *Chevron*, explicit statements regarding ambiguity are not  
4 necessary to resolve the question at step one. *United States v. Home Concrete & Supply, LLC*,  
5 566 U.S. 478, 488-89 (2012). Rather, the inquiry is whether the prior decision indicates the  
6 court’s belief that congress spoke “directly to the question at hand” and thus left “no gap for the  
7 agency to fill.” *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

8 Starting with *Chevron*’s first step, the Court finds that the Forest Service’s authority to  
9 broadly regulate “occupancy and use” unambiguously permits it to grant special use permits for  
10 purposes not specifically identified by Congress. 16 U.S.C.A. § 551. According to the text of  
11 section 551 of the Organic Act, the Forest Service’s authority to determine permissible uses is  
12 limited only by its obligation to “insure the objects” of the reservation and “preserve the forests  
13 thereon from destruction.” *Id.* However, this does not limit the agency to regulating solely for the  
14 purpose of forest protection. [Pl.’s Reply, Dkt. # 24, at 4]. Rather, several circuit courts have  
15 held that the Forest Service may permit uses it determines will not harm the forest but also do not  
16 actively protect it. *See, e.g., McMichael v. United States*. 480 U.S. 572, 582 (9th Cir. 1987)  
17 (upholding a prohibition on motorized vehicles in certain areas); *United States v. Hymans*, 463  
18 F.2d 615, 617 (10th Cir. 1972) (upholding a regulation prohibiting skinny dipping and stating  
19 that Forest Service regulations need not directly protect the forest); *Wyoming v. U.S. Dep’t of*  
20 *Agric.*, 661 F.3d 1209, 1234 (10th Cir. 2011) (collecting cases).

21 More importantly, the Supreme Court has found that the Forest Service’s regulative  
22 powers extend beyond those purposes listed in section 475 of the Organic Act. In *U.S. v.*  
23 *Grimaud*, the Court held that the Forest Service’s power encompasses requiring a special permit  
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1 for grazing. 220 U.S. 506, 523 (1911). In reaching this conclusion, the Court relied on both  
2 section 551, which authorizes regulation of “occupancy and use,” and section 478, which states  
3 that other sections should not “prohibit any person from entering upon such national forests for  
4 all proper and lawful purposes.” *Id.* at 515; 16 U.S.C.A. §§ 478, 551. The Court explained that to  
5 “pasture sheep and cattle on the reservation, at will and without restraint, might interfere  
6 seriously with the accomplishment of the purposes for which they were established,” but that  
7 regulated pasturage “might not be inconsistent” with those purposes. *Grimaud*, 220 U.S. at 516.

8 As the Court acknowledged in *Grimaud*, the only statutory purposes for national forests  
9 in 1911 were protecting forests, controlling water flow, and securing timber supplies. *See id.* at  
10 507 (quoting 16 U.S.C.A. § 475). Nonetheless, based on sections 478 and 551 of the Organic  
11 Act, the Court determined that harmonizing additional uses with these purposes was a “matter of  
12 administrative detail.” *Grimaud*, 220 U.S. at 516. Although the Court did not state that the statute  
13 was unambiguous, this is not necessary to satisfy step one for a statute that pre-dates *Chevron* as  
14 long as the court found Congress had addressed the issue. *Home Concrete*, 566 U.S. at 488-89.  
15 In addition, although MUSYA identifies additional national forest purposes, its language mirrors  
16 section 475 and is supplemental to that subchapter. *See* 16 U.S.C.A. § 528; *Home Concrete*, 566  
17 U.S. at 483 (upholding an interpretation of a statute that was reenacted where the “operative  
18 language is identical”). Consequently, the interpretation from *Grimaud* controls and the Forest  
19 Service has authority to issue permits for purposes not identified by Congress.

20 Even if the authority granted by the Organic Act was ambiguous, the Court would defer  
21 to the Forest Service’s reasonable interpretation under step two of *Chevron*. *See* 467 U.S. at 844.  
22 While it may be possible to read the purposes identified by Congress as limiting the permissible  
23 uses of reservation land, the Forest Service’s interpretation that the list does not limit its  
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1 authority is also permissible. Indeed, neither section 475 of the Organic Act nor MUSYA state  
2 that the list is exhaustive, and section 551 of the Organic Act does not reference the purposes  
3 listed in other subchapters as limitations on agency authority. 16 U.S.C.A. §§ 475, 528, 551.

4 The cases cited by FSEEE fail to convince the Court otherwise. *Rainsong* may be  
5 distinguished on several bases. *See* 106 F.3d at 272-74. First, while the statute in *Rainsong*  
6 explicitly mandated that FERC consider congressional purposes before granting a license, no  
7 statute at issue here makes such a command. *Id.* at 272 (quoting 16 U.S.C. § 797(e)). Second,  
8 *Rainsong* involved FERC's interpretation of a statute it did not administer, meaning the court  
9 owed the agency no deference. *Id.* at 274. Here, in contrast, the Forest Service is interpreting its  
10 own Organic Act and is thus entitled to deference.

11 *New Mexico* likewise does not support FSEEE's interpretation. There, the Supreme Court  
12 addressed how much water the United States could reserve for its own use, rather than leaving it  
13 open for state or private uses. *New Mexico*, 438 U.S. at 699-700. However, this involved  
14 analyzing the congressional purposes for *establishing* the forest, not administering it. *Id.* (stating  
15 that the court must examine the "specific purposes for which the land was reserved"). In fact, the  
16 Court emphasized that the few purposes for reserving land were intended to limit the federal  
17 government's ability to exclude other private uses. *Id.* at 708.

18 The Court finds that section 551 of the Organic Act unambiguously grants the Forest  
19 Service authority to permit uses of forest land that have not been specifically identified by  
20 Congress. As a result, the Forest Service had authority to grant a special use permit to the Navy  
21 to conduct its electronic warfare training.

1 **C. The Special Use Permit’s Compliance with Forest Plan Requirements**

2 The Forest Plan authorizes the Forest Service to grant special use permits only where the  
3 use “cannot reasonably be accommodated on private land,” the “interests and needs of the  
4 general public” are prioritized, and the use is “in harmony” with the surrounding landscape.  
5 AR022641. FSEEE asserts that the Forest Service’s decision to grant a special use permit to the  
6 Navy is inconsistent with these requirements from the Forest Plan and thus violates the NFMA.

7 *1. Review of NFMA Claims under the APA*

8 Review of agency decision-making under the NFMA is governed by the APA because  
9 the NFMA does not contain a provision for judicial review. *Native Ecosystems Council v. U.S.*  
10 *Forest Serv., an agency of U.S. Dep’t of Agric.*, 418 F.3d 953, 960 (9th Cir. 2005). Under the  
11 APA, the court’s role on summary judgment is not to engage in independent fact finding, but to  
12 “determine whether or not as a matter of law the evidence in the administrative record permitted  
13 the agency to make the decision it did.” *Occidental Eng’g Co. v. Immigration & Naturalization*  
14 *Serv.*, 753 F.2d 766, 769 (9th Cir.1985). An agency decision may only be set aside if it was  
15 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Native*  
16 *Ecosystems*, 418 F.3d at 960.

17 To determine if an agency decision is arbitrary and capricious, the court must consider  
18 “whether the decision was based on a consideration of the relevant factors and whether there has  
19 been a clear error of judgment.” *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th  
20 Cir. 2012). The standard is a “narrow one,” but the court must still engage in a “thorough,  
21 probing, in-depth review.” *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401  
22 U.S. 402, 415–16 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105  
23 (1977)). The agency must show a “rational connection between the facts found and the

1 conclusions made.” *Id.* (quoting *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d  
2 1163, 1170 (9th Cir.2004)).

3 2. *The Forest Service's Consideration of Private Land*

4 The Forest Plan requires that special use permits “may be authorized when such use  
5 cannot reasonably be accommodated on private land.” AR022641. FSEEE contends that the  
6 Forest Service failed to consider this requirement when it granted a permit to the Navy. FSEEE  
7 argues that the administrative record contains no documents evidencing that the Forest Service  
8 considered whether the Navy’s electronic warfare training could be conducted on private land.  
9 Furthermore, FSEEE argues that the Navy also failed to consider private land in its application  
10 for a special use permit application. Even if it did, FSEEE asserts that the Forest Service was not  
11 permitted to rely on the Navy’s determinations, but instead had to explain how the record’s facts  
12 support its conclusion.

13 In opposition, the Forest Service argues that the Navy did consider other locations for its  
14 training, and the Forest Service was entitled to adopt these findings. The Forest Service asserts  
15 that the Navy considered several Department of Defense locations, AR205704, 177876-77, and  
16 reviewed maps to rule out private land, AR205610-16. The Navy determined that these private  
17 land locations were unacceptable due to the specific requirements of electronic warfare training.  
18 *See* AR177871, 177876, 205705. In addition, the Forest Service references the Navy’s policy of  
19 ruling out public land before it can acquire an interest with a private entity. AR205704. The  
20 Forest Service concluded from all this information that the Navy’s use could not reasonably be  
21 accommodated on private land. Finally, if the Court were to find a violation, the Forest Service  
22 requests an opportunity for further briefing regarding remedies and harmless error.

1           The NFMA requires that “[r]esource plans, permits, contracts, and other instruments for  
2 the use and occupancy of National Forest System lands shall be consistent with the land  
3 management plans.” 16 U.S.C. § 1604(i). “[T]he Forest Service's interpretation and  
4 implementation of its own forest plan is entitled to substantial deference.” *Weldon*, 697 F.3d at  
5 1056. However, a court may not defer to an agency where its interpretation is “plainly  
6 inconsistent with the regulation at issue” or “contradicts the regulation’s plain language.” *Native*  
7 *Ecosystems*, 418 F.3d at 960 (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059,  
8 1069 (9th Cir.1998); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129  
9 L.Ed.2d 405 (1994)). In addition, when deciding whether a use complies with a validly enacted  
10 plan, the agency may not decide on its own which requirements are relevant or meaningful, but  
11 must instead amend the plan itself. *Native Ecosystems*, 418 F.3d at 961.

12           Here, the Forest Plan’s requirement that the use “cannot reasonably be accommodated on  
13 private land” is not onerous. AR022641. However, the Plan’s plain language still minimally  
14 requires that the Forest Service explain somewhere in the record why private land would not be  
15 feasible. Instead of doing this, the Forest Service merely states in the record that “the Navy  
16 considered alternatives and determined that the actions cannot be accommodated on private  
17 lands.” AR205599. If the Navy made such a determination, it is not explained in the record.

18           The record does identify several criteria that make locations acceptable for electronic  
19 warfare training. These include the existence of maintained roads, preexisting “pull-outs” for the  
20 trucks, lack of electronic spectrum interference, different elevations and angles for receiving  
21 signals, presence beneath a military operations area, and a clear line of sight to the west.

22 AR177871, 177876, 205705. There are also factors that make other locations “unreasonable,”  
23 including scheduling conflicts, limited range time, lack of proximity to existing bases, and cost.

1 AR205705. However, these criteria are never applied to explain why private land within the  
2 Olympic Military Operations Areas would not suit the Navy's needs. Instead, the Navy's  
3 Environmental Assessment and permit application use the criteria only to explain why national  
4 forest land is ideal for electronic warfare training, AR177871, and why Department of Defense  
5 locations are untenable, AR205705. This has little to do with private land.

6 The Forest Service identifies only one place in the administrative record where private  
7 land is actually depicted. Appendix A to the Forest Service's Decision contains seven pages of  
8 maps depicting the Navy's "Proposed Mobile Emitter Sites" and their surroundings. AR205609-  
9 16. However, these maps contain no analysis based on the criteria mentioned by the Forest  
10 Service. The legend identifies "other land, including private" with the color white, but the maps  
11 contain no details regarding the topography of private land. AR205609-16. The legend also only  
12 identifies "Forest Service existing roads" and seemingly does not label other roads. AR205609-  
13 16. Consequently, despite showing that a fair amount of private land does exist within the  
14 Olympic Military Operations Areas, these maps shed little no light on whether it could  
15 reasonably accommodate the Navy's needs. AR205610-11.

16 Furthermore, even if the Forest Service's expertise allows it to somehow use these maps  
17 to rule out private land, this would be inadequate to satisfy the NFMA. The agency must "set  
18 forth [the basis of its decision] with such clarity as to be understandable," rather than forcing the  
19 court to "guess at the theory underlying the agency's action." *Native Ecosystems*, 418 F.3d at  
20 953, 963 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), and finding that the  
21 Forest Service violated the NFMA by failing to explain in the record how it applied one of the  
22 standards from the forest plan). The Forest Service cannot now rely on post hoc rationalizations  
23 that are not supported by the record. *See Ctr. for Biological Diversity v. U.S. Bureau of Land*  
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1 | *Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012) (“We cannot gloss over the absence of a cogent  
2 | explanation by the agency by relying on the post hoc rationalizations.”).

3 |         The Forest Service also suggests that private land is not feasible because the Navy is  
4 | required to “evaluate other Department of Defense locations, other federal lands, [and] other  
5 | government lands before it can acquire an interest in land with a private entity.” [Def.’s Mot. For  
6 | Summ. Judg., Dkt. # 23, at 17]; AR205704. However, this requirement is only a barrier to using  
7 | private land if the Navy can accommodate its use on government land. It follows that, if the  
8 | Forest Service denied the Navy’s application and there were no other public options, the Navy’s  
9 | policy would no longer limit its ability to consider private land. Furthermore, if the Navy does  
10 | follow this policy, this would directly contradict the Forest Service’s statement that the Navy  
11 | determined its training “cannot be accommodated on private lands.” *See* AR205599. The Navy  
12 | could not have made such a determination if it had to exhaust government options first.

13 |         In short, the Forest Service committed an error by failing to provide any reason for why  
14 | the Navy’s training could not be accommodated on private land, as required by the Forest Plan.  
15 | Nonetheless, the rationale behind the Navy’s policy of preferring government land seems  
16 | compelling. Dealing with multiple private entities in order to lease or purchase land to conduct  
17 | electronic warfare training would likely be costly for the Navy and invasive for the private  
18 | parties. Indeed, even if suitable private land does exist, it strikes the Court as unlikely that such  
19 | an option would be reasonable.

20 |         In light of this, the Court grants the Forest Service’s request for further briefing on the  
21 | issue of harmless error. The harmless error doctrine may be employed in the administrative  
22 | context “only when a mistake of the administrative body is one that clearly had no bearing on the  
23 | procedure used or the substance of decision reached.” *Nat. Res. Def. Council v. U.S. Forest*  
24 |

1 *Serv.*, 421 F.3d 797, 807 (9th Cir. 2005). Despite this relatively high bar, the doctrine may apply  
2 here, and therefore it should be addressed before summary judgment is granted.

3 3. *The Forest Service’s Prioritization of the Public Interest*

4 In addition to requiring consideration of private land, the Forest Plan also requires that  
5 the “interests and needs of the general public shall be given priority over those of the applicant.”  
6 AR022641. FSEEE argues that allowing the Navy to limit the public’s access to the area around  
7 the training sites subordinates recreational uses. Furthermore, FSEEE asserts that the 24-hour,  
8 nearly year-round access granted to the Navy will cause frequent conflicts with the public’s use  
9 of the forests. AR205700.

10 The Forest Service responds that FSEEE overstates the impact of the training activities.  
11 The Forest Service points out that only three vehicles may operate in the national forest at one  
12 time and they must use existing pull-off sites. AR205579. In addition, the Forest Service asserts  
13 that the Navy is required to use a different location if a camper is occupying the mobile emitter  
14 site, and if other recreational activities are ongoing the Navy must relocate if the public user  
15 wishes. AR205703.

16 The Court finds that the Navy’s special use permit does not violate the Forest Plan’s  
17 requirement to prioritize the general public. As the Forest Service stated, the Navy’s operating  
18 procedures clearly require mobile emitter trucks to leave the area if public users would prefer.  
19 AR205703. Although the procedures do not state that a truck must vacate the area if a public user  
20 arrives after operations have begun, this is not necessary to satisfy the Forest Plan’s requirements  
21 as interpreted by the Forest Service. *Weldon*, 697 F.3d at 1056 (stating that the agency’s  
22 interpretation is entitled to “substantial deference”). Consequently, the Forest Service did not  
23 subordinate the public interest and did not violate the NFMA.

1 4. *The Forest Service's Consideration of the Surrounding Landscape*

2 Finally, the Forest Plan also requires that the use be “compatible, and in harmony with,  
3 the surrounding landscape.” AR022641. FSEEE argues that the Forest Service failed altogether  
4 to address this requirement, and further contends that the mobile emitter vehicles are not in  
5 harmony with their forested surroundings.

6 The Forest Service once again counters that it did consider effects on the surrounding  
7 area, even if it did not use the magic words from the Forest Plan. The Decision Notice states that  
8 the eleven mobile emitter sites are all located along existing roads and will not alter the visual  
9 character of the area. AR205590-91. The Decision Notice also determined there would be no  
10 significant impact on the public, vegetation, and wildlife. AR205586-96.

11 The Court determines that the Forest Service did consider whether the electronic warfare  
12 training would be compatible and in harmony with the surroundings. This requirement is not  
13 very specific, and the Forest Service has the discretion to interpret it reasonably. Here, the Forest  
14 Service decided that it required considering such things as whether the training would physically  
15 alter the land, AR205591, whether it would interfere with park land or other designated areas,  
16 AR205591, and whether it would adversely affect surrounding flora and fauna, AR205588-90.  
17 This was a reasonable interpretation of the Forest Plan's requirement, and as a result the Forest  
18 Service did not violate the NFMA.

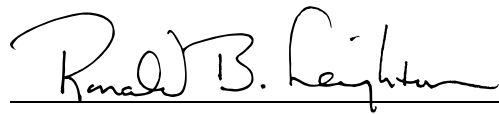
19 **CONCLUSION**

20 FSEEE's and the Forest Service's Motions for Summary Judgment as to the NFMA  
21 claim related to private land are hereby reserved, pending further briefing. Because the burden of  
22 proving harmless error falls on the agency, *see Natural Resources Defense Council*, 421 F.3d at  
23 807, the Forest Service is GRANTED fourteen days from the date of this order to supplement the  
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1 Motion for Summary Judgment. FSEEE is GRANTED fourteen days to respond and the Forest  
2 Service is GRANTED ten days to reply to any new issues or evidence raised in the response.  
3 FSEEE's Motion for Summary Judgment is DENIED and the Forest Service's Motion is  
4 GRANTED as to all other claims.

5 IT IS SO ORDERED.

6 Dated this 18<sup>th</sup> day of September, 2018.

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9 Ronald B. Leighton  
10 United States District Judge  
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