

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

16-35105

D.C. No. 6:14-cv-00747-AA

[Decided March 23, 2018]

WESTERN RADIO SERVICES COMPANY,)
INC.,)
Plaintiff-Appellant,)
v.)
JOHN ALLEN, Deschutes National Forest)
Supervisor; KATE KLEIN, Ochoco National)
Forest Supervisor; KEVIN LARKIN, Bend-)
Fort Rock District Ranger; SLATER R.)
TURNER, Lookout Mountain/Crooked River)
National Grassland District Ranger; RICK)
KESSLER, Special Use Permits, Bend/Fort)
Rock Ranger District; LISA DILLEY, Special)
Use Permits, Bend/Fort Rock Ranger)
District; HEIDI SCOTT, Special Use)
Permits, Ochoco National Forest; KAREN)

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BRAND, Special Use Permits, Ochoco)
National Forest; UNITED STATES)
FOREST SERVICE; KENT)
CONNAUGHTON, Regional Forester;)
MAUREEN HYZER, Acting Regional)
Forester,)
)
Defendants-Appellees.)
)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted March 7, 2018
Portland, Oregon

Before: FISHER, N.R. SMITH and HURWITZ,
Circuit Judges

Western Radio Services Company, Inc. (Western Radio) appeals the district court's dismissal of its claims under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and summary judgment in favor of the United States Forest Service on its claims under the Administrative Procedure Act, 5 U.S.C. §§ 702-706 and the Forest Service's counterclaims for trespass and unjust enrichment. We have jurisdiction under 28 U.S.C. § 1291, we review *de novo*, see *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 929 (9th Cir. 2010), and we affirm.

1. The district court properly dismissed Western Radio's Bivens claims as foreclosed by precedent. See *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009) ("[T]he APA leaves no room for Bivens claims based on agency action or inaction.").

We decline Western Radio's invitation to fashion a Bivens remedy for those Forest Service decisions not subject to administrative appeal – for example, the Forest Service's decision not to renew certain leases and permits upon expiration – because the absence of authorized appeal procedures does not necessarily render an agency's decision any less final. See *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is final for the purposes of [the APA] and therefore subject to judicial review" (internal quotation marks omitted)); cf. *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1196-97 (9th Cir. 1997) (holding a challenge to proposed construction was not ripe for review until the Forest Service concluded its environmental assessment). Western Radio gives us no reason to believe the Forest Service's multiple formal notifications of its decisions do not constitute "final agency action" under the APA, and we review them accordingly. See *Darby*, 509 U.S. at 144-46 (defining "final agency action" under 5 U.S.C. § 704).

2. The district court also properly concluded the Forest Service acted rationally when it (1) revoked Western Radio's existing lease at Sugar Pine Butte; (2)

rejected new leases and permits at Sugar Pine Butte, Gray Butte and Round Mountain; (3) back-billed Western Radio for a tenant's rent at Gray Butte; (4) rejected Western Radio's permit and development plans at Sugar Pine Butte and South Paulina Peak; and (5) demanded removal of Western Radio's facilities. Western Radio has neither pointed to any arbitrary or irrational action by the Forest Service nor identified any further process to which Western Radio was entitled before the revocation or non-renewal of its leases and permits. The Forest Service's decisions were not contrary to the evidence before the agency or implausible in light of it. See *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732-33 (9th Cir. 2017).

3. Finally, the district court properly granted summary judgment on the Forest Service's counterclaims for trespass and unjust enrichment. Contrary to Western Radio's argument, trespass does not require a showing of "interference" with the land or its facilities. See *Rich v. Tite-Knot Pine Mill*, 421 P.2d 370, 373 (Or. 1966). We likewise reject Western Radio's argument that the parties' then-expired lease provisions constrained the Forest Service's options for collecting unpaid fees; the Forest Service properly brought an unjust enrichment claim and was awarded the fees Western Radio would have been charged had it obtained authorization to continue operating at the relevant sites.

AFFIRMED.

[*] This disposition is not appropriate for

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publication and is not precedent except as provided by
Ninth Circuit Rule 36-3.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. 6:14-00747-AA

[Filed April 17, 2015]

WESTERN RADIO SERVICES COMPANY,)
INC.,)
Plaintiff,)
v.)
JOHN ALLEN, Deschutes National Forest)
Supervisor; KATE KLEIN, Ochoco National)
Forest Supervisor; KEVIN LARKIN, Bend/)
Fort Rock District Ranger; SLATER R.)
TURNER, Lookout Mountain/Crooked River)
National Grassland District Ranger; RICK)
WESSLER, Special Use Permits (Bend/Fort)
Rock Ranger District); LISA DILLEY,)
Special Use Permits (Bend/Fort Rock)
Ranger District); HEIDI SCOTT, Special)
Use Permits, Ochoco National Forest;)
KAREN BRAND, Special Use Permits,)
Ochoco National Forest; KENT)
CONNAUGHTON, Regional Forester;)

MAUREEN HYZER, Acting Regional)
Forester; and UNITED STATES FOREST)
SERVICE,)
Defendants.)

)

OPINION AND ORDER

Plaintiff Western Radio Services Company, Inc., (Western Radio) filed suit under the Administrative Procedures Act (APA), 5 U.S.C. § 706, alleging that the United States Forest Service (Forest service) took arbitrary and capricious action and unlawfully withheld action in violation of the National Forest Management Act. 16 U.S.C. § 497. Western Radio also alleges claims against several Forest Service employees for violations of its First Amendment and Equal Protection rights pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Western Radio's claims arise from ongoing disputes between it and the Forest Service regarding Western Radio's telecommunications facilities on national forest lands. The Forest Service denies Western Radio's claims and asserts counterclaims for trespass and unjust enrichment.

Individual defendants now move for dismissal of Western Radio's Bivens claims, arguing that these claims are not cognizable when based on agency action or inaction reviewable under the APA. Individual defendants also move for sanctions against Western Radio's counsel, arguing that the Bivens claims are frivolous and without legal basis in light of previous

Ninth Circuit's rulings against Western Radio.

Additionally, the Forest Service moves for a preliminary injunction requiring Western Radio to remove its equipment and facilities from the Gray Butte telecommunications site. The Forest Service maintains that Western Radio is no longer authorized to remain at Gray Butte and therefore is in trespass. The Forest Service also contends that Western Radio's presence at Gray Butte irreparably harms other site users as well as the Forest Service's authority to manage forest lands.

The court heard oral argument on March 3, 2015 regarding all three motions. Individual defendants' motion to dismiss is granted, the motion for sanctions is denied, and the Forest Service's motion for preliminary injunction is granted, in part. Finally, the Forest Service's pending motion to compel is granted as set forth below.

BACKGROUND

Western Radio is a telecommunications company which operates telecommunication facilities within national forest lands pursuant to permits and leases authorized by the Forest Service. At these telecommunications sites, Western Radio has made improvements to the land and built structures such as telecommunications towers.

Western Radio has a long history of disputes with the Forest Service; Western Radio or its owner, Richard Oberdorfer, has filed suit against the Forest

Service and other federal agencies numerous times during the past three decades. See, e.g., Oberdorfer v. Jewkes, 11-cv-06209-SI, 2012 WL 464026 (D. Or. Feb. 13, 2012), dismissal aff'd, 583 Fed. Appx. 770 (9th Cir. July 24, 2014); W. Radio Servs. Co. v. U.S. Forest Serv., 09-cv-00872-HO (D. Or. 2009), dismissal aff'd, 433 Fed. Appx. 558 (9th Cir.), cert. denied, 132 S. Ct. 555 (2011); W. Radio Servs. Co. v. U.S. Forest Serv., 08-cv-6359-HO, 2010 WL 1169794 (D. Or. Mar. 24, 2010); W. Radio Servs. Co. v. U.S. Forest Serv., 04-cv-1346-AA, 2008 WL 427787 (D. Or. Feb. 12, 2008), dismissal aff'd, 578 F.3d 111'6 (9th Cir. 2009), cert. denied, 559 U.S. 1106 (2010); W. Radio Servs. Co., Inc. v. Veneman, 01-cv-6240-HO (D. Or. 2001), dismissal aff'd, 100 Fed Appx. 649 (9th Cir. 2004), 231 Fed. Appx. 684 (9th Cir. 2007); Oberdorfer v. Glickman, 98-cv-1588-HU, 2001 WL 34045732 (D. Or. Sept. 14, 2001); W. Radio Servs. Co., Inc. v. Glickman, 95-cv-0679-MA (D. Or. 1995), dismissal aff'd, 123 F.3d 1189 (9th Cir. 1997); W. Radio Servs. Co., Inc. v. Glickman, 95-cv-6207-TC (D. Or. 1995), dismissal aff'd, 113 F.3d 966 (9th Cir. 1997); W. Radio Servs. Co., Inc. v. Espy, 94-cv-6323-HO (D. Or. 1994); W. Radio Servs. v. Espy, 93-cv-0552-MA (D. Or. 1993), dismissal aff'd, 79 F.3d 896 (9th Cir.), cert. denied, 519 U.S. 822 (1996).

On May 5, 2014, Western Radio filed this action against the Forest Service and several of its employees. Western Radio alleges that the Forest Service delayed action on Western Radio's application to modify its facilities at Sugar Pine Butte and denied a permit for such facilities; rejected Western Radio's applications to renew leases for existing facilities at Round Mountain and Gray Butte and ordered the removal of such

facilities; and rejected an application for a relay station facility at South Paulina Peak. Western Radio alleges that the Forest Service's actions were arbitrary and capricious and constituted unreasonable interpretations of its own regulations under the APA. Western Radio also asserts Bivens claims against ten Forest Service employees, alleging that these individual defendants denied Western Radio's applications in retaliation for its prior lawsuits against the agency and singled it out for differential treatment.

Despite the pending legal dispute over Western Radio's Gray Butte facilities, on July 31, 2014, Western Radio entered into a 5-year lease agreement with a third-party tenant, Sureline, Inc. (Sureline). Evans Am. Sec. Decl. Ex. C (doc. 101) Under the terms of the lease, Sure line was allowed to install telecommunications equipment at Western Radio's Gray Butte facility. Shortly thereafter, other site users complained and notified the Forest Service that Western Radio had not provided the required 30-day notice of new frequencies or tenants at the site, and that Sureline' s operations caused interference with other, authorized tenants.

On November 13, 2 014, the Forest Service was granted leave to amend its answer and allege counterclaims of trespass and unjust enrichment against Western Radio. The Forest Service alleges Western Radio is no longer authorized to operate at Sugarpine Butte, Gray Butte and Round Mountain, and that Western Radio has not removed its facilities or paid fees to occupy the sites. The Forest Service contends that Western Radio is in trespass, that its

structures and improvements are now property of the Forest Service, and that Western Radio owes the Forest Service additional fees. The Forest Service also alleges that Western Radio has unjustly benefited by remaining on Forest Service lands and operating its facilities without authorization or payment of fees.

On December 2 and 17, 2014, defendants moved to dismiss the Bivens claims and for sanctions, and on January 21, 2015, the Forest Service moved for a preliminary injunction and to compel the production of documents.

DISCUSSION

A. Individual Defendants' Motion to Dismiss

Individual defendants move for dismissal of Western Radio's Bivens claims against them. Under Bivens, a court may award damages against federal officials for alleged violations of a plaintiff's federal constitutional rights. *W. Ctr. for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000). "However, Bivens remedies are not available to compensate plaintiffs for all constitutional torts committed by federal officials." *Id.* For example, a Bivens remedy is unavailable when "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur' in the course of administering a federal program." *Id.* (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)). In this case, defendants argue that Western Radio's Bivens claims are not cognizable because the APA provides an "adequate remedial

mechanism" for the agency's alleged action or inaction. I agree. See *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) ("We therefore conclude that the APA leaves no room for Bivens claims based on agency action or inaction."); see also *Wilkie v. Robbins*, 551 U.S. 537, 553-54 (2007). Western Radio alleges Bivens claims in its First and Second Claims for Relief, and those claims specifically rely on the same facts alleged in support of Western Radio's APA claims. Western Radio's Bivens claims allege that in denying Western Radio's applications, individual defendants retaliated against Western Radio based on its previous lawsuits against the agency and "singled out" Western Radio in violation of its First Amendment and Equal Protection rights. Pl.'s Am. Compl. 4-13. Western Radio's APA claims allege that the Forest Service arbitrarily and capriciously delayed or denied Western Radio's applications in violation of the APA. Pl.'s Am. Compl. 14. Further, Western Radio seeks the same injunctive relief with respect to all claims. Id. 12-14. Thus, Western Radio acknowledges that the APA provides an existing process to protect its interests and remedy the Forest Service's allegedly unlawful actions; consequently, its Bivens claims are barred. In fact, in a previous case I dismissed very similar Bivens claims brought by this very same plaintiff. See *W. Radio Servs. Co. v. U.S. Forest Serv.*, 2008 WL 427787 (D. Or. Feb. 12, 2008); aff'd, 578 F.3d 1116. There, Western Radio brought Bivens claims against individual Forest Service employees based on the Forest Service's withholding of action on Western Radio's application for sidehill antennas at Gray Butte, allegedly in retaliation for Western Radio's previous lawsuits against the agency.

2008 WL 427787, at *2. I dismissed Western Radio's Bivens claims because the APA afforded a remedy for the Forest Service's alleged failure to act:

[P]laintiffs complain of delay and inaction on the part of defendants in processing Western Radio's application for sidehill antennas, complaints that the APA was specifically crafted to redress. Thus, the APA provides an alternative and comprehensive remedy to protect plaintiffs' interest in compelling government action - a convincing reason for this court to refrain from crafting a Bivens remedy in this case.

Id. at *4 (footnote and citation omitted). On appeal, the Ninth Circuit affirmed:

In sum, the design of the APA raises the inference that Congress expected the Judiciary to stay its Bivens hand" and provides a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," Wilkie, 551 U.S. at 550, 554, 127 S. Ct. 2588[.] We therefore conclude that the APA leaves no room for Bivens claims based on agency action or inaction.

W. Radio Servs. Co., 578 F.3d at 1123 (emphasis added); see also Oberdorfer v. Jewkes, 583 Fed. Appx. 770, 772 (9th Cir. July 24, 2014) ("[N]o Bivens remedy is available for the withholding of a use permit because the Administrative Procedures Act (APA) provides an adequate remedy.")

Western Radio does not discuss or distinguish the

Ninth Circuit's decision in Western Radio or explain why its reasoning does not foreclose the specific Bivens claims in this case. Instead, Western Radio asserts three arguments.

First, Western Radio claims that it states plausible Bivens claims under the applicable pleading standard, and that it should be allowed to amend its complaint if the court finds Western Radio insufficiently pled its claims. However, Western Radio has not sought amendment after conferral and in accordance with this Court's local rules. Moreover, Western Radio does not explain what additional facts it would allege or why amendment would not be futile given the availability of APA remedies. Second, Western Radio argues that this Court and the Ninth Circuit have carved out exceptions to the prohibition against Bivens claims, and that its current Bivens claims fit within these exceptions. Western Radio cites *Edgar v. Schmidt*, Case No. 09-cv-6376-AA, 2011 WL 5514037 (D. Or. No. 9, 2011) and *Martin v. Naval Criminal Investigative Serv.*, 539 Fed. Appx. 830 (9th Cir. 2013) in support of its argument.

In *Edgar*, I allowed the plaintiff's Bivens claim to proceed where the government had allegedly destroyed the plaintiff's real and personal property without due process. Notably, however, I vacated my decision and the case ultimately resolved. See 09-cv-6376-AA (doc. 67). Regardless, in *Edgar* the government conceded that the plaintiff could not have brought APA claims to challenge the destruction of his property and the deprivation of his due process rights; i.e., the plaintiff had no "alternative existing process for protecting [his]

interest." Wilkie, 551 U.S. at 550. In contrast, Western Radio does not allege the deprivation of its due process rights arising from the Forest Service's destruction of property pursuant to an unreviewable agency decision. [1] Moreover, Western Radio does not explain why the Forest Service's ultimate decisions in this case are not subject to APA review. Thus, Edgar is completely inapposite and Western Radio's reliance entirely misplaced.

Martin is likewise unavailing. There, the Ninth Circuit .recognized a Bivens action against a federal law enforcement officer who allegedly harassed and intimidated the plaintiff in retaliation for her constitutionally protected . speech. Martin, 539 Fed. Appx. at 832-33. The court distinguished its holding in Western Radio, explaining that the "very gravamen of Ms. Martin's complaint is that the alleged retaliatory 'investigation' of her is pretextual and perpetually open, rendering the APA's provision for judicial review of 'final' agency actions particularly illusory" and thus, unavailable. Id. at 833. Here, Western Radio does not allege an open-ended and pretextual "investigation" of its operations; it alleges discrete, agency actions denying its applications. Thus, neither Edgar nor Martin creates applicable "exceptions" to allow Western Radio's Bivens claims when alternative remedies are available under the APA.

Third, Western Radio emphasizes that its Bivens claims are pled "in the alternative" and will be pursued only if the court finds that Western Radio has no remedy under the APA. However, Western Radio's Bivens claims are the first and second claims for relief

alleged in the complaint, and the relief Western Radio seeks is available under the APA. For example, to remedy defendants' alleged retaliation, Western Radio seeks following injunctive relief:

- a. Sugar Pine Butte approval of plaintiff's application for a replacement tower; renewal of plaintiff's permit; an injunction halting the processing of other applications which will interfere with plaintiff's operations; and/or vacating any that have been approved.
- b. Renewal of the permits for Gray Butte and Round Mountain, and approval of existing approved modifications to the existing approved towers.
- c. Approval of plaintiff's application at South Paulina Peak.

Pl.'s Am. Compl. at 12. Thus, Western Radio's "only-in-the-alternative" assertion rings hollow. Regardless, it is the availability of relief under the APA that bars Western Radio's Bivens claims. W. Radio Servs., 578 F.3d at 1125. I also find that Western Radio's allegations fail to state a claim for violations of its First Amendment or Equal Protection rights. To establish First Amendment retaliation, Western Radio must show "a substantial causal relationship between the constitutionally protected activity and the adverse action." See *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010) However, Western Radio pleads no specific facts suggesting an individual defendant's malice or retaliatory animus. For example, Western Radio alleges the following:

The Forest Service stated that a decision was "expected" for [the Sugar Pine Butte] application in August 2013, but District Ranger Kevin Larkin placed the project on hold during the summer of 2013.

In November 2013, Larkin notified plaintiff that the Forest Service would not be issuing a new permit upon the expiration of the permit December 31, 2013. Plaintiff appealed that decision, and on January 17, 2014, Forest Supervisor John Allen dismissed the appeal, stating that the decision was not appealable.

During this same period of time Larkin and Allen were in the process of approving a new telecommunications facility at Sugar Pine that would interfere with Western's facility.

On February 14, 2014, defendant Larkin signed a notice revoking plaintiff's lease at Sugar Pine.

On June 26, 2014, defendant Allen signed a decision upholding the revocation of plaintiff's lease at Sugar Pine.

On July 23, 2014, defendant Maureen T. Hyzer (as Acting Regional Forester) signed a decision upholding that decision after a discretionary review.

Pl.'s Amend. Compl. 6-7. Allegedly, defendants "Rick

Wessler and Lisa Dilley were also involved in the actions and inactions alleged herein regarding Sugar Pine [Butte]," though Western Radio does not specify their involvement. Id. Western Radio asserts similar allegations about its proposals for the Gray Butte, Round Mountain and South Paulina Peak sites. Id. 7-10.

As the Ninth Circuit recently explained, Western Radio's vague and conclusory allegations fail to state Bivens claims:

Western Radio alleges that the Forest Service advised county officials that its Walker Mountain tower was illegal and caused the Department of Justice to file a federal complaint. But Western Radio failed to plead facts making it plausible that a retaliatory motive - as opposed to a legitimate concern for the property rights of the government - was the but-for cause of those actions.

Western Radio's pleadings similarly failed to state a Bivens claim under the Equal Protection Clause. The conclusory allegation that "defendants intentionally treated plaintiffs differently from others similarly situated" fails to give the Forest Service fair notice of Western Radio's claim; Western Radio's complaint specifies neither those similarly situated nor the supposed difference in treatment.

Oberdorfer, 583 Fed. Appx. at 772 (emphasis added). Similarly, Western Radio here fails to allege facts inferring plausible retaliatory motives as opposed to

"legitimate concern for the property rights of the government." Id.

Given the clear and unequivocal holdings of the Ninth Circuit in cases virtually indistinguishable from the one at bar, Western Radio has an adequate remedy under the APA and is precluded from bringing Bivens claims against individual defendants. Further, Western Radio fails to allege facts supporting plausible Bivens claims'. Therefore, individual defendants' motion to dismiss is granted and Western Radio's Bivens claims are dismissed with prejudice.

B. Defendants' Motion for Sanctions

Defendants also move for sanctions in the form of an order reprimanding Western Radio's counsel for filing frivolous Bivens claims that are intended to harass the individual defendants.

Rule 11 (b) provides that, by presenting a written motion "or later advocating it,"

an attorney certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by

a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law [.]

Fed. R. Civ. P. 11 (b). "The standard for determining the propriety of Rule 11 sanctions is one of objective reasonableness for determinations of frivolousness as well as of improper purpose." Conn v. Borjorquez, 967 F.2d 1418, 1421 (9th Cir. 1992) "If, judged by an objective standard, a reasonable basis for the position exists in both law and in fact at the time the position is adopted, then sanctions should not be imposed." *Id.* (citation omitted).

In response to the motion for sanctions, Western Radio's counsel asserts that the Bivens claims are not frivolous, because some alleged Forest Service actions "have no identifiable 'handles' that can be appealed under the APA." Pl.'s Response to Defs.' Mot. for Sanctions 8. Counsel also relies heavily on the fact that the Bivens claims were alleged "only in the alternative," as if alleging claims "in the alternative" constitutes a shield against Rule 11 liability.

Notably, Western Radio fails to specify what agency actions are not reviewable under the APA and why. Given the Ninth Circuit's clear directives in the Western Radio and Oberdorfer decisions, it is difficult to find that Western Radio's Bivens claims in this action are objectively reasonable or "warranted by existing law." Fed. R. Civ. P. 11 (b) (2); W. Radio Servs. Co., 578 F. 3d at 1123, 1125; Oberdorfer, 583 Fed. Appx. at 772. As defendants emphasize, Western Radio's counsel has represented Western Radio in

every lawsuit in which it has attempted to bring Bivens claims against Forest Service employees. Thus, Western Radio's counsel was on notice that the availability of APA remedies precludes Bivens claims arising from agency action or inaction, and that generalized, conclusory allegations do not state a Bivens claim in any event.

Consequently, I likely would be well within my discretion to reprimand plaintiff's counsel. At the same time, I recognize that "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution," and that "such sanctions can have an unintended detrimental impact on an attorney's career and personal well-being." Conn, 967 F.2d at 1421 (citation omitted). Accordingly, I give counsel the benefit of the doubt and decline to impose sanctions or issue a reprimand. I am confident that the preceding analysis adequately advises counsel that Bivens claims similar to those currently alleged would be frivolous and not warranted by existing law.

C. The Forest Service's Motion for Preliminary Injunction

The Forest Service moves for a preliminary injunction requiring Western Radio to either shut down its facilities at Gray Butte or to remove Sureline's equipment. The Forest Service argues that Western Radio lacks authority to remain at Gray Butte and has completely disregarded Forest Service regulations and other site users by allowing Sureline to install equipment and use frequencies that cause interference. Given that Western Radio entered into a

lease with Sureline after the commencement of this lawsuit, the Forest Service contends that removal of Sureline's equipment is warranted and maintains the relevant status quo. Alternatively, the Forest Service requests interim injunctive relief requiring Western Radio to provide information about Sureline's equipment at Gray Butte, as well as all frequencies in use. Defs.' Status Report & Response (doc. 114).

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the Western Radio is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). At the same time, "[a] preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. A.. BMH and Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001).

In order to obtain a preliminary injunction, the movant must show: 1) a likelihood of success on the merits; 2) a likelihood of irreparable harm if the injunction is not issued; 3) the balance of the hardships tips in the movant's favor, and 4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. Under the sliding scale approach employed by the Ninth Circuit, a court may issue a preliminary injunction if the movant shows serious questions going to the merits of its claim and that the balance of the hardships tips sharply in its favor. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013).

The Forest Service argues that it will likely succeed

on its trespass counterclaim, because Western Radio is no longer authorized to operate at Gray Butte. The Forest Service explains that Western Radio's lease for the Gray Butte site terminated in 2006, and the parties operated on a yearly basis afterward. AR No. GB_1277, 1280-81. On December 28, 2012, the Forest Service notified Western Radio that its tenancy at Gray Butte was not authorized beyond December 31, 2013. Scott Decl. '[4; AR No. GB 1280-81. Subsequently, Western Radio submitted two proposals to renew the Gray Butte lease. On December 31, 2013, the Forest Service rejected Western Radio's proposals and stated that Western Radio's "hold over status is no longer being tolerated after December 31, 2 013." Scott Decl. Ex. A. [2] Thus, the Forest Service argues that Western Radio has no authority to maintain facilities at Gray Butte.

Federal and Oregon courts refer to the Restatement of Torts when considering a trespass claim. See *United States v. Milner*, 583 F.3d 1174, 1182-83 (9th Cir. 2009); *Martin v. Reynolds Metals Co.*, 221 Or. 86, 101, 342 P.2d 790 (1959). A person is liable for trespass "if he intentionally: (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158.

Here, the Forest Service informed Western Radio that its authority to operate at Gray Butte expired on December 31, 2013 and that its facilities must be removed by July 2014. [3] Nonetheless, Western Radio remains at Gray Butte without authorization, has not removed its facilities, and has allowed a third party to

install additional equipment. Further, Western Radio presents no evidence to either dispute the Forest Service's reasons for failing to renew Western Radio's lease or show that such reasons were arbitrary and capricious. Western Radio does not respond to the Forest Service's arguments regarding the lack of authority to remain at Gray Butte or to lease space to Sureline. Rather, Western Radio contends generally that it has met the requirements associated with its Gray Butte facility, and that there is no harm in maintaining the current "status quo" with respect to Sureline. However, the relevant status quo is the circumstances existing when Western Radio filed suit; i.e. before the installation of Sureline's equipment. See U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010) ("the very purpose" of a preliminary injunction is "merely to preserve the relative positions of the parties until a final judgment issues") Western Radio also maintains that it was "required" to allow Sureline's equipment pursuant to Western Radio's agreement with the Forest Service. Western Radio is patently mistaken. First, the Forest Service denied Western Radio's proposals to renew the lease, and no lease terms remained in effect. Even if the lease terms applied to Western Radio as a holdover tenant, so to speak, the lease provides that Western Radio is authorized to rent space and provide other services to customers; the lease does not "require" Western Radio to do so. Scott Sec. Decl. at 1, Ex. A at 1-2. Furthermore, Western Radio did not provide other site users with the requisite 30 days' notice of Sureline's equipment and use of a frequency. See *id.* Thus, I find that the Forest Service is likely to succeed on its claim that Western Radio has no authority to

remain at Gray Butte; or, at minimum, that Western Radio had no authority to enter into a lease agreement with Sureline. The Forest Service also argues that it suffers irreparable harm because Western Radio continues to take unauthorized actions at Gray Butte, leaving the Forest Service with little recourse or control over Western Radio's activities. I agree that the Forest Service suffers intangible and irreparable harm from Western Radio's continued defiance of agency decisions and its disregard of the relevant lease and notice requirements. Similarly, the balance of harms tips in favor of the Forest Service. Because Western Radio lacks authorization to remain at Gray Butte or enter into the Sureline lease in the first place, it cannot rely on any hardship it may suffer to refute the propriety of a preliminary injunction. See *Swaggerty v. Petersen*, 280 Or. 739, 747-48, 572 P.2d 1309 (1977). Any hardship suffered by Western Radio or Sureline arises from their own actions; both parties had notice that Western Radio's authorization to remain at Gray Butte had expired. Finally, the public interest would be served by a preliminary injunction enjoining unauthorized action within public forest lands. Therefore, I find that the Forest Service has met its burden to support the injunctive relief requested. However, rather than order Western Radio to remove its facilities or Sureline's equipment at this time, I instead order Western Radio to comply with the interim injunctive relief requested by the Forest Service; Western Radio's disclosure of information about Sureline could potentially resolve the alleged interference issues and avoid the necessity of further preliminary relief. If Western Radio fails to comply with interim injunctive relief or takes further

unauthorized action at any of its facilities, the court will order Western Radio to show cause why its facilities on Gray Butte should not be removed immediately.

D. Motion to Compel

The Forest Service also moves for an order compelling the production of certain documents. As the Forest Service indicated in its reply brief, [4] the parties have reached agreement regarding certain documents. Pursuant to this agreement, Western Radio shall produce documents responsive to amended Requests 1, 3, 5, 7 and 8.

However, the parties disagree with respect to amended Requests 2, 4 and 6. I find the requested documents to be relevant and subject to production. Therefore, Western Radio shall produce unredacted emails in response to Request 2; monthly bank or financial statements from 2013-14 in response to Request 4; and 2013 tax returns for Western Radio and/or Richard Oberdorfer in response to Request 6, subject to a stipulated protective order.

CONCLUSION AND ORDER

For the reasons above, the individual defendants' Motion to dismiss (doc. 69) is GRANTED, and Western Radio's Bivens claims are dismissed with prejudice. Defendants' Motion for Imposition of Sanctions (doc. 70) is DENIED.

The Forest Service's Motion for Preliminary

Injunction (doc. 83) is GRANTED in part and DENIED in part. Within seven (7) days from the date of this order, Western Radio shall provide defendants' counsel with a detailed inventory of the equipment located at Western Radio's Gray Butte facility. This information shall include a detailed inventory of all Sureline equipment at the site, the date each piece of equipment was installed at the site, and a detailed list of all frequencies currently in use. Failure to comply with this order will result in an order to show cause why Western Radio's equipment at Gray Butte should not be removed.

The Forest Service's Motion to Compel (doc. 81) is GRANTED as set forth above. Western Radio shall provide the documents described above within fourteen (14) days from the date of this order unless otherwise agreed to by the parties.

IT IS SO ORDERED.

Dated this 17 day of April, 2015.
Ann Aiken
United States District Judge

[1] To the contrary, the Forest Service's counterclaims seek to remove Western Radio's property, and Western Radio will receive the process it is due before such action is ordered.

[2] The Forest Service explained that it would not renew the lease due to: 1) Western Radio's failure to demonstrate the technical and financial capability to operate and maintain the equipment in compliance

with applicable terms and conditions; 2) Western Radio's lack of compliance in the Ochoco National Forest; 3) a district court decision finding that Western Radio trespassed and breached its lease at the Walker Mountain Communication site; 4) Oberdorfer's conviction under 36 C.F.R. § 261.10(a) for constructing and maintaining a structure without authorization; and 5) the revocation of Western Radio's lease at the 1il7alker Mountain site. Scott Decl. Ex. A.

[3] Interestingly, on August 20, 2014, Sureline told Oberdorfer that the Forest Service had informed it that Western Radio's "land rights [were] expired up on Gray Butte" and that Sureline was "not allowed to put anything on [Western Radio's] tower." Forest Service Status Rep. & Response (doc. 114), Ex. A at 2. Oberdorfer responded that he "ha[d] not heard this before." Id. Ex. A at 1. Given the Forest Service's letter of December 31, 2013, Oberdorfer's response is disingenuous, at best.

[4] Generally, the Local Rules do not permit replies in support of discovery motions without leave of the court. See L.R. 26-3(c). However, the Forest Service's reply served as a status report after attempted mediation and explained the parties' agreement regarding discovery. Therefore, it is allowed.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. 6:14-00747-AA

[Filed November 24, 2015]

WESTERN RADIO SERVICES COMPANY,)
INC.,)
Plaintiff,)
v.)
JOHN ALLEN, Deschutes National Forest)
Supervisor; KATE KLEIN, Ochoco National)
Forest Supervisor; KEVIN LARKIN, Bend/)
Fort Rock District Ranger; SLATER R.)
TURNER, Lookout Mountain/Crooked River)
National Grassland District Ranger; RICK)
WESSLER, Special Use Permits (Bend/Fort)
Rock Ranger District); LISA DILLEY,)
Special Use Permits (Bend/Fort Rock)
Ranger District); HEIDI SCOTT, Special)
Use Permits, Ochoco National Forest;)
KAREN BRAND, Special Use Permits,)
Ochoco National Forest; KENT)
CONNAUGHTON, Regional Forester;)

MAUREEN HYZER, Acting Regional)
Forester; and UNITED STATES FOREST)
SERVICE,)
Defendants.)

)

AIKEN, Chief Judge:

Plaintiff Western Radio Services Company, Inc., (Western Radio) filed suit under the Administrative Procedures Act (APA), 5 U.S.C. § 706, alleging that the United States Forest Service (Forest Service) took arbitrary and capricious action and unlawfully withheld action in violation of 16 U.S. C. § 4 97. Western Radio's claims arise from ongoing disputes between it and the Forest Service regarding Western Radio's telecommunications facilities on National Forest lands. [1] The Forest Service denies Western Radio's claims and asserts counterclaims for trespass and unjust enrichment.

The Forest Service now moves for summary judgment on Western Radio's APA claims and its counterclaims; plaintiff likewise moves for summary judgment on the Forest Service's counterclaims. Further, the Forest Service again moves for a preliminary injunction requiring Western Radio to remove equipment and facilities from the Gray Butte telecommunications site. The Forest Service's motions for summary judgment and preliminary injunctive are granted, and plaintiff's motion is denied.

BACKGROUND

Western Radio operates telecommunication facilities within National Forest lands pursuant to permits and leases authorized by the Forest Service. At three telecommunications sites - Gray Butte, Sugar Pine Butte, and Round Mountain - Western Radio has made improvements to the land and/or built structures such as telecommunications towers. Western Radio also has sought to establish a facility at a fourth site, South Paulina Peak. As explained in further detail below, the Forest Service either has revoked or declined to renew Western Radio's leases to maintain facilities at Gray Butte, Sugar Pine Butte and Round Mountain. The Forest Service also has denied permission for Western Radio to install communications facilities at South Paulina Peak. On May 5, 2014, Western Radio filed this action. Western Radio alleges that the Forest Service's actions are arbitrary and capricious and constitute unreasonable interpretations of its own regulations under the APA. Western Radio also alleges that the Forest Service unlawfully withheld and unreasonably delayed action on Western Radio's various applications.

Despite the legal dispute over Western Radio's authorization to remain at Gray Butte, on July 31, 2014, Western Radio entered into a five-year lease agreement with a third-party tenant, Sureline, Inc. (Sureline) and allowed Sureline to install telecommunications equipment at its Gray Butte facility. Shortly afterward, other site users notified the Forest Service that Western Radio had not provided the required 30-day notice of new frequencies or tenants at the site, and that Sureline's operations

caused interference with authorized tenants. On November 13, 2014, the Forest Service was granted leave to amend its answer and allege counterclaims of trespass and unjust enrichment against Western Radio. The Forest Service contends that Western Radio is in trespass at Sugar Pine Butte, Gray Butte and Round Mountain, that its structures and improvements are now property of the Forest Service, and that Western Radio has unjustly benefited by remaining on Forest Service lands and operating its facilities without authorization or payment of fees.

DISCUSSION

A. Plaintiff's APA Claims

Western Radio alleges violations of 16 U.S.C. § 497(c), which authorizes the Forest Service to permit the use and occupancy of public lands for industrial or commercial purposes. Compl. at 2. [2] However, 16 U.S. C. § 497 does not contain a provision for judicial review; therefore, a plaintiff alleging that an agency failed to comply with a statute must bring its claims under the APA. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205 (9th Cir. 2004). Here, Western Radio alleges that the Forest Service unlawfully withheld action on a development proposal and unlawfully revoked or declined to renew its telecommunication leases. Under § 706 (1) of the APA, a court can compel an agency to act only if the action is discrete and required by law. 5 U.S.C. § 706 (1); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Consequently, unless a plaintiff identifies a "clear statutory duty" with which the agency must comply, an

agency's "failure to act ... is not challengeable under the APA." ONRC Action v. Bureau Land Mgmt., 150 F.3d 1132, 1140 (9th Cir. 1998); Hells Canyon Preservation Council v. U.S. Forest Serv., 593 F. 3d 923, 932 (9th Cir. 2010) (the "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command").

Under § 706(2) (A) of the APA, a reviewing court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1005 (9th Cir. 2011) (quoting 5 U.S.C. § 706(2) (A)). An agency decision is considered arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Review under the arbitrary and capricious standard is narrow, and courts give deference to an agency's construction of a statutory provision it is charged with administering. American Fed'n of Gov't Employees v. Fed. Labor Relations Auth., 204 F.3d 1272, 1274-75 (9th Cir. 2000).

Notably, a plaintiff must challenge a "final" agency action under § 706(2). Oregon Natural Desert Ass'n (ONDA) v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006). "For an agency action to be final, the action

must (1) mark the consummation of the agency's decision-making process and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow." Id. (internal quotation marks and citation omitted) .

The Forest Service correctly notes that Western Radio fails to submit evidence that the Forest Service's actions violated§ 497 in any way, and therefore, Western Radio cannot prevail on its APA claims. See Or. Nat. Res. Council v. Thomas, 92 F.3d 792, 797, nn.10 & 11 (9th Cir. 1996) ("[T]here can be no 'arbitrary and capricious' review under APA § 706 (2) (A) independent of another statute.") . While I find the Forest Service's argument compelling, I nonetheless review the substance of Western Radio's claims in the event they suffice to allow for APA review.

1. Gray Butte

a. Rejection of New Lease

In 1999, the Forest Service granted Western Radio a multi-year communications use lease for the Gray Butte site. GB 347-53. The lease terminated on December 31, 2006. GB 348. Afterward, the parties operated on a yearly basis under the terms of the lease.

In December 2012, the Forest Service formally notified Western Radio of numerous compliance problems with its lease. GB 1268-71. The Forest Service also described specific actions Western Radio must take to "avoid further action." GB 1269-70. On December 28, 2012, the Forest Service notified

Western Radio that its tenancy at Gray Butte would not be authorized beyond December 2013. GB 1280-81. In February 2013,

Western Radio submitted a renewal application for Gray Butte. GB 1285-1316, 1486-1520.

On December 31, 2013, the Forest Service rejected Western Radio's request for a new lease and stated that it would no longer tolerate Western Radio's "hold-over" status. GB 1655-56. On January 30, 2014, the Forest Service notified Western Radio that its Gray Butte facilities must be removed by July 2014. GB 1692-95; see also 36 C.F.R. § 251.60(I). To date, Western Radio has not removed its facilities from Gray Butte. Rather, after the Forest Service made clear that Western Radio's authorization to maintain facilities at the site was terminated, Western Radio entered into a tenancy agreement with Sureline.

Western Radio argues that the Forest Service acted arbitrarily and capriciously when it rejected Western Radio's request for a new lease, and that it received no administrative process or opportunity to appeal. I disagree. "Under the APA, an agency cannot lawfully suspend or revoke a license unless the licensee has been given written notice of the facts warranting the action and an opportunity to demonstrate compliance with the requirements 'before the institution of agency proceedings.'" *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1134 (9th Cir. 2010) (quoting 5 U.S.C. § 558 (c)).

Here, the Forest Service did not suspend or revoke

Western Radio's Gray Butte lease; rather, the Forest Service denied the request for a new lease. Regardless, the Forest Service provided Western Radio with notice of non-compliance issues and an opportunity for compliance; it subsequently found that Western Radio remained out of compliance with several terms and conditions. See, e.g., GB 1524-26, 1592-95. Western Radio contested the non-compliance issues in August 2013, and the Forest Service responded to each issue. GB 1476-77, 1592-95. The record reflects that Western Radio cured several items of non-compliance but failed to correct the remaining items despite notice and warnings to do so. GB 1525-26, 1592-95, 1647-54.

Further, the Forest Service explained its decision. GB 1655-56. The Forest Service explained that it would not renew the lease due to: 1) Western Radio's failure to demonstrate the technical and financial capability to operate and maintain the equipment in compliance with applicable terms and conditions; 2) Western Radio's lack of compliance in the Ochoco National Forest; 3) a district court decision finding that Western Radio trespassed and breached its lease at the Walker Mountain Communication site; 4) Richard Oberdorfer's conviction under 36 C. F. R. § 2 61. 10 (a) for constructing and maintaining a structure without authorization; [3] and 5) the revocation of Western Radio's lease at the Walker Mountain site. Id.

Finally, Forest Service regulations do not allow for an appeal when the agency declines to renew a lease, unless the lease "specifically provides for renewal." 36 C.F.R. § 214.4(c) (5); see also *id.* § 214.5 (lease holders "may not appeal" decisions that are "not expressly set

forth in § 214.4"). Here, Western Radio's lease stated it was "not renewable." GB 348. Therefore, Western Radio had no appeal right.

Given the record before the court, I cannot find that the Forest Service acted arbitrarily or capriciously in rejecting Western Radio's request for a new lease at Gray Butte.

b. Yellow Knife Billing

Yellow Knife Wireless is a tenant of Western Radio at the Gray Butte site. Yellow Knife equipment was added to Western Radio's Gray Butte structures in the summer of 2011, GB 1700, but Western Radio did not disclose Yellow Knife on its October 1, 2011 inventory listing. GB 1228-29. The inventory listing required the disclosure of "all occupants" who had "a formal or informal agreement to lease space" at Western Radio's facilities as of September 30, 2011. GB 1228. In September 2013, the Forest Service back-billed Western Radio about \$552 in rent for the Yellow Knife's occupancy. GB 1556-59. On appeal, the Forest Supervisor and the Regional Forester affirmed the decision. GB 1696-1701, 1705.

Western Radio argues that the back-billing was arbitrary and capricious, because Yellow Knife had installed equipment prior to September 30, 2011 but had not completed installation of all facilities as of that date. Regardless, Western Radio did not include Yellow Knife in its inventory listing, and it failed to respond to the Forest Service's requests to update the inventory listing. See GB 1701. Thus, it was well within the

Forest Service's discretion to bill Western Radio for such occupancy.

c. Trespass Notice

On January 30, 2014, the Forest Service notified Western Radio that it was in trespass at Gray Butte and that its facilities must be removed by July 31, 2014. GB 1692-95; 36 C.F.R. § 251.60(I).

Western Radio complains that it had no administrative appeal regarding this notice. However, no regulation allows an administrative appeal of a trespass notice. 36 C.F.R. § 214.4. Regardless, Western Radio filed this suit to challenge the Forest Service's decision before the deadline to remove its facilities, and the Forest Service filed suit under trespass. Thus, Western Radio has been provided with the process it is due through this court action.

2. Sugar Pine Butte

a. Lease Revocation

In 2004, Western Radio obtained a twenty-year lease authorizing it to operate facilities at Sugar Pine Butte, including a tower and buildings. SuP 52-82, 597.

In early 2013, the Forest Service issued Western Radio two notices identifying compliance problems with the terms of its lease. SuP 535, 627. On October 28, 2013, the Forest Service notified Western Radio of continued compliance problems. SuP 771-79.

On January 9, 2014, the Forest Service again notified Western Radio of continued non-compliance issues with its lease, explained the grounds for lease revocation, and provided Western Radio another opportunity to correct the noted problems. SuP 854-57.

On February 5, 2014, the agency issued a final warning. SuP 824. According to the Forest Service, Western Radio did not correct the compliance problems. Consequently, on February 14, 2014, the Forest Service notified Western Radio that it was revoking its communication use lease, effective immediately. SuP 852-53.

On March 28, 2014, Western Radio filed an administrative appeal of the decision to revoke its lease. SuP 899. On June 26, 2014, the Forest Service affirmed the decision with a seven-page explanation. SuP 1183, 1185-91. On July 23, 2014, the Regional Forester affirmed the decision after an additional "discretionary" review. SuP 1194. Western Radio contends that the Forest Service acted arbitrarily and capriciously in revoking its lease. I disagree.

As described above, the Forest Service provided Western Radio with several notices of noncompliance with lease terms and afforded Western Radio an opportunity to cure its compliance issues. Specifically, the Forest Service notified Western Radio of its failure to supply an inventory of site users along with their categories of use. SuP 771-78, 854. Western Radio refused to correct its inventory, and in January 2014 the Forest Service provided another non-compliance notice. SuP 854-57. This notice explained the grounds

for lease revocation and allowed Western Radio thirty days in which to cure the problem. SuP 854-57. On February 5, 2014, the agency issued a final warning. SuP 824. Western Radio failed to cure the problem, instead arguing about the requirement, and the Forest Service revoked the lease. SuP 825, 852-53. On administrative appeal, the agency provided a detailed, seven-page explanation for revoking the lease. SuP 1185-91. Given Western Radio's repeated failures to cure the deficiency identified by the Forest Service, its decision was not arbitrary or capricious.

Western Radio also argues that revocation of its lease was arbitrary, because Western Radio previously had settled a 2011 dispute with the Forest Service. SuP 167-68. I fail to discern how an earlier resolution between the parties somehow prevents the Forest Service from enforcing Western Radio's compliance with lease provisions. Regardless, the Forest Service explained why the prior agreement was inapplicable to Western Radio's present lack of compliance. SuP 824. Finally, Western Radio argues that the District Ranger lacked authority to revoke the lease. Under the terms of the lease, revocation must be instituted by an "Authorized Officer," and the District Ranger is an "Authorized Officer." SuP 52, 55 ("unless otherwise indicated such authority may be exercised by the Forest Supervisor or District Ranger"). Therefore, the revocation by the District Ranger complied with the terms of the lease. See *United States v. Western Radio Services Co., Inc.*, 2014 WL 1679821, at* 8-9 (D. Or. April 28, 2014). Moreover, the Forest Supervisor affirmed the District Ranger's decision to revoke the lease. *Id.* at *9; SuP 1183-84.

b. Permit for Agency-Owned Tower

In 2004, Western Radio obtained a special use permit that allowed Western Radio to use a tower owned by the Forest Service on Sugar Pine Butte. SuP 84-93. The permit expired by its terms on December 31, 2013. SuP 85.

On November 20, 2013, the Forest Service informed Western Radio that it would not renew Western Radio's permit after its expiration on December 31, 2013. SuP 798. The Forest Service noted that Western Radio did not have any antennas on the agency-owned tower and had not requested a new permit. *Id.* Western Radio argues that the failure to renew the permit was arbitrary and capricious. I disagree.

As noted, Western Radio had no antennas on the tower covered by the permit and had not requested a new permit prior to July 2013, which barred the renewal of the permit. SuP 85 ("If the holder desires issuance of a new permit after expiration the holder shall notify the authorized officer in writing not less than six (6) months prior to the expiration date of this permit."); SuP 798. Moreover, the terms of the permit state that its renewal "is at the absolute discretion of the Forest Service." SuP 85.

Finally, Western Radio argues that it received no process because its administrative appeal was dismissed. However, Western Radio was not entitled to an appeal under 36 C.F.R. § 214.4; SuP 821.

c. Development Proposal

In July 2011, Western Radio submitted a proposal to develop its operations at Sugar Pine Butte and replace the Forest Service-owned tower with a new Western Radio tower. SuP 171-79. In April 2012, Western Radio submitted revisions to its proposal. SuP 332-33. The Forest Service delayed ruling on Western Radio's proposal because of Western's Radio's non-compliance with its lease and agency review of its proposal required amendment of the Sugar Pine Butte site management plan regarding power limits. SuP 779, 789.

By April 2013, the Sugar Pine Butte management plan was amended to exempt cellular service from the site power limit. SuP 570-601, 689-93. However, Western Radio's proposal remained on hold. SuP. 708.

In September 2013, the Forest Service told Western Radio that it intended to make a "competitive interest" determination for Sugar Pine Butte before further reviewing Western Radio's proposal. SuP 753. On February 21, 2014, the Forest Service notified Western Radio that there was a competitive interest in constructing and/or managing a communications facility at Sugar Pine Butte, and that the Forest Service could not accept Western Radio's site development proposal. SuP 858. Western Radio was also instructed to inform the Forest Service if it wanted the agency to consider the 2011 proposal as an indication of Western Radio's interest. Id.

Western Radio first contends that the Forest Service unlawfully failed to review its development proposal, and that it should be compelled to do so.

However, plaintiff fails to identify a clear statutory duty requiring the Forest Service to review the proposal, and I decline to compel such a review under§ 706(1).

Plaintiff also suggests that the Forest Service acted arbitrarily and capriciously when it rejected Western Radio's proposal for expansion and development of its facilities. However, plaintiff concedes that the Forest Service made no "final decision" regarding its proposal, a requirement for review under§ 706(2). Regardless, the Forest Service ultimately declined to accept Western Radio's development proposal; to the extent this constitutes a "final decision" for purposes of the APA, it was neither arbitrary nor capricious.

When a party submits an unsolicited proposal, the Forest Service may determine whether there is "competitive interest" in such development. 36 C.F.R. § 251.58 (c) (3) (ii) If the Forest Service determines such a competitive interest exists, the agency issues a public prospectus. Id. ; P 4 98 0. Here, the Forest Service determined that there was competitive interest in development at Sugar Pine Butte. SuP 858. Therefore, the Forest Service was authorized to issue a development prospectus before considering Western Radio's proposal. Notably, Western Radio did not respond to the prospectus issued by the Forest Service. Regardless, the Forest Service's decision is supported by the record.

3. Round Mountain

In 1996, the Forest Service granted Western Radio

a communications use lease for the Round Mountain site. RM 2384-90. The lease terminated in 2001, RM 2385, and the parties continued on a yearly basis under the terms of the lease.

In December 2012, the Forest Service formally notified Western Radio of compliance problems. RM 3501-03. On December 28, 2012, the Forest Service notified Western Radio that its tenancy at Round Mountain would not be authorized beyond December 31, 2013. RM 3507-08. In January 2013, Western Radio requested a new lease, and in April 2013, the Forest Service rejected its request. RM 3511-12, 3547. In August 2013, Western submitted a second request. RM 3566-88. However, the Forest Service found that Western Radio remained out of compliance with several terms and conditions of its lease. See, e.g., RM 3592-3604, 3653-59, 3672-75.

On December 31, 2013, the Forest Service rejected Western Radio's proposal for a new lease and stated that it was no longer tolerating Western Radio's "hold-over" status. RM 3683-84. On January 30, 2014, the Forest Service informed Western Radio that its Round Mountain facilities must be removed by July 2014. RM 3708-11. As with the facilities at Gray Butte, Western Radio has not removed its facilities at Round Mountain. Plaintiff again argues that the Forest Service's decision to rejects its lease request was arbitrary and capricious. However, the Forest Service provided a detailed rationale for its decision not to continue doing business with Western Radio, including its lease non-compliance at Round Mountain and illegal conduct by Western Radio and Mr. Oberdorfer

at Walker Mountain. RM 3501-03, 3507-08, 3592-604, 3653-59, 3672-82, 3683-84. Western Radio also complains that the Forest Service did not provide an administrative appeal. As the Forest Service informed Western Radio in December 2013, administrative appeal is available only if a lease "specifically provides for renewal." 36 C. F. R. § 214.4 (c) (5); RM 3684. Here, Western Radio's lease stated it was "not renewable." RM 2385. Therefore, Western Radio was not entitled to an administrative appeal.

4. South Paulina Peak

South Paulina Peak is within the Newberry National Volcanic Monument in the Deschutes National Forest. See SoPP 1213, SoPP 1237. Pursuant to the Deschutes Forest Plan, neither South Paulina Peak nor North Paulina Peak is available for telecommunications site development. P 3550, 3557 (South Paulina Peak sites are "not available for development") . Nevertheless, Western Radio repeatedly has requested authorization to construct communications facilities at South Paulina Peak. See, e.g., SoPP 1213-14 (1998 denial); SoPP 1237-38 (2007 denial); SoPP 1242-45 (2009 denial).

Relevant to this lawsuit, in January 2013, Western Radio again sought authorization to build a relay station facility at South Paulina Peak to augment coverage from Sugar Pine Butte and restore a service area. SoPP 1341-49. On March 8, 2013, the Forest Service denied Western Radio's proposal as inconsistent with the provisions of the Deschutes Forest Plan and the Newberry National Volcanic

Monument management plan. SoPP 1350-51; see also SoPP 1338-40 (Oct. 2012 letter to Western Radio denying a request for a pre-proposal meeting) . Western Radio alleges that the Forest Service arbitrarily and capriciously rejected its application. I disagree. Given that the Deschutes Forest Plan precludes development, and, presumably, the construction of communications facilities on South Paulina Peak, the Forest Service's denial of Western Radio's proposal was neither arbitrary nor capricious. Plaintiff nonetheless argues that the Forest Plan's provisions were replaced by the Newberry Monument Plan. Pl.'s Response at 19. However, in designating the Monument, Congress indicated that it was not reconsidering, amending, or revising the Forest Plan. SoPP 1157. Western Radio also contends that the plan governing South Paulina Peak development provides for review of "new applications" on a "case-by-case basis." However, I find no inconsistency between this provision and the Forest Service's denial of Western Radio's application; the Forest Service reviewed Western Radio's application and denied it as inconsistent with the lack of development at South Paulina Peak.

Western Radio also argues that the facility it proposed is similar to those already approved or in use within the Newberry National Monument area. Specifically, Western Radio asserts that the United States Geological Service (USGS), the United States Air Force, and the Soil Conservation Service (SCS) either had or have operations in the Monument area. However, as the Forest Service points out, the USGS does not operate facilities on South Paulina Peak, and

the USGS facility is intended to provide timely public warnings of volcanic activity within the Monument. P 5144. Further, as Western Radio itself indicated in 1985, the Air Force and SCS ceased any operations at Paulina Peak by the early 1980s. SoPP 252.

Finally, plaintiff asserts that CenturyLink operates telecommunication facilities in the Monument area. However, the only evidence plaintiff cites for this assertion is the extra-record declaration of Richard Oberdorfer, a declaration the court declines to consider in the context of plaintiff's APA claims. See *Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2004). Regardless, the Forest Service denies that CenturyLink has a lease or permit to operate on South Paulina Peak, and no evidence in the record suggests otherwise. Accordingly, plaintiff's claim fails.

B. The Forest Service's Counterclaims

In its counterclaims, the Forest Service alleges that Western Radio is trespassing at the Gray Butte, Sugar Pine Butte and Round Mountain sites and has been unjustly enriched by continuing its operations without authorization. The Forest Service also alleges that Western Radio has not paid fees for 2014 and 2015 while receiving monthly payments from tenants and customers. Thus, the Forest Service maintains Western Radio has benefited financially by impermissibly continuing its business operations on Forest Service land. The parties move for summary judgment on the Forest Service's counterclaims.

1. Trespass Counterclaim

The Forest Service contends that if Western Radio does not prevail on its APA claims, it is in trespass at the Gray Butte, Sugar Pine Butte and Round Mountain sites. I agree. [4]

Federal and Oregon courts refer to the Restatement of Torts when considering a trespass claim. See *United States v. Milner*, 583 F. 3d 1174, 1182 (9th Cir. 2009); *Martin v. Reynolds Metals Co.*, 221 Or. 86, 101, 342 P.2d 790 (1959). A person is liable for trespass "if he intentionally: (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." Restatement (Second) of Torts § 158.

Here, the Forest Service informed Western Radio that its authority to operate at Gray Butte and Round Mountain expired on December 31, 2013 and that its facilities must be removed by July 2014. The Forest Service also revoked Western Radio's lease to operate at Sugar Pine Butte as of February 14, 2014, and that decision was affirmed on July 23, 2014. Nonetheless, Western Radio remains at these sites without authorization, has not removed its facilities, and has allowed a third party to install additional equipment at Gray Butte.

As discussed above, the Forest Service's reasons for declining to renew and for revoking Western Radio's leases were neither arbitrary nor capricious. Therefore, Western Radio has no authorization to remain at those sites, and the Forest Service has established that Western Radio is in trespass at the Gray Butte, Sugar

Pine Butte, and Round Mountain telecommunications sites. See Oberdorfer, 583 Fed. Appx. at 774 (affirming summary judgment on trespass claim).

The Forest Service also seeks a declaration that Western Radio's facilities have become property of the United States, because Western Radio did not remove such facilities in the time allowed by the Forest Service. The Forest Service relies on 36 C.F.R. § 251.60. This regulation provides:

Upon revocation or termination of a special use authorization, the holder must remove within a reasonable time the structures and improvements and shall restore the site to a condition satisfactory to the authorized officer, unless the requirement to remove structures or improvements is otherwise waived in writing or in the authorization. If the holder fails to remove the structures or improvements within a reasonable period, as determined by the authorized officer, they shall become the property of the United States, but holder shall remain liable for the costs of removal and site restoration.

36 C.F.R. § 251.60(I). The Forest Service argues that Western Radio failed to remove its facilities within the reasonable time allowed by the agency, and that such facilities now belong to the United States. However, Western Radio filed suit to challenge the Forest Service's decisions in May 2014, before the Forest Service's deadline for removal of Western Radio facilities at the Gray Butte and Round Mountain sites and before the Forest Service affirmed the revocation

of Western Radio's lease at Sugar Pine Butte. Aside from the facilities as Gray Butte, the Forest Service has not sought the removal of Western Radio's facilities. Further, even though the Forest Service sought preliminary injunctive relief to require the removal of Western Radio's facilities at Gray Butte, the court declined to order such relief.

Therefore, even though Western Radio is in trespass, I do not find that its facilities have become property of the United States in these specific circumstances. Rather, the court is inclined to enter injunctive relief, affording Western Radio the opportunity to remove its facilities within a reasonable time frame as set forth by the Forest Service.

2. Unjust Enrichment Counterclaim

The Forest Service also seeks summary judgment on its counterclaim for unjust enrichment. The Forest Service alleges that by maintaining facilities at the telecommunications site without authorization, Western Radio has unjustly profited at the expense of the federal government. The Forest Service seeks \$29, 279. 58 in fees that Western Radio would have been charged if it had obtained authorization to remain at the sites, as well as the disgorgement of profits it attained during that time.

Unjust enrichment is a theory of "quasi-contract" based on an implied contract. See *Summer Oaks Ltd. P'ship v. McGinley*, 183 Or. App. 645, 654, 55 P.3d 1100 (2002). The theory of unjust enrichment provides a remedy where no enforceable contract exists, and 1)

one party has conferred a benefit on another, 2) the recipient is aware that a benefit has been received, and 3) "under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it." *Id.* at 654.

I find that the Forest Service has established the elements of unjust enrichment against Western Radio. The permits and leases between the parties have expired or otherwise have terminated and no enforceable contracts exist. Nonetheless, Western Radio has remained at the sites without paying fees and continues to operate its facilities and receive revenue. Thus, Western Radio has received the benefit of remaining on the sites, despite the lack of authorization, and it is aware of such benefit. Under the circumstances, it would be unjust for Western Radio to retain this benefit.

According to the Forest Service, Western Radio owes the Forest Service \$29,279.58 for the three sites in question, including fees for tenants who are Internet Service Providers (ISP). *Perry Decl. Ex. D.* The Forest Service provided evidence detailing the fees owed at each site, including "rental sheets" to calculate fees per tenant and customer of Western Radio. *Id. Exs. A-C.* Western Radio does not contest the Forest Service's calculations, and I find the amount to be supported with sufficient evidence. Therefore, Western Radio is ordered to pay \$29,279.58 in fees it would have owed had it retained authorization to remain at the three sites. Further, I note that the fee calculations were submitted in July 2015, and that additional fees may be owed. The Forest Service also seeks the

disgorgement of monies paid to Western Radio by its customers and tenants during the time it operated without authorization, approximated to be \$149, 950. 76. Burke Decl. Ex. A. The Forest Service contends that it is entitled to recover this income, because the structures and improvements at the communications sites became property of the United States after Western Radio failed to remove them. The Forest Service emphasizes that Western Radio should not be allowed to retain the benefit of income obtained from its trespass and disregard of federal law and regulations. However, as explained above, I do not find that Western Radio's facilities became property of the United States, as it challenged the Forest Service's decisions before expiration of the removal deadlines at Gray Butte and Round Mountain and before affirmance of the Sugar Pine Butte lease revocation. Though I recognize the Forest Service's frustration with Western Radio's unauthorized conduct, the revenue received by Western Radio would not have gone to the Forest Service in any event. I thus find no basis to disgorge the monies paid by tenants with existing agreements as of the date Western Radio filed suit. I find it a closer call with respect to any profit Western Radio gained through its agreement with Sureline, given that Western Radio entered into that agreement after receiving notice that it no longer had authorization to operate at Gray Butte. At the same time, I declined to grant the Forest Service's previous motion for injunctive relief to cease Western Radio's operations as Gray Butte. As a result, it is not appropriate to order Western Radio to disgorge those profits.

C. The Forest Service's Motion for Preliminary Injunction

Finally, the Forest Service renews its motion for a preliminary injunction requiring Western Radio to either shut down its facilities at Gray Butte or to remove Sureline's equipment. The Forest Service argues that Western Radio not only lacks authority to remain at Gray Butte, but it has completely disregarded Forest Service regulations by allowing Sureline to install equipment and use frequencies that cause interference with other authorized site users.

In light of the court's finding that Western Radio has no authorization to maintain its facilities at Gray Butte, injunctive relief is appropriate. Not only has the Forest Service established success on the merits, its motion establishes Western Radio's continued disregard of the Forest Service's authority and irreparable harm to other users. Accordingly, Western Radio is ordered to remove Sureline's equipment from the Gray Butte site and cease its operations at Gray Butte immediately.

CONCLUSION AND ORDER

The Forest Service's Motions for Summary Judgment and Preliminary Injunction (doc. 116, 119, 141) are GRANTED and plaintiff's Motion for Partial Summary Judgment (doc. 120) is DENIED. Pending final judgment in this case, Western Radio shall cease its operations at Gray Butte and remove Sureline's equipment from that site immediately. The Forest Service shall submit a proposed form of judgment and

a supporting memorandum within 21 days from the date of this Order.

IT IS SO ORDERED.

Dated this 24th day of November, 2015.

/s/ Ann Aiken

Ann Aiken
United States District Judge

[1] Western Radio also alleged claims against several Forest Service employees for violations of its First Amendment and Equal Protection rights pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). However, the court dismissed these claims in a previous opinion. See doc. 115.

[2] In its Complaint, Western Radio mistakenly characterizes its claim as arising under the National Forest Management Act (NFMA); they do not, as plaintiff does not invoke provisions of NFMA or allege violations of a relevant forest land management plan. In response to the Forest Service's motion for summary judgment, plaintiff also attempts to invoke the Telecommunications Act of 1996 and the Federal Land Policy and Management Act. Plaintiff's Complaint does not allege violations of these statutes and the court will not consider them. Regardless, the statutory provisions cited by plaintiff do nothing more than grant federal agencies authority to grant or issue permits; they do not require specific action or impose applicable standards. 43 U.S.C. § 1761(a); 47 U.S.C. § 332.

[3] Richard Oberdorfer owns and operates Western Radio.

[4] In seeking summary judgment on the Forest Service's counterclaims, Western Radio argues that the agency's sole remedy lies under the APA. Western Radio misapprehends the nature of the Forest Service's claims as well as the APA's scope. The APA provides for judicial review of agency action; it is not a mechanism for review of agency claims against a lessee or permittee whose authorization to remain on federal lands has expired or otherwise terminated. In similar cases, the government generally brings claims for trespass; such actions are preferred as they provide the lessee or permittee with adequate due process before the removal of unauthorized property or operations from federal lands. See, e.g., *United States v. Brunskill*, 792 F.2d 938 (9th Cir. 1986) (government filed suit seeking injunctive relief to vacate mining site); *United States v. Moore*, 2010 WL 373863 (D. Or. Jan. 28, 2010) (government filed suit for trespass and sought ejectment of property from mining site); *United States v. Tracy*, 2009 WL 3780936 (D. Or. Nov. 10, 2009) (government filed claims for trespass and ejectment of property from mining site).

Indeed, the Forest Service previously has brought trespass claims against Western Radio; claims that were granted on summary judgment and upheld by the Ninth Circuit long before Western Radio filed its motion for partial summary judgment in this case. See *Oberdorfer v. Jewkes*, 583 Fed. Appx. 770, 774 (9th Cir. July 24, 2014) ("For similar reasons, no rational trier of fact could have found for Western Radio on the

Forest Service's trespass claim based on the record before the district court The absence of a special use authorization signed by both parties ... and the District Ranger's June 2010 letter outlining additional steps on which construction authorization was contingent, establish that Western Radio's construction exceeded the scope of any consent granted by the Forest Service.") , cert. denied sub nom. W. Radio Servs. Co. v. United States, 135 S. Ct. 1901 (2015).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. 6:14-00747-AA

[Filed December 18, 2015]

WESTERN RADIO SERVICES COMPANY,)
INC.,)
Plaintiff,)
)
v.)
JOHN ALLEN, Deschutes National Forest)
Supervisor; KATE KLEIN, Ochoco National)
Forest Supervisor; KEVIN LARKIN, Bend/)
Fort Rock District Ranger; SLATER R.)
TURNER, Lookout Mountain/Crooked River)
National Grassland District Ranger; RICK)
WESSLER, Special Use Permits (Bend/Fort)
Rock Ranger District); LISA DILLEY,)
Special Use Permits (Bend/Fort Rock)
Ranger District); HEIDI SCOTT, Special)
Use Permits, Ochoco National Forest;)
KAREN BRAND, Special Use Permits,)
Ochoco National Forest; KENT)
CONNAUGHTON, Regional Forester;)

MAUREEN HYZER, Acting Regional)
Forester; and UNITED STATES FOREST)
SERVICE,)
Defendants.)
_____)

JUDGMENT

The Court DECLARES as follows:

1. Based on the Opinion and Order entered on 4/17/2015 (Dkt. 115), Plaintiffs first and second claims against the Individual Defendants are dismissed with prejudice.
2. Based on the Opinion and Order entered on 11/24/15 (Dkt. 150), Plaintiffs third and fourth claims for relief are dismissed with prejudice;
3. Based on the Opinion and Order entered on 11/24/15 (Dkt. 150), Plaintiff has no valid leases or permits and no authorization to maintain any communication property pursuant to the agency actions and decisions challenged in Plaintiffs third and fourth claims.
4. Based on the Opinion and Order entered on 11/24/15 (Dkt. 150), as to Defendant United States' first, second and third counterclaims, Plaintiff Western Radio is liable for intentional trespass and shall remove all trespassing property (facilities) as required by the permanent injunction below.

5. Based on the Opinion and Order entered on 11/24/15 (Dkt. 150), as to Defendant United States' fourth counterclaim for unjust enrichment, Judgment is entered for the United States in the amount of \$29,279.58. Post judgment interest shall accrue at the legal rate pursuant to 28 U.S.C. § 1961 (a) and shall be computed daily and compounded annually until paid in full.

6. The United States is the owner of any facilities that are not removed by Western Radio, as required by the permanent injunction below.

7. The United States is awarded all reasonable costs of removal and site restoration that may be incurred to satisfy the terms of this Judgment.

The Court ENJOINS AND RESTRAINS Western Radio as follows:

1. Western Radio shall remove all facilities at Sugar Pine Butte, Round Mountain and Gray Butte. Western Radio shall remove all facilities at a site within 14 days of written notice from the Forest Service. May 15, 2016 is the earliest date that the Forest Service shall provide the written notice and Western Radio shall not remove any facilities without written notice. Any facility remaining at a site after a 14 day notice shall be the property of the United States. For all sites and facilities, Western Radio shall remove all facilities by August 1, 2016. Written notice is effective by e-mail when sent to Western Radio at Oberdorfer@earthlink.net.

2. Western Radio shall cease its operations at Gray Butte and remove Sureline's equipment from the site within four days of entry of this Judgment. If Western Radio does not cease operations or remove Sureline's equipment, the United States may take any action necessary to satisfy this permanent injunction.

This is the Court's Judgment in this matter. The Court retains jurisdiction as necessary to enforce or modify the terms of this Judgment.

DATED this December 18, 2015.

/s/ Ann Aiken
Honorable Ann Aiken
United States Chief District Judge

SUBMITTED BY:

BILLY J. WILLIAMS
United States Attorney

/s/ Neil J. Evans
NEIL J. EVANS, OSB #96551
Assistant United States Attorney
United States Attorney's Office
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

16-35105

D.C. No. 6:14-cv-00747-AA

[Filed May 21, 2018]

WESTERN RADIO SERVICES COMPANY,)
INC.,)
)
Plaintiff-Appellant,)
)
v.)
)
JOHN ALLEN, Deschutes National Forest)
Supervisor; KATE KLEIN, Ochoco National)
Forest Supervisor; KEVIN LARKIN, Bend-)
Fort Rock District Ranger; SLATER R.)
TURNER, Lookout Mountain/Crooked River)
National Grassland District Ranger; RICK)
KESSLER, Special Use Permits, Bend/Fort)
Rock Ranger District; LISA DILLEY, Special)
Use Permits, Bend/Fort Rock Ranger)
District; HEIDI SCOTT, Special Use)

Permits, Ochoco National Forest; KAREN)
BRAND, Special Use Permits, Ochoco)
National Forest; UNITED STATES)
FOREST SERVICE; KENT)
CONNAUGHTON, Regional Forester;)
MAUREEN HYZER, Acting Regional)
Forester,)
Defendants-Appellees.)
_____)

ORDER

Before: FISHER, N.R. SMITH and HURWITZ, Circuit Judges.

The panel judges voted to deny Appellant's petition for rehearing. Judges Smith and Hurwitz voted to deny the suggestion for rehearing en banc, and Judge Fisher recommended denial of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and suggestion for rehearing en banc, filed April 6, 2018, is denied.