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National Environmental Policy Act/Endangered Species Act: Federal Appellate Court Addresses Challenge to U.S. Forest Service Timber Harvest/Road Construction

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The United States Court of Appeals, Ninth Circuit (“Ninth Circuit”), in a February 22nd appeal from the United States District Court for the District of Idaho (“District Court”) addressed an issue arising out of United States Forest Service (“Forest Service”) timber harvest and road construction. See *Friends of Clearwater et al. v. Jeanne M. Higgins, et al.*, 2021 WL 672859.

Plaintiffs – Friends of the Clearwater and Alliance for the Wild Rockies (collectively “FOTC”) sought a preliminary injunction to prevent these activities from occurring in the Brebner Flat Project (“Project”) in Shoshone County, Idaho.

The Ninth Circuit first addressed FOTC’s argument that the District Court committed error by requiring a showing of likely harm to the species of grizzly bear. FOTC argued that harm was only required to be shown to the interests of its members.

The Ninth Circuit rejected this argument, stating that:

... Plaintiffs who seek to enjoin a violation of the ESA must show a “definitive threat of future harm to protected species.” ... Harm to FOTC’s members’ interests can suffice, but only if they “adequately show harm to themselves as a result of harm to listed [endangered species].”

FOTC also argued that the District Court committed error in failing to find that the organization presented sufficient evidence of irreparable harm to grizzly bears. The Ninth Circuit stated that it could not identify any record evidence that undermines the District Court’s determination that FOTC failed to show a definitive threat to grizzly bears, noting:

... no bears have ever been identified in the project area, there is no known bear population in the St. Joe Ranger District, and the Project area is not in critical bear habitat (citing from the record).

The National Environmental Policy Act (“NEPA”) arguments raised by FOTC related to the District Court’s alleged failure to analyze adequately:

- the cumulative effects of the Project on elk, and
- the efficacy of the chosen mitigation measures for elk.

FOTC argued that the Forest Service should have disclosed in the NEPA Environmental Assessment what are described as historical declines in the elk population of the Project area due to past logging and road building. The Ninth Circuit stated that the Forest Service was not required to:

. . . engage in such a fine-grained analysis of all historical details of past actions.

It cited in support of this decision NEPA regulations that it describes as allowing for analyzing cumulative impacts. 36 C.F.R. § 220.4(f) (Cumulative effects analyses need not catalogue or exhaustively list and analyze all individual past actions.)

Also cited was the Forest Service's proposal to increase the cumulative elk security beyond baseline levels.

The Ninth Circuit also agreed with the District Court's discounting FOTC's attack on implementation of seasonal closure of an ATV trail with signage, gates and gates monitoring to increase elk security. A spreadsheet that purported to show a Forest Service survey of gate closures indicating a high failure rate was not deemed pertinent since it was never presented to the District Court.

A misstatement in the NEPA Environmental Assessment that the Project area does not include the St. Joe Wild and Scenic River Corridor was held by the District Court not to have drastically undermined public participation (therefore rendering the Forest Service's action unlawful). The Ninth Circuit upheld the District Court's weighing the effect of the Forest Service misstatement on public participation and agreed that the single incorrect sentence did not drastically undermine public participation.

A copy of the Opinion can be downloaded [here](#).