

Friends of Clearwater v. Probert Analysis

KATHERINE COOK



WRITER'S COMMENT: Filed in 2021, Juliana v. United States piqued my interest in the use of civil suits to remedy environmental harms. I had the privilege of taking Professor Winsor's Environmental Law class not six months after this suit was filed and became resolute in the idea of becoming an environmental lawyer. In addition, I have always loved the incredible beauty contained in the State and National Parks in the United States and I look for opportunities to advocate on their behalf. This piece is not only an explanation and analysis of the case The Friends of Clearwater v. Probert, but also a fraction of my passion for the environment and environmental law. My hope for students who pursue an Environmental Science and Policy degree is that they take after the Lorax and speak for the trees.

EDITOR'S COMMENT: In ESP161: Environmental Law, students work on a research paper about a current environmental law controversy throughout the quarter. In the paper, we ask that they introduce and explain the importance of the controversy they have selected, describe the parties involved, identify relevant laws, and evaluate the likely outcome and implications of the controversy.

Katherine's paper on the Nez Perce-Clearwater National Forest litigation highlights her work ethic and commitment to conservation. From the drafting stages to the final paper, her analysis of the logging industry's impact on federal forest lands demonstrated excellent reasoning and organization. In the classroom, Katherine was a positive presence and an active participant, collaborating with other students and regularly volunteering to answer questions posed to the class. Her

instructor and TAs are proud to see her paper be published in Prized Writing.

—Juliet Vaughn and Tracy Winsor, Department of Environmental Science and Policy

Introduction

Earlier this year, the Friends of Clearwater, an environmental nonprofit based in Idaho, filed suit against Cheryl Probert, the supervisor of the Nez Perce-Clearwater National Forests and the United States Forest Service (USFS), alleging that they violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA) (*Friends of Clearwater v. Probert*, 1). The Plaintiff alleges that the USFS violated these policies in approving of two logging projects, the End of the World and the Hungry Ridge, in the Nez Perce-Clearwater National Forests without completing an environmental impact assessment, dismissing certain impacts of the plan, and refusing to acknowledge the impact on threatened and endangered species. The forests in the United States are an incredibly important and rapidly vanishing resource and with the USFS seemingly unrestrained approval of forestry projects, that trend will only continue. The two logging projects combined threaten more than 26,000 acres of land.

Parties

The Friends of Clearwater is an advocacy group for “public wildlands, wildlife, and waters in north-central Idaho” (Friends of Clearwater, 2018). This region of the country includes the Nez Perce-Clearwater National Forests. The Friends of Clearwater claim that their members regularly visit the Nez Perce-Clearwater and value the land for its aesthetic, recreational, and scientific contributions to the surrounding community. The Friends of

Clearwater claim to be injured by the USFS's decision to approve the logging projects because they were not allowed to participate in the public review process and because of the loss they will suffer in lost time, energy, and money devoted to protecting the Nez Perce-Clearwater National Forests in this legal battle (*Friends of Clearwater v. Probert*, 6). The Friends of Clearwater ask the court for a declaration that the environmental assessment put forth by the USFS was insufficient and that a full environmental impact statement is required. They ask that both logging sites be set aside as protected lands and an injunction to bar the continuance of the logging projects.

The defendants, the US Forest Service and Cheryl Probert, are an agency with the authority to manage public lands and the Forest Supervisor of the Nez Perce-Clearwater National Forests, respectively (*Friends of Clearwater v. Probert*, 7). Ms. Probert is being sued because she approved of the two logging projects in the forest. The USFS and Ms. Prober would like the logging project to continue, as it was originally proposed, and without doing the paperwork that the Friends of Clearwater are asking for.

Issue

The policies at issue, as mentioned above are National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA). The Friends of Clearwater claims that the USFS did not take the requisite "hard look" at the environmental impact of the logging projects as required by NEPA (*Friends of Clearwater v. Probert*, 7). The approval of the logging projects by a federal government agency triggers NEPA review which requires an environmental impact statement (EIS). The USFS only completed an environmental assessment (EA), which is only a sufficient replacement for an EIS if "no significant impact" on the environment is found in the EA (42 USC Sec. 4332). The Friends of Clearwater allege that the logging projects would obviously disrupt the surrounding environment and it is important for an EIS to be filled out.

In addition, the USFS continually refuses to acknowledge the projects' impact on the resident endangered and threatened species (*Friends of Clearwater v. Probert*, 4), also in direct violation of NEPA.

The second issue is the alleged violation of the National Forest Management Act (NFMA) in regard to USFS's violation of their forest plan. The NFMA requires the USFS to prepare a land and resource management plan for each "unit of the National Forest System" (i.e. each national forest) (16 USC Sec. 6). The USFS did create a forest plan for the Nez Perce National Forest detailing a management plan for logging, the protection of old growth forests, "water quality, fish, and wildlife" in the Nez Perce National Forest (*Friends of Clearwater v. Probert*, 9). The plaintiff alleges that the USFS violated its own forest plan in approving the logging projects because they would "increase water yields or sediment beyond acceptable limits" and they did not observe an "upward trend in carrying capacity" before any logging projects were allowed in the area (*Friends of Clearwater v. Probert*, 12). The USFS also failed to meet the forest plan's management plan for fish habitat objectives (*Friends of Clearwater v. Probert*, 4).

The Friends of Clearwater also contest the USFS violated the Endangered Species Act (ESA), the statute that prohibits the illegal take of endangered animals and plants (16 USC 1531-1544). The plaintiffs claim that the projects would threaten grizzly bears, Snake River steelhead, and other at-risk species of fish (*Friends of Clearwater v. Probert*, 4). The ESA prohibits the take of any endangered or threatened species within the US or in the proprietary seas of the US (16 USC Sec. 9). A "take" in regard to the statute includes any harm or harassment of an endangered or threatened species or any disruption of their habitat that would harm or harass them (16 USC 1531-1544 Sec. 3). The Friends of Clearwater claims that the USFS refuses to acknowledge that the logging projects pose a threat to grizzly bears in the area. The fish in the waters near the proposed projects, notably the listed Snake River steelhead, will also be affected by the logging. Once again, the USFS "improperly dismissed" the impacts of the logging on

the fish habitats (*Friends of Clearwater v. Probert*, 4). The plaintiff alleges that each of these actions constitutes a prohibited “take” under the ESA.

Finally, the plaintiffs cite the Administrative Procedure Act (APA) because it allows private entities to bring action against governmental agencies if they feel their decisions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” (5 USC Sec. 10). This document is the federal government consenting to be sued by a private entity, such as the Friends of Clearwater. The plaintiffs feel as though the approval of the two logging projects constitute an abuse of discretion by the USFS (*Friends of Clearwater v. Probert*, 15).

Relevant Laws

NEPA

The complaint focuses on three main environmental laws that the Friends of Clearwater believe have been violated. The first of these laws is NEPA, the statute that requires an environmental assessment (EA) or an environmental impact report (EIR) for any actions undertaken, funded, or approved by the federal government. In completing an EIR, the agency taking action must detail the environmental impact of the project, adverse environmental effects that the project has on its surroundings that cannot be avoided, alternatives and mitigation methods, short-term human use and long-term environmental productivity, and “any irreversible and irretrievable commitment of resources” (42 USC Sec. 4332). The responsible agency also has the duty of consulting any subject-matter experts that may have information on the impacts of their proposed project. The agency must make their report available for comment to all experts, relevant agencies, and the public. This law is relevant because the Friends of Clearwater allege that the USFS only completed an EA, because they needed to complete the more detailed EIR.

NEPA also created the Council on Environmental Quality (CEQ), which is charged with, among other things, reviewing and appraising “the various programs and activities of the Federal Government” to determine whether these agencies adhere to the statute (42 USC Sec. 4343). This means that the USFS, which is part of the Department of Agriculture (USDA), in addition to the CEQ will be involved in rewriting the EIR if necessitated by the court’s decision.

Much like the allegations against the USFS concerning their environmental assessment in this case, the US Court of Appeals for the Ninth District found that the environmental impact report in the case of *South Fork Band Council of Western Shoshone of Nevada et al. v. United States Department of the Interior* was not nearly detailed enough. The DOI missed key features of the document, such as the analysis of mitigation measures, intended to protect the environment. The project in that instance was not performed in a National Forest so one would think that the regulations surrounding federally owned lands would be much more strict than privately owned lands. As the Friends of Clearwater argue, a logging project of this size being performed on federally owned land should require more scrutiny than it is getting.

NFMA

The next relevant environmental law is the NFMA, the act that necessitates the publishing of a forest plan. The forest or land management plan includes the coordination of recreation, industrial, and sustainable wildlife interests. The NFMA also requires that the USFS come up with the suitable level of harvesting of forest products, like timber, fish, or wildlife (16 USC Sec. 472 Subsec. 6). Notably, in section 6, the Act requires that the responsible agency establish thresholds for the amount of sediment allowed in the water ways in each national forest as well as an approximation of the maximum wildlife population (carrying capacity) the forest can sustain. This is the part of the act that the

Friends of Clearwater claim that USFS has violated. The plaintiff claims that the logging project is in direct violation of the act because it assures that logging will only take place in a National Forest where the “protection is provided for [...] bodies of water from detrimental changes in deposits of sediment” (16 USC Sec. 472 Subsec. 6). The removal of trees from land uproots the soil and removes the roots that once bound together the soil. The dirt is then free to roll downhill and into a body of water, depositing sediment that is potentially detrimental to water chemistry or the wildlife that inhabits the waterway. The plaintiff alleges that the deposit of sediment in this case would be detrimental to the health of the stream.

The NFMA applies to the Department of Agriculture and even specifically mentions the duties of the Secretary of the USDA in certain sections. The US Forest Service, as the name suggests, is the chief agency in charge of completing and enforcing forest plans. The USFS seems to run into a lot of court cases alleging that they have violated NFMA. For example, a 2016 complaint filed by the Idaho Conservation League claims that the USFS violated the NFMA in approving a mine exploration project in Boise National Forest.

ESA

The final environmental law that is relevant to this case is the ESA. Section 7 of the ESA requires that a biological assessment be completed to ensure that a federal action is “not likely to jeopardize the continued existence of any endangered or threatened species” or the destruction of their habitat in a way that would negatively affect the species (16 USC 1531-1544 Sec. 7). The Nez Perce-Clearwater forests are home to several endangered and threatened species including the grizzly bear and the Snake River steelhead. The plaintiff claims that both these species will be harmed or harassed, either directly or via habitat destruction, by the logging projects. They also allege that USFS failed to comply with the

biological assessment aspect of the ESA in refusing to acknowledge the harm that the project poses to the grizzly bear and impact the Snake River steelhead's habitat. The USFS also, allegedly, failed to complete the consultation process as delineated in Section 7 of the ESA. The formal consultation involves the Fish and Wildlife Service (FWS) and/or NOAA Fisheries depending on what species are implicated in the project (16 USC 1531-1544 Sec. 7). The action agency is to bring their biological assessment to the consultation so that a Biological Opinion may be formed by the consulted agency. The Biological Opinion includes measures that the action agency should take to protect any endangered or threatened species in the area. The plaintiffs allege that the USFS failed to even draw up the proper biological assessment to initiate the consultation process.

As mentioned above, the relevant agencies in this matter would be the USFS, the FWS, and/or NOAA Fisheries. The FWS, according to the ESA, is the agency that is in charge of gathering information on terrestrial and freshwater endangered and threatened species while NOAA Fisheries is in charge of marine species (16 USC 1531-1544 Sec. 8a). These two agencies prepare biological opinions on how federal actions will impact endangered and threatened species.

In 2015, the USFS was deemed in violation of Section 7 of the ESA when it failed to consult with the FWS concerning the critical habitat of the Canada Lynx on National Forest land (*Cottonwood Environmental Law Center v. U.S. Forest Service*). Another relevant case is *Defenders of Wildlife v. Bernal* which may help the plaintiff demonstrate what constitutes an illegal take. In that case, the Defenders of Wildlife contested the construction of a school on the grounds that it would harm or harass the resident pygmy owls. However, the US Court of Appeals for the Ninth Circuit found that because the building of the school would not occur on the critical habitat for the owls and that the birds could tolerate, and even benefit from, a high level of human activity, the construction would not constitute a take under ESA.

Evaluation

I believe that most of this case relies on the discovery portion of the trial process. The Friends of Clearwater must be able to prove that the USFS failed to comply with all of the relevant laws mentioned above. The Friends of Clearwater must come up with the documents- or the lack thereof- that prove that the USFS failed to complete an EIR when it should have. The plaintiff must also demonstrate why the agency needed to complete an EIR in the place of an EA. I think that given the massive impact the two logging projects seem to have on the surrounding environment, including sediment deposits in nearby bodies of water, habitat destruction, and the harassment of native species, the plaintiff has a good case for the requirement of an environmental impact report. In addition, given that trees are not immediately renewable, the USFS must include, in their EIR, whether the timber would be an “irretrievable commitment of resources” within a reasonable amount of time (42 USC Sec. 4332).

Based on my reading of the National Forest Management Act, it seems that a forest land management plan is for agency use so as to quantify each national forest based on its unused resources, and the wildlife that inhabits it. It is not a binding document and, therefore, a violation of the forest plan for the Nez Perce–Clearwater Forests would not entail a cause of action against the USFS.

The federal Endangered Species Act contains strict guidelines for the conservation of species listed as endangered or threatened. The Friends of Clearwater would have to produce evidence that the logging projects would result in the illegal take of the local grizzly bears and Snake River Trout. In order to do so, the plaintiffs must demonstrate that the aforementioned species occupy the land on which the projects are proposed and that the projects would harm or harass the animals under the ESA definitions in Section 3. As stated in the *Defenders of Wildlife v. Bernal* opinion, the plaintiff must show that there is a “factual basis to conclude” that the animals mentioned above use the planned project sites. I

would suggest they do this via trail camera footage and thermal photography to observe the grizzly bears and catch and release netting to observe the steelhead.

The plaintiff also needs to prove that the logging projects would be detrimental to the endangered and threatened species. The addition of sediment to the rivers inhabited by the steelhead must be predicted to impact some aspect of their lives significantly, the river is likely a spawning area for the fish and the addition of sediment would erode their spawning grounds. In addition, the act of removing timber from the forest must impact the grizzly bear, likely a destruction of their habitat.

It seems that the Friends of Clearwater are likely to win their case on the grounds of NEPA and ESA but not NFMA.

Conclusion

The Friends of Clearwater filed a complaint against Cheryl Probert, the Forest Supervisor of the Nez Perce-Clearwater National Forests and the USFS alleging that the agency violated NEPA, ESA, and NFMA. The plaintiff claims that it has the grounds to sue under the Administrative Procedures Act as they feel that the logging projects proposed by USFS in the Nez Perce-Clearwater Forests are “an abuse of discretion” (5 USC Sec. 10). The Friends of Clearwater believe that the USFS failed to complete an environmental impact report pursuant to NEPA. Although USFS completed an environmental assessment, it was allegedly not sufficient and lacked a thorough analysis of the environmental impact and mitigation methods.

The Friends of Clear water also claim that the USFS failed to consider the impact on endangered and threatened species that inhabit the Nez Perce-Clearwater National Forests and that the logging would constitute an illegal take.

Finally, the plaintiff alleges that the USFS violated the NFMA by failing to comply with the forest plan that they drew up for the Nez Perce-Clearwater National Forest.

The plaintiff is likely to show sufficient evidence under NEPA and ESA, but not under NFMA. This means that the defendant, USFS, would have to prepare a full environmental impact report and submit biological assessments to FWS or NOAA Fisheries to ensure that their project would not result in the illegal take of wildlife.

References

- Friends of Clearwater v. Probert* (No. 3:21-cv-189 April 28, 2021). http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210428_docket-321-cv-189_complaint.pdf
- Friends of the Clearwater. (2018). Retrieved October 26, 2021, from <https://www.friendsoftheclearwater.org/>
- National Forest Management Act (1976). 16 U.S.C. §§472a, 1600-1606, 1607-1614.
- Administrative Procedures Act (1946). 5 U.S.C § 5
- National Environmental Policy Act (1969). 42 U.S.C. §§ 4321 et seq.
- Endangered Species Act (1973). 16 U.S.C. 1531-1544, 87 Stat.
- South Fork Band Council of Western Shoshone of Nevada et al. v. United States Department of the Interior et al.*, F.3d 718 (2009).
- Paez, R. A. (2015). *Cottonwood Environmental Law Center v. U.S. Forest Service*, no. 13-35624 (9th cir. 2015). Justia Law. Retrieved November 3, 2021, from <https://law.justia.com/cases/federal/appellate-courts/ca9/13-35624/13-35624-2015-06-17.html>
- Defenders of Wildlife v. Bernal*, 204 F.3d November 23 (1999).
- Idaho Conservation League v. U.S. Forest Service*, 811 F.3d 502 (2016).