Environmental Impact Statement/National Environmental Policy Act: Federal Appellate Court Considers Whether Fire Line is Exempted

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The United States Court of Appeals for the Ninth Circuit ("Court") addressed in a June 8th opinion whether a community protection line ("CPL") constructed during a wildfire is exempted from the requirement to prepare a National Environmental Policy Act ("NEPA") environmental assessment or environmental impact statement ("EIS"). See *Forest Service Employees for Environmental Ethics v. United States Forest Service, et al.* , 2018 WL 2752485.

Whether a NEPA EIS could be foregone was dependent upon if it was exempted by what is described as an authorizing emergency regulation.

A CPL is stated to have been constructed during the Wolverine wildfire of 2015. This wildfire occurred in the Okanogan-Wenatchee National Forest in eastern Washington.

The CPL is described as a 300-foot wide swath of land thinned of vegetation over a significant distance. It was created in part by logging timber by the United States Forest Service. The purpose was to act as a barrier between the Wolverine fire and populated communities.

Plaintiff Forest Service Employees for Environmental Ethics ("FSEEE") filed an action under NEPA in the United States District Court for the Eastern District of Washington alleging a violation of NEPA. The United States Forest Service and the United States Department of Agriculture (collectively "Forest Service") were named as Defendants. FSEEE alleged that the Forest Service violated NEPA by failing to prepare an EIS or an environmental assessment prior to constructing the CPL.

The Forest Service responded that it was not required to undertake an EIS or environmental assessment because of an emergency regulation ("Emergency Regulation"). See 36 C.F.R. § 220.4(b). The United States District Court granted summary judgment to the Forest Service.

FSEEE asserted an "as-applied" challenge to the Forest Service's reliance on the Emergency Regulation during the agency's response to the Wolverine fire.

The Court noted in considering the appeal that FSEEE argued that "forest fires are not emergencies exempt from NEPA." The organization supported this argument citing a dictionary definition of "emergency." The definition read as follows:

. . . an unforeseen combination of circumstances or the resulting state that requires immediate action.

FSEEE further argued that forest fires are a common occurrence in the western United States and, therefore, not "unforeseen." As a result, they argued that the U.S. Forest Service acted arbitrarily by utilizing the Emergency Regulation during its response to the Wolverine fire.

The Court rejected this argument, stating:

While it is true that fires happen every year, it defies plain language and common sense to conclude that no individual ire – or its course, intensity, or duration – could be unforeseeable. It is unreasonable to argue that forest fires can never present emergency situations when viewed at the time the fire is raging. Further, FSEEE provides no evidence – outside of the immaterial NC Plan, which was crafted by a different agency in charge of a different area – that the Wolverine fire was not an emergency.

Consequently, the Court upheld the United States District Court granting of summary judgment for the Forest Service. The Forest Service was held to not have acted arbitrarily or capriciously in invoking the Emergency Regulation during the Wolverine fire.

A copy of the opinion can be downloaded here.