

Ninth Circuit Clarifies the Requirements for Incidental Take Statements Prepared During Endangered Species Act Section 7 Consultations

February 22, 2007

On February 16th, the Ninth Circuit Court of Appeals issued an important Endangered Species Act (ESA) decision, which clarified: (1) the legal relationship between an incidental take statement (ITS) and a biological opinion (BiOp); and (2) the factors that must exist for an ITS to include a surrogate measure for authorized incidental take instead of a specific numerical limit. See *Oregon Natural Resources Council v. Allen*, No. 05-35830 (9th Cir. Feb. 16, 2007). This decision could have significant consequences for entities that rely upon an ITS for protection from ESA section 9 take liability.

Background

Oregon Natural Resources Council v. Allen arises from a challenge to a BiOp and ITS issued for timber harvests on federally-managed lands in the Pacific Northwest. In 2001, the United States Fish and Wildlife Service (FWS) issued a “no jeopardy” BiOp, including an ITS authorizing the incidental take of all spotted owls associated with timber harvests occurring in suitable spotted owl habitat. The Oregon Natural Resources Council filed suit challenging the validity of the BiOp and ITS. Subsequently, as a result of the Ninth Circuit’s decision in *Gifford Pinchot* (invalidating the FWS’s definition of “destruction or adverse modification” of critical habitat used in the northern spotted owl section 7 consultation process), the FWS voluntarily reinitiated consultation on a portion of the proposed timber harvests. The FWS then withdrew portions of the previous BiOp without withdrawing or modifying the original ITS. Upon review, the district court upheld the ongoing validity of the ITS, notwithstanding FWS’s partial withdrawal of the BiOp.

The Ninth Circuit’s Decision

The Ninth Circuit reversed and remanded the district court’s decision, concluding that the partial withdrawal of the BiOp invalidated the ITS because “Incidental Take Statements supplement BiOps, and were not meant to stand alone.” The court ruled that the purpose of a BiOp is to analyze the scope, purpose, and impact of the proposed action. Until the FWS performs this examination, the agency cannot determine whether the authorized take is “incidental” to the proposed action.

Next, the court invalidated the ITS because it did not contain a numerical cap on spotted owl take and did not adequately explain its use of a surrogate instead of a numerical cap. While acknowledging the legitimacy of using a surrogate in lieu of a numerical cap in an ITS, the court, recognizing Congress’s preference for a numerical value, noted that where possible “the permissible level of take ideally should be expressed as a specific number.” If, however, the FWS uses a surrogate, the agency must demonstrate that it could not “practically obtain” a numerical value. In this case, the court concluded that the FWS did not adequately demonstrate the impracticability of identifying a numerical value.

The court then continued to provide future guidance on the use of surrogates instead of numerical limits on take. The court stated that the surrogate must be able to perform the same functions as a numerical value. Specifically, the court opined that a surrogate must contain measurable guidelines that allow a determination of when the ITS is exceeded, thereby triggering reinitiation of section 7 consultation. Here, the court concluded that the FWS impermissibly established an ITS level of take coextensive with the scope of the project. By adopting an ITS of “all spotted owls” associated with the timber harvest, the FWS ensured that the permissible level of take would not be reached until after the proposed action was completed. In the court’s opinion, this construction rendered the ITS and BiOp redundant, and circumvented the monitoring requirements of the ESA by effectively preventing the reinitiation of consultation.

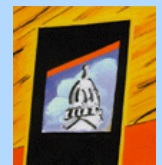
A Professional
Corporation

1050 Thomas Jefferson
Street, NW
Washington, DC
20007-3877
(202) 298-1800
(202) 338-2416

The Millennium Tower
719 Second Avenue
Suite 1150
Seattle, Washington
98104
(206) 623-9372
(206) 623-4986

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Implications of the Court's Decision

The Ninth Circuit's decision could have significant implications for those entities that rely on the ESA protection afforded by an ITS in a BiOp. First, the court confirmed that the validity of an ITS is dependent upon its supporting BiOp, stating that an ITS "cannot stand alone." According to the Ninth Circuit, once the FWS withdrew the underlying BiOp, the ITS lacked a rational basis and was therefore no longer valid. Second, this decision clarifies the standard that must be met for surrogate measures to be used, in lieu of numerical values, for authorization of incidental take. Namely, the court held that an agency may adopt a surrogate measure only if it adequately demonstrates that the use of a numerical value is impractical. Further, where the use of a surrogate measure is required and appropriate, the authorized level of take must be sufficiently defined so that the action agency and the FWS can monitor take and reinitiate consultation to prevent the proposed action from jeopardizing the continued existence of a listed species.

For Additional Information

For additional information on this case or threatened and endangered species, please contact Mike Swiger or Sam Kalen in our Washington, DC office at (202) 298-1800, or Matt Love in our Seattle office at (206) 623-9372, or any member of the firm at www.vnf.com.

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