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GREATER YELLOWSTONE COALITION V. FLOWERS: CLEARING THE IRREPARABLE HARM HURDLE IN THE TENTH CIRCUIT TO PROTECT YELLOWSTONE BALD EAGLES

I. INTRODUCTION

The bald eagle has served as the United States' national emblem since 1782.¹ The country's founders chose the bald eagle to represent their nation because they believed it signified strength, majesty and freedom.² Today, the bald eagle appears not only on The Great Seal of the United States, but also on much of its currency, stamps and state seals.³

Known in the scientific community as *Haliaeetus leucocephalus* (sea eagle with white head), the bald eagle is the only sea eagle species native to North America.⁴ Bald eagles live in aquatic ecosystems, usually nesting in trees near water in remote areas free of disturbance.⁵ Additionally, bald eagles tend to use the same nesting area, and often the same nest, for years at a time.⁶ Their nesting season lasts approximately six months.⁷ Bald eagles are most sensitive to human disturbance during the nest building and incu-

1. See Hope Rutledge, *The Bald Eagle - An American Emblem*, at <http://www.baldeagleinfo.com/eagle/eagle9.html> (last visited Apr. 10, 2004) [hereinafter *American Emblem*] (explaining bald eagle was not officially adopted as national emblem until 1787 after many states used bald eagle in their coats of arms).

2. See *id.* (discussing why bald eagle was chosen as United States' national emblem); see generally Hope Rutledge, *American Bald Eagle Information*, at <http://www.baldeagleinfo.com> (last visited Apr. 10, 2004) [hereinafter *Bald Eagle Info*] (discussing bald eagle in general).

3. See *American Emblem*, *supra* note 1 (discussing adoption of bald eagle as United States' national emblem). However, the choice was not unanimous. *Id.* Benjamin Franklin, in fact, characterized the bald eagle as dishonest, lazy and cowardly and suggested that the turkey was a much more appropriate national emblem. See *id.*

4. See Endangered and Threatened Wildlife and Plants; Proposed Rule To Remove the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 64 Fed. Reg. 36,454 (proposed July 6, 1999) (to be codified at 50 C.F.R. pt. 17) [hereinafter *Bald Eagle Proposal*] (noting bald eagle ranges throughout North American continent from Florida to Mexico to Labrador to Alaska).

5. See *id.* (adding eagles occasionally nest on cliffs and rarely on ground).

6. See *id.* (describing 35-year old nest at Vermilion, Ohio).

7. See *id.* (describing nesting season). See also Hope Rutledge, *Bald Eagle - Nesting & Young*, at <http://www.baldeagleinfo.com/eagle/eagle4.html> (last visited Apr. 10, 2004) [hereinafter *Nesting & Young*] (describing bald eagle nesting cycle).

bation stages of the nesting cycle.⁸ Young bald eagles usually stay near their nest as they learn to hunt and eventually leave when they are fifteen to twenty weeks old.⁹

The Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (BEPA), and the Endangered Species Act (ESA) all currently protect the bald eagle.¹⁰ Formerly listed as an endangered species under the ESA, the bald eagle has since been downgraded to a threatened species.¹¹ In 1999, the U.S. Fish and Wildlife Service (FWS) proposed to completely remove the bald eagle from the ESA's "endangered or threatened" species list.¹² FWS has delayed removal from the list until it can determine the best way to manage the species once off the list.¹³

This Note examines the recent decision of the United States Court of Appeals for the Tenth Circuit in *Greater Yellowstone Coali-*

8. See WASHINGTON DEP'T OF FISH & WILDLIFE, *Bald Eagle Nesting & Wintering Cycle, Washington State*, at <http://www.wdfw.wa.gov/viewing/wildcam/eaglecam/graphics/chart2.jpg> (last visited Apr. 10, 2004) (charting bald eagle disturbance sensitivity during nesting cycle of nest building, incubation, nesting and adults/young/wintering stages). See also *Nesting & Young*, *supra* note 7 ("Human disturbance can have an impact on the bald eagle, as most of them need some privacy and quiet to breed.").

9. See *id.* (noting benefit of communal gatherings of bald eagle nesting areas); see also Bald Eagle Proposal, *supra* note 4, at 36,454-55 (discussing bald eagle nesting cycle).

10. See *Bald Eagle Info*, *supra* note 2; Migratory Bird Treaty Act, 16 U.S.C. § 703 (2001) (prohibiting taking, killing, possession, transportation and importation of migratory birds, or their eggs, parts or nests, unless specifically authorized by Department of Interior); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2001) (prohibiting taking, possessing, transporting, exporting, importing, bartering, or offering to sell, purchase, or barter bald or golden eagle, or eggs, parts, or nests, unless under certain specific conditions); Endangered Species Act of 1973, 16 U.S.C. § 1531 (2001) (stating purpose to conserve and protect endangered species and their ecosystems).

11. See Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (2003) (listing bald eagle as threatened species throughout lower 48 states); see also *Bald Eagle Info*, *supra* note 2 (describing protection of bald eagles under MBTA, BEPA and ESA).

12. See *Bald Eagle Proposal*, *supra* note 4, at 36,454 (suggesting available data indicates bald eagle species has recovered). The proposal to remove the bald eagle from the list is due in part to habitat protection and management actions under ESA, and the reduced presence of certain pesticides in the environment. See *id.*; see also Hope Rutledge, *The American Bald Eagle – Re-introduction*, at <http://www.baldeagleinfo.com/eagle/future.html> (last visited Apr. 10, 2004) [hereinafter Future] (discussing bald eagle reintroduction programs); U.S. FISH AND WILDLIFE SERVICE, *The Bald Eagle is Back! President Clinton announces Proposal to Remove Our National Symbol From Endangered Species List*, available at <http://www.fws.gov/r9extaff/eaglejuly2.html> (July 2, 1999) [hereinafter Removal] (announcing FWS's decision to remove bald eagles from ESA list of "endangered or threatened" species).

13. See Future, *supra* note 15 (discussing proposed rule removing bald eagle from endangered species list).

tion v. Flowers.¹⁴ In *Yellowstone*, the Tenth Circuit held that a party seeking a preliminary injunction against actions threatening bald eagles need not show damage to the entire species.¹⁵ Further, the court held that the plaintiffs need only show a significant risk of harm to those affected bald eagles.¹⁶ Part II of this Note discusses the relevant factual and procedural history of *Yellowstone*.¹⁷ Part III sets forth the legal framework within which *Yellowstone* was decided.¹⁸ Part IV then explains the Tenth Circuit's rationale in reaching its decision.¹⁹ Next, Part V scrutinizes the court's reasoning.²⁰ Finally, Part VI explores the potential effect that *Yellowstone* may have on subsequent environmental litigation.²¹

II. FACTS

A. Canyon Club's March Proposal

In March 2001, Richard Edgcomb, president and general manager of Canyon Club, Inc. (Canyon Club), submitted a proposal to the Army Corps of Engineers (the Corps) for a permit under section 404 of the Clean Water Act (CWA) to build a golf course and residential development in Teton County, Wyoming.²² The land, bordered by the Snake River, is currently home to three bald eagle nesting sites: the Cabin Creek nest, the Dog Creek nest and the

14. 321 F.3d 1250, 1258, 1261 (10th Cir. 2003) (holding party seeking preliminary injunction need not show damage to entire bald eagle species, but need only show significant risk of harm to individually threatened bald eagles).

15. *See id.* at 1258, 1261 (discussing court's holding).

16. *See id.* (finding developers' actions posed significant risk of harm to bald eagles in Canyon Club territory).

17. For a discussion of the facts of *Yellowstone*, see *infra* notes 22-51 and accompanying text.

18. For a discussion of the pertinent statutory history and case law influencing the *Yellowstone* decision, see *infra* notes 52-101 and accompanying text.

19. For an explanation of the Court's rationale, see *infra* notes 102-142 and accompanying text.

20. For a critical analysis of the Court's rationale, see *infra* notes 143-181 and accompanying text.

21. For a discussion of the impact of the *Yellowstone* decision, see *infra* notes 182-196 and accompanying text.

22. *See Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1252-53 (10th Cir. 2003) (explaining developers were required to obtain permit under section 404 of CWA because project required dredging and filling of wetlands and waters under Corps' jurisdiction); *see also* 33 U.S.C. § 1344(a) (2001) (describing CWA permit requirements). The parcel was originally part of the River Bend Ranch which was sold to the Canyon Club by Richard Edgcomb, the president and general manager of Canyon Club. *Yellowstone*, 321 F.3d at 1252 (explaining east and south border of parcel consists of national forest land).

Martin Creek nest.²³ The Cabin Creek nest has recently been the most productive nest in the Greater Yellowstone ecosystem.²⁴ Between 1992 and 2002, it produced eleven bald eagle fledglings.²⁵ In addition, the Dog Creek nest has produced at least one fledgling per year since 1992.²⁶ The Martin Creek nest has been inactive for the past few years.²⁷

B. Canyon Club's October Proposal

When several state and federal agencies and environmental groups criticized the Canyon Club's March proposal, the Corps recommended that Canyon Club submit a revised proposal.²⁸ That proposal, submitted in October of 2001, made several changes to comply with Teton County Land Development Regulations.²⁹ These changes included moving two proposed golf holes off a peninsula, reducing impacts on wetlands and redesigning proposed conservation easements.³⁰ Subsequently, multiple parties created several reports assessing the potential environmental impacts of the

23. *Yellowstone*, 321 F.3d. at 1252-53 (describing three bald eagle nesting sites within Cabin Creek vicinity). A fourth nest at Elbow Creek lies less than three miles from the proposed development site, but plaintiffs did not allege any risk of harm to this site. *See id.* at 1253 n.3.

24. *See id.* (describing three bald eagle nesting sites within Cabin Creek vicinity).

25. *See id.* (explaining Cabin Creek nest, located 1,475 feet south of one proposed tee box, also maintains alternate nesting site close to development); *see also Nesting & Young*, *supra* note 7 (defining "fledglings" as young eagles that have acquired feathers necessary for flight).

26. *Yellowstone*, 321 F.3d. at 1252-53 (describing three bald eagle nesting sites within Cabin Creek vicinity).

27. *See id.* (explaining Dog Creek nest is located approximately 1,000 feet from one proposed golf hole while Martin Creek nest is set 230 feet from another proposed golf green).

28. *See id.* (explaining areas of controversy included failure to comply with Teton County Land Development Regulations and impacts to wetlands); *see generally Teton County - Planning and Development Website*, at <http://clerk1.state.wy.us/plan> (last visited Apr. 10, 2004) (requiring that all development in Teton County meet requirements of county land development regulations); *Jackson/Teton County Comprehensive Plan & Land Development Regulations*, at <http://clerk1.state.wy.us/plan/nav/100141.shtm> (last visited Apr. 10, 2004) (establishing goals and requirements of land development in Teton County).

29. *Yellowstone*, 321 F.3d at 1252-53 (discussing changes made to address criticism of March proposal).

30. *Id.* (discussing changes in project suggested in October proposal). The new proposal also increased the number of homes on the site to sixty-six and increased the overall size of the area to 359 acres. *Id.*

proposed development site.³¹ The reports also evaluated the feasibility of alternatives to the October proposal.³²

C. Agency Ecological Reports

1. Pioneer's Biological and Environmental Assessments

Canyon Club retained Pioneer Environmental Services, Inc. (Pioneer) to prepare a Biological Assessment (BA) of the proposed development.³³ This report examined the proposed development's possible impacts on several species and found that it was "likely to adversely affect bald eagles."³⁴ Pioneer then prepared an analysis under section 404(b)(1) of the CWA (404 Analysis), comparing the October proposal to five alternatives.³⁵ In March 2002, Pioneer prepared an Environmental Assessment (EA) comparing the October proposal to each of the alternatives listed in its 404 Analysis.³⁶ Pioneer determined that no alternative to the October proposal would both satisfy the project's goals and comply with local land regulations.³⁷

31. See *id.* at 1253-55 (describing Biological Assessment, Section 404(b)(1) Analysis, and Environmental Assessment prepared by Canyon Club; Biological Opinion prepared by Fish and Wildlife Service; and Environmental Assessment prepared by Corps).

32. See *Yellowstone*, 321 F.3d at 1253-55 (describing various environmental reports). For a discussion of the reports, see *infra* notes 33-44 and accompanying text.

33. *Id.* at 1253-54 (discussing Pioneer's biological assessment). Section 7(c) of the ESA requires the creation of an assessment identifying those endangered or threatened species likely to be affected by action in areas where such species may be present. See Endangered Species Act of 1973, 16 U.S.C. § 1536(c)(1) (2001) (describing requirements of biological assessment). For a further discussion of the ESA, see *supra* notes 67-70 and accompanying text.

34. *Yellowstone*, 321 F.3d at 1253 (noting Pioneer also determined that proposed project was not likely to affect species other than bald eagles).

35. *Id.* at 1254 (listing five alternatives: March proposal, nine-hole golf course, design relocating holes three and four, denial of permit and "no action" alternative). For a discussion of CWA, see *infra* notes 52-58 and accompanying text.

36. *Yellowstone*, 321 F.3d at 1254 (noting considered alternatives did not include denial of permit alternative). Federal agencies are required, under the National Environmental Policy Act of 1969, to create an environmental assessment to determine whether a proposed action will significantly affect the "quality of the human environment." See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2001); see also When to prepare an environmental assessment, 40 C.F.R. § 1501.3 (2003). For a further discussion of NEPA, see *supra* notes 59-66 and accompanying text.

37. *Id.* at 1253-54 (listing several project goals). These project goals included supplementing ranch operations on adjacent property with income from Canyon Club, developing a world-class 18-hole championship golf course with exceptional visual experiences and varied play, minimizing development sprawl and preserving the scenic quality of the environment, and minimizing tree removal, wetland impacts and ground disturbance while conserving open space. *Id.*

2. Fish and Wildlife Service's Biological Opinion

In April 2002, FWS prepared its own Biological Opinion (Opinion), determining it was likely that the proposed project would only adversely affect bald eagles.³⁸ FWS predicted that the proposed action would result in the loss of the Cabin, Dog and Martin Creek nesting territories, destroying the reproductive output of six adult bald eagles.³⁹ FWS, however, maintained that the project would not jeopardize the continued existence of the bald eagle species as a whole.⁴⁰

3. The Corps' Environmental Assessment

The Corps prepared its own EA, rejecting the alternatives that Pioneer suggested.⁴¹ The Corps concluded that, compared to the other alternatives, the October proposal posed the slightest environmental threat.⁴² Determining that the project would not significantly impact the quality of the human environment, the Corps then issued a Finding of No Significant Impact.⁴³ As a consequence of this finding, the Corps declined to issue an Environmental Im-

38. *Yellowstone*, 321 F.3d at 1254 (explaining FWS' determination that increased human disturbance would make foraging habitat less suitable for bald eagles, but conceding that some bald eagles could become tolerant of some human activity along Snake River). Section 7(b) of the ESA requires a written opinion to be prepared, summarizing the possible effects that a federal action will have on endangered or threatened species and their critical habitats. See Endangered Species Act of 1973, 16 U.S.C. § 1536(b)(3) (2001). For a further discussion of the ESA, see *supra* notes 67-70 and accompanying text.

39. *Yellowstone*, 321 F.3d at 1254 (suggesting that reproductive output of six bald eagles would be lost when bald eagles move from Canyon Club nests to territory already occupied by other bald eagles).

40. *Id.* (noting FWS did recommend that Canyon Club act in attempt to mitigate incidental take that proposed action might cause); see Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B),(G) (2001) (prohibiting unauthorized "take" of listed species).

41. *Yellowstone*, 321 F.3d at 1255 (explaining Corps determined that these alternatives, as well as two off-site alternatives, were unsatisfactory because they failed to meet project goals, violated Teton County Land Development Regulations, were too expensive or would have unacceptable adverse impact on wetlands).

42. *Id.* (discussing Corps' consideration of relative environmental threats of various alternatives).

43. *Id.* (discussing Corps' decision to issue Finding of No Significant Impact). See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4321, 4332(C) (2001) [hereinafter NEPA] (requiring preparation of Environmental Impact Statement for every major Federal action "significantly affecting the quality of the human environment"). For a discussion of NEPA, see 56 JERRY L. MARSHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, 160-61 (4th ed. 1998).

fact Statement under the National Environmental Policy Act of 1969 (NEPA).⁴⁴

D. Corps' Grant of Section 404 Permit

The Corps granted the section 404 permit on June 14, 2002.⁴⁵ Shortly thereafter, the plaintiffs, Greater Yellowstone Coalition and Jackson Hole Conservation Alliance, brought suit challenging the permit in the United States District Court for the District of Wyoming.⁴⁶ The plaintiffs also sought a temporary restraining order and a preliminary injunction.⁴⁷

The District Court for the District of Wyoming denied the preliminary injunction.⁴⁸ The court found that, due to the speculative nature of the plaintiffs' claims, the plaintiffs demonstrated neither a likelihood of prevailing on the merits, nor irreparable harm to the entire species.⁴⁹ On appeal, the Court of Appeals for the Tenth Circuit reversed and remanded.⁵⁰ The Tenth Circuit held that, to show irreparable harm, the plaintiffs do not need to allege harm to

44. *Yellowstone*, 321 F.3d at 1255 (explaining Corps' decision not to issue EIS). For a further discussion of NEPA, see *infra* notes 59-66 and accompanying text.

45. *Yellowstone*, 321 F.3d at 1255 (stating effect of grant was to allow October proposal to go forward).

46. *Id.* (stating plaintiffs challenged permit by arguing violations of NEPA and CWA, and that issuance was arbitrary, capricious and abuse of discretion). See generally *Inside the Greater Yellowstone Coalition*, at http://www.greateryellowstone.org/gyc/inside_gyc.html (last visited Apr. 10, 2004) (describing Coalition as "nationally known advocate for the idea that ecosystem level sustainability should guide the management of the region's public and private lands."); *Jackson Hole Conservation Alliance*, at <http://www.jhalliance.com> (last visited Apr. 10, 2004) (describing Jackson Hole Conservation Alliance as "dedicated to responsible land stewardship in Jackson Hole, Wyoming, to ensure that human activities are in harmony with the area's irreplaceable wildlife, scenic and other natural resources.").

47. *Yellowstone*, 321 F.3d at 1255 (discussing procedural posture of case).

48. *Id.* at 1255-56 (discussing district court's denial of preliminary injunction).

49. *Id.* at 1255 (explaining court had originally issued temporary restraining order, but later amended order to allow limited construction pending decision on preliminary injunction). After a hearing, the district court lifted the temporary restraining order and later denied the motion for preliminary injunction. *Id.*

50. *Id.* at 1262 (instructing district court to consider remaining elements of preliminary injunction on remand) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)). The remaining elements include the balance of harms presented and the effect on the public interest. *Id.* If those factors favor the plaintiffs, the court must inquire whether the plaintiffs' claims "are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Id.* The Tenth Circuit also noted that if the plaintiffs fail to meet the above test, the district court must consider the likelihood of success on the merits under the different standards of both of the NEPA and CWA claims. *Id.* at 1262, n.12.

the whole species, but only need to show a significant risk of harm to those threatened bald eagles.⁵¹

III. BACKGROUND

A. Statutory Background

1. Clean Water Act

Section 404 of the CWA requires developers to obtain a permit from the Secretary of the Army Corps of Engineers “for the discharge of dredged or fill material into the navigable waters” of the United States.⁵² The CWA prohibits such discharge in several instances.⁵³ First, discharge is prohibited if a practicable alternative exists.⁵⁴ An alternative is practicable if it is feasible in terms of cost, existing technology and logistics.⁵⁵ Additionally, the alternative must be less damaging to the aquatic ecosystem and may not otherwise significantly harm the environment.⁵⁶ Second, discharge of dredged or fill material is prohibited if it violates any applicable toxic effluent standard or prohibition under section 307 of the CWA or any state water quality standard.⁵⁷ Third, such discharge is prohibited if it threatens to destroy any species listed as endangered or threatened, or any critical habitat, as defined by the Endangered Species Act of 1973 (ESA).⁵⁸

51. *Id.* at 1258, 1261 (finding developers’ actions posed significant risk of harm to bald eagles in Canyon Club territory).

52. 33 U.S.C. § 1344(a) (2001) (requiring publication of notice and opportunity for public hearings); *see also id.* § 1344(c) (authorizing Administrator of EPA to prohibit specification of any defined area as disposal site upon determination, after notice and opportunity for public hearings and consultation with Secretary of Corps, that such discharge would adversely affect municipal water supplies, shellfish beds, fishery areas, wildlife or recreational areas).

53. *See generally id.* § 1344; *see also* Section 404(B)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.10 (2003) [hereinafter *404 Guidelines*] (discussing restrictions on discharge of dredged or fill material).

54. 404 Guidelines, *supra* note 53 (discussing situations in which discharge of dredged or fill material is prohibited).

55. *See* 404 Guidelines, *supra* note 53 (stating area not presently owned by applicant, if otherwise practicable alternative, may be considered if reasonably available to fulfill basic purpose of proposed activity).

56. *Id.* (noting practicable alternatives may include activities which do not involve discharge of dredged or fill material into U.S. waters or ocean waters, or discharges at other locations in U.S. waters or ocean waters).

57. *See* 404 Guidelines, *supra* note 53, at (b)(1)-(2) (noting dilution and dispersion must be considered when determining cause or contribution to state water quality standards).

58. *See* 404 Guidelines, *supra* note 53, at (b)(3) (noting exemptions granted by Endangered Species Committee shall apply).

2. National Environmental Policy Act of 1969

Congress enacted NEPA to reduce damage to the environment, to promote environmental awareness and to establish a Council on Environmental Quality.⁵⁹ NEPA requires federal agencies to consider alternatives to certain proposed actions that would affect the environment.⁶⁰ Such agencies must issue an Environmental Impact Statement (EIS) for any federal action “significantly affecting the quality of the human environment.”⁶¹ To determine whether an EIS is necessary, the agency must first prepare an Environmental Assessment (EA).⁶² The agency must support the EA and its determination with sufficient evidence and analysis.⁶³ NEPA’s requirements are procedural in nature and demand that decisions under NEPA are based on relevant information.⁶⁴ If the agency determines in its EA investigation that the proposed action will not significantly affect the quality of the human environment, then it must issue a formal “Finding of No Significant Impact,” rather than an EIS.⁶⁵ Lastly, an agency decision not to prepare an EIS under NEPA is subject to the Administrative Procedure Act’s “arbitrary and capricious” standard of review.⁶⁶

59. 42 U.S.C. § 4321 (2001) (discussing Congressional declaration of national policy encouraging “productive and enjoyable harmony between man and his environment.”)

60. 42 U.S.C. § 4332(2)(E) (2001) (listing one of requirements for Federal agencies).

61. *Id.* § 4332(2)(C) (requiring that responsible Federal official consult with any Federal agency which has jurisdiction by law or special expertise regarding action involved before issuing any detailed statement).

62. *See* When to prepare an environmental assessment, 40 C.F.R. § 1501.3 (2003) (noting assessment is unnecessary if agency prepares environmental impact statement).

63. *See id.* § 1508.9(b) (stating environmental assessment “shall include brief discussions of the need for the proposal, of alternatives. . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted”).

64. *See* Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam) (requiring that environmental effects of proposed action be adequately identified and evaluated) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)).

65. *See* 40 C.F.R. 1508.13 (noting “finding of no significant impact” document must include, at least, summary of environmental assessment and note any other related documents).

66. *See* Sierra Club v. Martin, 71 F. Supp. 2d 1268, 1312 (N.D. Ga. 1996) (citing *State of North Carolina v. Federal Aviation Admin.*, 957 F.2d 1125, 1128 (4th Cir. 1992)); *see also* 5 U.S.C. § 706(2) (2001) (discussing standard of review for federal agency decisions).

3. Endangered Species Act of 1973

The ESA prohibits the unauthorized “take” of any species listed as endangered under the Act.⁶⁷ The ESA defines the term “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or attempt to do so.⁶⁸ In addition, section 7(a)(2) of the ESA requires federal agencies to take steps to ensure that any action it authorizes is not likely to jeopardize the continued existence of any endangered species or destroy or harm its habitat.⁶⁹ As part of this mandate, the ESA requires the creation of a written biological opinion summarizing the possible effects of the federal action on local endangered or threatened species and their critical habitats.⁷⁰

B. Burden for Preliminary Injunction

In the Tenth Circuit, a party must show four elements to successfully obtain a preliminary injunction: “(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest.”⁷¹ The Tenth Circuit modifies this test where the party seeking relief can set forth a strong showing of the last three elements.⁷² If such a showing is made, the likelihood of prevailing on the merits element may be satisfied by establishing that there is enough controversy to make the issue ripe for litigation.⁷³

67. See 16 U.S.C. § 1538(a)(1)(B), (G) (2001) (prohibiting unauthorized taking of species listed under ESA).

68. See *id.* at § 1532(19) (providing definition of “take” under ESA).

69. *Id.* § 1536(a)(2) (setting forth requirements for federal action affecting environment); see also *Bays’ Legal Fund v. Browner*, 828 F. Supp. 102 (D. Mass. 1993).

70. See Endangered Species Act of 1973, 15 U.S.C. § 1536(b)(3) (2001) (discussing requirements of biological opinion).

71. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003) (quoting *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)).

72. *Id.* at 1255-56 (explaining available exceptions requiring lower standard of proof for preliminary injunction) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)).

73. *Id.* at 1256; see also *Davis*, 302 F.3d at 1111 (explaining that success on merits may be satisfied by showing that questions going to merits are “so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation”) (quoting *Fed. Lands Legal Consortium*, 195 F.3d at 1194-95).

C. Irreparable Harm Requirement

1. Necessary Level of Harm to Species

a. Old Trend: Necessary to Show Harm to Species as a Whole

The plaintiffs in *Fund for Animals v. Frizzell*⁷⁴ sought a preliminary injunction challenging FWS regulations permitting hunting of the greater snow goose and Atlantic brant in specific areas.⁷⁵ The Court of Appeals for the District of Columbia Circuit held that a party must show that the action would “irretrievably damage” the species as a whole.⁷⁶ Both species of birds were once severely underpopulated, but they have enjoyed significant population increases in recent years.⁷⁷ The court found that properly regulated hunting would not threaten the bird populations, and thus it posed no threat of irreparable harm to the species.⁷⁸ Additionally, the court noted that allowing the loss of a small number of abundant game birds to satisfy the irreparable harm standard would ignore the requirement’s plain meaning.⁷⁹ According to the court, plaintiffs “made only nonspecific claims of ‘the destruction and loss of wildlife,’” and the EIS and EAs suggested no such irreparable injury.⁸⁰

Considering a request for a preliminary injunction in *Bays’ Legal Fund v. Browner*,⁸¹ the District Court for the District of Massachusetts ruled that plaintiffs may use evidence of irreparable harm to support a claim under the ESA.⁸² In that case, plaintiffs sought a preliminary injunction barring the continued construction of a municipal sewage discharge tunnel.⁸³ The plaintiffs made additional claims based on the ESA, NEPA and the Marine Mammal Protec-

74. 530 F.2d 982 (D.C. Cir. 1975).

75. *Id.* at 987 (affirming district court’s denial of injunction).

76. *Id.* (finding appellants had not shown sufficient irreparable harm and such injury was neither presently occurring, nor likely to occur).

77. *Id.* at 983-84 (explaining while populations of greater snow goose and the Atlantic brant had once fallen to 7,000 and 40,700, respectively, greater snow goose population now approximates 190,000 and Atlantic Brant population exceeds 120,000).

78. *Id.* at 986 (noting habitat, not hunting, is primary limiting factor on migratory bird populations).

79. *Fund For Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (refusing to accept plaintiff’s assertion that loss of only one bird may be sufficient irreparable harm to warrant preliminary injunction).

80. *Id.* (adding regulations providing for suspension of hunting within forty-eight hours if significant damage to bird population later seems likely to occur).

81. 828 F. Supp. 102 (D. Mass. 1993).

82. *Id.* at 114 (ruling that federal authorization of construction tunnel did not violate federal environmental laws).

83. *Id.* at 104 (discussing plaintiffs’ request for preliminary injunction).

tion Act (MMPA).⁸⁴ The court compared section 7(a)(2) of the ESA (requiring a showing that the challenged action probably would adversely affect protected endangered species) to the irreparable harm standard for a preliminary injunction.⁸⁵ Accordingly, the court treated the plaintiffs' irreparable harm arguments as support for a claim under section 7(a)(2) of the ESA.⁸⁶ The district court held that the evidence presented was insufficient to support the plaintiffs' ESA claim that the tunnel project was likely to adversely impact endangered species in the bays.⁸⁷

b. Recent Trend: Unnecessary to Show Harm to Species as a Whole

More recently, the District Court for the Northern District of Georgia held that the destruction of certain sensitive or endangered plants and animals and their habitats is sufficient to show irreparable harm for a preliminary injunction in *Sierra Club v. Martin*.⁸⁸ The plaintiffs in that case sought to enjoin a timber cutting project affecting over 2,000 acres of national forest land in Georgia.⁸⁹ The court noted that the logging would destroy several endangered species, as well as certain plants and animals listed by the United States Forest Service as "sensitive species and their habitats."⁹⁰

84. *Id.* at 105-06, 108 (noting plaintiffs alleged that discharge of nutrients and toxics from tunnel, as well as noise from ongoing construction, would adversely impact endangered species protected by ESA). For a discussion of the Endangered Species Act, see *supra* notes 67-70 and accompanying text.

85. *Id.* at 108-10 (discussing alleged violations of section 7(a)(2) of ESA). The court consolidated plaintiffs' motion for preliminary injunction with plaintiffs' claims under ESA, NEPA and MMPA. *Id.* at 105.

86. *Bays' Legal Fund*, 828 F. Supp. at 108 (discussing analogy between ESA claim and preliminary injunction).

87. *Id.* at 108-10 (discussing section 7(a)(2) of ESA and ruling for defendant).

88. 71 F. Supp. 2d 1268 (N.D. Ga. 1996) (considering plaintiffs' request for preliminary injunction and holding that defendant's finding that timber sales would have no impact on plant and animal species was arbitrary and capricious).

89. *Id.* at 1270-71 (noting challenged action specifically involved projects authorized by United States Forest Service allowing timber cutting, logging, clearcutting, and road building in Georgia's Chattahoochee and Oconee National Forests).

90. *Id.* at 1274-75 (noting habitats would prove suitable for several species which were likely to be found in affected areas). These species included the Peregrine Falcon, Green Salamander, Small Whorled Pogonia, American Ginseng, Turkeybeard, Southern Shrew, Northern Pine Snake, Rafinesque's Big-Eared Bat, Large Flowered Skullcap, Southern Appalachian Cottontail Rabbit, Common Raven, Mountain Maple, Red Elderberry, Rosy Twisted Stalk, Fort Mountain Sedge, Golden Seal, Trispot Darter, Holiday Darter and Blue Shiner. *Id.*

The court further suggested that irreparable injury should be judged by the existence of an adequate remedy at law rather than by its severity.⁹¹ The court reasoned that if no adequate remedy existed at law, the injury was irreparable.⁹² Noting that no monetary award could remedy the harm alleged, the court found sufficient irreparable harm for a preliminary injunction.⁹³

2. Significant Risk of Harm Standard is Adequate

The irreparable harm element also requires that the harm alleged be more than purely speculative.⁹⁴ In *Forest City Daly Housing, Inc. v. Town of North Hempstead*,⁹⁵ the Second Circuit explained that a Board of Zoning Appeals' denial of a special use permit for constructing an assisted living facility would lead to only speculative injury because it would affect only unidentified, future residents.⁹⁶ Likewise, in *Wisconsin Gas Company v. Federal Energy Regulatory Commission*,⁹⁷ (FERC), the D.C. Circuit found an allegation that an FERC order may result in a loss of supply to customers was purely speculative because the claim was not supported by any evidence indicating any supplier's intention to cease contracting.⁹⁸

Several circuits, however, recognize the significant risk standard for showing irreparable harm.⁹⁹ These cases demonstrate that

91. *Id.* at 1327 (noting gravity of injury is irrelevant to determining irreparable harm).

92. *Martin*, 71 F. Supp. 2d at 1327 (noting injury is irreparable only if it cannot be remedied through monetary damages) (quoting *Northeastern Fla. Chapter v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)); see also *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."). *Id.*

93. *Martin*, 71 F. Supp. 2d at 1327 (finding no adequate remedy at law for alleged injuries).

94. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (noting that purely speculative harm does not fulfill irreparable injury requirement).

95. 175 F.3d 144 (2d Cir. 1999) (denying developer's motion for preliminary injunction).

96. *Id.* at 153 (adding that only other harm alleged would be to facility's developer and would, therefore, be purely economic).

97. 758 F.2d 669, 674-75 (D.C. Cir. 1985) (denying motion for stay of FERC orders).

98. *Id.* at 675 (noting that, even if realized, resulting harm would merely be economic and would not warrant preliminary injunction).

99. See *Yellowstone*, 321 F.3d at 1258 (discussing significant risk of harm standard for irreparable injury); see also *Gonzalez v. Reno*, 2000 U.S. App. LEXIS 7025 (11th Cir. 2000) (granting injunction where plaintiff's removal from U.S. presented "significant risk of irreparable harm" to plaintiff); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000) ("The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experi-

while an injury may not be certain to occur, the injury is not necessarily speculative per se.¹⁰⁰ As long as the plaintiff demonstrates a significant risk of harm, the plaintiff may meet the irreparable harm element necessary to justify a preliminary injunction.¹⁰¹

IV. NARRATIVE ANALYSIS

The primary question before the Tenth Circuit in *Yellowstone* was whether a party must show damage to an entire species to satisfy the irreparable harm element of a preliminary injunction.¹⁰² In earlier proceedings, the district court denied the plaintiffs' request for a preliminary injunction, finding that they had failed to show either a likelihood of prevailing on the merits or irreparable harm.¹⁰³ Relying on *Fund for Animals and Bays' Legal Fund*, the district court held that a party seeking a preliminary injunction must demonstrate that a challenged action will irretrievably damage an entire species in order to satisfy the irreparable harm element.¹⁰⁴

The district court cited two reasons why the plaintiffs had failed to show irreparable harm.¹⁰⁵ First, the district court found that the plaintiffs failed to show that the project had put the bald

ence harm. . . ."); *Lanier Prof'l Servs., Inc. v. Ricci*, 192 F.3d 1, 3 (1st Cir. 1999) (recognizing "significant risk of irreparable harm" as element of preliminary injunction); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) (stating plaintiff must show "significant risk of irreparable harm" in order to satisfy burden for preliminary injunction); *Standard & Poor's Corp., Inc. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (noting "significant risk of irreparable harm to the public supports the preliminary injunction."). Similarly, other circuits recognize a "substantial threat" of irreparable harm. See *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001) (recognizing "substantial threat that plaintiff will suffer irreparable injury" as element of preliminary injunction); *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (recognizing "threat of irreparable harm" as element of preliminary injunction).

100. See *Lanier Prof'l Servs., Inc. v. Ricci*, 192 F.3d 1 (1st Cir. 1999) (finding insufficient evidence to support claim of misappropriated documents on which preliminary injunction claim was based).

101. See *Yellowstone*, 321 F.3d at 1258 (discussing "proposition that purely speculative harm does not amount to irreparable injury").

102. See *id.* at 1256 (explaining district court's finding that plaintiffs failed to show well-being of bald eagle species threatened by challenged action).

103. *Id.* (noting that because district court found that plaintiffs failed to meet burden of satisfying first two elements, it need not consider whether threatened injury outweighed harm that preliminary injunction may cause defendants, or whether injunction, if issued, would adversely affect public interest).

104. See *id.* at 1255-56 (reviewing district court's denial of preliminary injunction under abuse of discretion standard).

105. *Id.* at 1256 (discussing further reasons for district court's rejection of preliminary injunction).

eagle species' continued existence in danger.¹⁰⁶ Second, the district court found that the injuries alleged were too speculative.¹⁰⁷ The Tenth Circuit addressed both parts of the district court's analysis in turn.¹⁰⁸

A. Not Necessary to Show Damage to Entire Species

The Tenth Circuit first rejected the district court's reliance on *Fund for Animals* and *Bays' Legal Fund*.¹⁰⁹ In *Fund for Animals*, the D.C. Circuit stated that to satisfy the irreparable harm requirement for a preliminary injunction, a party must show that a challenged action will "irretrievably" damage an entire species.¹¹⁰ The Tenth Circuit distinguished *Fund for Animals*, concluding that its holding was specific to the facts of that case.¹¹¹ The Tenth Circuit stated that while the birds in *Fund for Animals* were part of an abundant game species, the eagles in *Yellowstone* belonged to a threatened species.¹¹² Furthermore, the Tenth Circuit emphasized that the controversy in *Yellowstone* concerned the main breeding ground for bald eagles in the Greater Yellowstone area, which plays a vital role in sustaining the bald eagle species in that area.¹¹³

Similarly, the Tenth Circuit determined that *Bays' Legal Fund* was inapplicable.¹¹⁴ In that case, the district court addressed whether evidence of irreparable harm for a preliminary injunction could support a claim under the ESA.¹¹⁵ The Tenth Circuit found that *Bays' Legal Fund* merely determined that evidence of such harm

106. *Yellowstone*, 321 F.3d at 1256-58 (explaining element of damage to entire species).

107. *Id.* (describing district court's conclusion that plaintiffs' alleged risk of harm was too speculative).

108. *Id.* at 1256-61 (addressing district court's analysis).

109. *Id.* (explaining district court's error in finding damage to twelve juvenile bald eagles and loss of three bald eagle nests insufficient to warrant preliminary injunction).

110. *Id.* (discussing *Fund For Animals*).

111. *Yellowstone*, 321 F.3d at 1256-57 (noting in *Fund For Animals*, species in question were neither threatened nor endangered).

112. *Id.* (finding that "threatening or eliminating the primary breeding area for bald eagles in the Greater Yellowstone area would have a significant impact on that species in the area.").

113. *Compare Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (noting petitioners' argument that loss of only one bird may satisfy burden for preliminary injunction) with *Yellowstone*, 321 F.3d at 1257 (noting that threatening or destroying important breeding ground would significantly impact area species).

114. *Yellowstone*, 321 F.3d at 1257 (criticizing analogy between ESA claim and preliminary injunction).

115. *Id.* (adding that district court decisions are not binding on circuit courts).

may support an ESA claim, which requires a showing that a particular federal action would jeopardize a species or destroy or otherwise harm its critical habitat.¹¹⁶ The Tenth Circuit explained that the district court in *Bays' Legal Fund* did not consider the preliminary injunction claim, but instead ruled on the merits of the case.¹¹⁷

Because the plaintiffs did not base their claim on the ESA, the Tenth Circuit rejected the contention that the ESA's language should govern the issue of irreparable harm.¹¹⁸ The court noted that here, the plaintiffs based their claim in part on the CWA, which focuses on harm to the "aquatic ecosystem."¹¹⁹ The court also recognized the plaintiffs' contention that eliminating bald eagles from the area in question would surely adversely affect the aquatic ecosystem because of the importance of bald eagles, and the Cabin Creek nest, in particular, to the Greater Yellowstone area.¹²⁰ The Tenth Circuit found further support in *Sierra Club v. Martin*, in which the District Court for the Northern District of Georgia found irreparable harm where a logging operation would destroy certain sensitive or endangered plants and animals and their habitats.¹²¹ Thus, the court concluded that it was unnecessary to demonstrate harm to an entire species to meet the irreparable harm requirement.¹²²

B. Sufficient to Show Significant Risk of Harm

The Tenth Circuit then addressed the district court's decision that the harm alleged was purely speculative and, thus, insufficient to show irreparable injury.¹²³ While the Tenth Circuit agreed with the district court that purely speculative harm does not equate to irreparable harm, it nonetheless held that a plaintiff who demon-

116. *Id.* (discussing finding in *Bays' Legal Fund*). For a discussion of the Endangered Species Act, see *supra* notes 67-70 and accompanying text.

117. *Yellowstone*, 321 F.3d at 1257 (rejecting analysis in *Bays' Legal Fund*).

118. *Id.* at 1257-58 (noting that CWA focuses on harm to "aquatic ecosystem" rather than differentiating between harm to individual animals and harm to entire species).

119. *Id.* at 1257-58 (rejecting application of ESA standard in this case).

120. *See id.* at 1258 (analyzing plaintiffs' claim under CWA standard).

121. *See Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1999) (holding destruction of certain sensitive or endangered plants and animals and their habitats may satisfy burden of irreparable harm for preliminary injunction purposes); *see also Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1340 (S.D. Ala. 2002) (suggesting consideration must be given to "individual members of the species"); *Sierra Club v. Atlanta*, 171 F. Supp. 2d 1349, 1357-62 (discussing irreparable harm) (N.D. Ga. 2001); *cf. Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (addressing challenge to slaughter of individual bison).

122. *Yellowstone*, 321 F.3d at 1258 (rejecting district court's analysis).

123. *Id.* (discussing plaintiffs' failure to show actual harm to species).

strates a significant risk of irreparable harm may still satisfy the irreparable harm requirement.¹²⁴ Next, the Tenth Circuit considered whether the plaintiffs had shown such risk, examining: (1) the Opinion prepared by the Fish and Wildlife Service (FWS), (2) the Biological Assessment (BA) prepared by Pioneer, and (3) the testimony presented at the preliminary injunction hearing.¹²⁵

The court first considered the Opinion issued by FWS.¹²⁶ In the Opinion, FWS predicted the loss of three bald eagle nests due to the Canyon Club and its construction.¹²⁷ The court then examined Pioneer's BA.¹²⁸ First, the court recognized Pioneer's suggestion that it was possible to minimize the adverse effects on bald eagles.¹²⁹ Next, the court cited Pioneer's ultimate finding that the proposed development posed numerous potential harms to the bald eagles.¹³⁰ Finally, the court considered the cumulative impacts on bald eagles in and around the Canyon Club area.¹³¹

The Tenth Circuit then relied on testimony presented at the preliminary injunction hearing.¹³² Robert J. Oakleaf, a Wyoming

124. *See id.* ("An 'irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'") (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000); *see also Lanier Prof'l Servs., Inc. v. Ricci*, 192 F.3d 1,3 (1st Cir. 1999) (noting need to show irreparable harm); *Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) (stating plaintiff must show "significant risk of irreparable harm" to satisfy burden for preliminary injunction); *but see Forest City Daly Hous. v. Town of N. Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999) (noting that purely speculative harm is insufficient to show irreparable injury); *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

125. *See Yellowstone*, 321 F.3d at 1258-59 (criticizing district court's failure to apply "significant risk" standard).

126. *See id.* (discussing evidence Tenth Circuit considered). For a discussion of the Opinion prepared by FWS, see *supra* notes 38-40 and accompanying text.

127. *Yellowstone*, 321 F.3d at 1258-59 (noting FWS' conclusions that proposed development "may affect and is likely to adversely affect bald eagles").

128. *See id.* at 1259 (considering BA prepared by Pioneer). For a further discussion of the BA prepared by Pioneer, see *supra* notes 33-37 and accompanying text.

129. *See Yellowstone*, 321 F.3d at 1259 (explaining that Pioneer recommended implementing mitigation measures and monitoring efforts).

130. *Id.* (noting Pioneer's admission that Canyon Club construction would impose direct effects to bald eagles and their habitats, including disturbances such as noise, human activities, ground disturbance and tree removal).

131. *Id.* (explaining Pioneer's contention that increased recreational land use by Club members, families and guests would result in such cumulative impact).

132. *Id.* Plaintiffs argued that the district court failed to give deference to the Opinion prepared by FWS. *Id.* at 1258 n.10. The court determined that deference may not have been appropriate here because the claim in this case did not come up under the ESA, a statute which FWS administers. *Id.* The court did not decide whether deference was appropriate because it concluded that the evidence

Game and Fish Department biologist, predicted a loss of the three bald eagle nests near the proposed development site.¹³³ Oakleaf testified that it may take anywhere from two to twenty years before such a loss is realized, but he maintained that the project would likely harm the bald eagles.¹³⁴ Ann Deibert, a FWS biologist, conceded that Canyon Club could still take measures to try and save the bald eagles.¹³⁵ Nevertheless, Deibert continued to support FWS's prediction that the proposed development would likely destroy three bald eagle nests.¹³⁶ Finally, the court referred to the testimony of Roy Hugie, a wildlife biologist and president of Pioneer.¹³⁷ Though Hugie conceded that the project could potentially harm the bald eagles, he predicted that the bald eagles' chances of success amidst the development project were strong.¹³⁸

Having concluded that the proposed development posed a significant risk of harm to the bald eagles, the Tenth Circuit considered whether such harm was likely to occur before the district court ruled on the merits.¹³⁹ The court held that to get the preliminary injunction, the plaintiffs must allege that the project's construction

presented at the hearing was sufficient to demonstrate a significant risk of harm. *Id.*

133. *Id.* at 1259 (explaining Oakleaf's prediction was based on increased human activity and removal of significant amount of foraging habitat). Oakleaf also predicted that the greatest threat would be to the Martin Creek nest, followed by either the Dog or Cabin Creek nest. *Id.* In addition, Oakleaf suggested that the project may also place the Elbow Creek nest in danger. *Id.*

134. *Yellowstone*, 321 F.3d at 1259-60 (adding Oakleaf's acknowledgement that bald eagles, in some instances, may tolerate human activity).

135. *Id.* at 1260 (stating Deibert testified that 400 meter buffer zone around nest sites may protect nests, but not foraging areas, which are crucial to successful breeding, and that FWS' prediction of losing three nest areas was worst-case scenario).

136. *Id.* (noting that, despite mitigation measures, Deibert believed that losing three bald eagle nesting territories was likely).

137. *Id.* (discussing Hugie's testimony). Hugie was a witness called by Canyon Club. *Id.*

138. *Id.* (explaining that Hugie suggested bald eagles could adapt to golf course and increased activity and that project may even develop stronger food source than presently exists). Hugie also suggested that course design and other measures could attempt to control human intrusion effects, pointing to the continued existence of Elbow nest despite its proximity to a campground. *Id.* According to the court, "Hugie conceded under cross-examination that he 'wholly agreed' with the proposition that implementation of the project 'has the potential to adversely affect bald eagles.'" *Id.*

139. *Yellowstone*, 321 F.3d at 1260 (suggesting if trial on merits can be conducted before injury occurs, interlocutory relief would be unnecessary) (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)).

would harm bald eagles before, rather than after, its completion.¹⁴⁰ Continuing its analysis, the court found that the construction process posed a significant risk to the eagles.¹⁴¹ Thus, the Tenth Circuit in *Yellowstone* held that a party seeking a preliminary injunction based on harm to a select group of bald eagles need only show a significant risk of harm to that group of eagles rather than to the entire species as a whole.¹⁴²

V. CRITICAL ANALYSIS

The Tenth Circuit's analysis in *Yellowstone*, though it may have overlooked a few points, seems firmly supported and logically reasoned. In finding that a claimant need not establish harm to a species as a whole, the court correctly distinguished two seemingly inapplicable cases from the present case, focusing primarily on the facts at hand and relying on a more analogous case.¹⁴³ Additionally, the Tenth Circuit's adoption and application of the significant risk of harm standard appears to be in harmony with the current legal trend.¹⁴⁴ Furthermore, the Tenth Circuit is not bound by decisions from other circuits and is free to use its own discretion where its circuit's caselaw allows.¹⁴⁵ Finally, the Tenth Circuit's decision demonstrates a policy recognizing the bald eagle's value both as a productive and important member of the Greater Yellowstone ecosystem and also its importance to the United States as a symbol of national heritage.¹⁴⁶

A. Not Necessary to Show Damage to Entire Species

In reversing the district court's decision, the Tenth Circuit properly concluded that irreparable injury did not require a show-

140. *Id.* (noting allegations that only completed project would harm bald eagles would be insufficient to justify preliminary injunction before trial court decides on merits of case).

141. *Id.* (referring to Opinion issued by FWS).

142. *Id.* at 1257-58. The court held that the district court was incorrect in relying on the ESA standard, requiring demonstration of damage to the entire species. *Id.* at 1261. Because the court found that the plaintiffs showed a significant risk of harm to the bald eagles, the court held that the district court abused its discretion in holding the injury to the bald eagles was too speculative to warrant preliminary injunctive relief. *Id.*

143. *See id.* at 1256 (introducing bases for district court's analysis).

144. *See Yellowstone*, at 1258-59 (adopting significant risk of harm standard); *see also supra* note 104.

145. *See Yellowstone*, 321 F.3d at 1257 (stating Tenth Circuit is not bound by rulings of district courts).

146. *See id.* at 1258 (discussing plaintiffs' arguments regarding bald eagles' importance to Snake River area).

ing of harm to an entire species because the two cases relied upon by the district court were inapplicable to this case.¹⁴⁷ Distinguishing *Fund for Animals*, the Tenth Circuit noted that that case involved abundant game species.¹⁴⁸ The court pointed out that the bald eagles in *Yellowstone*, by contrast, were a threatened species under the ESA.¹⁴⁹ Of course, similar to bald eagles, both the greater snow goose and Atlantic brant were protected until FWS proposed the regulation to allow hunting to resume.¹⁵⁰ The court may have overlooked the fact that, like the greater snow goose and Atlantic brant, the bald eagle species has experienced such a strong population resurgence in recent years that FWS is moving towards eliminating them from the ESA list completely.¹⁵¹

Regardless of the similarities between the bald eagles in *Yellowstone* and the game birds in *Fund for Animals*, the type of actions involved in the two cases seems critical in distinguishing them.¹⁵² *Fund for Animals* centered around the hunting of the greater snow goose and Atlantic brant while *Yellowstone* involved damage to the bald eagles' habitat.¹⁵³ *Fund for Animals* referred to the Final EIS, which pointed out that habitat, rather than hunting, was the key factor in determining threat to migratory bird populations.¹⁵⁴ In that document, the Department of the Interior suggested that, so long as habitat conditions are adequate, hunting migratory game birds would not cause long-term population reductions.¹⁵⁵ By contrast, damage to a bald eagle's habitat may pose a great threat to the

147. See *id.* at 1256-58 (discussing *Fund for Animals* and *Bays' Legal Fund* and holding it was abuse of discretion for district court to deny preliminary injunction based on plaintiffs' failure to establish harm to whole species).

148. *Id.* at 1256-57; see also *Fund for Animals*, 530 F.2d at 983 n.2 (citing 1975 FWS wildlife census showing populations of greater snow geese and Atlantic Brant were approximately 190,000 and 120,000, respectively).

149. *Yellowstone*, 321 F.3d at 1256 (addressing district court's analysis in *Fund for Animals*).

150. See *Fund for Animals*, 530 F.2d at 983 n.2 (discussing prohibition against hunting greater snow geese since 1931 when their population was 7,000 and that hunting of Atlantic Brant was discontinued in 1971 due to two years of poor reproduction and depletion by hunting).

151. See *supra* notes 11-13 and accompanying text.

152. Compare *Fund for Animals*, 530 F.2d at 984 (considering regulations allowing hunting of greater snow goose and Atlantic brant) with *Yellowstone*, 321 F.3d at 1256 (considering proposed development project threatening bald eagle nesting territories).

153. *Yellowstone*, 321 F.3d at 1256-57 (distinguishing facts in *Fund for Animals* from those in *Yellowstone*).

154. *Fund for Animals*, 530 F.2d at 986 (clarifying actual threat to migratory bird populations).

155. *Id.* (explaining regulated harvest typically does not lead to long-term population reduction).

species.¹⁵⁶ Thus, even applying the standard articulated by the D.C. Circuit in *Fund for Animals* to the facts in *Yellowstone*, the “destruction or adverse modification” of three bald eagle nests may in itself be sufficient to demonstrate irreparable harm to the entire bald eagle species.¹⁵⁷

Similarly, the Tenth Circuit’s analysis of *Bays’ Legal Fund* seems to indicate that the district court’s reliance on that case was misplaced.¹⁵⁸ As the Tenth Circuit pointed out, the Massachusetts district court in *Bays’ Legal Fund* never directly addressed the plaintiffs’ preliminary injunction claim; instead it ruled on the plaintiffs’ ESA claim.¹⁵⁹ In *Bays’ Legal Fund*, the district court treated plaintiffs’ irreparable harm arguments as support for an ESA claim.¹⁶⁰ The Tenth Circuit in *Yellowstone*, however, dealt directly with the preliminary injunction issue.¹⁶¹ Furthermore, the court recognized that the plaintiffs did not base its claims on the ESA, but rather on the CWA, which uses a different standard.¹⁶²

Additionally, *Bays’ Legal Fund* is factually distinguishable from *Yellowstone*.¹⁶³ In *Bays’ Legal Fund*, the plaintiffs voiced concern over the discharge of nutrients and toxins from the use of the outfall tunnel.¹⁶⁴ The plaintiffs in that case also alluded to the damaging effects of noise from the tunnel construction on the species in the bay.¹⁶⁵ Unlike in *Yellowstone*, however, the plaintiffs in *Bays’ Legal Fund* failed to substantiate their claims with data from agency environmental reports.¹⁶⁶ In a letter to EPA, the National Marine Fish-

156. See *id.* (noting habitat is key factor in sustaining migratory bird populations).

157. See *Yellowstone*, 321 F.3d 1252-53 (discussing bald eagle nesting territories in Canyon Club project area).

158. *Yellowstone*, 321 F.3d at 1257-58 (discussing district court’s erroneous application of *Bays’ Legal Fund*).

159. See *id.*; see also *Bays’ Legal Fund*, 828 F. Supp. at 108-09 (analogizing proof of adverse impact on endangered species requirement under ESA to irreparable harm standard).

160. See *Bays’ Legal Fund*, 828 F. Supp. at 108 (holding that proof of adverse impact on endangered species requirement under ESA is analogous to irreparable harm standard).

161. See *Yellowstone*, 321 F.3d at 1257-58 (rejecting analogy used in *Bays’ Legal Fund* between ESA standard and irreparable harm).

162. See *id.* (addressing claim under CWA).

163. See *Yellowstone*, 321 F.3d at 1253-55 (distinguishing facts from those in *Bays’ Legal Fund*).

164. *Bays’ Legal Fund*, 828 F. Supp. at 108-09 (discussing plaintiffs’ allegation that discharge of nutrients and toxins from tunnel would harm local species).

165. *Id.* at 109-10 (discussing plaintiffs’ allegation that noise from tunnel construction would harm local species).

166. See *id.* at 108-10 (addressing allegations of discharge of nutrients and toxins, as well as potential effects of noise on bay species).

eries Service determined that the tunnel project “will not significantly affect” any of the species in the bays.¹⁶⁷ BAs prepared by EPA in 1988 and 1993 also concluded that the project would not adversely impact the species in the bay area.¹⁶⁸

Finally, the analysis in *Sierra Club v. Martin* seems more applicable to *Yellowstone* than does that of *Fund for Animals or Bays’ Legal Fund*.¹⁶⁹ *Martin*, like *Yellowstone*, involved damage to individual plants and animals rather than to an entire species.¹⁷⁰ In *Martin*, the court found irreparable harm in logging activities that would destroy certain sensitive plants and animals, as well as areas that could provide suitable habitats for certain other sensitive and endangered species.¹⁷¹ Comparing the construction project in *Yellowstone* to the logging project in *Martin*, the Tenth Circuit properly determined that establishing harm to an entire species is not necessary to meet the irreparable harm requirement.¹⁷²

B. Sufficient to Show Significant Risk of Harm

The Tenth Circuit also correctly applied the significant risk of harm standard, considering the substantial number of courts that

167. *Id.* at 106 (discussing NMFS’ “tentative conclusion”).

168. *Id.* at 106-07 (discussing EPA’s findings).

169. *See Yellowstone*, 321 F.3d at 1257-58 (comparing destruction of certain sensitive plants and animals in national forest territory to elimination of bald eagles from Greater Yellowstone area).

170. *Id.* at 1327 (discussing threat to local species).

171. *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996) (continuing that such injury may not be rectified economically, thus adequate remedy does not exist at law).

172. *See Yellowstone*, 321 F.3d at 1258 (applying reasoning of *Martin* to reject ESA standard for determining irreparable harm in a claim based on CWA or NEPA). Interestingly, the Tenth Circuit chose not to address whether the true issue should have been the type of harm, as opposed to the necessary level of harm. *Id.* As *Martin* noted, irreparable harm is not dependant on the significance of the injury, but rather on the type of available remedy. *See Martin*, 71 F. Supp. 2d at 1327 (noting injury is “irreparable” only if no adequate remedy at law exists) (citing *Northeastern Florida Chapter v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)) (stating injury is irreparable only if it cannot be undone through monetary remedies). Thus, it may be argued that any injury is irreparable if it cannot be remedied through monetary damages. *See id.* (explaining when injury may not be rectified economically, adequate remedy does not exist at law); *but see Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”). In *Yellowstone*, it seems clear that the harm to the bald eagles could not have been remedied through monetary damages. *See Yellowstone*, 321 F.3d at 1253-54 (describing potential threat to bald eagles). Nonetheless, the Tenth Circuit chose not to consider this argument, despite its reliance on *Martin*. *See id.* at 1257 n.8 (discussing *Martin*).

recognize and apply this standard.¹⁷³ Furthermore, the evidence the Tenth Circuit considered in finding a significant risk of harm to the bald eagles seemed to weigh in the plaintiffs' favor.¹⁷⁴ The FWS Opinion predicted the loss of three bald eagles' nests due to the Canyon Club's construction.¹⁷⁵ Pioneer's assessments suggested that there were ways to minimize the adverse effects, but they ultimately acknowledged that the proposed development posed various potential harms to the bald eagles.¹⁷⁶

The testimony presented and considered by the Tenth Circuit at the preliminary injunction hearing also suggested that a significant risk of harm threatened the bald eagles.¹⁷⁷ Robert Oakleaf predicted a loss of at least three, if not all four, bald eagle nests.¹⁷⁸ Ann Deibert, a FWS biologist, conceded that measures could be taken to try and save the bald eagles, but she maintained that the proposed development would likely destroy three bald eagle nests.¹⁷⁹ Even Roy Hugie, the president of Pioneer, while optimistic about the bald eagles' chances of success amidst the development project, conceded that the project created the potential to harm the bald eagles.¹⁸⁰

Thus, the Tenth Circuit in *Yellowstone* properly held that a party seeking a preliminary injunction based on harm to a select group of bald eagles needs only to show a significant risk of harm to

173. See *supra* notes 94-101 and accompanying text.

174. See *Yellowstone*, 321 F.3d at 1258-61 (considering evidence of harm to bald eagles in light of significant risk standard).

175. See *id.* at 1258 (noting FWS' conclusions that proposed development "may affect and is likely to adversely affect bald eagles"). For a further discussion of the Opinion prepared by FWS, see *supra* notes 38-40 and accompanying text.

176. See *Yellowstone*, 321 F.3d at 1259 (noting Pioneer's admission that Canyon Club construction would impose direct effects to bald eagles and their habitats, including disturbances such as noise, human activities, ground disturbance and tree removal). For a further discussion of the BA prepared by Pioneer, see *supra* notes 33-37 and accompanying text.

177. See *Yellowstone*, 321 F.3d at 1259-61 (concluding evidence presented at hearing was sufficient to demonstrate significant risk of harm).

178. See *id.* at 1259 (explaining Oakleaf's prediction was based on increased human activity and removal of significant amount of foraging habitat). Oakleaf also predicted that the greatest threat would be to the Martin Creek nest, followed by either the Dog Creek or Cabin Creek nest. *Id.*

179. See *id.* at 1260 (stating Deibert testified that 400 meter buffer zone around nest sites may protect nests but not foraging areas, and FWS' prediction of losing three nest areas was "worst-case scenario").

180. See *id.* (explaining Hugie suggested bald eagles could adapt to environment and project may even develop stronger food source for eagles than presently exists). Hugie also suggested that course design and other measures could attempt to control human intrusion effects, pointing to the continued existence of Elbow nest despite its proximity to a campground. *Id.* (noting Hugie conceded under cross-examination that he agreed project could potentially harm bald eagles).

that group of eagles rather than show damage to the entire species as a whole.¹⁸¹

VI. IMPACT

The Tenth Circuit took advantage of the lack of binding precedent to hand down an environmentally friendly decision in *Yellowstone*.¹⁸² The unmentioned fact, that perhaps was considered in the analysis, was the importance of the bald eagle to both the United States' ecosystem and its national identity.¹⁸³ The court appears to have paved the way for greater protection of the nation's species by lessening the burden of showing irreparable harm involving actions concerning a particular group of animals.¹⁸⁴ Not only did the *Yellowstone* decision relieve parties from showing that a challenged action jeopardizes the continued existence of an entire species, it also adopted and applied a "significant risk of harm" standard in evaluating the type of harm.¹⁸⁵

Bays' Legal Fund may serve as an example of how the standard recognized by the Tenth Circuit may be applied.¹⁸⁶ Under the standard articulated in *Yellowstone*, the court in *Bays' Legal Fund* may have been compelled to issue a preliminary injunction.¹⁸⁷ In that case, as in *Yellowstone*, a construction project threatened members of a protected species.¹⁸⁸ Although the findings related to the alleged harm were not sufficient to substantiate the plaintiffs' claims under the ESA, the alleged threats may have been sufficient to show a significant risk of harm to the species to warrant a preliminary injunction under the *Yellowstone* standard.¹⁸⁹

181. See *id.* at 1258, 1261 (pointing out district court abused its discretion by both relying on ESA standard requiring showing of damage to entire species and by finding injury to bald eagles too speculative).

182. See generally *Yellowstone*, 321 F.3d at 1258-61 (finding sufficient risk of harm to bald eagles to satisfy irreparable harm requirement for preliminary injunction).

183. See *supra* notes 1-3 and accompanying text.

184. See *Yellowstone*, 321 F.3d at 1258, 1261 (holding party seeking preliminary injunction based on harm to select group of bald eagles need only show significant risk of harm to that group of eagles rather than showing damage to entire species).

185. See *id.* (discussing standard of harm review).

186. See *supra* notes 81-87 and accompanying text.

187. See generally *Bays' Legal Fund v. Browner*, 828 F. Supp. 102, 105 (D. Mass. 1993) (consolidating plaintiffs' motions for preliminary injunction with formal review of their claims).

188. See *id.* at 104-05 (introducing facts of case).

189. Compare *Bays' Legal Fund*, 828 F. Supp. at 105-07 (discussing impact of tunnel project on local species), with *Yellowstone*, 321 F.3d at 1258-61 (discussing threats to bald eagles posed by construction project).

The full impact of *Yellowstone* has yet to be seen. It is important to note that the nesting territories threatened in *Yellowstone* were an integral part of the Greater Yellowstone ecosystem.¹⁹⁰ Also, bald eagles, while no longer endangered, are still listed as “threatened” under the ESA.¹⁹¹ Thus, courts may be likely to distinguish *Yellowstone* in subsequent cases challenging actions that involve harm to a less sensitive species or affecting a less significant component of a particular ecosystem.¹⁹²

It is also necessary to recognize that the *Yellowstone* decision only considered one element of the preliminary injunction test: the irreparable harm element.¹⁹³ In order to obtain a preliminary injunction, the plaintiffs must also show that the threatened injury outweighs any harm it might cause defendants and that the injunction, if issued, will not adversely affect the public interest.¹⁹⁴ Furthermore, the plaintiffs must either: (1) show that the issue is ripe for litigation, or (2) demonstrate a likelihood of success on the merits under its NEPA and CWA claims.¹⁹⁵ Nevertheless, in light of the heavy burden required to justify a preliminary injunction, the Tenth Circuit’s decision in *Yellowstone* should be considered a victory for the environment and a significant development in protecting one of the United States’ most majestic species.¹⁹⁶

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190. See *Yellowstone*, 321 F.3d at 1253, 1257-58 (discussing productivity of bald eagle nests in Canyon Club area and their importance to Greater Yellowstone ecosystem).

191. See *supra* notes 10-13 and accompanying text (noting bald eagles listed as “threatened” under ESA though proposal to remove bald eagles from ESA list is pending).

192. See *Yellowstone*, 321 F.3d at 1253 (explaining significance of Canyon Club area bald eagle nests).

193. See *id.* (framing issues related to irreparable harm).

194. See *id.* at 1261-62 (noting remaining inquiries are balance of harms and effect on public interest).

195. See *id.* (noting ripeness may be satisfied by showing that issues are so serious, substantial, difficult and doubtful to be deserving of more deliberate investigation).

196. See *supra* notes 1-3 and accompanying text.

