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Salix v. U.S. Forest Service

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Salix v. U.S. Forest Service, ___F. Supp. 2d___, 2013 WL 2099811, 2013 U.S. Dist. LEXIS 69947 (D. Mont. May 16, 2013).

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I. ABSTRACT

In this case, a federal district court held federal agencies must reinitiate Environmental Species Act (ESA) consultation when critical habitat is designated, even when a prior Biological Opinion (BiOp) has been issued. As threshold matters, the court held that the plaintiffs had standing and that jurisdiction was appropriate. Although the plaintiffs' motion for summary judgment was granted, no projects were enjoined because an adequate showing of irreparable harm was not made. Finally, the court held *Pacific Rivers Council v. Thomas*--holding forest plans are continuing agency actions under the ESA--continues to be binding precedent in the Ninth Circuit despite another circuit holding it had been overruled by the U.S. Supreme Court.

II. INTRODUCTION

In *Salix1*, the United States District Court for the District of Montana ruled in favor of Nolan Salix and the Cottonwood Environmental Law Center (collectively CELC) regarding the United States Forest Service's (USFS) failure to reinitiate consultation under the ESA.² In 2000, the U.S. Fish and Wildlife Service (FWS) listed the Canada lynx found in the contiguous United States as a threatened species under the ESA.³ Subsequently, the USFS developed the Northern Rockies Lynx Amendment (Lynx Amendment).⁴ In 2007, the agency completed ESA Section 7 consultation with the FWS. However, in 2009, the Wildlife Service extended the lynx's designated critical habitat to include areas covered by the Lynx Amendment.⁵

1 *Salix v. U.S. Forest Serv.*, ___F. Supp. 2d___, 2013 WL 2099811 (D. Mont. May 16, 2013).

2 *Id.* at *1.

3 *Id.*

4 *Id.*

5 *Id.*

The district court addressed three issues raised by the USFS: CELC lacked standing to bring a claim; the court lacked jurisdiction because CELC did not provide adequate notice of the suit; and *Pacific Rivers*⁶ had been “effectively overruled.”⁷

III. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns whether or not the USFS’s failure to reinitiate consultation on the Lynx Amendment will negatively affect millions of acres of designated critical habitat for the threatened Canada lynx.⁸ Following the listing of the Lynx in 2000, the USFS developed the Lynx Amendment to its forest plans for eighteen National Forests in the Northern Rockies area.⁹ The Lynx Amendment is programmatic in nature because it provides direction for future management opportunities that will require site-specific environmental analysis tiered to the document.¹⁰

In 2005, as required by Section 7, the USFS initiated formal consultation on the Lynx Amendment with the FWS.¹¹ Because the FWS had not designated critical habitat for lynx on Forest Service lands yet, the consultation did not consider whether the Lynx Amendment would affect the lynx’s critical habitat.¹² In 2007, the consultation was finalized and the FWS issued a BiOp stating the Lynx Amendment would not jeopardize the continued existence of the threatened Canada Lynx.¹³ Accordingly, the USFS incorporated the Lynx Amendment into its management plans for eighteen national forests.¹⁴ In 2009, the FWS extended the lynx’s

6 *Pacific Rivers Council v. Thomas*, 20 F.3d 1050 (9th Cir. 1994).

7 *Salix*, 2013 WL 2099811 at **3, 7, 10.

8 Compl., *Salix v. U. S. Forest Serv.*, 2012 WL 1080186 at ¶ 1 (D. Mont. Mar. 26, 2012) (No. 9:12-cv-00045-DLC).

9 *Salix*, 2013 WL 2099811 at *1.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

designated critical habitat to include areas covered by the Lynx Amendment.¹⁵ CELC alleged this event should have triggered the reinitiation of Section 7 consultation.¹⁶

IV. ANALYSIS

Ruling on cross-motions for summary judgment, the District Court examined the following issues: (1) whether CELC had standing to sue; (2) whether CELC provided adequate notice of the suit; (3) whether a forest plan constitutes an ongoing agency action, requiring an analysis of whether *Pacific Rivers* has been overruled in the Ninth Circuit; (4) whether a triggering event occurred, necessitating the reinitiation of Section 7 consultation; and (5) whether, in terms of relief, specific projects would be enjoined. This case summary will explore the first three issues. The first three issues required lengthy analysis from the court as they represented the USFS' legal argument whereas the final two issues were brief sections that clarified Section 7 provisions.

A. STANDING AND NOTICE

The court offered a tripartite analysis explaining how CELC had standing. First, the USFS argued that *Summers v. Earth Island Inst.*,¹⁷ required plaintiffs who challenged a programmatic regulation to also assert a site-specific, "as-applied" claim against a specific project.¹⁸ The court held that it was not a lack of a project-specific claim that precluded standing in that case; instead, it was the absence of a concrete showing of imminent harm to the plaintiffs' interests.¹⁹ The court went on to hold that CELC sufficiently established an imminent injury to their interests in one national forest affected by the Lynx Amendment.²⁰

¹⁵ *Salix*, 2013 WL 2099811 at *1.

¹⁶ *Salix v. U. S. Forest Serv.*, 2012 WL 1080186 at ¶ 1 (D. Mont. Mar. 26, 2012) (No. 9:12-cv-00045-DLC); *Salix*, 2013 WL 209811 at *2.

¹⁷ *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

¹⁸ *Salix*, 2013 WL 209811 at *3.

¹⁹ *Id.*

²⁰ *Id.*

Second, the court addressed the argument that CELC must prove the limited project-level analysis the agency completed did not compensate for any injury the programmatic plan might cause.²¹ Proof a project-level analysis will not compensate for an injury caused by a programmatic plan is not required when the harm allegedly caused by the programmatic plan is sufficiently imminent and concrete.²² CELC brought the claim under the ESA—and the ESA only guarantees particular procedures are followed. The USFS’s failure to follow these procedures could cause a harm that is uncorrectable by a myopic site-specific analysis. Because the Lynx Amendment advanced a “big-picture” approach to lynx management covering broad levels, the potential for harm was sufficiently imminent to present a ripe controversy.²³

Third, the court made clear that if a plaintiff alleges a procedural violation with a programmatic plan, he need only establish that he has a procedural right that, if exercised, could protect his concrete interests.²⁴

Next, the court was unpersuaded by USFS’s argument that CELC had failed to provide adequate notice of the lawsuit.²⁵ Under the citizen suit provision of the ESA, a plaintiff is required to give a 60-day notice of their intent to sue which cites specific statutory violations, for a court to have jurisdiction.²⁶ CELC’s notice stated that reinitiation of consultation was necessary under Section 7 following the critical habitat designation on National Forest land.²⁷ Further, CELC identified the statutes that were allegedly violated.²⁸ As such, the court found

²¹ *Id.* at *5.

²² *Id.*

²³ *Id.* at *6.

²⁴ *Salix*, 2013 WL 2099811 at *7.

²⁵ *Id.* at *10.

²⁶ *Id.* at *7 (citing 16 U.S.C. § 1540(g)(2)(A)(i), (g)(3)(A); *S.W. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998)).

²⁷ *Id.* at *7.

²⁸ *Id.* at **7-8.

the notice was adequate and jurisdiction was proper.²⁹

B. *Pacific Rivers* AND REINITIATION

After finding CELC had standing to challenge the USFS's failure to reinitiate consultation, the court held that forest plans continue to constitute ongoing agency actions under *Pacific Rivers*.³⁰ In 1994, in *Pacific Rivers*, the Ninth Circuit held that forest plans are continuing agency action under Section 7(a)(2) of the ESA.³¹ Ten years later, in *Norton v. Southern Utah Wilderness Alliance*,³² the United States Supreme Court determined that forest plans are not ongoing agency actions under the National Environmental Policy Act (NEPA). After that, the Tenth Circuit, in *Forest Guardians v. Forsgren*,³³ held *Southern Utah Wilderness Alliance* had overruled *Pacific Rivers*, and an agency is not required to reinitiate consultation on previously approved forest plans even when new species or critical habitat are listed.

The USFS attempted to use *Forest Guardians* and *Southern Utah Wilderness Alliance* to argue that *Pacific Rivers* had been effectively overruled.³⁴ The court found the USFS's argument misplaced because the Supreme Court's decision concerned forest plans under NEPA, not the ESA. The Tenth Circuit's opinion was not binding on the court and not persuasive that *Pacific Rivers*, as it relates to the ESA, had been impliedly abrogated.³⁵ Moreover, the court noted that no other circuit had rejected *Pacific Rivers*.³⁶ Overall, because USFS enacted the Lynx Amendment to set broad standards for lynx management, and all proposed or enacted projects in forests with Canada lynx must be consistent with the Lynx Amendment, the

²⁹ *Id.* at *10.

³⁰ *Salix*, 2013 WL 2099811 at*14.

³¹ *Id.* at *10.

³² *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004).

³³ *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007).

³⁴ *Salix*, 2013 WL 2099811 at *12.

³⁵ *Id.*

³⁶ *Id.*

Amendment cannot be solely advisory.³⁷ Therefore, the court held that the Lynx Amendment, under *Pacific Rivers*, was an ongoing agency action.³⁸

V. CONCLUSION

In this case, the USFS argued that the Ninth Circuit should further the Tenth Circuit's overruling of *Pacific Rivers*. Unpersuaded, the district court made clear *Pacific Rivers* remains good law in the Ninth Circuit, and under the ESA, forest plans are ongoing agency actions. Consequently, agency action is broadly construed in the Ninth Circuit. This case has since been appealed, and if upheld, it will serve as an important primer for the USFS should they challenge what constitutes ongoing agency action in the future.

³⁷ *Id.* at *14.

³⁸ *Id.*