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Alliance for the Wild Rockies and Native Ecosystems Council v. Krueger

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Alliance for the Wild Rockies and Native Ecosystems Council v. Krueger
950 F. Supp. 2d 1196 (D. Mont. 2013).

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ABSTRACT

Environmental plaintiffs demanded injunctions following U.S. Forest Service approval of two fuel reduction projects in the Gallatin National Forest, alleging, inter alia, ESA and NEPA violations. Although both projects had already been challenged in *Salix v. United States Forest Serv.*, Plaintiffs in *Alliance for the Wild Rockies* alleged specific harms, allowing the court to create a new injunction standard for cases involving procedural, programmatic violation of the ESA. The new test harmonizes two conflicting lines of Ninth Circuit precedent.

I. INTRODUCTION

Plaintiffs in *Alliance for the Wild Rockies and Native Ecosystems Council v. Krueger* challenged two U.S. Forest Service ("Forest Service") fuel reduction projects in the Gallatin National Forest.[1] Most notably, plaintiffs alleged that the Service's flawed analysis of project impacts on lynx critical habitat violated the Endangered Species Act ("ESA")[2] and the National Environmental Policy Act ("NEPA").[3] The district court enjoined both projects, creating in the process a new injunction standard for cases of procedural, programmatic violation of the ESA.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2007, the Forest Service adopted the Northern Rockies Lynx Amendment ("Lynx Amendment") to the Gallatin National Forest Land and Resource Management Plan ("LRMP"), thereby laying out "a conservation strategy for the Canada Lynx," a threatened species under the

[1] 950 F. Supp. 2d 1196 (D. Mont. 2013).
[2] 16 U.S.C. § 1531 (2012).
[3] 42 U.S.C. § 4331 (2012).
[4] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1199.

ESA.[5] Before adopting the Amendment, the Forest Service formally consulted with the Fish and Wildlife Service ("FWS") as required under § 7(a)(2) of the ESA to determine whether the Amendment would adversely affect the lynx or its critical habitat.[6] The FWS found that it would not.[7] However, the FWS did not designate any lynx critical habitat within the Gallatin National Forest until February 25, 2009—*after* the required consultation had occurred. Thus, the Lynx Amendment consultation failed to consider "whether and how the amendment would affect *lynx critical habitat*" (emphasis added).[8]

In 2011, the Service authorized the East Boulder Fuels Reduction Project ("Boulder Project").[9] The following year, the Service authorized the Bozeman Municipal Watershed Fuels Reduction Project ("Bozeman Project").[10] Crucially, both projects relied on the pre critical habitat designation analysis of the Lynx Amendment to the LRMP.[11]

Plaintiffs participated in the comment periods for both the Bozeman and Boulder Projects, claiming their constituents would suffer legal injury if either of the projects were implemented.[12] After exhausting their administrative remedies, plaintiffs requested the district court enjoin both projects, alleging the Forest Service's decision to authorize the projects without

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[5] U.S.D.A. Forest Serv., *Gallatin National Forest: Summary of Forest Plan Amendments*, 36, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5130412.pdf (last visited Aug. 31, 2014).
[6] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1199.
[7] *Id.*
[8] *Id.*
[9] U.S.D.A. Forest Serv., *Decision Notice & Finding of No Significant Impact: East Boulder Fuels Reduction Project*, 1, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5322329.docx, (last visited Aug. 31, 2014). (In order to avert highly destructive forest fire, and to protect landowners and firefighters, the Boulder Project calls for "thinning trees and removing ladder fuels and vegetation.")
[10] *Alliance for the Wild Rockies,* 950 F. Supp. 2d at 1198. (The Bozeman Project proposes to "create vegetation and fuel conditions" that would "reduce the risk of excess sediment and ash resulting from a wildfire event from reaching the municipal water treatment plant.") *Record of Decision: Bozeman Municipal Watershed Project*, 1, U.S.D.A. Forest Serv., Gallatin Nat'l Forest (Nov., 2011).
[11] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1198
[12] Pl.'s Compl. ¶ 12 (April 10, 2012).

reinitiating consultation under § 7(a)(2) of the ESA was an arbitrary and capricious abuse of agency power.[13] Once at district court, plaintiffs moved for summary judgment on all claims.[14]

III. DISCUSSION AND ANALYSIS

In *Salix v. United States Forest Serv.*,[15] decided shortly before *Alliance*, the district court considered whether or not the designation of critical habitat triggers "the need for reinitiation of consultation" under § 7(a)(2) of the ESA.[16] Plaintiffs in that case also sought to enjoin the Bozeman and Boulder Projects because of the Forest Service's reliance on the flawed Lynx Amendment.[17] The district court concluded the Lynx Amendment constituted "an ongoing agency action under the ESA," thus requiring that the Service "reinitiate consultation on the Amendment if a triggering event" occurs, and that the designation of lynx critical habitat did indeed necessitate reinitiated consultation.[18] The *Salix* decision, however, did not enjoin either project because the plaintiffs failed to show any irreparable injury to support "the issuance and scope of an injunction."[19]

Alliance for the Wild Rockies thus presented the district court with the opportunity to "articulate the approach for enjoining a specific project."[20] In doing so, the district court created a three-part burden-shifting test for evaluating when injunction of a specific agency project for programmatic violation of the ESA is appropriate.[21] In creating this new standard, the court

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[13] *Id.* at ¶ 1.
[14] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1198.
[15] 944 F. Supp. 2d 984 (D. Mont. 2013).
[16] *Id.* at 1200.
[17] *Salix,* 944 F. Supp. 2d at 987.
[18] *Id.* at 999-1000.
[19] *Id.* at 1001.
[20] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1199.
[21] *Id*.

harmonized two disparate lines of Ninth Circuit precedent regarding injunction standards under the ESA.[22]

Under the first Ninth Circuit approach, a party requesting injunction is not required to show a likelihood of irreparable harm; instead, "irreparable harm is presumed."[23] The agency may then rebut the presumption of irreparable harm if it shows the "challenged action will not jeopardize the species or destroy or adversely modify its critical habitat."[24] Conversely, under the second approach, the plaintiff bears the initial burden of showing that an agency's violation of an ESA procedural requirement will likely result in irreparable harm.[25]

The new test requires the plaintiff to first allege a specific irreparable harm in order to substantiate its claim.[26] To do so, the plaintiff must show that the ESA violation is likely to "jeopardize the continued existence of a specific endangered or threatened species" or "destroy or adversely modify its critical habitat."[27] Requiring allegations of specific, irreparable harm allows the court to fashion a remedy that will "fit the specific harm," should it decide to grant an injunction.[28]

If the plaintiff meets this initial step, the court presumes that the harm alleged would be irreparable.[29] The burden then shifts to the agency to show its action will neither jeopardize the existence of the species, nor destroy or adversely modify its critical habitat.[30] This stage of the test in turn triggers NEPA standards, as merely complying with ESA regulations could permit an

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[22] *Id.* at 1201.
[23] *Id.*
[24] *Id.* (citing *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005)).
[25] *Id.* (citing *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994)).
[26] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1202.
[27] *Id.* at 1202.
[28] *Id.*
[29] *Id.*
[30] *Id.*

agency to ignore "an important aspect of the problem," thereby violating the NEPA mandate that agencies fully consider the environmental ramifications of their decisions[31]

Finally, should the defendant meet its obligations under the second part of the test, the burden shifts back to the plaintiff, who may submit evidence to show that harm resulting from agency action is at least likely.[32] In a close question, the benefit of the doubt tips toward the species and its habitat, per the guiding policy of the ESA.[33]

The district court applied this new test to the facts of *Alliance for the Wild Rockies* to hold that (1) plaintiffs alleged specific harms caused by the Bozeman and Boulder Projects and the agencies' ESA violations, and (2) the agencies failed to show that the projects would not destroy or adversely modify lynx critical habitat.[34] The court therefore granted the injunctions.[35]

Crucially, the plaintiffs in *Alliance* alleged the projects would "adversely impact thousands of acres of lynx habitat by, among other things, damaging denning habitat, foraging habitat, and snowshoe hare habitat."[36] These specific harms met the first step of the court's new test—and informed the court exactly what an effective injunction in the case would entail.[37]

IV. CONCLUSION

Alliance for the Wild Rockies weighs both NEPA and ESA demands to produce a seemingly effective, usable test for determining whether an agency project should be enjoined due to a programmatic, procedural error. Additionally, by requiring allegations of specific harm to pass the initial step of the test, this new standard could create a more responsive, informed

[31] *Id.* (citing *Lands Council v. McNair*, 537 F.3d, 981, 993 (9th Cir. 2008).
[32] *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1203.
[33] *Id.*
[34] *Id.* at 1206.
[35] *Id.* at 1207.
[36] *Id.* at 1206.
[37] *Id.* at 1205.

judiciary. In a legal arena where cases frequently turn on scientific studies, this requirement may help courts acquire sufficient information for educated decision making.