

6-30-2014

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### **Recommended Citation**

Michelle Tafoya, Oral Argument Preview, *Salix v. USFS: When Is Agency Consultation Required Under the ESA?*, 75 Mont. L. Rev. Online 13, [https://scholarship.law.umt.edu/mlr\\_online/vol75/iss1/4](https://scholarship.law.umt.edu/mlr_online/vol75/iss1/4).

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***SALIX V. USFS; WHEN IS AGENCY CONSULTATION  
REQUIRED UNDER THE ESA?***

**Michelle Tafoya**

Nos. 13-35624 and 13-35631  
Ninth Circuit Court of Appeals

Oral Argument: Monday, July 7, 2014, 9:00 a.m. in the Portland  
Pioneer Courtroom, Portland, Oregon.

I. INTRODUCTION

Section 7 of the Endangered Species Act (ESA) has been called the “heart of the ESA” because it requires interagency consultation before undertaking actions that may harm endangered species.<sup>1</sup> In *Salix v. United States Forest Service*, the United States District Court held the United States Forest Service (USFS) had to reinitiate consultation on a management plan amendment after the Fish and Wildlife Service (FWS) belatedly designated critical habitat for the Canada lynx.<sup>2</sup> On appeal, the Ninth Circuit will address two other issues common to ESA challenges, standing and injunctive relief, in addition to the § 7 consultation requirement.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2000, FWS listed the entire population of the Canada lynx in the contiguous U.S. as a threatened species under the ESA.<sup>3</sup> The listing necessarily involved a significant area of federal land managed by USFS.<sup>4</sup> As mandated by § 7 of the ESA, USFS consulted with FWS on the Northern Rockies Lynx Amendment (Amendment) to supplement USFS management plans.<sup>5</sup> At the time of consultation, FWS had not listed any critical habitat for the lynx on USFS lands despite the statutory requirement that it do so at the time of species listing.<sup>6</sup> Despite this error, FWS approved the Amendment and USFS supplemented 20 national forest management plans in a single Record of Decision.<sup>7</sup>

In 2009, FWS finally designated lynx critical habitat in 11 national forests, almost ten years after the species was listed.<sup>8</sup> Plaintiffs Nolan

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<sup>1</sup> *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

<sup>2</sup> *Salix v. U.S. Forest Serv.*, 944 F. Supp. 2d 984 (D. Mont. 2013).

<sup>3</sup> *Id.* at 986.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; 16 U.S.C. § 1563 (a)(2) (1973).

<sup>6</sup> *Id.*; 16 U.S.C. § 1553 (b)(6)(C) (2003).

<sup>7</sup> *Salix*, 944 F. Supp. 2d at 987.

<sup>8</sup> *Id.*

Salix and the Cottonwood Environmental Law Center (CELC), bringing suit under the ESA's citizen suit provision, contended USFS should have reinitiated consultation on the Amendment after the critical habitat designation.<sup>9</sup> While § 7 remained central to this case, the court also addressed two other issues in detail: whether the plaintiff had Article III standing and whether specific or broad injunctive relief was justified.<sup>10</sup>

The court first held the environmental plaintiffs established the three elements of standing: injury in fact, causation, and redressability.<sup>11</sup> Specifically, the plaintiffs successfully argued that USFS's failure to reinitiate consultation with FWS threatened lynx habitat and, as a result, the plaintiff's opportunity to view lynx in the wild.<sup>12</sup> While the federal defendants claimed the plaintiffs needed to challenge each of the 20 management plans separately to establish standing, the court vehemently disagreed.<sup>13</sup> Citing Ninth Circuit case law, the court held, "plaintiffs may challenge a programmatic regulation that affects multiple forests so long as they allege a particularized injury in a specific area that is affected by the regulation and that will be subject to an agency action that relies on the regulation."<sup>14</sup> The court also found irrelevant the defendant's argument that site specific biological opinions for two projects within lynx critical habitat undermined the plaintiff's injury in fact claim.<sup>15</sup> Consistent with Ninth Circuit precedent, the court ruled that such site specific analysis after the fact cannot cure an initial, procedural failure to conduct an environmental review in the first place.<sup>16</sup>

The court also ruled in favor of the plaintiffs on the consultation issue, rejecting the defendant's argument that the Amendment was not an "agency action" under § 7(a)(2) of the ESA.<sup>17</sup> Instead, the court upheld *Pacific Rivers Council v. Thomas*, a Ninth Circuit case which previously rejected the same argument by USFS.<sup>18</sup> USFS's arguments in this case were based on NEPA case law and a Tenth Circuit decision.<sup>19</sup> However, Ninth Circuit precedent interprets an ESA "agency action" more broadly than a NEPA action, and directly holds forest plans as "ongoing, affirmative agency actions."<sup>20</sup> Ultimately, the court held USFS violated the ESA when it failed to reinitiate consultation with FWS after a statutory triggering event occurred, the lynx critical habitat designation,

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 986.

<sup>11</sup> *Id.* at 987.

<sup>12</sup> *Id.* at 988.

<sup>13</sup> *Salix*, 944 F.Supp.2d at 988.

<sup>14</sup> *Id.* at 989.

<sup>15</sup> *Id.* at 989–991.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 995, 999.

<sup>18</sup> *Id.* at 999; *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

<sup>19</sup> *Salix*, 944 F. Supp. 2d at 996–998.

<sup>20</sup> *Id.* at 997–998.

and ordered USFS to reinstate consultation.<sup>21</sup>

The District Court then turned to the relief requested by the environmental plaintiffs; an injunction on all USFS projects covered by the Amendment.<sup>22</sup> While the court noted the broad standard for imposing injunctive relief in ESA cases, it also turned to Ninth Circuit precedent which directs plaintiffs to show irreparable injury in order to justify such relief.<sup>23</sup> In this case, the plaintiffs claimed the lack of agency analysis would impair their lynx viewing opportunities in two project areas.<sup>24</sup> The court was not satisfied with this argument because there was “no showing that the harm is likely to occur despite the site specific analysis or that the harm is irreparable.”<sup>25</sup> Thus, the court denied the plaintiff’s request for injunctive relief on the specific projects named, or on any other project, covered by the Amendment.<sup>26</sup>

### III. ARGUMENTS FROM THE PARTIES’ BRIEF ON APPEAL

#### *A. Environmental Plaintiff-Appellee CELC*

1. Section 7 gives first priority to endangered species, reflecting a national policy to protect listed species from harmful agency actions.<sup>27</sup> Injunctive relief is the appropriate remedy in this case because long-standing U.S. Supreme Court and Ninth Circuit precedent holds an injunction to be the necessary remedy when a significant procedural violation of the ESA occurs.<sup>28</sup> In ESA cases, “irreparable harm is presumed to flow from a failure to properly evaluate the environmental impact of an agency action.”<sup>29</sup> The defendants mistakenly rely on NEPA cases to support their position to the contrary.<sup>30</sup> However, the ESA’s language shows “Congress intended to depart from the normal requirement of showing a likelihood of irreparable harm before an injunction issues in cases where an agency has not fulfilled its § 7 duties.”<sup>31</sup> A programmatic injunction is appropriate here, even in the absence of site specific challenges and a greater showing of irreparable harm.<sup>32</sup> Alternatively, even if a showing of irreparable harm is required, an injunction is still proper because the plaintiffs have established that

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<sup>21</sup> *Id.* at 1000.

<sup>22</sup> *Id.* at 1001–1002.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1002.

<sup>25</sup> *Salix*, 944 F. Supp. 2d at 1002.

<sup>26</sup> *Id.*

<sup>27</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>28</sup> Pl./Appellee/Cross-Appellant’s Reply Br., *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, at 4–7 (9th Cir. Apr. 7, 2014) (Nos. 13-35624, 13-35631).

<sup>29</sup> *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

<sup>30</sup> Pl./Appellee/Cross-Appellant’s Reply Br., *supra* n. 28, at 5–10.

<sup>31</sup> *Id.* at 9–10.

<sup>32</sup> *Id.*

the Amendment is likely to cause such harm. The lynx was listed under the ESA due to the lack of conservation planning on the part of USFS.<sup>33</sup> The current Amendment allows for forest thinning and other actions that are harmful to lynx critical habitat.<sup>34</sup> Therefore, the application of the Amendment should be enjoined until FWS reinitiates consultation to avoid harmful agency action.<sup>35</sup>

2. CELC is not required to challenge site-specific projects to establish standing in this case. Rather, a “programmatic procedural challenge” is sufficient under Ninth Circuit case law. The plaintiffs identified three site specific projects where the Amendment applies and where they definitely plan to return. They also established imminent, concrete, and particularized harm to their esthetic interest of seeing the lynx in the wild; an injury which can be redressed by ruling in CELC’s favor.<sup>36</sup>

#### *B. Amici Brief in Support of Plaintiff-Appellee*

The brief further reinforces CELC’s argument for injunctive relief. In short, two tourism businesses contend that keystone species such as the lynx are essential to maintain intact ecosystems and the USFS violation of § 7 will harm the Greater Yellowstone economy if an injunction is not issued.<sup>37</sup>

#### *C. Federal Defendants-Appellants USFS*

1. CELC failed to show any concrete, particularized injury caused by USFS’s decision not to reinitiate consultation on the Amendment. To establish standing there must be a distinct, palpable injury.<sup>38</sup> Here, CELC makes “vague or conclusory assertions about hypothetical or abstract harms” which are “devoid of specific facts explaining how the agency’s application of the Lynx Amendment injures its members’ concrete interests.”<sup>39</sup> CELC cannot sidestep the standing requirement by claiming this to be a procedural rights case.<sup>40</sup> Even if it were, procedural challenges like those found in NEPA still require some showing of injury in fact apart from the procedural injury.<sup>41</sup> CELC fails in this regard

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<sup>33</sup> 65 Fed. Reg. 16502, 16082 (March 24, 2000).

<sup>34</sup> Pl./Appellee/Cross-Appellant’s Reply Br., *supra* n. 28, at 17–18.

<sup>35</sup> *Id.* at 18–19.

<sup>36</sup> *Id.* at 25–27.

<sup>37</sup> Br. of Amici Curiae Big Wild Adventures & Nat. Exposures in Support of Cottonwood Env’tl. Law Ctr. and Injunctive Relief, *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, at 2–5 (9th Cir. Jan. 28, 2014) (Nos. 13-35624, 13-35631).

<sup>38</sup> Ans./Reply Br. on Cross-App. for the Fed. Defs., *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, at 2 (9th Cir. Mar. 24, 2014) (Nos. 13-35624, 13-35631).

<sup>39</sup> *Id.* at 4–6.

<sup>40</sup> *Id.* at 8–9.

<sup>41</sup> *Id.* at 10.

because it does not contest a site-specific project caused by the Amendment's application.<sup>42</sup> Thus, CELC fails to prove injury in fact, causation, or redressability and lacks standing in this case.

2. Under the ESA, USFS was not required to reinitiate consultation on the Amendment because USFS did not trigger § 7 via any action on the existing, amended forest plans.<sup>43</sup> CELC's reliance on *Pacific Rivers* is in error because the Supreme Court's opposite ruling on NEPA land use plans overrules the proposition that such plans constitute ongoing agency action.<sup>44</sup> The regulatory definition of the term "action" in NEPA and the ESA are not "meaningfully different" and thus *Pacific Rivers* is effectively overruled.<sup>45</sup> "The ESA, its implementing regulations, and binding case law make clear that the mere existence of a forest plan is not action."<sup>46</sup>

3. The district court properly ruled against injunctive relief in this case because CELC failed to demonstrate irreparable harm.<sup>47</sup> As discussed above, "alleging the deprivation of a procedural right" is insufficient to prove likely harm.<sup>48</sup> Despite CELC's claims, "*Hill* did not establish a presumption in favor of injunctive relief" in ESA cases.<sup>49</sup> Additionally, CELC's requests an overly broad injunction because it asserted injury for only three projects, but requests to enjoin all projects covered by the Amendment.<sup>50</sup>

#### *B. Amici Brief in Support of Defendants-Appellants*

The brief further reinforces USFS's argument that forest plans should no longer be considered an agency action under recent case law.<sup>51</sup> Further, the brief reiterates the contention that injunctive relief is not automatic in ESA cases and should not be granted here due to a lack of irreparable harm.<sup>52</sup>

#### IV. ANALYSIS

As a threshold matter, the Ninth Circuit is likely to affirm the district court's holding in favor of standing. Not only is it rare for standing to fail

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<sup>42</sup> *Id.* at 14.

<sup>43</sup> *Id.* at 27.

<sup>44</sup> *Id.* at 28.

<sup>45</sup> *Id.* at 29–31.

<sup>46</sup> *Id.* at 48.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 50.

<sup>49</sup> *Id.* at 53.

<sup>50</sup> *Id.* at 56–57.

<sup>51</sup> *Mot. of Am. Forest Resource Council, Pub. Lands Council, Mont. Wood Prods. Assn. Inc., Mont. Logging Assn., Associated Logging Contractors, Inc., Cal. Forestry Assn, and Douglas Timber Operators to Appear as Amici Curiae in Support of Fed. Appellants, Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, at 7–11 (9th Cir. Nov. 27, 2013) (Nos. 13-35624, 13-35631).

<sup>52</sup> *Id.* at 23–24.

in environmental cases, but the plaintiffs here have also seemingly followed an established framework for success.<sup>53</sup> Specifically, the plaintiffs contend USFS's failure to reinitiate consultation threatens the lynx and thus their opportunity to see the species in national forests, places where they often recreate and intend to return. The plaintiffs are also likely to overcome USFS's site-specific argument against standing.<sup>54</sup> In two recent cases, the Ninth Circuit allowed the plaintiffs to bring a facial challenge to a forest plan without requiring a challenge to the plan's specific projects.<sup>55</sup>

The plaintiffs also make a good case on the § 7 issue by relying on *Pacific Rivers*, which clearly held forest plans to be ongoing agency actions consistent with ESA consultation requirements.<sup>56</sup> USFS's claim that *Norton*, a 2004 NEPA case, effectively overruled this precedent will likely fail given Ninth Circuit precedent construing ESA "agency actions" more broadly than NEPA's counterpart.<sup>57</sup> Additionally, USFS's reliance on a Tenth Circuit case which explicitly rejected *Pacific Rivers* will likely fail for two reasons: one, no other Circuit has followed the Tenth Circuit's ruling and, second, the Ninth Circuit continued to cite *Pacific Rivers* with approval after *Norton*.<sup>58</sup> Thus, the court will likely require USFS to reinitiate consultation because the Amendment is an ongoing agency action under the ESA.

Finally, the Ninth Circuit will likely affirm the district court's holding against injunctive relief. Not only does the court review the denial of an injunction for an abuse of discretion, the plaintiffs here also fail to allege specific, irreparable harm. Unless the court finds the procedural injury is sufficient to establish harm, the general claim of potentially impaired lynx sightings is simply inadequate to demonstrate irreparable injury.<sup>59</sup>

Lower Court: District of Montana Cause No. CV 12-45-M-DLC;  
Honorable Dana L. Christensen, District Court Judge of the United State  
District Court, District of Montana.

Attorney for Appellants: John Philip Meyer, Cottonwood Environmental  
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<sup>53</sup> George C. Coggins & Robert L. Glicksman, *Pub. Nat. Resources Law* § 8:9, 8:11 (2d ed., C. Boardman 2014).

<sup>54</sup> *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011); *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1023 (9th Cir. 2012).

<sup>55</sup> *Id.*

<sup>56</sup> *Pac. Rivers Council*, 30 F.3d at 1056.

<sup>57</sup> *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012).

<sup>58</sup> *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007); *Salix*, 944 F. Supp. 2d at 997-999.

<sup>59</sup> *Nat. Resources Def. Council v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007).

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