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## Friends of the Wild Swan v. Ashe

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*Friends of the Wild Swan v. Ashe*, \_\_ F. Supp.2d \_\_, 2014 WL 1870370, 2014 U.S. Dist. LEXIS 65378 (D. Mont. May 8, 2014).  
Hannah S. Cail

**ABSTRACT**

In *Friends of the Wild Swan v. Ashe*, the District Court of Montana reviews the reasonableness of the U.S. Fish and Wildlife Service’s delayed preparation of the Canada lynx recovery plan. Environmental organizations brought the action for declaratory and injunctive relief pursuant to the ESA and the APA. In applying the “TRAC factors” and the “rule of reason,” the U.S. District Court for the District of Montana held that the Service’s twelve-year delay was unreasonable. The court ordered the Service propose a schedule, which the court will set as firm after review.

**I. INTRODUCTION**

The U.S. District Court for the District of Montana held in *Friends of the Wild Swan v. Ashe*<sup>1</sup> that the U.S. Fish and Wildlife Service’s (“Service”) delay in creating a recovery plan for the Canada lynx was unreasonable, and the Service must file a proposed schedule within thirty (30) days.<sup>2</sup> Plaintiff environmental groups, Friends of the Wild Swan, Rocky Mountain Wild, Biodiversity Conservation Alliance, and San Juan Citizens Alliance, had fifteen (15) days to file objections to the proposed schedule.<sup>3</sup> The court will set a firm schedule by which the Service must comply based on submissions by all interested parties.<sup>4</sup> The court relied on *Brower v. Evans*<sup>5</sup> in applying the six “TRAC Factors”<sup>6</sup> and a “rule of reason”<sup>7</sup> to determine the reasonableness of time in agency action.

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<sup>1</sup> \_\_ F. Supp.2d \_\_, 2014 WL 1870370 (D. Mont May 8, 2014).

<sup>2</sup> *Id.* at \*4.

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

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

<sup>5</sup> 257 F.3d 1058, 1068 (9th Cir. 2001).

<sup>6</sup> See *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70, 80 (D.C.Cir.1984).

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The Canada lynx was listed as a threatened species under the ESA, 65 Federal Register 16052, on March 24, 2000.<sup>8</sup> At that time the Service did not designate critical habitat, as is required under the ESA, and since then lynx critical habitat designation has been repeatedly litigated.<sup>9</sup> The ESA, 16 U.S.C. § 1533(a), (f), requires the Service to designate critical habitat and create a recovery plan, but does not designate a specific deadline. On March 14, 2013, plaintiff environmental groups filed their complaint requesting an order to declare the Service's delay in preparing a lynx recovery plan unreasonable and compelling the Service to adhere to a set deadline.<sup>10</sup> The Service argued in its cross-motion for summary judgment that the delay is not unreasonable, yet the Service conceded the recovery plan is a mandatory duty that has not yet been met.<sup>11</sup>

## **III. ANALYSIS**

After finding the plaintiffs had standing, the court reviewed the Service's delayed action pursuant to the APA, which authorizes the court to "compel agency action" that is unreasonably delayed.<sup>12</sup> In doing so, the court balanced the six *TRAC* Factors and used a "rule of reason" to determine the Service's inaction amounted to an unreasonable delay.<sup>13</sup>

### A. *TRAC* Factors

The court looked to the six *TRAC* factors as relied upon in *Brower* to balance:

(1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason [;] (3) delays that

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<sup>7</sup> *Ashe* at \*2 (citing *Brower*, 257 F.3d at 1068).

<sup>8</sup> 65 Fed. Reg. 16052 (Mar. 24, 2000).

<sup>9</sup> *Ashe*, 2014 WL 1870370 at \*1.

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

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

<sup>12</sup> *Id.* at \*2 (citing 5 U.S.C. § 706(1) (2012))

<sup>13</sup> *Id.* at \*4.

might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake [;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.<sup>14</sup>

With these factors, the court determined that unless the Service “finds [the] recovery plan will not promote the conservation of the species,” the Service must submit a firm deadline to complete the lynx recovery plan.<sup>15</sup>

#### B. Rule of Reason

Because the ESA directs the development of a recovery plan for listed species but does not include a timetable for it, the court measured the reasonableness of the delay by a “rule of reason” as substantiated by case law and weighed in the *TRAC* factors.<sup>16</sup> Initially, the Service published a recovery plan timeline based on agency guidelines.<sup>17</sup> The guidelines suggest a recovery outline for a listed species be submitted to the regional office within 60 days of listing; approved within 90 days of listing; then a draft Recovery Plan be prepared for public comment and peer review within eighteen (18) months of listing.<sup>18</sup> The final recovery plan should be issued within 30 months of listing, which the court noted would have been in September of 2002, twelve years ago.<sup>19</sup> Although the Service guidelines are not binding, the court noted federal agency opinions provide courts and litigants “a body of experience and informed judgment ... to resort for guidance.”<sup>20</sup>

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<sup>14</sup> *Id.* at \*2 (citing *Brower*, 257 F.3d at 1068).

<sup>15</sup> *Ashe*, 2014 WL 1870370 at \*2 (citing 16 U.S.C. § 1533 (f)(1) (2012)).

<sup>16</sup> *See Brower* 257 F.3d at 1068; *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C.Cir. 1983); *In re Intl. Chemical Workers Union* 958 F.2d 1144, 1149 (D.C.Cir. 1992).

<sup>17</sup> *Ashe*, 2014 WL 1870370 at \*2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

The Service argued the recovery plan is contingent on the pending lynx critical habitat rule, which has been litigated heavily.<sup>21</sup> It also argued the lynx has a high recovery potential, a low threat degree, and therefore is a low priority species.<sup>22</sup> Lastly, it proclaimed that there are twenty other higher priority species needing a recovery plan.<sup>23</sup> The court expressed concern about the Service’s “stutter-step approach,” and determined “that if the deadline is not in place, a new impediment will continually prevent the development of a recovery plan for the lynx in contravention of the ESA . . . . At some point the agency needs to meet the obligation imposed by Congress when it enacted the law.”<sup>24</sup>

The court recognized that a determination of agency delay cannot be made without practical consideration of the significance of the outcome and available agency resources.<sup>25</sup> However, it stated that the Service’s delay justifications “become less persuasive the longer the delay continues.”<sup>26</sup> The court regarded the Service’s most recent self-declared deadline as indicative that it could balance the competing interests and solidify a recovery plan for the lynx.<sup>27</sup> “The history of this case causes a certain skepticism about the agency's self-declared deadlines for initiating recovery planning. Consequently, the Service will be bound by a deadline for recovery planning unless it finds and documents that such a plan will not promote the conservation of the lynx.”<sup>28</sup>

#### **IV. CONCLUSION**

The court in this case applied both the *TRAC* factors and emphasized on a “rule of reason” to determine the Service inaction on a lynx recovery plan was unreasonable. It

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

<sup>22</sup> *Ashe*, 2014 WL 1870370 at \*3.

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

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

<sup>25</sup> *Id.* (citing *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003)).

<sup>26</sup> *Id.* (citing *Intl. Chem.*, 958 F.2d at 1150).

<sup>27</sup> *Ashe*, 2014 WL 1870370 at \*3.

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

expressed doubt that the Service would adhere to self-imposed deadlines for developing the Canada lynx recovery plan. Therefore, it ordered the Service to propose a schedule to complete the recovery plan, by which it must comply after the court's review. On June 25, 2014, the court accepted the Service's proposed forty-three (43) month recovery plan schedule with a deadline of January 15, 2018.<sup>29</sup>

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<sup>29</sup> *Friends of the Wild Swan v. Ashe*, No. 13-cv-57-DWM, \_\_\_F.Supp. 2d, \_\_\_, 2014 WL 1870370 (D. Mont June 25, 2014).