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

Nicholas R. VandenBos\*

INTRODUCTION

The plaintiffs in *Alliance for the Wild Rockies and Native Ecosystems Council v. Krueger* challenged two U.S. Forest Service fuel reduction projects in the Gallatin National Forest (“Forest”).<sup>1</sup> The first, the Bozeman Municipal Watershed Project (“Bozeman Project”) authorized the construction or reopening of ten miles of forest road to facilitate “logging and burning on several thousand acres over a 5-12 year time frame.”<sup>2</sup> The second, the East Boulder Project (“Boulder Project”) involved “650 acres of logging and 2 miles of temporary road construction.”<sup>3</sup>

The plaintiffs mounted a four-pronged challenge to the Projects, alleging that (1) the Forest Service’s flawed analysis of lynx critical habitat violated the Endangered Species Act (“ESA”) and the National Environmental Policy Act (“NEPA”); (2) the Forest Service conducted insufficient analysis of impacts on grizzly bear populations; (3) the Forest Service violated NEPA by failing to adequately monitor several sensitive species in relation to “snag” density; and (4) the Bozeman Project’s authorization of timber harvest in an inventoried roadless area violated NEPA and the Roadless Rule.<sup>4</sup> Of the four issues presented, the inadequate

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

2. *Id.* at 1198.

3. *Id.*

4. *Id.* at 1199, 1207, 1211, 1213.

analysis of lynx critical habitat presents the most noteworthy outcome, as it required the district court to synthesize an injunction standard for cases of procedural, programmatic violation of the ESA.<sup>5</sup>

## I. FACTS AND BACKGROUND

Today, the Custer Gallatin National Forest encompasses 3.1 million acres across southern Montana and northwestern South Dakota, and holds a significant portion of the most extensive intact ecosystem in the continental United States—the Greater Yellowstone.<sup>6</sup> It contains roughly 1 million acres of wilderness, including the Absaroka-Beartooth and Lee Metcalf.<sup>7</sup> In 1987, in compliance with the National Forest Management Act of 1976 (“NFMA”), the then-Gallatin National Forest adopted a Land and Resource Management Plan (“LRMP”), which set forth the procedures through which the “high quality recreational, vegetative, and wildlife resources” found in the Forest were to be administered.<sup>8</sup>

A number of amendments modified the plan in the following years, including, in 2007, the Northern Rockies Lynx Amendment (“Lynx Amendment”), which laid out a “conservation strategy for the Canada Lynx,” a threatened species.<sup>9</sup> Prior to 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 Lynx Amendment

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5. *Id.* at 1199.

6. U.S. Forest Serv., Custer Gallatin National Forest, U.S. DEP’T AGRIC., <http://www.fs.usda.gov/main/custergallatin/about-forest> (last visited April 12, 2015).

7. U.S. Forest Serv., Custer Gallatin National Forest, U.S. DEP’T AGRIC., <http://www.fs.usda.gov/main/custergallatin/home> (last visited April 12, 2015).

8. Gallatin Nat’l Forest Plan, No. i (U.S. Forest Serv., Gallatin Nat’l Forest, 1987).

9. Gallatin National Forest: Summary of Forest Plan Amendments, 1-36, 36 (U.S. Forest Serv., Aug. 17, 2009).

would adversely affect the lynx or its critical habitat.<sup>10</sup> The FWS found it would not.<sup>11</sup> However, the FWS did not designate any lynx critical habitat within the Forest until February 25, 2009—*after* the required consultation had occurred. Thus, the Amendment consultation failed to consider “whether and how the amendment would affect lynx *critical habitat*” (emphasis added).<sup>12</sup>

In November 2011, the Forest Service issued a Record of Decision (“ROD”) authorizing the Bozeman Municipal Watershed Project<sup>13</sup> which proposes to “create vegetation and fuel conditions” reducing the risk of excess sediment and ash from reaching the municipal water treatment plant in the event of a wildfire.”<sup>14</sup> The Bozeman Municipal Watershed encompasses roughly the lower third of the Bozeman and Hyalite Creek drainages, and is classified as a Wildland Urban Interface (“WUI”) due to the significant presence of private homes and other buildings.<sup>15</sup> It provides roughly 80% of the city of Bozeman’s water supply.<sup>16</sup> In 2003, a Forest Service fire risk assessment concluded that conditions at critical points for the water supply presented a considerable risk of large and severe wildfires, and that the ensuing ash and sediment from such fires would become a major source of contamination for Bozeman’s water supply.<sup>17</sup> The 2011 ROD therefore called for selective thinning to reduce wildfire risk, prevent water contamination, and protect private property within the WUI.<sup>18</sup> On March 5, 2012, the Forest Service authorized the Bozeman Project.<sup>19</sup>

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10. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1199.

11. *Id.*

12. *Id.*

13. Compl. ¶ 42, *Alliance for the Wild Rockies*, 950 F. Supp. 2d. at 1199.

14. U.S. FOREST SERV., GALLATIN NAT’L FOREST, BOZEMAN RANGER DIST., RECORD OF DECISION: BOZEMAN MUNICIPAL WATERSHED PROJECT 1-79 (Nov. 2011).

15. *Id.*

16. *Id.* at 2.

17. *Id.* at 5.

18. *Id.* at 5-6.

19. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1198.

The East Boulder Fuels Reduction Project concerned approximately 4,000 acres of Gallatin National Forest land located along the Boulder River Corridor in the Absaroka Mountain Range.<sup>20</sup> The Boulder Project area receives heavy traffic from the Stillwater Mining Corporation's East Boulder Mine as well as from recreational users, and has also been identified as a WUI.<sup>21</sup> As a result of early Forest Service fire suppression policy, trees within the project area have grown so thick that their crowns touch, presenting significant wildfire risk.<sup>22</sup> Additionally, pine beetle infestation has resulted in die-offs among the project area's timber, and high winds frequently blow through the corridor during the fall and summer months.<sup>23</sup> Taken together, these factors "set the stage for a potentially extreme crown fire situation."<sup>24</sup> In order to avert such a fire, and to protect landowners and firefighters, the Boulder Plan calls for "thinning trees and removing ladder fuels and vegetation in the treatment units."<sup>25</sup> Both the Boulder and Bozeman Projects rely on the pre-critical habitat designation analysis of the Lynx Amendment to the LRMP.

## II. PROCEDURAL HISTORY

Plaintiffs Alliance for the Wild Rockies and Native Ecosystems Council participated in the comment periods related to both the Bozeman and Boulder Projects, claiming their constituents would suffer legal injury if the Projects were implemented.<sup>26</sup> Specifically, they alleged the "aesthetic, recreational, scientific, spiritual, and educational interests" of their respective memberships, who had visited the project areas and firmly planned

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20. U.S. FOREST SERV., GALLATIN NAT'L FOREST, YELLOWSTONE RANGER DIST., DECISION NOTICE & FINDING OF NO SIGNIFICANT IMPACT: EAST BOULDER FUELS REDUCTION PROJECT 1-119 (July 2011).

21. *Id.*

22. *Id.* at 3.

23. *Id.*

24. *Id.* at 4.

25. *Id.*

26. Compl., *supra* note 13, at ¶ 12.

to visit again, would be irreparably injured were the Projects approved.<sup>27</sup>

The Bozeman Project faced a series of challenges and reconsiderations before the plaintiffs filed suit in Montana federal district court. After developing a Draft Environmental Impact Statement (“DEIS”) for the Bozeman Project, the Forest Service published notice of public opportunity to comment on October 22, 2007; the plaintiffs timely submitted their comments.<sup>28</sup> The Forest Service subsequently issued notice of the Final Environmental Impact Statement (“FEIS”) and a ROD on March 26, 2010, which the plaintiffs then appealed.<sup>29</sup> In the ensuing year, the Forest Service issued a Supplementary EIS (“SEIS”), which it withdrew for more formal public review before ultimately issuing a revised Final SEIS (“FSEIS”).<sup>30</sup> After appealing the FSEIS, the plaintiffs issued notice, filing suit on April 10, 2012 under the judicial review provision of the Administrative Procedure Act (“APA”) and the citizen suit provision of the ESA.<sup>31</sup>

The Boulder Project met a similar series of administrative challenges before the plaintiffs filed suit. The plaintiffs first commented on the initial Environmental Assessment (“EA”), then appealed the Forest Service’s Finding of No Significant Impact (“FONSI”) on July 19, 2010.<sup>32</sup> After the appeal, the Forest Service withdrew its decision for further analysis before issuing a revised EA, which the plaintiffs also appealed.<sup>33</sup> The Forest Service denied the appeal in early October of 2011, and the plaintiffs issued notice to sue before filing with the court in April.<sup>34</sup> Having exhausted their administrative remedies, the plaintiffs requested the district court enjoin the Bozeman and Boulder Projects, alleging that the Service’s decision was an arbitrary and capricious abuse of agency

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27. *Id.* at ¶¶ 10-12.

28. *Id.* at ¶¶ 35-36.

29. *Id.* at ¶¶ 37-38.

30. *Id.* at ¶¶ 40-42.

31. *Id.* at ¶¶ 44-46.

32. *Id.* at ¶¶ 23-26.

33. *Id.* at ¶¶ 27-31.

34. *Id.* at ¶¶ 32-34.

power.<sup>35</sup> Once at district court, the plaintiffs moved for summary judgment on all claims.<sup>36</sup>

### III. HOLDING

A court may grant summary judgment if a party demonstrates “there is no genuine dispute as to any material fact” and that it “is entitled to judgment as a matter of law.”<sup>37</sup> The district court granted the plaintiffs’ motion for summary judgment on their claim that the Projects violated NEPA and the ESA by failing to adequately consider impacts on lynx critical habitat, enjoined both Projects, and remanded the case to the Forest Service. It held that, because the agencies’ “analyses of primary constituent elements for lynx critical habitat and their analyses of the standards and guidelines in the flawed Lynx Amendment [were] inextricably intertwined and incapable of separation,” the agencies failed to “meet their burden of showing that the Projects [would] not adversely modify lynx critical habitat.”<sup>38</sup> The court awarded summary judgment to the defendants on the other three claims.<sup>39</sup>

### IV. DISCUSSION OF LEGAL BACKGROUND

The Endangered Species Act and the National Environmental Policy Act provide the broad legal framework for the key issue in *Alliance for the Wild Rockies*. Within this framework, the central question presented by the case concerns the ESA standards for granting injunctive relief, and, to the extent that they are implicated by that standard, NEPA requirements for environmental assessments in agency decision making.

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35. *Id.* at ¶ 1.

36. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1198.

37. Fed. R. Civ. P. 56(a).

38. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1199, 1206.

39. *Id.* at 1217.

*A. The Endangered Species Act*

A nearly unanimous Congress passed the Endangered Species Act in 1973.<sup>40</sup> Lawmakers were particularly troubled by how quickly many of the country's species were becoming extinct, and what unknown costs the loss of the "value of this genetic heritage" might inflict.<sup>41</sup> Congressional purpose, then, was to provide "a means whereby the ecosystems upon which endangered or threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species."<sup>42</sup> By the terms of the ESA, an endangered species is one "in danger of extinction throughout all or a significant portion of its range"; a threatened species, meanwhile, is any "which is likely to become an endangered species within the foreseeable future."<sup>43</sup>

The ESA provides a broad body of substantive law. Among its contents are provisions for listing endangered or threatened species, prohibitions against takings of such listed species, provisions requiring consultation with federal agencies, and provisions for enforcement.<sup>44</sup> Because the pertinent issue in *Alliance for the Wild Rockies* deals with the ESA requirements for agency consultation, and for enforcement, this discussion highlights those aspects of the Act.

Section 7(a)(2) of the ESA requires all federal agencies to consult with the FWS prior to undertaking any action that might affect a threatened or endangered species.<sup>45</sup> This consultation should ensure the action is unlikely to either "jeopardize the continued existence" of the species, or "result in the destruction or adverse modification of the [critical] habitat of such species."<sup>46</sup>

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40. JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 289 (4th ed. 2014).

41. *Id.* at 290 (citing H.R. Rep. No. 93-412, at 4-5 (1973)).

42. 16 U.S.C. § 1531(b) (2006).

43. 16 U.S.C. §§ 1532(6), (20) (2006).

44. 16 U.S.C. §§ 1533, 1538, 1536, 1540 (2006).

45. 16 U.S.C. § 1536(a)(2).

46. *Id.*

Critically, the law specifically requires assessing both the existence of the species and destruction or modification of its habitat. Finally, 7(a)(2) requires the consulting agency use “the best scientific and commercial data available” in deciding the likely effects of the contemplated action.<sup>47</sup>

In *Salix v. United States Forest Service*,<sup>48</sup> the court considered whether or not the designation of critical habitat triggers “the need for reinitiation of consultation” under § 7(a)(2).<sup>49</sup> In that case, as in *Alliance for the Wild Rockies*, the plaintiffs sought to enjoin the Bozeman and Boulder Projects because of the Forest Service’s reliance on the flawed Lynx Amendment.<sup>50</sup> The court relied on *Pacific Rivers Council v. Thomas*<sup>51</sup> to find, under Ninth Circuit case law governing forest plans, that the Lynx Amendment constituted “an ongoing agency action under the ESA,” thus requiring the Forest Service to “reinitiate consultation on the Amendment if a triggering event” occurs.<sup>52</sup> The court then applied 50 C.F.R. § 402.16 to conclude that the “designation of critical habitat in 11 national forests to which the Lynx Amendment applies” triggered reinitiated consultation.<sup>53</sup> Specifically, the designation satisfied subsections (b) and (d) of § 402.16, because it revealed “effects of the action that may affect [ . . . ] critical habitat in a manner [ . . . ] not previously considered,” and because the newly designated critical habitat could “be affected by the identified action.”<sup>54</sup>

In so holding, the Ninth Circuit rejected the reasoning of the Tenth Circuit, which has determined that forest plans do not qualify as ongoing agency actions requiring reinitiated FWS consultation.<sup>55</sup> The Tenth Circuit cites the reasoning of the

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47. *Id.*

48. 944 F. Supp. 2d 984 (D. Mont. 2013).

49. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1200.

50. *Salix*, 944 F. Supp. 2d at 987.

51. 30 F.3d 1050 (9th Cir. 1994).

52. *Id.* at 999.

53. *Id.* at 1000.

54. *Id.*

55. *Id.* at 996.

Supreme Court, which has held that NEPA regulations recognize that the approval of a forest plan is a major federal action, but that “the action is complete when the plan is approved,” and thus requires no further consultation.<sup>56</sup> In its reasoning, then, the Ninth Circuit advances the position that the term “agency action” should be more broadly construed under the ESA than it would be under NEPA.<sup>57</sup>

Furthermore, the ESA does not permit consideration of cost in agency decision making. The Supreme Court summed this Congressional purpose in *TVA v. Hill*,<sup>58</sup> stating that Congress’s “plain intent” in enacting the ESA was to “halt and reverse the trend towards species extinction, whatever the cost.”<sup>59</sup> In *TVA*, the Court held the ESA required enjoining a near-finished dam project, in which nearly \$80 million had already been invested, because of the presence of the endangered snail darter perch downstream, clearly demonstrating the regulatory force of the ESA.<sup>60</sup>

Finally, the ESA contains a citizen suit provision, and empowers federal courts to grant injunctive relief in response to suit.<sup>61</sup> In *Salix*, the district court noted the “well-settled” rule empowering courts to “enjoin agency action pending completion of § 7(a)(2) requirements.”<sup>62</sup> It also observed that the “traditional preliminary injunction analysis” of balancing interests “does not apply to injunctions issued pursuant to the ESA.”<sup>63</sup> Instead, the ESA always requires favoring the endangered or threatened species by presuming that irreparable injury will result from the failure to

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56. *Id.* (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 57 (2004)).

57. *Id.* at 997 (citing *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012)).

58. *TVA v. Hill*, 437 U.S. 153 (1978).

59. *Id.* at 184.

60. *Id.* at 153.

61. 16 U.S.C. § 1540(g) (2006).

62. *Salix*, 944 F. Supp. 2d at 1000 (citing *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005)).

63. *Id.* at 1001 (citing *Wash. Toxics*, 413 F.3d at 1035, and *Nat'l Wildlife Fed'n. v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005)).

properly evaluate the environmental impact of agency action.<sup>64</sup> Despite this “liberal” standard, however, the *Salix* decision did not enjoin the projects because the plaintiffs failed to identify “likely and irreparable harm tied to specific projects in Lynx Amendment Forests.”<sup>65</sup>

### *B. The National Environmental Policy Act*

The National Environmental Policy Act, passed in 1969 and enacted in 1970, is another product of an environmentally conscious Congress. Unlike the ESA, NEPA does not provide agencies with substantive environmental law; instead, NEPA governs agency procedure, requiring all federal agencies to create an Environmental Impact Statement before undertaking any major action “significantly affecting the quality of the human environment.”<sup>66</sup> Before conducting a full EIS, an agency may prepare an Environmental Assessment in order to determine whether an EIS is needed.<sup>67</sup> If the agency concludes the action will not cause significant impacts, it must then issue a FONSI.<sup>68</sup>

An EIS serves as “an action forcing device,” ensuring the “policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.”<sup>69</sup> At the “heart” of an EIS is the requirement that agencies “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action; doing so provides the clarity necessary for informed agency decision-making.<sup>70</sup> Merely relying on compliance with the standards required by other regulatory schemes, such as the ESA, will not satisfy this requirement if, in doing so, an agency

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64. *Id.* (citing *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)).

65. *Id.* at 1002.

66. 42 U.S.C. § 4332(c) (2006).

67. 40 C.F.R. § 1508.9(a)(1) (2013).

68. 40 C.F.R. § 1508.13 (2013).

69. 40 C.F.R. § 1502.1 (2013).

70. 40 C.F.R. §§ 1502.14, 1502.14(a) (2013).

nevertheless neglects “an important aspect of the problem” in its decision making process.<sup>71</sup>

Agencies are required to submit a draft EIS for public comment, and to “assess and consider” the comments it receives as it prepares its final EIS.<sup>72</sup> The final EIS must then include the agency’s response to those comments at significant points.<sup>73</sup> Unlike the ESA, NEPA contains no citizen suit provision. Instead, challenges to agency action must be brought under The Administrative Procedures Act.

### *C. The Administrative Procedures Act*

The Administrative Procedures Act, established 1946, allows for judicial review of “final agency action for which there is no other adequate remedy in a court.”<sup>74</sup> Under the APA, private citizens are also granted the right to sue for judicial review of final agency decisions.<sup>75</sup> Although some environmental statutes, such as ESA, provide for citizen suits, others (including NEPA) do not. The APA thus provides a door for citizen action in matters of administrative law.

## V. DISCUSSION AND ANALYSIS

In *Alliance for the Wild Rockies*, 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.<sup>76</sup> In doing so, the court harmonized two disparate lines of Ninth Circuit precedent regarding injunction standards under the ESA.<sup>77</sup>

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71. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

72. 40 C.F.R. §§ 1503.1, 1503.4 (2013).

73. 40 C.F.R. § 1502.9(b) (2013).

74. 5 U.S.C. § 704 (2006).

75. 5 U.S.C. § 702 (2006).

76. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1204.

77. *Id.* at 1202.

In constructing this three-part test, the court drew heavily on the Ninth Circuit's reasoning in *Southwest Center for Biological Diversity v. U.S. Forest Service*.<sup>78</sup> There, the Ninth Circuit considered a request for an injunction under the ESA to halt a grazing project, but refused to enjoin the project because the Forest Service could show it had taken mitigating measures to prevent damage to a threatened minnow and its habitat.<sup>79</sup> *Southwest*, however, was withdrawn for mootness and is therefore not binding precedent in the Ninth Circuit.<sup>80</sup>

Under the first Ninth Circuit approach, a plaintiff who requests injunction is not required to show a likelihood of irreparable harm; instead, "irreparable harm is presumed."<sup>81</sup> However, in *Washington Toxics Coalition v. EPA*,<sup>82</sup> the Ninth Circuit also held that an agency may 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."<sup>83</sup>

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.<sup>84</sup> The district court relied on this rule in refusing to enjoin the Boulder and Bozeman projects in *Salix*, because the plaintiffs did not show any likelihood of irreparable harm resulting from the Forest Service's reliance on the flawed Lynx Amendment, thus making it impossible for the court to "craft a tailored injunction."<sup>85</sup>

From these conflicting precedents, the court fashioned its test. The first step requires the plaintiff to allege a specific

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78. *Id.* at 1203-04 (citing *Sw. Cent. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964 (9th Cir. 2002), opinion withdrawn, 355 F.3d 1203 (2004)).

79. *Sw. Cent. for Biological Diversity*, 307 F.3d at 968, 973-74.

80. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1203.

81. *Id.*

82. 413 F.3d 1024.

83. *Id.* at 1201.

84. *Id.* (citing *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994)).

85. *Id.*

irreparable harm in order to substantiate its claim.<sup>86</sup> In order 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.”<sup>87</sup> Allegations of specific irreparable harm allow the court to fashion a remedy that will fit the specific harm should it decide to grant an injunction.<sup>88</sup>

If the plaintiff meets this initial prong of the test, the court must presume the harm alleged would be irreparable.<sup>89</sup> At this point, the burden shifts to the agency to show its action will neither jeopardize the existence of the species, nor destroy or adversely modify its critical habitat.<sup>90</sup> This stage of the test in turn triggers NEPA standards, as merely complying with ESA regulations might still permit an agency to ignore “an important aspect of the problem,” thereby violating the NEPA mandate that agencies fully consider the environmental ramifications of their decisions.<sup>91</sup>

Finally, should the agency produce evidence demonstrating the project will neither jeopardize a species nor destroy or modify its critical habitat, the burden shifts back to the plaintiff to rebut that evidence.<sup>92</sup> In a close question, the benefit of the doubt tips toward the species and its habitat, per the guiding policy of the ESA as explicated in *TVA*.<sup>93</sup>

The district court applied this new test to the facts of *Alliance for the Wild Rockies* to hold that (1) the plaintiffs alleged specific harms caused by the Projects and the agencies’ ESA violations, and (2) the agencies failed to show that the Projects

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86. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1202.

87. *Id.*

88. *Id.* at 1204.

89. *Id.*

90. *Id.*

91. *Id.* at 1202 (citing *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)); *see also* 40 C.F.R. § 1502.14.

92. *Alliance for the Wild Rockies*, 950 F. Supp. 2d at 1204.

93. *Id.*

would not destroy or adversely modify lynx critical habitat.<sup>94</sup> The court therefore granted the injunction.<sup>95</sup>

Crucially, and unlike in *Salix*, the plaintiffs in *Alliance*, alleged that the Projects would “adversely impact thousands of acres of lynx habitat by, among other things, damaging denning habitat, foraging habitat, and snowshoe hare habitat.”<sup>96</sup> 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.<sup>97</sup>

The agencies attempted to rebut by arguing that, though the Projects would adversely affect lynx critical habitat, the amount affected would be relatively small “in comparison to the total unaffected critical habitat.”<sup>98</sup> Though the court acknowledged that, if considered strictly in terms of ESA regulations, the agencies’ argument had some merit, it held that, because the decision relied heavily on the flawed Lynx Amendment, it provided no “*independent* justification” for a FONSI.<sup>99</sup> Thus, the Forest Service’s failure to reinitiate consultation with the FWS after the lynx critical habitat designation limited its decision-making process and thereby fell short of the NEPA standard governing major agency actions.<sup>100</sup>

This decision presents several noteworthy outcomes. The first stems from the distinction the district court drew in *Salix* between 9th and Tenth Circuit interpretations of forest plans as continuing agency actions when it determined the Forest Service was required to reinitiate consultation with the FWS. This presents the Forest Service and other federal agencies contemplating ESA and NEPA compliance with an interesting jurisdictional problem. In Tenth Circuit jurisdictions, a forest plan is not considered a continuing agency action, and therefore modifications to that plan

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94. *Id.* at 1205-07.

95. *Id.* at 1206.

96. *Id.* at 1204.

97. *Id.*

98. *Id.* at 1205.

99. *Id.* at 1206.

100. *Id.* at 1206-07.

do not require reinitiating consultation with the FWS. In the Ninth Circuit, however, because forest plans are considered continuing actions, reinitiated consultation is required. The question, of course, is with what standard a federal agency should comply.

Because a number of National Forests are part of larger contiguous wild lands, different ESA standards may govern parts of the same ecosystem. The Greater Yellowstone Ecosystem, for instance, encompasses parts of both the Custer Gallatin National Forest and the Shoshone National Forest. The Shoshone lies in Wyoming, within Tenth Circuit jurisdiction, while the Gallatin sits within the 9th. To choose just one easily imaginable scenario, then, a fuel reduction plan with a procedural history mirroring those of the Bozeman and Boulder Projects might well pass Tenth Circuit judicial review, even though it would fail under the ongoing action test utilized in *Alliance for the Wild Rockies*. Clearly, this possibility poses problems from a conservationist point of view, and may also pose broader ESA issues if the effect is to limit protection of species or habitat.

Second, an appeal of the district court's decision also presents an issue for the Ninth Circuit. As described above, the Ninth Circuit has enforced two distinct burden tests for injunctions under the ESA, leaving open the question of whether it will choose to adopt the new test from *Alliance*. A potential answer can be found in *Southwest Center*, in which the Ninth Circuit explored a test similar to the one articulated by the district court in *Alliance*. Though *Southwest Center* was withdrawn, its reasoning may forecast future Ninth Circuit action.

The greatest take-away from *Alliance for the Wild Rockies*, though, is the three-part injunction test itself, which nimbly balances agency and public interests in managing endangered species and their habitat. Particularly noteworthy is how the test blends both ESA and NEPA standards governing programmatic agency decisions. Additionally, by requiring allegations of specific harm to pass the initial step of the test, this new standard could create a more responsive, informed judiciary. In a legal arena where cases frequently turn on scientific studies, this requirement may help courts acquire sufficient information for educated decisions.

Just a few months after deciding *Alliance for the Wild Rockies*, the district court applied its new test to another case involving lynx critical habitat, finding there that the plaintiffs, by not alleging specific irreparable harm, failed to satisfy the injunction standard.<sup>101</sup> As a working test, then, the new ESA injunction standard appears to have legs.

## VI. CONCLUSION

NEPA and the ESA present federal agencies with complex regulatory demands as those agencies make decisions that may impact endangered or threatened species and critical habitat. The ESA, as a substantive body of law, generally provides a greater level of protection for listed species, but NEPA continues to play an important role in ensuring balanced agency decision-making. *Alliance for the Wild Rockies* weighs both NEPA and ESA demands to produce an effective, usable test for determining whether an agency project should be enjoined due to a programmatic, procedural error. In so doing, however, the case also highlights issues of wildland management and uniform application of agency regulation. Conflict around such questions will certainly continue to arise in cases of forest management and endangered species and habitat protection.

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101. *Alliance for the Wild Rockies v. Weber*, 979 F. Supp. 2d. 1118 (D. Mont. 2013).