



Ninth Circuit Lifts the Veil: Explains How to Comply With Endangered Species Act 60-Day Notice Requirement

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The federal Endangered Species Act (ESA) imposes certain procedural hurdles on any would-be plaintiff commencing a citizen suit to compel compliance with the ESA. One of the more substantive requirements is the 60-day notice of suit to the agency. The ESA provides that "[n]o action may be commenced ... prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator" 16 U.S.C. 1540(g)(2)(A). Failure to comply with this requirement has severe consequences: dismissal of the claim. As a result, practitioners have taken a very cautious approach to the 60-day notice requirement, waiting to commence a suit alleging ESA, as well as non-ESA claims until expiration of the 60-day period. In *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, No. 13-35253 (9th Cir. Nov. 20, 2014), however, the Ninth Circuit provided plaintiffs with a little bit of breathing room, holding that plaintiffs may send a 60-day notice, file a complaint alleging non-ESA claims, and then file an amended complaint after the passage of 60-days adding all ESA claims adequately identified in the notice.

The Ninth Circuit's decision represents a significant shift in the law, as federal courts all across the United States have prohibited plaintiffs from amending a complaint to add an ESA claim if the original complaint was filed before the expiration of the 60-days, even if the amendment was filed more than 60 days after the notice was issued. E.g., *Proie v. Nat'l Marine Fisheries Serv.*, No. 11-5955, 2012 U.S. Dist. LEXIS 60779 (W.D. Wash. May 1, 2012). Thus, if a plaintiff wanted to also pursue an ESA claim, it was forced to sit on its non-ESA claims until the passage of the notice period, which meant no temporary restraining order or preliminary injunction motion could be filed for at least 60 days even if there was a clear violation of some other federal statute.

The District Court's Decision Dismissing the Suit

The litigation arose out of a challenge to the helicopter hazing program for bison in the Yellowstone Grizzly Bear Recovery Zone. In order to minimize disease transfer between wild bison and cattle in the Greater Yellowstone Area, the National Park Service adopted an Interagency Bison Management Plan. The Plan concluded that helicopter hazing operations would not adversely affect the Yellowstone grizzly. Because the Yellowstone grizzly is a threatened species under the ESA, the National Park Service prepared a biological evaluation for the Plan, and the U.S. Fish and Wildlife Service concurred in the biological evaluation's determination that hazing activities do not significantly interfere with the normal behavioral patterns of the grizzly bear. A Final Environmental Impact Statement was also prepared for the Plan.

Shortly after all necessary approvals for the Plan had been obtained, plaintiff Alliance for the Wild Rockies sent the Service a 60-day notice of intent to sue. Before the expiration of the 60 days, however, plaintiff filed a complaint alleging violations under the National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA). After the expiration of the 60 days, plaintiff filed an amended complaint adding claims under the ESA. Specifically, plaintiff alleged that the federal agencies failed to comply with the requirements in section 7 of the ESA, and that the hazing operations would result in "take" of the grizzly bear in violation of section 9 of the ESA.

After the parties had fully briefed cross-motions for summary judgment, the federal agencies reinitiated and completed consultation with the U.S. Fish and Wildlife Service regarding the Plan. The district court granted the federal defendants' motion for summary judgment, and denied plaintiff's, finding that plaintiff lacked Article III standing to pursue its claims, that the ESA claims had to be dismissed because plaintiff failed to comply with the 60-day notice requirement, that plaintiff's section 7 claim was moot because the defendants had reinitiated and completed a new round of consultation, and that plaintiff's section 9 claim failed because there was "no evidence in the record" that the hazing resulted in "take." The district court also found in favor of the defendants with respect to the NEPA and NFMA claims.

Ninth Circuit Decision Reversing the Trial Court on the 60-Day Notice Requirement

On appeal, after finding that plaintiff had standing to pursue its claims, the U.S. Court of Appeals for the Ninth Circuit turned to the 60-day notice issue. The Ninth Circuit summarized the issue as follows: "whether Alliance complied with the ESA's 60-day notice requirement when it gave notice of its intent to sue under the ESA but then filed a complaint alleging non-ESA claims, later amending the complaint to add ESA claims after the 60-day notice period had expired." Noting that it had never squarely addressed the issue, the Ninth Circuit analyzed the legislative purpose of the notice requirement.

The Ninth Circuit explained that the purpose for the notice requirement is to provide "federal agencies with an opportunity to 'take responsibility' for enforcing the ESA and to correct any violation short of litigation. . . [T]here is nothing in the ESA that remotely suggests that a potential ESA plaintiff must refrain from commencing suit to pursue other non-ESA claims before the 60-day period expires." Further, the Ninth Circuit stated that if it did not permit a plaintiff to amend to allege ESA claims, it "would be imposing a de facto notice requirement for cases that also potentially raise ESA issues where Congress has explicitly declined to do so." Accordingly, after finding support in other decisions dealing with analogous pre-filing requirements in other laws, the Ninth Circuit found that the plaintiff had complied with the 60-day notice requirement by amending its complaint to add the ESA claims after the expiration of the 60-day period.

While plaintiff won the battle over notice, it lost the war in every other respect, as the Ninth Circuit found that by reinitiating and completing consultation the federal defendants had mooted plaintiff's section 7 challenge, and that even when the evidence is read in the light most favorable to plaintiff there was inadequate evidence of a "take" in violation of section 9. The Ninth Circuit also affirmed the district court's decision on plaintiff's NEPA and NFMA claims.