APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 13-35624, 13-35631
D.C. No. 9:12-cv-00045-DLC

COTTONWOOD ENVIRONMENTAL LAW CENTER,
PLAINTIFF-APPELLEE/CROSS-APPELLANT

v.

UNITED STATES FOREST SERVICE; FAYE KRUEGER,
IN HER OFFICIAL CAPACITY AS REGIONAL FORESTER
FOR THE U.S. FOREST SERVICE, REGION ONE,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Argued and Submitted:
July 7, 2014—Portland, Oregon
Filed: June 17, 2015

OPINION

Appeal from the United States District Court
for the District of Montana
DANA L. CHRISTENSEN, Chief District Judge, Presiding

Before: HARRY PREGERSON, RICHARD A. PAEZ, and PAUL J. WATFORD, Circuit Judges.

PAEZ, Circuit Judge:

Opinion by Judge PAEZ; Partial Concurrence and Partial Dissent by Judge PREGERSON

In 2000, the United States Fish and Wildlife Service ("FWS") listed the Canada lynx, a snow-sturdy cousin to the bobcat, as a threatened species under the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq*. FWS designated critical habitat for the Canada lynx in 2006, but did not include any National Forest System land. Subsequently, the United States Forest Service ("Forest Service") issued standards and guidelines for land management activities on National Forest land that responded to FWS's listing and designation decisions. The Forest Service then initiated consultation with FWS under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2). FWS determined that the Forest Service's standards and guidelines did not jeopardize the Canada lynx. Shortly after completing the consultation process, FWS discovered that its decisions relating to the designation of critical habitat for the Canada lynx were flawed. After re-evaluating the data, FWS designated extensive National Forest land as critical habitat.

In this case, we must decide whether the district court properly determined that the Forest Service violated the ESA when it decided not to reinitiate consultation after the FWS revised its critical habitat designation to include National Forest land. Before doing so, however, we address the Forest Service's arguments that Cottonwood lacks standing to bring its claim and that the claim is not ripe for review. Because we conclude that Cottonwood's claim is justiciable, and that the Forest Service violated the ESA, we proceed to consider whether the district court erred in denying injunctive relief to Cottonwood. Although we affirm the district court's ruling, we remand

for further proceedings to allow Cottonwood an opportunity to make the necessary showing in support of injunctive relief.

I. Background

In 2000, after eight years of litigation by conservation groups, FWS listed the distinct population segment of Canada lynx in the contiguous forty-eight states as a threatened species. *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Contiguous U.S. Distinct Population Segment of the Canada Lynx and Related Rule*, 65 Fed. Reg. 16052-01, 16052, 16061 (Mar. 24, 2000). Six years later, FWS designated 1,841 square miles of land as critical habitat for the Canada lynx. *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 71 Fed. Reg. 66008-01, 66030 (Nov. 9, 2006). The designation included 1,389 square miles in the Northern Rocky Mountains "critical habitat unit."[1] FWS did not, however, designate any National Forest land as critical habitat.

In March 2007, the Forest Service adopted the Northern Rocky Mountains Lynx Management Direction, which is commonly referred to as the "Lynx Amendments." The Lynx Amendments were designed to "incorporate management direction in land management

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[1] FWS divides critical habitat for the Canada lynx into five units, including: Maine ("Unit 1"), Minnesota ("Unit 2"), Northern Rocky Mountains ("Unit 3"), North Cascades ("Unit 4"), and Greater Yellowstone Area ("Unit 5"). *Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 74 Fed. Reg. 8616-01 (Feb. 25, 2009).

plans that conserves and promotes recovery of Canada lynx . . . while preserving the overall multiple-use direction in existing plans." The Lynx Amendments set specific guidelines and standards for permitting activities that are determined likely to have an adverse effect on Canada lynx. These activities include over-the-snow recreational activity, wildland fire management, pre-commercial forest thinning, and other projects that might affect the Canada lynx. The Forest Service amended the Forest Plans[2] for eighteen National Forests to include the Lynx Amendments.

The Forest Service initiated Section 7 consultation with FWS, the consulting agency. FWS issued a biological opinion ("BiOp") in March 2007, which determined that the management direction in the Lynx Amendments did not jeopardize the Canada lynx. The BiOp concluded that "[n]o critical habitat has been designated for this species on Federal lands within the [areas governed by the Lynx Amendments], therefore none will be affected." Just four months later, however, FWS announced that its critical habitat designation had been "improperly influenced by then deputy assistant secretary of the Interior Julie MacDonald and, as a result, may not be supported by the record, may not be adequately explained, or may not comport with the best available scientific and commercial information." *Endangered and Threatened*

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[2] Pursuant to the National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, the Forest Service must promulgate Forest Plans, also known as Land Resource Management Plans, to "guide sustainable, integrated resource management of the resources within the plan area in the context of the broader landscape, giving due consideration to the relative values of the various resources in particular areas." 36 C.F.R. § 219.1(b).

Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 74 Fed. Reg. 8616-01, 8618 (Feb. 25, 2009). In 2009, FWS revised its critical habitat designation upward from 1,841 square miles to 39,000 square miles. *Id.* at 8642. The revised designation included more than 10,000 square miles in the Northern Rocky Mountains critical habitat unit. *Id.* Unlike the 2006 designation, the 2009 revised designation identified critical habitat in eleven National Forests. Despite this significant addition of critical habitat in the National Forests, the Forest Service declined to reinitiate Section 7 consultation with FWS on the Lynx Amendments. Thereafter, FWS issued BiOps determining that two projects within the Gallatin Forest, considered occupied by the Canada lynx, were unlikely to modify or adversely affect the lynx's critical habitat.[3]

In 2012, the Cottonwood Environmental Law Center ("Cottonwood") filed this action in district court alleging that the Forest Service violated the ESA by failing to reinitiate consultation. The parties filed cross-motions for summary judgment. The court ruled that the revised designation of critical habitat for the Canada lynx required reinitiation of Section 7 consultation on the Lynx Amendments. *Salix v. U.S. Forest Serv.*, 944 F. Supp. 2d 984, 986 (D. Mont. 2013). Although the court granted summary judgment to Cottonwood and ordered reinitiation of consultation, it declined to enjoin any specific project. *Salix*, 944 F. Supp. 2d at 1000-02.

The parties filed timely cross-appeals.[4]

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[3] *See infra* notes 6 and 8.

[4] We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Standard of Review

We review de novo a district court's decisions on cross-motions for summary judgment. *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 989 (9th Cir. 2005). We also review de novo a district court's rulings on questions of standing and ripeness. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). We review the denial of injunctive relief for abuse of discretion. *Dep't of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006).

III. Standing

The Forest Service first argues that Cottonwood lacks Article III standing to challenge the Lynx Amendments because it brought a programmatic challenge, rather than a challenge to a specific implementing project that poses an imminent risk of harm to its members. As discussed below, we conclude otherwise.

A.

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). An association or organization has standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members

in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An organization can satisfy the concrete harm requirement by alleging "an injury to the recreational or even the mere esthetic interests" of its members. *Jayne v. Sherman*, 706 F.3d 994, 999 (9th Cir. 2013) (internal quotation marks omitted).

The Forest Service argues that the declarations Cottonwood filed in the district court on behalf of its members do not satisfy Article III standing requirements, as articulated in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). In particular, the Forest Service argues that Cottonwood does not have standing because Cottonwood only challenges the failure to reinitiate consultation, rather than particular actions that would more directly injure Cottonwood's members. In *Summers*, a group of environmental organizations sought a nationwide injunction against the enforcement of regulations issued by the Forest Service that exempted small-scale fire-control and timber-salvage projects from the notice, comment, and appeal process that applied to more substantial land management decisions. *Id.* at 490. Plaintiffs also specifically challenged a 238-acre salvage sale of timber, called the Burnt Ridge Project, in the Sequoia National Forest. *Id.* at 491. During the course of litigation, the parties settled their dispute over the Burnt Ridge Project. *Id.* After the settlement was in place, the district court proceeded to invalidate five regulations and grant a nationwide injunction enjoining their enforcement. *Id.* at 492. We affirmed. *Id.*

Reversing, the Supreme Court held that the plaintiffs failed to establish injury in fact necessary to satisfy Article III standing requirements. *Id.* at 494-97. The plaintiffs filed only one affidavit—from Jim Bensman, a mem-

ber of one of the plaintiff organizations—that purported to relate a threatened interest beyond the Burnt Ridge Project. *Id.* at 495. The Court held that Bensman's representation of general plans to visit "several unnamed National Forests in the future" was insufficient to establish standing because Bensman "fail[ed] to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan . . . to enjoy the National Forests." *Id.* The Court emphasized that, although Bensman referred to a series of projects in the Allegheny National Forest, Bensman did not "assert . . . any firm intention to visit their locations, saying only that [he] 'wants to' go there. . . . Such 'some day' intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of . . . 'actual or imminent' injury. . . . " *Id.* at 496 (internal quotation marks and citations omitted). Thus, the Court concluded that there was "a chance, but . . . hardly a likelihood, that Bensman's wanderings w[ould] bring him to a parcel about to be affected by a project unlawfully subject to the regulations." *Id.* at 495.

There is a clear contrast between the specificity of Cottonwood's declarations and Bensman's affidavit. Cottonwood's declarations establish that its members extensively utilize specific National Forests where the Lynx Amendments apply and demonstrate their date-certain plans to visit the forests for the express purpose of viewing, enjoying, and studying Canada lynx.[5]

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[5] As specified in the 2007 BiOp, the following National Forests are considered occupied by the Canada lynx: Bridger-Teton, Clearwater, Custer, Flathead, Gallatin, Helena, Idaho Panhandle, Kootenai, Lewis and Clark, Lolo, Shoshone, and the Targhee.

For instance, the declaration of Sara Jane Johnson describes a twenty-year history of lynx-related recreational activity in the Gallatin, Flathead, and Helena National Forests with plans to return in "spring and summer of 2013." Similarly, the declaration of Jennifer Pulchinski describes several past trips she took to the Gallatin and Custer National Forests to look for Canada lynx, and her plans to take a similar trip in "mid-July of 2013." Further, several declarations state that Cottonwood's members engage in lynx-related recreation within specific project areas that have applied, or will apply, the management direction in the Lynx Amendments. For example, Joe Milbrath states that he has "already recreated in the Bozeman Watershed Project area, and ha[s] definitive plans to ski in the area next spring and to look for signs of Canada lynx."[6] Cottonwood's members assert that the Forest Service's failure to reinitiate consultation will cause aesthetic, recreational, scientific, and spiritual injury, in the specific forests and project areas covered by the Lynx Amendments. Unlike Bensman's affidavit in *Summers*, these declarations sufficiently establish "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *See*

The following six National Forests contain lynx habitat, but are not occupied by the Canada lynx: Ashley, Beaverhead-Deerlodge, Bighorn, Bitterroot, Nez Perce, and Salmon-Challis.

[6] The Bozeman Municipal Watershed Fuel Reduction Project area is located in the Gallatin National Forest in Montana. The purpose of the project is to treat vegetation and fuel conditions to diminish the impact of wildland fires in the area. The project includes thinning of mature stands and smaller diameter trees, among other strategies. In November 2009, FWS issued a BiOp concluding that the project was "not likely to result in the destruction or adverse modification of lynx critical habitat."

W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2011) (internal quotation marks omitted); *see also Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010).

B.

This is not the first time we have held that a plaintiff has standing to challenge programmatic management direction without also challenging an implementing project that will cause discrete injury. In *Sierra Forest Legacy*, a post-*Summers* case, we explained that "a procedural injury is complete after [a Forest Plan] has been adopted, so long as [] it is fairly traceable to some action that will affect the plaintiff's interests."[7] 646 F.3d at 1179. As in *Sierra Forest Legacy*, Cottonwood properly

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[7] The Forest Service argues that this is not a procedural rights case. The Forest Service relies on a misreading of *Lujan* to support its argument. Although *Lujan* explained that there can be no standing for the assertion of procedural rights where plaintiffs raise "only a generally available grievance" about the government's failure to comply with a statutory requirement, the Court recognized that procedural rights exist where the violation is connected to a concrete injury. *Lujan*, 504 U.S. at 573 & n.8. Here, Cottonwood does not allege the "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . ," *Summers*, 555 U.S. at 496, but rather "a procedural requirement the disregard of which could impair a separate concrete interest of theirs," *Lujan*, 504 U.S. at 572. Accordingly, along with other circuits, we have recognized a procedural rights theory of standing in the context of alleged Section 7 violations. *See, e.g.*, *Natural Res. Def. Council v. Jewell*, 749 F.3d 776, 782-83 (9th Cir. 2014) (en banc); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008); *In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 977 (D.C. Cir. 2013); *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998).

alleges procedural injury stemming from the Forest Service's decision not to reinitiate consultation on the Lynx Amendments. The declarations connect that procedural injury to imminent harm in specific forests and project areas. Cottonwood was not required to challenge directly any specific project because, as in *Sierra Forest Legacy*, the "procedural injury [was] complete." *See id.*; *see also Jayne*, 706 F.3d at 999-1000 (holding that plaintiffs had standing to challenge a programmatic rule without challenging a specific implementing project).

Although the Forest Service acknowledges that Cottonwood's members have a relationship to the areas affected by the Bozeman Municipal Watershed Project and the East Boulder Fuels Reduction Project,[8] it argues that Cottonwood "failed to link these projects, or the absence of the reinitiation of programmatic consultation, to any specific injury to its members' interests." The Forest Service argues that, because there was Section 7 consultation on these individual projects after the revised critical habitat designation, and because there was a determination that the projects would not have an adverse impact on lynx critical habitat, no injury resulted from the failure to reinitiate consultation on the Lynx Amendments.

The Forest Service's argument is not persuasive as it overlooks a significant aspect of the consultation process.

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[8] The East Boulder Fuels Reduction Project area is located in the Gallatin National Forest in Montana. The purpose of this project is to reduce hazardous fuel loading in the Wildland Urban Interface along the East Boulder River drainage by thinning and clearing vegetation across 872 acres. In March 2009, FWS issued a BiOp concluding that this project was "not likely to result in the destruction or adverse modification of lynx critical habitat."

Although the Forest Service may initiate Section 7 consultation with FWS on individual projects, FWS bases its analysis of those projects largely on the Lynx Amendments and corresponding 2007 BiOp.[9] For instance, the BiOp for the Bozeman Municipal Watershed Fuel Reduction Project ("Bozeman BiOp") cites to the Lynx Amendments and the 2007 BiOp as primary sources of information, and states that individual projects will be evaluated against the standards and guidelines in the Lynx Amendments. In fact, the Bozeman BiOp frames its ultimate conclusion in terms of those standards: "[w]e have determined that the proposed action is in compliance with the [Lynx Amendments], and that its effects on lynx were included in those anticipated and analyzed in the 2007 biological opinion on the [Lynx Amendments]." Thus, even though individual projects may trigger additional Section 7 scrutiny, that scrutiny is dependent, in large part, on the Lynx Amendments and the 2007 BiOp that were completed before critical habitat was designated on National Forest land. Further, project-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level.

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[9] This is consistent with FWS's own explanation of how a programmatic Section 7 consultation will affect consultation on implementing projects: "In issuing its biological opinion on an action, [FWS's] finding under section 7(a)(2) entails an assessment of the degree of impact that action will have on a listed species. Once evaluated, that degree of impact is factored into all future section 7 consultations conducted in the area." *Interagency Cooperation-Endangered Species Act of 1973 as Amended; Final Rule*, 51 Fed. Reg. 19,926-01, 19,932 (June 3, 1986).

C.

The Forest Service's insistence that Cottonwood must establish how the failure to reinitiate consultation on the Lynx Amendments would lead to different, injurious results at the project-specific level places an inappropriate burden on Cottonwood. That is, Cottonwood is not required to establish what a Section 7 consultation would reveal, or what standards would be set, if the Forest Service were to reinitiate consultation. Ideally, that is the objective and purpose of the consultation process. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc). Thus, where a procedural violation is at issue, a plaintiff need not "meet[] all the normal standards for redressability and immediacy."[10] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). In such a case, we have explained that "a litigant need only demonstrate that he has a procedural right that, if exercised, *could* protect his concrete interests and that those interests fall within the zone of interests protected by the statute at issue." *Jewell*, 749 F.3d at 783 (internal alterations and quotations omitted). Cottonwood has properly alleged that the reinitiation of consultation could result in the protection of its members' interests in specific National Forests and project areas where those members recreate. *See id.* Those interests are clearly within the "zone of interests protected by the [ESA]." *See id.*

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[10] As the D.C. Circuit has explained, the doctrine of procedural rights "relieves the plaintiff of the need to demonstrate that (1) the agency action would have been different but for the procedural violation, and (2) court-ordered compliance with the procedure would alter the final result." *In re Endangered Species Act*, 704 F.3d at 977 (internal quotation marks and alterations omitted).

The standing analysis in this case is strikingly similar to our analysis in *Salmon Spawning*, 545 F.3d 1220. In *Salmon Spawning*, an alliance of environmental organizations filed suit against several agencies for failing to reinitiate Section 7 consultation after new information emerged about protected salmon. *Id.* at 1224. Citing *Lujan*, we determined that, because the plaintiffs had properly alleged a procedural harm, the standards for causation and redressability were relaxed. *Id.* at 1229 (citing *Lujan*, 504 U.S. at 572 n.7). We said that "uncertain[ty about] whether reinitiation will ultimately benefit the groups (for example, by resulting in a 'jeopardy' determination) does not undermine [the plaintiffs'] standing." *Salmon Spawning*, 545 F.3d at 1229. Thus, we concluded that the alleged injury—"scientific, educational, aesthetic, recreational, spiritual, conservation, economic, and business interests" in the ongoing survival of the salmon, *id.* at 1225 (internal quotation marks omitted)—was "not too tenuously connected to the agencies' failure to reinitiate consultation," *id.* at 1229. Further, we determined that "a court order requiring the agencies to reinitiate consultation would remedy the harm asserted." *Id.*

As in *Salmon Spawning*, Cottonwood's allegation of a procedural injury relaxes its burden of showing causation and redressability. *See id.* Cottonwood need not show that reinitiation of Section 7 consultation would lead to a different result at either the programmatic or project-specific level. *See id.* Cottonwood's declarations alleging aesthetic, recreational, scientific, and spiritual injury are "not too tenuously connected to [the Forest Service's] failure to reinitiate consultation" to establish standing. *See id.* A court order reinitiating consultation on the

Lynx Amendments would adequately redress the alleged harm. *See id.*

In sum, we hold that the district court properly determined that Cottonwood has standing to pursue its claim.

IV. Ripeness

Rehashing many of its standing arguments, the Forest Service argues that Cottonwood's lawsuit is not ripe for review until, and unless, Cottonwood challenges a particular project that implements the Lynx Amendments. Further, the Forest Service suggests that adjudication of Cottonwood's programmatic challenge at this point is improper because future project-specific consultations might result in mitigation or elimination of any potential harm to Cottonwood's members, thus rendering adjudication unnecessary. We conclude, however, that Cottonwood's lawsuit is ripe for adjudication.

A.

"The doctrine of ripeness prevents courts from becoming involved in abstract questions which have not affected the parties in a concrete way." *S. Cal. Edison Co. v. F.E.R.C.*, 770 F.2d 779, 785 (9th Cir. 1985). To determine ripeness in an agency context, we must consider:

> (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006) (applying this

test to an ESA claim involving FWS). Judicial intervention does not interfere with further administrative action when an agency's decision is "at an administrative resting place." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003). Further, no additional factual development is necessary after a procedural injury has occurred. *See Ohio Forestry Ass'n*, 523 U.S. at 737 (holding that a procedural dispute is ripe "at the time the [procedural] failure takes place").

B.

The Forest Service's arguments rest on the false premise that Cottonwood is pursuing a substantive ESA claim. As explained above, Cottonwood does not argue for a particular substantive result, but rather alleges that the Forest Service failed to comply with the procedural requirements of the ESA when it declined to reinitiate consultation. When a party such as Cottonwood suffers a procedural injury, it "may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* at 737. The imminence of project-specific implementation "is irrelevant to the ripeness of an action raising a procedural injury." *Citizens for Better Forestry*, 341 F.3d at 977; *see also Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993). Because the alleged procedural violation—failure to reinitiate consultation—is complete, so too is the factual development necessary to adjudicate the case. *See Kraayenbrink*, 632 F.3d at 486. Further, because the Forest Service is actively applying the Lynx Amendments at the project-specific level, delayed review would cause hardship to Cottonwood and its members.

The Forest Service's argument that judicial intervention would preclude it from refining its policies and

"adopting additional protective measures" after conducting site-specific analysis misses the point. The Forest Service has completed the Lynx Amendments and refused to reinitiate Section 7 consultation after the 2009 revised critical habitat designation. That decision is ripe for review because it is "at an administrative resting place." *Citizens for Better Forestry*, 341 F.3d at 977; *see also Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) (explaining that a claim is ripe for review when it is not "merely tentative or interlocutory," but rather the agency "has rendered its last word on the matter") *quoting Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001). Any "additional protective measures" would apply only at the project-specific level, not the programmatic level in dispute. There is thus no improper interference with administrative action.

Delayed review would cause Cottonwood and its members further hardship. This dispute requires no additional factual development because the procedural injury has already occurred. Further, judicial intervention will not interfere with further agency action because the agency's decision is at an administrative resting place. We therefore hold that Cottonwood's claim is ripe for review.

V. Reinitiation of Section 7 consultation

We turn to the merits of Cottonwood's argument that the Forest Service violated Section 7 of the ESA by failing to reinitiate consultation on the Lynx Amendments when FWS designated critical habitat on National Forest land. The Forest Service asserts that it had no remaining Section 7 obligations related to the Lynx Amendments "because the Forest Service completed its action in 2007 when it made a final decision to amend the [Forest

Plans]." We disagree and hold that the Forest Service must reinitiate consultation on the Lynx Amendments.

A.

Under Section 7(a)(2) of the ESA,

> [e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species. . . .

16 U.S.C. § 1536(a)(2). If it appears that an action may affect an endangered or threatened species, the consulting agency must provide a biological opinion to the action agency explaining how the action "affects the species or its critical habitat." *Id.* § 1536(b)(3)(A). When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest "reasonable and prudent alternatives." *Id.* If the biological opinion concludes otherwise, then the action is permitted to proceed.

The implementing regulations for the ESA define "action" as "all activities or programs of any kind authorized, funded, or carried out . . . by Federal agencies." 50 C.F.R. § 402.02. The regulation lists, as examples, "actions intended to conserve listed species or their habitat," *id.* § 402.02(a), and "actions directly or indirectly causing modifications to the land, water, or air," *id.* § 402.02(d). There is no dispute that the adoption of the

Lynx Amendments was an action that required consultation and that the 2007 BiOp satisfied the Forest Service's initial Section 7 obligations. However, as noted above, because FWS had decided not to designate any National Forest land as critical habitat, the initial BiOp did not address, or respond to, the impact of the Lynx Amendments on designated critical habitat. The parties disagree about whether the 2009 revised critical habitat designation required reinitiation of Section 7 consultation on the Lynx Amendments.

The Forest Service argues that reinitiation was not required because it had already promulgated the Lynx Amendments and incorporated them into the Forest Plans when the FWS released its revised critical habitat designation. For support, the Forest Service relies on *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) ("*SUWA*"). In *SUWA*, the Supreme Court considered whether the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370, required the U.S. Bureau of Land Management ("BLM") to supplement its environmental review of a land use plan if significant new information emerged after the plan was approved. Applying NEPA, the Court explained that "supplementation is necessary only if there remains 'major Federal action' to occur." *Id.* at 73 (citing 42 U.S.C. § 4332 and 43 C.F.R. § 1601.0-6) (internal quotation marks and alterations omitted). The Court concluded that, because the land use plan was complete upon approval, the BLM had no obligation to supplement its environmental analysis.

In analogizing to *SUWA*, the Forest Service ignores a key difference between NEPA and the regulations gov-

erning reinitiation of consultation under the ESA. The governing ESA regulation states, in relevant part,

> [r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> . . .
>
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> . . . , or
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.[11] Unlike the supplementation of environmental review at issue in *SUWA*, an agency's responsibility to reinitiate consultation does not terminate when the underlying action is complete. Stated another way, there is nothing in the ESA or its implementing regulations that limits reinitiation to situations where there is "ongoing agency action."[12] The 2009 revised critical

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[11] The regulation governing reinitiation of consultation corresponds with the regulation governing consultation, generally. 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.").

[12] The parties vigorously debate whether our opinion in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) is still good law after *SUWA*. In *Pacific Rivers*, we held that the Forest Service was required to reinitiate consultation because Forest Plans

habitat designation clearly meets the requirements of subsections (b) and (d) above. *See id.* The determinative question, therefore, is whether "discretionary Federal involvement or control over the [Lynx Amendments] has been retained or is authorized by law." *See id.*

B.

In *National Association of Home Builders v. Defenders of Wildlife*, the Supreme Court clarified that the regulatory language limiting agencies' Section 7 obligations to actions over which they maintain "*discretionary* Federal involvement or control" is designed to avoid "impliedly repealing nondiscretionary statutory mandates." 551 U.S. 644, 665 (2007). Section 7 does not "attach to actions . . . that an agency is *required* by statute to undertake," because it could lead to an "override" of other statutory authority. *Id.* at 669. Similarly, "[i]n the case where a permit or license ha[s] been granted, reinitiation would not be appropriate unless the permitting or licensing agency retained jurisdiction over the matter under the terms of the permit or license or as otherwise authorized by law." *Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. 19926-01, 19956 (June 3, 1986); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) (holding that

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are "ongoing agency action." *Id.* at 1053. We do not address the viability of *Pacific Rivers*' reasoning after *SUWA* because it is not determinative of whether the Forest Service was required to reinitiate consultation. We certainly agree that where there is "ongoing agency action," an agency may be required to reinitiate consultation. However, even if the agency action is complete and not "ongoing," the agency still may be required to reinitiate consultation if there is "discretionary Federal involvement or control" over the completed action.

there is not sufficient discretion to warrant Section 7 consultation where an agency lacks the ability to influence a private action). In other words, if an agency has no discretion to take any action that might benefit the threatened species, Section 7 consultation would be "a meaningless exercise." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1085 (9th Cir. 2001) ("*EPIC*") (Nelson, J. dissenting) (citing *Sierra Club*, 65 F.3d at 1509); *see also Jewell*, 749 F.3d at 784 ("The agency lacks discretion only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit.").

Here, there is no "nondiscretionary statutory mandate[]," *see Home Builders*, 551 U.S. at 665, nor "legal obligation," *see Jewell*, 749 F.3d at 784, at issue that is beyond the Forest Service's authority. Reinitiation of Section 7 consultation, therefore, could yield important actionable information. The Forest Service remains "involve[d]" in the Forest Plans, 50 C.F.R. § 402.16, because, as *SUWA* itself explained, agencies make additional decisions after approval that implement land use plans at the site-specific level, *see* 542 U.S. at 69-70. Further, the Forest Service retains exclusive "control," 50 C.F.R. § 402.16, over its own Forest Plans throughout their implementation. Indeed, we have repeatedly explained that Forest Plans fall squarely within the "discretionary" parameters of 50 C.F.R. §§ 402.03 and 402.16 because, through the Forest Plans, the Forest Service retains a "continuing ability . . . to control forest management projects. . . . " *Sierra Club*, 65 F.3d at 1509; *see also W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) (explaining our holding in *Pacific Rivers Council*, 30 F.3d at 1053-54, that Section 7 applies to For-

est Plans, because the Forest Service "maintain[s] continuing authority"); *EPIC*, 255 F.3d at 1080.

C.

This is not the first time since *SUWA* that we have decided that an agency has obligations under Section 7 even after the underlying action is complete. In *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024 (9th Cir. 2005), the Environmental Protection Agency ("EPA") argued that, because it had completed registration of fifty-four pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*, it was not required to comply with Section 7. 413 F.3d at 1030-33. Rejecting that argument, we clarified that the appropriate test is not whether the agency has completed its action, but whether it retains regulatory authority over the action. *Id.* at 1033. We concluded that "[b]ecause EPA has continuing authority over pesticide regulation, it has a continuing obligation to follow the requirements of the ESA." *Id.* We explained that it was EPA's discretion to take actions that "inure to the benefit" of protected species that placed the registrations within the ambit of Section 7. *Id.*

As in *Washington Toxics*, it is irrelevant here whether the process of incorporating the Lynx Amendments into the Forest Plans was complete when FWS designated lynx critical habitat on National Forest land. "Because [the Forest Service] has continuing authority over [the Lynx Amendments to the Forest Plans], it has a continuing obligation to follow the requirements of the ESA." *See id.* The Forest Service's "ongoing regulatory authority" provides it "discretionary control to inure to the benefit of [the Canada lynx]." *See id.* (internal quotation marks omitted). Indeed, the Forest Service's deci-

sion to voluntarily reinitiate consultation in some forests, but not in others, demonstrates that it retains discretion and authority over the Lynx Amendments, and that it does not view reinitiation of consultation as a meaningless exercise.

Requiring reinitiation in these circumstances comports with the ESA's statutory command that agencies consult to ensure the "*continued* existence" of listed species. 16 U.S.C. § 1536(a)(2), (4) (emphasis added). The Forest Service's position in this case would relegate the ESA—"the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978)—to a static law that evaluates and responds to the impact of an action before that action takes place, but does not provide for any further evaluation or response when new information emerges that is critical to the evaluation. Here, FWS discovered that its decision on critical habitat had been tainted by an ethical lapse in its own administrative ranks. Re-evaluation of the data generated a drastically different result that justified vast designation of previously unprotected critical habitat. These new protections triggered new obligations. The Forest Service cannot evade its obligations by relying on an analysis it completed before the protections were put in place.

We hold that, pursuant to the ESA's implementing regulations, the Forest Service was required to reinitiate consultation when the FWS designated critical habitat in National Forests. We therefore affirm the district court ruling on this issue.

VI. Injunctive relief

In its cross-appeal, Cottonwood argues that the district court erred when it declined to enjoin "those projects that 'may affect' critical habitat" until the agency has completed the required Section 7 consultation. Cottonwood contends that the court improperly required that it present evidence showing a likelihood of irreparable injury. Cottonwood urges the court to follow our nearly thirty-year-old precedent that relieves plaintiffs of the traditional burden of establishing irreparable harm when seeking injunctive relief to remedy a procedural violation of the ESA. We affirm the district court's denial of injunctive relief but remand for further proceedings.

A.

Under "well-established principles of equity," a plaintiff seeking permanent injunctive relief must satisfy a four-factor test by showing:

> (1) that it has suffered an irreparable injury;
>
> (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

Starting with *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), we have long recognized an exception to the traditional test for injunctive relief when addressing procedural violations under the ESA. *See also Wash.*

Toxics, 413 F.3d at 1035; *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). In *Thomas*, after holding that plaintiffs established a procedural violation of the ESA, we addressed the appropriate remedy. We looked to our case law under NEPA, noting that "[t]he procedural requirements of the ESA are analogous to those of NEPA. . . . " 753 F.2d at 764. We then acknowledged in the NEPA context, we had held that because "[i]rreparable damage is presumed to flow from a failure properly to evaluate" environmental impacts of an agency action, an injunction is typically the appropriate remedy for a Section 7 violation.[13] *Id.* (citing *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 330 (9th Cir. 1975)). Critical to our discussion here was our holding that "[w]e see no reason that the same principle

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[13] In a subsequent case involving a Section 9 illegal take claim, *National Wildlife Federation v. Burlington Northern Railroad*, we held that, although the traditional test for injunctive relief does not apply in ESA cases, "[t]he plaintiff must make a showing that a violation of the ESA is at least likely in the future." 23 F.3d 1508, 1511 (9th Cir. 1994). In that case, it was undisputed that there had been a take of animals within an endangered species, grizzly bears, but we affirmed the denial of injunctive relief because there was insufficient evidence in the record that the defendant's operations would result in a future take of bears. On the surface, there is some tension between *Burlington* and *Thomas*, but there is a fundamental difference between the two cases. *Burlington* involved a discrete incident that resulted in a substantive violation of the ESA, whereas *Thomas* involved a procedural violation. Addressing the procedural aspects of the ESA, we stressed in *Thomas* that there is a presumption of irreparable harm because "there can be no assurance that a violation of the ESA's substantive provisions will not result" from a procedural failure under Section 7. 753 F.2d at 764. Notably, there was no procedural violation at issue in *Burlington*.

should not apply to procedural violations of the ESA." *Id.* In so holding, we explained that "[i]t is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed." *Id.* at 765.

In 2005, we reiterated that "the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA." *Wash. Toxics*, 413 F.3d at 1035. We acknowledged that some "non-jeopardizing agency actions [may] continue during the consultation process," but stated that "the burden should be on the agency [as] the entity that has violated its statutory duty" to establish that the agency action is non-jeopardizing. *Id.*

The Forest Service argues that the *Thomas* presumption of irreparable harm has been effectively overruled by two recent Supreme Court cases addressing injunctive relief in the context of NEPA: *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), and *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). In *Winter*, the Court rejected our test for preliminary injunctive relief in NEPA cases as "too lenient." 555 U.S. at 22. Our precedent had allowed for granting a preliminary injunction upon a showing that irreparable harm was a "possibility." *Id.* The *Winter* Court held that, even in NEPA cases, "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* In *Monsanto*, this time addressing permanent injunctive relief in the context of NEPA, the Court disapproved of cases which do not apply the traditional four-factor test and instead "presume that an injunction is the proper remedy for a NEPA

violation except in unusual circumstances." 561 U.S. at 157. The Court explained that there is nothing in NEPA that allows courts considering injunctive relief to put their "thumb on the scales." *Id.*

B.

The central question here is whether *Winter* and *Monsanto*'s analysis of injunctive relief under NEPA extends to the ESA, or whether the differences between the two statutes warrant a different test. The Supreme Court has explained that

> Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 542 (1987) ("*Amoco*") (internal quotation marks and alterations omitted); *see also eBay*, 547 U.S. at 391-92 (rejecting a presumption in favor of injunctive relief because "[n]othing in the Patent Act indicates that Congress intended such a departure [from the traditional four-factor test]. To the contrary, the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity'" (citing 35 U.S.C. § 283)). Therefore, we must look to the underlying statute to determine whether the traditional test for injunctive relief applies, or whether courts must apply a different test.

There is no question, as firmly recognized by the Supreme Court, that the ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted. *Amoco*, 480 U.S. at 543 n.9 (explaining that the ESA "foreclose[s] the traditional discretion possessed by an equity court"). *Hill* held that courts do not have discretion to balance the parties' competing interests in ESA cases because Congress "afford[ed] first priority to the declared national policy of saving endangered species." 437 U.S. at 185. *Hill* also held that Congress established an unparalleled public interest in the "incalculable" value of preserving endangered species. *Id.* at 187-88. It is the incalculability of the injury that renders the "remedies available at law, such as monetary damages . . . inadequate." *See eBay*, 547 U.S. at 391; *see also Amoco*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages. . . . "); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9th Cir. 2009) (same). But, although *Hill* clarified that the "language, history, and structure" of the ESA, 437 U.S. at 174, remove several factors in the four-factor test from a court's equitable jurisdiction, *Hill* did not resolve whether plaintiffs must establish irreparable injury. That factor was not an issue in *Hill* because there was uncontroverted scientific evidence that completion and operation of the disputed project would "either eradicate the known population of [the listed species] or destroy their critical habitat." *Id.* at 171.

There is nothing in the ESA that explicitly, "or by a necessary and inescapable inference," restricts a court's discretion to decide whether a plaintiff has suffered irreparable injury. *See Amoco*, 480 U.S. at 542 (internal quotation marks omitted); 16 U.S.C. § 1540(g)(1)(A). Al-

though Congress altered the third and fourth prongs of the traditional four-factor test for injunctive relief in ESA cases, *Hill*, 437 U.S. at 185, 187, and the second is generally not at issue in environmental cases, *Amoco*, 480 U.S. at 545, the ESA does not allow courts to put their "thumb on the scales" in evaluating the first prong, *Monsanto*, 561 U.S. at 157. Thus, even though *Winter* and *Monsanto* address NEPA, not the ESA, they nonetheless undermine the theoretical foundation for our prior rulings on injunctive relief in *Thomas* and its progeny. Indeed, *Thomas*'s reasoning explicitly relied on the presumption of irreparable injury that we had previously recognized in the NEPA context.[14] Where Supreme Court precedent "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," the prior circuit precedent is no longer binding. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). We must therefore conclude that there is no presumption of irreparable injury where there has been a procedural violation in ESA cases. A plaintiff must show irreparable injury to justify injunctive relief. In light of the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them, establishing irreparable injury should not be an onerous task for plaintiffs. 16 U.S.C. § 1531.

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[14] Cottonwood argues that since *Winter* and *Monsanto* we have continued to apply *Thomas*'s presumption of irreparable harm, citing *Kraayenbrink*, 632 F.3d at 500, and *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 533 (9th Cir. 2010). Although we determined in both cases that the ESA procedural violation warranted injunctive relief pending compliance with the ESA, we did so without discussing *Winter* and *Monsanto*'s impact on *Thomas*'s presumption of irreparable harm.

C.

The dissent worries that our opinion today will cause "uncertainty" "as a global storm of extinction rages." Dissent at 40. The dissent overstates the significance of our holding. First, our opinion does nothing to disturb the Supreme Court's holding in *Hill* that when evaluating a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors always tip in favor of the protected species. As the Court made unmistakably clear: "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Hill*, 437 U.S. at 194. That fundamental principle remains intact and will continue to guide district courts when confronted with requests for injunctive relief in ESA cases.

Second, we do not dispute that the *Thomas* presumption of irreparable harm virtually assures the grant of injunctive relief to remedy an ESA procedural violation. But that does not mean that without the aid of such a presumption the district courts will be at a disadvantage in remedying procedural violations pending compliance with the ESA. Indeed, as exemplified by several of the cases the dissent cites, district courts are quite capable of identifying harm to protected species, and in crafting an injunction to remedy the precise harm. For instance, in *South Yuba River Citizens League v. National Marine Fisheries Service*, the district court, although acknowledging *Thomas*'s holding, nonetheless held that the plaintiff "must show that irreparable harm to the listed species will result from defendants' violation of the ESA

in the absence of each [protective] measure plaintiffs request." 804 F. Supp. 2d 1045, 1054 (E.D. Cal. 2011). The court proceeded to address the evidence of harm and the relief requested, and granted an injunction to address the harm established by the evidence.

Similarly, in *National Wildlife Federation v. National Marine Fisheries Service*, 839 F. Supp. 2d 1117, 1131 (D. Or. 2011), the plaintiffs moved the district court to order the operators of the Federal Columbia River Power System to maintain previously established spring and summer dam spills along the Columbia River for the protection of endangered salmon species. In ruling on the motion, the court recognized our holding in *Thomas*, but did not stop there. Instead, it proceeded to review the record and found that without certain protective measures sought by the plaintiffs, including the spills, the protected fish would suffer irreparable harm. The court then granted injunctive relief to address the specific harm.

As these cases demonstrate, district courts will not be left adrift without the benefit of *Thomas*'s presumption of irreparable harm. The purposes and objectives of the ESA, as recognized in *Hill*, will continue to provide fundamental direction to the district courts when confronted with a request for injunctive relief to remedy a procedural violation of the ESA. The presumption of irreparable harm, however, as explained above, cannot survive the Court's recent opinions in *Winter* and *Monsanto*.

D.

Although we acknowledge today that *Thomas*'s ruling on injunctive relief is no longer good law, we recognize that it has been the law of the circuit since 1985. Cottonwood should not be faulted for relying on *Thomas*

and its progeny as a basis for injunctive relief. We therefore vacate the district court's denial of injunctive relief and remand on an open record to allow Cottonwood an opportunity to make a showing of irreparable injury.

VII. Conclusion

We affirm the district court's ruling that the Forest Service violated Section 7 of the ESA when it failed to reinitiate consultation after FWS designated critical habitat on National Forest land. We also affirm the district court's denial of injunctive relief to Cottonwood. We remand, however, to provide Cottonwood an opportunity to make an evidentiary showing that specific projects will likely cause irreparable damage to its members' interests.

AFFIRMED AND REMANDED.

The parties shall bear their own costs on appeal.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

Respectfully, I dissent from Section VI of the majority opinion which makes it harder to protect the threatened Canada Lynx and its critical habitat, and puts the species at increased risk. I do not agree with the majority that *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) ("*Thomas*"), should be put into the shredder by inferring that *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), and *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), implicitly "undermine the theoretical foundation for our prior rulings on injunctive relief in *Thomas* and its progeny." Maj. op. at 33. I do not read *Winter* and *Monsanto* as casting a dark shadow on the ESA's legislative purpose and our Ninth Circuit precedent. *Winter* and *Monsanto* are not

"clearly irreconcilable" with *Thomas* as required for a three-judge panel to overturn settled Ninth Circuit case law. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

Winter and *Monsanto* focus on NEPA's—not the ESA's—standard for injunctive relief. *Winter* and *Monsanto* do not address the ESA, which has a unique purpose and history, and still shines as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Home Chapter of Cmtys for a Great Oregon*, 515 U.S. 687, 698 (1995).

The Supreme Court has carefully considered the ESA's purpose and text in terms of a court's equitable powers when faced with an ESA violation. *See TVA v. Hill*, 437 U.S. 153, 173, 193-95 (1978) (finding that it was the plain intent of Congress in enacting the ESA to halt and reverse the trend towards species extinction, whatever the cost, and that an injunction was the appropriate remedy when a nearly-completed, multimillion-dollar dam threatened an endangered snail darter and its critical habitat).

The Supreme Court examined congressional intent to understand how Section 7 of the ESA affected the courts' equitable powers. *Id.* at 183-84. Although the courts ensure compliance with the ESA, as the Supreme Court noted, "Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Discussing *Hill*, the Ninth Circuit has observed that "[courts] have no expert knowledge on the subject of endangered species, much less do [they] have a mandate from the people to strike a balance of equities [against the interests of an

endangered species]." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (internal citations omitted).

The majority asserts that "the ESA does not allow courts to put their thumb on the scales," Maj. op. at 33. But, I remain firmly convinced that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . . " *Sierra Club*, 816 F.2d at 1383. I agree with the Supreme Court that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than [those of the ESA]." *Romero-Barcelo*, 456 U.S at 313 (*citing Hill*, U.S. 437 at 173).

The ESA commands federal agencies to "insure that any action authorized, funded, or carried out by [them] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . . " 16 U.S.C.A. § 1536. "The purpose and language of the statute under consideration in *Hill*, not the bare fact of a statutory violation, compel[an injunction in the face of an ESA violation that threatens critical habitat]." *Romero-Barcelo*, 456 U.S. at 314. "In Congress's view, projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species." *Sierra Club*, 816 F.2d at 1383. Contrary to the majority, I agree with Ninth Circuit precedent holding that "[w]e may not use equity's scales to strike a different balance." *Id.*

The majority's analogy between NEPA and the ESA fails to appreciate the critical difference between these

statutes. The ESA's statutory goal is to substantively provide for the conservation of endangered and threatened species and their ecosystems, 16 U.S.C.A. § 1531(b); whereas NEPA's statutory goals are fundamentally procedural, and designed to create an environmental policy process that promotes the nation's general welfare. 42 U.S.C. § 4331; *see Winter*, 555 U.S. at 23 (remarking that "NEPA itself does not mandate particular results. Instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." (internal citation and quotation marks omitted)).

The substantive purpose of the ESA, conserving endangered and threatened species and their ecosystems, justifies more protective processes than NEPA's purpose, ensuring decision-makers have and consider all important information on environmental impacts. *See Thomas*, 753 F.2d at 764 ("If anything, the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.").

It is important to note that the majority opinion eliminates *Thomas*'s procedural protections as a global storm of extinction rages. *See* S.L Pimms et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 Science 1246752 (2014) (concluding that rates of extinction today are approximately 1,000 times the rate of extinction absent human action); Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* (2014). The uncertainty resulting from the ma-

jority opinion bodes ill for endangered species and the public.

A number of species at risk of extinction have been protected by *Thomas*'s holding, *both in the Ninth Circuit and elsewhere.* *See*, *e.g.*, *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 804 F. Supp. 2d 1045, 1055 (E.D. Cal. 2011) (protecting Chinook salmon, Central Valley Steelhead, and green sturgeon); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d 1029, 1038 (D. Ariz. 2011) (protecting the Mexican spotted owl and New Mexico ridge-nosed rattlesnake); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1131 (D. Or. 2011) (protecting several endangered species of salmon, including Chum, Chinook, Sockeye, and Coho salmon); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. C 03-05509 SI, 2004 WL 3030209, at *6 (N.D. Cal. Dec. 30, 2004) (protecting the Mojave desert tortoise); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1248 (N.D. Cal. 2001) (protecting the shortnose sucker and the Lost River sucker); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066, 1073 (W.D. Wash. 2000) (protecting the Stellar sea lion); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1137 (D. Haw. 2000) (protecting the Hawaiian monk seal); *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1291 (S.D. Fla. 2005), *aff'd sub nom. Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (protecting the Key Largo cotton mouse, Key Deer, Key Largo woodrat, Lower Keys marsh rabbit, Schaus' swallowtail butterfly, silver rice rat, Stock Island tree snail, and Key tree-cactus).

Section VI of the majority opinion states that "[i]n light of the stated purposes of the ESA . . . [,] estab-

lishing irreparable injury should not be an onerous task for plaintiffs." Maj. op. at 34. This may prove more difficult in practice than the majority assumes.

The majority opinion points to *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117 (D. Or. 2011), where a district court seemingly easily identified irreparable harm to endangered salmon species, to demonstrate that district courts will have no difficulty determining the existence of irreparable harm to a species and tailoring injunctions accordingly. Maj. op. at 35-36. Notably, the majority opinion fails to discuss the decades of scientific analysis needed for the district court to identify that harm, beginning with the 1991 listing of the Snake River sockeye salmon as an endangered species under the ESA. *See*, *e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1278878, at *22-32 (D. Or. May 26, 2005) (listing some of the scientific sources considered by the District Court of Oregon during *National Wildlife Federation*'s years of protracted litigation)). A full review of the "Columbia basin salmon saga" demonstrates that the district court's decades-long efforts to analyze the evidence of irreparable harm has resulted in judicial frustration and "status quo dam operations [that] largely continue to inflict high salmon mortalities" even "over two decades after a determination that more than a dozen species of Pacific salmonids require ESA protection." Michael C. Blumm & Aurora Paulsen, *The Role of the Judge in ESA Implementation: District Judge James Redden and the Columbia Basin Salmon Saga*, 32 Stan. Envtl. L.J. 87, 148 (2013) (examining a "paradigmatic example of the limits of judicial review to effectuate real improvements in complex natural resources cases" despite active managerial efforts by the district court).

The outcome of *National Wildlife Federation* is a good example justifying *Thomas*'s holding that an injunction to protect endangered species and their critical habitat must come first.[1] *Thomas*'s holding remains one of the best guarantors of positive outcomes for threatened and endangered species.

Because I would follow settled precedent and protect the Canada Lynx and its critical habitat first, I would apply *Thomas v. Peterson* rather than finding it to be implicitly overturned as the majority does. Thus, I would grant Appellant's request for an injunction pending compliance with the ESA's Section 7 consultation requirements.

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[1] The majority opinion also discusses *South Yuba River Citizens League*, 804 F. Supp. 2d 1045, another ESA case involving the effect of dams on endangered salmon and other fish species, to demonstrate the ability of a district court to "address the evidence of harm and the relief requested, and grant[] an injunction to address the harm established by the evidence." Maj. op. at 35.

But a careful reading of *South Yuba River* finds that *Thomas* provided a critical function in that case, offering the district court a solid foundation for an injunction even when the "data and analysis necessary to determine what measures, precisely, are needed in order to avoid jeopardizing the listed species [were not provided by the government.]" 804 F. Supp. 2d at 1055. Lacking this necessary information, the district court was able to "err on the side of a more protective injunction," relying, in part, on *Thomas*'s holding that, had plaintiffs sought such a remedy, the court could "enjoin the new project entirely." *Id.*

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

No. CV-12-45-M-DLC

NOLAN SALIX; COTTONWOOD ENVIRONMENTAL LAW CENTER, PLAINTIFFS

v.

UNITED STATES FOREST SERVICE; FAYE KRUEGER, IN HER OFFICIAL CAPACITY AS REGIONAL FORESTER FOR THE U.S. FOREST SERVICE, REGION ONE, DEFENDANTS

[Filed: May 16, 2013]

ORDER

Before the Court are the parties' cross-motions for summary judgment. For the reasons discussed below, Plaintiffs' motion is granted and Defendants' motion is denied. As threshold matters, Plaintiffs have standing to challenge the Forest Service's failure to reinitiate section 7 consultation on the programmatic plan amendment at issue here, and the Court has jurisdiction to consider the case because Plaintiffs' notice of intent to sue was adequate. The Court also finds that the Ninth Circuit's decision in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied* 514 U.S. 1082 (1995)

("Pacific Rivers (1994)"), remains good law in this Circuit and that the programmatic plan amendment is thus subject to the Endangered Species Act's requirements that section 7 consultation be reinitiated in certain circumstances. The designation of critical habitat on forest service lands subject to the plan amendment constituted such a triggering event, and the Forest Service violated the Endangered Species Act by failing to reinitiate consultation. While the Forest Service must now reinitiate consultation, the Court will not enjoin any specific projects or grant the broad injunctive relief requested by Plaintiffs because Plaintiffs have not made an adequate showing of irreparable harm to support the scope of the injunctive relief requested.

FACTS

In 2000, the Distinct Population Segment of Canada lynx in the contiguous United States was added to the list of threatened species under the Endangered Species Act ("ESA"). In response, the United States Forest Service ("Forest Service") developed the Northern Rockies Lynx Amendment (the "Lynx Amendment" or "Amendment"), a "programmatic plan amendment[]" to the land and resource management plans ("forest plans") of 18 National Forests in the Northern Rocky Mountains analysis area. The Lynx Amendment is "programmatic in nature, consisting of direction that would be applied to future management activities." AR 2372 at 4; AR 0101(a) at 4; AR 2535 at 8639.

In 2005, the Forest Service initiated formal consultation with the Fish and Wildlife Service ("Wildlife Service") on the Amendment, pursuant to Section 7 of the ESA. At that time, the Wildlife Service had not yet designated any critical habitat for lynx on Forest Service

lands.[1] Thus, the consultation did not include any consideration of whether the Lynx Amendment would affect lynx critical habitat.

Section 7 consultation was completed in 2007 when the Wildlife Service issued a Biological Opinion concluding that the Lynx Amendment would not jeopardize the continued existence of the Canada lynx. In a single Record of Decision, the Forest Service then incorporated the Lynx Amendment into the land and resource management plans for 18 national forests.

On February 25, 2009, the Wildlife Service extended critical habitat protections to additional lands in Idaho, Montana, and Wyoming that were already occupied by lynx, including areas within 11 national forests that were impacted by the Lynx Amendment.

Plaintiffs allege that the Forest Service should have reinitiated Section 7 consultation on the Lynx Amendment when lynx critical habitat was designated on Forest Service land. The claim arises under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A).

ANALYSIS

I. Standing

In order to satisfy the case or controversy requirement of Article III, a plaintiff must establish standing to bring a claim. *Summers v. Earth Island Inst.*, 555 U.S. 488, 491 (2009). An organizational plaintiff has standing

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[1] In 2006, the Wildlife Service designated some critical habitat for lynx, but none of the designated areas were located on Forest Service lands. Ultimately, the Wildlife Service voluntarily revisited this designation, citing the "improper administrative influence" of Julie MacDonald, former Deputy Assistant Secretary of the Interior.

to sue if its members would have standing to sue in their own right, the "interests at stake are germane to the organization's purposes," and the members' participation is not necessary to the claim or the relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Srvcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Three elements are essential to member standing: injury in fact, causation, and redressability. An "injury in fact" must be (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493 (citation omitted). An organization must show, through specific facts, Fed. R. Civ. P. 56(e), that at least one member has concrete and personal interests in a specific area of the environment that is affected by the challenged government action and that the member's interests have been and will be directly harmed by the government action. *Summers*, 555 U.S. at 494-98. Additionally, the injury must be "fairly traceable to the challenged action" and likely to be redressed by a favorable decision. *Id.* "A showing of procedural injury lessens a plaintiff's burden on the last two prongs of the Article III standing inquiry, causation and redressability." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008) (citation omitted). "Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests." *Id.* (citation omitted) (emphasis in original).

In the case at hand, Plaintiffs challenge the Forest Services failure to reinitiate consultation on the Lynx Amendment, which was accomplished through one Record of Decision, but amended 20 separate plans covering 18 national forest units. Plaintiffs have named several

specific, affected subareas of the national forests affected by the Lynx Amendment that they use and enjoy. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484 (9th Cir. 2010) (citing *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992)). In several of these areas, the Forest Service has designated critical habitat for lynx. In a few of these areas, Plaintiffs have alleged that their interests face imminent threat because the Forest Service has approved projects without conducting the landscape-level analysis that would take place if the Forest Service reinitiated consultation on the Lynx Amendment. They allege the failure to reinitiate consultation on the Lynx Amendment threatens lynx habitat in these areas and will impair their opportunity to see lynx in the wild.

Defendants claim that Plaintiffs must establish standing to challenge each individual forest plan, that they must also challenge specific projects that rely on the plan, and that they must show that the site-specific analysis for particular projects did not compensate for any injury that might have been caused by the failure to reinitiate consultation on the Lynx Amendment. Defendants argue that Plaintiffs have failed to allege an injury in fact that is traceable to the amendment of the plans for 17 of the 18 forests and that Plaintiffs' allegations of injury in the Gallatin National Forest are negated by the Wildlife Service's determination in site-specific biological opinions that the projects in question would not adversely modify lynx critical habitat. Plaintiffs counter that they have established standing to challenge the single, programmatic Lynx Amendment. It is sufficient, they insist, that they show a single imminent injury to their interests in one specific area in one national forest that is affected by the Amendment.

For the reasons discussed below, Plaintiffs' arguments are more compelling.

A.

Defendants suggest that *Summers* requires plaintiffs who are challenging a programmatic regulation to also assert (and succeed on) a site-specific, "as-applied" claim challenging a specific project. (*See* doc. 32 at 9-12). However, for the purpose of establishing standing to challenge a programmatic regulation, plaintiffs can allege injury from a project that relies on that regulation without asserting a separate claim against the project.

In *Summers*, the plaintiffs challenged various timber regulations and also challenged the failure of the Forest Service to apply one of the regulations to a particular project, the Burnt Ridge Project. 555 U.S. at 494. They settled the dispute over the Burnt Ridge project before the challenge to the regulations was decided. *Id.* The Supreme Court held that the plaintiffs lacked standing to challenge the regulations since their dispute over the Burnt Ridge project had been resolved. *Id.* But this was not because the separate claim was no longer part of the action. Rather, the only injury the plaintiffs had alleged in their standing affidavits was associated with the Burnt Ridge project. *Id.* at 495. They had not alleged a particularized injury in any other area. The Court held: "We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), *apart from any concrete application that threatens imminent harm to his interests*." *Id.* at 494 (emphasis added). It was the lack of a concrete application that

threatened imminent harm to the plaintiffs' interests, not the lack of an independent, project-specific claim, that ultimately impaired the plaintiffs' standing to challenge the regulations.

The Ninth Circuit's decisions in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011), and *Pacific Rivers Council v. United States Forest Service*, 689 F.3d 1012 (9th Cir. 2012) ("*Pacific Rivers (2012)*"), support this reading of *Summers*. At issue in *Sierra Forest Legacy* was whether the State of California and a nonprofit member organization called Sierra Forest Legacy had standing to challenge a 2004 Framework that established direction for timber projects in 10 national forests and one management unit encompassing some 11.5 million acres. *Id.* at 1170, 1178-80. The Circuit held that both plaintiffs had standing. California had standing because of its "unique proprietary interests" as a state. *Id.* at 1178-79. But Sierra Forest Legacy also "ha[d] standing to bring a facial challenge to the 2004 Framework, *independent from specific implementing projects*." *Id.* at 1179 (emphasis added). Sierra Forest Legacy's members had asserted interests in areas encompassed by three timber projects within just one of the affected forests. *Id.* at 1179-80. Sierra Forest had standing not based on whether it challenged any of the projects, but because its members asserted interests in areas that would be affected by specific projects in a forest that was subject to the 2004 Framework.

The Ninth Circuit reached the same conclusion in *Pacific Rivers (2012)*, a case in which the plaintiffs challenged the same 2004 Framework that was at issue in *Sierra Forest Legacy*. The court held that where "there is little doubt that [the plaintiff's members] will come into

contact with affected areas, and the implementation of the [programmatic plan] will affect their continued use and enjoyment of the forests," NEPA plaintiffs do not have to "wait to challenge a specific project when their grievance is with an overall plan." 689 F.3d at 1023 (internal quotation marks and citation omitted). The court explained:

> [I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determined the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Id. (quoting *Salmon River Concerned Citizens* v. *Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994)). *See also Wilderness Society, Inc.* v. *Rey*, 622 F.3d 1251, 1256-57 (9th Cir. 2010).

Under *Sierra Forest Legacy* and *Pacific Rivers (2012)*, 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. It is not necessary for plaintiffs to assert a separate claim challenging the project or for plaintiffs to assert a particularized injury for every forest subject to the regulation. Plaintiffs' decision not to challenge a specific project in this action does not undermine their standing to challenge the programmatic Lynx Amendment, and they are not required to show a particularized injury in every forest affected by the Lynx Amendment.

B.

Defendants also suggest that plaintiffs alleging injury from a specific project that relies on a programmatic plan must prove that the project analysis for that specific site failed to compensate for any injury the programmatic plan might have caused. In the case at hand, Defendants insist that the site-specific biological opinions for the Bozeman Municipal Watershed Project and the East Boulder Project considered the effects of the projects on lynx critical habitat and thereby eliminated any risk that the failure to address critical habitat when consulting on the Lynx Amendment would cause Plaintiffs injury.

Defendants rely on *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998),[2] in support of their argument that Plaintiffs must prove that site-specific biological opinions relied upon the programmatic document "in any unlawful fashion." (Doc. 32 at 11.) In the NFMA context, the Supreme Court held in *Ohio Forestry* that forest plans do "not create adverse effects . . . of a sort that traditionally would have qualified as harm" because "they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations."

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[2] The other cases cited by Defendants, *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010), and *Natural Resources Defense Council v. Salazar*, 686 F.3d 1092, 1098 (9th Cir. 2012), are inapposite. *Wild Fish Conservancy* did not address standing or traceability and *Natural Resources Defense Council* did not address whether a plaintiff has standing to challenge a programmatic document when the plaintiff has not challenged site-specific projects or biological opinions implementing the document.

523 U.S. at 733. Thus, the potential harm posed by a forest plan is neither imminent nor certain when the forest plan is considered in a vacuum. *Id.* at 734. A specific project relying on the plan, however, raises the possibility the plan will cause an injury in fact. *Id.* The Court stated:

> Any such later challenge [to a project] might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, i.e., if the Plan plays a causal role with respect to the future, then-imminent, harm from logging.

Id. Twinning a project challenge with a plan challenge allows the "benefit of the focus that a particular logging proposal could provide" and avoids "the kind of abstract disagreements over administrative policies . . . that the ripeness doctrine seeks to avoid." *Id.* at 736 (internal quotation marks and citation omitted).

Unlike the case at hand, however, *Ohio Forestry* involved a challenge under the National Forest Management Act ("NFMA"). The Supreme Court explicitly distinguished a NFMA challenge from a challenge brought pursuant to the National Environmental Policy Act ("NEPA"):

> NEPA, unlike NFMA, simply guarantees a particular procedure, not a particular result. . . . Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

Id. at 737.

Like NEPA, section 7 of the ESA guarantees a particular procedure, not a particular result. Thus *Ohio*

Forest's requirements that a NFMA challenge to a Forest Plan be combined with a challenge to a project and that Plaintiffs prove the Project improperly relied on the challenged plan do not apply here.

The Ninth Circuit has explicitly rejected the notion that site-specific environmental analyses can cure an asserted procedural injury related to a programmatic regulation:

> Nor could the Forest Service cure flaws in [a land management resource plan] in the [environmental impact statement ("EIS")] for a site-specific project. *See Pit River [Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785 (9th Cir. 2006)] ("[D]ilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review."). We have never held that an LRMP is not subject to facial attack based on an alleged NEPA violation.

Sierra Forest Legacy, 646 F.3d at 1180. It is thus irrelevant that the biological opinions for the Bozeman Municipal Watershed Project and the East Boulder Project found that neither project will adversely modify lynx critical habitat. The possibility of harm is imminent and concrete despite the project-specific decisions because the Lynx Amendment provides the "big picture approach to lynx management" and "contributes to the landscape level direction." AR 0101(a) at 70. Even if site-specific environmental analyses are completed, "[e]ffects may occur and/or continue without appropriate management direction at broad scales." AR 2375 at 31. *See Idaho Conserv. League*, 956 F.3d at 1516 ("[S]hort of assuming that Congress imposed useless procedural safeguards . . . we must conclude that the management plan plays some, if not a critical, part in subsequent decisions.").

Thus Plaintiffs were not required to prove that the site-specific analyses for the Bozeman Municipal Watershed Project and East Boulder Project failed to compensate for their alleged injury.

C.

As in *Pacific Rivers Council (2012)* and *Sierra Forest Legacy*, Plaintiffs here allege a procedural violation related to a programmatic plan affecting multiple forests. Six members have submitted affidavits alleging interests in areas of the Gallatin, Custer, Lolo, Flathead, Helena, Custer, Shoshone, and Bridger-Teton National Forests. (Docs. 1-2, 12, 16, 25, 26, 27, 28.) They name specific subareas of these forests in which they recreate, including areas in which lynx critical habitat has been designated. Some of these areas with lynx critical habitat have been and will be affected by specific projects the Forest Service is implementing—including the Bozeman Municipal Watershed Project and the East Boulder Project in the Gallatin National Forest—and several members indicate they have used these areas in the past and have concrete plans to return in the future.[3] (Docs. 1-2 at 2-3; 12 at 2-3; 16 at 2-3; 25 at 2; 28 at 4.) The affiants hunt, hike, ride horses, recreate, and look for wildlife, including lynx, in these areas. They specifically like to visit lynx critical habitat because it offers a better opportunity to see Canada lynx. They are concerned that the lack of consultation on the Lynx Amendment since critical habitat was designated will result in adverse modification to critical habitat in the Forests generally and in

[3] One affiant is also connected to the Colt Summit Project area in the Lolo National Forest, but it is not clear whether this project area contains lynx critical habitat.

the Project areas specifically because of the lack of analysis at the landscape, rather than the site-specific, level. (Docs. 25-28.)

Plaintiffs have demonstrated that the affiants have a connection to several areas that contain lynx critical habitat and are affected by the Lynx Amendment and that they have "specific and concrete" plans to return to and use these areas. *Summers*, 555 U.S. at 494-95. They have shown that their risk of harm is actual and imminent because specific projects guided in part by the Lynx Amendment are being implemented in areas they use and plan to return to. They have shown the alleged procedural injury "affects the recreational or even the mere esthetic interest[s]" of Cottonwood Environmental Law Center members and that it is possible that a favorable decision in this case could redress their alleged injuries. *Summers*, 555 U.S. at 494-95. "Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests." *Salmon Spawning & Recovery Alliance*, 545 F.3d at 1226 (internal quotation marks and citation omitted).

> [T]he fact that . . . [re-initiating consultation] might not in any way change the [management direction for the projects] is irrelevant. The asserted injury is that environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies. . . . The ultimate outcome following proper procedures is not in question.

Idaho Conservation League, 956 F.2d at 1518 (citation omitted). In summary, Plaintiffs have established standing to challenge the Lynx Amendment to the 20 forest plans at issue based on the subsequent designation

of lynx critical habitat and the Forest Service's decision not to reinitiate consultation with the Wildlife Service.

II. Notice of Intent to Sue

Defendants insist that the Court lacks jurisdiction to consider this case because Plaintiff's letter of intent to sue under the ESA did not provide adequate notice of the lawsuit it has filed. A citizen suit under the ESA may not 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)(i). "The purpose of the 60-day notice provision is to put the agencies on notice of a perceived violation of the statute and an intent to sue." *S.W. Ctr. for Biological Diversity v. US. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). The notice must provide sufficient detail "so that the Secretary or [alleged violator can] identify and attempt to abate the violation." *Id.* at 522. Otherwise, courts lack jurisdiction to consider the case. *Id.* at 520; 16 U.S.C. § 1540(g)(3)(A).

Plaintiffs' Notice to the government states: "The Government's reliance on the Northern Rockies Lynx Management Direction without re-initiating formal consultation violates the Endangered Species Act." (Doc. 23-2 at 3.) It states that reinitiation of consultation was required under section 7 of the ESA after critical habitat was designated on national forest land *(id.* at 2), and it identifies the specific regulatory provisions alleged to have been violated, 50 C.F.R. § 402.16(b) and (d):

> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> . . . . or

(d) If a new species is listed or critical habitat is designated that may be affected by the identified action.

(*Id.* at 2-3.) The Notice demands reinitiation of formal consultation on the Lynx Amendment and a "new biological opinion" analyzing "the designation of new critical habitat on National Forests" and it informs Defendants of Plaintiffs' intent to seek declaratory and injunctive relief if corrective action was not taken. (*Id.*) The Notice does not identify any specific project or national forest that is subject to the Lynx Amendment.

Plaintiffs provided sufficient notice under 16 U.S.C. § 1540(g)(3)(A). The single cause of action in the Complaint was described in the Notice. The Notice identified the statute and regulations allegedly violated and identified the specific violation complained of, the Forest Service's failure to reinitiate consultation on the Lynx Amendment once lynx critical habitat was designated on affected lands. The Complaint alleged the same violation and relied on the same statutes and regulations.

Plaintiffs were not required to provide Defendants notice of a specific project that relied on the Lynx Amendment because they have not challenged a specific project. In contrast, in *Southwest Center for Biological Diversity*, the plaintiffs' complaint and amended complaint specifically alleged that the defendant was jeopardizing the continued existence of the flycatcher, an endangered bird, at Lake Mead, by unlawfully taking flycatchers in the absence of a valid reasonable and prudent alternative and incidental take statement. 143 F.3d at 519. The plaintiffs' 60-day notices, however, had failed to identify either the flycatcher or Lake Mead as a species or area of concern. *Id.* at 520-21. The notices had only generally asserted that the defendants' memorandum of agreement

failed to provide for the conservation of federally listed species on the Lower Colorado River. *Id.* Thus, the defendant had no notice of the specific violation the Plaintiffs ultimately alleged and no opportunity to correct it. *Id.*

Here, on the other hand, the Complaint does not challenge a specific project. The specific projects mentioned by Plaintiffs merely establish their standing to challenge the Lynx Amendment. Defendants are well aware of the forests to which the Lynx Amendment applies, the locations where lynx critical habitat has been designated, and the projects that have been initiated or are being considered in those areas. Under Plaintiffs' theory, any such project would pose potential harm because of the lack of consideration on the landscape level of whether the Lynx Amendment adequately protects lynx critical habitat from adverse modification.

The Forest Service did not need Plaintiffs to point to a specific project or forest affected by the Lynx Amendment in order to identify the alleged violation or reinitiate consultation on the Lynx Amendment. *S.W. Ctr.*, 143 F.3d at 522 (finding a notice was sufficient in itself because the agency could have "identif[ied] and attempt[ed] to abate the violation"). A similar notice was adequate in *Lane County Audubon Society v. Jamison*, in which the plaintiffs notified the defendant agency of their intent to sue based on the agency's failure to consult with the Wildlife Service on a programmatic management strategy to protect the spotted owl that set forth the criteria "for logging in the millions of acres administered by the [agency] in Washington, Oregon and California." 958 F.2d 290, 291-92 (9th Cir. 1992).

Center for Biological Diversity v. Marina Point Development Co., 566 F.3d 794, 801 (9th Cir. 2008), is inapplicable here. First, it arose under the Clean Water Act, not the ESA. As the court noted, 40 C.F.R. § 153.3(a) provides a "specific and clear statement of the information that must be included" in a Clean Water Act 60-day notice. *Id.* at 801-02. No analogous regulation exists under the ESA. *Ctr. for Sierra Nevada Conservation* v. *US. Forest Serv.*, 832 F. Supp. 2d 1138, 1174 (E.D. Cal. 2011). Notably, though the court found that the plaintiffs' notices to the defendants failed to meet the regulation's specific requirements, it held that the notices appeared to be sufficient under the ESA. *Ctr. for Biological Diversity*, 566 F.3d at 804.

Second, the permit-specific nature of the violations at issue in *Marina Point* is readily distinguishable from the type of procedural violation on a programmatic amendment that is alleged here. In *Marina Point*, the Complaint alleged violations of both §§ 402 and 404 of the Clean Water Act,[4] but the plaintiffs' notices had not mentioned § 402 at all. The Complaint also raised claims concerning specific discharges for which the defendants should have obtained permits, but the 60-day notices did not identify any specific discharges. *Id.* Thus the notices did not comply with the requirements of 40 C.F.R. § 153.3(a) or provide notice to the defendants of what corrective actions could be taken to obviate the need for a lawsuit. Similarly, in *Klamath Siskiyou Wildlands Center v. Macwhorter*, 12-cv-1900-PA (D. Or.

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[4] Section 402 requires permits for discharges of pollutants into navigable waters. 33 U.S.C. § 1342. Section 404 requires permits for the discharge of dredged or fill materials into the waters of the United States, including wetlands. 33 U.S.C. § 1344.

April 23, 2013) (doc. 35-2), the plaintiffs filed a complaint challenging specific mining authorizations, but their Notice of Intent did not identify which mining authorizations they were challenging.

In the present case, Plaintiffs are challenging the failure to reinitiate consultation on the Lynx Amendment, a single programmatic decision that simultaneously amended multiple forest plans. They are not challenging specific projects. Their Notice cites the specific statutory and regulatory language Defendants are alleged to have violated and identifies the specific violation complained of—the failure to reinitiate consultation following the designation of lynx critical habitat in several of the forests subject to the Lynx Amendment. The same violation and the same statutes and regulations are cited in the Complaint and form the basis for this cause of action. (Doc. 1 at 14.) Unlike the plaintiffs in *Marina Point* and *Klamath Siskiyou Wildlands Center*, Plaintiffs have not raised new claims or violations.

Defendants also claim that Plaintiffs' request for relief—that all projects in forest land areas subject to the Lynx Amendment be enjoined pending consultation—exceeds the scope of the Notice because 16 U.S.C. § 1536(d) was not specifically mentioned in the Notice.[5] While the ESA requires plaintiffs seeking injunctive relief to first provide notice of "the provision or regulation"

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[5] This section states: "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

allegedly violated, it does not state that the notice must specify the statutory provision that authorizes the injunctive relief sought. 16 U.S.C. § 1540(g). In any case, the Notice provided sufficient warning of the relief that would be sought and the applicable scope of that relief. It alleged the Forest Service violated "the ESA, 16 U.S.C. § 1531 *et seq.*" and cited the specific regulatory provisions the Forest Service was alleged to have violated. (Doc. 23-2 at 1.) It also notified the Forest Service that Plaintiffs would seek declaratory and injunctive relief if the Forest Service failed to reinitiate consultation. *(Id.* at 3.) *See Marbled Murrelet v. Babbit*, 83 F.3d 1068, 1073 (9th Cir. 1996) ("The letter clearly gives notice of an intent to sue under the ESA. Although section 7 was referenced in only one part of the letter, the letter as a whole provided notice sufficient to afford the opportunity to rectify the asserted ESA violations.").

Because the Notice cited the specific statutes and regulations that the Complaint alleges were violated, the Complaint does not raise new claims or grounds for relief, and the Notice provided adequate notice of the relief Plaintiffs intended to seek, Plaintiffs' Notice was adequate under the ESA and this Court has jurisdiction to consider the case.

III. Whether *Pacific Rivers (1994)* has been effectively overruled

Under section 7(a)(2) of the ESA, an agency must consult with the Wildlife Service (or the National Marine Fisheries Service) to "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction

or adverse modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Sometimes, a federal agency is required to reinitiate consultation:

> Reinitiation of formal consultation is required . . . where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> . . . .
>
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> . . . .
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R.§ 402.16. The applicable Wildlife Service regulation defines "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02.

Defendants claim the Forest Service is not required to reinitiate consultation on the Lynx Amendment because that action—the amendment of the forest plans in March 2007—was completed at the time of amendment and there is no further affirmative agency action to be taken. Defendants insist the Ninth Circuit's contrary opinion in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied* 514 U.S. 1082 (1995) ("*Pacific Rivers (1994)*"), has been "effectively overruled" because it "is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335

F.3d 889, 899-900 (9th Cir. 2003) (en banc). Specifically, Defendants cite the United States Supreme Court's opinion in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) *("Norton v. SUWA")*, and a Tenth Circuit opinion, *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007). Defendants also cite a few Ninth Circuit cases that they contend support their position. Plaintiffs, of course, argue that *Pacific Rivers (1994)* is controlling and that the cases relied on by Defendants are distinguishable or actually support Plaintiffs' position.

In *Pacific Rivers (1994)*, the Ninth Circuit held: "Given the importance of [forest plans] in establishing resource and land use policies for the forests in question there is little doubt that they are continuing agency action under § 7(a)(2) of the ESA." 30 F.3d at 1056. Thus, when the chinook salmon was listed as a threatened species two years after two forest plans had been approved, the Forest Service was required to reinitiate consultation on the plans. *Id.* The Ninth Circuit reasoned that forest plans "are actions that 'may affect' the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat." *Id.* at 1055. The plans set guidelines for logging, grazing, and road-building activities that "may affect" the salmon, and established the allowable sale quantity and production targets for these activities. *Id.* Because the plans "are comprehensive management plans governing a multitude of individual projects" and "every individual project planned in [a] national forest[] . . . is implemented according to the [forest plan]," the effect of a plan is "ongoing and long-lasting." *Id.* at 1053.

The court explicitly rejected the Forest Service's argument, which the Forest Service reiterates here, that forest plans are only agency actions at the time they are adopted, revised, or amended, and they cease to be actions upon their adoption because they do not mandate any particular action and are "'merely' programmatic documents." *Id.* at 1055. The court noted the broad language defining an "action" under the ESA. *Id.* at 1054. The ESA requires consultation on "any action" carried out by an agency, *id.* (citing 16 U.S.C. § 1536(a)(2)), and the Supreme Court has stated that "[t]his language admits of no exception," *id.* (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978)). Similarly, the regulatory language is broad:

> *Action* means *all* activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, *but are not limited to*:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.

Id. (quoting 50 C.F.R. § 402.02) (emphasis added by Ninth Circuit). "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.* at 1055 (quoting *Tenn. Valley Auth.*, 437 U.S. at 194).

Unless *Pacific Rivers (1994)* has been "effectively overruled" by subsequent, higher authority, the parties appear to agree that it mandates the conclusion that the Lynx Amendment is an ongoing agency action under the ESA and is thus subject to reinitiation of consultation requirements.

In 2004, in *Norton v. SUWA*, the United States Supreme Court determined that forest plans are not ongoing agency actions under NEPA. 542 U.S. at 72-73. NEPA requires that agencies supplement their environmental analysis for "major Federal actions" if (1) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," *id.* (citing 40 C.F.R. § 1502.9(c)(1)(ii))," and (2) there remains 'major Federal action' to occur, as that term is used in [42 U.S.C.] § 4332(2)(C)," *id.* (quoting *Marsh v. Or. Natural Resources Council*, 490 U.S. 360, 374 (1989)). NEPA regulations recognize the "[a]pproval of a [forest plan]" as a major Federal action, 43 C.F.R. § 1601.0-6, but the Court held that "that action is completed when the plan is approved" and "[t]here is no ongoing 'major Federal action' that could require supplementation." *Norton v. SUWA*, 542 U.S. at 73.

In *Forest Guardians v. Forsgren*, the Tenth Circuit applied *Norton's* reasoning to the ESA and explicitly rejected the Ninth Circuit's approach in *Pacific Rivers (1994)*. 478 F.3d at 1152-56. It held that an agency is not required to reinitiate consultation on previously approved forest plans even if new species or critical habitat are listed after a plan is approved. *Id.* The Tenth Circuit explained that although all projects must be consis-

tent with the governing forest plan, the forest plan only provides a framework for later project decisions:

> Plans do not grant, withhold, or modify any contract, permit or other legal instrument, subject anyone to civil or criminal liability, or create any legal rights. Plans typically do not approve or execute projects and activities. Decisions with effects that can be meaningfully evaluated typically are made when projects and activities are approved.

Id. at 1153 (quoting 36 C.F.R. § 219.3(b) (2007)).[6] The court reasoned that an "agency action" includes the adoption of a forest plan, the amendment or revision of a forest plan, and the proposal and approval of a site-specific project in the forest. *Id.* at 1154. But the forest plan itself is not an "agency action" under the ESA after its adoption and before it is amended or revised, unless it specifically authorizes or requires an agency to fund or carry out an activity or a program. *Id.* at 1156.

> A [forest plan] considered in isolation simply is not an ongoing, self-implementing document. Specific activities, programs, and/or projects are necessary to implement the plan. Those same activities, programs, and projects must be alleged in a complaint that seeks to establish an "acting" agency's duty to consult under § 7(a)(2) of the ESA. As we have explained, a [forest plan] envisions the forest will be used for multiple purposes, including" outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." A plan or vision is certainly a precursor to "agency action," but neither is action requiring § 7(a)(2) consultation.

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[6] This regulation appeared in the regulations until 2010. The language does not appear in the current regulations.

Id. at 1158 (citations omitted).

Of course, the Tenth Circuit's decision in *Forsgren* is not binding in this Circuit. The opinion does not appear to have been adopted or even cited outside the Tenth Circuit except by a Ninth Circuit district court, which merely noted, while following the Ninth Circuit precedent, the Tenth Circuit's express rejection of the conclusion in *Pacific Rivers (1994)* that the ongoing implementation of a forest plan is an action for purposes of the ESA. *Coalition for a Sustainable Delta* v. *Fed. Emerg. Mgt. Agency*, 812 F. Supp. 2d 1089, 1109 n.7 (E.D. Cal. 2011). Nor does it appear that any other Circuit has adopted *Pacific Rivers (1994)*'s contrary approach.

Both parties argue that Ninth Circuit case law since *Pacific Rivers (1994)* supports their view concerning whether the case is still good law. Plaintiffs' arguments are more convincing.

The Ninth Circuit distinguishes "agency actions" under the ESA from those under NEPA, noting that it has "repeatedly held that the ESA's use of the term 'agency action' is to be construed broadly." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012) (en banc) ("Although the 'major federal action' standard under NEPA is similar to the more liberal 'agency action' standard under the ESA, the terms are not interchangeable."); *Marbled Murrelet*, 83 F.3d at 1075 (noting that though the agency action standards under NEPA and the ESA are somewhat similar, the distinction in their wording demonstrates that the NEPA requirement for an EIS is "more exclusive" than the requirement under section 7 of the ESA). *See also P. Coast Fedn. of Fishermen's Assns.*, 2007 WL 1752289, * 16 n.5 (E.D. Cal. 2007).

Although the Ninth Circuit construes the ESA standard broadly, it has recognized that not all agency actions remaining ongoing after they are approved. *Cal. Sportfishing Protec. Alliance v. F.E.R.C.*, 472 F.3d 593, 597 (9th Cir. 2006). For example, where an agency has already granted a right of way to a logging company or issued an incidental take permit to a contractor, the action has been completed and need not be revisited if a triggering event under 50 C.F.R. § 402.16 occurs. *Id.* at 598 (citing cases). In *California Sportfishing*, the court focused on the "potential effect of the government's contemplated action," *id.* at 597, and emphasized that some "affirmative action" is necessary for the action to remain ongoing, *id.* at 598 (citation omitted). Citing *Pacific Rivers (1994)*, it confirmed that a forest plan is an ongoing agency action because the plan "continue[s] to apply to new projects" and thus has an "'ongoing and long-lasting effect even after adoption,'" *id.* at 598 (quoting *Pacific Rivers (1994)*, 30 F.3d at 1052)). The Ninth Circuit has also cited *Pacific Rivers (1994)* with approval in *Western Watersheds Project v. Matejko*, stating: "Ongoing agency action also existed in *Pacific Rivers* [*(1994)*.]" 468 F.3d 1099, 1110 (9th Cir. 2006).

Defendants' notice of supplemental authority cites a recent Northern District of California case that held that *Pacific Rivers (1994)* was "implicitly overruled" by the Ninth Circuit in *Karuk Tribe*, 681 F.3d 1006. *Ctr. for Biological Diversity v. Envtl. Protec. Agency*, 2013 WL 1729573 (N.D. Cal. Apr. 22, 2013). The case is distinguishable from this case, however. The plaintiffs alleged the Environmental Protection Agency violated the ESA by failing to reinitiate consultations on the effects of 382 registered pesticides on listed species. Each pesticide corresponded to an individual agency act—the approval of

the pesticide. Thus, there were 382 different acts, each of which had to be challenged independently. Here, on the other hand, there is only one agency act—the approval of the Lynx Amendment. Additionally, the approval of a pesticide is not a programmatic regulation or plan amendment that governs later actions.

Presumably, Defendants are interested in the court's interpretation of *Karuk Tribe*. The court stated that *Karuk Tribe's* requirement that section 7 only applies when an agency makes an affirmative act implicitly overruled *Pacific Rivers (1994)*'s holding that forest plans are ongoing agency actions. *Id.* at *10. The court's statement was dicta, however, because it was not considering a forest plan. Moreover, *Karuk Tribe* did not mark the first time the Ninth Circuit held that an affirmative act is required to find ongoing agency action under the ESA. In *Western Watersheds v. Matejko*, the Ninth Circuit noted this requirement and expressly confirmed that forest plans constitute ongoing, affirmative agency action because the Forest Service "maintained continuing authority under a comprehensive and long term management plan, that was still in effect." 468 F.3d at 1102, 1111. *See also Cal. Sportfishing*, 472 F.3d at 597-98.

Because the Ninth Circuit has demonstrated continued support for *Pacific Rivers (1994)* in decisions emphasizing that an "affirmative act" is necessary for an agency action to be ongoing, this Court respectfully disagrees with the district court's conclusion that *Karuk Tribe* implicitly overruled *Pacific Rivers (1994)*. Forest plans and programmatic amendments to forest plans are not situations "[w]here private activity is proceeding pursuant to a vested right or to a previously issued li-

cense." *Karuk Tribe*, 681 F.3d at 1021. Instead, multiple federal actions stem from those forest plans because a forest plan "continue[s] to apply to new projects." *Cal. Sportfishing*, 472 F.3d at 598. The district court's holding on pesticide regulations is not applicable to forest plans.

In *Karuk Tribe*, the Ninth Circuit explained that an "agency action" inquiry under the ESA is two-fold:

> First, we ask whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.

681 F.3d at 1021. Here, the Forest Service affirmatively enacted the Lynx Amendment in order to set broad standards for the management of the Canada Lynx, and it continues to carry out the Lynx Amendment in 18 different forests. All projects proposed or enacted in those forests must be consistent with the Lynx Amendment—thus the Amendment is not merely advisory. It continues to have significant effects each time a new project relying on the Amendment is authorized, and as held in *Sierra Forest Legacy*, a procedural failure related to a programmatic plan cannot be compensated for in a project analysis for a specific site. 646 F.3d at 1180. The Forest Service also maintains discretionary involvement or control over the Lynx Amendment, as evidenced by the fact that in some forests, the Forest Service has voluntarily reinitiated consultation on the Lynx Amendment since new critical habitat was designated.

Given that the Ninth Circuit distinguishes ongoing agency actions under NEPA and the ESA and has cited

Pacific Rivers (1994) with approval since *Norton v. SUWA* was issued, it is not clear that *Pacific Rivers (1994)* has been effectively overruled. Such a determination is not for this Court to make, even though the Forest Service has presented a pragmatic argument for following the Tenth Circuit's lead. Under Ninth Circuit case law, then, the Lynx Amendment constitutes an ongoing agency action under the ESA. The Forest Service is required to reinitiate consultation on the Amendment if a triggering event under 50 C.F.R.§ 402.16 occurs.

IV. Whether a triggering event occurred

Agencies are required to engage in section 7 consultation whenever an action "may affect" a listed species. As the agencies recognized when they first consulted on the Lynx Amendment, the Amendment "may affect" the lynx and lynx critical habitat because it provides the broad management direction for 20 forest plans covering 18 separate national forest units.

Though the Forest Service and Wildlife Service consulted on the Lynx Amendment in 2007, Plaintiffs contend they must re-initiate consultation based on the subsequent designation of lynx critical habitat. An agency must reinitiate consultation in the following circumstances:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
>
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or

> critical habitat that was not considered in the biological opinion; or
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. These events provide a "trigger" to "ensure that the 'no jeopardy 'determination remains valid." *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012) (citations omitted).

The designation of critical habitat in 11 national forests to which the Lynx Amendment applies satisfies both subsections (b) and (d) of 50 C.F.R. § 402.16. Since no critical habitat had been designated when the agencies first consulted on the Amendment, the Bi-Op concluded that "none will be affected." AR 0101(a) at 75. Nor did the Bi-Op address whether the Amendment would impact the Primary Constituent Elements of lynx habitat. "The analysis of the effects to critical habitat is a separate and different analysis from that of the effects to the species, and may provide greater regulatory benefits to the recovery of a species than listing alone." AR 2535 at 8616, 8624.

The agencies cannot shift this analysis to the project level. *Sierra Forest Legacy*, 646 F.3d at 1180; *Pac. Coast Fedn. of Fishermen's Assns. v. Natl. Marine Fisheries Serv.*, 428 F. Supp. 2d 1248, 1267 (W.D. Wash. 2007) (citation omitted); As the Wildlife Service found in its 2007 Biological Opinion:

> Without programmatic guidance and planning to conserve lynx, assessment of land management effects to lynx and development of appropriate conservation strategies are left to project-specific analysis without consideration for larger landscape patterns.

Bi-Op at 75. A "big picture approach to lynx management" is required. AR 0101(a) at 70. "[L]andscape level direction [is] necessary for the survival and recovery of lynx in the northern Rockies ecosystem." AR 0101(a) at 70. "[M]anagement activities [can] reduce or degrade essential habitat elements used by lynx for denning, foraging, and recruitment, or [] increase habitat fragmentation and lynx mortality" and "[e]ffects may occur and/or continue without appropriate management direction at broad scales." AR 2375 at 31. The Forest Service cannot now claim the opposite—that project-specific analysis is sufficient to protect the lynx and its habitat in the larger region.

By failing to reinitiate consultation on the Lynx Amendment, the Forest Service violated 50 C.F.R. § 402.16 and section 7 requirements after lynx critical habitat was identified in forests subject to the Amendment. The Forest Service must now reinitiate consultation in order to determine that the Amendment is "not likely to . . . result in the destruction or adverse modification of" designated critical habitat, 16 U.S.C. § 1536(a)(2), "in a way that will affect both the conservation of the species, and its recovery," AR 2535 at 8646. The Forest Service and Wildlife Service must determine "whether, with implementation of the [Amendment], the affected critical habitat would remain functional (or retain the current ability for the [primary constituent elements] to be functionally established) to serve its intended conservation role for the species." AR 2535 at 8644.

V. Appropriate Relief

It is "well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements."

Wash. Toxics Coalition v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005). Section 7 provides that "[a]fter initiation of consultation required under subsection (a)(2) of this section, the Federal agency . . . shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d). Additionally, "the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements [than NEPA's procedural requirements], because [the ESA's] procedural requirements are designed to ensure compliance with the substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

The "traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA." *Nat. Wildlife Fedn. v. NMFS*, 422 F.3d 782, 793 (9th Cir. 2005). The Court cannot "balance interests in protecting endangered species against the costs of the injunction when crafting its scope." *Wash. Toxics Coalition*, 413 F.3d at 1035. "Congress has decided that . . . the balance of hardships always tips sharply in favor of the endangered or threatened species." *Id.* Additionally, the Ninth Circuit has implemented a burden-shifting approach under which an agency that has violated section 7 must prove a particular action is non-jeopardizing in order to avoid an injunction. *Id.* Requiring this proof of the acting agency "is consistent with the purpose of the ESA and what [the Ninth Circuit has] termed its institutionalized caution mandate." *Id.*

Despite this liberal standard for imposing injunctive relief under section 7, Plaintiffs are still obligated to show an irreparable injury to support the issuance and scope of an injunction. In *National Wildlife Federation v. National Marine Fisheries Service*, the Ninth Circuit held that the district court's rejection of a biological opinion under the ESA, together with its finding of irreparable harm, were "precisely the circumstances in which our precedent indicates that the issuance of an injunction is appropriate." 422 F.3d 782, 796 (9th Cir. 2005). The Ninth Circuit also stated in *National Wildlife Federation v. Burlington Northern Railroad* that ESA cases "do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA." 23 F.3d 1508, 1511 (9th Cir. 1994) (internal citations omitted).

Similarly, a district court has held:

> Reason dictates that plaintiffs make a showing that the particular injunction they request is necessary to prevent irreparable harm caused by the defendants' violation of the ESA. It could not be the case that any time defendants are found liable for a significant violation of the ESA's procedural provisions, the plaintiffs are entitled to any form of injunctive relief that they request. Indeed, "injunctive relief must be tailored to remedy the specific harm alleged." *NRDC v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007). As a practical matter, the court must decide what irreparable harms are likely to occur to the species in order to craft an appropriately tailored injunction. Here, plaintiff is only entitled to an injunction that prevents irreparable harm caused by defendants' violation of the Endangered Species Act. Thus, even if a show-

> ing of irreparable harm was not necessary for an injunction to issue, such a showing is required in order to justify the specific measures that plaintiffs' request. Accordingly, the court holds that plaintiff must show that irreparable harm to the listed species will result from defendants' violation of the ESA in the absence of each measure plaintiffs request.

S. *Yuba River Citizens League v. Natl. Marine Fisheries Serv.*, 804 F. Supp. 2d 1045, 1054 (E.D. Cal. 2011), *reconsideration denied in part*, 851 F. Supp. 2d 1246 (E.D. Cal. 2012).

The practical approach adopted by the district court in *South Yuba River Citizens League* is persuasive. Based on the limited factual support provided by Plaintiffs, the Court cannot analyze in the context of this case whether the harm posed by all projects to take place in Lynx Amendment forests is likely to occur and is irreparable, and there is no basis for the Court to properly narrow the scope of the injunction. Although "[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action," *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), and although the "[t]he remedy for a substantial procedural violation of the ESA—a violation that is not technical or *de minimis—must* . . . be an injunction of the project pending compliance with the ESA," *Wash. Toxics Coalition*, 413 F.3d at 1034, Plaintiffs have not met their burden to substantiate the particular relief requested. They have not provided any evidence for assessing the "likelihood of harm" or ensuring that the injunction is "tailored to remedy the specific harm alleged." *Natl. Wildlife Fedn. v. Burlington N.R.R.*, 23 F.3d at 1511; *NRDC v. Winter*, 508 F.3d at 886.

Plaintiffs' decision not to challenge any particular project also imposes an impossible burden on Defendants under the burden-shifting approach of *Washington Toxics*. To show their actions are non-jeopardizing, Defendants would have to show that each action to take place in all the forests subject to the Lynx Amendment will not "appreciably" or "considerably" "diminish the value of critical habitat for both the survival and recovery of the listed species." 50 C.F.R. § 402.02. The Lynx Amendment amended 20 plans affecting 18 forests, 11 of which include critical lynx habitat. Thus, the breadth of injunction requested by Plaintiffs would impose an impossible task on Defendants. If Plaintiffs had substantiated their request with specific showings of irreparable harm, such a burden would be fair. But it is not in the total absence of such evidence.

This approach is consistent with that taken by the Eastern District of California in *Sierra Forest Legacy v. Sherman*, 2013 WL 1627894 (E.D. Cal. Apr. 15, 2013), a NEPA case. As that court found, project-specific injunctive relief may not be appropriate if plaintiffs have not "identified any imminent [project] in any specific area and explained how such [project] will harm their interests." *Sierra Forest Legacy*, 2013 WL 1627894, *8. "[B]road and untethered allegations of harm cannot serve as the irreparable injury required to demonstrate the need for injunctive relief." *Id.*

Plaintiffs have not met the burden of identifying likely and irreparable harm tied to specific projects in Lynx Amendment forests. "Establishing injury-in-fact for the purposes of standing is less demanding than demonstrating irreparable harm to obtain injunctive relief." *Id.* at *8 n.6 (citing *Carribean Marine Serv. Co. v. Baldridge*,

844 F.2d 668, 674 (9th Cir. 1988), and *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011)). Here, Plaintiffs merely state that the lack of landscape-level analysis will impair their ability to view lynx in the Bozeman Municipal Watershed Project and the East Boulder Project areas. They make no showing that the harm is likely to occur despite the site-specific analyses or that the harm is irreparable. Accordingly, these projects will not be enjoined. Nor have Plaintiffs made a sufficient showing of likely, irreparable harm to support the injunction of any other projects. Thus no projects will be enjoined in this case, but the Forest Service must reinitiate consultation on the Lynx Amendment.

CONCLUSION

For the reasons discussed above,

IT IS ORDERED that Defendants' motion for summary judgment (doc. 22) is DENIED, and Plaintiffs' motion for summary judgment (doc. 17) is GRANTED, as follows: the Forest Service shall reinitiate consultation on the Lynx Amendment, but no specific projects are enjoined because Plaintiffs have not made an adequate showing of irreparable harm to obtain the relief requested.

This case is closed.

Dated this 16th day of May 2013.

/s/ DANA L. CHRISTENSEN
DANA L. CHRISTENSEN, Chief Judge
United States District Court