Save the Bull Trout v. Williams—Ninth Circuit holds challenge to 2015 FWS Bull Trout Recovery Plan barred by issue preclusion

Bull trout were listed as threatened under the Endangered Species Act in 1999. Sixteen years later, the United States Fish and Wildlife Service issued a Bull Trout Recovery Plan. Friends of the Wild Swan and Alliance for the Wild Rockies challenged the Plan in Oregon federal district court unsuccessfully, with the court determining that their citizen suit complaint failed to state a claim for violation of a nondiscretionary duty. *Friends of the Wild Swan, Inc. v. Thorson*, 260 F. Supp. 3d 1338 (D. Or. 2017). Although granted leave to amend, the organization declined and then appealed the ensuing judgment, once more without success. *Friends of the Wild Swan, Inc. v. Dir. of U.S. Fish & Wildlife Serv.*, 745 F. App'x 718 (9th Cir. 2018). Back before the district court, they sought relief under Fed. R. Civ. P. 60(b) for the purpose of filing an amended complaint with "Additional Claims". After such leave was denied, the organizations—now joined by Save the Bull Trout—moved on to a different forum, Montana federal district court, "again challenging the Service's compliance with the ESA in creating the 2015 Bull Trout Recovery Plan." The Montana court rejected the federal defendants' motion to dismiss on issue-preclusion grounds. However, it granted summary judgment to them on the merits. *Save the Bull Trout v. Williams*, 544 F. Supp. 3d 1047 (D. Mont. 2021).

The Ninth Circuit affirmed the judgment but accepted the defendants' position that the suit was barred by issue preclusion. *Save the Bull Trout v. Williams*, No. 21-35480, 2022 WL 4492080 (9th Cir. Sept. 28, 2022). After finding that the organizations sufficiently established procedural injury for standing purposes, the panel set out the elements of claim preclusion: "'the earlier suit (1) involved the same "claim" or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies.'" Here, no dispute existed over the first two elements because the 2015 Recovery Plan challenge mimicked the Oregon suit and the organizations' "Additional Claims rest on theories that they indisputably could have included in an amended complaint in Oregon" and because the organizations "share the required common interest in wildlife and habitat conservation."

The only element in dispute, therefore, was whether the Oregon litigation had resulted in a final judgment on the merits. In answering that question "yes," the panel began by stating that the circuit has "applied claim preclusion to bar the subsequent filing of claims that were subject to the denial of leave to amend even where the denial was based on dilatoriness rather than the merits. ... A contrary holding ... would 'create incentive for plaintiffs to hold back claims and have a second adjudication.'" Here, the original plaintiffs, "[i]nitially declining the opportunity to amend their Oregon complaint to add the Additional Claims, ... instead decided to pursue an appeal. Only after losing on appeal did they move to amend their complaint, but the district court denied that motion." This strategy meant that "[w]hen they appealed the district court's original dismissal of their complaint rather than amending, [the organizations] took on the risk that we would affirm and leave the judgment against them intact. Now they must live with the consequences of their choice." Finally, the panel rejected the organizations' contention that the Oregon dismissal was not on the merits:

> ESA's citizen-suit provision only confers jurisdiction over challenges alleging the Service's failure to perform a nondiscretionary duty. ... As a result, federal courts must assess the merits of an ESA claim in order to determine their jurisdiction over

> it. ... In other words, the Oregon district court had to analyze whether Friends plausibly alleged that the Service failed to comply with a nondiscretionary duty in order to determine whether there was jurisdiction.

Indeed, the panel noted that the Oregon court pointed this relationship out. *See Friends of the Wild Swan*, 260 F. Supp. 3d at 1343 ("The consequence of this particular type of failure to state a claim is that this Court lacks jurisdiction over the claims under the citizen-suit provision.").

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/21-35480.pdf