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Biodiversity Legal Foundation v. Badgley: Good News for Endangered Species Act Advocates, Bad News for At-Risk Species

Jennifer Schlotterbeck

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Biodiversity Legal Foundation v. Badgley:

Good News for Endangered Species Act Advocates,

Bad News for At-Risk Species

Jennifer Schlotterbeck*

In Biodiversity Legal Foundation v. Badgley, the Ninth Circuit held that the U.S. Fish and Wildlife Service cannot delay the initial finding to list a species as threatened or endangered beyond the mandatory deadline for making a final determination to list the species. The court held that under the Endangered Species Act, both decisions must be made within twelve months of receiving the listing petition. The court rejected the Service's arguments that funding constraints prevent timely final determinations. However, the decision failed to elucidate permissible reasons for delaying the initial finding for up to a year. It also failed to determine whether the agency's Listing Priority Guidance, which relegates new listing petitions to the bottom of the Service's priority list, is valid. Moreover, while the decision will clearly benefit species' advocates by reining in agency delay, it may actually harm at-risk species that lack petitioners vying for their listing.

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In *Biodiversity Legal Foundation v. Badgley (BLF)*, two individuals and eleven environmental organizations appealed a federal district court's ruling that the U.S. Fish and Wildlife Service (the Service) had discretion to delay certain findings under the Endangered Species Act (ESA). The case centered around two deadlines imposed by the ESA. The first is the ninety-day deadline for an "initial finding." This is a finding that a petition to list a species as threatened or endangered does or does not present substantial enough information showing that the

1. 309 F.3d 1166 (9th Cir. 2002).
species should be listed. The second is the twelve-month deadline for a "final determination" that the listing of a species is warranted or not warranted. The Service had been in the practice of delaying the ninety-day initial findings for so long that compliance with the twelve-month deadline for final determinations was impossible. The Ninth Circuit held that the Service must make both the initial finding and the final determination within twelve months of receiving the petition.

This decision represents a solid victory for ESA advocates. That said, two issues remain. First, the limits of agency discretion to delay the initial finding beyond ninety days, but for less than a year, have yet to be explicitly defined. Second, if budgetary shortfalls are truly prohibitive, the Service may have difficulty complying with court-ordered listing decisions.

Part I of this Note provides background on the Endangered Species Act and the listing process in particular. Part II outlines the legal landscape for alleged violations of the Endangered Species Act and Part III describes the Ninth Circuit’s holding in Biodiversity Legal Foundation v. Badgley. Part IV analyzes the court’s holding and the likely success of future facial or as-applied challenges to the Service’s Listing Priority Guidance (LPG), a document issued by the Service to help set listing priorities in light of budgetary shortfalls. Part V focuses on the practical effects of the decision on the Service, ESA advocates, and at-risk species.

This Note concludes first that the court’s holding amounts to a ruling that as applied, the LPG cannot lawfully operate to delay the initial finding or the final determination beyond twelve months. Second, any future facial challenge to the LPG will likely fail due to the Ninth Circuit’s decision in Western Radio Services Co. v. Espy, which precludes review of agency compliance with agency policy documents. Third, an as-applied challenge to the LPG, when it leads to a delay of an initial finding for less than for twelve months, is unlikely to occur. Finally, while the case is likely to benefit at least some species proposed for listing, it is also likely to result in the Service’s reshuffling of limited resources to comply with the deadlines. Unless the Service is provided with additional funding, this may prevent the agency from attending to at-risk species that are not the subject of listing petitions or court orders.

3. Id. § 1533(b)(3)(B).
4. BLD, 309 F.3d at 1175.
5. Id. at 1176.
6. 79 F.3d 896 (9th Cir. 1996).
I. BACKGROUND ON THE ENDANGERED SPECIES ACT

A. The Listing of Species Under the ESA

The ESA empowers the Secretaries of Commerce and the Interior to "list" species pursuant to articulated criteria. A species may be listed as either "endangered" (in danger of extinction) or "threatened" (likely to become endangered in the near future) if it meets any one or a combination of the factors outlined in the statute. These factors include: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization of the species for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting the species' continued existence. Once a species is listed, the protective measures outlined by the ESA and corresponding regulations apply to that species.

The Secretary may initiate the listing process herself, or pursuant to a petition submitted by "an interested person." Some ESA provisions require the Secretary to use certain mandatory practices in making a listing determination; other ESA provisions grant the Secretary significant discretion. The most obvious discretionary provision relates

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7. 16 U.S.C. § 1533(a) (2003); Matthew J. Rizzo, The Endangered Species Act and Federal Agency Inaction, 13 ST. LOUIS U. PUB. L. REV. 855, 856 (1994). The Secretary of Commerce is responsible for listing marine species; the Secretary of Interior is responsible for listing terrestrial species. § 1532(15). The Secretary of Commerce acts through the National Marine Fisheries Service, while the Secretary of Interior acts through the Fish and Wildlife Service. Id.

8. §§ 1533 (a)(1)(A)-(E); Rizzo, supra note 7, at 857 n.14.

9. § 1533(a)(1).

10. The Act prohibits certain acts with respect to listed species. Id. § 1538. For example, it is unlawful to "take" a listed species. "Take," defined in Section 1532(19), means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

11. “Secretary” as used herein refers to either the Secretary of Interior or the Secretary of Commerce. Id. § 1532(15).

12. Id. § 1533(a)(1).

13. Id. § 1533(b)(3)(A).

14. For example, the Secretary must publish in the Federal Register the proposed and final rules when listing a species, as well as the list of threatened and endangered species itself. Id. § 1533(b)(4), (c)(1). The Secretary is instructed to make sure the listing process relies solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species . . . .

15. See e.g., § 1533 (authorizing the Secretary to determine what qualifies a species as endangered); see also Roosevelt Campobello Int'l Park Comm'n v. United States EPA, 684 F.2d 1041, 1050 n.5 (1982) (holding that the Secretary has exclusive authority over the initial
to the listing decision itself: it is the Secretary who interprets the data and decides whether to list a species. Conversely, aspects of the timeline for making listing determinations are mandatory. It is this listing timeline that presents the critical issue in *Biodiversity Legal Foundation v. Badgley*.

### B. Deadlines for Listing Decisions Under the ESA

The ESA establishes a timeline for the consideration of listing petitions by the Secretary. It involves three deadlines. First, the Secretary is required, "to the maximum extent practicable," to make an initial finding within ninety days of receiving a listing petition. The initial finding is a determination of whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." If the finding is positive (i.e., the petition presents such information), the Secretary must "promptly commence a review of the status of the species concerned." Second, within twelve months of receiving the petition, the Secretary is required to make a final determination whether to list the species and she must publish a proposed rule if a listing is warranted. Third, within one year of publishing the proposed rule, the Secretary must publish a final one.

### C. Agency Track Record and The Listing Priority Guidance

An efficient, streamlined listing process is critical given the number of species in peril of extinction today. However, the Service's on-time listing performance has been less than stellar. Through 1991, the Service
missed its ninety-day deadline for an initial finding seventy-four percent of the time, and it missed the twelve-month deadline for a final determination by over six months thirteen percent of the time.\(^\text{23}\) In fact, in 1990, the U.S. Department of the Interior’s Inspector General noted that at then-current rates of listing, it could take up to forty-eight years to make listing determinations for all species then on the candidate list and that thirty-four species had already become extinct while waiting to be listed."\(^\text{24}\) As of July 15, 2003, there were 287 species awaiting an agency decision on their status.\(^\text{25}\)

Precisely to avoid this sort of backlog, the ESA requires the Secretary to publish agency guidelines to ensure efficient and effective implementation of listing procedures.\(^\text{26}\) Pursuant to this requirement, in 1996 the U.S. Fish and Wildlife Service published the Listing Priority Guidance (LPG).\(^\text{27}\) The LPG sets forth a tiered-ranking system for the Service to use to determine the order in which to address species listing. From highest to lowest priority, the LPG ranks emergency listings as Tier 1, final decisions on outstanding proposed listings as Tier 2, and all other actions including reclassifications and delistings, new proposed listings, petition findings, and critical habitat designations as Tiers 3 to 5.\(^\text{28}\) The Service created the LPG in response to severe cutbacks of its listing budget in the mid-nineties, including a temporary congressional moratorium on final listings.\(^\text{29}\) The Service realized that once funding was

\(^{23}\) J.B. Ruhl, Chapter 3: Section 4 of the ESA: The Keystone of Species Protection Law in ENDANGERED SPECIES LAW, POLICY, AND PERSPECTIVES, supra note 15, at 36 (citing GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: TYPES AND NUMBERS OF IMPLEMENTING ACTIONS, GAO/RCED-92-131BR 23 (May 1992)).


\(^{28}\) Id. The 2000 LPG no longer uses the term “tiers” but it still prioritizes the listing activities and gives fourth priority to the preliminary and final determinations on new petitions. Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg. 57,114 (Oct. 22, 1999).

\(^{29}\) In 1995, for example, a rider to the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-06, 109 Stat. 73, 86 (1995), provided that "$1,500,000 are rescinded from the amounts available for making determinations whether a species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act" and that, “none of the remaining funds appropriated under that heading may be made available for making a final determination that a species is threatened or endangered or that habitat constitutes critical habitat . . . .” See also Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1251 (10th Cir. 1998) (describing various bills passed in the mid-1990s to rescind previously appropriated funds from the listing budgets).
restored, it would need an efficient process for dealing with the backlog created by the moratorium.\textsuperscript{30}

The Service has issued a few new versions of the LPG since the original,\textsuperscript{31} but it has nevertheless continued to struggle with a backlog of candidate species.\textsuperscript{32} This backlog, along with the LPG's low prioritization of certain listing activities,\textsuperscript{33} such as petition findings (i.e., making the required initial findings and final determinations) or the processing of new proposed listings, often results in the Service missing deadlines imposed by the ESA. This in turn often leads to litigation.\textsuperscript{34}

When a member of the public challenges the Service's delay in making a finding under the ESA, the Service often defends the delay by pointing to its priorities as listed in the LPG.\textsuperscript{35} Challenging Service delay in essence means challenging the LPG. Courts must therefore choose between deferring to the Service's interpretation of the ESA as embodied in the LPG or forcing the Service to comply with sometimes flexible, sometimes stringent statutory deadlines.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{30} Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9,651 (Mar. 11, 1996).
\item \textsuperscript{31} The most recent LPG, addressing fiscal year 2000, addresses emergency listings, final decisions on proposed listings, the resolution of the status of hundreds of candidate species, and the processing of listing petitions. Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg 57,114.
\item \textsuperscript{32} U.S. FISH AND WILDLIFE SERVICE, THREATENED AND ENDANGERED SPECIES SYSTEM, at http://ecos.fws.gov/tess_public/html/boxscore.html (last updated June 1, 2003).
\item \textsuperscript{33} See supra note 30.
\item \textsuperscript{34} See, e.g., Envt'l Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) (regarding an alleged violation of section 7 of the ESA); Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1998) (regarding the Service's delay in designating critical habitat of the silvery minnow); Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249 (10th Cir. 1998) (regarding the Service's delay in making initial determination for Columbian sharp-tail grouse); Oregon Natural Res. Council, Inc. v. Kantor, 99 F.3d 334 (9th Cir. 1996) (regarding the Service's delay in making listing determination for coho salmon); Envt'l Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995) (regarding delay in making final determination for red-legged frog); Ctr. for Biological Diversity v. Norton, 212 F. Supp. 2d 1217 (S.D. Cal. 2002) (regarding failure to make critical habitat designations); Ctr. for Biological Diversity v. Norton, 208 F. Supp. 2d 1044 (N.D. Cal 2002) (regarding delay in making final determination for the California spotted owl and initial determination for the west coast population of the fisher); Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Tex. 1997) (reviewing agency decision to withdraw proposed listing of the Barton Springs salamander).
\item \textsuperscript{35} Because the Service uses the LPG to set its priorities, and a document prioritizing agency action is required under the ESA, the LPG is the perfect "fall guy" when the Service cannot comply with ESA deadlines. See, e.g., Biodiversity Legal Found. v. Babbitt, 146 F.3d at 1251 (agreeing with Service that LPG was permissible interpretation of ESA's requirements); see also discussion infra Part IV.
\item \textsuperscript{36} The ninety-day deadline to make the initial finding is to be followed "to the maximum extent practicable." 16 U.S.C. § 1533(b)(3)(A) (2003). The 12-month deadline provides no such wiggle room. It reads, "[w]ithin 12 months after receiving a petition... the Secretary shall make... [a] finding." Id. § 1533(b)(3)(B).
II. LEGAL LANDSCAPE: CHALLENGING ALLEGED VIOLATIONS OF THE ESA

A. Judicial Review of ESA Violations

When an agency interprets a statute it is charged with administering, the deferential *Chevron* doctrine applies. In *Chevron*, the Supreme Court established a two-pronged inquiry into statutory interpretation. First, if congressional intent behind a statute is clear, the inquiry ends; the agency and the court must give effect to that congressional intent. However, if the statute is silent or ambiguous, the second prong of *Chevron* calls for deference to the agency charged with administering the law. The question is then whether the agency’s construction of the statute is a permissible one. If permissible, *Chevron* calls for deference to the agency’s interpretation.

There is no Chevron deference when an ESA provision makes an agency action mandatory; rather, courts should actively enforce those provisions. In *Tennessee Valley Authority v. Hill* (*TVA*), for example, the Court held that the ESA required the cessation of construction on the Tellico Dam, a multi-million dollar investment. The Court held that the on-site discovery of the endangered snail darter required the cessation of construction so the required consultation could take place. The Supreme Court in *TVA* found that, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”

B. Challenges to Agency Delay Under the ESA

Some circuit courts have exhibited a similar readiness to compel agency action under the ESA. The cases suggest that whether a court should compel such action depends on how truly desperate the agency’s funding situation is: if there is a total moratorium on funding, the court will likely be more sympathetic to agency delay.

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38. *Id.* at 843
39. *Id.* at 842-43.
40. *Id.* at 843
41. *Id.* In other words, the interpretation is not arbitrary, capricious, or manifestly contrary to law.
42. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (finding ESA mandated that construction stop where an endangered species was discovered at construction site).
43. *Id.*
44. *TVA*, 437 U.S. at 172-73.
45. *Id.* at 184.
In 1995, before the advent of the LPG, in *Environmental Defense Center v. Babbitt* (EDC), environmental groups filed suit to compel a final determination on a petition to list the California red-legged frog as endangered. The Service argued that the funding moratorium precluded agency action. The Ninth Circuit found that the legislation enacting the moratorium "necessarily restrict[s] the Secretary's ability to comply with this duty by denying him funding." Though the failure to make a final determination violated the ESA, the court excused the Secretary from taking final action on the frog because no funds were appropriated for this purpose.

One year after EDC, in *Oregon Natural Resources Council v. Kantor*, the Ninth Circuit revealed a willingness to enforce the requirement that the Service publish a final rule within one year of a proposed rule listing a species. In that case, because the Service had delayed issuance of a proposed rule beyond the one-year deadline, the issuance of a final rule did not occur until well beyond twenty-four months of the filing of the original petition. The plaintiffs argued that the Secretary should have been required to publish the final regulation within twenty-four months of the filing of the petition while the Service argued that it was only required to publish the regulation within one year of the promulgation of the proposed regulation. Despite the congressional moratorium the court found that the Secretary should have published a final regulation, withdrawn the proposed regulation, or given notice that the one-year period was being extended within one year of publishing the proposed regulation.

In 1998, the Tenth Circuit concluded in *Forest Guardians v. Babbitt* that "if the Secretary unlawfully withheld agency action or unreasonably delayed it *at a time when the moratorium was not in effect*, we must compel the Secretary to perform the mandatory duties required by the ESA." The Service had failed to designate critical habitat for the Rio Grande silvery minnow and argued that the 1995 funding moratorium had precluded any critical habitat designations and created an enormous

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46. 73 F.3d 867 (9th Cir. 1995).
47. *Id.* at 869.
48. *Id.*
49. *Id.* at 871.
50. *Id.* at 872.
51. 99 F.3d 334 (9th Cir. 1996).
52. *Id.* at 336.
53. *Id.* at 336-37.
54. *Id.* at 338.
55. 174 F.3d 1178 (10th Cir. 1998).
56. *Id.* at 1189 (emphasis added).
57. *Id.* at 1181.
The Service also relied on the prioritizations in the LPG to justify its missed deadlines. Rejecting these arguments, the court held that resource limitations do not justify the Secretary’s failure to comply with mandatory, non-discretionary duties under the ESA. The court found the district court’s deference to the LPG misplaced, and ordered the Secretary to issue a final critical habitat designation for the silvery minnow.

Thus, except in the case of a congressional funding moratorium wholly precluding the challenged activity (or inactivity), the courts have treated mandatory, non-discretionary deadlines as mandatory, non-discretionary deadlines and have been willing to enforce them.

C. Challenges to Agency Delay of the Ninety-Day Initial Finding Specifically

As noted above, the ESA requires the Secretary, “[t]o the maximum extent practicable,” to make an initial finding “within 90 days after receiving the petition.” This provision grants the Secretary at least some discretion to delay this finding. The Tenth Circuit addressed the extent of agency discretion to delay the ninety-day initial finding in *Biodiversity Legal Foundation v. Babbitt* (Babbitt).

In Babbitt, ESA advocates and the Service argued for opposite meanings of “to the maximum extent practicable.” Both parties relied on a House Conference Report addressing agency discretion to delay the initial finding. The Report read:

The phrase “to the maximum extent practicable” addresses the concerns that a large influx of petitions coupled with an absolute requirement to act within 90 days would force the devotion of staff resources to petitions and deprive the Secretary of the use of those resources to list a species that might be in greater need of protection. The phrase is not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending and imminent proposals to list species subject to a greater degree of threat would make allocation of

58. *Id.* at 1182-83.
59. *Id.* at 1184.
60. *Id.*
61. *Id.* at 1192-93.
63. Some commentators argue that the use of words such as “discretion, practical, practicable, and judgment often guarantees failure.” George Cameron Coggins, *Chapter 1: A Premature Evaluation of American Endangered Species Law in ENDANGERED SPECIES ACT LAW, POLICY, AND PERSPECTIVES*, supra note 15, at 6.
64. 146 F.3d 1249 (10th Cir. 1998).
65. *Id.* at 1253-54.
resources to such a petition unwise. The listing agencies should utilize a scientifically based priority system to list and delist species, subspecies and populations based on the degree of threat, and proceed in an efficient and timely manner.66

The plaintiffs in Babbitt argued that the passage indicated that “only actions pertaining to ‘species subject to a greater degree of threat’ may excuse noncompliance” with the initial finding deadline.67 The Service argued that the passage reference “to the allocation of resources to species most in need” supports a broader reading of the statutory language, allowing the Service to prioritize its actions according to biological need when funding and manpower are limited.68

Despite this legislative history, the court found that Congress had not directly addressed the effects of a budgetary shortfall on the Service’s listing decisions. Without clear evidence of congressional intent, the court turned to an examination of the agency interpretation of the statute as embodied in the LPG. The issue was therefore whether the Service’s LPG—meant to fill the gap left by Congress—was inconsistent with the statute.69 The plaintiffs’ challenges to the agency delay in making a ninety-day finding on the sharp-tail grouse amounted to both a facial and an as-applied challenge to the 1997 LPG.70

Granting the agency Chevron deference, the court found the LPG itself to be consistent with the legislative history and the “broader purpose of the ESA”71 and ultimately, “eminently reasonable.”72 Moreover, even though the agency’s reliance on the LPG precluded its compliance with the final determination deadline, the Tenth Circuit found that reliance permissible since the document was valid on its face.73

67. Babbitt, 146 F.3d at 1254 (quoting Appellant Brief at 13-14).
68. Id.
69. Id. at 1255.
70. Plaintiffs challenged the LPG on its face by alleging the document itself was invalid; they challenged the application of the LPG in this instance as it precluded timely decisions regarding the sharp-tail grouse. Id. at 1252

(Although not explicitly stated in its brief, Biodiversity appears to challenge the validity of the 1997 LPG in that it directly conflicts with or is an unreasonable interpretation of section 4 of the ESA. Thus, our review of the district court’s grant of summary judgment in favor of the Service focuses on whether the Service’s promulgation of, and reliance on, the 1997 LPG are in violation of section 4 of the ESA ....)
71. Id. at 1255.
72. Id. at 1256.
73. Id. at 1257. The Tenth Circuit held that the Service’s delay in making a ninety-day finding on the sharp-tail grouse did not constitute unlawfully withheld agency action.
III. BIODIVERSITY LEGAL FOUNDATION V. BADGLEY: THE HOLDING

A. The Missed Deadlines

The case at hand concerns four species proposed for listing as threatened or endangered. Plaintiff environmental groups brought suit after the Service failed to act on the petitions for listing—petitions that had been brought between 1995 and 1998.\(^{74}\) The Service did not make the required findings within the statutory time frames for any of the species.\(^{75}\) The environmental groups (BLF) filed suit in Oregon federal district court in the fall of 1999, alleging that the Department of the Interior and the Service failed to make the required findings within the statutory deadlines outlined in the ESA.\(^{76}\) BLF sought relief in the form of (1) an order to the Service to make all listing decisions within thirty days of the opinion, and (2) a declaration that it is unlawful for the Service to delay the initial finding for so long that the Service is then precluded from meeting the twelve-month deadline.\(^{77}\) The plaintiffs also sought a declaration that the 1998-1999 LPG was invalid and that the Service was therefore enjoined from relying on it or similar guidelines.\(^{78}\) The chart below outlines the listing petitions filed by plaintiffs, and the Service’s respective findings.\(^{79}\)

\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id. at *8-9.
\(^{78}\) Id. at *9.
\(^{79}\) Id. at *2. In this chart, findings made by the Service are as of November 17, 1999, the date the suit was filed in the district court.
B. The District Court

BLF first argued that the LPG was invalid on its face because it was inconsistent with the statutory deadlines. The district court disagreed, adopting the reasoning of the Tenth Circuit’s Babbitt decision to hold that the LPG was not unlawful. The district court found that the “LPG does not require the [Service] to take any actions which would make delay beyond the statutory deadlines unavoidable.” Moreover, the Service has “statutory authority to establish guidelines to accomplish the purpose of the ESA efficiently.”

BLF next argued that the Service had violated the ESA by delaying the ninety-day findings for so long, noting that extensive delay in the initial finding could make compliance with the twelve-month deadline for

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80. Id. at *9.  
81. Id. at *12.  
82. Id.  
83. Id.
a final determination impossible.\textsuperscript{84} BLF argued that the phrase "to the maximum extent practicable" in the provision setting the ninety-day deadline for the initial finding should be construed as "unless impossible."\textsuperscript{85} Since the Service, relying on the LPG, argued that it had the authority to delay an initial finding indefinitely if it was not practicable to make the determination within ninety days,\textsuperscript{86} BLF's argument, in effect, amounted to an as-applied challenge to the LPG.

Again relying on \textit{Babbitt}, the court upheld the Service's interpretation of the initial finding deadline in the LPG.\textsuperscript{87} The court recognized the potential for violation of the twelve-month deadline if the initial finding were significantly delayed,\textsuperscript{88} but it declined to rule such a circumstance unlawful.\textsuperscript{89} Instead, the court indicated that, "[i]f the 12-month finding is late, it will be dealt with in its own right."\textsuperscript{90} The court found that the ESA's twelve-month finding deadline is absolute, and then held that the Service had failed to make the findings within that statutory deadline.\textsuperscript{91} The court ordered the Service to make the final determinations according to a court-ordered schedule.\textsuperscript{92}

\textbf{C. The Ninth Circuit}

Both the Service and BLF appealed several issues, although BLF did not appeal the district court's decision to uphold the LPG on its face.\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{84} The plaintiffs noted that the extensive delay in making the initial finding could make it impossible to comply with the mandatory twelve-month deadline to make the final determination. \textit{Id.} at *13.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} The LPG itself makes no mention of the authority to indefinitely delay the ninety-day initial finding. The Ninth Circuit did acknowledge that the current state of law under \textit{Kantor} "is that the Service has discretion to extend the initial determination beyond ninety days." Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002). It noted, though, that "the Service is required to make a final determination on positive petitions within twelve months of receipt" and that "[u]nfortunately, as a practical matter, if the initial determination has not been completed within twelve months, the final one has not been completed either." \textit{Id.}
\item \textsuperscript{87} Biodiversity Legal Found. v. Badgley, No. 98-1093-KI, 1999 U.S. Dist. LEXIS 17806, at *13-14.
\item \textsuperscript{88} \textit{Id.} at *22. With respect to the cuckoo, no initial finding had yet been made. The court acknowledged that if the 90-day finding on the cuckoo is positive, the Secretary will immediately have failed to make the 12-month finding in a timely fashion because he received the petition a year and nine months ago. If plaintiffs file another action at that time, [the court will] expedite the resolution of the case and rule in accordance with this opinion, unless Ninth Circuit law requires a different analysis. \textit{Id.}
\item \textsuperscript{89} \textit{Id.} at *14-15.
\item \textsuperscript{90} \textit{Id.} at *15.
\item \textsuperscript{91} \textit{Id.} at *19.
\item \textsuperscript{92} \textit{Id.} at *21.
\item \textsuperscript{93} See discussion infra Part IV.
\end{itemize}
This Note focuses on two issues presented to the Ninth Circuit: first, whether the Service had discretion to delay the initial finding indefinitely if it found that it was not practicable to make the finding within ninety days, and second, whether the district court should have considered the agency’s prioritization of its mandatory duties in determining whether the agency unlawfully withheld, or unreasonably delayed, action.

With respect to the first issue, the Ninth Circuit found that the district court’s interpretation, which authorized the Service to delay an initial finding indefinitely, rendered the twelve-month deadline for a final determination inoperative. Moreover, Congress recognized that timeliness in the listing process was essential and enacted the deadlines “for the very purpose of curtailing the process.” Because the Ninth Circuit had to reject constructions of the statute that frustrated Congress’ intent or purpose, the Service’s interpretation had to fail. The Ninth Circuit concluded that, “if the final determination must be made within twelve months, the only logical conclusion is that the initial one must be made within that time as well.”

94. Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171-76 (9th Cir. 2002). The Service presented the following issues on appeal that will not be addressed in this Note: first, whether plaintiff/appellants had standing to sue (the appellate court found that they did have standing to sue), id. at 1173; second, whether the issue was moot since all listing determinations in appellants’ complaints had been made by the time of the appellate hearing (the appellate court found that the issue was not moot), id. at 1175; and third, whether the district court erred in compelling the Service to act when the Service failed to meet the ESA deadline (the appellate court found that the district court did not err in compelling agency action), id. at 1177. The Ninth Circuit issued its first opinion in this case on March 21, 2002. Biodiversity Legal Found. v. Badgley, 284 F.3d 1046 (9th Cir. 2002). Based on that ruling, the Service asked for a rehearing on the issues of standing and mootness. The court granted the request for the rehearing and ultimately issued a second opinion on November 4, 2002. BLF, 309 F.3d 1166. The court ordered the first opinion withdrawn. Though the holding in the second Ninth Circuit opinion was the same as the holding in the first opinion with respect to all issues on appeal, the rationale for the ruling that the case was not moot differed. In the first opinion, the court relied on general principles of mootness, noting that “cessation of conduct does not necessarily render a declaratory judgment moot.” Biodiversity Legal Found. v. Badgley, 284 F.3d at 1054. In the second opinion, the court additionally based its holding on the fact that the Service’s delay was “capable of repetition, yet evading review.” BLF, 309 F.3d at 1173. With the exception of minor word changes, the remainder of the re-issued opinion is identical to the first opinion in all other respects but one: the first opinion was unanimous, while in the second opinion, Judge Graber dissented on the grounds that plaintiffs did not have standing and the case was moot. Id. at 1179.

95. In other words, without explicitly referring to the LPG itself, the Ninth Circuit addressed whether the district court should have deferred to the Service’s reliance on the LPG, which led to delayed initial findings beyond a year—in effect, an as applied ruling on the LPG. See discussion infra Part IV(A).

96. BLF, 309 F.3d at 1175.

97. Id. (citing Ctr. for Biological Diversity v. Norton, 254 F.3d 833, 839 (9th Cir. 2001)).

98. BLF, 309 F.3d at 1175 (citing Eisinger v. Fed. Labor Relations Auth., 218 F.3d 1097, 1100-01 (9th Cir. 2000)).

99. Id.
With respect to the second issue, the Ninth Circuit held that the district court properly ignored the agency’s priorities (as stated in the LPG) in determining whether the agency had unlawfully withheld or unreasonably delayed agency action. In essence, the agency’s stated priorities were irrelevant to a determination of whether the findings were unlawfully withheld or unreasonably delayed. Here, Congress imposed a twelve-month deadline for final determinations under the ESA and the Service failed to comply with that deadline.

IV. ANALYSIS: THE YEARLONG NINETY-DAY FINDING?

The Ninth Circuit’s holding in Biodiversity Legal Foundation (BLF) places a time limit on Service delay of ninety-day findings by making the twelve-month deadline for the final determination the “cap” on delay. Thus, budgetary constraints are no excuse to miss the final determination deadline. However, the decision does not describe permissible reasons for delaying the initial finding.

The court in BLF impliedly held that the LPG was invalid as applied when the Service’s reliance on it leads to missing the twelve-month deadline. However, the court did not address the validity of the LPG as applied in cases where the Service delays the initial finding beyond ninety days but less than one year; nor did the Ninth Circuit address the validity of the LPG on its face. Thus, it is not clear whether budgetary constraints can justify delay of the initial finding for up to one year.

A. Agency Discretion to Delay the Initial Finding for More Than One Year

The Ninth Circuit in BLF held that there is no agency discretion to delay the initial finding beyond the deadline for a final determination, but it did not address the extent of agency discretion to delay the initial finding before that deadline. The issue of the extent of agency discretion to delay findings under the ESA is inextricably linked to the validity of the LPG’s prioritization scheme. Because the LPG prioritization sometimes leads to missed deadlines under the ESA, a court addressing a missed deadline is inevitably faced with the issue of LPG validity. In such a situation, depending on the arguments posed, the court may address the validity of the LPG on its face, or it may address the validity of the LPG as applied in that instance.

Because the plaintiffs in BLF explicitly stated that they were not challenging the validity of the LPG or its application to the subject

100. Id. at 1176-77.

101. Id. at 1177. Relying on TVA, the Ninth Circuit found that the district court properly issued declaratory relief. Id.
species, the Ninth Circuit did not explicitly analyze the LPG, on its face or as applied. However, the Ninth Circuit did address whether the district court should have considered "the agency’s prioritization of its mandatory duties [with statutorily imposed deadlines] in determining whether the action in question was ‘unlawfully withheld’ or ‘unreasonably delayed.’" Because the LPG embodies the agency’s prioritization of its duties, this issue amounts to whether the LPG was valid as applied in this case. The district court found that failure to comply with a mandatory deadline is agency action “unlawfully withheld” regardless of the agency’s stated priorities, and the Ninth Circuit agreed.

Seemingly then, the Ninth Circuit did make a determination (albeit veiled) about the validity of the LPG—not on its face, but as applied. The court held that the Service’s prioritization of mandatory duties does not—and cannot—excuse the Service from complying with the final determination deadline. BLF thus stands for the proposition that the LPG is invalid as applied whenever it causes the Service to delay the initial finding for so long that it misses the mandatory twelve-month deadline for a final determination.

BLF was correctly decided. When the Service relies on the LPG, it uses the LPG’s prioritization scheme as an excuse for delaying listing findings and decisions beyond statutory deadlines (at least some of which are non-discretionary). To the extent that the Ninth Circuit has found certain deadlines under the ESA to be non-discretionary, application of the LPG can flout these deadlines by “guiding” the Service to postpone certain listing decisions.

102. Reply Brief for Appellants at 12, Biodiversity Legal Found. v. Badgley, 284 F.3d 1046 (9th Cir. 2002) (Nos. 00-35076, 00-35089) (“In this appeal, BLF is not challenging the validity of the LPG or its application to the cuckoo and catchfly.”)

103. BLF, 309 F.3d at 1176. Appellants note in their reply brief that the remedy (an injunction) is the same whether there is unreasonable delay or unlawfully withheld agency action. Reply Brief for Appellants, supra note 102, at 30.

104. BLF, 309 F.3d at 1178.

105. Id. The Ninth Circuit found that “Congress intended the petitioning process to interrupt the department’s priority system by requiring immediate review. Id. at 1177 (citing Ctr. for Biological Diversity v. Norton, 254 F.3d 833, 840 (9th Cir. 2001)).

106. 16 U.S.C. § 1533(b)(3)(B) (2003) states that “[w]ithin 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings...” (emphasis added). It is this very provision that was found to be a firm ESA deadline in BLF.

107. See BLF, 309 F.3d 1166, 1178 (holding that decision to list species must be made within one year from date of listing petition); Oregon Natural Res. Council, Inc. v. Kantor, 99 F.3d 334, 338 (9th Cir. 1996) (noting that Secretary must publish a final regulation, withdraw a proposed regulation, or give notice that the one-year period is being extended within one year from the date the proposed regulation is published).
The first LPG (published in 1996) states that a "backlog exists, and in order to focus conservation benefits on those species in greatest need, the Service believes that processing the outstanding proposed listings should receive higher priority than other actions authorized by section 4 (such as petition findings, new proposed listings, and critical habitat determinations)." While the Service's interest in granting listing priority to species described in outstanding petitions is perhaps commendable, nowhere does the ESA authorize the Service to use such a prioritization system as an excuse to miss the statutorily imposed deadlines for "lower priority" species. Arguably, the Service is authorized to rely on such a document only to the extent that the document prioritizes decision making within the framework of the statutorily imposed deadlines. In other words, the Service is not authorized to set up a prioritization system that, when applied, precludes timely listing decisions.

B. Agency Discretion to Delay the Ninety-Day Finding For Less Than One Year

BLF did not address the validity of the LPG in situations where it has led to delays in making the initial finding of less than one year. In fact, the holding appears to give the Service unfettered discretion to delay the initial finding for up to one year as long as the final determination is made on time. Practically speaking, a delay of one year in making the initial finding is surely preferable to a delay of several years, but reading BLF to authorize a year-long delay with no questions asked may lead to Service abuse of discretion. Lawsuits by listing petitioners have yet to cause the agency to make listing decisions in a timely fashion, so judicial authorization to delay the initial finding certainly will not reduce the Service's delay tactics — at least with respect to the initial finding.

110. See discussion, infra, Part V(B).
C. What the Future Holds

1. A Facial Challenge to the LPG

The Ninth Circuit did not address the issue of the facial validity of the LPG because the issue was not presented on appeal.\(^{111}\) If a petitioner challenges the LPG on its face, in an effort to delimit agency discretion, the Ninth Circuit will probably decline to consider challenge. The court would be limited by its holding in *Western Radio Services Company v. Espy*.\(^{112}\) There, the Ninth Circuit declined to review the Forest Service's alleged failure to comply with its own manual and handbook for two reasons. First, the manual and handbook did not have the independent force and effect of law (neither was substantive in nature; rather they were mere "guidelines").\(^{113}\) Second, neither was promulgated pursuant to a specific statutory grant and neither was in conformance with the Administrative Procedure Act's procedural requirements.\(^{114}\) The LPG has these same characteristics. Similarly, the LPG was adopted as "guidance for assigning relative priorities to listing actions."\(^{115}\) A court faced with the issue would therefore correctly conclude that the LPG is analogous to the Forest Service manual and handbook, and therefore not reviewable.\(^{116}\)

2. An As Applied Challenge to the LPG When It Leads to a Delay of the Initial Finding for Less Than One Year

Alternatively, ESA advocates might raise an as-applied challenge to the LPG when it leads to initial finding delays of greater than ninety days, but less than twelve months.\(^{117}\) It is unclear how the case would come out if the Ninth Circuit were faced with such a challenge.\(^{118}\) Perhaps more importantly, it is unlikely that ESA advocates will bring such a challenge.

\(^{111}\) See supra note 102.

\(^{112}\) 79 F.3d 896 (9th Cir. 1996).

\(^{113}\) *Id.* at 901.

\(^{114}\) *Id.*


\(^{116}\) Both prongs of the *Western Radio Services* analysis must be satisfied. *Western Radio, 79 F.3d* at 901. Thus even if the court found that the LPG was issued pursuant to a specific statutory grant (i.e., § 1533(h)) and in accordance with the APA, it would not likely conclude that the LPG creates substantive law or binding limits on the agency's authority.

\(^{117}\) Reply Brief for Appellants, supra note 101, at 12 ("In this appeal, BLF is not challenging the validity of the LPG or its application to the cuckoo and catchfly.")

\(^{118}\) Given the apparent discrepancy between the Ninth Circuit *EDC* holding and that in *BLF* (see discussion *infra* Part IV(D)), one wonders whether the Ninth Circuit is anxious to clarify whether budget problems justify delaying the initial finding.
After *BLF*, it is guaranteed that delay of the ultimate decision to list a species cannot take longer than twelve months. Ultimately, compliance with the twelve-month deadline for the final determination really is, "the heart of the issue."\(^{119}\) Thus, an as-applied challenge to the LPG when delay of the initial finding does not lead to a missed deadline for the final determination may be unnecessary.

**D. Agency Discretion to Delay Findings Due to Budgetary Constraints**

The Service consistently argues that its delay in making listing determinations is caused by lack of funding. In *BLF*, the Ninth Circuit noted that "[t]he Service's explanation for the delays is budgetary."\(^{120}\) In *Babbitt*, the Service argued that it had failed to make an initial finding "due to inadequate funding."\(^{121}\) In *Forest Guardians*, the Secretary defended his failure to designate critical habitat on the grounds that "no resources are available at this time to complete a critical habitat determination."\(^{122}\) In *Center for Biological Diversity v. Badgley*, the Service failed to make a final determination on the yellow-billed cuckoo because it was "laboring under a backlog due to insufficient funding over many years."\(^{123}\)

The *BLF* Court's rejection of the Service's argument that its delay in making initial findings is justified by lack of funding arguably conflicts with the court's earlier decision in *EDC*. There, the Ninth Circuit excused the Service's failure to make a final determination on the grounds that Congress had failed to appropriate funds for this purpose.\(^ {124}\)

Read broadly, *EDC* stands for the proposition that a lack of funding that precludes agency compliance with mandatory deadlines under the ESA always justifies agency delay. Other ESA decisions do not support this interpretation given the "pit bull" nature of the ESA. For instance, the Supreme Court entrenched the regulatory power of the ESA in *TVA v. Hill*.\(^ {125}\) The Ninth Circuit, relied on *TVA* to find that "[o]nly by requiring substantial compliance with the act's procedures can we effectuate the intent of the legislature."\(^ {126}\) Similarly, in *Forest Guardians*, the Tenth Circuit indicated that it was "not unsympathetic to the Secretary's practical predicament," but nonetheless ordered the Secretary

\(^{119}\) E-mail from Stephanie M. Parent, Staff Attorney, Pacific Environmental Advocacy Center, to Jennifer Schlotterbeck (Oct. 9, 2002) (on file with author).

\(^{120}\) Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1170, n.2 (9th Cir. 2002).

\(^{121}\) Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1252 (10th Cir. 1998).

\(^{122}\) Forest Guardians v. Babbitt, 174 F.3d 1178, 1182 (10th Cir. 1998).


\(^{124}\) Envt'l Def. Ctr. v. Babbitt, 73 F.3d 867, 872 (9th Cir. 1995).


\(^{126}\) Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002).
to issue a final critical habitat designation for the silvery minnow "without regard to the Secretary's other priorities under the ESA."\(^{127}\)

Read together, those cases support a narrower reading of *EDC*. *EDC* thus stands for the proposition that in the rare instance of a total moratorium on funding, the Secretary is authorized under the ESA to delay final action on a petition. The language in the *EDC* opinion—that the court could hold off on compelling action until "a reasonable time after appropriated funds are made available"—supports this interpretation.\(^{128}\) Moreover, this language was more than mere dicta, it was the appellate court's order on remand.

In *BLF*, the Ninth Circuit found that inadequate resources do not excuse delay of the twelve-month final determination. Perhaps a future ruling will declare that inadequate resources are no excuse for delay of the ninety-day initial finding as well. Either way, it is worth noting that the initial finding places little extra burden on the Service given the minimal effort required to review the petition.\(^{129}\) The benefit to listing petitioners is significant, however. If the initial finding is negative, the petitioner knows sooner that more science must be gathered in support of listing the species.

V. THE PRACTICAL IMPLICATIONS OF BLF

Pursuant to *BLF*, the Service must make a final determination about the listing of a species within twelve months of receiving a petition. While forcing agency compliance with mandatory deadlines designed to help ensure species protection is a step forward, one cannot ignore the practical implications of the decision in light of congressional underfunding of listing decisions.


*BLF* gives listing petitioners the upper hand when it comes to forcing agency action on final determinations. The case represents a substantial victory for ESA advocates for two reasons. First, while the initial finding may continue to be delayed with or without justification, any unfettered discretion the Service may have been exercising with respect to the final determination has been reined in. With a ruling as plainly worded as

\(^{127}\) 174 F.3d at 1191-93.

\(^{128}\) *EDC*, 73 F.3d at 869.

\(^{129}\) See 16 U.S.C. § 1533(b)(3)(A). According to the statute, the Secretary need not look further than the petition itself to make the ninety-day finding. "[T]he Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information . . .") (emphasis added).
BLF's, the Service may be less likely to contest challenges to its delayed listings and may instead either settle the matter or make the findings. Second, by holding that both the initial finding and the final determination must be made within a year, the court has implicitly granted potential litigants a cause of action that ripens one year and one day after the filing of the listing petition. Prior to BLF, petitioners had to rely on the Administrative Procedure Act's rule against unreasonable delay. Listing petitioners sometimes waited two years before filing suit for fear that the courts would not find "unreasonable delay." Even if the Service does not settle or concede, at least the listing petitioners can get into court faster.

B. BLF May Be Bad News for Some At-Risk Species.

There is no doubt that congressional budgetary actions have severely impacted the Service’s listing budget. Given the Service’s dismal financial situation, a court mandate forcing a particular listing decision seems destined to knock another species off the Service’s radar screen. Funds must be redirected when a court mandates compliance with ESA deadlines. The species that has a litigator waiting in the wings thus benefits from BLF, but the species with no advocate – even if it is more

130. BLF, 309 F.3d at 1178 ("[B]oth the initial finding and the final determination must be completed within twelve months of the date the petition is received.").
131. See id. at 1176. The court upheld the district court’s reliance on Forest Guardians for the proposition that agency action is unlawfully withheld when the Secretary fails to comply with a statutorily imposed absolute deadline and an injunction shall thus issue. id. at 1176-78.
132. E-mail from Stephanie M. Parent, Staff Attorney, Pacific Environmental Advocacy Center, to Jennifer Schlotterbeck (Oct. 14, 2002) (on file with author). According to the Staff Attorney who represented the Biodiversity Legal Foundation in BLF, "[t]he case law is all over the map, but generally you need a couple of years to get unreasonable delay." In BLF, the initial findings were delayed by at least one year and as many as four years, at the time the suit was filed.
133. See supra note 29. Whether the delay in listing decisions is caused solely by budgetary problems is less clear, however. Arguably there is some degree of inefficiency or perhaps even laziness at work. Moreover, Biodiversity Legal Foundation argued in its reply brief that despite the Service' persistent claim that it lacks funds, it has yet even to request more funding from Congress. Reply Brief for Appellants, supra note 102, at 21.
134. Some courts have all but ignored the potential impact on other species when the Service is mandated to take action under the ESA. For example, with respect to the Service's obligation to devise and implement a recovery plan for a listed species, a district court in Texas indicated that:

[ti]his Court refuses to legislate a new exception reading: the Secretary shall develop and implement a recovery plan unless he claims, or suspects, that "tight budget constraints" make develop [sic] or implementation of a recovery plan inconvenient or difficult to reconcile with the needs of other species, in which case he may or may not develop and implement a plan, when and if he pleases.

threatened—may be lost in the shuffle simply because there is not enough agency manpower to discover the species in peril.

There is something to be said for allowing agency experts to decide priorities for making listing decisions. As one commentator argues, "there is little doubt that a flexible, forgiving judicial approach [to agency inaction due to inadequate resources] is vastly superior to the rigid adherence to doctrine urged by Posner" (who wrote in *Salameda v. INS* that "understaffing is not a defense to a violation of principles of administrative law"). That same commentator points out that the federal agencies today have to perform with less money and fewer people, and even suggests that "there seems to be an inverse relationship between the resources made available to an agency and the demands imposed upon it." Further, strict enforcement of deadlines "would not and could not induce a resource-starved agency to comply with all statutory deadlines."

When the Service is forced to make a decision about a particular species (by either court order or threat of litigation), if the finding is positive (i.e., the species warrants further investigation or listing), that species will profit from a speedier assignment to the list of threatened or endangered species. The benefit to the listed species is clear. The adverse impact on other candidate species, however, is difficult to assess. To properly address the needs of all at-risk species by complying with mandatory ESA deadlines, additional funding is for the Service is necessary.

**CONCLUSION**

In *BLF*, the Ninth Circuit held that both the initial finding and the final determination must be made within twelve months of receiving a petition to list a species as threatened or endangered under the ESA. The decision made clear that the Service may not rely on the LPG to justify a delay of the ninety-day initial finding that lasts more than one year; such a delay clearly violates the ESA. However, it is still unclear when the Service may delay the ninety-day finding if such delay does not lead to a missed final determination deadline under the ESA.

Though the Ninth Circuit did not delineate permissible reasons for delaying an initial finding for up to one year, its ruling may nonetheless benefit some species at-risk of extinction. First, the decision will likely

135. 70 F.3d 447, 452 (7th Cir. 1995).
137. Id. at 65.
138. Id. at 77.
139. Id. at 86.
decrease litigation over delays because the Service will concede that it has limited discretion. Second, because BLF placed a time limit on agency discretion to delay the initial finding, a cause of action for delay accrues in considerably less time than before BLF.

Despite the benefits of the decision, however, one cannot ignore the practical implications of an order to make a listing decision directed at an agency with insufficient funding. The reshuffling of limited resources by the Service, to comply with court orders and mandatory deadlines, may harm rather than help some at-risk species. By forcing agency action only on species for which a listing petition has been filed, agencies may overlook those species at-risk of extinction, but for which no petition has been filed. Successful implementation of the ESA may therefore only be possible if the agency receives adequate funding to do its job. Let us hope that day is coming.