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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TURTLE ISLAND RESTORATION NETWORK and  
MAYPORT VILLAGE CIVIC ASSOCIATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE,

Defendant.

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No. 09-5239 CW

ORDER GRANTING  
DEFENDANT'S  
MOTION FOR  
JUDGMENT ON THE  
PLEADINGS  
(Docket No. 17)

Plaintiffs Turtle Island Restoration Network (TIRN) and Mayport Village Civic Association allege that Defendant United States Department of State does not satisfy its obligations under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) when it certifies that foreign nations meet the requirements of section 609(b)(2) of Public Law 101-162, 103 Stat. 988, 1037-38 (Nov. 21, 1989) (codified at 16 U.S.C. § 1537 note). Defendant moves for judgment on the pleadings. Plaintiffs oppose the motion. The motion was heard on June 3, 2010. Having considered oral argument and all the papers submitted by the parties, the Court GRANTS Defendant's Motion.

BACKGROUND

Passed by Congress in 1989, section 609(b)(1) of Public Law 101-162 bans the importation of shrimp harvested with technology that may adversely affect sea turtles. 103 Stat. at 1037. Under section 609(b)(2), this ban "shall not apply if the President shall

1 determine and certify to the Congress" that

2 (A) the government of the harvesting nation has provided  
3 documentary evidence of the adoption of a regulatory  
4 program governing the incidental taking of such sea  
turtles in the course of such harvesting that is  
comparable to that of the United States; and

5 (B) the average rate of that incidental taking by the  
6 vessels of the harvesting nation is comparable to the  
average rate of incidental taking of sea turtles by  
7 United States vessels in the course of such harvesting;  
or

8 (C) the particular fishing environment of the harvesting  
9 nation does not pose a threat of the incidental taking of  
such sea turtles in the course of such harvesting.

10 103 Stat. at 1038. The certification authority under section  
11 609(b)(2) has been delegated to Defendant. Delegation of Authority  
12 Regarding Certification of Countries Exporting Shrimp to the United  
13 States, 56 Fed. Reg. 357 (Dec. 19, 1990).

14 The certification process under section 609(b)(2) is  
15 implemented through guidelines promulgated by Defendant. These  
16 guidelines have been revised on several occasions since they were  
17 first promulgated in 1991. The version currently in use was  
18 promulgated in 1999. See generally Revised Guidelines for the  
19 Implementation of Section 609 of Public Law 101-162 Relating to the  
20 Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64  
21 Fed. Reg. 36,946 (July 8, 1999) (1999 Guidelines). Since the  
22 inception of the certification program, several parties have  
23 challenged the various iterations of Defendant's implementation  
24 guidelines.

25 In 1992, Earth Island Institute, of which TIRN was formerly a  
26 part, filed a lawsuit in the Northern District of California,  
27 asserting that Defendant had improperly implemented and

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1 administered the section 609(b)(2) certification process and had  
2 not banned the importation of shrimp as required by section  
3 609(b)(1). See generally Earth Island Inst. v. Christopher, 6 F.3d  
4 648 (9th Cir. 1993) (Earth Island I). The district court dismissed  
5 the action for lack of subject matter jurisdiction, concluding that  
6 Earth Island's challenge to section 609(b) fell within the  
7 exclusive jurisdiction of the United States Court of International  
8 Trade (CIT). The Ninth Circuit agreed, holding that section 609(b)  
9 concerns an embargo on the importation of merchandise, which lies  
10 within the CIT's exclusive jurisdiction under 28 U.S.C. § 1581(i).  
11 Earth Island I, 6 F.3d at 651.

12 Earth Island then filed suit in the CIT, alleging that the  
13 certification process, as provided for by the implementation  
14 guidelines, did not comport with section 609. See Earth Island  
15 Inst. v. Christopher, 913 F. Supp. 559, 562 (CIT 1995) (Earth  
16 Island II); see generally Revised Guidelines for Determining  
17 Comparability of Foreign Programs for the Protection of Turtles in  
18 Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9,015 (Feb. 18, 1993)  
19 (1993 Guidelines). Specifically, Earth Island complained that the  
20 1993 Guidelines impermissibly restricted the geographical scope of  
21 the ban imposed by section 609(b)(1). Id. at 562. Earth Island  
22 also objected to how Defendant determined whether the incidental  
23 taking of sea turtles was "comparable to that of the United  
24 States." Id. The court agreed that Defendant inappropriately  
25 limited the areas to which the ban applied, but concluded that the  
26 record did not, at that time, support a finding that the 1993  
27 Guidelines contravened section 609(b)(2). Earth Island II, 913 F.

1 Supp. at 579-80.

2 In a subsequent suit, Earth Island, which TIRN eventually  
3 replaced as a named plaintiff, asserted that Defendant's 1999  
4 Guidelines did not comport with section 609(b)(2). See generally  
5 Earth Island Inst. v. Daley, 48 F. Supp. 2d 1064 (CIT 1999); Turtle  
6 Island Restoration Network v. Mallett, 110 F. Supp. 2d 1005 (CIT  
7 2000). In particular, TIRN complained that the 1999 Guidelines  
8 impermissibly provided for a procedure through which shipments of  
9 shrimp from uncertified countries could be imported into the United  
10 States. See Turtle Island Restoration Network v. Evans, 284 F.3d  
11 1282, 1286-87 (Fed. Cir. 2002) (Earth Island III). Although the  
12 CIT agreed with TIRN's position, the Federal Circuit reversed,  
13 concluding that the 1999 Guidelines reflected a reasonable  
14 interpretation of section 609(b). Earth Island III, 284 F.3d at  
15 1297.

16 The 1999 Guidelines were promulgated in response to objections  
17 raised by the World Trade Organization on behalf of foreign  
18 countries that argued that section 609(b) violated the 1994 General  
19 Agreement on Tariffs and Trade. Earth Island III, 284 F.3d at  
20 1289. Defendant intended the revisions contained therein "to  
21 increase the transparency and predictability of the certification  
22 process and to afford foreign governments seeking certification a  
23 greater degree of due process." 64 Fed. Reg. at 36,946. To this  
24 end, the 1999 Guidelines define when the section 609(b)(1) ban  
25 applies, list factors Defendant considers when certifying countries  
26 under section 609(b)(2) and prescribe a timeline and procedures for  
27 making certification decisions. Id. at 36,949-51.

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1 In this action, TIRN and Mayport Village, a Florida-based  
2 organization that represents the interests of businesses and  
3 residents of Mayport, Florida, complain that Defendant's  
4 certification process violates the NEPA and the ESA. In  
5 particular, Plaintiffs contend that the individual certification  
6 decisions made pursuant to the 1999 Guidelines are "major federal  
7 actions that have significant impacts on the human environment,"  
8 requiring environmental review and public disclosure under the  
9 NEPA. Compl. ¶¶ 30-31. Plaintiffs also assert that these  
10 decisions may affect sea turtle species listed as threatened or  
11 endangered under the ESA, triggering the consultation requirement  
12 under section 7(a)(2) of the ESA. Plaintiffs seek a declaration  
13 that Defendant violates the NEPA and the ESA and an injunction  
14 requiring Defendant to comply accordingly.

15 LEGAL STANDARD

16 Rule 12(c) of the Federal Rules of Civil Procedure provides,  
17 "After the pleadings are closed but within such time as not to  
18 delay the trial, any party may move for judgment on the pleadings."  
19 Judgment on the pleadings is proper when the moving party clearly  
20 establishes on the face of the pleadings that no material issue of  
21 fact remains to be resolved and that it is entitled to judgment as  
22 a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co.,  
23 Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

24 DISCUSSION

25 Defendant argues that, based on the final judgments in Earth  
26 Island II and Earth Island III, res judicata bars TIRN's claims in  
27 this action. Because venue in this case is based on TIRN's  
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1 residence within this judicial district, Defendant asserts that  
2 Mayport Village's claims must be dismissed for improper venue.  
3 Defendant also asserts that Plaintiffs have failed to state a  
4 claim. Alternatively, Defendant contends that the Court lacks  
5 subject matter jurisdiction because the CIT has exclusive  
6 jurisdiction over claims arising out of the administration and  
7 enforcement of section 609(b).

8 I. Res Judicata

9 "Res judicata bars a suit when 'a final judgment on the merits  
10 of an action precludes the parties or their privies from  
11 relitigating issues that were or could have been raised in that  
12 action.'" ProShipLine Inc. v. Aspen Infrastructures Ltd., 594 F.3d  
13 681, 688 (9th Cir. 2010) (quoting Allen v. McCurry, 449 U.S. 90, 94  
14 (1980)). Res judicata applies "when there is '(1) an identity of  
15 claims; (2) a final judgment on the merits; and (3) identity or  
16 privity between parties.'" ProShipLine, 594 F.3d at 688 (quoting  
17 Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002). TIRN  
18 does not dispute that Earth Island II and Earth Island III  
19 constitute final judgments on the merits or that it is in privity  
20 with Earth Island.

21 To determine whether an identity of claims exists, a court  
22 considers four factors: "(1) whether the two suits arise out of the  
23 same transactional nucleus of facts; (2) whether rights or  
24 interests established in the prior judgment would be destroyed or  
25 impaired by prosecution of the second action; (3) whether the two  
26 suits involve infringement of the same right; and (4) whether  
27 substantially the same evidence is presented in the two actions."  
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1 ProShipLine, 594 F.3d at 688 (citation omitted; emphasis in  
2 original). "Whether two suits arise out of the 'same transactional  
3 nucleus' depends upon 'whether they are related to the same set of  
4 facts and whether they could conveniently be tried together.'" Id.  
5 (quoting W. Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992))  
6 (emphasis in original). "Reliance on the transactional nucleus  
7 element is especially appropriate because the element is outcome  
8 determinative." ProShipLine, 594 F.3d at 689 (citation and  
9 internal quotation marks omitted).

10 An identity of claims exists between this action and the  
11 earlier Earth Island litigation and, as a result, res judicata bars  
12 TIRN's current claims. TIRN complains here that Defendant fails to  
13 comply with the NEPA or the ESA in the context of its certification  
14 decisions. As explained above, the 1999 Guidelines prescribe the  
15 factors Defendant considers in making certification decisions and  
16 the procedures through which such decisions are made. The process  
17 and, specifically, the 1999 Guidelines were at issue in Earth  
18 Island III, and Plaintiff does not assert that either have  
19 materially changed.

20 At the time of that litigation, it was known that Defendant's  
21 process and the 1999 Guidelines did not require that, when it makes  
22 certification decisions, it engage in the environmental review and  
23 public disclosure that are required when the NEPA applies or the  
24 consultation mandated when the ESA applies. As noted above,  
25 Defendant intended the 1999 Guidelines to delineate for foreign  
26 countries exactly what it considers when making certification  
27 decisions. The 1999 Guidelines say nothing about an environmental  
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1 review or general consultation with other federal agencies.<sup>1</sup> This  
2 placed TIRN on notice that Defendant does not undertake these  
3 procedures when certifying foreign countries. Thus, TIRN could  
4 have raised its current claims in its prior litigation before the  
5 CIT but chose not to do so.<sup>2</sup>

6 TIRN asserts that Defendant mischaracterizes its claims. It  
7 argues that it is not challenging the 1999 Guidelines, but rather  
8 Defendant's "failure to act in compliance with NEPA and section 7  
9 of the ESA." Opp'n at 10. TIRN cannot artfully plead its NEPA and  
10 ESA theories to elude the res judicata bar of its claims. American  
11 Bird Conservancy v. FCC, 545 F.3d 1190 (9th Cir. 2008), which  
12 addressed an attempt to plead around a jurisdictional bar, is  
13 instructive. There, the plaintiffs filed suit under the ESA in  
14 federal district court, asserting that "the FCC had not complied  
15 with its statutory obligation to consult with the Secretary of the  
16 Interior when it granted the registration applications for the  
17 seven communications towers." Id. at 1192. The district court

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19 <sup>1</sup> The 1999 Guidelines provide for consultation with other  
20 federal agencies in limited circumstances. In assessing any  
21 information on a country's efforts to protect sea turtles outside  
22 the context of "commercial shrimp trawl harvesting," Defendant must  
23 "rely on the technical expertise of [the U.S. National Marine  
24 Fisheries Service] and, where appropriate, the US Fish and Wildlife  
25 Service to evaluate threats to sea turtles and the effectiveness of  
26 sea turtle protection programs." 64 Fed. Reg. at 36,951.

24 <sup>2</sup> TIRN correctly asserts that "the CIT does not have  
25 jurisdiction over cases involving only NEPA and ESA claims." Opp'n  
26 at 14. However, the CIT can hear such claims when they are plead  
27 along with claims within its jurisdiction. See, e.g., Defenders of  
28 Wildlife v. Hogarth, 330 F.3d 1358, 1363-64 (Fed. Cir. 2003).  
Because the CIT had jurisdiction over the claims raised in the  
litigation underlying Earth Island III, it could have heard TIRN's  
NEPA and ESA claims.

1 dismissed the plaintiffs' suit for lack of subject matter  
2 jurisdiction, concluding that they were actually challenging the  
3 FCC orders that granted the licenses, the exclusive review of which  
4 was vested in the courts of appeals. Id. On appeal, American Bird  
5 contended that it was not challenging the tower registrations, but  
6 rather was objecting only "to the FCC's failure to consult with the  
7 Secretary before granting the tower registrations." Id. at 1193  
8 (emphasis in original). The Ninth Circuit rejected the plaintiffs'  
9 "artful pleading," stating,

10 American Bird does not object to the agency's failure to  
11 consult in the abstract; rather, it identifies seven  
12 discrete tower registrations that it alleges were not  
13 supported by adequate environmental investigation. The  
14 tower registrations are therefore inextricably  
15 intertwined with the FCC's obligation to consult with the  
16 Secretary. American Bird recognizes as much; in its  
17 notice of filing suit, it stated that it would "file  
18 litigation to enforce the ESA's requirements should the  
19 FCC continue to authorize operation of the subject  
20 structures in an unlawful manner." American Bird cannot  
21 elude the Communications Act's exclusive review provision  
22 by disguising its true objection to the tower  
23 registrations as a "failure to act" claim.

24 Id. (emphasis and editing marks omitted).

25 Similarly here, TIRN is objecting to Defendant's failure to  
26 act in compliance with the NEPA and the ESA when it certifies  
27 foreign countries under section 609(b)(2). This failure to act is  
28 in the context of Defendant's certification process, as prescribed  
by the 1999 Guidelines. The certification decisions, the process  
through which they are made and the 1999 Guidelines prescribing the  
process are, as in American Bird, inextricably intertwined. Thus,  
even though TIRN phrases its current claims as challenges to  
Defendant's failure to comply with the NEPA and the ESA, its claims

1 are in fact directed at the 1999 Guidelines.

2 TIRN analogizes this case to Fund for Animals v. Lujan, in  
3 which the Ninth Circuit held that res judicata did not bar the  
4 plaintiff's claims. 962 F.2d 1391, 1399 (9th Cir. 1992). There,  
5 the federal government defendants asserted that the action was  
6 barred because the plaintiff, in earlier litigation, challenged a  
7 1985 decision to allow bison to leave Yellowstone National Park.  
8 Id. at 1398. The court rejected this argument because the  
9 plaintiff's action concerned a 1990 bison management plan, which  
10 the court stated differed "significantly from the passive conduct  
11 of the named federal defendants in 1985 in failing to prevent bison  
12 from leaving Yellowstone." Id. at 1399. Because the two actions  
13 challenged different conduct, res judicata did not apply. Id.  
14 Here, in contrast, the same government conduct is at issue: the  
15 procedures Defendant uses to certify nations under the 1999  
16 Guidelines. As noted above, TIRN does not contend that either the  
17 process or the 1999 Guidelines have materially changed since Earth  
18 Island III was litigated.

19 TIRN also cites Hells Canyon Preservation Council v. United  
20 States Forest Service, 403 F.3d 683 (9th Cir. 2005), which is  
21 equally inapposite. In a prior action, the plaintiff had alleged  
22 that the Forest Service violated the NEPA by relocating a portion  
23 of a trail without filing an environmental impact statement. Id.  
24 at 690. The court concluded that this did not bar the plaintiff's  
25 subsequent suit, in which it complained that "parts of the trail  
26 remain inside the Wilderness after the relocation." Id. at 691  
27 (emphasis in original). Unlike TIRN here, Hells Canyon challenged  
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1 the defendant's conduct following a change in the facts. No such  
2 shift has occurred here. TIRN contends that it is challenging the  
3 certification process under the NEPA and the ESA, not section  
4 609(b)(2). However, Defendant has not altered how it determines  
5 whether to certify foreign nations. This action does not reflect a  
6 change in facts, but rather a different legal theory TIRN is  
7 employing to challenge the 1999 Guidelines.

8 Finally, TIRN contends that the recent NEPA and ESA violations  
9 they allege could not have been raised in Earth Island II or Earth  
10 Island III because they had not yet occurred. This is true to the  
11 extent that Defendant makes certification decisions annually that,  
12 according to TIRN, do not comply with the NEPA and the ESA.  
13 However, TIRN does not dispute that this challenge could have been  
14 raised with respect to the 1999 Guidelines in the Earth Island III  
15 litigation. By asserting legal theories that could have been  
16 adjudicated earlier, TIRN impermissibly attacks the 1999 Guidelines  
17 in a piecemeal fashion; allowing TIRN to do so would contravene the  
18 purposes of res judicata.

19 Accordingly, because TIRN's claims arise from the same  
20 transactional nucleus of facts as the previous Earth Island  
21 litigation, res judicata bars its claims under the NEPA and the ESA  
22 against Defendant's 1999 Guidelines. Res judicata, however, does  
23 not bar Mayport Village's claims because it lacks privity with any  
24 plaintiff in the previous Earth Island litigation.

25 II. Improper Venue

26 Generally, a civil action in which a defendant is an agency of  
27 the United States may "be brought in any judicial district in which

1 (1) a defendant in the action resides, (2) a substantial part of  
2 the events or omissions giving rise to the claim occurred, or a  
3 substantial part of property that is the subject of the action is  
4 situated, or (3) the plaintiff resides if no real property is  
5 involved in the action." 28 U.S.C. 1391(e).

6 Absent TIRN's participation in the suit, Mayport Village does  
7 not establish venue in the Northern District of California.  
8 Mayport Village may file suit in either the District of Columbia,  
9 in which Defendant resides and a substantial part of the events  
10 underlying this suit occurred, or in the Middle District of  
11 Florida, in which it is a resident.

12 Accordingly, Mayport Village's claims are dismissed for  
13 improper venue.

14 CONCLUSION

15 For the foregoing reasons, the Court GRANTS Defendant's Motion  
16 for Judgment on the Pleadings. (Docket No. 17.) TIRN's claims are  
17 dismissed with prejudice as barred by res judicata. Mayport  
18 Village's claims are dismissed without prejudice to refile in a  
19 proper venue.

20 The Clerk shall enter judgment and close the file. The  
21 parties shall bear their own costs.

22 IT IS SO ORDERED.

23  
24 Dated: July 19, 2010



CLAUDIA WILKEN  
United States District Judge