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Lawsuit over orcas dismissed: Builders, farmers have no legal right to challenge whale protections, ruling says
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Dec. 21--A federal judge in Seattle dismissed with prejudice on Wednesday a lawsuit challenging the 2005 Endangered Species Act listing of Puget Sound's resident killer whales.

U.S. District Court Judge Thomas Zilly's ruling was greeted as an early Christmas present by orca fans, who said it clears the way for actions to revive the remaining population of about 90 killer whales.

On the other side of the dispute, attorney Russell Brooks, who filed the lawsuit for the Washington State Farm Bureau and the Building Industry Association of Washington, said his clients still have legal options, including appeal.

In his decision, Zilly said the builders and farmers don't have the legal right to challenge the federal government's decision to protect the orcas as endangered because lawyers failed to provide evidence that the listing harms the two groups. That didn't please Brooks or his clients.

"Why in the world do we have to wait until someone actually loses their livelihood?" asked Brooks, who works for the Pacific Legal Foundation, which specializes in property rights cases.

Foes of the listing have argued that building regulations and other land-use restrictions based on the listing would unnecessarily hinder farming and construction.

Orca fans first asked federal officials to extend Endangered Species Act protections to the Sound's killer whales in 2001, but the National Marine Fisheries Service refused.

Activists led by **the Center for Biological Diversity** sued the federal government. After another federal judge, Robert Lasnik, ordered the Fisheries Service to reconsider, agency officials agreed to protect the whales, who typically inhabit northern Puget Sound from spring until fall.

Late last month, the Fisheries Service issued a proposed whale recovery plan, calling for more study to weigh the significance of problems confronting the whales. Perhaps the most outstanding is the lack of suitable prey, specifically chinook salmon, also federally protected under the Endangered Species Act. Other difficulties include toxic pollution, vessel traffic and underwater noise.

Among those celebrating Zilly's order Wednesday was former Secretary of State Ralph Munro, who was among the parties who sued the federal government to protect the whales.

Munro, and others, discounted the likelihood of an appeal by the builders and farmers.

"Tom Zilly is a highly respected judge. I would be surprised if they appeal. This is -- from their point of view -- a kind of nail in the coffin."

Steve Mashuda, a lawyer for Earthjustice, which sued to obtain the listing on behalf of Munro and others, said the fact that the case was dismissed with prejudice is significant. Under these circumstances, a successful appeal is unlikely. Also, the builders and farmers can't file another challenge.

"They don't get another bite at the apple," he said. "I think it's pretty cut and dried.

"This was the only cloud over the listing," Mashuda said. "I don't think it's unfair to say that the holidays came early for

the orcas this year."

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