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## Conservation Congress v. U.S. Forest Service

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*Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048 (9th Cir. 2013).

Katelyn J. Hepburn

**ABSTRACT**

This case involves challenges to the adequacy of the United States Forest Service’s biological assessment authorizing a timber sale in the Shasta-Trinity National Forest of Northern California. The plaintiff requested an injunction under the Endangered Species Act (“ESA”) alleging that the Forest Service failed to adequately evaluate the effects the timber sale could have on the northern spotted owl’s critical habitat. The Ninth Circuit affirmed the District Court for the Eastern District of California, finding that the Forest Service’s actions did not violate the ESA and that the ESA imposes a lesser requirement than the National Environmental Policy Act (“NEPA”) in assessing cumulative environmental impacts of unrelated projects in the same area.

**I. INTRODUCTION**

In *Conservation Congress v. U.S. Forest Service*,<sup>1</sup> the Ninth Circuit held that the Forest Service’s biological assessment was adequate under the ESA.<sup>2</sup> The court considered two issues on appeal.<sup>3</sup> First, whether federal agencies are required under the ESA to consider “cumulative effects” when preparing a biological assessment and engaging in informal consultation with other federal agencies.<sup>4</sup> Second, whether the district court abused its discretion by deferring to the Forest Service’s determination that the project would have no “adverse effect” on the owl’s critical habitat.<sup>5</sup> The Ninth Circuit held that the ESA does not require agencies to consider

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<sup>1</sup> 720 F.3d 1048 (9th Cir. 2013).

<sup>2</sup> *Id.* at 1048.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

cumulative impacts during informal consultation, and that the district court did not abuse its discretion.<sup>6</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

The ESA, enacted in 1972, requires federal agencies to insure that their actions, or actions that they authorize or fund, do not “jeopardize the continued existence of endangered or threatened species,” or adversely affect their critical habitat.<sup>7</sup> In the early 1990s, the U.S. Fish and Wildlife Service (“FWS”) listed the northern spotted owl (“owl”) as a “threatened species” under the ESA, and designated 6.9 million acres of critical owl habitat throughout Washington, Oregon, and California.<sup>8</sup>

In 2008, the Forest Service prepared a biological assessment to analyze potential impacts on owl critical habitat resulting from the Mudflow Vegetation Management Project (“Mudflow Project”).<sup>9</sup> The project would thin, regenerate, and restore 13,830 acres of forest, including 544 acres of critical owl habitat.<sup>10</sup> The Mudflow Project’s biological assessment initially determined that 1,719 acres of the owl’s suitable foraging habitat would be temporarily degraded.<sup>11</sup> However, the Forest Service concluded that the Mudflow Project was “not likely to adversely affect” the owl’s critical habitat.<sup>12</sup> The Forest Service consulted with the FWS multiple times to assess the project’s potential impacts on the owl. As a result, the FWS issued three separate concurrence letters agreeing with the Forest Service’s determination of no likely adverse effect on the owl’s critical habitat.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> 16 U.S.C. § 1536(a)(2).

<sup>8</sup> 55 Fed. Reg. 26114 (June 26, 1990); 57 Fed. Reg. 1796, 1809 (Jan. 15, 1992).

<sup>9</sup> *Conservation Congress*, 720 F.3d at 1052.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1053.

In 2011, the plaintiff filed suit against the Forest Service seeking a preliminary injunction.<sup>14</sup> The district court denied the motion and plaintiff appealed.<sup>15</sup>

### III. ANALYSIS

Courts review a denial of preliminary injunction for abuse of discretion, which is a “limited and deferential” standard.<sup>16</sup> Reversal is appropriate only where the district court’s decision is legally erroneous or based on clearly erroneous findings of fact.<sup>17</sup> Generally, to warrant a grant of a preliminary injunction the movant must establish a “probability of success on the merits of its ESA claim.”<sup>18</sup>

Under the Administrative Procedures Act (“APA”), if a court finds that an agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” it may set aside the agency action.<sup>19</sup> The APA also provides additional requirements for determining whether a party is likely to succeed on the merits.<sup>20</sup> The district court determined that the plaintiff did not establish a “probability of success on the merits as to its ESA claim.”<sup>21</sup>

In this case, the plaintiff challenged the district court’s finding that they did not establish the probability of success on the merits based on two grounds.<sup>22</sup> First, they argued the district court incorrectly concluded that the Forest Service was not required to conduct a cumulative effects analysis under the ESA.<sup>23</sup> Second, they claimed the district court ignored evidence contrary to its finding that the Mudflow Project would not adversely affect critical owl habitat.<sup>24</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Conservation Congress*, 720 F.3d at 1053.

<sup>16</sup> *Id.* (citing *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1054 (citing *Winters v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008)).

<sup>19</sup> 5 U.S.C. § 706(2)(A).

<sup>20</sup> *Id.* at 1053 (citing *Earth Island Inst.*, 626 F.3d at 468).

<sup>21</sup> *Conservation Congress*, 720 F.3d at 1054.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## A. Cumulative Effects under the ESA

The ESA defines “cumulative effects” as, “those effects of future State and private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.”<sup>25</sup> The Ninth Circuit found that this definition is significantly narrower than the term “cumulative impacts” under NEPA.<sup>26</sup> Further, the court found that under the ESA, “cumulative effects” do not have to be considered during informal consultation.<sup>27</sup> Additionally, the court found that the Forest Service incorporated past environmental effects on owl habitat in the environmental baseline used for the biological assessment.<sup>28</sup> The court concluded that the baseline accounted for “aggregate effects of past activities,” and that future projects must “withstand independent regulatory scrutiny” under the requirements of the ESA.<sup>29</sup> Under this reasoning, the Forest Service acted in accordance with the ESA.<sup>30</sup>

Section 7(a)(2) of the ESA requires federal agencies to consult with other appropriate agencies, but it does not speak directly to whether a cumulative effects analysis is required.<sup>31</sup> The Ninth Circuit reiterated that it must defer to reasonable agency interpretations of ambiguous statutes, and found that the ESA was ambiguous in directing whether cumulative effects analysis was required in informal consultation.<sup>32</sup> The court noted that the FWS has implemented

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<sup>25</sup> *Id.* (quoting 50 C.F.R. § 402.02.)

<sup>26</sup> *Id.* at 1054-55 (quoting 40 C.F.R. § 1508.7.) (“incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”).

<sup>27</sup> *Conservation Congress*, 720 F.3d at 1055-56.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 16 U.S.C. § 1536(a)(2).

<sup>32</sup> *Conservation Congress*, 720 F.3d at 1055 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)).

regulations that require the consideration of cumulative effects only during formal consultation.<sup>33</sup>

However, informal consultation is an optional inter-agency process that requires no such cumulative effects analysis.<sup>34</sup> Further, the court held that agencies conducting biological assessments are not required by either statute or regulation to consider cumulative effects.<sup>35</sup> Although this consideration is permissive in both informal consultation and in conducting a biological assessment, it is not mandatory.<sup>36</sup>

## **B. Contrary Evidence**

Further, the Ninth Circuit found that the district court did not abuse its discretion by failing to consider contrary evidence presented in the FWS's concurrence letters written during informal consultation.<sup>37</sup>

The court responded to evidence showing that the project would significantly reduce the owl's foraging habitat by stating that there are multiple factors which must be considered when determining adequate acreage of viable foraging habitat, none of which are independently determinative.<sup>38</sup> The court found that it was unclear whether the effects on owl foraging habitat would "adversely affect" the owl's broader foraging habitat.<sup>39</sup> The court highlighted that the term "adverse effects" is a technical term "referring to effects that appreciably diminish habitat value" and the evidence provided by the plaintiff did not meet this standard.<sup>40</sup> The court deferred to the Forest Service's determination that the Mudflow Project would neither "downgrade" (temporarily reduce habitat functioning) nor "remove" (render no longer

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1056.

<sup>36</sup> *Id.* (citing 50 C.F.R. § 402.12(f)).

<sup>37</sup> *Id.*

<sup>38</sup> *Conservation Congress*, 720 F.3d at 1057.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (see *Butte Env'tl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 963, 948 (9th Cir. 2010) ("[A]n adverse modification occurs only when there is a direct or indirect alteration that appreciably diminishes the value of the critical habitat.")).

functional) critical owl habitat, and the portion of viable foraging habitat that would be temporarily “degraded” would not adversely affect the owl or its critical habitat.<sup>41</sup>

### **CONCLUSION**

In *Conservation Congress*, the Ninth Circuit Court of Appeals differentiated the legal effect of cumulative impacts and consultation under the ESA and NEPA. The court determined, based on statutory definition, that cumulative effects analyses are not required under section 7 of the ESA during inter-agency informal consultation, or in conducting a biological assessment. Following this regulatory interpretation, the court determined that neither the Forest Service nor the FWS abused its discretion when it failed to account for cumulative effects of other projects on the northern spotted owl’s critical habitat in the Mudflow Project area.

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<sup>41</sup> *Id.*