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## Cascadia Wildlands v. Thraikill

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*Cascadia Wildlands v. Thraikill*, 806 F.3d 1234 (9th Cir. 2015)

Maresa A. Jenson

The ninth circuit denied preliminary injunction for a wildfire Recovery Project in Oregon’s Klamath Mountains, the home range of the threatened spotted owl. The USFWS BiOp for the Recovery Project determined that there was no jeopardy to the species, even though research found adverse habitat effects and incidental take of the spotted owl. Thus, affirming the scientific procedure contained the “best available science” and was not arbitrary or capricious.

I. INTRODUCTION

In *Cascadia Wildlands v. Thraikill*, the Plaintiffs (“Cascadia Wildlands”) challenged the United States Fish and Wildlife Service’s (“USFWS”) application of the “best available science” under the Administrative Procedures Act as it related to the approval of the Douglas Fire Complex Recovery Project’s (“Recovery Project”) effect on the northern spotted owl.<sup>1</sup> The Recovery Project was issued to recover profit from timber in wildfire-affected areas in southern Oregon.<sup>2</sup> The United States Court of Appeals for the Ninth Circuit examined three issues: first, whether the USFWS properly relied on surveys that considered the effects of the predatory barred owl;<sup>3</sup> second, whether scientific data was properly applied to the wildfire’s effects on spotted owl range and habitat;<sup>4</sup> and lastly, whether Cascadia Wildlands was unlikely to succeed on merit of their claim and be denied preliminary injunction.<sup>5</sup> Based on the examination of these factors, the ninth circuit upheld the United States District Court for the District of Oregon’s denial of Cascadia Wildlands’s request for preliminary injunction of the Recover Project.<sup>6</sup>

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1. *Cascadia Wildlands v. Thraikill*, 806 F.3d 1234 (9th Cir. 2015) [hereinafter *Thraikill II*].

2. *Id.* at 1235.

3. *Id.* at 1236.

4. *Id.* at 1237.

5. *Id.* at 1235, 1236.

6. *Cascadia Wildlands v. Thraikill*, 49 F. Supp. 3d 774, 784 (D. Or. 2014), *aff’d*, 806 F.3d 1234 (9th Cir. 2015) [hereinafter *Thraikill I*].

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 2013, the Douglas Complex Fire burned 48,000 acres of federal and non-federal land in Oregon's Klamath Mountains.<sup>7</sup> After completing an Environmental Assessment, the Medford District of the Bureau of Land Management ("BLM") issued a Finding of No Significant Impact and Record of Decision to approve the Recovery Project.<sup>8</sup> The Recovery Project approved salvage logging on 1,600 acres of the Douglas Complex.<sup>9</sup>

When producing the Environmental Assessment, the BLM consulted with the USFWS to determine the Recovery Project's impact on the spotted owl, a threatened species under the Endangered Species Act ("ESA").<sup>10</sup> The USFWS subsequently issued a Biological Opinion ("BiOp") concluding the Recovery Project was

likely to incidentally take 14 adult and up to 10 young spotted owls at seven sites . . . in the form of harm caused by habitat destruction or degradation via timber harvest . . . likely to significantly disrupt breeding, feeding, and sheltering behavior of these spotted owls to an extent that causes injury or death.<sup>11</sup>

Subsequently, the USFWS BiOp concluded the project was "not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat."<sup>12</sup>

Cascadia Wildlands requested an injunction of the Recovery Project on four grounds, asserting the following were inadequately considered: first, the barred owl's predatory relationship with the Spotted owl; second, the effect of Wildfire on the spotted owl's habitat; third, the Recovery Plan for the Spotted owl; and fourth, the Procedural Requirements of the ESA.<sup>13</sup> The district court denied the motion for preliminary injunction by rejecting these four arguments, then concluding that Cascadia Wildlands had "failed to adequately establish that it was likely to succeed on the merits . . . or that irreparable harm to

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7. *Thraikill II*, 806 F.3d at 1236.

8. *Id.* at 1236.

9. *Id.*

10. *Thraikill I*, 49 F. Supp. 3d at 776.

11. *Thraikill II*, 806 F.3d at 1236.

12. *Id.*

13. *Id.* at 1236-41.

the spotted owl was likely.”<sup>14</sup> Cascadia Wildlands’s appealed to the ninth circuit, which affirmed the district court.<sup>15</sup>

### III. ANALYSIS

The ninth circuit reviewed the district court’s decision for an abuse of discretion, giving a limited and deferential review of the agency’s opinion.<sup>16</sup> The ESA requires federal agencies to consult with the USFWS when a federal action may affect an endangered or threatened species.<sup>17</sup> On appeal, the ninth circuit did not reconsider Cascadia Wildlands’s challenge to the procedural requirements of the ESA, affirming the district court’s distinction that the guidelines they failed to follow were “guidelines rather than fixed formulas.”<sup>18</sup> In turn, the ninth circuit examined the potential adverse impact of barred owls on spotted owl detection, the spotted owls’ post wildfire habitat, and the challenges posed by proposed spotted owl Recovery Plan.<sup>19</sup> Each challenge was found to be based on the best available science and thus not arbitrary and capricious.<sup>20</sup>

#### *A. Barred Owls Potential Adverse Impact on Northern Spotted Owl Detection*

Cascadia Wildlands challenged the USFWS’s lack of jeopardy conclusion by alleging it did not weigh the influence of the barred owl on the spotted owl.<sup>21</sup> Where the predatory barred owl is present, spotted owls are less likely to respond to the “survey calls” used to detect spotted owl presence in the area.<sup>22</sup> The district court found that the USFWS had specifically referenced this relationship, using several surveys and surveyors, and thus adequately considered the effects.<sup>23</sup> By updating their spotted owl survey protocol, the USFWS was undisputedly using “best available science.”<sup>24</sup> Cascadia Wildlands argued that the science used did

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14. *Id.*

15. *Id.*

16. *Id.* at 1240.

17. *Id.*

18. *Thraikill II*, 806 F.3d at 1238; *see Thraikill I*, 49 F. Supp. 3d at 782.

19. *Thraikill II*, 806 F.3d at 1241.

20. *Id.* at 1244.

21. *Id.* at 1241.

22. *Id.*

23. *Id.* at 1236-37.

24. *Id.* at 1241.

not support the USFWS's final conclusion.<sup>25</sup> Courts must give "wide latitude" to the agency to determine what constitutes the "best scientific data" and give deference to the conclusions reached from the data.<sup>26</sup> Based on this deference and latitude the ninth circuit held that the district court's rejection of the challenge was not an abuse of discretion.<sup>27</sup>

### B. Spotted Owl Post Wildfire Habitat

Cascadia Wildlands challenged the USFWS's examination of the changed habitat ranges of the spotted owl, arguing it was arbitrary and not based on the best available science.<sup>28</sup> The evidence showed that the "considered the possibility" the spotted owl's home range and core-use area altered after the fire.<sup>29</sup> The scientific reports referenced by the BiOp were "highly variable . . . and not directly comparable to one another."<sup>30</sup> Thus, the USFWS "relie[d] on professional judgment and interpretation of [the] best available information."<sup>31</sup>

After a wildfire, spotted owls will shift or increase the their home range, but they will also continue to use portions of original home range, especially if it is only lightly or moderately burned.<sup>32</sup> The BiOp approximated forty-five spotted owl sites within the Recovery Project, with thirty-nine potentially affected.<sup>33</sup> The USFWS considered the following issues: modifications the owls would make to their "nesting, roosting, and foraging home range," and "pre-and post-fire habitat conditions, habitat suitability, and abiotic factors."<sup>34</sup> The ninth circuit determined that the USFWS's methods were "cautious, conservative, and [a] data-guided approach to salvaging," complying with both the ESA and Administrative Procedures Act.<sup>35</sup>

The BLM implemented salvage damage restrictions to guarantee minimal disturbance habitat damage by: "1) precluding harvest on any of the low severity burned areas; 2) limiting salvaging in core-use areas; 3) retaining large trees, snags and downed wood; and 4) reforestation of the

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25. *Id.*  
26. *Id.*  
27. *Id.*  
28. *Id.*  
29. *Id.* at 1242.  
30. *Id.*  
31. *Id.*  
32. *Id.*  
33. *Id.*  
34. *Id.* at 1242-43.  
35. *Id.* at 1243.

burned areas.”<sup>36</sup> Asserting that the scientific data was appropriately applied, the ninth circuit stated that “it is not within the province of a reviewing court to substitute its judgment for that of the respective agency as long as the agency used adequate and reliable data.”<sup>37</sup> Here, the record suggested the Recovery Project would not have no jeopardy on the spotted owl.<sup>38</sup>

### C. Recovery Plan for the Spotted Owl

Finally, Cascadia Wildlands’s argued that the USFWS failed to sufficiently consider the “best scientific information” when developing the Recovery Project’s jeopardy determination.<sup>39</sup> Cascadia Wildlands contended that the USFWS “was either obligated to follow or explain its departure from . . . the *jeopardy* determination.”<sup>40</sup> Under section 4 of the ESA, the USFWS had to enact a recovery plan for the spotted owl “to protect, enhance and develop habitat in the quantity and distribution necessary to provide for the long-term *recovery* of spotted owls.”<sup>41</sup> The court distinguished between the distinct concepts of species recovery and jeopardy.<sup>42</sup> The court found jeopardy, not recovery, was the appropriate focus in the BiOp.<sup>43</sup>

The analysis focused on Recovery Actions 10 and 12.<sup>44</sup> Recovery Action 10’s objective was for the conservation of spotted owl population by protecting its habitat.<sup>45</sup> Recovery Action 12’s objective was to develop and restore habitat elements post-fire.<sup>46</sup> It was met by “provid[ing] for high retention of snags and coarse wood debris in the spotted owl’s critical habitat.”<sup>47</sup> The ninth circuit found “Cascadia failed to prove a likelihood of success on the merits was supported legally and factually.”<sup>48</sup>

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36. *Thraikill II*, 806 F.3d at 1243.

37. *Id.*; see *Conservation Cong.*, 774 F.3d at 620.

38. *Thraikill II*, 806 F.3d at 1243.

39. *Thraikill II*, 806 F.3d at 1243; see generally *Conservation Cong.*, 774 F.3d 611.

40. *Thraikill II*, 806 F.3d at 1243 (emphasis added).

41. *Id.* at 1243-44 (citing 16 U.S.C. § 1533 (2012)) (emphasis added).

42. *Id.*, at 1244.

43. *Id.*

44. *Id.* at 1243.

45. *Id.* at 1244.

46. *Id.*

47. *Id.*

48. *Id.*

## IV. CONCLUSION

Cascadia Wildlands' motion for preliminary injunction was denied as they "failed to prove a likelihood of success on the merits [of their claim] was supported legally and factually."<sup>49</sup> The USFWS considered the barred owl's potentially adverse impact on spotted owl detection, changes in the spotted owl's post wildfire habitat, and a recovery plan under the ESA.<sup>50</sup> The USFWS's analysis was enough to determine the Recovery Project was supported by "best available science" and not arbitrary or capricious under the Administrative Procedures Act.<sup>51</sup>

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49. *Id.*

50. *Id.*

51. *Id.*