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Conservation Congress v. Finley

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***Conservation Congress v. Finley*, 774 F.3d 611 (9th Cir. 2014).**

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ABSTRACT

Once again the federal government is challenged for violation of the ESA and NEPA in relation to forest management projects affecting the Northern Spotted Owl. Conservation Congress, joined by a number of other plaintiffs, brought suit against the USFWS and USFS challenging both the agencies consultation under § 7 of the ESA, and the Forest Service's failure to take a "hard look" as required within the EIS completed under NEPA. Although Conservation Congress provided sufficient notice of intent to sue in accord with 16 U.S.C.S. § 1540(g)(2)(A) and their claims were not moot, the summary judgment was appropriately awarded to the government on both challenges. The Ninth Circuit reviewed the district court's ruling.

I. INTRODUCTION

In *Conservation Congress v. Finley* the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held the federal government was not in violation of the Endangered Species Act ("ESA") or the National Environmental Policy Act ("NEPA") when approving a lumber thinning and fuel reduction project within Northern California's Trinity National Forest ("Forest Service").[1] Conservation Congress ("Plaintiffs") challenged the Forest Service and United States Fish and Wildlife Service's ("USFWS") failure to adequately complete consultation as required by § 7 of the ESA.[2] Compliance with the ESA is required based on the presence of the Northern Spotted Owl, a listed threatened species and its critical habitat.[3] Plaintiffs further challenged the Forest Service's failure to take the requisite "hard look" at environmental impact statements promulgated for the project.[4]

II. FACTUAL AND PROCEDURAL BACKGROUND

The Beaverslide Project ("Project"), aimed at lumber thinning and fuel reduction, is located within the Trinity National

[1] *Conservation Congress v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014).
[2] *Id*.
[3] *Id*.
[4] *Id*. at 621.

Forest on approximately 13,241 acres.[5] Project goals include preservation of a sustainable timber supply and protection against wildfire.[6] The Project encompasses area designated as critical habitat for the Northern Spotted Owl.[7] The Northern Spotted Owl was provided federal recognition as a threatened species under the ESA in 1990.[8] In recognition of the threatened species, the USFWS issued a recovery plan in 2008, which was revised in 2011.[9] The recovery plan, which is non-binding, provides specific recommendations on how to protect the Northern Spotted Owl.[10]

The Forest Service issued a biological assessment under 50 C.F.R. § 402.14(g)(4 in September 2009.[11] The biological assessment concluded that the Project "may" but was unlikely to have an adverse affect on the Northern Spotted Owl.[12] The USFWS issued a letter of concurrence agreeing with the conclusions reached by the Forest Service.[13] The biological assessment was amended in May 2010 and the original findings related to impacts to the Northern Spotted Owl were unaffected.[14] Again, the USFWS agreed with the findings of the biological assessment.[15]

Plaintiffs provided notice of intent to sue in accordance with the ESA's citizen-suit provision in May 2011.[16] A second notice was issued in October 2011 alleging that both the biological assessment and the amended version failed to utilize "best scientific and commercial data available."[17] Upon receipt of the notices of intent to sue, the Forest Service and USFWS determined there was no need to complete further consultation.[18] However, following a re-designation of the Northern Spotted Owl's critical habitat, the agencies reinitiated consultation, and again concluded

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[5] *Id*. at 614.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*. See 16 U.S.C. § 1533(f) (2014).
[11] *Id*. at 616.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*. See 16 U.S.C. § 1540(g) (2014).
[17] *Id*.
[18] *Id*.

that the Project "would not result in destruction or adverse modification of the owl's habitat."[19]

Plaintiffs filed suit against both agencies, and in an amended complaint, alleged that the agencies failed to conduct proper consultation under the ESA and NEPA.[20] The agencies were awarded summary judgment on all claims and Plaintiffs appealed the district court's ruling.[21] The government challenged Conservation Congress' notice of intent to sue, and mootness of their claims, but both the United States District Court for the Northern District of California and Ninth Circuit ruled in favor of Plaintiffs on these two isolated claims.[22]

III. ANALYSIS

A. ESA Consultation Requirement

Plaintiffs take aim at a number of supposed failures of the Forest Service to properly complete § 7 consultation.[23] For an agency to comply with 50 C.F.R. § 402.16, the agency must reinitiate either formal or informal consultation "if 'new information' reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered."[24] This requirement is not mandated of all modifications to lengthy and complex projects.[25]

Plaintiffs claimed the 2011 recovery plan adopted by the Forest Service was replete with new information not previously considered, specifically the Project's short-term effects on critical habitat.[26] The Ninth Circuit held that even assuming the 2011 recovery plan contained new information, "a close reading of the Forest Service's biological assessment reveals that it directly and sufficiently addressed several short term effects."[27]

Plaintiff further contended that the Forest Service failed to consider how "new information" contained in a study on the

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[19] *Id.*
[20] *Id.* at 617.
[21] *Id.*
[22] *Id.* at 617-619.
[23] *Id.* at 619.
[24] *Id.*
[25] *Id.* See *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987).
[26] *Id.*
[27] *Id.* at 619-620.

invasive presence of Barred Owls impacted the Northern Spotted Owl and its habitat.[28] The Ninth Circuit disagreed, however, and found that the "assertion is also contradicted by an examination of the record."[29] The Forest Service's biological assessment revealed that potential impacts resultant from barred owls was fully considered.[30] The Forest Service went so far as to contemplate the need for reinitiation based on this "new information" and concluded that it was unnecessary.[31]

With their final challenge, Plaintiff's alleged that the Forest Service failed to follow recommendations contained in the 2011 recovery plan. However, failing to adopt certain recommendations contained in a non-binding recovery plan or study does not translate to a failure to consider information under 50 C.F.R. § 402.16.[32]

In sum, the Ninth Circuit held that the Forest Service considered all required "new information" and utilized "best scientific and commercial data available" when deciding that reinitiating consultation was not needed in adopting the Project.[33]

B. NEPA "Hard Look" Requirement

Plaintiffs further claimed that the Forest Service's promulgated EIS failed to take a "hard look" at information contained in the 2011 recovery plan.[34] NEPA requires agencies to employ a "hard look" approach when analyzing identified significant probable environmental impacts noted within an EIS.[35]

A "hard look" occurs only when an agency has conducted a "full and fair discussion of significant environmental impacts."[36] If, however, an agency simply provides general statements and comments regarding possible environmental impacts, the "hard look" requirement has not been met.[37]

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[28] *Id*. at 620.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 620-621.
[34] *Id*. at 621
[35] *Id*.
[36] *Id*. (quoting *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1047 (9th Cir. 2013)).
[37] *Id*.

The court found both of the environmental impact statements issued by the Forest Service "contain full and fair discussions of possible short-term effects to the" Northern Spotted Owl.[38] Based on the extensive analysis conducted by the Forest Service within its prepared environmental impact statements, the Ninth Circuit held that the "hard look" requirement had clearly been met and that Plaintiffs' allegations were without merit.[39]

IV. CONCLUSION

The Forest Service properly ran the gamut of procedural and substantive hurdles contained within the ESA and NEPA in moving forward with the Beaverslide Project. Cases such as this are a constant reminder of the cat and mouse game embedded in environmental litigation under the Administrative Procedures Act. As much as some may be inclined to dub Conservation Congress and similar groups unwanted and unnecessary hurdles to government sponsored projects, it is important to know they play a key role in ensuring governmental accountability. Continued compliance with the ESA and NEPA by federal agencies and continued scrutiny of government actions by environmental groups will provide for the continued protection of one of the environmental movement's most recognizable faces, the Northern Spotted Owl.

[38] *Id*.
[39] *Id*.