



Federal Court Strikes Down HCP: No Piggybacks Under Section 10

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While decisions dealing with lawsuits alleging violations of section 7 or section 9 of the Endangered Species Act (ESA) are rather common, it is far less common for courts to address suits under section 10. In fact, in any given year, courts will issue less than a handful of decisions dealing with section 10 challenges. On April 3, 2015, a federal district court in California issued one of these infrequent section 10 decisions, finding that the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) failed to adhere to the requirements of section 10 when approving a Habitat Conservation Plan (HCP) and issuing an Incidental Take Permit (ITP). *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Administration*, Case No. 13-cv-03717 (N.D. Cal. Apr. 3, 2015). The court also found that NMFS violated section 7 of the ESA when it issued a biological opinion and incidental take statement that failed to consider the potential short term impacts a timber harvest project would have on threatened Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*).

Section 9 of the ESA generally prohibits "take" of endangered and threatened species. Under the ESA, a private party has two potential avenues for avoiding the general take prohibition in section 9: (1) if the project requires a federal approval, the federal agency can obtain a biological opinion and incidental take statement under section 7 of the ESA, and the private party can comply with the terms of that incidental take statement; or (2) regardless of whether a federal approval is required, the private party can comply with the terms of a habitat conservation plan and incidental take permit under section 10 of the ESA. Section 10 of the ESA requires that a habitat conservation plan "minimize and mitigate the impacts of the taking" to the maximum extent practicable, and that the taking will "not appreciably reduce the likelihood of the survival and recovery of the species in the wild."

The project at issue in this case was a timber harvest operation in known habitat of the threatened Northern spotted owl in northern California. The logging project also had the potential to impact coho salmon by increasing the introduction of sediment into nearby streams and rivers. In order to proceed with the project,

the project proponent submitted an HCP and obtained an ITP from FWS and NMFS to cover take of the spotted owl and coho salmon. The project proponent also obtained biological opinions and incidental take statements from FWS and NMFS with respect to the HCP and ITP. Both biological opinions concluded that the HCP and ITP would "not jeopardize the species or adversely modify critical habitat."

Under the HCP, the project proponent would harvest timber in 58 owl circles (each owl circle measuring approximately 3,400 acres), while preserving limited habitat in 24 owl circles. Only limited habitat would be conserved by the project proponent because the project proponent owned only portions of the land within the 24 owl circles – sometimes as few as 62 acres; the U.S. Forest Service owned the bulk of the remaining land. In approving the HCP and issuing the ITP, FWS found, using a weighted average, that the proposed conservation would more than offset the incidental take because project logging would primarily occur in owl circles with low conservation value, whereas conservation would primarily occur in owl circles with high conservation value. In determining the conservation score for an owl circle, FWS considered the entire owl circle, not just the portion owned by the project proponent.

A number of environmental groups subsequently challenged the analysis by FWS and NMFS. With respect to FWS, the court found that by basing its conclusion on the conservation value of the entire owl circle, even though the project proponent controlled only minor portions of the land, the project proponent was "allowed to piggyback off of the conservation work of a non-applicant neighbor" – in this case the Forest Service. The court explained that because "the record leaves open the possibility that the conservation values for the highest value owl circles are what they are regardless of whether Conservation Support Areas are ever created in those circles by" the project proponent, it could not be said that the project proponent had "minimize[d] and mitigate[d] the impacts of the taking" to the maximum extent practicable as required under section 10.

The court also found that the HCP failed to comply with the minimization and mitigation requirements in section 10, because FWS relied on a mitigation measure obligating the project proponent to "promote" practices that develop and maintain dispersal habitat, as opposed to actually requiring the implementation of practices that "will" develop and maintain dispersal habitat, and the mitigation measure failed to identify any objective criteria by which to measure compliance. Notably, the court found that the biological opinion issued by the FWS for the HCP did not need to be invalidated because of this failing, because the mitigation measure, which was also incorporated into the biological opinion issued by FWS under section 7, did not constitute "a critical, primary, or relatively significant factor in FWS's finding that the [HCP] is 'not likely to jeopardize the continued existence of the northern spotted owl or impede its recovery.'"

With respect to NMFS, the court found that the 50-year biological opinion issued by NMFS, which was accompanied by an incidental take statement with a duration of 50 years, failed to comply with section 7 of the ESA because it failed to analyze the short-term impacts of the project on the coho salmon, which has a three-year life cycle. In reaching this conclusion, the court found that the fact that NMFS "concluded that long-term benefits would outweigh any short-term impacts of logging" was irrelevant, because without an adequate analysis of the issue the conclusion was arbitrary and capricious. Accordingly, the court invalidated the biological opinion along with the incidental take statement. The court also found that NMFS's issuance of the ITP was arbitrary and capricious "because the no-jeopardy finding required by ESA § 7 is identical to the survival finding required under §10[.]"