No. 14-16142

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSERVATION CONGRESS,

Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees

and

FRANKLIN LOGGING, INC.; SCOTT TIMBER CO.,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable Troy L. Nunley, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES/AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, public interest organization that provides a voice in the courts for limited government, property rights, and individual freedom. Thousands of individuals and organizations support PLF's efforts nationwide. PLF concurrently filed a motion to file this amicus brief because Conservation Congress refused consent. Defendants and Intervenor-Defendants consent to this filing.

This litigation presents an opportunity to affirm the authority of federal agencies to consider both the needs of listed species and the welfare of human beings when a proposed action modifies critical habitat. PLF has a long history of litigating for an approach to the Endangered Species Act that promotes the interests of both species and the communities around them. PLF attorneys have also participated as amicus curiae in the Supreme Court regarding the scope of the Endangered Species Act in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), and *Bennett v. Spear*, 520 U.S. 154 (1997), and have authored amicus briefs in dozens of Endangered Species Act cases in federal courts across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

This litigation involves the Algoma Vegetation Management Project in the Shasta-Trinity National Forest. The project will thin trees to reduce the chance of wildfire and other disturbances and improve the forest ecosystem. *Conservation Congress v. U.S. Forest Service*, No. 2:12-cv-02800-TLN-CKD, 2014 WL 2092385 at *3 (E.D. Cal. May 19, 2014). The Appellant, Conservation Congress, sued the United States Forest Service and the Fish & Wildlife Service, claiming that the project would hurt critical habitat of the northern spotted owl. The district court granted summary judgment for the government defendants. *Id.* at *16. The court held, among other things, that the project would not likely result in adverse modification of the owl's critical habitat. *Id.* at *9.

The management of national forests must reduce risk of wildfire to address the needs and safety of surrounding communities. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-922T, WILDLAND FIRE: MANAGEMENT IMPROVEMENTS COULD ENHANCE FEDERAL AGENCIES' EFFORTS TO CONTAIN THE COSTS OF FIGHTING FIRES 9-10 (2007) ("[A]gencies have issued guidance clarifying that land managers, not fire managers, have primary responsibility for containing wildland fire costs . . . ."). An expansive approach to critical habitat protection and the meaning of adverse modification improperly limits the Forest Service's ability to prevent wildfire and other disturbances. This will have significant consequences for federal lands and

nearby communities. In 2012, 75% of all the acres burned by wildfire across the country were on federal land. KELSI BRACMORT, CONG. RESEARCH SERV., R43077, WILDFIRE MANAGEMENT: FEDERAL FUNDING AND RELATED STATISTICS 3 (2013). Wildfire in 2012 burned 4,244 structures and claimed the lives of fifteen firefighters. *Id.* at 4. Meanwhile, fire suppression costs are "skyrocketing" and seriously jeopardize the Forest Service's "ability to fund [its] natural resource mission." *Id.* at 10. Thinning projects, like the one proposed here, can reduce the risk of these devastating fires. *Id.* at 3. The Forest Service can comply with the ESA while reducing this threat.

The Algoma Project is not likely to cause adverse modification to the critical habitat of the northern spotted owl, as that term has been interpreted by this Court and defined by implementing regulations. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which interpreted the ESA to put a premium on species protection for federal agencies, does not dictate how agencies fulfill their duty to conserve. *Hill* does not force agencies to choose the most species-protective method of conservation when multiple methods can facilitate survival and recovery.

This Court should continue to interpret "adverse modification" narrowly. Under this Court's case law, modifications with some negative effects that do not "appreciably diminish" the value of critical habitat do not constitute adverse modification. *See, e.g., Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057

(9th Cir. 2013). This standard allows agencies to balance short-term harms against long-term benefits to critical habitat to avoid adverse modification.

ARGUMENT

I

TENNESSEE VALLEY AUTHORITY V. HILL DOES NOT DICTATE HOW AN AGENCY FULFILLS ITS DUTY TO CONSERVE

Appellant relies on *Tennessee Valley Authority v. Hill*, 437 U.S. 153, to argue that the Algoma Project violates the ESA. According to *Hill*, "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. Under *Hill*, therefore, agencies must place a high premium on conservation. But here, the agencies and the Appellant both claim that their respective approaches protect the northern spotted owl. The Appellant argues that thinning will hurt critical habitat, and that wildfire (which is more likely in the absence of thinning) is good for the owl. Brief of Appellant at 41-42. The agencies, however, determined that thinning will benefit the owl by reducing a high risk of not only wildfires but also beetle infestation and disease. *Conservation Congress v. United States Forest Service*, 2014 WL 2092385 at *8. Thinning also helps the owl by discouraging inter-tree competition, increasing tree growth rates, and favoring retention and growth of desirable trees for the owl. *Id.* at *7. The agencies' forest management plan, therefore, is designed to protect the owl. This satisfies *Hill*,

which does not dictate how agencies fulfill their duty to conserve or require them to adopt one conservation approach over another.

This Court has held that agencies enjoy flexibility in pursuing species conservation. They are "to be afforded some discretion in ascertaining how best to fulfill the mandate to conserve." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990). Accordingly, this Court found *Hill* does not "divest an agency of virtually all discretion in deciding how to fulfill its duty to conserve." *Id.* Rather, *Hill* only prohibits "the balanc[ing of] the [species'] interests against the interests of . . . citizens." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 593 (9th Cir. 2014). Prohibited balancing does not occur where agency action benefits a species, even if the action will also benefit people. Where an agency action promotes conservation, *Hill* does not dictate the course of conservation that an agency must chart.

Nor does *Hill* force an agency to select the most protective conservation method regardless of social and economic costs. Under the ESA, conservation means "to use and the use of all methods and procedures which are *necessary* to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3) (emphasis added). Thus, where various methods meet the minimum threshold of necessity,

neither the ESA nor *Hill* mandates the method that best promotes survival and recovery.

Although *Hill* requires that federal agencies "afford *first* priority to the declared national policy of saving endangered species," 437 U.S. at 185 (emphasis added), *Hill* does not preclude such agencies from pursuing second and third tier priorities in addition to the "first," even if the means selected are not the most species-protective option. Agencies need not be blind to human interests when deciding how to promote conservation. *See, e.g.*, 16 U.S.C. § 1533(b)(2) (allowing the Secretary to exclude areas as critical habitat because of economic effects); and, *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) ("[A]nother objective [of the ESA] is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."). Therefore, even assuming the Appellant has presented the "better plan" for the owl, under *Hill* the agency may choose another approach so long as it is still promotes species protection.

II

THE ALGOMA PROJECT IS NOT LIKELY TO CAUSE ADVERSE MODIFICATION TO THE NORTHERN SPOTTED OWL'S CRITICAL HABITAT

Under the ESA, federal agencies must insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. §

1536(a)(2). The trial court correctly held that the Algoma Project satisfies this requirement. *Conservation Congress*, 2014 WL 2092385 at *9. Not every unfavorable change to critical habitat constitutes adverse modification. Rather, only appreciable decline in valuable characteristics of critical habitat will cause adverse modification. Moreover, agencies may balance short-term harms against long-term benefits to determine whether an action is likely to result in adverse modification.

A. Adverse Modification Refers to Appreciable Decline in Characteristics of Critical Habitat Essential to Listed Species, Not Every Modification with Negative Effects

Under this Court's case law, only appreciable declines in the value of critical habitat constitute adverse modification. In *Conservation Congress v. U.S. Forest Service*,[1] this Court held that thinning a portion of the northern spotted owl's critical habitat did not constitute adverse modification. 720 F.3d 1048, 1057 (9th Cir. 2013). There, the agency proposed to thin twenty-two acres of the 408 acres of foraging habitat. *Id.* Conservation Congress argued that this thinning was likely to cause adverse modification. The Court disagreed, reasoning that "[e]ven completely destroying" that amount of foraging habitat would not adversely modify critical habitat. *Id.* The Court said that "CC ignores the fact that no single criterion determines the quality of foraging habitat." *Id.* Rather, a large variety of habitat

[1] Despite the similarity of the case name and the facts, the cited case is distinct from this litigation.

features contributed to a healthy ecosystem for the owl, and the thinning alone did not suffice to appreciably diminish the habitat's value for the owl. *See id.*

Even outright destruction of critical habitat will not always constitute adverse modification. In *Butte Environmental Council v. U.S. Army Corps of Engineers*, this Court held "[a]n area of a species' critical habitat can be *destroyed* without appreciably diminishing the value of critical habitat for the species' survival or recovery." 620 F.3d 936, 948 (9th Cir. 2010) (emphasis added). If utter destruction of a portion of the owl's critical habitat can occur without causing adverse modification, then thinning an overgrown forest (that will ultimately benefit the species) does not adversely modify critical habitat.

The regulatory definition of "adverse modification" accords with this Court's case law.

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02. This Court has expressly relied upon this definition. *See, e.g.*, *Conservation Congress*, 720 F.3d at 1057 ("It is unclear . . . that a thinning of 22 acres, out of a total of 408 acres of the Owl's degraded foraging habitat . . . would necessarily mean that the Owl's total foraging habitat would be 'adversely'

modified—*which, in the regulatory context, means appreciably diminished.*" (emphasis added)).[2]

This Court has also relied on the FWS's ESA consultation handbook,[3] which provides an even narrower definition of adverse modification.

> Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in . . . adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in *significant adverse effects* throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.

U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act 4-36 (1998) (boldface removed) (emphasis added). Thus, mere decrease in value of critical habitat does not always constitute adverse modification.

Here, the Algoma Project is not likely to cause adverse modification as that term has been interpreted by this Court and implementing regulations. As in the prior

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[2] A portion of the regulatory definition was disapproved in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). There, this Court held that the phrase "both the survival and recovery of a listed species" was invalid, and that modification of critical habitat that appreciably diminishes the value of the habitat for survival *or* recovery constitutes adverse modification. *Id.* at 1070-72. That case however, did not invalidate or disapprove of the "appreciably diminish" standard in the regulatory definition. This Court has relied on that standard at least twice since *Gifford*, attesting to its validity as a definition of "adverse modification." *See Conservation Cong.*, 720 F.3d at 1057; *Butte Environmental Council*, 620 F.3d at 948.

[3] *See Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d at 948.

Conservation Congress case, the Algoma Project will thin only a minor portion of the owl's foraging habitat. Thinning foraging habitat certainly does not compare to outright destruction, which this Court has said does not constitute adverse modification.

B. Long-term Benefits Can Be Balanced Against Short-term Detriments

Even if the immediate effects of the Algoma Project might harm critical habitat, the counterbalance of long-term improvements can offset short-term effects to avoid adverse modification. The prohibition against "adverse modification" does not mention a time frame. This gives agencies flexibility to balance short- and long-term costs and benefits, so long as the net result does not appreciably diminish the value of the habitat for species survival or recovery.

Agencies must consider both short- and long-term elements of conservation. In evaluating the effects of a proposed action, agencies must study both immediate effects and "those that are caused by the proposed action and are later in time." 50 C.F.R. § 402.02. Yet present and future interests can conflict. Just as retirement savings tighten belts in the short-term for future welfare, actions that promote long-term recovery may not always benefit a species in the short-term. As long as short-term costs are not likely to result in substantial species decline, the sacrifice of immediate welfare for long-term recovery does not constitute adverse modification.

See Miccosukee Tribe of Indians of Florida v. United States, 566 F.3d 1257, 1270-71 (11th Cir. 2009) (holding that an agency action's short-term harm to a bird's critical habitat did not constitute adverse modification in light of its long-term benefits for the bird).

This Court has held that short-term harm to critical habitat even without a commensurate long-term benefit is not necessarily adverse modification. In *Rock Creek Alliance v. U.S. Fish and Wildlife Service*, 663 F.3d 439, 442-43 (9th Cir. 2011), this Court held that a mining project would not adversely modify the bull trout's critical habitat where "the most significant impacts would only be temporary, lasting five to seven years." Agencies should consider and balance both scale of impact and duration. A shorter duration can mitigate a greater impact, even where the agency action would not result in a net gain for the species in the long-term. *See id.* at 442-43.

Nevertheless, Appellant argues that short-term harms cannot be justified despite long-term benefits to the owl. But this Court has only held that long-term benefits cannot compensate for short-term harms where the species may experience extinction in the short-term. In *Pacific Coast Federation of Fisherman's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005), the Marine Fisheries Service planned to temporarily reduce the water flow for the coho salmon, whose life and breeding cycle depended on short-term considerations. *Id.* at 1090-94. This Court

concluded that an increased water flow in the future would not compensate for eight years of insufficient water because the coho only had a three-year life cycle. *Id.* at 1094. After eight years without enough water, "all the water in the world in [subsequent years] will not protect the coho, for there will be none to protect." *Id*. Here, however, no evidence indicates that the short-term effects of thinning will lead to extinction or even significant decline in owl population prior to the advent of long-term benefits. *See Conservation Congress*, 2014 WL 20292385 at *7-8. Thus, the Forest Service can temporarily degrade owl habitat in a manner designed to improve critical habitat in the long-term.

CONCLUSION

The trial court's holding should be affirmed.

DATED: November 21, 2014.

Respectfully submitted,

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By s/ ETHAN W. BLEVINS
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DATED: November 21, 2014.

s/ ETHAN W. BLEVINS
Attorney for Pacific Legal Foundation

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I hereby certify that on November 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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