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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS and  
KLAMATH FOREST ALLIANCE,

NO. CIV. S-11-2605 LKK/EFB

Plaintiffs,

v.

O R D E R

UNITED STATES FOREST  
SERVICE,

Defendant,

and

SIERRA PACIFIC INDUSTRIES,

Proposed Defendant  
Intervenor.

\_\_\_\_\_ /

Plaintiff Conservation Congress brings this action against Defendants United States Forest Service and United States Fish and Wildlife Service (collectively, "Federal Defendants"), concerning Federal Defendants' approval of a timber sale, known as the Mudflow Vegetation Management Project, and its effect upon the habitat of the northern spotted owl. Plaintiff's action arises under the

1 Endangered Species Act ("ESA"), the National Environmental Policy  
2 Act ("NEPA"), the Administrative Procedure Act ("APA"), the  
3 Declaratory Judgment Act ("DJA"), and the Equal Access to Justice  
4 Act ("EAJA").

5 Pending before the court is Plaintiff's motion for a  
6 preliminary injunction, brought specifically in relation to  
7 Plaintiff's claims under the ESA. Pl's Amend. Mot., ECF No. 44.  
8 Federal Defendants and Defendant-Intervenor Sierra Pacific  
9 Industries ("SPI") oppose. Fed. Defs' Opp'n, ECF No. 46; Def. SPI  
10 Opp'n, ECF No. 47. For the reasons provided below, Plaintiff's  
11 motion is denied.

## 12 I. BACKGROUND

### 13 A. Statutory Background

14 The Endangered Species Act ("ESA") requires that the  
15 Secretaries of the Interior and Commerce promulgate regulations  
16 listing plant and animal species that are "endangered" by  
17 extinction and to designate critical habitat for such species. 16  
18 U.S.C. § 1533; Bennett v. Spear, 520 U.S. 154, 157-58, 117 S.Ct.  
19 1154, 137 L.Ed.2d 281 (1997). Critical habitat consists of those  
20 areas which have "physical or biological features (I) essential to  
21 the conservation of the species and (II) which may require special  
22 management considerations or protection." 16 U.S.C. § 1532(5)(A).

23  
24 Section 9 of the ESA establishes a blanket prohibition on the  
25 "taking" of any member of a listed endangered species. 16 U.S.C.  
26 § 1538(a)(1)(B); Oregon Natural Resources Council v. Allen, 476

1 F.3d 1031, 1033 (9th Cir. 2007). To "take" is defined as "to  
2 harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or  
3 collect, or to attempt to engage in any such conduct." 16 U.S.C.  
4 § 1532(19); Oregon Natural Resources Council, 476 F.3d at 1033 n.1.

5  
6 Section 7 of the ESA allows statutorily-defined "applicants,"  
7 including Federal agencies, to carve out limited exceptions to  
8 Section 9's blanket prohibition under certain circumstances. 16  
9 U.S.C. § 1536(a)-(c), (o). Under Section 7, each federal agency  
10 must "insure that any action authorized, funded, or carried out by  
11 such agency is not likely to jeopardize the continued existence of  
12 any endangered species or threatened species or result in the  
13 destruction or adverse modification of habitat of such species  
14 which is determined by the Secretary . . . to be critical." 16  
15 U.S.C. § 1536(a)(2). The applicable regulations define an "action"  
16 to include "actions directly or indirectly causing modifications  
17 to the land, water, or air." 50 C.F.R. § 402.02.

18 In addition to the ESA's substantive obligations to conserve  
19 and not jeopardize protected species, Section 7(a)(2) imposes a  
20 procedural obligation on federal agencies. See Nat'l Ass'n of Home  
21 Builders v. Defenders of Wildlife, 551 U.S. 644, 667, 127 S.Ct.  
22 2518, 168 L.Ed.2d 467 (2007); New Mexico ex rel. Richardson v.  
23 Bureau of Land Mgmt., 565 F.3d 683, 700 (10th Cir. 2009). "An  
24 agency's decision whether to take a discretionary action that may  
25 jeopardize endangered or threatened species is strictly governed  
26 by ESA-mandated inter-agency consultation procedures." Forest

1 Guardians v. Johanns, 450 F.3d 455, 457 (9th Cir. 2006). The  
2 procedural obligation ensures that the agency proposing the action,  
3 in this case the United States Forest Service ("USFS"), consults  
4 with the United States Fish and Wildlife Service ("FWS") to  
5 determine the effects of its action on endangered species and their  
6 critical habitat.<sup>1</sup> See Fla. Key Deer v. Paulison, 522 F.3d 1133,  
7 1138 (11th Cir. 2008).

8 To meet its procedural obligation, the agency action must  
9 first determine whether its proposed discretionary action may  
10 affect a listed species or a critical habitat. 50 C.F.R. §  
11 402.14(a). If an agency determines that an action "may affect"  
12 critical species or habitats, formal consultation is ordinarily  
13 mandated. Natural Resources Defense Council v. Houston, 146 F.3d  
14 1118, 1126 (9th Cir. 1998) (citing Thomas v. Peterson, 753 F.2d  
15 754, 763 (9th Cir. 1985); 50 C.F.R. § 402.14(a)). Formal  
16 consultation is excused only where (1) an agency determines that  
17 its action is unlikely to adversely affect the protected species  
18 or habitat, and (2) the relevant Service (FWS or NMFS) concurs with  
19 that determination. Id. (citing 50 C.F.R. § 402.14(b); Pacific  
20 Rivers Council v. Thomas, 30 F.3d 1050, 1054, n.8 (9th Cir. 1994)).

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24 <sup>1</sup> The FWS and the National Marine Fisheries Service administer  
25 the ESA. 50 C.F.R. § 402.01(b). The "FWS has jurisdiction over  
26 freshwater and terrestrial species while the National Marine  
Fisheries Service is responsible for anadromous and marine  
species." Johanns, 450 F.3d at 457 n.1 (citing 50 C.F.R. §  
402.01(b)).

1           If it appears from informal consultation<sup>2</sup> that a protected  
2 species may be present in the area of a federal agency's "major  
3 construction activity," then the agency must prepare a "biological  
4 assessment." 50 C.F.R. § 402.12(b). The purpose of the biological  
5 assessment is to "evaluate the potential effects of the action on  
6 listed and proposed species and designated and proposed critical  
7 habitat and determine whether any such species or habitat are  
8 likely to be adversely affected by the action and is used in  
9 determining whether formal consultation or a conference is  
10 necessary." 50 C.F.R. § 402.12(a). Again, formal consultation is  
11 not required if, as a result of informal consultation, the "Federal  
12 agency determines with the written concurrence of the Director [of  
13 the Fish and Wildlife Service], that the proposed action is not  
14 likely to adversely affect any listed species or critical habitat."  
15 Sierra Club v. Van Antwerp, 661 F.3d 1147, 1155 (D.C. Cir. 2011)  
16 (citing 50 C.F.R. § 402.14(b)).

17           To determine a project's effects, agencies are required to  
18 understand the existing conditions of the species or critical  
19 habitat at issue, before they consider the effects of a proposed  
20 action on those conditions. The "environmental baseline" for  
21 Section 7 consultation purposes is defined as follows:

22           The environmental baseline includes the past and  
23           present impacts of all Federal, State, or private  
24           actions and other human activities in the action

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25           <sup>2</sup> Informal consultation merely means "all discussions,  
26 formal consultation will be necessary. 50 C.F.R. § 402.13(a).

1 area, the anticipated impacts of all proposed  
2 Federal projects in the action area that have  
3 already undergone formal or early section 7  
4 consultation, and the impact of State or private  
actions which are contemporaneous with the  
consultation in process.

5 50 C.F.R. § 402.02 (definition of "environmental baseline" is  
6 included within the definition of "effects of the action"). For  
7 Section 7 consultation purposes, the "effects" of a proposed action  
8 include not only "direct" effects, but also "indirect effects,"  
9 which is defined to include any effects caused or induced by the  
10 action that are "reasonably certain to occur." 50 C.F.R. § 402.02.  
11 Additionally, in meeting the Section 7 consultation requirements,  
12 agencies must utilize the best scientific and commercial data  
13 available and agencies that fail to consult properly run the risk  
14 that their activities will be enjoined. See 16 U.S.C. §  
15 1536(a)(2); see also, e.g., Pacific Rivers Council v. Robertson,  
16 854 F. Supp. 713, 724 (D. Or. 1993) (holding that procedural  
17 violations of the ESA, such as not initiating Section 7(a)(2)  
18 consultation when required, mandate that the underlying action be  
19 enjoined), *aff'd in part, rev'd in part sub nom., Pacific Rivers*  
20 *Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

## 21 **B. Factual Background**

22 The northern spotted owl has been listed as a threatened  
23 species by the U.S. Fish and Wildlife Service ("FWS"). See Shasta-  
24 Trinity National Forest, Biological Assessment Mudflow Vegetation  
25 Management Project, MAR002558-2580, at 8 (Feb. 15, 2008)  
26 ("Biological Assessment"). Critical habitat for the northern

1 spotted owl was proposed within the Federal Register on May 6,  
2 1991, and a Final Rule was published on January 15, 1992. Id.  
3 (citing 56 Fed. Reg. 20816-21016; 57 Fed. Reg. 1796-1838). On  
4 September 12, 2008, a Final Revised Critical Habitat Rule for the  
5 northern spotted owl became effective. See Fish & Wildlife  
6 Service, Second Letter of Concurrence, FWS AR 001317-1331, at 1-2  
7 (Feb. 10, 2012) ("2<sup>nd</sup> LOC") (citing 73 Fed. Reg. 47326-47522). The  
8 Mudflow Project area contains 888 acres within the 2008 Critical  
9 Habitat designation subunit C-70 and 3,392 acres within the  
10 Critical Habitat subunit C-72. Id. at 2.

11       The area encompassing the Mudflow Project has been surveyed  
12 for northern spotted owls "annually to protocol" starting in 2004  
13 through 2007. Biological Assessment, at 9. According to the  
14 Biological Assessment for the Mudflow Project, which was based on  
15 the 1992 Final Critical Habitat Rule, the nearest known owl nests  
16 (ST-211 and ST-213) are located approximately .6 miles to the east  
17 and 1 mile to the west, respectively. Id. Portions of both 1.3  
18 mile radius owl home ranges are within the project assessment area.  
19 Id. Starting in 1992, annual historical checks have occurred in  
20 most years at both nest sites. Id. Owls in ST-211 were last known  
21 to nest in 1992. Id. A single male was located in the vicinity  
22 of this nest core in 2006. Id. Owls in ST-213 were last known to  
23 breed in 1992 and a single male was last heard in 1994. Id. In  
24 2005, a single male northern spotted owl was heard approximately  
25 1 mile to the northeast of the nest core on Forest Service land  
26 during surveys conducted by a private landowner, but the owl was

1 not relocated by Forest Service personnel on subsequent surveys.

2 Id. There are no known owl locations on private ownership within  
3 1.3 miles of the Mudflow Project. Id.

4 The proposed area for the Mudflow Project encompasses  
5 approximately 10,430 acres of Forest Service land and 3,400 acres  
6 of private land. Id. The project area contains 510 acres of  
7 suitable nesting/roosting habitat and 5,125 acres of foraging  
8 habitat. Id. There are no activities proposed within 1/4 mile of  
9 the known nest cores of ST-213 and ST-211. Id. at 10. Protocol  
10 surveys conducted during 2004, 2005, 2006, and 2007 in all areas  
11 of potential nesting, roosting, or foraging habitat in the Mudflow  
12 Project did not detect any additional owls. Id.

13 According to the Biological Assessment, the Mudflow Project  
14 will "degrade" 1,719 acres of foraging habitat for the northern  
15 spotted owl overall, 215 acres of which are within the owl's "home  
16 range" (1.3 mile radius) and 18 acres of which are within the owl's  
17 "territory" (.7 mile radius). Id. at 11. "Degraded" is defined  
18 as a reduction in some habitat components, but the habitat would  
19 still function at the current habitat level. Id. T h e  
20 Biological Assessment indicates that none of the Mudflow Project  
21 area will be "downgraded" or "removed." Id. "Downgraded" is a  
22 term of art which "indicates that there is a temporary reduction  
23 (approximately 30 years) in nesting/roosting or foraging habitat."  
24 Id. "Removed" is a term of art which "indicates that the habitat  
25 would not longer function as nesting/roosting or foraging"  
26 habitat." Id. The Biological Assessment concludes with a



1 determination that the proposed Mudflow Project “[m]ay affect, but  
2 is not likely to adversely affect” the northern spotted owl. Id.  
3 at 15.

4 The FWS issued an initial letter of concurrence with the  
5 Biological Assessment for the Mudflow Project on April 28, 2008.  
6 See 2<sup>nd</sup> LOC, at 1. On February 10, 2012, in order to take into  
7 account both the 2008 Final Revised Critical Habitat Rule for the  
8 Northern Spotted Owl and the 2011 Revised Recovery Plan for the  
9 Northern Spotted Owl (“Recovery Plan”), the FWS issued a second  
10 letter of concurrence. Id. at 1-2.

### 11 **C. Plaintiff’s Complaint**

12 Plaintiff Conservation Congress filed its original complaint  
13 on October 3, 2011, and its first supplemental complaint on March  
14 22, 2012. Pl’s Compl., ECF No. 1; Pl’s First Suppl. Compl., ECF  
15 No. 40. In its first supplemental complaint, Plaintiff makes,  
16 inter alia, the following assertions:

17 The 2011 Recovery Plan for the northern spotted owl notes that  
18 “past habitat loss, current habitat loss and competition from  
19 Barred Owls” were “the most pressing threats to [northern] spotted  
20 owl persistence,” and that active management projects should  
21 explicitly evaluate the short-term impacts to the Northern Spotted  
22 Owl and its prey while considering the long-term ecological  
23 benefits of such projects. Id. (citing 76 Fed. Reg. 38575).

24 According to Plaintiff, the most recent scientific evidence  
25 analyzing northern spotted owl population and demographic trends  
26 indicate that, despite over 20 years of legal protection under the

1 ESA, the species' population is declining by 3%-4% each year. Id.  
2 at 13-14.

3 The Mudflow Project is only one of many projects that involve  
4 tree cutting on lands managed by the Shasta-Trinity National Forest  
5 that are designated as critical habitat for the northern spotted  
6 owl. Id. at 15. USFS has analyzed and/or approved several  
7 projects that also involve tree cutting in northern spotted owl  
8 habitat including the Algoma, Pilgrim, Moosehead and East McCloud  
9 projects. Id.

10 FWS has conducted no surveys for northern spotted owl's in the  
11 Mudflow Project area since 2007. Id. Seventeen percent of the  
12 existing foraging habitat within the home range of a spotted owl  
13 pair, designated as ST-211, will be degraded in the Mudflow  
14 Project. Id. Despite this level of degradation, in its Biological  
15 Assessment, USFS did not evaluate the spatial relationship of its  
16 proposed logging to the existing habitat features of this area,  
17 even though spatial patterns of logging units vis-a-vis existing  
18 habitat, are considered by experts to be important to the survival  
19 of Owls post-logging. Id.

20 Based on the 2008 critical habitat rule, the Mudflow Project  
21 area contains 888 acres of designated critical habitat in unit "C-  
22 70" and 3,392 acres in unit "C-72," for a total of 4,280 acres of  
23 critical habitat. Pl's Reply, ECF No. 49, at 3.<sup>3</sup> The Project will

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24  
25 <sup>3</sup> Initially, Plaintiff alleged calculations for the Mudflow  
26 Project's effects on northern spotted owl critical habitat using  
the 1992 critical habitat rule. Following briefing by the parties  
in support of the instant motion, Plaintiff offers recalculations

1 encompass 19% of the total critical habitat in unit C-70 and 11%  
2 of the total critical habitat in unit C-72. Id. The 544 acres  
3 that USFS and FWS propose to treat are comprised of 408 acres of  
4 foraging habitat, 128 acres of dispersal habitat, and 8 acres of  
5 non-capable habitat. Id. USFS's proposed treatments include 340  
6 acres of natural stand thinning, 22 acres of thinning with  
7 sanitation, and 46 acres of shaded fuelbreak. Id. Plaintiff  
8 alleges that these treatments "appear to be targeted at all the  
9 foraging habitat, the highest quality remaining habitat[] included  
10 in the Project." Id. at 3-4.

11 Plaintiff asserts that, in its Second Letter of Concurrence,  
12 FWS fails to consider: the 2011 Revised Recovery Plan for the  
13 Northern Spotted Owl; or FWS's Biological Opinion on USFS's Algoma  
14 Project. Pl's Am. Compl., ECF No. 40, at 20. Plaintiff further  
15 asserts that FWS conducted no surveys in the Mudflow Project area  
16 since 2007, even though FWS revised its survey protocol in 2011 to  
17 better detect both Barred Owls (a competitor species to the  
18 Northern Spotted Owl) and northern spotted owls. Id.

19 Plaintiff brings two claims under the ESA alleging: (1)  
20 inadequate biological assessment on the part of USFS, in violation  
21 of 16 U.S.C. § 1536 and 50 C.F.R. § 402.12(a); and (2) arbitrary  
22 concurrence letters on the part of FWS, in violation of 16 U.S.C.  
23 § 1536(a)(2) and 50 C.F.R. § 402.14(a). Id. at 22-25.

24 On April 5, 2012, Federal Defendants filed an answer to  
25 \_\_\_\_\_  
26 based on the 2008 critical habitat rule.

1 Plaintiff's supplemental complaint, see Fed. Defs' Answer, ECF No.  
2 41, as did Defendant-Intervenor Sierra Pacific Industries, see Def-  
3 Intervenor's Answer, ECF No. 42.

4 **D. Plaintiff's Motion for Preliminary Injunction**

5 On April 9, 2012, Plaintiff filed the pending motion for a  
6 preliminary injunction. Pl's Amend. Mot., ECF No. 44.

7 On April 30, 2012, Federal Defendants and Defendant-Intervenor  
8 Sierra Pacific Industries filed oppositions to Plaintiff's motion  
9 for a preliminary injunction. See Fed. Defs' Opp'n, ECF No. 46,  
10 Def-Int's Opp'n, ECF No. 47.

11 **II. STANDARD OF REVIEW FOR A PRELIMINARY INJUNCTION UNDER THE**  
12 **ENDANGERED SPECIES ACT**

13 Fed. R. Civ. P. 65 provides authority to issue preliminary  
14 injunctions. A preliminary injunction is an "extraordinary  
15 remedy." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7,  
16 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (internal citation  
17 omitted). When a court considers whether to grant a motion for a  
18 preliminary injunction, it traditionally balances "the competing  
19 claims of injury, . . . the effect on each party of the granting  
20 or withholding of the requested relief, . . . the public  
21 consequences in employing the extraordinary remedy of injunction,"  
22 and plaintiff's likelihood of success. Id. at 20, 24 (quoting  
23 Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542, 107 S.Ct. 1396, 94  
24 L.Ed.2d 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305,  
25 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

26 Under the traditional approach, a plaintiff seeking a

1 preliminary injunction must demonstrate that he is "likely to  
2 succeed on the merits, that he is likely to suffer irreparable harm  
3 in the absence of preliminary relief, that the balance of equities  
4 tips in his favor, and that an injunction is in the public  
5 interest." Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559  
6 F.3d 1046, 1052 (9th Cir. 2009) (citing Winter, 555 U.S. at 20).  
7 Alternatively, "'serious questions going to the merits' [rather  
8 than a likeliness of success on the merits] and a hardship balance  
9 that tips sharply toward the plaintiff can support issuance of an  
10 injunction, assuming the other two elements of the Winter test are  
11 also met." Alliance For The Wild Rockies v. Cottrell, 632 F.3d  
12 1127, 1132 (9th Cir. 2011).

13 By enacting the ESA, Congress altered the normal standards for  
14 injunctions under Federal Rule of Civil Procedure 65. The Ninth  
15 Circuit has consistently held that "[t]he traditional preliminary  
16 injunction analysis does not apply to injunctions issued pursuant  
17 to the ESA." Nat'l Wildlife Fed'n v. NMFS, 422 F.3d 782, 793 (9th  
18 Cir. 2005). The Supreme Court explained that in enacting the ESA  
19 "Congress has spoken in the plainest of words, making it abundantly  
20 clear that the balance has been struck in favor of affording  
21 endangered species the highest of priorities." Tenn. Valley Auth.  
22 v. Hill, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).  
23 "Accordingly, courts may not use equity's scales to strike a  
24 different balance." Nat'l Wildlife Fed'n, 422 F.3d at 794  
25 (internal quotation omitted). "The appropriate remedy for  
26 violations of the ESA consultation requirements is an injunction

1 pending compliance with the ESA." Wash. Toxics Coalition v.  
2 Environmental Protection Agency, 413 F.3d 1024, 1035 (9th Cir.  
3 2005) (upholding an injunction prohibiting the EPA from authorizing  
4 the use of certain pesticides within proscribed distances of  
5 salmon-bearing waters until it had fulfilled its consultation  
6 obligations under § 7(a)(2) of the ESA).

### 7 **III. ANALYSIS**

8 Plaintiff asserts a procedural violation of the ESA due to  
9 Federal Defendants' failure to engage in the formal consultation  
10 required by Section 7(a)(2).

11 The Tenth Circuit has indicated that, to challenge the  
12 agency's failure to undertake formal consultation, a plaintiff may  
13 utilize the ESA's citizen-suit provision, 16 U.S.C. §  
14 1540(g)(1)(A). Rio Grande Silvery Minnow v. Bureau of Reclamation,  
15 601 F.3d 1096, 1106 n.3 (10th Cir. 2010). Under this provision,  
16 "any person may commence a civil suit . . . to enjoin any person,  
17 including the United States and any other governmental  
18 instrumentality or agency . . . who is alleged to be in violation  
19 of any provision of [the ESA] or regulation issued under the  
20 authority [of the ESA]; . . . ." 16 U.S.C. § 1540(g)(1)(A).

21 However, to challenge discretionary final agency actions of the FWS  
22 and other federal agencies under the ESA, plaintiffs must utilize  
23 the Administrative Procedure Act ("APA"). See 5 U.S.C. § 706(2);  
24 Bennett v. Spear, 520 U.S. 154, 174-75, 117 S.Ct. 1154, 137 L.Ed.2d  
25 281 (1997).

26 Plaintiff and Federal Defendants dispute whether Plaintiff's

1 claims against the USFS and the FWS arise under the ESA citizen  
2 suit provision or the APA. Because the APA governs judicial review  
3 of agency action challenged through the ESA citizen-suit provision,  
4 see 5 U.S.C. § 706; Friends of Endangered Species, Inc. v. Jantzen,  
5 760 F.2d 976, 981-82 (9th Cir. 1985); Rio Grande Silvery Minnow,  
6 601 F.3d at 1106 n.3 (citing Coal. for Sustainable Res., Inc. V.  
7 U.S. Forest Serv., 259 F.3d 1244, 1249 (10th Cir. 2001)), the APA  
8 will provide the standard of review for both of Plaintiff's  
9 relevant claims, regardless of the statutory authority under which  
10 the claims arise. At this stage in the proceedings, the court  
11 therefore declines to analyze whether Plaintiffs claims against the  
12 USFS and FWS arise under the ESA Section 11(g) citizen suit  
13 provision or the APA.<sup>4</sup>

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14  
15 <sup>4</sup> The court must note, however, the ESA Section 11(g) citizen-  
16 suit requirement that 60-day written notice be provided to the  
17 appropriate Secretary and to any alleged violator intended to be  
18 a defendant in the lawsuit. See 16 U.S.C. § 1540(g)(2)(A), (B),  
19 and (C). A proper 60-day notice of intent must sufficiently alert  
20 the recipient of the actual alleged violation, so that the  
21 recipient may attempt to abate the violation. Southwest Ctr. for  
22 Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 521  
23 (9th Cir. 1998). The Ninth Circuit considers this requirement  
24 jurisdictional. Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1072  
25 (9th Cir. 1996).

26 Here, the administrative record indicates that a 60-day notice  
of intent to sue, from Plaintiff Conservation Congress was received  
by Sharon Heywood, the Forest Supervisor for the Shasta-Trinity  
National Forest of the USFS, on July 13, 2011--over 60 days before  
Plaintiff's filing of its original complaint in this action.  
See Letter from Denise Boggs, Conservation Congress, Sixty-Day  
Notice of Intent to Sue (Jul. 13, 2011). The letter was also  
addressed to Ken Salazar, Secretary of the Interior, for the U.S.  
Department of the Interior. Id. at 1. In addition to being filed  
in a timely manner, the letter is explicitly identified as a 60-day  
notice of intent to sue under ESA Section 11(g), see id. at 1; it  
clearly provides notice of the violation upon which Plaintiff sued,  
see, e.g., id. at 2 ("the USFS and USFWS have contravened the

1 **A. Likelihood of Success on the Merits**

2 **i. Standard of Review**

3 Under the APA, a court may disturb an agency's final action  
4 only if that final action is "arbitrary, capricious, an abuse of  
5 discretion, or otherwise not in accordance with law." 5 U.S.C. §  
6 706(2)(A). This standard is "highly deferential, presuming agency  
7 action to be valid and affirming the agency action if a reasonable  
8 basis exists for its decision." Independent Acceptance Co. v.  
9 California, 204 F.3d 1247, 1251 (9th Cir. 2000). A reviewing court  
10 must not "substitute its judgment for that of the agency"  
11 concerning the proposed action. Citizens to Preserve Overton Park  
12 v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).  
13 Rather, a court must determine whether the decision was "based on  
14 a consideration of relevant factors" and whether "the agency has  
15 taken a 'hard look' at the environmental consequences of its  
16 proposed action." Blue Mountains Biodiversity Project v.  
17 Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998). That is, the  
18 agency must state a rational connection between the facts found and  
19 the decision made. Gifford Pinchot Task Force v. U.S. Fish and  
20 Wildlife Serv., 378 F.3d 1059, 1065 (9th Cir. 2004). The standard

21 \_\_\_\_\_  
22 requirements of the ESA by . . . failing to initiate formal  
23 consultation with the USFWS"); and it appears to have been served  
24 upon the relevant Secretary (the Secretary of the Interior) as well  
25 as the alleged ESA violator (the USFS). This letter was therefore  
26 sufficient to satisfy the jurisdictional requirement of notice  
under 16 U.S.C. § 1540(g)(2)(A)(i). To the extent that Plaintiff  
asserts an ESA claim against the USFS, brought pursuant to the ESA  
citizen suit provision of 16 U.S.C. § 1540(g)(1)(A), this court has  
jurisdiction to hear that claim.



1 does not shield the agency from a "thorough, probing, in-depth  
2 review." Seattle Audubon Soc'y v. Moseley, 798 F.Supp. 1473, 1476  
3 (W.D. Wash. 1992) (quoting Citizens to Preserve Overton Park, 401  
4 U.S. at 415, 91 S.Ct. 814).

5 In reviewing environmental actions, in particular, the Ninth  
6 Circuit has explicitly provided that the "highest deference is owed  
7 to the Forest Service's technical analyses and judgments within its  
8 area of expertise." League Of Wilderness Defenders Blue Mountains  
9 Biodiversity Project v. Allen, 615 F.3d 1122, 1131 (9th Cir. 2010)  
10 (citing Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008),  
11 *overruled on other grounds by* American Trucking Ass'ns Inc. v. City  
12 of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)). The Ninth  
13 Circuit has further provided that agencies are entitled to  
14 deference relative to their interpretation of their own  
15 regulations, including forest plans, and that, under the APA, the  
16 court's role in reviewing agency actions is not to weigh  
17 conflicting expert opinions or to consider whether the agency  
18 employed the best methods, but instead, when an agency's particular  
19 technical expertise is involved, to guard the agency's discretion.  
20 See Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097,  
21 1099 (9th Cir. 2003); Friends of Endangered Species, Inc. v.  
22 Jantzen, 760 F.2d 976, 986 (9th Cir. 1985); Marsh v. Or. Natural  
23 Res. Council, 490 U.S. 360, 376-77, 109 S.Ct. 1851, 104 L.Ed.2d 377  
24 (1980).

25 **ii. Analysis**

26 Underlying the test for injunctive relief is the requirement

1 that Plaintiff demonstrate at least some probability of success on  
2 the merits. See Sports Form, Inc. v. United Press Int'l, Inc., 686  
3 F.2d 750, 753 (9th Cir. 1982) (citing Benda v. Grand Lodge of  
4 International Association of Machinists & Aerospace Workers, 584  
5 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937, 99  
6 S.Ct. 2065, 60 L.Ed.2d 667 (1979)). For the reasons explained  
7 below, the court determines that Plaintiff has not established a  
8 probability of success on the merits of its claims. Accordingly,  
9 the court denies Plaintiff's request for injunctive relief.

10 Plaintiff claims that the USFS and the FWS were arbitrary and  
11 capricious in their determination that the Mudflow Project was not  
12 likely to adversely affect the Northern Spotted Owl and that formal  
13 consultation, therefore, should have been required. A plaintiff's  
14 burden in establishing a procedural violation of the ESA is to show  
15 that the circumstances triggering the procedural requirement exist  
16 (i.e., that the agencies were arbitrary and capricious in  
17 determining that the Mudflow Project is not likely to adversely  
18 affect the Northern Spotted Owl), and that the required procedures  
19 have not been followed (i.e., the USFS and the FWS did not engage  
20 in formal consultation). See Thomas v. Peterson, 753 F.2d 754, 765  
21 (9th Cir. 1985). It is uncontested that the USFS and the FWS did  
22 not engage in formal consultation. Nonetheless, Plaintiff has not  
23 met its burden of establishing that the agencies were arbitrary and  
24 capricious in determining that Mudflow Project is not likely to  
25 adversely affect the Northern Spotted Owl.

26 ////

1           **a. Short-Term Impacts of the Mudflow Project on the**  
2           **Northern Spotted Owl and its Prey**

3           Plaintiff argues that the USFS's biological assessment and the  
4 FWS's second letter of concurrence failed to consider the short-  
5 term impacts to the Northern Spotted Owl and its prey in reaching  
6 their conclusions that the Mudflow Project offers long-term  
7 ecological benefits. Pl's Am. Mot., ECF No. 44, at 23-24.

8           It appears to the court, however, that the USFS considered the  
9 short-term impacts to the species when it determined that "[n]o  
10 activities are proposed within 1/4 mile of" the "nearest known owl  
11 nests (ST-11 and ST-213)," which are located .6 miles to the east  
12 of the Mudflow Project and 1 mile to the west, respectively, and  
13 when the USFS further provided that "[s]hould an owl nest be  
14 located in the project area, a limited operating period . . . will  
15 be required to avoid direct effects to spotted owls during the  
16 breeding season." Biological Assessment, at 9-10. The USFS also  
17 seems to have explicitly taken into account short-term impacts on  
18 the prey of the Northern Spotted Owl when analyzing the effects of  
19 the Mudflow Project on the Northern Spotted Owl's foraging habitat.  
20 See Biological Assessment, at 11-14.

21           Furthermore, the FWS clearly considered the short-term effects  
22 of the Mudflow Project on both the Northern Spotted Owl and its  
23 prey when it determined that:

- 24           1) limited detections in both historical activity  
25           centers [ST-211 and ST-213] since 1992 indicate a  
26           low likelihood of occupancy by NSO [Northern  
              Spotted Owls] within the project area, 2)  
              treatments are not proposed within nesting/roosting

1 habitat or high-quality foraging habitat, within  
2 the NSO core areas, 3) treatments proposed for 171  
3 acres of foraging habitat within the two home  
4 ranges have been designed to retain the function of  
foraging habitat and, 4) a seasonal restriction  
will be placed on project activities during the  
breeding season.

5 2<sup>nd</sup> LOC, at 9. Indeed, in determining the proximity of any  
6 Northern Spotted Owls to the Mudflow Project area, the effects of  
7 the Mudflow Project upon the any nesting/roosting habitat or high-  
8 quality foraging habitat of the Owls, and the impacts that the  
9 Mudflow Project might have upon the Owls' breeding season, the FWS  
10 appears to have overtly considered the short-term effects that the  
11 Project would have upon the species.

12 Contrary to Plaintiff's assertion, Federal Defendants took  
13 into account the short-term impacts of the Mudflow Project on both  
14 the Northern Spotted Owl and its prey. Plaintiff therefore fails  
15 to establish that Federal Defendants' conclusions were arbitrary  
16 and capricious in this regard.

17 **b. Characterization of the Forest Areas**

18 Plaintiff further asserts that the Federal Defendants  
19 incorrectly characterized the Mudflow Project area as 65 to 85 year  
20 old "second growth" forests, and thus, not high quality Northern  
21 Spotted Owl habitat, when the habitat actually includes old growth  
22 trees hundreds of years old. Pl's Am. Mot., ECF No. 44, at 24-25.

23  
24 Plaintiff cites the declaration of Monica Bond, a "wildlife  
25 biologist with expertise in wildlife biology, ecology, and  
26

1 behavior." Bond Decl., ECF No. 43, Att. 2.<sup>5</sup> Bond asserts that she  
2 "was dumbfounded when [she] saw the large size of the trees  
3 proposed for logging within Northern Spotted Owl Critical Habitat."  
4 Id. at 6, ¶ 14. In support of her testimony regarding the size of  
5 the trees, Bond submits a series of photographs of a person  
6 standing beside marked tree trunks. Bond Photos, ECF No. 43, Atts.  
7 3-5, 7, 9-11. Plaintiff also cites the declaration of Denise  
8 Boggs, "the Executive Director and a member of Conservation  
9 Congress," who asserts that many of the trees marked for cutting  
10 "are large, old trees." Boggs Decl., ECF No. 43, Att. 12, at 2,  
11 ¶ 4. Boggs further states, "We measured trees marked for cutting  
12 up to 43 inches in diameter at breast height. . . . These trees  
13 are not 60-80 year old 'second growth' forest," but instead "are

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14  
15 <sup>5</sup> A court may consider evidence outside the administrative  
16 record for the limited purposes of reviewing a plaintiff's ESA  
17 claim. Western Watersheds Project v. Kraayenbrink, 632 F.3d 472,  
18 497 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 366 (2011). Thus, to  
19 the extent that Plaintiff's claims are brought under the ESA's  
20 citizen suit provision, the court considers the Boggs and Bond  
21 declarations and attachments.

18 When reviewing a claim under the APA standard of review,  
19 however, an agency action must typically be judged on the rationale  
20 and record that led to the decision. See, e.g., Beno v. Shalala,  
21 30 F.3d 1057, 1073-74 (9th Cir. 1994). However, a court is "not  
22 straightjacketed to the original record in trying to make sense of  
23 complex technical testimony," but may consider evidence not  
24 included in the administrative record to "clarif[y] a dispute that  
25 . . . was less than clear from the original record." Bunker Hill  
26 Co. v. Env'tl. Prot. Agency, 572 F.2d 1286, 1292 (9th Cir. 1977).  
Here, Plaintiff's submitted evidence is clearly meant to support  
its assertion that the Federal Defendants' findings are belied by  
"simple observation." See Pl's Am. Mot., ECF No. 44, at 25. To  
the extent that Plaintiff's claims are brought pursuant to the APA,  
the court considers the Boggs and Bond declaration and attachments  
to ascertain whether the Federal Defendants considered the evident  
size of the Mudflow Project area trees when making its habitat  
determination.

1 old growth trees hundreds of years old." Id.

2 Plaintiff's submitted evidence does not establish that the  
3 Federal Defendants made an arbitrary and capricious assessment of  
4 habitat quality. Even if the court agrees that the trees in the  
5 submitted photographs appear to be large as compared to the person  
6 in the photograph and therefore also appear to be old, that  
7 agreement does not call into question the complex and technical  
8 analyses and judgments of the USFS and the FWS in their assessment  
9 of the characteristics of the habitat affected by the Mudflow  
10 Project. The court declines to disturb the Forest Service's  
11 discretion in making technical analyses and judgments of the  
12 Mudflow Project habitat--a subject clearly within the agency's area  
13 of expertise. See League Of Wilderness Defenders Blue Mountains  
14 Biodiversity Project v. Allen, 615 F.3d 1122, 1131 (9th Cir.  
15 2010).<sup>6</sup>

16 Thus, the court finds that the Plaintiff fails to establish  
17 that the Federal Defendants' assessment of habitat quality was  
18 arbitrary and capricious.

19 **c. Threat of Barred Owls**

20 Plaintiff argues that the USFS's biological assessment fails  
21 to discuss the Mudflow Project's potential to facilitate the  
22 invasion of Barred Owls, and FWS's Second Letter of Concurrence  
23 inappropriately minimizes the threat of Barred Owls and fails to  
24

---

25 <sup>6</sup> While the photos are opaque, the affidavit says that certain  
26 trees were measured. Although troubling, the deference the court  
owes the agency's technical evaluation disposes of the issue.

1 use the best available science. Pl's Am. Mot., ECF No. 44, at 25-  
2 26.

3 Although Plaintiff bases its argument, in part, on the  
4 assertion that "FWS has conducted no surveys for Spotted Owl[]s in  
5 the Mudflow Project area since 2007," Pl's Am. Mot., ECF No. 44,  
6 at 26, the FWS 2<sup>nd</sup> Letter of Concurrence, in fact, indicates that  
7 "[t]he Mudflow [P]roject area has been surveyed annually for NSOs  
8 from 2004 to 2011," FWS 2<sup>nd</sup> LOC, at 6.

9 Furthermore, the FWS's 2<sup>nd</sup> Letter of Concurrence explicitly  
10 discusses the threat of Barred Owls to Northern Spotted Owls in  
11 relation to the Mudflow Project and references the FWS's analysis  
12 of recovery planning for the Northern Spotted Owl, which is based  
13 upon the 2011 Revised Recovery Plan for the Northern Spotted Owl.  
14 See FWS 2<sup>nd</sup> LOC, at 7, 12. All parties agree that the 2011 Revised  
15 Recovery Plan for the Northern Spotted Owl represents the "best  
16 available science." The FWS 2<sup>nd</sup> Letter of Concurrence states:

17 Barred owls are recognized as a significant threat  
18 to the recovery of the NSO (USFWS 2011). Although  
19 barred owls have not been detected in the project  
20 area, given the local presence of barred owls and  
21 their current rate of spread, it is likely that  
22 barred owls could move into the project area in the  
23 foreseeable future. Results of a recent study . .  
24 . suggest that in environments where the two  
25 species compete directly for resources, maintaining  
26 larger amounts of older forest (nesting/roosting)  
may help NSOs to persist, at least in the short  
term. Our evaluation of the Mudflow Project  
therefore focused on whether proposed treatments  
could potentially act to exacerbate competitive  
interactions between the two species by reducing  
the availability of high-quality habitat (see  
*Recovery Planning for NSO* section . . . ). As  
described below, the treatments prescribed by the  
Mudflow project are not proposed for

1 nesting/roosting and other high-quality habitat,  
2 and therefore, it is unlikely that the Mudflow  
3 project will exacerbate competitive interactions  
4 between the two species. In addition, because  
5 survey results suggest that neither barred owls nor  
territorial NSO currently occupy the treatment  
areas, the direct influence of barred owls was not  
a factor in determining the effects of this project  
on NSO.

6 FWS 2<sup>nd</sup> LOC, at 7 (*italics included*). Plaintiff's arguments fail  
7 to establish that the FWS arbitrarily and capriciously minimized  
8 the threat of Barred Owls in its analysis. Additionally, because  
9 the FWS explicitly references its "Recovery Planning for NSO  
10 section," which relies upon the 2011 Revised Recovery Plan for the  
11 Northern Spotted Owl, the FWS analysis appears to be using the  
12 "best available science."

13 Although the USFS's Biological Assessment does not explicitly  
14 discuss any potential invasion of Barred Owls--a threat which was  
15 identified in the 2011 Revised Recovery Plan for the Northern  
16 Spotted Owl--the USFS's Biological Assessment was published in  
17 2008, years before the 2011 Revised Recovery Plan for the Northern  
18 Spotted Owl was issued, and an updated memorandum to the Biological  
19 Assessment was made in May 3, 2011, over a month before the 2011  
20 Revised Recovery Plan was released. See Memorandum: Mudflow  
21 Vegetation Management Project Biological Assessment Update,  
22 MAR002420 (May 3, 2011); 2011 Revised Recovery Plan for the  
23 Northern Spotted Owl, FWS AR 002765. Absent evidence that the USFS  
24 was aware of the potential threat of Barred Owl invasion due to the  
25 Mudflow Project at the time that its Biological Assessments were  
26 conducted, yet failed to take that evidence into account, the court



1 cannot determine that the USFS failed to consider the best  
2 scientific data available to it at the time. It also appears to  
3 the court that the fact that the FWS's 2<sup>nd</sup> Letter of Concurrence  
4 later discussed the Barred Owl threat in some detail in concurring  
5 with the USFS's Biological Assessment cures the Biological  
6 Assessment's failure to consider the Barred Owl threat before the  
7 release of the 2011 Revised Recovery Plan.

8 Furthermore, the contents of a Biological Assessment are  
9 discretionary. The applicable regulations state that "[t]he  
10 contents of a biological assessment are at the discretion of the  
11 [action] agency and will depend on the nature of the Federal  
12 action." 50 C.F.R. § 402.12(f). See also Strahan v. Linnon, 967  
13 F. Supp. 581, 594 (D. Mass. 1997) (citing Bays' Legal Fund v.  
14 Browner, 828 F. Supp. 102, 110 (D. Mass. 1993) ("there are no  
15 strict requirements for what the biological assessment should  
16 include; its contents are discretionary within the agency preparing  
17 it.")).<sup>7</sup> As explained above, without evidence indicating that the  
18 USFS was aware of any potential invasion of Barred Owls due to the  
19 Mudflow Project in 2008, the court cannot find that the USFS abused  
20

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21 <sup>7</sup> The regulation does list certain criteria that the agency  
22 may consider. These include: (1) the results of an on-site  
23 inspection of the area affected by the action to determine if  
24 listed or proposed species are present or occur seasonally; (2) the  
25 views of recognized experts on the species at issue; (3) a review  
26 of the literature and other information; (4) an analysis of the  
effects of the action on the species and habitat, including  
consideration of cumulative effects, and the results of any related  
studies; and (5) an analysis of alternative actions considered by  
the Federal agency for the proposed action. 50 C.F.R. § 402.12(f).

1 its discretion in failing to address that threat in its Biological  
2 Assessment.

3 Plaintiff therefore fails to demonstrate that the USFS and FWS  
4 were arbitrary and capricious in their consideration, or failure  
5 to explicitly consider (in the case of the USFS), any threats of  
6 invasion by Barred Owls due to the Mudflow Project.

7 **d. Effects of "Landing" Construction**

8 Plaintiff argues that the FWS failed to address the adverse  
9 modification and destruction of critical habitat that will likely  
10 result from "landing" construction. Pl's Am. Mot., ECF No. 44, at  
11 26-27.

12 In discussing the Mudflow Project's landing construction, the  
13 FWS's 2<sup>nd</sup> Letter of Concurrence states that:

14 Within the project area there are approximately 73  
15 existing landings that would be reused, along with  
16 an estimated 55 new landings proposed for  
17 construction. All existing and proposed landings  
18 are located within existing treatment units and are  
19 often directly adjacent to roads. Landing size  
20 will vary between 0.25 and 0.5 acres depending on  
21 unit volume. Existing landings and openings will  
22 be used when available, and Forest biologists will  
23 work with the Sale Administrator to encourage  
24 placing landings outside of high quality foraging  
25 habitat, where possible. A conservatively high  
26 estimate of 10 acres of foraging habitat would be  
affected due to landing construction. Landings are  
not proposed within nesting/roosting habitat,  
Riparian Reserves, or NSO core areas. Due to their  
small size and placement outside of high-quality  
habitat, the effects of landing construction are  
considered negligible in the scope of the Project.

24 FWS 2<sup>nd</sup> LOC, at 6.

25 Plaintiff has produced no evidence to indicate that, contrary  
26 to the FWS's assessment, the proposed landings will adversely

1 affect critical habitat for the Northern Spotted Owl. Plaintiff  
2 argues that “[l]anding construction results in the complete  
3 destruction of Owl habitat,” and “[a]t a minimum it must be  
4 considered adverse modification,” but cites no evidence in support  
5 of those assertions. See Pl’s Am. Mot., ECF No. 44, at 27.

6  
7 The Ninth Circuit has provided that “an adverse modification  
8 occurs only when there is a direct or indirect alteration that  
9 appreciably diminishes the value of critical habitat,” and that  
10 “[a]n area of a species’ critical habitat can be destroyed without  
11 appreciably diminishing the value of a critical habitat for the  
12 species’ survival or recovery.” Butte Environmental Council v.  
13 U.S. Army Corps of Engineers, 620 F.3d 936, 948 (9th Cir. 2010)  
14 (internal quotations omitted) (emphasis omitted). Even if  
15 Plaintiff’s assertion that “[l]anding construction results in  
16 complete destruction of Owl habitat” is credited, according to the  
17 Ninth Circuit, that destruction may not necessarily “appreciably  
18 diminish[] the value of the critical habitat,” and thus, that  
19 destruction does not necessarily rise to the level of an adverse  
20 modification. Plaintiff’s argument, that the landing construction  
21 itself requires the FWS to conclude that an adverse modification  
22 will necessarily occur, therefore fails.

23 Thus, Plaintiff has failed to show that the FWS abused its  
24 discretion in determining that adverse affects on Northern Spotted  
25 Owls are unlikely to occur.

26 ////

1           **e. Cumulative Effects of Past Logging and USFS Projects**

2           Plaintiff argues that the USFS and the FWS failed to analyze  
3 the cumulative effects of past logging and USFS projects on the  
4 Northern Spotted Owl when evaluating the Mudflow Project. Pl's Am.  
5 Mot., ECF No. 44, at 27-30.

6           Although agencies are required to evaluate the cumulative  
7 effects on a listed species or critical habitat during formal  
8 consultation, see 50 C.F.R. § 402.14(g)(3)-(4), no such requirement  
9 binds the action or the consulting agency during informal  
10 consultation, cf. 50 C.F.R. § 402.13. Furthermore, in completing  
11 the Biological Assessment, the USFS could have, but was not  
12 required to include a consideration of cumulative effects. 50  
13 C.F.R. § 402.12(f)(4). Because, as explained above, the contents  
14 of a Biological Assessment are discretionary, the court is  
15 unwilling to find that the USFS abused its discretion in failing  
16 to consider a factor which it was not required to consider in the  
17 first instance.

18           It is particularly difficult for the court to find that the  
19 USFS and the FWS abused their discretion in failing to consider  
20 cumulative effects where, as here, Plaintiff's argument hangs upon  
21 its conflation of the technical and colloquial meanings of the word  
22 "degrade." In essence, Plaintiff argues that, according to the  
23 USFS and the FWS, "degradations" will occur to the critical  
24 habitat, and that "a large amount of degradation from repetitive  
25 timber sale projects, even if designed to benefit the Owl over the  
26 long-term, simply must have some short-term impacts to the Owl and

1 are likely impeding its recovery." Pl's Am. Mot., ECF No. 44, at  
2 29. Although Plaintiff's argument appears facially valid, the  
3 argument loses its force in a regulatory world in which words are  
4 not given their plain meanings.

5 According to the Biological Assessment, "degraded" is defined  
6 as "a reduction in some habitat components," without a loss of  
7 "function at the current habitat level." Biological Assessment,  
8 at 11. The FWS's Second Letter of Concurrence stretches the common  
9 understanding of the word "degrade" further by providing that:

10 The term *degraded* signifies when treatments  
11 influence the quality of habitat by the removal or  
12 reduction of habitat elements but *not to the degree*  
13 *where existing habitat function is changed . . . .*  
14 this category includes activities that *may be*  
15 *neutral or beneficial to habitat function* even  
16 though habitat elements are being reduced.

17 FWS 2<sup>nd</sup> LOC, at 7 (emphasis included). In light of a definition of  
18 "degrade" that could mean "beneficial to habitat function," and  
19 absent further proof to the contrary, the court is unable to agree  
20 with Plaintiff that a series of "degradations" will necessarily  
21 have an adverse effect upon the Northern Spotted Owl critical  
22 habitat.

23 Thus, Plaintiff has failed to demonstrate that the FWS and the  
24 USFS arbitrarily and capriciously determined that, although  
25 Northern Spotted Owl critical habitat will be "degraded" by the  
26 Mudflow Project, such "degradation" does not rise to the level of  
an "adverse modification."

////

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1           **f. Analyzing the Mudflow Project's Effects Upon the**  
2           **Recovery of the Northern Spotted Owl**

3           Finally, Plaintiff argues that FWS and USFS improperly failed  
4 to analyze the Mudflow Project's effects upon the recovery, as  
5 opposed to the mere survival, of the Northern Spotted Owl. Pl's  
6 Am. Mot., ECF No. 44, at 30-31. Underlying Plaintiff's argument  
7 is Plaintiff's unsupported assumption that "it appears clear that  
8 'degrading' a species['s] critical habitat may well set back its  
9 recovery." Id. at 31. However, as the court previously discussed,  
10 in light of the peculiar way that the agencies employ the term  
11 "degrade," it is not at all clear to the court that "degrading" a  
12 species' critical habitat would necessary adversely affect the  
13 recovery of the species. Without evidence to support Plaintiff's  
14 position, Plaintiff fails to demonstrate that the FWS and the USFS  
15 abused their discretion in this regard.<sup>8</sup>

16           Because Plaintiff has failed to produce evidence demonstrating  
17 that the Federal Defendants abused their discretion in determining  
18 that the Mudflow Project is not likely to adversely affect the  
19 Northern Spotted Owl, Plaintiff has not established a probability

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20  
21           <sup>8</sup> Moreover, the FWS's Second Letter of Concurrence explicitly  
22 states that it is based, in part, on the 2011 Revised Recovery  
23 Plan. See FWS 2<sup>nd</sup> LOC, at 2. The 2011 Revised Recovery Plan for  
24 the Northern Spotted Owl, in turn, explains that "[r]ecover plans  
25 describe reasonable actions and criteria that are considered  
26 necessary to recover listed species." U.S. Fish & Wildlife Serv.,  
2011 Revised Recovery Plan for the Northern Spotted Owl, FWS AR  
002766 (June 28, 2011). If the FWS's Second Letter of Concurrence,  
in fact, adheres to the recommendations and analyses of the 2011  
Revised Recovery Plan, it stands to reason that the FWS's Second  
Letter of Concurrence takes into account the recovery, as opposed  
to the mere survival, needs of the species.

1 of succeeding on the merits of its claim that the Federal  
2 Defendants violated the ESA consultation requirements. The court  
3 therefore denies Plaintiff's motion for a preliminary injunction.  
4 Plaintiff's request that the court waive the bond requirement is  
5 moot.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Plaintiff's motion for a preliminary  
8 injunction, ECF No. 43, is DENIED.

9 IT IS SO ORDERED.

10 DATED: June 19, 2012.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT