UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PACIFIC RIVERS COUNCIL, OREGON WILD, KLAMATH-SISKIYOU WILDLANDS CENTER, THE WILDERNESS SOCIETY, CASCADIA WILDLANDS, CENTER FOR BIOLOGICAL DIVERSITY, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, and UMPQUA WATERSHEDS, Plaintiffs, vs. EDWARD W. SHEPARD, State Director, Oregon/Washington Bureau of Land Management, in his official capacity; UNITED STATES BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR; Defendants. RON HAILICKA EQUIPMENT, INC., an Oregon corporation; and OREGON WEST LUMBER SALES, INC., an Oregon corporation; Defendant-Intervenors.	**No. 03:11-cv-00442-HU** **FINDINGS & RECOMMENDATIONS ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT-INTERVENORS' MOTION FOR STAY**

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Susan Jane M. Brown
Western Environmental Law Center
4107 N.E. Couch Street
Portland, OR 97232

Kristen L. Boyles
Amanda Goodin
Earthjustice
705 Second Avenue
Suite 203
Seattle, WA 98104

Attorneys for Plaintiffs

Ignacia S. Moreno
Assistant Attorney General
Seth M. Barsky
Coby H. Howell
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
c/o U.S. Attorney's Office
1000 S.W. Third Avenue
Portland, OR 97204-2902

Paul D. Barker, Jr.
Clifford E. Stevens, Jr.
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
P.O. Box 7369
Washington, D.C. 20044-7369

Attorneys for Defendants

Julie A. Weis
Haglund Kelley Jones & Wilder LLP
200 S.W. Market Street
Suite 1777
Portland, OR 97201

Attorney for Defendant-Intervenors

HUBEL, Magistrate Judge:

The plaintiffs bring this action for declaratory and injunctive relief relating to actions taken by the defendants in connection with their final Records of Decision (RODs) for the Western Oregon Plan Revisions (WOPR), adopted on December 30, 2008, which revised the Bureau of Land Management's (BLM) Resource Management Plans for the Western Oregon BLM Districts of Salem, Eugene, Roseburg, Coos Bay, and Medford, and the Klamath Falls Resource Area of the Lakeview District, and the accompanying final Environmental Impact Statement (FEIS). *See* Dkt. #1.

In their Complaint, the plaintiffs provide a comprehensive historical background leading to issuance of the WOPR RODs at issue in this case. The history includes the adoption of the Northwest Forest Plan (NFP) in April 1994, and the Aquatic Conservation Strategy included within the NFP; a discussion of endangered and threatened species that are affected by the NFP, including the northern spotted owl, the marbled murrelet, and numerous aquatic species; the Oregon and California Lands Act (O&C Lands Act), which governs BLM's management of certain O&C lands in western Oregon; negotiations between timber industry groups and BLM that culminated in a 2003 settlement agreement regarding the contents of the NFP; and, ultimately, issuance of the WOPR, the FEIS, and a proposed Resource Management Plan (PRMP). Further, the plaintiffs discuss in detail a number of objections they assert to the WOPR, the FEIS, and the PRMP. *Id.*, ¶¶ 15-104.

However, very little of the underlying history of the case is relevant to the matters currently before the court. Only a brief

historical background is necessary to place the current motions in context.

BLM finalized the WOPR on December 30, 2008, by signing six RODs that adopted the PRMP for the BLM areas listed above. Subsequently, four separate lawsuits were filed challenging the WOPR, including two lawsuits filed by the same plaintiffs who have filed the current action; i.e., *Pacific Rivers Council v. Shepard*, No. 03:09-cv-00058-ST (D. Or.), and *Oregon Wild v. Shepard*, No. 03:09-cv-00060-PK (D. Or.). Among other things, the plaintiffs in those two lawsuits alleged BLM had issued the RODs without engaging in the biological consultation required by section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* Section 7 requires, in any non-exempt action where there is discretionary federal involvement or control, that the involved federal agencies consult to ensure the agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . us[ing] the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03. ESA-listed species present in the WOPR area include northern spotted owls, marbled murrelets, and salmon and steelhead populations.

Faced with four pending lawsuits challenging the WOPR, BLM issued a Withdrawal Memorandum dated July 16, 2009, withdrawing the WOPR RODs, and acknowledging that the RODs were legally deficient under the ESA. The plaintiffs in the two cases listed above then stipulated to dismissal with prejudice of those cases.

Several timber industry organizations filed suit in the United States District Court for the District of Columbia to challenge BLM's withdrawal of the WOPR RODs. Among other things, the timber organization plaintiffs argued BLM failed to comply with the Administrative Procedures Act (APA) by withdrawing the RODs without providing notice and allowing comment on the proposed withdrawal. On March 31, 2011, the D.C. court issued a Memorandum Opinion vacating and remanding BLM's July 16, 2009, decision to withdraw the WOPR RODs. *See* Dkt. #32-4, *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245 (D.D.C. 2011) ("*DTO*"). The D.C. court held the agency "lacked inherent authority to withdraw the December 2008 ROD, and the failure to comply with procedures under the FLPMA [Federal Land Policy and Management Act] was arbitrary, capricious and an abuse of discretion under 5 U.S.C. § 706(2)." *Id.*, 774 F. Supp. 2d at 260. The *DTO* court specifically noted that the legal issue of whether BLM failed to consult as required by ESA § 7 prior to approving the WOPR RODs was not properly before the court in that case. *Id.*, 774 F. Supp. 2d at 258.

The present action currently is before the court on two motions - the plaintiffs' motion for partial summary judgment, and a motion to stay filed by the defendant-intervenors Ron Hailicka Equipment, Inc. and Oregon West Lumber Sales, Inc. (hereafter, collectively, "Hailicka").

The plaintiffs move for partial summary judgment on their first claim for relief, in which they allege the defendants failed to consult as required by ESA § 7 before issuing the WOPR and the final RMP. Dkt. ##10-21 & 23; *see* Dkt. #1, ¶¶ 105-111. As a remedy for the agency's failure to consult as required, the

plaintiffs ask the court to vacate the WOPR RODs, which would restore the NFP - in plaintiffs' opinion, "the most protective rule for threatened and endangered species . . . [which] courts have found . . . continues to embody the best available scientific information pertaining to the impacts of forestry activities on salmon and their habitat." Dkt. #11, p. 27.

The defendants have responded, Dkt. ##31, 32, & 33, agreeing "that BLM should have consulted [as required by ESA § 7,] and [stating] the agency does not dispute this allegation under the facts of this case and the law of this Circuit." Dkt. #32, p. 17. The defendants expressly "do not contest liability on Claim One of Plaintiffs' Complaint." *Id.*, p. 16. The defendants also agree that remand and vacation of the WOPR RODs is the appropriate remedy. Dkt. #32, pp. 17-18. The plaintiffs have filed a reply, Dkt. #43, urging the court to grant their motion for partial summary judgment.

Having seen the defendants' response that they do not oppose summary judgment on the plaintiffs' first claim for relief, Hailicka moved to intervene in this case to protect its private interests. *See* Dkt. ##37 & 38, Motion to Intervene and supporting brief. Hailicka argued the WOPR greatly increased the allowable annual timber harvest provided under the NFP, and vacating the WOPR would return those Oregon BLM lands to the more restrictive harvest levels previously allowed under the NFP. Dkt. #28, pp. 5-6. The plaintiffs did not oppose the motion to intervene, Dkt. #42, and the court granted the motion, Dkt. #44.

In the meantime, the plaintiffs in the *DTO* case filed a motion for "an order under the all Writs Act, 28 U.S.C. § 1651(a), to

effectuate and prevent frustration of the [D.C.] Court's Order of March 31, 2011 vacating and remanding defendant Salazar's July 16, 2009 decision to withdraw the [WOPR RODs]." Dkt. #45-1, p. 1. The *DTO* plaintiffs ask the D.C. court (1) to order the defendants in the *present* case to withdraw their "no contest" response to the plaintiffs' motion for partial summary judgment, and (2) to enjoin the defendants from any further filings in the present case in which the defendants "rely on the July 16, 2009 Withdrawal Decision or any finding or determination therein, and . . . from taking any action in the [present] case asserting the validity of the July 16, 2009 Withdrawal Decision or any finding or determination therein." *Id.*, p. 5. The *DTO* plaintiffs suggest that in acquiescing in the entry of partial summary judgment on the plaintiffs' first claim for relief, and in seeking remand and vacatur of the WOPR RODs, the defendants effectively are attempting an end-run around the D.C. court's order holding the withdrawal of the WOPR RODs to be unlawful.

Hailicka has filed a motion asking this court to stay all proceedings in the present case pending a ruling by the D.C. court on the *DTO* plaintiffs' pending motion. Dkt. #45. Hailicka has filed a combined brief in support of its motion for stay and opposing the plaintiffs' motion for partial summary judgment. Dkt. #46. Not surprisingly, the plaintiffs and the defendants oppose Hailicka's motion for stay. *See* Dkt. ##48 & 49. Hailicka has filed a reply in support of its motion. Dkt. #51. Hailicka advances several arguments in support of its motion for stay and its opposition to the plaintiffs' motion for partial summary judgment. I address each of Hialicka's arguments below.

1. Adequacy of legal basis to vacate and remand the WOPR

Hailicka asserts that if the *DTO* plaintiffs' motion is granted, and the defendants here are ordered to withdraw their response to the plaintiffs' motion for partial summary judgment, then this court "would have before it no response from the federal defendants to plaintiffs' motion for partial summary judgment, would be uninformed as to the federal defendants' position until such time as they filed a new response, and would have no basis for determining what action to take on plaintiffs' motion." Dkt. #46, pp. 4-5.

Hailicka further argues the defendants' "do not contest" response to the plaintiffs' motion does not provide this court with an adequate legal basis for vacating and remanding the WOPR without determining the merits of the plaintiffs' first claim for relief. *Id.*, pp. 5-9. Hailicka argues the Secretary of the Department of Interior, Kenneth Salazar, has attempted to use the same strategy - "confession of 'legal error' to invalidate a decision of the previous presidential administration without following the notice and comment procedures required by law" - on three prior occasions, each of which was "decisively rejected" by the D.C. federal court. *Id.*, p. 5; *see id.*, pp. 5-9, discussing *Nat'l Parks Conserv. Ass'n v. Salazar*, 660 F. Supp. 2d 3 (D.D.C. 2009); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126 (D.D.C. 2010; and *DTO*, *supra*. They urge this court to follow suit.

The plaintiffs argue the *DTO* case is over, the plaintiffs in that case having succeeded in their challenge to the withdrawal of the WOPR. In contrast, they state the current action "challenges the WOPR decisions themselves, decisions which are now back in

place because of the *DTO* decision, but with claims and parties that were not part of the *DTO* case." Dkt. #48, p. 3. Regarding the three cases cited by Hailicka, the plaintiffs argue none of them is on point because in none of those cases did a party seek a ruling on the merits, as the plaintiffs do here. The plaintiffs assert the more relevant case is *Center for Native Ecosystems v. Salazar*, ___ F. Supp. 2d ___, 2011 WL 2646515 (D. Colo. July 7, 2011), cited by Hailicka in footnote 1 of its brief. The *Center for Native Ecosystems* court allowed the Secretary to vacate a prior agency decision after another court determined, on the merits, that the legal basis for the decision was flawed. In addition, the court observed that "vacation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction." *Id.*, 2011 WL 2646515, at *4 (citing, *inter alia*, *N.R.D.C. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)).

The defendants also argue a stay is improper under the circumstances of this case. They observe that the *DTO* court held it was improper under the FLPMA for the BLM itself to withdraw the WOPR administratively without a public notice and comment process. However, the *DTO* court expressly noted that the decision as to whether BLM properly consulted under ESA § 7 prior to adopting the WOPR was not before the court. In contrast, in the present case, this court is being asked to review a separate agency action - the adoption of the WOPR RODs themselves - under the APA and to vacate the WOPR if the court finds BLM failed to comply with the ESA by failing to consult. *See* Dkt. #32, p. 11. The defendants argue the APA "explicitly authorizes courts to 'set aside' (*i.e.*, vacate)

agency action that is not in accordance with the law." Dkt. #49, p. 3 (citing 5 U.S.C. § 706(2)).

The court is not persuaded by Hailicka's position that without the defendants' "do not contest" response to the plaintiffs' motion for partial summary judgment, the court would have no legal basis to vacate and remand the WOPR without determining the merits of the case. In any event, Hailicka's argument is moot - here, the plaintiffs have expressly asked for a ruling on the merits of the their first claim for relief. No party is asking the court to vacate and remand the WOPR without a ruling on the merits of whether BLM consulted as required under ESA § 7.

Further, as observed by the plaintiffs and the defendants, the present case involves different parties seeking different relief than the *DTO* case. The *DTO* court held the agency had violated the FLPMA by withdrawing the WOPR without providing public notice and soliciting comments. The court therefore remanded the withdrawal, effectively reinstating the WOPR RODs. The issues raised by the plaintiffs in the present case concern the substance of the WOPR RODs and the FEIS. In their Complaint, the plaintiffs assert BLM failed to comply with the ESA by failing to consult as required in ESA § 7; BLM failed to comply with the National Environmental Policy Act (NEPA) by failing to analyze direct, indirect, and cumulative impacts in the FEIS; the FEIS lacked scientific integrity, in violation of NEPA; the FEIS's statement of "purpose and need" for the action was too narrow; the FEIS failed to analyze a reasonable range of alternatives; BLM violated the APA by failing to act rationally in its decision-making process; and BLM violated the APA and the O&C Lands Act in failing to comply with the Acts'

"mandates for permanent forest production and protection of forest resources." Dkt. #1, Complaint, First through Seventh Claims for Relief.

Nothing in the *DTO* court's decision would preclude this court from ruling on the issues raised by the plaintiffs in their Complaint, nor would any such ruling by this court - even one that vacated and remanded the WOPR - contradict or thwart the intent of the *DTO* court's ruling.

Hailicka also asserts that the Department of Justice, in 2008, "flatly contradicted federal defendants' current position when it proclaimed that the BLM's 'no effects' determination is 'a facially valid agency determination . . . that is contemplated by the ESA regulations and is presumptively valid.'" Dkt. #46, p. 8 (quoting a brief filed in *American Forest Resource Council v. Caswell*, No. 94-1031 (JR) (D.D.C. Nov. 25, 2008) (Ex. 1)). The *Caswell* court observed that "substantial Ninth Circuit authority" exists holding an agency determination that a proposed action will have "no effect" on endangered or threatened species "obviates the ESA's consultation requirement unless it is found to be an abuse of discretion." *Am. Forest Res. Council v. Caswell*, 631 F. Supp. 2d 30, 32 (D.D.C. 2009) (citing, *inter alia*, *Defenders of Wildlife v. Flowers*, 414 F.3d 1066, 1070-71 (9th Cir. 2005); *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1447 (9th Cir. 1996); 51 Fed. Reg 19926, 19949 (June 2, 1986) "('The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision.')"). However, Hailicka ignores the court's further holding that the question of whether there was a duty to

consult, or whether any such duty had been satisfied, was not before the court in the *Caswell* case, but rather, "as a matter of comity," was a question for decision by "the federal courts in the Ninth Circuit." *Id.* & n.3.

2. Need for full Administrative Record

Hailicka argues this court "cannot rule on the merits of whether the BLM's 'no effect' determination is arbitrary and capricious without the administrative record that supports the agency's 'no effect' determination." Dkt. #46, p. 9. They note the defendants have supplied only a portion of the administrative record, and they argue a proper ruling cannot be made until the court has before it the entire administrative record supporting BLM's "no effect" determination. Dkt. #46, pp. 9-12.

The plaintiffs and the defendants agree that the court has before it all portions of the administrative record necessary to decide the plaintiffs' first claim for relief. In addition, the WOPR RODs, the FEIS, and other documents are publicly available on the BLM's website, http://www.blm.gov/or/plans/wopr/.* Hailicka cites cases where the courts indicated they were reviewing agency actions based on "the administrative record." *See id.* In none of those cases, however, did any court hold that a court must have before it the *entire* administrative record underlying an agency

*Despite the *DOT* court's order remanding the agency's withdrawal of the WOPR, the BLM's website continues to state that the WOPR was withdrawn on July 16, 2009, and "BLM forests in western Oregon will again be managed under the Northwest Forest Plan, which guided BLM timber sales from 1994 until December 2008." *See* http://www.blm.gov/or/plans/wopr/index.php.

determination before the court can rule on whether the agency's actions were arbitrary and capricious. Further, Hailicka has not pointed to any particular information or documents it believes to be lacking in the record before the court.

The court finds the current record to be sufficient to allow a ruling on the merits of the plaintiffs' first claim relief, which is the sole issue before the court in connection with the plaintiffs' motion for partial summary judgment.

3. Standing to argue the merits

Hailicka argues it plans to defend BLM's "no effect" determination even if the defendants choose not to do so. In support of this assertion, Hailicka cites *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011), wherein the court held "it is well established that the government is not the only party who has standing to defend the validity of federal regulations." *Id.* While this is true, Hailicka fails to address head-on the issue of standing, discussed by the *Western Watersheds* court.

In order for Hailicka to defend the validity of the WOPR RODs and the FEIS, it must establish Article III standing. In *Western Watersheds*, the intervenors intervened on behalf of the BLM to defend proposed amendments to nationwide grazing regulations for federal lands. When the district court granted judgment in favor of the plaintiff environmental advocacy organizations, both the intervenors and the BLM filed notices of appeal. However, the BLM subsequently withdrew its appeal. The intervenors still sought to defend the regulations, in spite of the BLM's position that it

would not seek to defend the regulations. The plaintiffs challenged the intervenors' standing, and the BLM filed an *amicus curiae* brief in support of the plaintiffs' argument that the intervenors lacked standing. The court observed that in the absence of the government's participation, the intervenors "must now, and for the first time, establish Article III standing." *Id.*

Hailicka's desire to defend the WOPR RODs, where the government does not, presents a similar circumstance. Hailicka must show "a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), the Supreme Court explained that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.*, 504 U.S. at 560, 112 S. Ct. at 2136 (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984)). The Court explained:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" . . . Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative,"

> that the injury will be "redressed by a favorable decision."

Id., 504 U.S. at 560-61, 112 S. Ct. at 2136 (citations omitted). The Court further explained that by a "particularized" injury, "we mean that the injury must affect the plaintiff in a personal and individual way." *Id.*, n.1.

Hailicka has not addressed the issue of Article III standing at all for purposes of defending BLM's "no effect" determination. Hailicka and co-intervenor Oregon West Lumber Sales are private companies; they are not organizations representing the interests of their members. The intervenors therefore must meet the Article III standing requirements on their own behalf. They have not attempted to do so, nor does it appear likely that they could, if given the chance. When the court raised the standing issue at oral argument, the issue was not addressed directly by the parties. The intervenors offered to brief the issue if the court requested a brief. Essentially, if the court did not request briefing on the standing issue, they were content to have the court assume standing and reach the merits of the case despite the court's expressed concerns. Therefore, in the unusual posture of this case, seeking a merits decision on an issue that is essentially undisputed by the plaintiffs and the defendants, I will assume the intervenors have standing and consider the intervenors' issues.

4. Appropriate remedy for failure to comply with the ESA

Hialicka argues the only permissible remedy for a failure to comply with the ESA consultation requirement is an injunction pending completion of the consultation. Hailicka maintains vacatur

of the WOPR is not permitted under Ninth Circuit precedents. Dkt. #46, p. 16. Hailicka relies on, *inter alia*, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), in which the court held, "Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA." *Id.*, 753 F.2d at 764.

The plaintiffs argue that under the APA, 5 U.S.C. § 706, the court can set aside or vacate an agency action that is not in accordance with law. Dkt. #48, pp. 20-21. They further argue that vacatur of the WOPR is the "least drastic remedy" to redress their alleged harms, and the court therefore should invalidate the agency action rather than "the more drastic remedy" of issuing an injunction. *Id.*, pp. 16-18.

For purposes of their ESA claim, the plaintiffs invoke this court's jurisdiction under 16 U.S.C. § 1540(g). *See* Dkt. #1, p. 4, ¶ 8. The statute, commonly known as the "citizen-suit provision of the ESA . . . allows individuals to bring suits **'to enjoin** any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be **in violation of** any provision of [the ESA] or regulation issued under authority thereof.'" *Western Watersheds*, 632 F.3d at 495 (emphasis added) (quoting 16 U.S.C. § 1540(g)(1); citing *Bennett v. Spear*, 520 U.S. 154, 173, 117 S. Ct. 1154, 1166, 137 L. Ed. 2d 281 (1997); *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1030 (9th Cir. 2005)).

In *Western Watersheds*, the Ninth Circuit Court of Appeals specifically addressed whether a failure-to-consult claim is

reviewable under the ESA citizen-suit provision or, alternatively, the APA, holding as follows:

> The citizen-suit provision "is a means by which private parties may enforce the substantive provisions of the ESA against" government agencies. *Bennett*, 520 U.S. at 173, 117 S. Ct. 1154. **Because Plaintiffs'[] claim is available under the ESA, this court looks to the ESA and not to the APA.** *See id.* at 164, 117 S. Ct. 1154 (determining first whether citizen-suit provision of ESA applied and then applying APA to remaining ESA claims); *Coos County Bd. of County Comm'rs[v. Kempthorne*], 531 F.3d [792,] 802 [9th Cir. 2008)] (determining that "if a plaintiff can bring suit against the responsible agencies under a citizen suit provision, this action precludes an additional suit under the APA" (internal quotation marks, citations, and brackets omitted)).

Western Watersheds, 632 F.3d at 495-96 (emphasis added).

The *Western Watersheds* court's determination that the plaintiffs' failure-to-consult claim was covered by the ESA's citizen-suit provision appears to directly contradict the United States Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). In *Bennett*, the Court held that an alleged failure to comply with ESA § 7, 16 U.S.C. § 1536, *was not reviewable* under ESA's citizen-suit provision. *See Bennett*, § III.B., 520 U.S. at 171-74, 117 S. Ct. at 1165-67; *id.*, 520 U.S. at 174, 117 S. Ct. at 1167 ("[T]he principal statute invoked by petitioners, the ESA, . . . does not support their claims based upon the Secretary's alleged failure to comply with [16 U.S.C.] § 1536."). The Court's analysis focused on whether failure to comply with ESA § 7 constitutes a "violation" as contemplated by the citizen-suit provision. *See* 16 U.S.C. § 1540(g) (authorizing individuals to sue for "violation" of the

ESA). The Court held that the "Secretary's conduct in implementing or enforcing the ESA is not a 'violation' of the ESA within the meaning of [the citizen-suit] provision." *Bennett*, 520 U.S. at 173, 117 S. Ct. at 1166. The Court went on to hold that the plaintiffs' claim under ESA § 7 *was* reviewable under the APA. *Bennett*, 520 U.S. at 179, 117 S. Ct. at 1169; *see id.*, § IV.A., 520 U.S. at 174-77, 117 S. Ct. at 1167-68. The Court observed that the ESA's citizen-suit provision is not exclusive, and does not supplant causes of action provided by the APA which, "by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court[.]'" *Id.*, 520 U.S. at 175, 117 S. Ct. at 1167 (citing 5 U.S.C. § 704). The Court held, "Nothing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so." *Id.*

One distinct difference exists between the allegations in the *Western Watersheds* case and the *Bennett* case. In *Western Watersheds*, the plaintiffs alleged the BLM violated ESA § 7, 16 U.S.C. § 1536(a)(1), by failing to consult as required before approving revisions to nationwide grazing regulations. In *Bennett*, the plaintiffs alleged the Bureau of Reclamation acted arbitrarily and in violation of ESA § 7, 16 U.S.C. § 1536(a)(2), when the agency issued a Biological Opinion contrary to "the best scientific and commercial data available," as required by the statute. However, the Supreme Court's analysis of what constitutes a "violation" of the ESA for purposes of the citizen-suit provision is equally applicable to both types of claims; both claims allege a "failure by the Secretary or other federal officers and employees

to perform their duties in administering the ESA." *Bennett*, 520 U.S. at 173, 117 S. Ct. at 1166; *see id.*, 520 U.S. at 172-74, 117 S. Ct. at 1166-67 (discussing what constitutes a "violation" of the ESA); *see also Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Protection*, 550 F.3d 1121, 1129 (Fed. Cir. 2008) (noting that in *Bennett*, the Supreme Court explained the ESA's citizen-suit provisions "cannot be read to apply to challenges to the implementation or enforcement of the ESA") (citing *Bennett*, 520 U.S. at 172-74, 117 S. Ct. at 1166-67).

The undersigned respectfully disagrees with the *Western Watersheds* court that the plaintiffs' failure-to-consult claim is available under the ESA; rather, I find that the APA applies to the claim. The *Western Watersheds* court recognized that the APA provides the standard of review, noting, "Because ESA contains no internal standard of review, section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, governs review" of the BLM's actions, and "the normal 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard applies." *Id.*, 632 F.3d at 496 (quoting *Village of False Pass v. Clark*, 733 F.2d 605, 609-10 (9th Cir. 1984); citing *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988)). Thus, "[i]rrespective of whether an ESA claim is brought under the APA or the citizen-suit provision, the APA's 'arbitrary and capricious' standard applies[.]" *Id.*, 632 F.3d at 481.

The court in this case finds, on the record before the court, that consultation was necessary before BLM could withdraw the WOPR RODs. Further, the court has no difficulty finding that BLM's failure to consult pursuant to ESA § 7 was arbitrary and

capricious. The WOPR substantially increases the allowable timber harvest, decreases protections for riparian reserves, and clearly will have some effect - whether negative or positive - on the threatened and endangered species and their critical habitat located within the lands governed by the WOPR. To blithely conclude such actions would have "no effect" on endangered or threatened species in the action area is a determination that cannot be made in a vacuum. On these facts, appropriate consultation is required, particularly in light of how low the threshold is for triggering such consultation. *See* 51 Fed. Reg. 19926, 19949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement."). Accordingly, the plaintiffs' motion for partial summary judgment on their first claim for relief should be granted on its merits. In so finding, the court *is not relying* on either BLM's attempted withdrawal of the WOPR RODs or the agency's finding that the "no effect" determination was legally insufficient. Rather, this decision is based on the record currently before the court.

Pursuant to the APA, the court is directed to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Having found the BLM's adoption of the WOPR RODs without consultation as required by ESA § 7 to be arbitrary and capricious, the appropriate remedy here is to set aside the agency action, vacating the WOPR RODs, and reinstating the NFP.

CONCLUSION

For the reasons discussed above, I recommend denying Hailicka's motion for stay, and granting the plaintiffs' motion for partial summary judgment on their first claim for relief.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by **October 17, 2011.** If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed, then any response is due by **November 3, 2011.** By the earlier of the response due date or the date a response is filed, the Findings and Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 29th day of September, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
Unites States Magistrate Judge