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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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1 HUBEL, Magistrate Judge:

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

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

26 However, very little of the underlying history of the case is
27 relevant to the matters currently before the court. Only a brief
28

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

3 BLM finalized the WOPR on December 30, 2008, by signing six
4 RODs that adopted the PRMP for the BLM areas listed above.
5 Subsequently, four separate lawsuits were filed challenging the
6 WOPR, including two lawsuits filed by the same plaintiffs who have
7 filed the current action; i.e., *Pacific Rivers Council v. Shepard*,
8 No. 03:09-cv-00058-ST (D. Or.), and *Oregon Wild v. Shepard*, No.
9 03:09-cv-00060-PK (D. Or.). Among other things, the plaintiffs in
10 those two lawsuits alleged BLM had issued the RODs without engaging
11 in the biological consultation required by section 7 of the
12 Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* Section 7
13 requires, in any non-exempt action where there is discretionary
14 federal involvement or control, that the involved federal agencies
15 consult to ensure the agency action "is not likely to jeopardize
16 the continued existence of any endangered species or threatened
17 species or result in the destruction or adverse modification of
18 habitat of such species . . . us[ing] the best scientific and
19 commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. §
20 402.03. ESA-listed species present in the WOPR area include
21 northern spotted owls, marbled murrelets, and salmon and steelhead
22 populations.

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

1 Several timber industry organizations filed suit in the United
2 States District Court for the District of Columbia to challenge
3 BLM's withdrawal of the WOPR RODs. Among other things, the timber
4 organization plaintiffs argued BLM failed to comply with the
5 Administrative Procedures Act (APA) by withdrawing the RODs without
6 providing notice and allowing comment on the proposed withdrawal.
7 On March 31, 2011, the D.C. court issued a Memorandum Opinion
8 vacating and remanding BLM's July 16, 2009, decision to withdraw
9 the WOPR RODs. See Dkt. #32-4, *Douglas Timber Operators, Inc. v.*
10 *Salazar*, 774 F. Supp. 2d 245 (D.D.C. 2011) ("DTO"). The D.C. court
11 held the agency "lacked inherent authority to withdraw the December
12 2008 ROD, and the failure to comply with procedures under the FLPMA
13 [Federal Land Policy and Management Act] was arbitrary, capricious
14 and an abuse of discretion under 5 U.S.C. § 706(2)." *Id.*, 774
15 F. Supp. 2d at 260. The *DTO* court specifically noted that the
16 legal issue of whether BLM failed to consult as required by ESA § 7
17 prior to approving the WOPR RODs was not properly before the court
18 in that case. *Id.*, 774 F. Supp. 2d at 258.

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

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

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

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

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

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

1 effectuate and prevent frustration of the [D.C.] Court's Order of
2 March 31, 2011 vacating and remanding defendant Salazar's July 16,
3 2009 decision to withdraw the [WOPR RODs]." Dkt. #45-1, p. 1. The
4 *DTO* plaintiffs ask the D.C. court (1) to order the defendants in
5 the *present* case to withdraw their "no contest" response to the
6 plaintiffs' motion for partial summary judgment, and (2) to enjoin
7 the defendants from any further filings in the present case in
8 which the defendants "rely on the July 16, 2009 Withdrawal Decision
9 or any finding or determination therein, and . . . from taking any
10 action in the [present] case asserting the validity of the July 16,
11 2009 Withdrawal Decision or any finding or determination therein."
12 *Id.*, p. 5. The *DTO* plaintiffs suggest that in acquiescing in the
13 entry of partial summary judgment on the plaintiffs' first claim
14 for relief, and in seeking remand and vacatur of the WOPR RODs, the
15 defendants effectively are attempting an end-run around the D.C.
16 court's order holding the withdrawal of the WOPR RODs to be
17 unlawful.

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

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

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

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

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

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

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

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

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

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

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

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

9 Hailicka also asserts that the Department of Justice, in 2008,
10 "flatly contradicted federal defendants' current position when it
11 proclaimed that the BLM's 'no effects' determination is 'a facially
12 valid agency determination . . . that is contemplated by the ESA
13 regulations and is presumptively valid.'" Dkt. #46, p. 8 (quoting
14 a brief filed in *American Forest Resource Council v. Caswell*, No.
15 94-1031 (JR) (D.D.C. Nov. 25, 2008) (Ex. 1)). The *Caswell* court
16 observed that "substantial Ninth Circuit authority" exists holding
17 an agency determination that a proposed action will have "no
18 effect" on endangered or threatened species "obviates the ESA's
19 consultation requirement unless it is found to be an abuse of
20 discretion." *Am. Forest Res. Council v. Caswell*, 631 F. Supp. 2d
21 30, 32 (D.D.C. 2009) (citing, *inter alia*, *Defenders of Wildlife v.*
22 *Flowers*, 414 F.3d 1066, 1070-71 (9th Cir. 2005); *Southwest Center*
23 *for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443,
24 1447 (9th Cir. 1996); 51 Fed. Reg 19926, 19949 (June 2, 1986)
25 "(The Federal agency makes the final decision on whether
26 consultation is required, and it likewise bears the risk of an
27 erroneous decision.')."). However, Hailicka ignores the court's
28 further holding that the question of whether there was a duty to

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

6 **2. Need for full Administrative Record**

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

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

25
26 *Despite the *DOT* court's order remanding the agency's with-
27 drawal of the WOPR, the BLM's website continues to state that the
28 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>.

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

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

9
10 **3. Standing to argue the merits**

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

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

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

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

13 In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct.
14 2130, 119 L. Ed. 2d 351 (1992), the Supreme Court explained that
15 "the core component of standing is an essential and unchanging part
16 of the case-or-controversy requirement of Article III." *Id.*, 504
17 U.S. at 560, 112 S. Ct. at 2136 (citing *Allen v. Wright*, 468 U.S.
18 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984)). The
19 Court explained:

20 Over the years, our cases have estab-
21 lished that the irreducible constitutional
22 minimum of standing contains three elements.
23 First, the plaintiff must have suffered an
24 "injury in fact" - an invasion of a legally
25 protected interest which is (a) concrete and
26 particularized, . . . and (b) "actual or
27 imminent, not 'conjectural' or 'hypothetical[.]'" . . . Second, there must be a causal
28 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,"

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

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

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

24
25 **4. Appropriate remedy for failure to comply with the ESA**

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

1 of the WOPR is not permitted under Ninth Circuit precedents. Dkt.
2 #46, p. 16. Hailicka relies on, *inter alia*, *Thomas v. Peterson*,
3 753 F.2d 754 (9th Cir. 1985), in which the court held, "Given a
4 substantial procedural violation of the ESA in connection with a
5 federal project, the remedy must be an injunction of the project
6 pending compliance with the ESA." *Id.*, 753 F.2d at 764.

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

14 For purposes of their ESA claim, the plaintiffs invoke this
15 court's jurisdiction under 16 U.S.C. § 1540(g). See Dkt. #1, p. 4,
16 ¶ 8. The statute, commonly known as the "citizen-suit provision of
17 the ESA . . . allows individuals to bring suits 'to enjoin any
18 person, including the United States and any other governmental
19 instrumentality or agency . . . who is alleged to be **in violation**
20 **of** any provision of [the ESA] or regulation issued under authority
21 thereof.'" *Western Watersheds*, 632 F.3d at 495 (emphasis added)
22 (quoting 16 U.S.C. § 1540(g)(1); citing *Bennett v. Spear*, 520 U.S.
23 154, 173, 117 S. Ct. 1154, 1166, 137 L. Ed. 2d 281 (1997);
24 *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1030 (9th Cir.
25 2005)).

26 In *Western Watersheds*, the Ninth Circuit Court of Appeals
27 specifically addressed whether a failure-to-consult claim is
28

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

3 The citizen-suit provision "is a means by
4 which private parties may enforce the substan-
5 tive provisions of the ESA against" government
6 agencies. *Bennett*, 520 U.S. at 173, 117
7 S. Ct. 1154. **Because Plaintiffs' [] claim is**
8 **available under the ESA, this court looks to**
9 **the ESA and not to the APA.** See *id.* at 164,
10 117 S. Ct. 1154 (determining first whether
11 citizen-suit provision of ESA applied and then
12 applying APA to remaining ESA claims); *Coos*
13 *County Bd. of County Comm'rs [v. Kempthorne]*,
14 531 F.3d [792,] 802 [9th Cir. 2008])
15 (determining that "if a plaintiff can bring
16 suit against the responsible agencies under a
17 citizen suit provision, this action precludes
18 an additional suit under the APA" (internal
19 quotation marks, citations, and brackets
20 omitted)).

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

22 The *Western Watersheds* court's determination that the
23 plaintiffs' failure-to-consult claim was covered by the ESA's
24 citizen-suit provision appears to directly contradict the United
25 States Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154,
26 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). In *Bennett*, the Court
27 held that an alleged failure to comply with ESA § 7, 16 U.S.C.
28 § 1536, was not reviewable under ESA's citizen-suit provision. See
29 *Bennett*, § III.B., 520 U.S. at 171-74, 117 S. Ct. at 1165-67; *id.*,
30 520 U.S. at 174, 117 S. Ct. at 1167 ("[T]he principal statute
31 invoked by petitioners, the ESA, . . . does not support their
32 claims based upon the Secretary's alleged failure to comply with
33 [16 U.S.C.] § 1536."). The Court's analysis focused on whether
34 failure to comply with ESA § 7 constitutes a "violation" as
35 contemplated by the citizen-suit provision. See 16 U.S.C.
36 § 1540(g) (authorizing individuals to sue for "violation" of the

1 ESA). The Court held that the "Secretary's conduct in implementing
2 or enforcing the ESA is not a 'violation' of the ESA within the
3 meaning of [the citizen-suit] provision." *Bennett*, 520 U.S. at 173,
4 117 S. Ct. at 1166. The Court went on to hold that the plaintiffs'
5 claim under ESA § 7 was reviewable under the APA. *Bennett*, 520 U.S.
6 at 179, 117 S. Ct. at 1169; see *id.*, § IV.A., 520 U.S. at 174-77,
7 117 S. Ct. at 1167-68. The Court observed that the ESA's citizen-
8 suit provision is not exclusive, and does not supplant causes of
9 action provided by the APA which, "by its terms, provides a right
10 to judicial review of all 'final agency action for which there is
11 no other adequate remedy in a court[.]'" *Id.*, 520 U.S. at 175, 117
12 S. Ct. at 1167 (citing 5 U.S.C. § 704). The Court held, "Nothing
13 in the ESA's citizen-suit provision expressly precludes review
14 under the APA, nor do we detect anything in the statutory scheme
15 suggesting a purpose to do so." *Id.*

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

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

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

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

1 capricious. The WOPR substantially increases the allowable timber
2 harvest, decreases protections for riparian reserves, and clearly
3 will have some effect - whether negative or positive - on the
4 threatened and endangered species and their critical habitat
5 located within the lands governed by the WOPR. To blithely
6 conclude such actions would have "no effect" on endangered or
7 threatened species in the action area is a determination that
8 cannot be made in a vacuum. On these facts, appropriate
9 consultation is required, particularly in light of how low the
10 threshold is for triggering such consultation. See 51 Fed. Reg.
11 19926, 19949 (June 3, 1986) ("Any possible effect, whether
12 beneficial, benign, adverse or of an undetermined character,
13 triggers the formal consultation requirement."). Accordingly, the
14 plaintiffs' motion for partial summary judgment on their first
15 claim for relief should be granted on its merits. In so finding,
16 the court *is not relying* on either BLM's attempted withdrawal of
17 the WOPR RODs or the agency's finding that the "no effect"
18 determination was legally insufficient. Rather, this decision is
19 based on the record currently before the court.

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

1 **CONCLUSION**

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

5
6 **SCHEDULING ORDER**

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

14 IT IS SO ORDERED.

15 Dated this 29th day of September, 2011.

16 /s/ Dennis J. Hubel

17 Dennis James Hubel
18 Unites States Magistrate Judge