IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs,	)	Civ. No. 01-0259-E-BLW
v.	)	MEMORANDUM DECISION AND ORDER
GEORGE MATEJKO, et al., Defendants.	)	

INTRODUCTION

The Court has before it cross-motions for partial summary judgment. The Court held oral argument on the motions and then allowed further briefing. The final briefs were received February 6, 2004, and the motions are now at issue. The Court finds that the Endangered Species Act (ESA) requires the BLM to consult with the appropriate federal fish and wildlife agency over its decision not to impose conditions on certain water diversions. The Court explains this decision below.

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BACKGROUND

Western Watersheds brings this action under the ESA to enjoin the operation of hundreds of water diversions on lands administered by the BLM. Ranchers and farmers use various means such as ditches and pipes, run across BLM lands, to divert water from streams to raise crops and livestock. These diversions, Western Watersheds alleges, are threatening ESA-listed species of fish by de-watering streams, obstructing fish passage, and stranding fish in ditches.

The ESA requires federal agencies to consult with the appropriate fish and wildlife service when the actions of the agency may affect a listed species. *See* 50 C.F.R. § 402.14(a).[1] One of Western Watershed's claims here – and the only claim at issue in the cross-motions for partial summary judgment – is that the BLM has violated the ESA by failing to follow this consultation requirement.

To avoid a review of hundreds of diversions, the parties selected six test-case diversions on three streams in the Upper Salmon River basin: (1) Big Timber Creek; (2) the Pahsimeroi River; and (3) Mahogany Creek. Western Watersheds produced evidence that these six diversions may be affecting listed species such as the Bull Trout by de-watering the streams, trapping fish in ditches, and preventing

[1] The agency is required to consult with either the Fish and Wildlife Service or the National Marine Fisheries Service, depending on which agency is in charge of the affected species. *See* 50 C.F.R. § 402.14(a).

fish from migrating to spawning grounds or to colder water. The BLM takes issue with some of Western Watersheds' allegations but does not dispute their main thrust that the diversions may affect a listed species.

The BLM instead argues that it has not taken any action that can reviewed under the ESA. The BLM asserts that the diversions are being operated by ranchers and farmers under the Act of 1866, which did not authorize the BLM to permit or approve such operation. As a result, the BLM asserts, it has no duty to take any action, and therefore has no duty to consult under the ESA.

The Act of 1866 – or more precisely the Mining Act of July 26, 1866 – allowed private parties with a vested water right to construct diversions across federal lands. The Act recognized such diversions as valid rights-of-way without requiring the private party to submit any application or to obtain any approval from a federal agency. *See Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

While this early approach to right-of-ways was "primitive," *id.*, Congress soon started requiring more of applicants who wanted federal recognition of their rights-of-way. In legislation known as the 1891 Act, Congress required an applicant to file a map and show that a water right had been, or would be, granted. *Id.* at pp. 406-07. The process grew more sophisticated with the Act of 1901,

which authorized the Department of Interior to require applicants to apply for a permit that would be granted upon a finding that the right-of-way was in the public interest.

Finally, in 1976, Congress passed the Federal Land and Policy Management Act (FLPMA) requiring that each right-of-way contain conditions that would "minimize damage to . . . fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a). The Act stated that it was not terminating any previously granted right-of-ways, but provided that a holder could consent to a termination and a re-issuance under the terms of FLPMA. 43 U.S.C. § 1769(a).

The BLM has interpreted FLPMA to apply to even right-of-ways issued prior to 1976 unless imposing conditions "diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply." *See* 43 C.F.R. § 2801.4. The BLM has decided generally not to impose conditions on the operation and normal maintenance of diversions arising under the Act of 1866 unless those activities "significantly alter the alignment or relocate the existing facility . . . ." *See BLM Instruction Memorandum dated June 14, 1983, attached to Declaration of Gehlert.* This decision is in line with the BLM's regulations, which state that for any right-of-way (arising either before or after FLPMA) "any

substantial deviation in location or authorized use" by the holder shall trigger FLPMA's requirements. *See* 43 C.F.R. § 2803.2(b).

According to Western Watersheds, this decision – the BLM's decision not to impose conditions on the normal operation of diversions arising under the Act of 1866 – constitutes agency "action" that may affect a listed species and thereby triggers the consultation requirement of the ESA. The BLM responds that the ESA is inapplicable here, and that there is no duty to consult. The parties have filed cross-motions for partial summary judgment to resolve this issue, which is raised in Count Four of Western Watersheds' Amended Complaint.

ANALYSIS

Western Watersheds uses the citizen-suit provisions of the ESA to enforce the consultation requirement of § 7(a)(2). *See* 16 U.S.C. § 1540(g)(1). Under these circumstances, the Court does not rely upon the standards of review set forth in the Administrative Procedures Act (APA). *See Environmental Protection Information Center v. The Simpson Timber Company*, 255 F.3d 1073 (9th Cir. 2001). Under the ESA, the question is whether the BLM had a duty to consult under § 7(a)(2).

Even if the APA does apply, the question is the same. The APA gives this Court authority to compel "agency action unlawfully withheld or unreasonably

delayed." 5 U.S.C. § 706(1). To be entitled to this relief under the APA, Western Watersheds must show that the BLM has failed to perform a clear statutory duty. *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998). In other words, if the APA is applicable, Western Watersheds must show that the BLM had a duty to consult under § 7(a)(2), the same showing it must make if the Court looks exclusively to the ESA for guidance.

The source of this alleged duty, § 7(a)(2) of the ESA, requires the BLM to consult with the appropriate federal fish and wildlife agency whenever the BLM's action "may affect" an endangered or threatened species. *See* 50 C.F.R. § 402.14(a). This section only applies "when the federal agency acts to authorize, fund, or carry out the relevant activity." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508 (9th Cir. 1995); 16 U.S.C. § 1536(a)(2). There is no agency action when the agency has contracted away or otherwise not retained its discretion to oversee the activity at issue. *Id.*; 50 C.F.R. § 402.03 (stating that § 7 requirements apply "to all actions in which there is discretionary federal involvement or control").

The BLM responds that it has not authorized, funded, or carried out any activity with regard to the diversions at issue here. The BLM has not regulated the diversions because they arose, the BLM asserts, under the Act of 1866, which did not give the BLM the authority to approve the diversions or require permits for

their operation. Hence, the BLM maintains that it has taken no "action" that would trigger application of the ESA.

Analysis of this argument turns first on whether the BLM has discretion to impose conditions on the diversions. *Sierra Club v. Babbitt, supra*. For the purpose of this issue, the Court will assume, *arguendo*, that the diversions at issue arose under the Act of 1866.

The Ninth Circuit has spoken to this issue in *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 103 (9th Cir. 1981). There, the Circuit held that the Act of 1901 gave the BLM authority to impose conditions on rights-of-way created by the Act of 1891. Those conditions could include "compliance with reasonable regulations and terms designed to protect the public interest." *Id.* While *Grindstone Butte* did not specifically hold that the Act of 1901 gave the BLM authority to place similar conditions on rights-of-way granted under the Act of 1866, it did find that the Act of 1866 "is essentially similar to the 1891 Act." *Id.* at 103. Moreover, *Grindstone Butte* cited with approval *Hyrup v. Kleppe*, 406 F.Supp. 214 (D.Colo. 1976), where the court held that the Act of 1901 authorized the BLM to impose conditions on rights-of-way created under the Act of 1866.

Thus, even assuming the diversions at issue here all arose under the Act of 1866, the BLM had the discretion to impose conditions on the operation of those

diversions. The next issue is whether the BLM's failure to exercise that discretion constitutes an "action" that triggers the consultation requirement of the ESA.

Congress enacted a "broad definition of agency action in the ESA." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). In that decision, the Circuit stated that "[t]he ESA's plain language affirmatively commands all federal agencies to 'insure that *any action* authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . .'" *Id.* (quoting § 7(a)(2)) (emphasis in original). Of § 7, the Supreme Court has held that "one would be hard pressed to find a statutory provision whose terms were any plainer," and further that "[t]his language admits of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1978).

These authorities counsel this Court to give the word "action" in § 7(a)(2) an expansive definition. Consistent with that, "action" would include not only an agency action that itself may affect a listed species, but also an agency decision to ignore actions by others that might have the same effect. There is no principled distinction between (1) a BLM decision to operate diversions across its lands that may affect Bull Trout; (2) a BLM decision to award a permit to a rancher who operates diversions across public lands that may affect Bull Trout; and (3) a BLM decision to ignore a rancher who operates diversions across public lands that may

affect Bull Trout. Certainly each of these BLM decisions has its unique aspects. But common to each is a BLM decision threatening a listed species. Thus, for all three scenarios the inescapable conclusion is that the BLM has engaged in "action" under the ESA.

These scenarios are to be distinguished from those instances where the agency has made no decision. If the agency has not yet decided to ignore the alleged threats, there is not yet any "action" under the ESA. Put another way, in the language of another doctrine, the controversy is not ripe for resolution.

That concern is not present here. The BLM has decided, through its regulations and Instruction Memorandum, not to impose conditions on diversions arising under the Act of 1866 unless there is a substantial deviation in either location or authorized use. *See* 43 C.F.R. §§ 2800.05(h), 2803.2(b); *Brief of BLM* at p. 26-27. It is that decision that constitutes the agency "action" under § 7(a)(2) of the ESA. That decision may affect a listed species, as Western Watersheds has shown in this litigation.[2]

[2] If a statute governing an agency is silent or ambiguous on the issue under consideration, this Court must give deference to that agency's reasonable interpretation of the statute. *See Chevron v. N.R.D.C.*, 467 U.S. 837 (1984). Deference is not granted, however, when the intent of Congress is clear. *Id.* at 842-43. Here, the parties debate the proper interpretation of the word "action" under § 7(a)(2) of the ESA. The Court finds that the intent of Congress is clear that "action" includes a decision by an agency not to exercise its discretion. Because the intent of Congress is clear, "that is the end of the matter" and no deference need be granted to the BLM's contrary interpretation. *Id.*

The BLM complains that these regulations are simply a general statement of existing law, and that any obligation to consult would be over the regulations, not over the operation of the diversions. *See Government's Reply Brief* at pp. 10-11. The BLM argues further that "action" under the ESA would not occur until the BLM took some specific action to approve the operation of these diversions.

Similar arguments were raised and rejected in *Pacific Rivers v. Thomas, supra*. There, plaintiffs brought an ESA challenge to the Forest Service's failure to stop ongoing projects in a National Forest that threatened listed species. Plaintiffs claimed that the "action" of the Forest Service that triggered the ESA was the existence of the Forest Service's Long Range Management Plan (LRMP) passed about 4 years earlier. *Id.* at 1053. If that was the case, the Forest Service responded, the plaintiffs could at most challenge the LRMP, not the later failure to stop ongoing projects. This is akin to the BLM's argument here that if the regulations and Instruction Memorandum constitute the ESA "action," Western Watersheds is confined to challenging those items, not the failure to impose conditions on the diversions at issue here.

In *Pacific Rivers*, the Forest Service also argued that "action" does not occur until there is a specific action undertaken under the LRMP, and the mere passage of a general pronouncement like the LRMP cannot constitute "action."

Id. at 1055. That argument is similar to the BLM's argument here that "action" requires a specific act such as an approval of a diversion.

In *Pacific Rivers*, the Ninth Circuit rejected both of these arguments. The Circuit held that the LRMP was an "ongoing" or "continuing" agency action under § 7(a)(2) of the ESA, and that plaintiffs did not need to await agency approval of specific projects under the LRMP. *Id.* at 1055. Applying the holding here, the BLM's regulations and Instruction Memorandum constitute a continuing agency action – a decision not to impose conditions on diversions arising under the Act of 1866. That BLM decision, under *Pacific Rivers*, is an "action" under § 7(a)(2), and Western Watersheds is not compelled to wait for the BLM to approve "specific activities" concerning the diversions. *Id.*

This analysis comports with regulations promulgated by the Secretary of the Interior that apply the § 7 consultation requirement "to all actions in which there is *discretionary* Federal involvement or control." *See* 50 C.F.R. § 402.03 (emphasis added). "If the BLM . . . retains the discretion to authorize the private entity's activity, the BLM must comply with the ESA." *Sierra Club*, 65 F.3d at 1509, n. 9.

For these reasons, the Court rejects the BLM's assertion that it is has not engaged in the necessary action under § 7(a)(2). As discussed above, Western Watersheds has shown that the operation of the six test-case diversions "may

affect" a listed species. *See* 50 C.F.R § 402.14(a). The Court therefore finds as a matter of law that the BLM's actions "may affect" a listed species, and that the BLM is therefore required to consult with the appropriate federal fish and wildlife agency pursuant to § 7(a)(2) of the ESA. Because Western Watersheds has shown that the BLM failed to perform a mandatory duty, the Court has the authority under the APA to order the agency to perform this duty. *See* 5 U.S.C. § 706(1). The Court finds further, as a matter of law, that the BLM's failure to consult was not in accordance with law under 5 U.S.C. § 706(2)(A). The Court will therefore grant Western Watershed's motion for partial summary judgment on Count Four, and deny the cross-motion filed by the BLM and the State.

ORDER

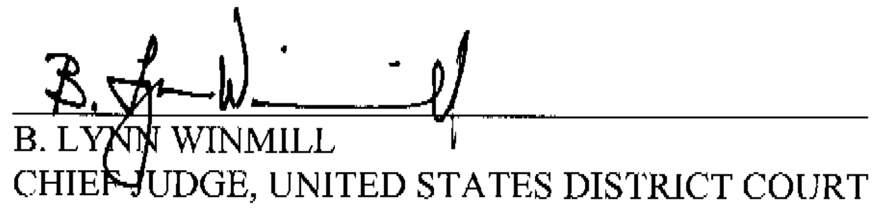
In accordance with the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for partial summary judgment filed by Western Watersheds (docket no. 56) is GRANTED,

IT IS FURTHER ORDERED, that the motions for partial summary judgment filed by the BLM (docket no. 40) and the State (docket no. 37) are DENIED.

IT IS FURTHER ORDERED, that the motion to file reply brief by the State (docket no. 52) is GRANTED.

Dated this 23rd day of March, 2004.



B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES DISTRICT COURT

dkh

United States District Court
for the
District of Idaho
March 24, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:01-cv-00259

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

Laurence J Lucas, Esq. 1-208-342-8286
LAW OFFICES OF LAURENCE J LUCAS
PO Box 1342
Boise, ID 83701

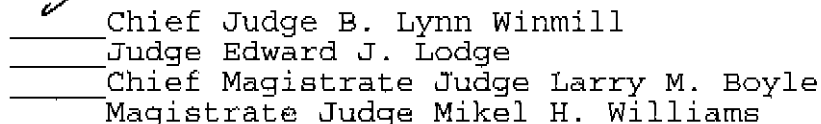
William M Eddie, Esq.
LAND & WATER FUND OF THE ROCKIES
PO Box 1612
Boise, ID 83701

Lauren M Rule, Esq.
ADVOCATES FOR THE WEST
PO Box 1612
Boise, ID 83701

Deborah A Ferguson, Esq. 1-208-334-1414
US ATTORNEY'S OFFICE
Box 32
Boise, ID 83707

Robert L Gulley, Esq. 1-202-305-0275
US DEPT OF JUSTICE
Wildlife & Marine Resources Section
PO Box 7369
Ben Franklin Station
Washington, DC 20044-7369

Clay R Smith, Esq.
OFFICE OF ATTORNEY GENERAL
Natural Resources Division
PO Box 83720
Boise, ID 83720-0010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_____Judge David O. Carter
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_____Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 3-24-04

BY: LW
(Deputy Clerk)