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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTER FOR SIERRA NEVADA
CONSERVATION, et al.,

NO. CIV. S-09-2523 LKK/JFM

Plaintiff,

v.

O R D E R

UNITED STATES FOREST SERVICE,
et al.,

Defendants.

_____/

On Monday, April 18, 2011, the court heard oral argument on the parties' cross motions for summary judgment. One claim at issue arises under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* The Forest Service contends that it complied with the ESA's consultation requirement by adhering to a 2006 programmatic consultation, which describes various design criteria for routes. At issue in this suit is criterion #2, which provides in part "In suitable California red-legged frog habitat, routes avoid Riparian Reserve and Riparian Conservation Areas except where necessary to cross streams." See, e.g., Administrative Record (AR) 12,871.

1 At oral argument, plaintiffs argued that the Forest Service's
2 application of this criterion was arbitrary and capricious in part
3 because the Forest Service excluded ephemeral streams from its
4 analysis, despite the asserted fact that the Sierra National Forest
5 Plan Amendments define Resource Conservation Areas to include areas
6 near ephemeral streams.

7 Having reviewed the papers, the court concludes that
8 plaintiffs outlined this argument in their opening brief. See
9 Plaintiffs' Opening Brief (Dkt. No. 52-1) at 25 (citing AR 10,979),
10 29 (citing AR 2,534, 2,681). This argument therefore has not been
11 waived by litigation conduct.¹ The court nonetheless agrees with
12 defendants' contention that this argument was incompletely
13 presented, such that defendants cannot be faulted for failing to
14 respond to it. Accordingly, the court requests supplemental
15 briefing on this issue.

16 Plaintiffs MAY file a brief on this aspect of their ESA claim.
17 Said brief may not exceed ten (10) pages, and may be filed no later
18 than 5 p.m. on Monday, April 25.

19 Defendants MAY file an opposition brief addressing the same
20 issues. Said brief may not exceed ten (10) pages, and may be filed
21 no later than 5 p.m. on Monday, May 2.

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25 ¹ The court expresses no opinion in this order as to whether
26 plaintiffs administratively exhausted this argument or whether the
exhaustion requirement contained in 7 U.S.C. § 6912(e) applies to
this or any other ESA claim.

1 Plaintiffs MAY file a reply brief, not to exceed five (5)
2 pages, no later than 9 a.m. on Thursday, May 5.

3 IT IS SO ORDERED.

4 DATED: April 19, 2011.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT