

Exhibit 5

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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Grand Canyon Trust; Richard Johnson,)	No. 04-CV-636-PHX-FJM
)	
Plaintiffs,)	ORDER
)	
vs.)	
)	
Gale Norton; Steven Williams,)	
)	
Defendants.)	

Before the court are Defendants' Motion to Dismiss (doc. 22), Plaintiffs' Response (doc. 26), Defendants' Reply (doc. 32), Plaintiffs' Motion to Include Documents in the Administrative Record (doc. 29), Defendants' Response (doc. 33), and Plaintiffs' Reply (doc. 34).

I.

The Endangered Species Act (ESA) provides both substantive and procedural requirements designed to further the goal of conserving endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). Pursuant to this statute, in 1979 the U.S. Fish and Wildlife Service (FWS) created a Recovery Plan for the humpback chub, an endangered species that inhabits the Colorado River Basin. The plan was revised in 1990, focusing on the need

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1 for research and conservation measures to protect and
2 restore the humpback chub's habitat and to establish viable,
3 self-sustaining populations. In 2002, the Defendants
4 developed the 2002 Recovery Goals (2002 Plan), which amended
5 and supplemented the 1990 Recovery Plan. Plaintiffs
6 challenge the 2002 Plan under the ESA and the Administrative
7 Procedure Act (APA), 5 U.S.C. §§ 701-706. Defendants move
8 to dismiss claiming there is no federal jurisdiction under
9 either the ESA or the APA to challenge the 2002 Plan.

10 II.

11 The Endangered Species Act outlines the requirements
12 and procedures the FWS is to use when setting up recovery
13 plans. The statute states:

14 The Secretary shall develop and implement
15 plans...for the conservation and survival of
16 endangered species and threatened species listed
17 pursuant to this section, unless he finds that
18 such a plan will not promote the conservation of
19 the species. The Secretary, in developing and
implementing recovery plans, shall, to the maximum
extent practicable

(A) give priority to those...species...that
are most likely to benefit from such plan...

(B) incorporate in each plan

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

1 16 U.S.C. § 1533(f)(1). Plaintiffs bring their first claim
2 pursuant to the citizen suit provision of the ESA which
3 states, "any person may commence a civil suit on his own
4 behalf...where there is an alleged failure of the Secretary
5 to perform any act or duty under section 1533 of this title
6 which is not discretionary with the Secretary." *Id.* at §
7 1540(g)(1)(C).

8 Defendants argue Plaintiffs are challenging the
9 contents of the 2002 Plan rather than any non-discretionary
10 act or duty, and thus jurisdiction pursuant to the ESA is
11 not proper. Plaintiffs' complaint alleges "Defendants did
12 not establish economic estimates for implementing 2002
13 Recovery Goals...[and] did not determine that establishing
14 economic estimates was not practicable. Defendants did not
15 establish a detailed timeline for implementing the
16 management actions necessary to achieve recovery of the
17 humpback chub, as the ESA requires." Plaintiffs' Amended
18 Complaint at ¶ 31. This contention does allege a failure by
19 the Secretary to perform mandatory duties specifically
20 outlined in the statute, and thus falls within the citizen
21 suit provision of the ESA.

22 Defendants further argue that even if jurisdiction does
23 lie under the ESA citizen-suit provision, final agency
24 action is a necessary prerequisite to invoking jurisdiction.
25 The APA, 5 U.S.C. § 704, makes judicial review available for
26 two categories of agency action: "[a]gency action made
27 reviewable by statute and final agency action for which
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1 there is no other adequate remedy in a court." Defendants
2 point to cases which have held that the APA's finality
3 requirements apply to cases where judicial review is
4 provided for under another statute. *Carter/Mondale*
5 *Presidential comm., Inc. v. Federal Election Comm'n*, 711
6 F.2d 279, 285 (D.C. Cir. 1983); *Greene County Planning Bd.*
7 *v. Federal Power Comm'n*, 455 F.2d 412, 425-26 (2d Cir.
8 1972). But as stated in *Carter/Mondale Presidential Comm.*,
9 711 F.2d at 285 n.9., "[w]e recognize that the finality
10 mandate in § 704 is tempered with a caveat that Congress may
11 decide to make a 'preliminary, procedural, or intermediate
12 agency action' 'directly reviewable'." We conclude that the
13 ESA citizen suit provision is such an instance. The ESA
14 citizen suit provision grants federal jurisdiction when
15 citizens challenge the procedure for creating a recovery
16 plan outlined in the ESA. Therefore, we conclude that
17 Plaintiffs' ESA claim is not subject to the finality
18 requirement of the APA because it is brought pursuant to the
19 ESA's own citizen suit provision, 16 U.S.C. § 1540(g), and
20 not the APA. See *Nat'l Wildlife Fed'n v. FEMA*, 345 F.
21 Supp.2d 1151, 1158 (W.D. Wash. 2004); *NRDC v. United States*
22 *Dep't of the Navy*, 2002 WL 32095131 at *22 n.13 (C.D. Cal
23 Sept. 17, 2002). We therefore deny Defendants' motion to
24 dismiss claim one.

25 III.

26 Plaintiffs invoke APA jurisdiction for their second
27 claim, challenging the contents of the 2002 Plan and arguing
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1 that the 2002 Plan's goals are "not supported by the
2 scientific literature on which they purport to be based,
3 fail to use the best available scientific information, and,
4 without explanation, ignore relevant and, indeed, critical
5 scientific information." Plaintiffs' Amended Complaint at ¶
6 34. In addition, Plaintiffs allege that the 2002 Plan is
7 "arbitrary and capricious, an abuse of discretion, not in
8 accordance with law, and without observance of procedure
9 required by law, within the meaning of the APA." *Id.*

10 The APA provides federal jurisdiction to review a
11 "final agency action for which there is no other adequate
12 remedy in a court." 5 U.S.C. § 704. The Supreme Court has
13 identified the characteristics of final agency action.
14 First, "the action must mark the consummation of the
15 agency's decisionmaking process," and second, "the action
16 must be one by which rights or obligations have been
17 determined, or from which legal consequences will flow."
18 *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Plaintiffs
19 argue the 2002 Plan meets these criteria and thus we have
20 jurisdiction over their claim. Defendants argue the court
21 lacks jurisdiction because a recovery plan does not
22 determine rights or obligations, but is a discretionary
23 guidance document and thus not final agency action.

24 The adoption of a recovery plan is not an action by
25 which legal rights and obligations have been determined, or
26 from which legal consequences flow. We agree with
27 Defendants' characterization of the 2002 Plan as a broad

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1 planning document that lists the tasks the FWS believes may
2 contribute to the recovery of the humpback chub. Only when
3 the recommendations of a recovery plan are implemented in a
4 concrete way, by either FWS, the states, or other federal
5 agencies do they become final agency action subject to
6 judicial review. *Fund for Animals v. Babbitt*, 903 F. Supp.
7 96, 107-108 (D.D.C. 1995). As stated in *Fund for Animals v.*
8 *Rice*, 85 F.3d 535, 548 (11th Cir. 1996), a "Recovery Plan is
9 not a document with the force of law divesting all
10 discretion and judgment from the [FWS]." Rather, recovery
11 plans are the agency's recommendations to itself or another
12 governmental decision-maker. Only when these
13 recommendations are relied upon to support some other action
14 are they "final" for purposes of the APA, and thus ripe for
15 judicial review. Because "[j]udicial intervention in
16 uncompleted administrative proceedings...is strongly
17 disfavored,...we will not entertain a petition where pending
18 administrative proceedings or further agency action might
19 render the case moot and judicial review completely
20 unnecessary." *Sierra Club v. U.S. Nuclear Regulatory*
21 *Comm'n*, 825 F.2d 1356, 1361 (9th Cir. 1987).

22 We therefore do not have jurisdiction to review the
23 adequacy of the 2002 Plan at this time. We therefore grant
24 Defendants' motion to dismiss Plaintiffs' second claim.

25 Therefore, Plaintiffs' challenges to the mandatory
26 procedural requirements of the ESA may proceed (claim one).

1 Plaintiffs' claims challenging the specific recommendations
2 of the 2002 Plan, are dismissed (claim two).

3 IV.

4 Plaintiffs move to include documents in the
5 administrative record filed by Defendants. Plaintiffs want
6 to include five documents that, they say, were "before the
7 agency" decision-maker and are relevant. *Citizens to*
8 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). We
9 agree. Although facially many of the internal agency emails
10 at issue deal primarily with criticism of recovery plans for
11 three other fish in the Colorado River, the documents do
12 make reference to the humpback chub or the recovery plans of
13 all four fish generally. We find these documents were
14 before the agency when creating the humpback chub 2002
15 Recovery Plan, are relevant, and thus should be included in
16 the administrative record.

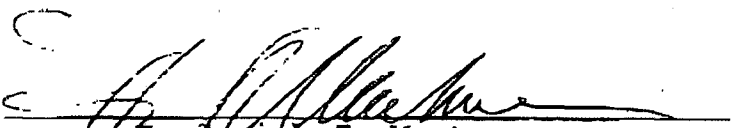
17 Plaintiffs also want to include nine documents in the
18 administrative record over which Defendants have asserted
19 the attorney client privilege. The declaration of Ms.
20 Zallen makes a sufficient showing that the documents
21 withheld are covered by the attorney client privilege. Her
22 legal comments on earlier drafts of the 2002 Plan, as well
23 as legal advice in email communications to agency staff are
24 privileged. We thus deny Plaintiffs' request to hold an in
25 camera review of the nine withheld documents. *Maricopa*
26 *Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1089 (9th Cir.

1 1997). These documents are privileged and should not be
2 included in the administrative record.

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4 IT IS THEREFORE ORDERED, GRANTING, IN PART, Defendants'
5 Motion to Dismiss with respect to claim two, and DENYING, IN
6 PART, Defendants' motion to Dismiss with respect to claim
7 one (doc. 22).

8 IT IS FURTHER ORDERED, GRANTING, IN PART, Plaintiffs'
9 Motion to Include Documents in the Administrative Record
10 with respect to the five internal agency emails attached to
11 Plaintiffs motion as Exhibits 4 through 8, and DENYING, IN
12 PART, Plaintiff's Motion to Include Documents in the
13 Administrative Record with respect to the nine additional
14 documents Defendants excluded because of attorney client
15 privilege (doc. 29).

16 DATED this 12 day of June, 2005.

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21 Frederick J. Martone
22 United States District Judge
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