IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

SANDRA SHORT, a/ka Sandy Short, DAVID SHORT, a/ka Dave Short, SANDRA SARBACKER, and DONALD SHORT, a/k/a Don Short, Plaintiffs, v. FEDERAL HIGHWAY ADMINISTRATION, an agency of the United States Department of Transportation, LEE POTTER, North Dakota Division Administrator, Federal Highway Administration, in his official capacity, UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture, WILLIAM P. O'DONNELL, Dakota Prairie Grasslands Supervisor, United States Forest Service, in his official capacity, SHANNON BOEHM, Dakota Prairie Grasslands District Ranger—Medora District, in his official capacity, Defendants, BILLINGS COUNTY, NORTH DAKOTA, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION Defendant-Intervenors,	**REPORT AND RECOMMENDATION RE MOTION TO DISMISS** Case No. 1:19-cv-00285-DMT-CRH

I. BACKGROUND

Plaintiffs, all members of the Short family, either own or have a recreational interest in the "Short Ranch" located in Township 143 North, Range 102 West, Billings County, North Dakota, along the Little Missouri River. In their complaint, plaintiffs characterize the Short Ranch as "land that is unblemished, majestic, and . . . isolated." They also allege the Short Ranch is of historic value, stating "it has been in continuous operation since 1902 and is approximately four miles upriver from the Elkhorn Ranch." (Doc. No. 1, ¶¶'s 3, 11–15).

In this action for declaratory and injunctive relief, plaintiffs challenge the decision of the Federal Highway Administration ("FHWA"), a part of the Department of Transportation, approving a road and bridge project ("Project") in western North Dakota. The Project is a joint effort by the FHWA, Billings County, and the North Dakota Department of Transportation to construct a new crossing over the Little Missouri River in an area where the two nearest crossings are nearly 70 miles apart. It also involves the construction of some new roadway on either side of the new bridge to tie into exiting roads. Plaintiffs oppose the Project, at least as presently proposed, contending the chosen route cuts through the heart of the Short Ranch and will cause "irreparable harm to the character, history, and function of the property." (Doc. No.1, ¶¶'s 1–3; ROD/FEIS, pp. 28[1]).

Plaintiffs allege that the FHWA's combined Record of Decision approving the Project and Final Environmental Impact Statement ("ROD/FEIS") violated the National Environmental Policy

[1] The ROD/FEIS as defined herein is part of the administrative record that has been filed conventionally at Doc. No. 28. When cited, the pages numbers are those of the document itself. When ruling on a motion to dismiss that raises a jurisdictional challenge, the court can consider material outside of the complaint. See, e.g., Faibisch v. Univ. of Minn., 304 F.3d 797, 801 (8th Cir. 2002); Osborn v. United States, 918 F.3d 724, 730 (8th Cir. 1990). With respect to the motion now before the court, references will be made to the ROD/FEIS as well as certain Section 4(f) documents reflecting determinations made by the Forest Service and the FHWA.

Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101 et seq., and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 ("Section 4(f)"). (Doc. No. 1, ¶¶'s 1, 6, 76–95).

Section 4(f) is the primary federal law intended to prevent federal highway projects from unnecessarily destroying parks, wildlife refuges, and historic properties ("Section 4(f) protected property").[2] See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 404 (1971) ("Overton Park") ("The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation designed to curb the accelerating destruction of the country's natural beauty. We are concerned in this case with s 4(f) of the Department of Transportation Act . . . ."). Plaintiffs allege that the FHWA and its named officials erred when they failed to treat as Section 4(f) protected property the Little Missouri River, the Short Ranch, and certain land within the Dakota Prairie Grasslands that will be traversed or otherwise impacted by the chosen route. (Doc. No. 1, ¶¶'s 92–95).

The Dakota Prairie Grasslands are lands owned and administered by United States Forest Service ("Forest Service"), a part of the Department of Agriculture. The specific part of the Dakota Prairie Grasslands that is the subject of plaintiffs' Section 4(f) claim has been classified by the Forest Service as "Management Area 3.65-Rangelands with Diverse Natural-Appearing Landscape" in its Land and Resource Management Plan ("LRMP") for the Dakota Prairie Grasslands and will be referred to as "MA 3.65." (Doc. Nos. 1, ¶¶'s 18, 74, 93; 39-1, pp. 7–8). The FHWA concluded

[2] The term "Section 4(f)" refers to the original location of its provisions in the Department of Transportation Act of 1966, and is now codified at 49 U.S.C. § 303. Identical language also appears at 23 U.S.C. § 138. The use of "Section 4(f)" as a shorthand reference to these statutory requirements continues to used by most courts and the Department of Transportation. See, e.g., Defenders of Wildlife v. North Carolina Dept. of Transp, 762 F.3d 374, 398 n.13 (4th Cir. 2014); 23 C.F.R. § 771.107 (defining "Section 4(f)" to refer to 23 U.S.C. § 138 and 49 U.S.C. § 303 as implemented by 23 C.F.R. Part 774).

that MA 3.65 is not Section 4(f) protected property. Plaintiffs claim this was error.

In addition to suing the FHWA and its officials with respect to the claimed violations of Section 4(f), plaintiffs are also suing the Forest Service and two of its officials in their official capacities (collectively "Forest Service" unless otherwise indicated). Plaintiffs' Section 4(f) claim as to the Forest Service, however, is limited to MA 3.65. Plaintiffs allege the Forest Service also erroneously determined that MA 3.65 was not Section 4(f) protected property. Plaintiffs' challenge to the Section 4(f) decisions of the FHWA and Forest Service are brought pursuant to the Administrate Practices Act ("APA"), 5 U.S.C. §§ 701–706. (Doc. No. 1, ¶¶'s 6– 7, 92– 95).

Before the court now is a motion to dismiss brought by the Forest Service. (Doc. No. 29). The Forest Service contends the court lacks subject matter jurisdiction over it or, in the alternative, the complaint fails to state a claim as to the Forest Service.

The FHWA has answered the complaint. (Doc. No. 27). Since the FHWA has not opposed the Forest Service's motion and is represented by the same executive branch attorneys representing the Forest Service, it will be presumed the executive branch is speaking in unison and will be referred to as the "Government."

II. DISCUSSION

A. Plaintiffs acknowledge the only claim being made against the Forest Service is for violation of Section 4(f)

The Government's motion to dismiss the Forest Service presents arguments for why it is not subject to suit in this case for alleged NEPA violations. Plaintiffs state in response they are not contending the Forest Service is the subject of their NEPA claims and the only claim being brought against the Forest Service is for a Section 4(f) violation. Hence, this will be the focus of what follows.

B. Section 4(f) requirements

The statutory language of Section 4(f) relevant to this case is the following:

> [FHWA] may approve a transportation program or project (other than any project for a park road or parkway under section 204 [1] of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance *(as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)* only if—
> (1) there is no prudent and feasible alternative to using that land; and
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c) (italics added).

The foregoing provisions require a two-fold determination as to whether a particular parcel of property is protected under Section 4(f). The first, is whether the property is in fact a public park, recreation area, or wildlife or waterfowl refuge. Often this is not an issue since in many cases the property has been officially designated as such by the federal, state, or local entity having jurisdiction or its use for such purposes is otherwise obvious. The second is the whether the Section 4(f) use is "significant" for Section 4(f) purposes. These two determinations are referred to herein as the "Section 4(f) threshold determinations."

A plausible reading of this statutory language is that, while it is the FHWA that is prohibited from approving a project that does not comply with Section 4(f) requirements, the Section 4(f) threshold determinations are made by the state or federal entity having jurisdiction over the property and the FHWA must accept those determinations. There is language in some early cases that suggests this is the case. See Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.3d 613, 623 (3d Cir. 1971) ("(Bartlett") ("the Secretary [of Transportation] was not only entitled but even obliged, to accede to [the relevant state official's] ruling that the land was not set aside for park, or recreation uses."); Lathan v. Volpe, 350 F. Supp. 262, 267–68 (W.D. Wash. 1972) (FHWA obliged

to follow the determination by local officials with respect to the question of significance), vacated in part on other grounds sub nom., Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974).

The FHWA's long-standing interpretation of the statutory language, however, is that, while it needs to obtain the determination of the federal, state, or local entity having jurisdiction, it possesses the authority to make the final determinations of whether the property is Section 4(f) protected property and is significant. And, with that authority, it can reach conclusions different from those of the federal, state, or local officials having jurisdiction if it concludes their Section 4(f) threshold determinations to be in error. See 23 C.F.R. §774.11(c) (FHWA reviews for reasonableness lack-of-significance determinations by officials having jurisdiction over Section 4(f) property); 23 C.F.R. § 774.11(d) (FHWA reviews for reasonableness determinations by federal agencies managing federal lands for multiple uses as to whether portions of the managed lands in question are Section 4(f) property); see also FHWA Section 4(f) Policy Paper, 77 Fed. Reg. 42802-01, 42814, 42817, 42821 (July 30, 2012); Comments on the FHWA Draft Section 4(f) Policy Paper, 77 Fed. Reg.42802, 42803 (rejecting comment on draft policy paper that the final decision-making authority should rest with public officials with jurisdiction over the property as being in "conflict with the FHWA's statutory or regulatory obligations . . . .").

Except for the few cases referenced earlier, the courts have largely agreed with the FHWA's determination that it has final say with respect to Section 4(f) threshold determinations. E.g., National Wildlife Federation v. Coleman, 529 F.2d 359, 368–69 (5th Cir. 1976) ("A more reasonable and enlightened interpretation of § 4(f) is that Congress intended that the threshold determination of the significance and use of state and local lands be made by those officials who are most likely to be aware of its importance to the local community and society. Once the appropriate

jurisdictional officials, however, have made the initial determination of whether potentially protected § 4(f) lands are used for one of the purposes enumerated and are of national, state, or local significance that decision is reviewable and reversable by the Secretary of Transportation."); Geer v. FHWA, 975 F. Supp. 47, 65 (D. Mass. 1997) (the determination of significance is made by the state when it has jurisdiction over the property but the FHWA reviews the state's determination for reasonableness); see Concerned Citizens on I-90 v. Secretary of Transp., 641 F.2d 1, 7 (1st Cir. 1981) (agreeing that the FHWA should consider the no significance determination made by local official but subjecting to review the FHWA's decision (which relied upon the determination by the local officials) for whether it was arbitrary, capricious, or an abuse of discretion on the merits of the question of whether the property was significant for Section 4(f) purposes).

A number of federal and state agencies (including the Forest Service here) own and manage lands for mixed purposes. In some instances, permitted usages include those for park, recreation, or wildlife preservation purposes but these uses are minor and incidental to the primary purposes for which the land is held and managed. The FHWA's regulations address in 23 C.F.R. § 774.11(d) how this situation is to be handled for Section 4(f) as follows:

> (d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, Section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl refuge purposes. The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource. The Administration will review this determination to assure its reasonableness.

In the briefing on the present motion, plaintiffs and the Government have both cited this provision as setting forth the governing law as it applies to the Forest Service land in this case.

Finally, relevant to what comes later, is that the FHWA's regulatory scheme integrates the

FHWA's processes for Section 4(f) and NEPA compliance and provides that its final Section 4(f) determinations are to be set forth in the FEIS or Record of Decision. 23 C.F.R. § 774.9(b).

C. The Section 4(f) threshold determinations by the Forest Service and FHWA in this case

Initially, the FHWA identified a number of Forest Service MAs of the Dakota Prairie Grasslands as potentially being impacted by the Project depending upon the route ultimately selected. (ROD/FEIS, pp. 172–74). In fulfilment of its Section 4(f) obligations, the FHWA submitted to the Forest Service a form document to be completed by the Forest Service for six of the MAs. (Doc. No. 39-1).

Part I of the form was entitled "Determination of Section 4(f) Applicability" and posed questions to be answered by the Forest Service by either checking a box or providing a written explanation. To assist the Forest Service in answering the questions, the form in Part I at various points included definitions of terms, Section 4(f) interpretational guidance, and other instructions. The first point of inquiry in Part I asked whether the major purpose of the MA was for park, recreation, or refuge activities. If the Forest Service checked "yes," then there were additional questions asking which Section 4(f) uses were a major purpose, what the primary purpose(s) of the MA is as identified in Forest Service's LRMP, and whether the identified Section 4(f) uses are incidental, secondary, or dispersed. (Id.).

The second point of inquiry in Part I asked whether the MA was publically owned and, if so, then what type of ownership. The third point of inquiry was whether the MA was open for public use and, if so, for which of any of the identified Section 4(f) purposes. Finally, the fourth point of inquiry asked whether the MA is significant as a park, recreation, or refuge—"yes" or "no"—along with space for additional comments. Following these questions, the Forest Service was asked to sign

and date the form. (Id.).

Part II of the form was entitled "Summary of Findings" and was completed by the FHWA. In this Part, the FHWA was to check "yes" or "no" with respect to each of the following: (1) whether the MA is a park, recreation, or wildlife and waterfowl refuge; (2) whether the MA is publicly owned; (3) whether the MA is open to the public; and (4) whether the MA's use for a Section 4(f) purpose is significant. Then there was an ultimate finding in which the FHWA was to check "yes" or "no" as to whether the MA is a Section 4(f) resource. Following this, there was space for additional comments and a place for the FHWA to date and sign the form. (Id.).

What is notable about the forms is that the FHWA did not merely ask the Forest Service whether the particular MA is a park, recreation, or wildlife and waterfowl refuge and is significant for one of these purposes. Rather, the forms attempt to gain additional information to assist the FHWA in reviewing the Forest Service's determinations and making its own findings in Part II.

The Forest Service completed the form for each of the six MAs and signed them on October 16, 2015. The FHWA completed its part of the form and signed them all on January 14, 2016. For four of the six MAs, the Forest Service stated the major purpose of the MA was for a protected Section 4(f) activity and that it was significant as a park, recreation, or refuge area. As for the other two, the Forest Service stated the MA's major purpose was not for a Section 4(f) activity and that it was not significant as a park, recreation, or refuge. For each of the six MAs, the FHWA made findings consistent with the Forest Service's determinations. (Id.).

As referenced earlier, the only Forest Service land that is the subject of plaintiffs' Section 4(f) claim as to the Forest Service is MA 3.65 entitled "Rangelands with Diverse Natural-Appearing Landscapes." In responding to the first point of inquiry in Part I of the form for MA 3.65, the Forest

Service checked "no" as to whether the primary purpose of the MA was for park, recreation, or refuge activities. The Forest Service then stated the following when asked to state what the primary purpose is for MA 3.65 as set forth in its LRMP:

> These areas are topographically diverse and managed with emphasis on maintaining a naturally appearing landscape while providing a mix of other rangeland values and uses. These areas may have fewer livestock and grazing developments. Oil and gas development may occur.

(Doc. No. 39-1, p. 7). In response to the other questions, the Forest Service stated that, while MA 3.65 is open to the public and used in part for recreation activity, the recreational use was incidental, secondary, or dispersed and that MA 3.65 is not significant as a park, recreation, or refuge. (Id. at pp. 7–8).

While this part of the Section 4(f) process took place in the latter part of 2015 and early 2016, the ROD/FEIS was not issued until June 2019 following the issuance of the draft EIS in June 2018 and the intervening process of giving public notice and holding hearings on the draft EIS. (ROD/FEIS, pp. 15, 17). As noted earlier, the FHWA regulatory process contemplates that its final Section 4(f) determination will be set forth in the FEIS or ROD when the FHWA prepares an EIS to comply with its obligations under NEPA.

In this case, the FHWA's final ROD states that the selected route for the Project (Alternative K, Option 1) does not use any properties under Section 4(f) based on the analysis set forth in the portion of the EIS entitled "Is Section 4(f) approval required for the Selected Alternative." (ROD/FEIS, p. 17). While the discussion in the FEIS is not the most straightforward in terms of identifying the category of Forest Service Lands that are crossed by the selected route, the parties are in agreement that they all fall under MA 3.65. The FEIS states the following with respect to MA 3.65 Dakota Prairie Grasslands:

> 6.3.2.6. DPG MA 3.65
>
> DPG MA 3.65 – Rangelands with Diverse Natural-Appearing Landscapes are managed with emphasis on maintaining or restoring a diversity of desired plants and animals and ecological processes and functions. This MA also provides a mix of other rangeland values and uses with limits on facilities to maintain a natural-appearing landscape. These areas have relatively few livestock grazing developments, such as fences and water tanks, resulting in a mosaic of livestock grazing patterns and diverse vegetation composition and structure (USFS 2001). The USFS has jurisdiction over DPG MA 3.65. The intended purpose of DPG MA 3.65 is not for recreation, wildlife or waterfowl refuge, or preservation of a historic site; therefore, it is not considered to be a Section 4(f) property.

(ROD/FEIS, p.174).

As noted earlier, plaintiffs allege the Forest Service erred when it determined that MA 3.65 is not park, recreation or refuge property protected under Section 4(f), or is otherwise not significant for such purposes, and that the FHWA erred in accepting Forest Service's flawed determinations.

D. The Government's contention that the Forest Service is not subject to suit because its decision did not constitute "final agency action" as required for a suit pursuant to the APA

The Government contends in its motion to dismiss that the Forest Service is not a proper party because only the FHWA's decision was "final agency action" that is subject to review under the APA. See 5 U.S.C. § 704. Plaintiffs disagree.

Notably, neither the Government nor plaintiffs have cited a case that is directly on point and the undersigned's less-than-exhaustive research has not uncovered one. Hence, the undersigned will start with the Supreme Court's unanimous decision in Bennett v. Spear, 520 U.S. 154 (1997) ("Bennett") that plaintiffs and the Government have both relied upon in support of their respective positions.

In Bennett, the Bureau of Reclamation ("BOR"), a part of the Department of the Interior, notified the Fish and Wildlife Service (USFWS), also part of the Department of Interior, that its operation of the Klamath Project might affect two endangered species. The Klamath Project is a

federal reclamation project consisting of lakes, rivers, and irrigation canals in northern California and southern Oregon. The BOR's notification to USFWS triggered the need under the Endangered Species Act ("ESA") for a biological opinion from USFWS. The USFWS's biological opinion was that the two endangered species would likely be jeopardized by the project but concluded there were reasonable and prudent alternatives that would avoid jeopardy that included maintenance of minimum water levels in two of the project's reservoirs. The BOR later notified USFWS that it intended to operate the project in compliance with the biological opinion. 520 U.S. at 158–59.

Plaintiffs in Bennett were two Oregon irrigation districts along with operators of two ranches within the irrigation districts who were users of Klamath Project water. They were concerned that the mitigation measures required by the USFWS would result in reductions in the amount of water they would be receiving. They sued the USFWS challenging its decision, asserting claims pursuant to the ESA and the APA. For reasons not clear, the BOR was not named in the action. Id.

Relevant to this case, the Government contended in Bennett that plaintiffs could not seek judicial review pursuant to the APA because the biological opinion was not final agency action. The Supreme Court disagreed. The Court stated that two conditions had to be met to satisfy the "final agency action" requirement in 5 U.S.C. § 704 for APA review. The first is that the challenged action must mark "the consummation of the decisionmaking process." Id. at 178 (internal quotation marks omitted). The second is that the "action must be one by which rights or obligations have been determined or from which legal consequences will flow." Id. at 179 (internal quotation marks omitted). The Court concluded that both conditions were satisfied by the USFWS's biological opinion notwithstanding that it was issued to the BOR for purposes of its further action.

With respect to the first requirement, the Court held that the biological opinion was

obviously final agency action by the USFWS. The Court concluded the second requirement was also satisfied because the biological opinion altered the legal regime under which the BOR could then operate. That is, the BOR was only free to proceed as a practical matter if it complied with the requirements set forth by the USFWS. In reaching these conclusions, the Court stated the following:

> The Government contends that petitioners may not obtain judicial review under the APA on the theory that the Biological Opinion does not constitute "final agency action," 5 U.S.C. § 704, because it does not conclusively determine the manner in which Klamath Project water will be allocated:
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> > "Whatever the practical likelihood that the [Bureau] would adopt the reasonable and prudent alternatives (including the higher lake levels) identified by the Service, the Bureau was not legally obligated to do so. Even if the Bureau decided to adopt the higher lake levels, moreover, nothing in the biological opinion would constrain the [Bureau's] discretion as to how the available water should be allocated among potential users." Brief for Respondents 33.
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> This confuses the question whether the Secretary's action is final with the separate question whether petitioners' harm is "fairly traceable" to the Secretary's action (a question we have already resolved against the Government, see Part III–A, supra). As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 91 S.Ct. 203, 209, 27 L.Ed.2d 203 (1970). It is uncontested that the first requirement is met here; and the second is met because, as we have discussed above, the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. In this crucial respect the present case is different from the cases upon which the Government relies, Franklin v. Massachusetts, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), and Dalton v. Specter, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994). In the former case, the agency action in question was the Secretary of Commerce's presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute "final agency action" was premised on the observation that the report carried "no direct consequences" and served "more like a tentative recommendation than a final and binding determination." 505 U.S., at 798, 112 S.Ct., at 2774. And in the latter case, the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission; our holding that this was not "final agency action" followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them. 511 U.S., at 469–471, 114 S.Ct., at 1725. Unlike the reports in Franklin and Dalton, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion

at issue here has direct and appreciable legal consequences.

Id. at 177–78. As for the conclusion that the action of the USFWS had altered the legal landscape, the Court earlier in its opinion stated:

> By the Government's own account, while the Service's Biological Opinion theoretically serves an "advisory function," 51 Fed.Reg. 19928 (1986), in reality it has a powerful coercive effect on the action agency:
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> > "The statutory scheme ... presupposes that the biological opinion will play a central role in the action agency's decisionmaking process, and that it will typically be based on an administrative record that is fully adequate for the action agency's decision insofar as ESA issues are concerned.... [A] federal agency that chooses to deviate from the recommendations contained in a biological opinion bears the burden of 'articulat[ing] in its administrative record its reasons for disagreeing with the conclusions of a biological opinion.' 51 Fed.Reg. 19,956 (1986). In the government's experience, action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species." Brief for Respondents 20–21.
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> What this concession omits to say, moreover, is that the action agency must not only articulate its reasons for disagreement (which ordinarily requires species and habitat investigations that are not within the action agency's expertise), but that it runs a substantial risk if its (inexpert) reasons turn out to be wrong. A Biological Opinion of the sort rendered here alters the legal regime to which the action agency is subject. When it "offers reasonable and prudent alternatives" to the proposed action, a Biological Opinion must include a so-called "Incidental Take Statement"—a written statement specifying, among other things, those "measures that the [Service] considers necessary or appropriate to minimize [the action's impact on the affected species]" and the "terms and conditions ... that must be complied with by the Federal agency ... to implement [such] measures." 16 U.S.C. § 1536(b)(4). Any taking that is in compliance with these terms and conditions "shall not be considered to be a prohibited taking of the species concerned." § 1536(o)(2). Thus, the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to "take" the endangered or threatened species so long as it respects the Service's "terms and conditions." The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment. See §§ 1540(a) and (b) (authorizing civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment for one year); see also Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 708, 115 S.Ct. 2407, 2418, 132 L.Ed.2d 597 (1995) (upholding interpretation of the term "take" to include significant habitat degradation).
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> The Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions. The Incidental Take Statement at issue in the present case begins by instructing the reader that any taking of a listed species is prohibited unless "such taking is

> in compliance with this incidental take statement," and warning that "[t]he measures described below are nondiscretionary, and must be taken by [the Bureau]." App. 92–93. Given all of this, and given petitioners' allegation that the Bureau had, until issuance of the Biological Opinion, operated the Klamath Project in the same manner throughout the 20th century, it is not difficult to conclude that petitioners have met their burden—which is relatively modest at this stage of the litigation—of alleging that their injury is "fairly traceable" to the Service's Biological Opinion and that it will "likely" be redressed—*i.e.*, the Bureau will not impose such water level restrictions—if the Biological Opinion is set aside.

Id. at 169–71.

Applying the two Bennett conditions for final agency action to this case, the Government concedes that the action taken by the Forest Service was final for its purposes and focuses its arguments on the second condition. That is, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.

The Government at several points in its briefing characterizes the role of the Forest Service here as being only a supplier of information that is then used by the FHWA to make the determination of whether the property in question in this case is Section 4(f) property. (Doc. No. 30, p. 14; 40, pp, 4–5). The problem with this, however is that it understates the role of the Forest Service under 23 C.F.R. § 774.11(d), which provides:

> The determination of which lands so function or are so designated [*i.e. as* park, recreation, or wildlife and waterfowl refuge purposes], and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource.

Contrary to what the Government suggests, the plain language of § 774.11(d) contemplates that the Section 4(f) threshold determinations are to be made by the officials having jurisdiction over the property. Following that, the FHWA then conducts a "*review* . . . to assure its reasonableness." (italics added).

What is the difference? The undersigned believes it lies in the deference the FHWA must give the determination of the officials having jurisdiction over the property as to whether it is being

used for Section 4(f) purposes. That is, the FHWA must be able to articulate good reasons for why the determination made by the officials having jurisdiction should not be followed before reaching a contrary conclusion. This is consistent with the use of the word "review." It is also consistent with the use of "reasonableness" and the officials having jurisdiction over the property being in the best position to assess the purposes for which the lands are being managed. Finally, if this was not what Congress intended, what then was the purpose of parenthetical in the governing statute: "(as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)"?

In several respects, the situation here is analogous to that in Bennett. Like the BOR in Bennett, the FHWA is the action agency but needs to obtain the determination of another agency and follow that determination unless there is a good reason not to, so the other agency determination is coercive in that respect. Finally, in Bennett, the BOR gave some indication that it would follow the Biological Opinion rendered by the USFWS and here the FHWA has accepted the determination made by the Forest Service.

Nevertheless, there are differences. Most notable is the fact that the FHWA's regulatory contemplates review of the Section 4(f) threshold determinations made by the officials having jurisdiction over the property. The regulatory scheme in Bennett did not contemplate the BOR reviewing the Fish Wildlife's Biological Opinion in such fashion. Further, the Section 4(f) threshold determinations by officials having jurisdiction over the property have no independent coercive effect like the criminal penalties that potentially could result from a failure to comply with the Biological Opinion in Bennett.

The Supreme Court has made it clear that the determination of whether agency action is final

for purposes of the APA is often a pragmatic one. F.T.C. v. Standard Oil of California, 429 U.S. 232, 239 (1980). And, in that regard, the Court has stated that "relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether the rights of the parties or obligations have been determined or legal consequences will from the agency action." Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71(1970).

Applying these considerations to the situation here supports the conclusion that the only agency action that is final for purposes of the APA is the final decision of the FHWA.[3] The reasons include:

- The FHWA's regulatory scheme expressly providing not only that the FHWA can review the Section 4(f) threshold determinations by the officials having jurisdiction over the property (a point not contested by plaintiffs here) but also will do so in every case. With the FHWA conducting such reviews, it is clear no legal consequences will flow until it makes its decision. This alone is probably sufficient to support the conclusion that only the FHWA's decision is final for purposes of APA review and the Forest Service's decision is only an interim step in the overall administrative process.
- The FHWA's integration of the Section 4(f) determination process with its NEPA compliance process when it is the action agency for complying with NEPA. While the Forest Service can provide input to the FHWA with respect to any potential

[3] In certain instances (e.g., de minimis impact findings, temporary occupancies, or transportation enhancement activities) not relevant in this case, the FHWA's regulations provide that it must obtain the concurrence or agreement of the officials having jurisdiction over the property. 23 C.F.R. §§ 774.5(b), 774.13(d) & (g). No opinion is expressed as to whether the Forest Service could be sued under the APA if one of these determinations was at issue.

environmental impacts, its has no decisionmaking authority in terms of approval of the final EIS when the action agency for NEPA compliance is another federal agency, such as the FHWA here.

- Closely related to the first two points is that a conclusion the Forest Service's determination is final for purposes of APA review has the potential for disrupting the orderly process of the overall Section 4(f) decisionmaking. In this case, it could have resulted in fighting over the Section 4(f) determination by the Forest Service more than three years before what the FHWA's regulatory scheme provides for in terms of its final Section 4(f) action, *i.e.*, its decision as set forth in the final ROD/FEIS. During the interim, there was the possibility that things might change not only as result of the FHWA's 4(f) review integrated with the NEPA process but also independently because of what is finally decided after the environmental review. In terms of the latter, the FHWA may have selected a different route for environmental reasons that impacted no or a different category of Forest Service property. Also, there was the possibility of the "no action" alternative being selected.
- Drawing the "final agency action" line at the point of the FHWA's final decision makes the timing of the availability of court review pursuant to the APA the same regardless of whether the officials having jurisdiction over the Section 4(f) property are federal or state or local.

E. The fighting here over whether the Forest Service and its officials should be parties appears to be a lot to do over very little given since the FHWA has acted and is named as a party

If plaintiffs had sued the Forest Service prior to making what the Government contends was

the FHWA's final decision as set forth in the ROD/FEIS or had not named the FHWA in this action, expending the time and effort to dismiss the Forest Service would make sense. However, with the FHWA having acted and been named as a party, is not clear why the Government bothered since the presence of the Forest Service as a nominal party or its absence appears to be no practical significance.

Notably, the Government obtains no tactical advantage with the dismissal of the Forest Service and its two officials given that the threshold Section 4(f) determinations are subject to a full review on the merits by this court to the extent permitted by the APA.[4] Or, to put it another way, if there are problems with the Section 4(f) threshold determinations, the dismissal of the Forest Service only rearranges the deck chairs on the Titanic. Also, obtaining the dismissal of the Forest Service and its officials is unlikely to reduce costs or lessen administrative burdens. The attorneys defending the Forest Service are the same as those defending the FHWA. As for Forest Service staff

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[4] The Government has not contended that this court's APA review is narrower than would be the case if the court was reviewing the Forest Service's determinations (or if the FHWA had made the Section 4(f) threshold determinations alone) and this is the reason why only the FHWA's decision is subject to review. For example, the Government arguing: (1) the FHWA's review of the Forest Service's Section 4(f) determination for reasonableness under 23 C.F.R. § 774.11(d) is only to determine whether the Forest Service articulated reasons for its decision that on their face appear to have some validity, but that the merits of the decision are not considered for arbitrary and capriciousness in light of the underlying circumstances, and (2) this court's review of the FHWA's final decision, in turn, then being limited by the narrow scope of the FHWA's review of the Forest Service's decision.

Rather, the position the Government has taken in its motion here is consistent with the merits of the threshold Section 4(f) determinations being fully reviewable by this court to the extent allowed under the APA. Also, the FHWA has not indicated anything different in the Section 4(f) guidance it has issued. See FHWA Section 4(f) Policy Paper, 77 Fed. Reg. 42802-01, 42813–814, (July 30, 2012). In fact, it appears clear from the forms that the FHWA asked the Forest Service to complete in this case that the FHWA was attempting to secure information that went beyond ascertaining the reasons articulated by the Forest Service and were directed to a review of the merits of whether the Forest Service land is Section 4(f) property and is significant. Finally, by and large, the courts have reviewed the FHWA's Section 4(f) threshold determinations under the standards for review set forth in the APA. See, e.g., Stewart Park and Reserve Coaltion, Inc. (SPARC) v. Slater, 352 F.3d 545, 554–57 (9th Cir. 2003) (concluding that the district court erroneously applied a too narrow a standard of review and that the FHWA's application of Section 4(f)'s requirements was unreasonable); National Wildlife Federation v. Coleman, 529 F.2d 359, 368–71 (5th Cir. 1976) (court reviewed the Section 4(f) threshold determinations on the merits as to whether the determinations were arbitrary, capricious, or an abuse of discretion); Concerned Citizens on I-90 v. Secretary of Transp., 641 F.2d 1, 7 (1st Cir. 1981) (same); Geer v. FHWA, 975 F. Supp. 47, 66–72 (D. Mass. 1997) (same).

time, there likely will be no or very little discovery (given this an APA review case) and the record of what transpired before the Forest Service presumably was reviewed by the FHWA and is part of its record if it conducted a thorough "reasonableness review." With respect to any administrative burden in monitoring the litigation, the Forest Service has an interest in the outcome since its lands will be impacted by the Project and likely would be doing so in any event.[5]

More understandable, perhaps, is the decision on the part of plaintiffs' counsel to include the Forest Service and its responsible officials as party defendants given possible concerns at the time of the filing of the action that the Government might claim the Forest Service needed to be a party given the language of the governing statute and 23 C.F.R. § 774.11(d) and/or the Government somehow arguing that review of only the FHWA's decision is narrower than reviewing the decision of the Forest Service. However, the position taken by the Government in its motion to dismiss along with its contentions of what the governing law is should alleviate any such concerns. With that and this court having the authority to grant all the relief (declaratory and/or injunctive) that plaintiffs need by directing it to the FHWA or its responsible officials, then dismissal of the Forest Service and its officials should be of little practical consequence for plaintiffs as well.

F. Dismissal without prejudice

In order for this court to entertain a suit against a federal agency, there must be an applicable waiver of sovereign immunity. This condition precedent is a jurisdictional requirement. The Supreme Court has made these points clear in a number of cases, including F.D.I.C. v. Meyer, 510 U.S. 471 (1994) where the Court stated:

[5] In fact, for all the court knows, the Forest Service might be supportive of the proposed Little Missouri River crossing given that it may assist in the administration of its lands on both side of the Little Missouri by affording more ready access.

> Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Loeffler v. Frank, 486 U.S. 549, 554, 108 S.Ct. 1965, 1968, 100 L.Ed.2d 549 (1988); Federal Housing Administration v. Burr, 309 U.S. 242, 244, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940). Sovereign immunity is jurisdictional in nature. Indeed, the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 770, 85 L.Ed. 1058 (1941). See also United States v. Mitchell, 463 U.S. 206, 212, 103 S.Ct. 2961, 2965, 77 L.Ed.2d 580 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"). Therefore, we must first decide whether FSLIC's immunity has been waived.

Id. at 475.

In this case, the only statute relied upon by plaintiffs for a waiver of sovereign immunity with respect to their Section 4(f) claim against the Forest Service is the APA's § 702, which does waive the Government's sovereign immunity for claims made pursuant to the APA. E.g., Preferred Risk Mut. Ins. Co. v. U.S., 86 F.3d 789, 792 (8th Cir. 1996). With the conclusion that the Forest Service's decision was not a final agency action for purposes of the APA, the only potentially applicable waiver of sovereign immunity as to it has been lost. Hence, the Government correctly argues that the Forest Service (including the two Forest Service officials named in their official capacities) should be dismissed from this action for lack of subject matter jurisdiction because there has been no waiver of sovereign immunity for a suit against them. See, e.g., Sierra Club v. United States Army Corps of Engineers, 446 F.3d 808, 811–15 (8th Cir. 2006) (affirming district court's dismissal for lack of jurisdiction an APA claim for which there was not final agency action); Hope v. Department of Veterans Affairs, No. 4:18-cv-00114, 2018 WL 1020122, **1-2, 4 (E.D. Ark. Feb. 22, 2018) ("Hope") (dismissing an APA action brought against a federal agency and officials sued in their official capacities pursuant to the APA for which there was not final agency action for lack of subject matter jurisdiction due to there being no applicable waiver of sovereign immunity); Starr Indem. & Liability Co. v. Continental Cement Co., L.L.C., No. 4:11-cv-809, 2012 WL 1070105, at

*3 (E.D. Mo. March 29, 2012) (dismissing APA claim for which there was not final agency action for lack of jurisdiction); see also Hagemeier v. Block, 806 F.2d 197, 202 (8th Cir.1986) (sovereign immunity bars claims against federal officials in their official capacities unless immunity is waived).

However, contrary to what the Government requests, the dismissal of the Forest Service defendants for lack of jurisdiction because of the bar of sovereign immunity must be without prejudice. Roth v. U.S., 476 Fed.Appx. 95 (8th Cir. 2012) (unpublished per curiam) (affirming dismissal of action for lack of subject matter because of sovereign immunity but clarifying that the dismissal should be without prejudice and citing prior Eighth Circuit cases); Murray v. United States, 686 F.2d 1320, 1327 & n.14 (8th Cir.1982) (affirming the dismissal without prejudice because, "[w]here a motion to dismiss for lack of subject matter jurisdiction is granted on grounds of sovereign immunity, the court is left without power to render judgment on the merits of the case"); Hope, 2018 WL 1020122, at *4 (dismissing APA action where agency action was not final and stating dismissal was without prejudice because of the lack of subject matter jurisdiction).

III. RECOMMENDATION

Based on the foregoing, it is **RECOMMENDED** that the court **GRANT** the Government's motion to dismiss the Forest Service and its defendant officials O'Donnell and Boehm (Doc. No. 29) for lack of subject matter jurisdiction based upon there being no applicable waiver of sovereign immunity for suit against these defendants, but order that the **DISMISSAL BE WITHOUT PREJUDICE**.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation.

Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond.

Dated this 11th day of May, 2021.

/s/ Charles S. Miller, Jr.
Charles S. Miller, Jr., Magistrate Judge
United States District Court