IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CASCADIA WILDLANDS, CENTER FOR BIOLOGICAL DIVERSITY, and AUDUBON SOCIETY OF PORTLAND,

Plaintiffs,

v.

JOHN KITZHABER, in his official capacity as Governor of Oregon and Chair of the State Land Board; TED WHEELER and KATE BROWN, in their official capacity as members of the State Land Board; DOUG DECKER, in his official capacity as Oregon State Forester with the Oregon Department of Forestry; LOUISE SOLLIDAY, in her official capacity as Director of the Department of State Lands; JOHN BLACKWELL, in his official capacity as Chair of the Oregon Board of Forestry; SYBIL ACKERMAN,

Case No. 3:12-cv-00961-AA

ORDER

CINDY DEACON WILLIAMS, NILS CHRISTOFFERSEN, TOM INSKO, GARY SPRINGER, and STEVE WILSON, in their official capacity as Board Members of the Oregon Board of Forestry; TOM SAVAGE, in his official capacity as District Forester for the Astoria District; JIM YOUNG, in his official capacity as the District Forester for the Coos District; ANDY WHITE, in his official capacity as the District Forester for the Forest Grove District and DAN GOODY, in his official capacity as the District Forester for the Tillamook District,

Defendants,

v.

OREGON FOREST INDUSTRIES COUNCIL, a non-profit corporation, DOUGLAS TIMBER OPERATIONS, a non-profit corporation, HAMPTON TREE FARMS INC., an Oregon Corporation, SENECA SAWMILL COMPANY, an Oregon Corporation, and SCOTT TIMBER CO., an Oregon Corporation,

Defendant-Intervenors,

v.

ASSOCIATION OF OREGON COUNTIES,

Defendant-Intervenor.

AIKEN, Chief Judge:

On June 29, 2012, plaintiffs filed a motion for a preliminary injunction to enjoin the logging or auction of eleven timber sales on the Tillamook and the Elliot State Forests, and against any further logging activities in known occupied marbled murrelet sites in Tillamook, Clatsop, and Elliot State Forests. Presently, the timber sales at issue are subject to a voluntary standstill pending the outcome of this case or no earlier than 60-days after notice is given by defendants to resume the challenged action.

DISCUSSION

I. Mootness

Defendants first argue that because the disputed timber sales are subject to a voluntary standstill, a decision by the Court on the pending motion will have no practical effect, and therefore not justiciable and should be denied as moot. Defs.' Resp. to Mot. for Prelim. Inj. at 6. Judicial power is limited to decisions in cases and controversies where a decision will have a practical effect on the rights of the parties. Matters that are moot, "where no actual or live controversy exists," are not justiciable. Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 989 (9th Cir. 1999). Where circumstances change while litigation is pending, an issue may be rendered moot because "[t]he federal courts lack power to make a decision unless the plaintiff has suffered an injury in fact, traceable to the challenged action, and likely to be redressed by a favorable decision." Snake River Farmers v. Dept. of Labor, 9 F.3d 792, 795 (9th Cir. 1993). However, it is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of a practice." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). The standard for determining whether a case has been mooted is stringent: a case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur; the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to resume lies with the party asserting mootness. See Friends of the Earth, Inc. v. Laidlaw Envt'l Serv (TOC), Inc., 528 U.S. 167, 189 (2000) (internal citations and quotations omitted).

Defendants assert that since June 13, 2012, the Oregon Department of Forestry (ODF) has refrained from taking any action on six of the eleven timber sales at issue, and have further refrained from taking action on the other five sales at issue since plaintiff filed the present motion. Defendants submit that ODF, through its Chief of the State Forests Division, has affirmed that this new position will remain until either a resolution is reached on the merits or otherwise, or that ODF may exercise an option with 60-days notice to plaintiffs to resume activities on any number of the disputed timber sales. Defs.' Resp. to Mot. for Prelim. Inj. at 5 n.1 (citing Decl. of Bordelon, ¶ 5).

Because defendants have retained the right to simply resume logging operations after providing notice, a possibility of recurrence of the allegedly illegal logging activities exists. "An action for an injunction does not become moot merely because the conduct complained of was terminated if there is a possibility of recurrence." F.T.C. v. Affordable Media, 179 F.3d 1228, 1237 (9th Cir. 1999). Therefore, Plaintiffs' request is not moot.

II. Injunctive Relief

Defendants next argue that plaintiffs' preliminary injunction request does not satisfy the requirements for a preliminary injunction as mandated by the Supreme Court in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008). Under Winter, plaintiffs must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. See id. at 20. Defendants argue that plaintiffs' fail on the second prong because they "cannot establish under the status quo that they are in imminent danger of being harmed by alleged taking of marbled murrelets by timber sales that have not been put up for auction or sales that have been contracted but are suspended." Defs.' Resp. to Mot. for Prelim. Inj. At 6. As discussed above, the status quo is that logging operations have been voluntarily suspended, but may be resumed by providing notice. Since defendants are not legally bound by their voluntary cessation of activities, they have not met the burden of establishing that "it is absolutely clear that the allegedly wrongful behavior could not be expected to recur." See Friends of the Earth, 528 U.S. at 189 (citing U.S. v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 (1968)). "For those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term." Earth Island Institute v. Mosbacher, 746 F.Supp. 964, 975 (N.D. Cal. 1990). Because the suspension of logging activities may be lifted at any time with 60-days notice, and due to the imperiled status of the marbled murrelet, the status quo includes an imminent threat of irreparable injury under the ESA. Plaintiffs have thus established the second prong. Defendants do not contest that plaintiffs have established the remaining prongs under Winter. As the Court finds that plaintiffs have sufficiently established likelihood of success on the merits, a balance of equities in their favor, and that an injunction is in the public interest, the requirements for preliminary injunctive relief under Winter are satisfied. See Pls.' Mem. in Supp. of Mot. for Prelim. Inj.

CONCLUSION

Plaintiffs' motion for a preliminary injunction (doc. 21) is GRANTED. Pursuant to Fed. R. Civ. P. 65, the Court hereby enjoins the eleven timber sales at issue in this case, as well as any further logging activities in known occupied marbled murrelet sites in the

Tillamook, Clatsop, and Elliot State Forests. This preliminary injunction will be remain in place until the Court has ruled on any future dispositive motions in this case, or until the matter is otherwise resolved.

IT IS SO ORDERED.

Dated this 9th of November 2012.

Ann Aiken

Ann Aiken
United States District Judge