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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE, a federally recognized Indian tribe,

Plaintiff,

vs.

NOAA FISHERIES, *et al.*,

Defendants.

Case No. 3:07-cv-247-BLW

MEMORANDUM IN SUPPORT OF NEZ PERCE TRIBE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is an action for declaratory and injunctive relief, based on violations of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA). The Nez Perce Tribe (Tribe) seeks review under the ESA and APA of the Lewiston Orchards Project Biological Opinion issued by NOAA Fisheries (NOAA) on March 1, 2006 (LOP BiOp).[1] NOAA prepared the LOP BiOp through consultation with BOR pursuant to Section 7 of the ESA, 16 U.S.C. § 1536 (Section 7), and in response to the complaint filed in Nez Perce Tribe v. NOAA Fisheries, Civ. 05-296-EJL.

The LOP BiOp purports to analyze the effects of BOR's operation and maintenance of the LOP on Snake River Basin steelhead listed as threatened under the ESA. The LOP BiOp addresses the operation and maintenance of diversion dams and canals in Captain John Creek, Webb Creek and Sweetwater Creek, and water storage in Lake Waha, Soldiers Meadow Reservoir and Mann Lake Reservoir, for a 15 year period. The ESA "action area" addressed in the LOP BiOp includes the drainages of Captain John, Webb and Sweetwater Creeks, as well as Lapwai Creek from the mouth of Sweetwater Creek to the confluence with the Clearwater River.

All of the drainages affected by the LOP lie within treaty fishing areas of the Tribe. Webb, Sweetwater and Lapwai Creeks literally flow within the Nez Perce Reservation. The Tribe, through its Department of Fisheries Resource Management, is a key co-manager of the fisheries resource throughout the Columbia/Snake Basin, including the LOP area. Snake River steelhead imperiled by the LOP are of extraordinary cultural importance to the Tribe and its members.

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[1] The LOP BiOp is included in the Administrative Record at NMFS000004-000121. The Tribe will refer to the LOP BiOp by its abbreviated name and internal page number in this brief. Other record references will be to "AR xxxxxx."

NOAA acknowledges the key facts of this case: "Most of the action area is located within the present Nez Perce Indian Reservation Boundary. The LOP kills or harms steelhead, which are a tribal trust resource, through alteration of fish habitat in streams traditionally used for fishing by the Nez Perce Tribe." LOP BiOp at 2. The history of the LOP Section 7 consultation and production of the final LOP BiOp, however, is disturbing. Five water seasons passed between BOR's 2001 Section 7 Biological Assessment (BA) and the issuance of a final BiOp by NOAA. Annual dewatering of Sweetwater and Webb Creeks during this period caused grave harm to the steelhead and its critical habitat. The Tribe persisted in demanding completion of the BiOp, consulting in the meantime with the agencies to encourage its production. Finally the Tribe had no choice but to bring the July 18, 2005, APA complaint that resulted in completion of a final BiOp by NOAA.

The final LOP BiOp on which this action is based is deficient as a matter of fundamental ESA Section 7 requirements. No reasoned explanation is offered for the ten year "initial" BiOp phase in which degraded conditions will be allowed to persist; jeopardy conclusions are made through unlawful "comparisons" of the action to baseline and hypothetical reference operations; long-term flows are unsupported by NOAA's own underlying scientific information on minimum flows required by the steelhead; a "drought exemption" is authorized without reasoned explanation and based on a facially arbitrary "trigger" point; potential project water savings are allocated in an arbitrary 50-50 ratio between the needs of the steelhead and LOP uses; minimum stream flows are "incapable of implementation" based on NOAA and BOR's inability to accurately release and measure required flows; and the BiOp fails to properly consider fish passage as an important aspect of the problem posed by the action. The continued threat to Snake River Basin steelhead from this federal project, literally conducted on the Nez Perce

Reservation and in the Tribe's treaty fishing areas, should be tolerated no longer. The 2006 LOP BiOp should be overturned and remanded to NOAA for completion of lawful BiOp.

BACKGROUND

I. THE PARTIES

Plaintiff Nez Perce Tribe is a federally recognized Indian tribe headquartered in Lapwai, Idaho. Since time immemorial, the Tribe and its members have used and enjoyed the lands and waters of the Columbia and Snake River Basins, including Sweetwater, Webb, and Lapwai Creeks within the Clearwater River Subbasin. Sweetwater, Webb, and Lapwai Creek watersheds lie within the Tribe's Reservation. Additional facts regarding the Tribe are provided in the attached Declaration of Emmit Taylor, Jr., in Support of Motion for Summary Judgment.

Defendant NOAA Fisheries[2] is an agency of the United States Department of Commerce responsible for administering the provisions of the ESA as to threatened and endangered marine species, including the species of threatened and endangered salmon and steelhead that inhabit the Columbia and Snake River Basins, and Sweetwater, Webb, and Lapwai Creeks within the Nez Perce Reservation.

As a fiduciary, the United States and all of its agencies owe a trust duty to all federally recognized Indian Tribes. United States v. Mitchell, 463 U.S. 206, 225 (1983). This trust relationship has been described as "one of the primary cornerstones of Indian law," Felix Cohen, *Handbook of Federal Indian Law* at 221 (1982), and has been compared to the relationship existing under the common law of trusts, with the United States as trustee, tribes as beneficiaries,

[2] Case law cited in this brief often refers to NOAA by its prior name National Marine Fisheries Service (NMFS). For consistency, all references except for case names have been converted to NOAA.

and property and natural resources managed by the United States as the trust corpus. 463 U.S. at 225.

II. THE LISTED SPECIES

Sweetwater Creek, Webb Creek, and Lapwai Creek provide critically important habitat for Snake River Basin steelhead. Snake River steelhead have been listed as threatened under the ESA since 1997. Endangered and Threatened Species: Listing of Several Evolutionary Significant Units of (ESUs) of West Coast Steelhead, 62 Fed. Reg. 43,937 (Aug. 18, 1997), revised, 71 Fed. Reg. 834 (Jan. 5, 2006); see also 70 Fed. Reg. 52630 (Sep. 2, 2005) (Final Rule designating critical habitat). Snake River steelhead are of extraordinary cultural importance to the Nez Perce Tribe and its members. See Taylor Decl. at 2-4.

Due to the unique thermal regime and flows of Sweetwater Springs, Sweetwater Creek is one of the most important steelhead tributaries in the lower Clearwater River Subbasin for threatened steelhead. NOAA acknowledges the historical habitat function of these flows: "The supply of abundant, cold water from the Twenty One Ranch spring [Sweetwater Springs] in summer is likely to have made Sweetwater and Lapwai Creeks, below the confluence with Sweetwater Creek, an important refuge in times of low flows and hot weather, when other nearby streams would be dry. Steelhead and other salmonids rely on thermal refugia to survive periods of drought (Lake 2003, Matthews and Berg 1997)." LOP BiOp at 45. But for the LOP, Sweetwater Creek would have significant and unique flows that would attract steelhead from other tributaries and serve as a thermal refuge for summer and winter rearing habitat that is not available in other tributaries. Steelhead return to mainstem rivers in late summer through fall, then disperse into tributaries to spawn from March through May. Id. at 15. Juveniles emerge from redds in four to eight weeks, depending on temperature. Id. Juveniles in the LOP action

area appear to reside in fresh water for no more than two years, migrating downstream to the ocean from March to mid-June during spring runoff. Id. at 16. Steelhead in the action area are predominantly "A-run," typically spending only one year in the ocean, with a life cycle of three to fours years. Id. For additional background on steelhead in the action area, see Taylor Decl..

III. THE PROJECT

The LOP is owned, operated and maintained by BOR and managed through contract with the Lewiston Orchards Irrigation District (LOID). The LOP is located within and through water diversions alters the hydrology of watersheds on and adjacent to the Nez Perce Reservation, including the East Fork and West Fork of Sweetwater Creek, Webb Creek, Sweetwater Creek, Captain John Creek, and Lapwai Creek. NOAA acknowledges that "Most of the action area is located within the present Nez Perce Indian Reservation Boundary." LOP BiOp at 2.

The original purpose of the LOP was to divert water from these drainages for agricultural irrigation within the LOID located above the City of Lewiston, but as NOAA acknowledges, "ninety percent of the acreage within [LOID] is presently urban or suburban, where the majority of irrigation water is applied to lawns, landscaping and gardens." Id. at 1.

IV. CONSULTATION HISTORY AND FINAL LOP BIOP

The historical facts of the LOP Section 7 consultation, and the fundamental statements and decisions made in the LOP BiOp, are undisputed. See attached Statement of Material Facts in Support of Nez Perce Tribe's Motion for Summary Judgment. A brief history follows.

In February 1998, BOR initiated ESA Section 7 consultation with NOAA on the effects of the LOP in its "Biological Assessment (BA) for the Bureau of Reclamation's Operations and Maintenance in the Snake River Basin Above Lower Granite Reservoir." AR 10982. In that BA, the BOR stated in its effects analysis for steelhead in the Lapwai/Sweetwater Creek

Drainages, that: "During the diversion period, these streams [Sweetwater and Webb Creeks] can be completely dewatered below the diversion structures, reducing available habitat downstream and preventing both upstream and downstream steelhead passage. The irrigation diversion ditches are not screened to prevent fish losses." AR 11033. As documented by BOR, NOAA's 1999 Draft BiOp for BOR's operations in the Snake River Basin above Lower Granite Dam ultimately did not cover the LOP, "because [NOAA] indicated that the information necessary to fully evaluate impacts to ESA-listed Snake River steelhead was still under development." AR 11260.

On April 26, 2001, BOR submitted a Supplemental BA for the LOP. AR 11343. BOR concluded that "Since there has been no recent documentation of adult returns of steelhead to Sweetwater Creek, LOID operations are not likely to adversely affect existing populations of listed anadromous fish in the Lapwai Creek basin. As a result of limited passage opportunities at the diversion dam on Sweetwater Creek, the unscreened diversion that exists at this dam, and diversion which depletes flow below the diversion at certain times of the year, LOID operations may be adversely modifying critical steelhead habitat in Sweetwater Creek." AR 11362, 11366. After the BA was completed, fish surveys conducted in Sweetwater and Webb Creeks documented the presence of juvenile steelhead, and pairs of adult steelhead were observed spawning in Lapwai Creek, near the mouth of Sweetwater Creek, indicating wild steelhead are spawning in the action area. LOP BiOp at 2-3. On April 16, 2002, NMFS notified BOR that a determination of adverse modification of critical habitat for the LOP "is likely because the action does not provide habitat conditions that would meet the basic biological requirements of steelhead in Sweetwater Creek and possibly in Webb Creek." AR 11428.

In the midst of the 2004 irrigation season, on July 17, 2004, NOAA provided a Draft LOP BiOp to the BOR concluding that the LOP jeopardized the continued existence of listed steelhead and adversely affect critical habitat. AR 11775. The BOR provided comments on the draft on August 20, 2004, taking issue with the jeopardy analysis and determination, and presenting an alternative view on the basin hydrology and the effect of the LOP on steelhead. AR 11854. On January 10, 2005, BOR submitted a draft proposal to modify its proposed action to provide 300 acre-feet for instream flows to be used at NMFS' discretion. LOP BiOp at 4. NOAA evaluated the proposal and informed BOR on a February 11, 2005 conference call that this proposal would be "insufficient to avoid jeopardy/adverse modification." Id. NOAA and the BOR acknowledged a disagreement over the jeopardy determination. Id. On February 23, 2005, the Tribe filed a notice of intent to sue NOAA for failure to produce a biological opinion for the LOP. AR 11940.

On April 13, 2005, NOAA's Regional Administrator provided the BOR a formal letter attaching a final draft BiOp and Conference Opinion (dated April 5, 2005). AR 12441. The final draft BiOp concluded that the LOP jeopardized the continued existence of listed steelhead and adversely modified critical habitat, and set forth two draft Reasonable and Prudent Alternatives (RPAs). On June 2, 2005, BOR provided NOAA with comments on the April 5, 2005 draft LOP BiOp, but declined to comment on the RPAs due to unresolved disagreements over the jeopardy analysis/critical habitat analysis and determinations. AR 12169. On July 15, 2005, the Tribe sued to force completion of the LOP BiOp, in Nez Perce Tribe v. NOAA Fisheries, Civ. 05-296-EJL.

On an October 25, 2005 conference call that included BOR, NOAA and LOID, those parties tentatively agreed upon minimum flows and operation procedures. AR 12747, AR

12750. On November 15, 2005, NOAA issued a new Draft LOP BiOp. LOP BiOp at 5. On December 16, 2005, BOR provided comments to NOAA on the Draft LOP BiOp. AR 13107. On December 19, 2005, the Tribe provided comments on the Draft LOP BiOp. AR 12149. On February 17, 2006, BOR issued its "Amended Proposed Action for the Operation and Maintenance of the Lewiston Orchards Project." That document plainly states that the "The Short-Term Operational Period [10 years] allows Reclamation and the District a reasonable amount of time to explore, develop, and implement steps to make system improvements to meet long-term stream flow commitments." AR 12316. Twelve days later, on March 1, 2006, NOAA issued its final LOP BiOp.

The final LOP BiOp is not factually in dispute. The BiOp states that "Most of the action area is located within the present Nez Perce Indian Reservation Boundary. The LOP kills or harms steelhead, which are a tribal trust resource, through alteration of fish habitat in streams traditionally used for fishing by the Nez Perce Tribe." LOP BiOp at 2. NOAA rejects BOR's conclusion as to the impact of the LOP on listed steelhead and states that "[NOAA] is reasonably certain the LOP harms or kills steelhead in the action area through effects of dewatering stream channels, and is reasonably certain that stream reaches designated as critical habitat are adversely affected by the LOP when they are dried as a result of LOP water diversions." Id. at 3. The action area considered in the LOP BiOp consists of "(1) Captain John Creek . . . (2) all portions of the Webb and Sweetwater Creek drainage systems where flows are altered by the LOP; and (3) the mainstem of Lapwai Creek from the confluence with Sweetwater Creek , downstream to its mouth." Id. at 13. "The majority of the LOP action area is designated critical habitat for the steelhead DPS, excluding portions of Webb and Sweetwater Creeks upstream from the diversion dams, and Indian lands in the lower portion of Sweetwater Creek." Id. at 3.

The proposed action under the LOP BiOp "is the future operation and maintenance of the LOP, for the next 15 years." Id. at 6. Under the "Environmental Baseline Summary" the BiOp NOAA concludes that "Since the long-term population growth rate (λ) for the DPS is less than one, and habitat conditions in the action area are generally poorer than the DPS as a whole, steelhead are unlikely to persist under the degraded environmental conditions that presently exist in the action area unless habitat conditions are improved." Id. at 46. The LOP BiOp ultimately concludes that "the LOP is not likely to jeopardize the continued existence of Snake River basin steelhead, or destroy or adversely modify critical habitat." Id. at 72.

V. THE ENDANGERED SPECIES ACT

The U.S. Supreme Court has acknowledged that "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, whatever the cost." TVA v. Hill, 437 U.S. 153, 180 (1978). The ESA mandates "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c). The Supreme Court has stated, "As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. . . . Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined 'conserve' as meaning 'to use and the use of *all methods and procedures which are necessary* to bring *any endangered species or threatened species* to the point at which the measures provided pursuant to this chapter are no longer necessary.'" 437 U.S. at 180 (emphasis in original).

Under Section 7 of the ESA, each federal agency must "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency

action') is not likely to jeopardize the continued existence of the endangered or threatened species or result in the destruction or adverse modification of habitat of such species . . . unless such agency has been granted an exemption for such action by the [Endangered Species] Committee."[3] 16 U.S.C. § 1536(a)(2). The preamble to the ESA's implementing regulations states that "Congress intended that the 'jeopardy' standard be the ultimate barrier past which Federal actions may not proceed." 51 Fed. Reg. 19926, 19934-35 (June 3, 1986). The consulting agency must "evaluate the current status of the listed species or critical habitat," "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat," and determine "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(2)-(4). "Effects of the action" are "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. The "environmental baseline includes all past and present impacts of all Federal, State, private, and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." Id. The legislative history confirms that "the burden is on the action agency" to demonstrate that its action will not jeopardize the species, giving "the benefit of the doubt to the species." H.R. Rep. No. 96-697,

[3] For the exemption to be granted, the Endangered Species Committee (commonly referred to as the "God Squad" because it is the ultimate arbiter of the fate of an endangered species) must find, among other things, that there are no reasonable and prudent alternatives to the proposed action, the proposed action is of regional and national significance and the "benefits of alternative courses of action" that are "consistent with preserving the species or its critical habitat" are clearly outweighed by the benefits of the action. 16 U.S.C. § 1536(h)(1)(A).

reprinted in 1979 U.S. Code Cong. & Admin. News 2557, 2572. The Supreme Court has emphasized that "the legislative history undergirding [ESA] § 7 consultation reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." TVA v. Hill, 437 U.S. at 185.

STANDARD OF REVIEW

An ESA final BiOp is an agency action reviewable under the arbitrary and capricious standard of the APA. Bennett v. Spear, 520 U.S. 154, 175 (1997). Under the APA, a court is authorized to "hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A). A court must perform a "thorough, probing, in-depth review" of agency action. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Review may not "rubber stamp . . . decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 (1983).

Agency action is unlawful "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983); accord Pacific Coast Fed'n of Fisherman's Ass'ns v. BOR, 426 F.3d 1082, 1090 (9th Cir. 2005) (PCFFA 2005) (judicial review of NOAA BiOp for BOR operations). A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Id. A BiOp is also invalid "if it fails to use the best available scientific information as required by 16 U.S.C.

§ 1536(a)(2)." Pacific Coast Fed'n of Fisherman's Ass'ns v. NMFS, 265 F.3d 1028, 1034 (9th Cir. 2001) (PCFFA 2001). "Essentially, [a court] must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." Id. (quotations and citations omitted).

A court's task in reviewing an ESA BiOp has been stated as follows: "To avoid a substantive violation of the prohibition against jeopardy, the agency must develop mitigation measures – either as part of the proposed project or as RPAs in the biological opinion. Mitigation measures must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards. The question before this Court is whether the Final BO meets these criteria." Center for Biological Diversity v. Rumsfeld, 198 F.Supp.2d 1139, 1152 (D. Ariz. 2002) (internal citations omitted; citing, inter alia, Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)).

ARGUMENT

I. THE BIOP DOES NOT PROVIDE A "REASONED EXPLANATION" FOR THE 10-YEAR "INITIAL" MINIMUM STREAM FLOWS

The LOP BiOp fails to offer a reasoned explanation for concluding that minimum stream flows in the "initial" 10-year period are sufficient to avoid jeopardy and adverse modification of critical habitat.[4] Given the BiOp's recognition of the present downward trend of the listed steelhead, the failure to improve habitat during the initial 10-year period, and the several steelhead life-cycles that will occur during that period, approval of this action phase is nearly

[4] The full LOP BiOp period is 15 years. The BiOp's conclusions as to "long-term" flows deemed sufficient for the steelhead, which occur in the final five years of the BiOp, are addressed below.

inexplicable.

The initial 10-year period of the action provides minimum flows of 1 cfs to Sweetwater Creek, at the Sweetwater Dam, during summer operations and steelhead rearing, with an increase to 1.5 cfs at the same point in the sixth year; Webb Creek is provided no minimum flows for the entire 10-year period. LOP BiOp at 8. As a simple matter of ESA case law applied to the BiOp, this is unlawful. Repeated Ninth Circuit decisions have overturned NOAA BiOps that allow "initial" action phases as short as five years to transpire before anadromous fish with short life cycles receive flow and other habitat improvements they require.

In PCFFA 2005, the Ninth Circuit reviewed a NOAA BiOp for BOR's Klamath Project and its effect on threatened Southern Oregon/Northern California Coast coho salmon. The coho has a three-year life cycle. NOAA's BiOp developed an RPA covering a 10-year period. The final two-year phase provided "long-term flow levels" "necessary to avoid" jeopardy, while the first two phases, covering eight years, provided lesser flows NOAA determined would be adequate for the "short-term." 426 F.3d 1082, 1089. The Ninth Circuit, reversing the district court, ruled that the BiOp failed to provide a "reasoned explanation" for NOAA's conclusion that the coho would "not be jeopardized during the first two phases of the RPA." Id. at 1092.

Although NOAA asserted that it had "explain[ed] [its] rationale for concluding that the short-term and long-term measures will avoid the likelihood of jeopardy," and although the district court had concluded that the agency "believed" the RPA would avoid jeopardy, the Ninth Circuit rejected the BiOp's explanations as conclusory assertions. The court found that although some of the initial phase discussions were "detailed," they amounted to "assertions" that the flows "should improve" conditions for the coho, without "show[ing] *how*" that would occur. Id. at 1092-93 (emphasis added). The court ultimately found it unacceptable that the "quantitative

determination" supporting required long-term flows was logically contradicted in the first eight years of the BiOp: "In Phase III of the RPA, [NOAA] establishes necessary flow levels: for Phases I and II, the RPA reduces these flows by nearly half, but does not explain why this reduction does not jeopardize the coho." Id. at 1094-95.

In PCFFA 2001, the Ninth Circuit affirmed the district court's invalidation of NOAA's "no-jeopardy" BiOps for federal timber sales affecting listed coho salmon and cutthroat trout. The court forcefully rejected the BiOps' allowance for "short-term," 10-year adverse effects. "Under the practice adopted by [NOAA], only degradations that persist more than a decade and are measurable at the watershed scale will be considered to degrade aquatic habitat. *This generous time frame ignores the life cycle and migration cycle of anadromous fish.* In ten years, a badly degraded habitat will likely result in the total extinction of the subspecies that formerly returned to a particular creek for spawning." 265 F.3d 1028, 1037-38 (emphasis added).

In National Wildlife Federation v. National Marine Fisheries Service, 481 F.3d 1224, 1235 (9th Cir. 2007) (NWF v. NMFS), the court addressed and rejected NOAA's 2004 BiOp for the Federal Columbia River Power System (FCRPS) on the Columbia and Lower Snake Rivers and its effects on listed salmon and steelhead (including Snake River Basin steelhead). Among other flaws, the court cited PCFFA 2005 for the "clear instruction" that NOAA must consider near-term impacts to species with short life cycles such as anadromous fish. 481 F.3d at 1240. The 2004 BiOp recognized negative impacts to the species from the action for the first five years "in spite of planned mitigation measures." Id. The court rejected this approach: "[NOAA] did not adequately demonstrate that these impacts would not affect the fishes' survival and recovery, in light of their short life-cycles and current extremely poor habitat conditions." Id. The court rejected NOAA's rationale that "short-term" impacts to critical habitat were acceptable because

"by the sixth year of this proposed action, the condition of critical habitat in the juvenile migration corridor would be improved." Id. (citing Gifford Pinchot Task Force v. U.S. Forest Service, 378 F.3d 1059, 1069 (9th Cir. 2004) (rejection of BiOps for federal timber harvests based in part on adverse modification regulation and analysis that did not adequately consider recovery as well as survival of species); see also NWF v. NMFS, 2005 WL 1278878, *16 (D. Or. 2005) (underlying case; district court's rejection of 2004 FCRPS BiOp; "[NOAA] did not analyze the short-term negative effects of the proposed action in the context of the species' life cycles and migration patterns.").

In this case, the Court need only examine the LOP BiOp's statements, unsupported by evidence and without "reasoned explanation", to see that the "initial" 10-year action phase fails to meet the requirements of the ESA, as did the initial phases in the above Ninth Circuit cases. Nowhere in the BiOp does NOAA explain how the 10-year Sweetwater and Webb minimum stream flows are adequate for needs of the listed steelhead. On the contrary, the LOP BiOp's statements and explanations concede the biological inadequacy of the "initial" 10-year phase of the action.

The LOP BiOp states that "[t]he purpose of the initial 10-year period is to provide a reasonable amount of time for LOID and BOR to explore, develop, and implement steps to conserve or increase water, while providing minimum flows in Sweetwater Creek, sufficient to maintain connected surface flows." LOP BiOp at 8. This introduces the fact that the 10-year period will not be justified based on a jeopardy analysis of its effect on the steelhead. See PCFFA 2005, 426 F.3d at 1092; 50 C.F.R. § 402.14(g). Undermining its conclusions, NOAA then recognizes the significance of prolonging risks to the listed species: "With an overall declining long-term population trend, Federal actions that appreciably prolong or exacerbate the

downward trend, or preclude improvements in the trend from occurring, would likely jeopardize the continued existence of the species." LOP BiOp at 19. "Since the long-term population growth rate (λ) for the DPS is less than one, and habitat conditions in the action area are generally poorer than the DPA as a whole, steelhead are unlikely to persist under the degraded environmental conditions that presently exist in the action area unless habitat conditions are improved." Id. at 46. The LOP BiOp then consistently reveals the initial 10-year flows to be biologically unjustified.

For Sweetwater Creek the flow measures are "assumed to provide continuous surface flows," but surface connectivity "has not been verified" and will require "monitoring to verify connectivity." Id. at 50. Webb Creek flows are conceded to be "discontinuous during the summer and portions of the remainder of the year" during the initial 10-year period. Id. The BiOp's description of the action's effect on stream flows concedes that the initial 10-year phase will be no different than the degraded current condition described earlier in the BiOp. Id. at 50-51. Summer water temperatures, earlier described as "near-lethal," Id. at 41, are "likely to remain the same" and "similar" in the action area for 10 years. Id. at 53. The BiOp concedes the adverse impacts of the initial 10-year flows on juvenile rearing, Id. at 63-64, and migration, spawning and incubation, Id. at 66, with no "reasoned explanation" beyond a repeated comparison of the initial 10-year period to the degraded environmental baseline. The BiOp's concluding "rationales" for both jeopardy and adverse modification, again provide nothing more than conclusory statements that the initial 10-year period of the action will leave conditions as they presently are, or "slightly better." Id. at 72-74.[5]

[5] The adverse modification of critical habitat conclusion literally states that because of "the lack of data regarding flow and habitat function in Webb Creek, it is reasonable to assume that restoring flow to Webb Creek after 10 years . . . is not likely to adversely modify critical

As in PCFFA 2005, PCFFA 2001 and NWF v. NMFS, the glaring omission in the LOP BiOp is the consideration of the effect of this 10-year period on listed steelhead with a life cycle of three to four years. And as in those cases, the BiOp's conclusions as to long-term needs of the fish in fact highlight the inadequacy of the initial 10-year period. 426 F.3d at 1093. The PCFFA 2005 coho were provided "slightly more than half" of the long-term flows for the first eight years of the action. Id. Here the steelhead receive, in Sweetwater Creek, less than half of long-term flows needs for five of the first 10 years, then slightly more than half for the next five; and literally nothing of long-term flow needs in Webb Creek for the entire 10-year phase. PCFFA 2005's conclusion that "[t]he agency has not demonstrated that it has followed the mandate of the ESA to avoid the likelihood of jeopardy to the [coho]" applies with equal force in the case before this Court.

II. THE BIOP EMPLOYS AN UNLAWFUL "COMPARATIVE" APPROACH TO JEOPARDY CONCLUSIONS

Closely related to the preceding LOP BiOp deficiency – the failure to rationally explain the effects on the species of the initial 10-year period of the action -- is the BiOp's employment of an unlawful "comparative" approach to the effects of the agency action, as to the long-term phase but especially as to the 10-year "initial" phase of the action.

The LOP BiOp is one of a series of recent Columbia River watershed NOAA BiOps that have employed a "comparative" analysis of the effects of proposed actions that has been ruled unlawful by Ninth Circuit courts. The 2004 FCRPS BiOp was overturned due to a flawed analytical framework by the Oregon district court, with the Ninth Circuit affirming on appeal. The 2005 Upper Snake River BiOp was overturned by the same court for nearly identical

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habitat." Id. at 74. This stands an astonishing distance from a "reasoned explanation" of an adverse modification conclusion. 426 F.3d at 1092.

reasons, and the federal defendants did not appeal. The 2006 LOP BiOp displays a similar "comparative" flaw that unlawfully abbreviates its jeopardy analysis.

The courts have consistently held that the ESA and its regulations require a jeopardy analysis in which the current status of the species in evaluated together with the combined effects of the action, the environmental baseline, and any cumulative effects. In ALCOA v. BPA, 175 F.3d 1156 (9th Cir. 1999), power users challenged BPA's adoption of the RPA in the 1995 FCRPS BiOp. The Ninth Circuit rejected the argument that the jeopardy analysis should have been limited to determining whether the action would have an incremental effect as compared with past actions.

> NMFS correctly viewed incremental improvements as insufficient to avoid jeopardy in the light of the already vulnerable status of the listed species. We agree with NMFS that the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.02, does not mean that an action agency can 'stay the course' just because doing so has been shown slightly less harmful to the species than previous operations. Here the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery.

Id. at 1162, n.6.

In NWF v. NMFS, 2005 WL 1278878 (D. Or. 2005), the court addressed NOAA's 2004 BiOp for the dams that make up the FCRPS on the Columbia and Lower Snake Rivers. The court rejected a jeopardy analysis more formalistically flawed than the instant case. NOAA openly stated that it would only make an aggregate jeopardy analysis of the proposed action with the baseline and cumulative effects if there was a "'net reduction' in the species' current status (i.e. status under the baseline). . . ." Id. at *14. The court rejected NOAA's analysis as an "estimate of the incremental impact to the listed species of the proposed action standing alone." Id. at *13. The court quoted Kandra v. United States, 145 F.Supp.2d 1192 (D. Or. 2001), in stating that "[t]he environmental baseline is part of the entire 'effects of the action' on the listed

species or habitat that must be considered, rather than some concrete standard or condition to which other standards or conditions are compared." Id.

On appeal, the Ninth Circuit strongly affirmed the district court's ruling:

> NMFS argues that, under this definition [402.02], it may satisfy the ESA by comparing the effects of proposed FCRPS operations on listed species to the risk posed by baseline conditions. Only if those affects are 'appreciably' worse than baseline conditions must a full jeopardy analysis be made. Under this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.

NWF v. NMFS, 481 F.3d 1224, 1235 (9th Cir. 2007).

Between the district court's ruling on the 2004 FCRPS BiOp and the Ninth Circuit's 2007 affirmance, the Oregon district court struck down NOAA's 2005 Upper Snake River BiOp due to NOAA's similar unlawful "comparison" of the action with the environmental baseline. American Rivers, Inc. v. National Marine Fisheries Service, 2006 WL 1455629 (D. Or. 2006). The federal defendants did not appeal. In that case, the court rejected the defendants' argument that, unlike the FCRPS BiOp, they had included non-discretionary impacts in the jeopardy analysis, and held that,

> Whether NOAA included non-discretionary impacts in its jeopardy analysis does not alter the fact that the comparative approach NOAA used for determining jeopardy in both the 2004 FCRPS BiOp and the 2005 Upper Snake BiOp violates the ESA. NOAA's *comparison of the effects of the action to the environmental baseline (reference operation), rather than aggregating those effects,* results in a jeopardy analysis that is "insufficiently comprehensive to 'insure' that any action carried out by a federal agency is 'not likely to jeopardize the continued existence' of a listed species."

Id. at *5 (quotations and citations omitted) (emphasis added).

As in American Rivers, it is likely NOAA in this case will argue that it has properly stated the aggregate jeopardy analysis test, as in fact it has at page 47 of the BiOp. ("The effects of the action under consideration include the direct and indirect effects . . . all of which are then

added to the environmental baseline, as described in [402.02]." And it is likely that NOAA will say it has considered what it terms non-discretionary impacts, such as the existence of the Sweetwater Dam, as it does appear to at Section 2.3.2.5. But as in NWF v. NMFS and American Rivers, a fundamental analytical flaw remains: the proposed action is compared to other operations, both a degraded environmental baseline and a "no-action" hypothetical, LOP BiOp at 47, and NOAA's jeopardy decision is then based on whether the proposed action is at least "better" than the degraded status quo. That is not the mandate of the ESA. ALCOA v. BPA, 175 F.3d at 1162, n.6. The LOP BiOp does not analyze what it should: whether BOR's action, given the current status of the species, and when combined with direct and indirect effects, the environmental baseline and cumulative effects, will jeopardize the continued existence of the listed species. 50 C.F.R. 402.14(g).

The BiOp's summary "Rationale for Jeopardy Determination," Section 2.4.1, displays the comparative reasoning:

> In the initial 10-year period of operation, conditions in Webb Creek would *remain unchanged*, while conditions in Sweetwater Creek would *likely improve from current conditions* and begin to resemble habitat characteristics common throughout the CRLMA . . . The short-term flows in Sweetwater Creek would support steelhead production at levels *similar to current production or slightly better*. *Slight improvements* . . . ensure that the steelhead subpopulation in the action area would remain *at least as large as it has been in the past, and offer some opportunity for increased production*.
>
> Low flow is the primary limiting factor for the affected subpopulation, and the proposed action would *increase flow sufficiently to provide higher production* for this important subpopulation of the DPS, and thus allow the CRMLA, MPG, and DPS to achieve a replacement growth rate over time.

LOP BiOp at 72-73.

This may sound appealing, but it is fundamentally the "comparative" jeopardy analysis that has been rejected by Ninth Circuit courts. Reciting the correct test and then making

conclusions of incremental improvement over a degraded baseline is inadequate under ALCOA, NWF v. NMFS and American Rivers. As the court stated in American Rivers: "[N]OAA's jeopardy analysis in the 2005 Upper Snake BiOp did not consider the *combined effects* of the proposed action and the existing environmental baseline, and thus did not provide the *comprehensive review* that was required under the ESA." Id. at *6 (emphasis added). The LOP BiOp concludes no more than that the proposed action will be incrementally better for Snake River steelhead than current conditions. That does not pass muster under the ESA.

III. THE BIOP'S CONCLUSION THAT LONG-TERM MINIMUM STREAM FLOWS ARE SUFFICIENT TO AVOID JEOPARDY AND ADVERSE MODIFICATION IS CONTRADICTED BY NOAA'S OWN EVIDENCE

The BiOp concludes that long-term (years 10-15) minimum flows under the proposed action will not cause jeopardy or adverse modification of critical habitat as prohibited by the ESA. This conclusion is contradicted by NOAA's own underlying information.

It is fundamental that a Section 7 BiOp must reflect consideration of relevant factors and contain an explanation of "a rational connection between the facts found and the choice made." PCFFA 2001, 265 F.3d at 1034. Under APA review, an agency may not offer an explanation for a decision "that runs counter to the evidence before the agency." Motor Vehicle Mfrs, 463 U.S. at 43. A BiOp is invalid "if it fails to use the best available scientific information as required by 16 U.S.C. § 1536(a)(2)." 265 F.3d at 1034.

The Tribe is not challenging whether NOAA assembled the "best available scientific information" on minimum stream flows for listed steelhead. NOAA's error is in approving an action which provides long-term minimum flows that are in fact contradicted by the scientific information NOAA assembled and purported to rely on. NOAA states that of the scientific methodologies it used to calculate minimum flows needed by Snake River steelhead, "no single

approach for setting minimum flows in the action area is clearly more suitable than another. However, the fish production analysis by Entrix (2004) stands apart as the only method that is directly based on a numeric response, while the other methods described in this appendix provide only a qualitative indicator of subpopulation response." LOP BiOp at B-2. "The long-term operation would provide minimum flows sufficient to maintain a stable population in the action area, roughly equal to the replacement rate, based primarily on the analysis by Entrix (2004)." Id. at 69.

The Entrix 2004 report is located at AR 11609-11628. That report states that "[w]hile none of our results prove what flows steelhead require to persist in Sweetwater and Webb Creeks, they do make a compelling argument that is supported by the best scientific data available." AR 11619. Minimum flows recommended in the 2004 Entrix document for Sweetwater and Webb Creek are shown in Table A.

Table A.

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Life Stage	J	J	S	S	S	S	J	J	J	J	J	J
Sweetwater Creek	3.5	3.5	20	20	20	10	3.5	3.5	3.5	3.5	3.5	3.5
Webb Creek	4	4	12	12	12	5	1.2	1.2	1.2	1.2	1.2	4

Critical life stage for minimum flows: J=Juvenile rearing, S=Spawning

Id.

NOAA has consistently recognized the Entrix 2004 report as the best scientific information available on minimum flows since its April 5, 2005 Draft LOP BiOp. AR 12173, 12224; LOP BiOp at 69, B-2. RPA #1 in the April 5, 2005 Draft LOP BiOp (which found jeopardy to the species from the proposed action) matched *exactly* the minimum flows recommended by Entrix and shown above in Table A. AR 12225. The flows were required and measured at the Sweetwater and Webb Creek diversion dams, with the statement "Data are from

Entrix (2004)." Id. (RPA #2 in the April 5, 2005 Draft BiOp had the "same basis" as #1, but authorized an initial eight-year phase of "less than necessary" flows while water saving measures were to be implemented. AR 12226.)

There is no dispute NOAA has had the Entrix 2004 report in its possession since before the April 5, 2005 Draft LOP BiOp. It based its flow recommendations in that BiOp on that information. And it still recognizes the Entrix 2004 report as the best scientific information in its possession in the final LOP BiOp. LOP BiOp at 69, B-2. Yet at some point in the consultation it chose to disregard the Entrix-recommended flows and authorize long-term minimum flows in the final BiOp that are significantly lower and contradicted by the Entrix data.

Long-term minimum flows under the final LOP BiOp are shown in Table B. LOP BiOp at 10-11.

Table B.

Long term minimum monthly instream flow rates (cfs) within 03/01/06 BiOp

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Life Stage	J	J	S	S	S	S	J	J	J	J	J	J
Sweetwater Creek at Diversion	≤4	≤4	≤10	≤10	≤5	2.5	2.5	2.5	2.5	2.5	≤4	≤4
Webb Creek at Diversion	≤2	≤2	≤6	≤6	≤4						≤2	≤2
Webb Creek at Mouth						1.2	1.2	1.2	1.2	1.2		

Critical life stage for minimum flows: S=Spawning; J=juvenile rearing.

For Sweetwater Creek, June – October minimum flows are approximately 71% of the Entrix flows. May is approximately 25% of Entrix flows. March and April are approximately 50%. Only November – February are roughly the same. For Webb Creek, July – October flows are identical, but are measured at the Webb Creek mouth under the final BiOp, thus losing any groundwater addition that would otherwise occur from the dam to the creek mouth. January – May flows are significantly lower, and only November and December are roughly similar.

The essential point is that NOAA has failed to explain itself -- to provide a "rational explanation" for its conclusion based on the "facts found." PCFFA 2001, 265 F.3d at 1034. It instead continues to point to the Entrix 2004 report as its best available scientific information, yet

drastically altered required long-term flows for listed steelhead, without any explanation of the change in conclusion. This is not harmless or remediable error under APA review: a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Motor Vehicle Mfrs., 463 U.S. at 43. The BiOp should be remanded to NOAA to provide a reasoned explanation of how the action will meet stream flow requirements of the listed steelhead, based on the "best available scientific information." NOAA may have assembled the latter, but its final BiOp disregards the flow recommendations provided in that very information.

IV. THE BIOP FAILS TO OFFER A REASONED EXPLANATION FOR THE "DROUGHT EXEMPTION"

Perhaps the most literally arbitrary aspect of the LOP BiOp is the "drought exemption," allowing a waiver of all minimum stream flow requirements once every three years. This aspect of the proposed action rests upon no factual support and is "triggered" by a Soldiers Meadow reservoir elevation that is not only unexplained by NOAA, but is subject to potentially arbitrary creation by BOR itself through project operation.

Under APA review, a court "must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." PCFFA 2001, 265 F.3d at 1034 (quotations and citations omitted). "Implicit" consideration of an issue in a BiOp is unacceptable: "when reviewing a biological opinion, we rely only on 'what the agency *actually said*' in the BiOp to determine whether the agency considered the appropriate factors." PCFFA 2005, 426 F.3d at 1091 (emphasis in original) (citing and quoting Gifford Pinchot Task Force, 378 F.3d 1059, 1072 & n.9 ("[W]e cannot assume that the FWS considered species recovery unless the FWS, in the BiOps, said that it was making this consideration)). A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Motor Vehicle Mfrs., 463 U.S. at 43.

The LOP BiOp provides a "drought exemption" waiver from all minimum flow requirements for steelhead one out of every three years, "with at least two years between waivers." LOP BiOp at 8. A second drought within three years triggers a "determination" by NOAA, BOR and the Tribe whether less than minimum flows can be provided. Id. Through its scientific literature summary, the BiOp recognizes the tremendous adverse effects of drought on fish populations in tributary streams. Id. at 41. "Based on the body of scientific literature cited in this Opinion regarding effects of low stream flows, there is little doubt that very few fish can survive several months in isolated pools that have near-lethal temperatures, no cover, and no food source, compared to survival in a stream with connected surface flows that buffer water temperatures and provide food and cover." Id. Low flows prevent juvenile steelhead from moving between habitat types that they "require for their survival." Id. at 42-43. Those few steelhead who survive tend to be "weak or small is size" and unlikely to survive "the first year they are in the ocean." Id. at 43 (study citations omitted).

Despite its recognition of the devastating effects of low stream flows on steelhead, the LOP BiOp merely notes that the effects of the action under the drought exemption will be "identical to the effects of past operations, described in the environmental baseline." Id. at 50. The BiOp then concedes that it only describes the "effects of the proposed action on stream flows when flows are not exempted[.]" Id. Undermining the allowance for LOP water uses to trump the needs of the steelhead under drought conditions, the BiOp recognizes the *particular* needs of steelhead in the action area during drought: historically "Sweetwater Creek likely functions as a refuge for catastrophes such as drought" and "is a notable exception to the drought-prone conditions that exist in most CRLMA streams due to the unique dynamics of Twenty One Ranch spring." Id. at 67.

The "trigger" for the drought exemption is particularly arbitrary and the LOP BiOp provides no explanation for it whatsoever. "Drought conditions are triggered when the volume of stored water in Soldiers Meadow is less than 1,800 acre-feet on May 31 of each year. A preliminary condition forecast will be provided to [NOAA] by May 31 each year and confirmed on June 30 each year." Id. at 8 (Section 1.2, "Proposed Action;" identical language used in implementing provisions of RPM #1 of ITS, pp. 79-80). Given that the Soldiers Meadow reservoir, and its elevations, are created by the agency's operation of the Soldiers Meadow Dam, there is no explanation in the LOP BiOp for why this drought-triggering elevation may not be simply a function of conditions created by the action agency's own operation of the project. It is fundamental that determination of a Section 7 consulting agency's consideration of a relevant factor must be based on "what the agency *actually said* in the BiOp." PCFFA 2005, 426 F.3d at 1091 (emphasis in original) (quotation and citation omitted).[6] The "drought trigger," and NOAA's unexplained approval of it in the LOP BiOp, stand in direct contrast to the ESA's "explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." TVA v. Hill, 437 U.S. at 185.

The LOP BiOp's conclusions ultimately provide nothing more than unsupported, unanalyzed assertions of the effect of the action's "drought exemption." No evidence is provided to support conclusions such as "occasional drought exemptions . . . would likely occur

[6] BOR's "Drought Trigger Analysis for Sweetwater Creek" memo, in the record, considers the irrigation needs of *the LOP* and concludes that reservoir storage is the proper measurement of "drought." AR 12420-21. It recommends the Soldiers Meadow elevation, 1800 feet, based on what, post hoc, characterizes particular past water seasons as droughts. Id. The BOR memo concludes with a revealing statement of drought considerations: "It seems the District [LOID] would be in the best position to make the call in the dry years, and would presumably be careful not to invoke the waiver knowing they would not be able to again for two years." Id. at 12421. NOAA may not "implicitly" rely on BOR's explanation, without explicitly providing its own. 426 F.3d at 1091.

at lower frequencies than events when stream flows are higher than the minimum flows . . . . Even with the drought exemption, there are normally still pools available where some juvenile steelhead may survive, and so the entire year class may not be lost." LOP BiOp at 69. The BiOp's jeopardy and adverse modification "rationales," Section 2.4.1 and 2.4.2, simply iterate earlier factually unsupported conclusions: "Even though production in is likely to drop below the replacement rate in drought years . . . [this would be "likely more than offset"] in the years with average or higher than average summer flows" and "[D]rought exemptions are likely to have a low rate of reoccurrence . . . which would not significantly affect the average production rate in the action area." These conclusions are not based on "facts found;" they are conclusory "assertions" that do not meet the analytical requirements of ESA jeopardy and adverse modification determinations. PCFFA 2005, 426 F.3d at 1092-93. Given the well-supported descriptions earlier in the LOP BiOp of the unique biological features of Twenty One Ranch spring and Sweetwater Creek, and of the devastating effects of drought on entire life cycles of listed steelhead, the BiOp's approval of the action's drought exemption from all minimum stream flow requirements nearly defines the lack of a "rational connection between the facts found and the choice made." PCFFA 2001, 265 F.3d at 1034.

V. THE LOP BIOP ARBITRARILY ALLOCATES WATER SAVING MEASURES IN A 50-50 RATIO BETWEEN THE LISTED SPECIES AND LOP WATER USES

The LOP BiOp's authorization of a 50-50 ratio sharing of water savings from improvements to the Sweetwater canal represents both a facially arbitrary decision, and an impermissible consideration of the water needs of the LOP, rather than the listed steelhead whose "continued existence" is the very purpose of NOAA's Section 7 consultation.

Under APA review, a court "must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." PCFFA

2001, 265 F.3d at 1034 (quotations and citations omitted). An agency may not "rel[y] on factors which Congress has not intended it to consider[.]" Motor Vehicle Mfrs., 463 U.S. at 43. A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Id.

A fundamentally disturbing aspect of the LOP BiOp is the extent to which it appears crafted around the needs and timetable of the BOR and LOID, rather than the listed steelhead. As noted, the 10-year "initial" period is based on the "reasonable time" needed for "LOID and BOR to explore, develop, and implement" water conservation measures. LOP BiOp at 8. This 10-year period is explained in part so as to allow LOID to "line 2600 linear feet" of the Sweetwater canal, and then add "one-half of the water savings" to the water bank to add to stream flows for steelhead during this 10-year period. Id. (stated nearly identically at 79, implementing provisions to RPM #1). Nothing else in the BiOp explains this aspect of the action. The BiOp states that BOR's "commitment to provide the specified minimum stream flows" is not dependent on the water conservation measures. Id. at 7. Whether the BiOp's conclusions, however, as to the sufficiency of the 10-year "initial" minimum flows are influenced by this aspect of the action is less clear. Its inclusion as a mandatory implementing provision of RPM #1 to the ITS suggests that it was part of NOAA's consideration. Id. at 79.

Regardless, as a mitigation measure, the water savings allocation is plainly flawed: it is not "certain to occur [and] subject to deadlines or otherwise-enforceable obligations[.] Center for Biological Diversity, 198 F.Supp.2d at 1152. More obviously, it bears no relation to NOAA's legal obligation to "address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." Id. Instead, the BiOp approves a literally arbitrary 50-50 allocation of (uncertain) water savings between the steelhead and the LOP. The reasoning

behind this mathematical allocation "cannot be reasonably discerned." PCFFA 2005, 426 F.3d at 1092. It plainly indicates NOAA's consideration of the needs of *the LOP* on an equal basis with its legal obligation to insure the "continued existence" of the listed steelhead. As with previously discussed aspects of this BiOp, NOAA's decision stands in contradiction of the ESA's "explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." TVA v. Hill, 437 U.S. at 185.

VI. DUE TO THE PROJECT'S TECHNICAL DEFICIENCIES, MINIMUM STREAM FLOW MEASURES VIOLATE THE ESA'S REQUIREMENT THAT THEY BE "CERTAIN TO OCCUR" AND "CAPABLE OF IMPLEMENTATION"

An additional fundamental flaw in the LOP BiOp involves certainty of implementation. Beyond the flaws discussed above regarding both short and long-term minimum flows, NOAA has failed to establish that the minimum flow quantities can in fact be accurately released, measured and verified, and the record indicates that they cannot.

It is insufficient for a Section 7 BiOp to simply specify ESA mitigation measures: "Mitigation measures must be reasonably specific, *certain to occur, and capable of implementation*[.]" Center for Biological Diversity, 198 F.Supp.2d at 1152 (emphasis added; citing, inter alia, Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)). The LOP BiOp's minimum flow measures fail to meet this test.

The LOP BiOp documents the fact that minimum flows at the Sweetwater dam (the location of measurement of Sweetwater Creek minimum flows), will not be accurate. "Actual flows provided [during a 2004 three-month voluntary flow period] were less than 1.5 cfs on average, due to difficulty controlling discharges at Sweetwater Creek diversion dam with a gate that is not designed to precisely regulate flows in small increments necessary to provide consistent flows of 1.5 cfs." LOP BiOp at 4. The BiOp further indicates that accurate minimum

flow quantities are not presently capable of implementation, when it describes BOR's obligation (in implementing mandatory RPM #3 as to "monitor[ing] stream flows") to "develop a monitoring plan" including "gauging of stream flows to verify that applicable daily minimum flows are provided as described in RPM #1." Id. at 80-81.

It adds insult to injury to the listed steelhead that the minimum flow requirements in the LOP BiOp, deficient for the multiple reasons outlined earlier, are additionally not even "certain to occur" or "capable of implementation," due to the technological deficiencies of the project in both accurately releasing and measuring minimum flows. For all of the reasons set forth in this brief, the LOP BiOp should be remanded to NOAA; on the instant point, NOAA should require that BOR take *immediate* steps to be capable of accurately providing and verifying minimum stream flows necessary for Snake River steelhead.

VII. THE LOP BIOP FAILS TO CONSIDER AN "IMPORTANT ASPECT OF THE PROBLEM" BY FAILING TO ADEQUATELY CONSIDER FISH PASSAGE AT THE SWEETWATER CREEK DAM

The LOP BiOp fails to consider an important aspect of the impact of the LOP on listed steelhead by failing to adequately consider fish passage at the Sweetwater Creek diversion dam. The LOP BiOp fails to recognize, among other things, the fish passage design analysis already completed by MWH Americas, Inc., under contract to BOR, in 2005.[7]

Agency action is unlawful when the agency has "entirely failed to consider an important aspect of the problem[.]" Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. A reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." Id.

[7] See Exhibit C in Support of Tribe's Motion for Summary Judgment, *Bureau of Reclamation letter "Final Predesign Memorandum for Fish Passage and Screening at Sweetwater Diversion Dam (March 28, 2005)* and *Bureau of Reclamation "Final Pre-Design Report, Sweetwater Creek Diversion Dam, Evaluation Study for Fish Passage and Screening (February, 2005)"* (Table of Contents and Executive Summary).

"Implicit" BiOp consideration of an issue is unacceptable: "when reviewing a biological opinion, we rely only on 'what the agency *actually said*' in the BiOp to determine whether the agency considered the appropriate factors." PCFFA 2005, 426 F.3d at 1091(emphasis in original) (citing and quoting Gifford Pinchot Task Force, 378 F.3d at 1072 & n.9).

The LOP BiOp, in background descriptions, recognizes impact of the Sweetwater dam: "The dam in the mainstem of Sweetwater Creek eliminates [steelhead] access to roughly one mile of the mainstem of Sweetwater Creek and more than 25 miles of perennial headwater streams of the East and West Forks of Sweetwater Creek. At least several miles of the lower portions in the East and West Forks of Sweetwater Creek could be used by steelhead for spawning or rearing if they were accessible, however the upstream extent of potential steelhead habitat is not known precisely." LOP BiOp at 32. Yet this is described merely as "Past LOP Operation." Id. The BiOp places the passage-blocking effect of the Sweetwater dam in the environmental baseline, as a past action therefore beyond the discretion of the action agency to modify. Id. at 46. The LOP BiOp's sole consideration of the addressing passage at the Sweetwater dam then comes in the ITS's RPM #5 and its implementing provisions. Id. at 78, 81-82.

There, ironically, the BiOp merely requires BOR to "complete preliminary actions to determine the feasibility of providing fish passage at the [Sweetwater dam] and any potential benefits to steelhead from improved passage, and develop a conceptual design for any modifications found to be warranted." Id. at 78. This is ironic because NOAA, as the consulting agency which must "consider all relevant factors," PCFFA 2001, 265 F.3d at 1034, does not indicate its consideration that these "preliminary actions" have already occurred. Fish passage design analysis was completed by MWH Americas, Inc., under contract to BOR, in 2005. See

Exhibit C.

More fundamentally, the LOP BiOp does not reveal adequate consideration of the Sweetwater dam as a part of the "problem" addressed in the Section 7 consultation. As the Ninth Circuit stated in NWF v. NMFS, the "*basic existence* of the FCRPS dams" may be outside the scope of the Section 7 consultation, but "[a]ll aspects of FCRPS operations, and any dam maintenance *or structural modifications*, are within the agencies' discretion, and accordingly are subject to section 7." 481 F.3d at 1234 (emphasis added). NOAA's meager requirement of "preliminary" study of fish passage – that has already occurred – does not meet the requirements of Section 7. The LOP BiOp does not reveal that NOAA in fact considered structural modifications to the Sweetwater dam as an "important aspect of the problem." 463 U.S. at 43. The Court must look to what NOAA "actually said" to determine whether it "considered the appropriate factors." 426 F.3d at 1091. Here, because NOAA assumed away the "existence of the dam," the LOP BiOp does not reveal that NOAA properly considered structural modifications to the Sweetwater dam as an important, possibly a critical, aspect of the problem posed to listed Snake River steelhead by the LOP.

CONCLUSION

For all of the above reasons, the Court should grant the Nez Perce Tribe's motion for summary judgment as against defendant NOAA Fisheries. Snake River Basin steelhead, listed as threatened for over 10 years, deserve a proper jeopardy analysis and protective mitigation measures at a federal project such as the LOP, to fulfill the ESA's mandate that federal agencies "afford first priority to the declared national policy of saving endangered species." TVA v. Hill, 437 U.S. at 185.

Dated: November 16, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November, 2007, I filed for the Nez Perce Tribe the foregoing Memorandum in Support of Nez Perce Tribe's Motion for Summary Judgment, electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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