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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NEZ PERCE TRIBE, Plaintiff, vs. NOAA FISHERIES; D. ROBERT LOHN, Regional Administrator of NOAA Fisheries; Defendants.	)	Case No. 3:07-cv-00247-BLW **COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE NEZ PERCE TRIBE'S MOTION FOR SUMMARY JUDGMENT [DOCKET NO. 18]**

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TABLE OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
BA	Biological Assessment
BiOp	Biological Opinion
BOR	United States Bureau of Reclamation
CRLMA	Clearwater-Lower Mainstem Population
DPS	Distinct Population Segment
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
FCRPS	Federal Columbia River Power System
FWS	United States Fish & Wildlife Service
IFIM	Instream Flow Incremental Methodology
ITS	Incidental Take Statement
LOID	Lewiston Orchards Irrigation District
LOP	Lewiston Orchards Project
MPG	Major Population Group
NMFS	National Marine Fisheries Service
NOAA	National Oceanic & Atmospheric Administration
RPA	Reasonable and Prudent Alternative
RPM	Reasonable and Prudent Measure
WUA	Weightable Usable Area

INTRODUCTION

On March 1, 2006, the National Marine Fisheries Service ("NMFS") issued a biological opinion pursuant to Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), regarding the United States Bureau of Reclamation's ("BOR") proposed operation and maintenance of the Lewiston Orchards Project ("LOP").[1/] The process leading to the issuance of the BiOp began in 1999 and, over the next five years, NMFS spent extensive time meeting and coordinating with BOR, the Nez Perce Tribe, and outside scientists and experts. NMFS's scientists and managers repeatedly visited the area to conduct informal surveys, evaluate the facilities, and to assess the LOP operations, fish habitat, populations, and hydrologic conditions. NMFS's experts spent considerable time examining over 145 scientific studies, including a thorough and detailed review of the available scientific methodologies used to predict fish responses to flow alterations. Moreover, NMFS thoroughly examined and analyzed every aspect of the past operations, BOR's proposed action, the action area, the Snake River steelhead distinct population segment ("DPS"), and the best available scientific information.

The product of this extensive administrative process is a thorough, well-reasoned biological opinion ("BiOp") in which NMFS concluded that BOR's proposed action is not likely to jeopardize the continued existence of the Snake River Basin steelhead DPS or destroy or adversely modify its critical habitat. BiOp at 72. The BiOp and the administrative record demonstrates that NMFS fully considered all relevant factors, issued articulate and reasoned determinations, and predicated its analysis and conclusions on the requirements of the ESA and the best available scientific data, as required by applicable law. See Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410,

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[1/] On October 18, 2007, NMFS filed with the Court the administrative record for the BiOp. See Dkt. No. 14. Defendants herein cite to documents in the administrative record ("AR") by referencing the document's bates stamp number (e.g., "AR xxxx"). For consistency with the Nez Perce Tribe's opening memorandum, Defendants will cite to the biological opinion by referencing the page number of the biological opinion (e.g., "BiOp at x").

1414 (9th Cir. 1990) ("The relevant inquiry is whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" (citation omitted)).

Despite NMFS's comprehensive biological opinion, Plaintiff the Nez Perce Tribe ("Tribe") raises several arguments challenging the BiOp. See Mem. in Supp. of Nez Perce Tribe's Mot. for Summary Judgment ("Pl. Br.") (Docket No. 23). However, not one of the Tribe's arguments are borne out by the BiOp or the administrative record. While the Tribe repeatedly contends that NMFS failed to adequately address certain issues – such as BOR's proposed short-term operations, a particular scientific study, or various aspects of BOR's proposed action, Pl. Br. at 12-17, 21-32 – the plain text of the biological opinion belies these assertions. See Sections II.A, C-E, infra. Moreover, while the Tribe takes issue with NMFS's analytical approach in arriving at its ultimate determinations, Pl. Br. at 17-21, the Tribe's arguments rely on past biological opinions prepared in vastly different contexts and generally disregard the biological opinion the Tribe seeks to challenge in this case. See Section II.B., infra.

At bottom, this lawsuit represents the Tribe's fundamental disagreement with BOR's proposed operations of the LOP, with the Tribe contending that BOR should utilize its authorities to operate the LOP as the Tribe desires, or not at all. For the past several years, the Tribe has repeatedly sought to eliminate the LOP, to no avail. See, e.g., AR 12149-52, 13044. Throughout the consultation process, the Tribe repeatedly demanded that BOR operate the LOP as the Tribe believed was appropriate. AR 12149-67,13043-44, 13201, 13087, 12794, 12811-12, 13074, 12905, 13094, 13181, 11609-11628. Similarly, as demonstrated by the record, BOR repeatedly contended throughout much of the consultation process that it need not modify its prior operations of the LOP in order to comply with the ESA's legal requirements. AR 12441 & Attachs., 12989-91, 13107 & Attachs., 13108 & Attachs., 12444-45, 12861, 12874.

NMFS, however, at all times firmly adhered to its independent, expert, and advisory role under the ESA – to rationally examine the best available scientific data, the threats to and needs of listed species, and the effects of BOR's proposed operations on steelhead and its habitat when issuing a scientifically-based, reasoned determination as to whether BOR's proposed action is likely to jeopardize the continued existence of the Snake River Basin steelhead DPS or destroy or adversely modify critical habitat. 16 U.S.C. § 1526(a)(2). NMFS did not accept BOR's contentions that past operations of the LOP are acceptable under the ESA, and NMFS did not accept the Tribe's contentions that BOR must do more than it ultimately proposed in order to comply with the ESA. The fact that the Tribe fundamentally disagrees with the LOP and NMFS's reasoned, expert fact-finding provides no basis for overturning the BiOp. NMFS's "interpretation of complex scientific data" is entitled to substantial deference and should be upheld. See Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv., 475 F.3d 1136, 1150 (9th Cir. 2007); Ranchers Cattleman Action Legal Fund v. U.S. Dep't of Agric., 415 F.3d 1078, 1093 (9th Cir. 2005) ("Deference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise.").

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND – THE ENDANGERED SPECIES ACT.

Congress enacted the Endangered Species Act of 1973 to protect and conserve endangered and threatened species. 16 U.S.C. § 1531(b). As applicable here, ESA § 7(a)(2) provides that each Federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). Section 7(a)(2) imposes both a substantive obligation (to ensure that agency actions are not likely to "jeopardize" the continued

existence of a listed species) and a procedural obligation (to consult with the appropriate agency). Section 7(b)(3)(A) of the ESA states that, once the consultation process contemplated by ESA § 7(a)(2) has been completed, "the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). Further, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [ESA § 7(a)(2)] and can be taken by the Federal agency . . . in implementing the agency action." Id.

Regulations promulgated jointly by the Secretaries of Commerce and the Interior furnish a structure for consultation concerning the likely effects on listed species of proposed federal actions. See 50 C.F.R. Pt. 402.[2/] *Inter alia*, the regulations establish a process of "formal consultation," see 50 C.F.R. § 402.14, which culminates in the issuance of a biological opinion, see 50 C.F.R. 402.14(h), that includes a "detailed discussion of the effects of the action on listed species or critical habitat," 50 C.F.R. § 402.14(h)(2). The biological opinion assesses the likelihood of jeopardy to listed species and whether the proposed action will result in destruction or adverse modification of designated critical habitat. See 50 C.F.R. § 402.14(g).

In a biological opinion, a federal agency is advised as to whether the proposed action, taken together with its cumulative impacts, is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. 50 C.F.R. § 402.14(h)(3); 50 C.F.R. § 402.02 (definition of "jeopardize the continued existence of"). If it is

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[2/] NMFS, also referred to as the National Oceanic and Atmospheric Administration Fisheries ("NOAA Fisheries"), administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. §§ 222.101(a), 223.102. The United States Fish and Wildlife Service ("FWS") implements the ESA with respect to species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. §§ 17.11, 402.01(b).

determined that a "take"[3/] is reasonably certain to occur incidental to the proposed action, but that the action and associated incidental take will not violate the ESA § 7 jeopardy standard, then the reviewing agency attaches an incidental take statement to the biological opinion. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i-v). The incidental take statement specifies the predicted impact to the species, the reasonable and prudent measures that the agency determines necessary to minimize take, and the terms and conditions required to implement the reasonable and prudent measures. Id. If the action complies with the terms and conditions of the incidental take statement, ESA § 7(o)(2) exempts the level of take specified from the ESA § 9 take prohibition. 16 U.S.C. § 1536(o)(2).

II. FACTUAL BACKGROUND

A. The Snake River Basin Steelhead Distinct Population Segment.

The "species" at issue in this case is the Snake River Basin steelhead DPS. See 16 U.S.C. § 1532(16) (defining "species" to include any distinct population segment). The Snake River Basin steelhead DPS was first listed as a "threatened" species under the ESA on August 18, 1997, 62 Fed. Reg. 43,937, but is now governed by a subsequent listing determination issued on January 5, 2006, 71 Fed. Reg. 834.[4/] The Snake River steelhead DPS includes all naturally spawned, anadromous populations of steelhead in streams in the Snake River Basin of southeast Washington, northeast Oregon, and north and central Idaho, as well as fish produced from six artificial propagation programs. 71 Fed. Reg. at 849.

As anadromous fish, adult steelhead migrate from the ocean to spawn in freshwater streams, where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. AR

[3/] ESA § 9 makes it unlawful for any person (including the federal government) to "take" a listed species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined in the statute as "to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect. . ." 16 U.S.C. § 1532(19).

[4/] The two listing determinations were largely a product of the agency's application of different policies, the ESU and DPS policy, to identify the "species" under consideration for listing under the ESA. See 16 U.S.C. §§ 1532, 1533; see 71 Fed. Reg. 834.

10119; BiOp at 15. Steelhead typically leave freshwater habitat at two to three years of age, AR 12280, and undergo a complex physiological change (termed smoltification) in order to make the transition from freshwater to saltwater. AR 12280. Steelhead can spawn more than once, and steelhead pair to lay and fertilize 2,500 to 10,000 eggs in freshwater gravel nests or "redds." AR 10119, 12280. Depending on water temperatures, eggs incubate for several weeks or months before hatching as "alevins" (a larval life stage dependent on food stored in a yolk sac). Id. Following yolk sac absorption, alevins emerge from the gravel as juveniles called "fry" and begin actively feeding. Id.; BiOp at 15-16; AR 10119-21, 4376, 7789-7814.

Steelhead are generally classified as summer-run steelhead, which identifies the period of peak migration activity, and steelhead generally enter the Columbia River from late June to October. AR 10143. Steelhead hold in the tributaries over the winter and move upstream to smaller tributaries to spawn the following spring (March to May). BiOp at 15. Summer-run Snake River steelhead are classified into two groups: A-run steelhead predominately have spent one year in the ocean ("age-1 ocean fish"), whereas B-run steelhead are larger, predominated by fish which have spent two years in the ocean ("age-2 ocean fish") before migrating to freshwater to spawn. Id. at 16. Steelhead in the LOP action area consist of A-run steelhead. Id.

Within the range of the Snake River Basin Steelhead DPS, there are 289 watersheds, and "the DPS remains spatially well distributed in each of the six major geographic areas in the Snake River Basin." 71 Fed. Reg. at 855-56. Population effects of the proposed action are evaluated at several hierarchical levels of organization. BiOp at 67. The broadest level is the Snake River Basin steelhead DPS, which consists of six major population groups ("MPGs"): Clearwater River, Grande Ronde River, Salmon River, Imnaha River, and the Hells Canyon Tributaries MPG. AR 12281-82. Steelhead in the action area belong to the Clearwater River MPG. Id. The MPGs are comprised of a total of 26 independent populations, AR 12281-82, six of which make up the Clearwater River

MPG. BiOp at 67. Steelhead in the action area belong to the Clearwater-Lower Mainstem ("CRLMA") population. Id.[5/] Available data "estimates potential steelhead smolt production in the [LOP] action area to be 5,000 smolts, which would be two percent of the CRLMA population, if all streams, including the action area, were producing fish near their potential." Id. at 40.

On September 2, 2005, NMFS designated critical habitat for the Snake River Basin steelhead DPS. 70 Fed. Reg. at 52630. In total, 8,049 miles of streams and 4 square miles of lakes were designated as critical habitat. 70 Fed. Reg. at 52673. NMFS excluded 39 miles of stream that overlap with Indian Lands, in part due to the requests of various Indian Tribes. Id.; 70 FR at 52783-52807 (map of designated critical habitat). The majority of the LOP action area is designated critical habitat for the DPS, with the exception of portions of Webb and Sweetwater Creeks upstream from the diversion dams and Indian fee lands in the lower portion of Sweetwater Creek. BiOp at 3; AR 13201.

B. The Lewiston Orchards Irrigation Project.

The Lewiston Orchards Project consists of three storage reservoirs (Lake Waha, Soldiers Meadow Reservoir, and Mann Lake Reservoir), four small diversion dams, and a canal system that collects and consolidates water from Captain John, Sweetwater, and Webb Creeks. BiOp at 6-7. The LOP was privately owned and operated beginning in 1906, and Congress authorized the repair and improvement of the LOP water collection and distribution system for irrigation and industrial water supply on July 31, 1946. Id. at 1. In 1948, the Lewiston Orchards Irrigation District ("LOID") deeded the entire collection, reservoir, distribution system, and all water rights to BOR. Id.

Pursuant to a July 10, 1947, contract between LOID and BOR, BOR owns the system, and LOID operates and maintains the LOP facilities. BiOp at 1. While the contract specifies that BOR

[5/] The term "population" is generally defined as a group of fish of the same species that spawns in a particular drainage at a particular season and, to a substantial degree, does not interbreed with fish from other groups spawning in a different place or during a different season. BiOp at 21.

can deliver up to 2.2 acre-feet of water annually for each acre of irrigated land (for a total of 8,444 acre-feet), BOR has provided on average only 1.4 acre-feet per acre of irrigable land (5,373 acre-feet) over the past 12 years, or 64 percent of the volume contracted for delivery. Id. at 32.[6/] Absent the LOP, "existing claims by third parties would likely enable water users to divert most or all of the water in summer." Id. at 31. The LOP originally served an agricultural based community but, through steady urban and suburban development, currently "provides irrigation water for agricultural, urban, and suburban lands." Id. at 1. The LOP serves about 5,700 municipal accounts with an approximate consumption of 1,800 million gallons per year. Id. at 33-34.

The LOP operates primarily during the summer, with infrequent diversions or withdrawals during the winter months. BiOp at 33-34. Irrigation water comes from surface water collected from the Craig Mountain watershed at Soldier's Meadow reservoir from November through late June or early July of each year and is released, as needed, into the Sweetwater Creek via the Webb Creek diversion dam and Webb Creek canal. Id. at 33; AR 11349. Water from the West Fork of the Sweetwater Creek is stored in the offstream Lake Waha and pumped back into the Sweetwater Creek during the irrigation season. Id. The Sweetwater Creek diversion dam diverts surface flows into the Sweetwater Canal, which empties into Mann Lake. Id. Water for irrigation and fire protection is furnished to LOID via pipeline, and water for municipal uses is furnished to LOID through a system of wells and storage facilities. AR 11347-49; AR 13201(map of the LOP).

C. The ESA Consultation Over The Proposed Operation And Maintenance Of The Lewiston Orchards Project.

The process leading to the issuance of the BiOp began in 1999 after NMFS completed consultation with BOR on the effects of ongoing operations and maintenance activities at BOR

[6/] For ease of reference, Defendants' will refer to BOR as the operator of the LOP, although LOID manages and operates the LOP pursuant to the July 10, 1947 contract. See also BiOp at 1 (summarizing the July 1947 contract).

facilities in the Snake River Basin. Id. at 2 (noting that the 1998-1999 consultation on BOR facilities did not fully evaluate the effects of the LOP; consequently, a separate consultation was initiated to evaluate the effects of the LOP); see also AR 10982 (BOR's 1998 biological assessment ("BA")); AR 11343 (BOR's 2001 BA). Over the next five years, NMFS spent extensive time meeting and coordinating with BOR, the Nez Perce Tribe, and outside scientists and experts, and NMFS thoroughly examined and analyzed every aspect of the proposed action, the action area, and Snake River Basin steelhead DPS. BiOp at 2-6. Between 1999 and 2005, NMFS's professional scientists and managers repeatedly visited the action area, conducting surveys and evaluating the facilities, the operations, fish habitat and populations, and hydrologic conditions. Id. at 3; AR 12457-62, 13290, 13296. In addition, NMFS's experts spent considerable time examining over 145 scientific studies, including a thorough and detailed review of the available scientific methodologies used to predict fish responses to flow alterations. BiOp at Appx. B.

During the early stages of the consultation, BOR proposed to continue operating the LOP, as it has done over the past 60 years, in perpetuity. See AR 12179, 12180 ("The proposed action described in [BOR's BA] would allow LOID unrestricted withdrawal of water . . . up to the limit of the contracted water volume or water right, physical limitations of the facilities, and water availability."). During these initial stages of the ESA consultation, NMFS preliminarily determined that such unaltered operations of the LOP in perpetuity would likely jeopardize the Snake River steelhead DPS. See AR 12223-24 (explaining that "The LOP would continue in perpetuity to harm and kill steelhead in the action area, which compounds the number of steelhead exposed to the effects of the action in each subsequent year of operation.").

Following the issuance of the draft BiOp, BOR revised its "proposed action" to provide substantial improvements in minimum instream flows and to substantially curtail the temporal scope of the proposed action under review. See BiOp at 6-11; AR 12314-30 (BOR's amended proposed action, requiring re-evaluation of operations through formal ESA § 7 consultation after 15 years).

BOR's amended proposed action was limited to a 15-year period (versus operations in perpetuity) and contained both a short-term (1-10 years) and long-term (10-15 years) operational plan. Id. at 6, 7. BOR explained that the short-term operational period was proposed in order to provide a reasonable amount of time for LOID and BOR to explore, develop, and implement steps to conserve water, while providing minimum flows in Sweetwater Creek sufficient to maintain connected surface flows. Id. at 8; AR 12314, 12316.

During the short-term operational period, BOR committed to ensuring that, at all times during the summer months (June 1 through October 31), at least 1 cfs of water is passed over the Sweetwater diversion dam, with limited exceptions. BiOp at 7.[7/] By no later than 2012, BOR proposed to increase the minimum flows in Sweetwater Creek to 1.5 cfs from June 1 through October 31. Id. at 7. BOR further proposed to allocate 50 percent of any water savings achieved through dam and canal improvement projects to instream flows and, during the winter months when the LOP is typically not diverting water (November through May), to ensure that specified levels of natural flows remain in the streams when the LOP is diverting or transferring water. See id. at 7, 8 (Table 2, providing specified minimum flows when the LOP is operating outside of the irrigation season).

For the long-term operational period (January 2016 to December 2021), BOR committed to provide, from June 1 to October 31 of each year, at least 2.5 cfs of water over the Sweetwater Creek diversion dam and at least 1.2 cfs of flow at the mouth of the Webb Creek. BiOp at 10. BOR's proposal to provide the minimum flows is not dependent on achieving any water savings measures, indicating BOR's unqualified commitment to provide the long-term minimum flows in Sweetwater and Webb Creeks. Id. at 7, 10. Outside of the normal irrigation season, when the LOP is rarely

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[7/] One of the limited exceptions was BOR's proposed drought exemption, which specified that BOR could waive the minimum flow requirements one out of every three years, with at least two years between waivers, during drought conditions, which are measured and triggered when the storage volume at Soldiers Meadow reservoir is less than 1800 acre-feet on May 31 of each year. BiOp at 8; AR 12319.

operated (November through May), BOR committed to ensure that specified levels of natural flows remain in the streams when the LOP is diverting or transferring water. Id. at 11 (Table 3 and 4).

After carefully reviewing BOR's revised proposed action, and based on an extensive evaluation of the best available scientific data, NMFS issued a biological opinion concluding that BOR's revised proposed action is not likely to jeopardize the continued existence of the Snake River Basin steelhead DPS or destroy or adversely modify its critical habitat. BiOp at 72. NMFS ultimately spent over five years analyzing and working through the very complex issues attendant with issuing an expert opinion on the likely effects of BOR's proposed operations on the Snake River Basin steelhead DPS. Id. at 1-6. Throughout the lengthy consultation period, NMFS received a great deal of pressure to conform its analysis and expert conclusions to the views advocated by BOR and the Nez Perce Tribe.[8/] However, as borne out by the administrative record, NMFS firmly adhered to its role as an independent, expert scientific agency, and its BiOp is fully supported by the best available scientific data and the administrative record.

STANDARD OF REVIEW

Agency decisions are reviewed under the Administrative Procedure Act's ("APA") deferential standard of review and may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See, e.g., Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1008-09 (9th Cir. 2006) (quoting Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1238 (9th Cir. 2005)); 5 U.S.C. § 706(2)(A). "This standard of review is highly deferential; the court must presume the agency action to be valid." Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1992) (citations omitted). "The relevant inquiry is whether the 'agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)

[8/] See AR 12149-67,13043-44, 13201, 13087, 12794, 12811-12, 13074, 12905, 13094, 13181, 11609-11628, 12441 & Attachs., 12989-91, 13107 & Attachs., 13108 & Attachs., 12444-45, 12861, 12874.

(citation omitted).

"[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). This Court must uphold the agency's decision so long as the agency's path may "reasonably be discerned." Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974). "Deference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise." Ranchers Cattleman Action Legal Fund v. U.S. Dep't of Agric., 415 F.3d 1078,1093 (9th Cir. 2005) (citing Arizona Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001)).

In addition, judicial review of final agency action under the APA is generally limited to the administrative record before the agency. 5 U.S.C. § 706; see Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 419-20. "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (citing Overton Park). "In applying [the APA], the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. at 142. Consideration of extra-record evidence "to determine the correctness or wisdom of the agency's decision is not permitted . . . ." Envtl. Def. Fund v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981).[9/]

[9/] In support of its motion, the Tribe submits several materials that are not part of the administrative record. See Declaration of Emmit Taylor, Jr. (Dkt. #20) (including Exhibits); Exhibit 3 to Exhibits in Support of Nez Perce Tribe's Motion for Summary Judgment ("Pl. Ex. 3") (Dkt. #21). However, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Friends of the Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986) (emphasis added) (citations omitted). Because Plaintiff has wholly failed to meet its burden of demonstrating that consideration of the extra-record materials is proper, Defendants respectfully request that the Court strike Plaintiff's extra-record materials. See Southwest Ctr. for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450-

ARGUMENT

I. THE 2006 BIOP SHOULD BE UPHELD BECAUSE IT IS RATIONAL, FULLY SUPPORTED BY THE ADMINISTRATIVE RECORD, AND ENTITLED TO DEFERENCE.

As explained below, NMFS's BiOp should be upheld, as NMFS considered all relevant factors and issued a reasoned biological opinion fully supported by the best available science and the administrative record. ESA § 7(a)(2) requires BOR to insure that the planned operation and maintenance of the LOP is not likely to jeopardize the continued existence of the Snake River steelhead DPS or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). NMFS, as the resource agency, provides an expert opinion on the effects of a federal action on listed species, thereby assisting the action agency (BOR) in complying with the ESA's substantive obligations. See 16 U.S.C. § 1536(b)(3)(A). Here, the inquiry that NMFS was charged with conducting was an examination of whether BOR's proposed operation and maintenance of the LOP is likely to jeopardize the continued existence of the listed Snake River Basin steelhead DPS – by "reduc[ing] appreciably the likelihood of both the survival and recovery of [the DPS] in the wild by reducing the reproduction, numbers, or distribution" of the DPS – and whether BOR's proposed action is likely to or destroy or adversely modify critical habitat. 50 C.F.R. § 402.02; 16 U.S.C. § 1536(a)(2).

The heart of NMFS's analysis centers on NMFS's considered evaluation of the impacts of water withdrawals on Snake River steelhead and its habitat. NMFS thoroughly analyzed the area directly or indirectly affected by the LOP, noting that the LOP affects surface flows in approximately 19 or more miles of fish-bearing streams in the Lapwai Creek drainage (7 miles in Sweetwater Creek, 6 or more miles in Webb Creek, and 6 or more miles in Lapwai Creek), and that the entire action area affects less than one percent of the present area occupied by Snake River steelhead DPS. BiOp at 12-13. NMFS then identified the biological requirements for the DPS, identifying as most relevant

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51 (9th Cir. 1996) (Plaintiff bears the burden of demonstrating that record is insufficient for judicial review and that one of the limited exceptions to the general rule that review is limited to the record applies); see also Section II.E, infra (discussing Plaintiff's improper and mistaken reliance on Ex. 3).

the timing and volume of stream flows and water temperatures in stream channels. Id. at 37, 40-45. NMFS described how these requirements influence the growth and survival of steelhead through the alteration of spawning, rearing, and migration activities. Id. at 34-43, 49-54, 63-66. For instance, NMFS explained that "[r]eductions in surface flows reduce the quantity of available habitat by drying portions of the stream that would otherwise retain water, and reduce the quality of habitat from a variety of mechanisms including changes in water temperatures, reduction in food availability, and decreased ability to move within the stream." Id. at 36.

NMFS also provided an overview of the environmental conditions affecting status and trends of steelhead in the Snake River Basin and in terms of steelhead's biological requirements:

> Water withdrawals are a significant cause of first-year mortality in the Snake River Basin, and likely are a large contributor to the declining trends in population growth of Snake River . . . steelhead. . . . Most of the streams accessible to Snake River . . . steelhead are largely intact, with mostly minor to moderate alterations in aquatic conditions due to the prevalence of undeveloped [Federal] lands. However, aquatic conditions in certain drainages are severely altered by water withdrawals, agriculture, mines, road systems, and other developments; and hydropower dams associated with the Federal Columbia River Power System (FCRPS) have eliminated access to roughly 600 miles of streams historically accessible to . . . steelhead.

Id. at 19. NMFS then assessed the significance of past habitat losses and degradation in the action area, id. at 36-45; identified the cause of the habitat losses, id. at 19-21; identified the status and trends of the Snake River steelhead DPS and the CRLMA population in the Snake River basin and the Lower Clearwater River Basin, id. at 21-27; assessed the habitat and biological conditions of the Sweetwater and Webb Creek watersheds, including those resulting from past operations of the LOP, id. at 28-40; and assessed the status and trends of steelhead in the action area, id. at 40-46.

After evaluating the environmental baseline,[10/] NMFS thoroughly considered and analyzed the direct, indirect, and cumulative effects of BOR's proposed operations of the LOP for the next 15

[10/] The environmental baseline represents the "present environment in which the species . . . exists," Endangered Species Act of 1973, As Amended, 51 Fed. Reg. at 19,932; 50 C.F.R. § 402.02 (defining environmental baseline"), and "is essentially the status of the health of the species at a snapshot in time." Westlands Water Dist. v. U.S. Dep't of Interior, 275 F. Supp. 2d 1157, 1194 (E.D. Cal. 2002), aff'd in part, rev'd in part, 376 F.3d 853 (9th Cir. 2004).

years. BiOp at 46-71. In short, NMFS found that the Snake River steelhead DPS has a low probability of going extinct in the next 50-75 years under the current environmental baseline, while the overall extinction risk remains high within the next century under present population growth rates, id. at 18, 27, 45; that steelhead have persisted in the action area under the current baseline conditions for nearly 60 years of LOP operations, where no minimum instream flows were provided, id. at 34, 73; that BOR's proposed short-term minimum instream flows provide slightly better habitat conditions than the current environmental baseline, id. at 72-73; that BOR's short-term minimum instream flows would not have an appreciable effect on the Snake River steelhead DPS because the initial flows would stop the area from continuing as a population sink and habitat conditions in the action area would resemble the habitat characteristics common in similar sized streams throughout the CRLMA's range, id. at 69,72; that BOR's long-term minimum stream flows provide minimum flows sufficient to maintain a stable population in the action area, roughly equal to the replacement rate,[11/] id. at 64; and that the action area would fulfill the historic role of the habitat in reducing the long-term demographic risks to the CRLMA population and the DPS as a whole, id. at 73.

Based on its considered analysis of the available data, NMFS reasonably determined that BOR's proposed action is not likely to jeopardize the Snake River steelhead DPS or destroy or adversely modify its critical habitat. BiOp at 72; Defs' Stat. Facts at ¶¶ 1-20. The BiOp reveals that NMFS considered all relevant factors and issued a reasoned, rational determination on the likely effects of BOR's proposed operations of the LOP. Therefore, NMFS's BiOp should be upheld in its entirety. See Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 954 (9th Cir. 2003) ("Disputes involving 'primarily issues of fact' must be resolved in favor of the expert agency so long as the agency's decision is based on a reasoned evaluation of the relevant factors.").

[11/] See Defs' Stat. Facts ¶ 12 & n. 5 (explaining population growth rates and the "replacement rate," which is the minimum rate of steelhead production required to maintain a self-sustaining population over long-term time frames); see also AR 4107.

II. THE TRIBE'S CHALLENGES TO THE BIOP ARE NOT SUPPORTED BY THE PLAIN TEXT OF THE BIOP, THE ADMINISTRATIVE RECORD, OR APPLICABLE LAW.

Notwithstanding NMFS's comprehensive analysis, the Tribe advances a host of arguments challenging the BiOp. Underlying its claims is the Tribe's fundamental disagreement with how limited water resources should be allocated between instream flows and consumptive, municipal uses. Yet BOR's decisions regarding how to accommodate these interests pursuant to its statutory mandates are not at issue here. The only question presented is whether NMFS reasonably concluded in the BiOp that BOR's proposed operation and maintenance of the LOP satisfied the ESA's statutory "jeopardy" and "adverse modification" standards. See 16 U.S.C. §§ 1536(a)(2), (b)(3)(A). When the BiOp is consulted, it is evident that NMFS fully and completely considered all of the relevant issues and set forth a reasoned, rational determination regarding the likely effects of BOR's proposed operations on the Snake River Basin steelhead DPS and its habitat.

A. NMFS Appropriately Analyzed The Effects Of BOR's Proposed Short-Term Operations On Steelhead And Its Habitat.

The Tribe's first argument is that BOR's "phased" proposed action is *per se* unlawful and that NMFS failed to consider and offer a rational explanation regarding the effects of BOR's short-term operations on Snake River steelhead and its habitat. Pl. Br. at 12-17. The BiOp, however, is replete with NMFS's reasoned analysis and consideration of the effects of BOR's short-term operations on steelhead and its critical habitat. BiOp at 7-10, 50-53, 55, 63-70, 72-74, 76, 79, B-7. As explained below, the Tribe's disagreement with BOR's proposed action, and the Tribe's disregard of NMFS's actual analysis in the BiOp, does not render the BiOp arbitrary or capricious.

1. The ESA Permits BOR To Propose, And NMFS to Review, A Phased Or Temporally Structured Proposed Agency Action.

Rather than disputing the information actually contained in the BiOp, the Tribe references BOR's short- and long-term periods of its proposed action and argues that BOR's phased proposed action is, "[a]s a simple matter of ESA case law," unlawful. See Pl. Br. at 13-15 (relying on Pac.

Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation ("PCFFA v. BOR"), 426 F.3d 1082 (9th Cir. 2005), Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv. ("PCFFA v. NMFS"), 265 F.3d 1028 (9th Cir. 2001), and Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF v. NMFS"), 481 F.3d 1224, 1235 (9th Cir. 2007)). These cases, however, stand for the unremarkable proposition that NMFS – as the consulting agency – must analyze all aspects of a proposed action in making a determination under ESA § 7. PCFFA v. BOR, 426 F.3d at 1094; PCFFA v. NMFS, 265 F.3d at 1037-38; NWF v. NMFS, 481 F.3d at 1240. Contrary to the Tribe's claims, the cases do not prohibit NMFS from reviewing a "phased" proposed action.

Indeed, in PCFFA v. BOR, the first case cited by the Tribe, the court expressly recognized that the Ninth Circuit has "approved the use of a phased approach" contained in an agency's proposed action and has upheld a consulting agency's analysis of that phased action, where "the agency's analysis revealed that it 'considered the relevant factors and reasonably found that the [species] could survive the loss of habitat' during a four-year period in which an agency gradually acquired replacement habitat." PCFFA v. BOR, 426 F.3d at 1091 (quoting Southwest Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998)). Accordingly, the Tribe's mere disagreement with the nature of BOR's proposed action does not render the action "unlawful," nor does such disagreement render NMFS's analysis of that proposed action improper.

2. NMFS Fully Examined And Analyzed BOR's Proposed Short-Term Operations On Steelhead And Its Habitat.

The Tribe next contends that "[n]owhere in the BiOp does NOAA explain how the 10-year Sweetwater and Webb minimum stream flows are adequate for needs of listed species." Pl. Br. at 16. The Tribe's claims are not persuasive. In the BiOp, NMFS spent considerable time analyzing and examining BOR's proposed short-term operations. Specifically, NMFS thoroughly analyzed the life-histories and short- and long-term population growth rate trends of Snake River Basin steelhead DPS, id. at 15-16, 21-26, 40-46; how LOP operations affect stream flows in the action area, id. at 49;

and how "[t]he effects of the proposed action differ in the initial and long-term periods of operation with regard to effects such as summer water temperatures, prey biomass, prey availability, restriction of fish movement, and formation of disconnected pools," id. at 50.

As such, NMFS evaluated the effects of BOR's proposed-short term operations on steelhead and its habitat, methodically assessing how the proposed short-term operations would likely affect: water temperatures, BiOp at 53-54; the primary constituent elements of designated critical habitat, id. at 55-61; juvenile steelhead rearing in Webb, Sweetwater, and Lapwai Creeks, id. at 63-65, and steelhead migration, spawning, and incubation in Webb, Sweetwater, and Lapwai Creeks, id. at 65-67. NMFS considered how the proposed short-term operations would affect steelhead at the CRLMA population level, considering the effects on a population's ability to survive catastrophic events, a population's long-term evolutionary potential, and a population's long-term demographic processes. Id. at 67-69.

Finally, NMFS then issued a rational, fully explained determination regarding the effects of BOR's short-term operations on steelhead in the action area, on the CRLMA population, and on the DPS as a whole. Id. at 72-74. Accordingly, the Tribe's suggestion that the BiOp contains a "glaring omission," the failure to consider BOR's short-term operations, rings hollow. Pl. Br. at 17.

3. NMFS Did Not Disregard Short-Term Impacts And Issue A Biological Opinion Predicated On Future Mitigating Events.

Finally, the Tribe relies on inapposite cases to argue that NMFS's consideration of the short-term effects of BOR's proposed action is arbitrary and capricious. See Pl. Br. at 15-17. Specifically, the Tribe relies on cases where the consulting agency found that allowing the agency action to proceed in the short-term was likely to jeopardize listed species, yet nonetheless appeared to ignore the short-term impacts in issuing a biological opinion. See PCFFA v. BOR, 426 F.3d at 1085, 1094; FCFFA v. NMFS, 265 F.3d at 1038; NWF v. NMFS, 481 F.3d at 1240. In those cases, the courts found that the agency's failure to adequately explain how the effects of the short-term impacts would

not cause jeopardy, where those short-term operations were likely to cause significant species-level adverse effects, was arbitrary and capricious. Id.

Contrary to the Tribe's claims, the BiOp demonstrates that NMFS rationally explained that the LOP's short-term impacts are not likely to jeopardize the continued existence of the Snake River steelhead DPS during the short-term period of operations, that NMFS did not disregard or make unfounded assumptions regarding the effects of BOR's short-term operations, and that NMFS did not base its determinations on the happening of speculative or uncertain future events. See BiOp at 50-53, 55, 63-70, 72-74. Rather, from the first day of proposed operations, NMFS ensured that the Snake River steelhead DPS is not likely to be jeopardized and that critical habitat would not be destroyed or adversely modified. Id. at 72-74.

The LOP action area does not support an independent breeding population of the Snake River steelhead DPS, but rather supports one of the DPS's 25 extant populations (the CRLMA). BiOp at 40, 68-69, 72-73. Moreover, the area directly or indirectly affected by the LOP consists of less than one percent of the Snake River steelhead DPS's present range and, even under optimal conditions, would support only two percent of the CRLMA population's size. Id. at 12, 40. Analyzing the available data, NMFS found that Snake River steelhead have a low probability of going extinct in the next 50 years under the current environmental baseline, id. at 25-26, 45; AR 12991; that steelhead have persisted in the action area under the current baseline conditions for nearly 60 years of LOP operations, id. at 34, 69, 73; that BOR's short-term operations increase surface flows and are expected to re-establish and maintain connectivity below the Sweetwater Creek diversion dam, id. at 50-51; and that the short-term flows would not have an appreciable effect on the Snake River steelhead DPS, as the initial flows would stop the area from acting as a population sink and habitat in the action area would resemble habitat characteristics common through the CRLMA population's

range, id. at 50-51, 69-72.[12/]

Thus, NMFS fully analyzed BOR's proposed short-term operations and provided a reasonable explanation for finding that the short-term operations would have a "more or less neutral" effect on the CRLMA population, and potentially result in increased production:

> The short-term minimum flows in Sweetwater Creek would support steelhead production at levels similar to the current production or slightly better. Slight improvements (minimum flow of 1 cfs in Sweetwater Creek at the onset of the proposed action, increasing to at least 1.5 cfs no later than 2012), ensure that the steelhead subpopulation in the action area would remain at least as large as it has in the past, and offer some opportunity for increased production. Present densities of juvenile *O. mykiss* in Sweetwater Creek are much higher than in Webb Creek; consequently, fish production in the Sweetwater/Webb Creek drainage at present likely is sustained primarily by production from Sweetwater Creek. As an initial step, improvements in habitat quality and steelhead production in Sweetwater Creek are likely to maintain or increase the pool of fish available to repopulate Webb Creek.

BiOp at 72. Moreover, at each successive stage of the proposed action, surface flows, water temperatures, and habitat conditions will improve, turning what has constituted degraded habitat over the past 60 years into an area expected to contribute to the overall abundance, diversity, and long-term population growth rates of the CRLMA population. Id. at 73-74. This means surface flows, water temperatures, and overall habitat conditions in the LOP action area will be improved from the first day of proposed operations until the last day of the proposed 15-year action, thereby "accomplish[ing] a critical step toward re-establishing the production rate of the CRLMA population at the replacement rate or better," which "is the threshold production rate needed for the survival and recovery of the Snake River steelhead DPS." Id. at 73. See also 50 C.F.R. § 402.02 (relevant inquiry is whether the proposed action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of [the DPS] . . . by reducing the reproduction, numbers, or distribution of [the DPS]").

[12/] A population "sink" refers to an area of habitat in which local mortality exceeds local reproductive success, such that the population density of an area is maintained largely by immigrants from "source" populations. A "source" population, by contrast, is where the birth rate exceeds the death rate and excess members of a population are able to leave as emigrants to support other populations or subpopulation. See generally AR 2476-2477 (Pulliam (1988)); AR 7786.

The Tribe's view that NMFS's "no jeopardy" determination is arbitrary and capricious so long as the Tribe can cite adverse effects to steelhead in the LOP action area is legally incorrect. Pl. Br. at 16 (selectively citing and characterizing effects of the LOP). Under ESA § 7, NMFS must issue an opinion as to whether the proposed action is likely to jeopardize the entire listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02 (defining "jeopardize the continued existence"). As the Ninth Circuit has found, the presence of adverse effects does not mandate a "jeopardy" determination; rather, the relevant inquiry is whether the proposed action is likely to "jeopardize [a species] existence." Selkirk Conservation Alliance, 336 F.3d at 953. The Tribe's citation to adverse effects, while ignoring the framework in which NMFS must issue a biological opinion, does not call into question NMFS's determinations in the BiOp. See Northwest Envtl. Advocates v. NMFS, No. 04-0666-RSM, 2005 WL 1427696, at *10 (W.D. Wash. June 15, 2005) (rejecting argument that degraded habitat conditions mandates a "jeopardy" conclusion).

Accordingly, Plaintiff's characterization of NMFS's analysis fails. NMFS thoroughly examined BOR's short-term operations and reasonably concluded that BOR's proposed action is not likely to jeopardize listed species or adversely modify critical habitat. NMFS appropriately insured that BOR's proposed action was not likely to appreciably reduce the Snake River Basin steelhead DPS's likelihood of both survival and recovery from the very first day of BOR's proposed action, BiOp at 72-74, and the Tribe's disregard of NMFS's analysis does not render the BiOp arbitrary and capricious.[13/]

B. NMFS's Jeopardy Analysis Does Not Turn On Whether BOR's Proposed Operations Are "Incrementally" Better Than Past Operations Of The LOP.

In its second challenge to the BiOp, the Tribe argues that NMFS did not conduct the required

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[13/] The Tribe's footnote claiming that NMFS failed to fully consider whether BOR's proposed operations are likely to adversely modify critical habitat, Pl. Br. at 16 n 5, is belied by the BiOp, which contains extensive and reasoned analysis regarding BOR's proposed action impacts on designated critical habitat. See, e.g., BiOp at 36-40, 46-49, 55-61, 73-74; Defs' Stat. Facts ¶¶ 16-20.

ESA § 7 analysis and instead determined only whether the effects of BOR's proposed future operations of the LOP are "incrementally" better than the effects of BOR's past operations of the LOP. Pl. Br. at 19-20. To support its claims, the Tribe cursorily states that NMFS "compared" the proposed future LOP operations to past operations of the LOP and to how the LOP action area would function without the existence of the LOP. Id. at 20. The Tribe devotes the remainder of its argument to characterizing judicial opinions and other biological opinions issued by NMFS. Id. at 17-20. The Tribe's arguments demonstrate its misunderstanding of the BiOp.

In the BiOp, NMFS engaged in a comprehensive, multi-faceted analysis, where NMFS first considered how the LOP action area would function without the existence of the dams, diversions, or canal system. See, e.g., BiOp at 30-32. NMFS then considered how past operations of the LOP and how other actions have affected steelhead – including the abundance and trends of steelhead in the action area, the CRLMA population, and the DPS – and how past operations have affected steelhead habitat. See, e.g., id. at 32-46. Finally, with a full understanding of these and other relevant factors, NMFS appropriately assessed whether the proposed operations of the LOP are likely to jeopardize the Snake River steelhead or destroy or adversely modify critical habitat. See, e.g., id. at 46-74. As explained below, and contrary to the Tribe's claims, NMFS's analysis consists of far more than just comparing "past operations to future operations."

As part of its ESA § 7 analysis, NMFS considered how the LOP action area would function without the existence of the dams, diversions, or canal systems. BiOp at 30-32. NMFS utilized this information to inform its analysis of the importance of the LOP action area to the CRLMA population and to the DPS. For instance, "[t]he supply of abundant, cold water from the Twenty One Ranch spring 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 dry." Id. at 45, 31. As such, the LOP action area historically provided habitat where fish from the CRLMA population could successfully spawn and reproduce in dry years and, therefore,

provided habitat which helped ensure that the CRLMA's "fish production would not drop below a certain average levels." Id. at 72, 45. NMFS understood the natural function of the LOP action area, and its consideration of this factor was entirely proper under the ESA. See In re Operation the Missouri River System Litigation, 421 F.3d 618, 633-34 (8th Cir. 2005); Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 387 (E.D. Cal. 2007) ("The government is entitled to make reasonable assumptions about the operational volume of water flows, water levels, temperature, and quality based on the historical and projected data.").

NMFS also methodically considered how past operations of the LOP have affected steelhead and its habitat, so that it could assess the current status of, and environmental condition affecting, steelhead and its habitat. See 50 C.F.R. § 402.02 (NMFS must consider, among other things, "the past and present impacts of all Federal . . .actions . . . in the action area"). For example, NMFS stated that past operations of the LOP have reduced surface flows, increased water temperatures, and reduced the unique role or function of the action area as a summer refuge for steelhead in dry years. BiOp at 32-40, 45. Under past operations, steelhead entering the action area have had limited spawning and reproductive success. Id. Thus, the action area has acted as a "sink" for the CRLMA population, contributing to the CRLMA's negative long-term population growth rates. Id. at 45.[14/]

With a full understanding of these relevant factors, NMFS was able to comprehensively assess whether the proposed action is likely to jeopardize the Snake River steelhead DPS or adversely modify critical habitat. NMFS understood the natural function of LOP habitat and its effect on maintaining, over time, a stable and viable CRLMA population. BiOp at 45, 56, 57, 67, 74. NMFS

[14/] NMFS also analyzed BOR's past operations to inform its analysis of how BOR's proposed future operations are expected to affect steelhead and its habitat. For example, comprehensive stream flow data during past operations (from 2004 and 2005) indicated that, where 0.1 and 0.9 cfs of flow were passed over the Sweetwater Creek diversion dam, stream flows at the mouth of the Sweetwater Creek (at the confluence with Lapwai Creek) were higher than the flows passed over the dam, due to an influx of water from groundwater sources and Webb Creek. Id. at 35. Thus, NMFS was able to determine that BOR's proposed action would likely maintain connected surface flows. Id. at 50-51.

understood that past operations of the LOP have impeded the natural function of the habitat by degrading habitat conditions and precluding steelhead from successfully spawning and reproducing year after year, therefore impeding the CRLMA population's ability to maintain a viable population size over the long-term. Id. at 19. Furthermore, NMFS understood that the CRLMA and DPS's long-term population growth rates cannot increase without addressing the underlying causes of their decline, such as the numerous water withdrawals which regularly degrade and eliminate suitable spawning and rearing habitat. Id. at 19, 46.

By appropriately and reasonably assessing: the historic function of the action area and its role in the survival and recovery of the CRLMA and DPS, BiOp at 29-32, 45, 57, 67, 74; BOR's past LOP operations, id. at 32-40; the environmental conditions currently affecting the entire DPS, id. at 17-26, 40-46; the likely effects of BOR's proposed operations, id. at 46-70; cumulative effects, id. at 70-71; and many other factors, NMFS was able to determine that, while not restoring the LOP habitat to its historic function, BOR's proposed action would restore the conservation or recovery role of the LOP habitat. As NMFS explained, BOR's proposed action:

> would accomplish a critical step toward reestablishing the production rate of the CRLMA population at the replacement rate or better, and this is the threshold production rate needed for the survival and recovery of the Snake River steelhead DPS. While the action area is too small to have a significant effect on the sheer numbers of fish at the CRLMA and MPG scales, it plays a crucial role in reducing long-term demographic risks within the CRLMA, and this role would be fulfilled under the proposed action.

BiOp at 73 (emphasis added).

Contrary to the Tribe's claims, NMFS could not have made these findings, which are explicitly set forth in the BiOp and undisputably based on the best available scientific information, had it merely compared "past operations to future operations." See Pl. Br. at 19-20. Moreover, the BiOp is fundamentally different from the biological opinions reviewed in the cases the Tribe relies upon, such as NWF v. NMFS, 481 F.3d 1224. See Pl. Br. at 18-19. For example, in NWF v. NMFS, the court faulted NMFS for evaluating a hypothetical "reference operation" to represent the

environmental baseline with regard to proposed operations of the Federal Columbia River Power System ("FCRPS"). 481 F.3d at 1235. According to the court, NMFS determined that "[o]nly if [effects of the discretionary aspects of the proposed action] are 'appreciably' worse than baseline conditions must a full jeopardy analysis be made." Id. The Ninth Circuit rejected this approach, finding that the analysis "amounted to little more than an analytical slight of hand, manipulating the variables to achieve a 'no jeopardy' finding." Id. at 1239.

Unlike NWF v. NMFS, NMFS's analysis in the BiOp does not utilize a hypothetical "reference" operation, nor did NMFS determine that it must conduct a "full" jeopardy analysis only if BOR's proposed action would be "'appreciably' worse" than the environmental baseline. See 481 F.3d at 1235. Indeed, one of the principal issues raised during the consultation was BOR's disagreement with NMFS's analytical methodology, claiming that NMFS's analysis was improper precisely because it did not follow the approaches utilized in NWF v. NMFS and other biological opinions cited by the Tribe. See AR 12441 & Attachs. (BOR stating that "Reclamation and NOAA fisheries have worked through some of these issues in other consultations such as the Upper Snake River and Federal Columbia River Power System (FCRPS). However, we find that understandings and agreements reached on these other consultations are not reflected in the draft BiOp on the LOP"); id. (BOR further disagreeing with NMFS's analysis by contending that "[i]t is not the aggregate of environmental baseline effects, cumulative effects, and effects of the action which determine whether an action is jeopardizing the continued existence of a species, but only the incremental effects attributable to the action itself").

In sum, the BiOp reveals NMFS's consideration of far more factors than BOR's past and present LOP operations. NMFS fully and reasonably "consider[ed] the effects of [BOR's] actions 'within the context of other existing human activities that impact the listed species,'" NWF v. NMFS, 481 F.3d at 1236 (quoting Aluminum Co. of Am. v. Bonneville Power Admin. , 175 F.3d 1156, 1162 n. 6 (9th Cir. 1999), cert. denied, 528 U.S. 1138 (2000)), and NMFS therefore fully complied with

requirements of the ESA in issuing the BiOp.[15/]

C. NMFS's Analysis Of BOR's Proposed Long-Term Operations Is Fully Reasoned And Supported By The Available Scientific Data.

Focusing on one of many scientific reports examined by NMFS during the consultation process – Entrix (2004) – the Tribe argues that NMFS "disregarded" the report and failed to adequately explain its consideration of BOR's proposed long-term flows in light of the report. Pl. Br. at 23-24; AR 08873-91 (Entrix (2004)). NMFS, however, fully considered Entrix (2004) in issuing the BiOp, along with numerous other available scientific studies, and NMFS's determinations are fully explained and supported by the administrative record.

The ESA requires NMFS to use "the best scientific and commercial data available" in issuing a BiOp. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). The "best scientific and commercial data" requirement prevents haphazard implementation, "on the basis of speculation or surmise," of the ESA. Bennett v. Spear, 520 U.S. 154, 176 (1997). The requirement "merely prohibits [NMFS] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on." Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1080 (9th Cir. 2006) (quoting Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000)); Kandra v. United States, 145 F. Supp. 2d 1192, 1208 (D. Or. 2001). "Even if the available scientific and commercial data were quite inconclusive, [it] may – indeed must – still rely on it at that stage." Southwest Ctr., 215 F.3d at 60 (quoting City of Las Vegas v. Lujan, 891 F.2d 927, 933 (D.C. Cir. 1989)).

Here, NMFS did exactly what it was required to do under the ESA. It examined the available scientific literature – including multiple hydrologic and flow studies, flow gage data, fish inventory

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[15/] Contrary to the Tribe's arguments, see Pl. Br. at 18-19, the Ninth Circuit in NWF v. NMFS did not accept the district court's assessment that the consulting agency must combine the environmental baseline and the effects of the action and then determine whether that construct is likely to jeopardize listed species. 481 F.3d at 1236 ("Our approach does not require NMFS to include the entire environmental baseline in the "'agency action' subject to review" when conducting a jeopardy analysis).

data, data supplied by BOR and the Nez Perce Tribe [16/] – to evaluate the biological effects of BOR's proposed flows on steelhead survival and production. See BiOp at B-1, B-2 (Appendix B). Specifically, NMFS thoroughly examined the data, studies, and methodologies commonly "used to predict fish response to flow alterations," including: (1) natural flows estimated from the Lapwai stream gage data; (2) Reiser and Devries (1992); (3) natural flows modeled by Morehead (2004); (4) Hatfield and Bruce (2000); (5) Tennant (1976); and (6) Entrix (2004). Id. at B-2. Based on its analysis, NMFS obtained a range of stream flow estimates corresponding to various factors, such as optimal population size, minimum population size, and sustainable population size, as follows:

- **Gage data**. Gage data "indicate that stream flows in Sweetwater Creek, below the [Twenty One Ranch] spring, would not normally drop below roughly 2.5-3 cfs in the summer." BiOp at B-2, B-4 (citing Ralson and Sprenke (1998)).

- **Simulation of Unimpaired Stream Flows from Meteorological Data and Physical Drainage Characteristics (Morehead (2004))**. The results of Morehead (2004) "show a wide range of variability in stream flows on an annual and interannual basis (see Table 6 in the [BiOp])," BiOp at B-4; that flow rates in Sweetwater Creek would naturally be between 3 and 10 cfs, id.; and that "outside low flow periods, natural flows in Sweetwater Creek are highly responsive to individual weather events, modulated by groundwater conditions and snow pack," id. at B-5.

- **Instream Flow Incremental Methodology ("IFIM") and Weightable Usable Area ("WUA") (Reiser and DeVries (1992)**). The IFIM and WUA methodologies are intended to reflect flows providing the best or "optimal" habitat conditions, BiOp at B-5 to B-7; AR 7367, 3496. The IFIM and WUA methodologies estimated that 7 cfs of flow at the mouth of the Sweetwater Creek, more than 2.5 cfs at the Sweetwater Creek diversion dam, and 2.9 cfs at the mouth of Webb Creek would provide maximum juvenile rearing habitat. BiOp at B-7. Flows providing 50% WUA[17/] for juvenile steelhead were estimated at 0.8 cfs at the

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[16/] The Tribe commissioned and provided Entrix (2004) to NMFS during the consultation, 2005BiOp at 5, in order to "provide[] justification for the instream flows recommended by the Nez Perce Tribe," AR 8876; see also AR 12505 (Entrix scientist noting that analysis in the report is intended to "make our argument about the minimum flows we desire a bit stronger" (emphasis added)).

[17/] WUA is "an index representing the relative amount of habitat available at a given rate of flow" and is obtained by measuring and correlating stream channel size, velocity, and depth. BiOp at B-2. The WUA index "allows habitat-flow relationships to be developed for any life stage of any species and allows quantitative habitat comparisons at different (hypothetical) flows." AR 7367. In the BiOp, WUA is used to compare a variety of flows to the maximum index value – a flow identical to the maximum value has a WUA of 100%, and a flow that provides half the amount of habitat as the

Sweetwater Creek diversion dam, 2.7 cfs at the mouth of Sweetwater Creek, and 2.9 cfs in Webb Creek at the mouth. Id. Flows providing maximum habitat for steelhead fry were estimated at 2 cfs in Sweetwater Creek below the confluence with the Webb Creek. Id.

- **Regression Equations from Meta-Analysis of Published IFIM Data in Western North America (Hatfield and Bruce (2000))**. Optimal flows for different steelhead life history stages (fry, juvenile, adult, spawning) at the mouth of Sweetwater and Webb Creeks were derived from Hatfield and Bruce (2000), are contained in Table B-2 of Appendix B, and range from 1.88 cfs to 3.56 cfs in Sweetwater Creek and 1.06 cfs to 2.94 cfs in Webb Creek, depending on life stage. BiOp at B-7 to B-9.

- **Heuristic Rule Set (Tennant (1976))**. Using Tennant (1976), a range of flows corresponding to a narrative description of the habitat (from "poor or minimum" to "outstanding to optimal") were derived, with flows ranging from 3.1 cfs to 18.4 cfs at the mouth of Sweetwater Creek and 1.0 cfs to 5.9 cfs at the mouth of Webb Creek. See BiOp at B-9 to B-10, Table B-3.

- **Flow Analysis Based on Steelhead Production Curves (Entrix (2004))**. The results of Entrix (2004) recommended that flows needed to achieve the replacement rate were 3.3 cfs in Sweetwater Creek and 1.2 cfs in Webb Creek. See BiOp at B-10 to B-11. Entrix (2004) did not distinguish between flows at the mouth or diversion dam of Sweetwater Creek; however, the model's estimates for Sweetwater Creek were derived from data collected from three locations below the Sweetwater Creek diversion dam. See AR 08879 (Entrix (2004), noting data collected from three points on the Sweetwater Creek, SM 1, SM 2, SM 3); AR 10104 (map containing SM 1, SM 2, and SM 3 locations on Sweetwater Creek).

With a reasonable range of flow estimates corresponding to various habitat conditions, NMFS appropriately assessed BOR's proposed long-term flows. BOR's proposed long-term minimum instream flows during the irrigation season consist of 2.5 cfs at the Sweetwater Creek diversion dam and 1.2 cfs of flow at the mouth of the Webb Creek. BiOp at 10. Sweetwater Creek, however, gains on average approximately 1 cfs of surface flow from groundwater sources between the diversion dam and the mouth, based on comprehensive gage data. Id. at 11, 35. Moreover, Sweetwater Creek's surface flows are supplemented by Webb Creek's surface flows. Id. at 35. Thus, under BOR's proposed long-term flows, with surface flows at the mouth of Webb Creek of 1.2 cfs and surface flows at the Sweetwater Creek diversion dam of 2.5 cfs, surface flows at the mouth of Sweetwater Creek are expected to be approximately 4.7 cfs, depending on the amount of groundwater influx.

Considering the available scientific data, NMFS determined that BOR's long-term minimum

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maximum value has a WUA of 50%. BiOp at B-5 to B-8.

instream flows fall squarely within the range of flows derived from the available scientific methodologies and are reasonably expected to support steelhead at the replacement rate or better in the action area. BiOp at 69. For instance, Entrix (2004) estimated that minimum stream flows in Sweetwater Creek range from 2.7 cfs to 4.2 cfs (with an average of 3.3 cfs) below the Sweetwater Creek diversion dam. AR 8879 (Table 3). BOR's proposed long-term flows thus provide less water than those estimated by Entrix (2004) at the Sweetwater Creek diversion dam (2.5 cfs versus 2.7 cfs, respectively). However, BOR's proposed long-term flows likely provide more water near the mouth of the Sweetwater Creek (4.7 cfs) than the minimum flow estimated by Entrix (2004) (4.2 cfs). In spite of minor differences in flows at the dam and near the mouth of Sweetwater Creek, the average minimum flows estimated by Entrix and the average minimum flows proposed by BOR are virtually the same. See BiOp at 10-11; AR 8879.

Similarly, BOR's proposed long-term flows during the irrigation season are consistent with the minimum flows naturally present in Sweetwater Creek, based on gage data and Morehead (2004); are greater than the flows expected to result in 50% WUA for juvenile steelhead in Sweetwater and Webb Creek, based on the IFIM and WUA analysis; and are squarely within the range of suitable flows derived from Hatfield and Bruce (2000) and Tennant (1976). BiOp at 56, Appx. B. As demonstrated above, NMFS reasonably considered all of the available scientific data as part of its analysis and rationally concluded that BOR's proposed long-term flows are expected to maintain viable numbers of steelhead in the action area. Id. at 56, 69, 72-74 (further considering other available scientific data in ultimately concluding that BOR's long-term minimum instream flows are likely to support steelhead reproduction at the replacement rate or better).

In fact, the Tribe concedes that NMFS considered the best available scientific literature, including Entrix (2004). See Pl. Br. at 21 ("The Tribe is not challenging whether NOAA assembled the 'best available scientific information' . . ."). Thus, the Tribe's complaint is not that NMFS disregarded the available scientific data, such as Entrix (2004), but rather that the Tribe disagrees

with NMFS's judgment as to the conclusions to be drawn from that science. See Pl. Br. at 22 (viewing Entrix (2004) as the best flow recommendations). The Court, however, is not called upon to resolve competing opinions regarding the interpretation and application of complex, scientific information. NMFS, relying on its considerable expertise in this area, has already resolved these questions, and its determinations are entitled to considerable deference by this Court. See Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc) ("We must look at the decision not as a chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimum standards of rationality.").[18/]

Nor are the Tribe's efforts to recast NMFS's analysis and determinations persuasive. For instance, the Tribe relies on a draft reasonable and prudent alternative ("RPA") developed during the consultation process to argue that NMFS relied solely upon Entrix (2004) during the consultation process. See Pl. Br. at 22-23. The Tribe is wrong. During the administrative process, NMFS determined that BOR's initial proposed action (operations of the LOP in perpetuity, without minimum instream flows, AR 12179-80) was likely to jeopardize steelhead and adversely modify critical habitat. AR 11997-12006. Thus, NMFS proposed two separate, draft RPAs. Id. While one of the RPAs contained flows similar to those estimated by Entrix (2004), the Tribe overlooks the fact that the second draft RPA contained a completely different flow regime and that NMFS later

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[18/] The Tribe's own characterizations of how BOR's proposed long-term flows differ from those recommended by Entrix (2004) are not persuasive, as the Tribe inaccurately interprets Entrix (2004). See Pl. Br. at 23. For example, the Tribe presumes that Entrix (2004)'s estimates were for the Sweetwater Creek diversion dam, when in fact Entrix (2004) provided stream wide flow estimates. See AR 8879, 10104. Thus, the Tribe's characterization of BOR's proposed long-term flows as less than Entrix (2004) is misleading, as BOR's proposed flows are greater than estimated by Entrix (2004) at the mouth of the Sweetwater Creek. See BiOp at 11, 35; AR 8879. The Tribe's misleading comparison of BOR's long-term flows with those estimated by Entirx (2004) simply confirms that deference to NMFS's expert and technical analysis is particularly warranted in this case. See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103, 105 (1983) (deference particularly required where decision involves agency's scientific and technical expertise).

developed several different iterations of the RPAs. See, e.g., AR 12750, 12429& Attachs., 12767, 13251. Contrary to the Tribe's claims, the record demonstrates that NMFS did not determine that Entrix provided the only flow estimates which should be considered during the consultation process. See BiOp at 68-69, 72-73 (fully explaining NMFS's analysis of BOR's proposed long-term flows).

Moreover, NMFS's draft RPAs, including the later iterations of the RPAs, soundly refute the Tribe's claim that NMFS found only one set of minimum flows sufficient to support viable numbers of steelhead in the action area. See Pl. Br. at 23-24. As NMFS explained, all of the available methodologies and studies, including Entrix (2004), "have considerable biases and limitations," "have different purposes[,] and use different types of data and model assumptions." BiOp at B-1 to B-2; id. at B-10 (noting that Entrix (2004) used an untested methodology to derive critical water velocities [AR 8876-79], which were then used "as a surrogate for effects of stream flow on fish populations").[19/] Thus, NMFS reasonably considered all of the available studies in evaluating the likely effects of BOR's proposed minimum instream flows. See BiOp at B-2 ("[N]o single approach for setting minimum flows in the action area is clearly more suitable than another.").[20/]

In sum, this is not a case where NMFS's analysis of the available flow data, and the conclusions reached during the consultation, are "so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise." PCFFA v. NMFS, 265 F.3d 1028, 1034 (9th Cir. 2001). Nor is this a case where NMFS's conclusion "is contradicted by NOAA's own underlying

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[19/] See also AR 13178 (NMFS scientist noting that Entrix's estimates were "reasonable" but "conservative," that Entrix (2004) has limitations and flaws, and that other studies and methodologies may be helpful to the analysis); AR 13263 (critical analysis of Entrix (2004) by BOR's scientists); AR 13094 & Attachment (Entrix itself noting "[t]he sample size for the analysis is fairly small, indicating that the power of the test is relatively weak").

[20/] See also AR 13138 (noting that "several commonly accepted methods provide similar results which bracket the recommendations provided by the Nez Perce Tribe" in Entrix (2004)); AR 13178 (considering Entrix (2004) and noting that "[w]ith the approximate flow duration curves derived from the Lapwai Creek gage and [Entrix (2004)], we have pretty solid footing for minimum flows in Sweetwater Creek in the range of 2.5 to 5 cfs." (emphasis added)).

information." Pl. Br. at 21. NMFS carefully analyzed the available data and reasonably concluded that BOR's proposed long-term flows are expected to support steelhead at the replacement rate or better. BiOp at 68-69, 72-73, B-10. Accordingly, NMFS's "interpretation of complex scientific data" is entitled to substantial deference and should be upheld. See Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv., 475 F.3d 1136, 1150 (9th Cir. 2007).

D. NMFS Properly Analyzed BOR's Commitment to Provide Minimum Instream Flows In The BiOp.

Generally dissatisfied with BOR's proposed action, the Tribe next complains that BOR purportedly cannot provide the minimum instream flows in Sweetwater and Webb Creeks, as set forth in its proposed action. See Pls. Br. at 29-30. The Tribe bases this assumption solely on events which occurred in 2004, where LOID voluntarily attempted (but was ultimately unable at that time) to provide 1.5 cfs of instream flows in Sweetwater Creek. Id.; BiOp at 3-4. As NMFS noted, "[a]ctual flows provided were less than 1.5 cfs on average, due to the difficultly in 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." BiOp at 4. However, BOR determined that it could provide the specified minimum instream flows following the 2004 irrigation season, and NMFS's consideration of this aspect of BOR's proposed action was proper.

First, there is no evidence in the administrative record that BOR and LOID are incapable of providing the proposed instream minimum flows. It simply does not follow that, because one voluntary effort to provide 1.5 cfs of instream flows was unsuccessful, BOR and LOID are left with no operationally feasible methods of providing instream flows. To the contrary, both BOR and NMFS assessed whether BOR could operationally provide minimum instream flows, and BOR determined that it could in fact provide the proposed instream flows. See AR 12317, 12322-23, 13286 (assessing system's ability to meet instream flows); AR 12316, 12321 (noting operations will follow stream flow provisions of the proposed action); AR 13276, 12322 (discussing operational

gages used to monitor stream flows); AR 12766 (NMFS noting that minimum flows "must be made regardless of infrastructure or water bank").

Moreover, BOR understood the limitations of the LOP system, had the ability to precisely determine how much water was passed over the diversion dam in 2004, and has many operationally feasible methods to meet instream flows, such as (and as NMFS highlighted) replacing the diversion dam gate or passing more water over the diversion to ensure that the minimum flows are met. See BiOp at 4. In any event, the instream flow aspects of the proposed operation are squarely within the "control" of BOR, and NMFS therefore appropriately considered BOR's commitment to provide the proposed instream flows. See NWF v. NMFS, 481 F.3d at 1241 n. 16 (consulting agency should "consider only those actions that are in fact under agency control").

Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322 (E.D. Cal. 2007), is instructive. There, the plaintiffs also complained that the agency's commitment to supply water to protect listed species was not "reasonably certain to occur" and, therefore, the consulting agency erred in considering those aspects of the proposed action. Id. at 357-58. The court rejected the plaintiffs arguments, noting that the action agency has a "duty to have available or acquire those necessary [water] resources" and that the agency had several available means of doing so. Id. at 358. Thus, the court concluded that it "must leave to the agency the application of its expertise and authority to manage the complex hydrologic, legal, financial, physical, and logistical aspects of protecting the [listed species]." Id. at 358-59. As in that case, NMFS here appropriately left it to BOR's discretion to determine how best to provide the instream flows.

The Tribe's reliance on Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139 (D. Ariz. 2002), is flawed and does not demonstrate that NMFS improperly considered the instream flow aspects of BOR's proposed action. See Pl. Br. at 29. In Rumsfeld, the United States Fish and Wildlife Service relied on the Army's future development and implementation of plans to mitigate impacts to protected species and habitats in rendering its "no jeopardy" opinion. Id. at 1146-47. The

court held that there was no factual or rational basis for the opinion because the mitigation measures were not identified and included in the opinion. Id. at 1154 ("These measures, however, have to be identified and included in the Final BO, either as RPAs or incorporated into the Army's proposed action, to support a 'no jeopardy' decision."). In contrast to Rumsfeld, BOR committed to providing minimum instream flows as part of its proposed operations of the LOP. BiOp at 6-11; AR 12314-30. Therefore, NMFS's consideration of this aspect of BOR's proposed operation was not only permissible and appropriate, but required by the ESA. See Connor v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (consulting agency must "analyze the effects of the entire agency action").

E. The Tribe's Disagreement With BOR's Proposed Action Provides No Basis For Disturbing NMFS's Analysis And Determinations In The BiOp.

The remainder of the Tribe's challenges to NMFS's BiOp constitute a disagreement with various aspects of BOR's proposed action and are premised on a fundamental misunderstanding of NMFS's role and obligations under the ESA. Specifically, the Tribe contends that NMFS failed to rationally explain: why a drought exemption was necessary (Pl. Br. at 24-27); why any water savings achieved through system improvements are split equally between instream flow and flow delivered to LOID (Pl. Br. at 27-29); and why NMFS allegedly failed to consider providing fish passage at the Sweetwater Creek diversion dam (Pl. Br. at 30-32). As explained below, the Tribe's complaints do not relate to any obligation NMFS has in issuing a BiOp under ESA § 7.

Under the ESA, NMFS must review and analyze the proposed action submitted to it by the action agency – here, BOR. See 16 U.S.C. §§ 1536(a)(2), (3); 50 C.F.R. § 402.14(c)(1), (g)(4). NMFS does not have the authority to alter or manipulate the proposed action, but rather must issue a BiOp on the effects of the "action as proposed." Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., No. 97-775, 1998 WL 1988556, at *10 (W.D. Wash. May 29, 1998) (citing Forest Conservation Council v. Espy, 835 F. Supp. 1202 (D. Idaho 1993), aff'd, 42 F.3d 1399 (9th Cir. 1994)). Indeed, NMFS's role under the ESA is purely advisory – it issues advisory opinions and

recommendations and does not regulate whether and how an agency must or can proceed. See 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) (consulting agency "performs strictly an advisory function under section 7;" the action agency "makes the ultimate decision as to whether its proposed action will satisfy the requirements of § 7(a)(2)"); Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (action agency has responsibility for determining how to proceed).

Here, the Tribe misunderstands NMFS's obligations under the ESA by arguing that NMFS "provided" an arbitrary drought exemption and then failed to rationalize or justify the need for the drought exemption (Pl. Br. at 24-27); that NMFS allocated 50% of any water savings measures to LOID and therefore failed to give priority to endangered species (id. at 27-29); and that NMFS failed to consider modifying the LOP to provide fish passage (id. at 30-32). NMFS did no such thing. BOR proposed these aspects of the agency action to strike a balance between competing needs – the need to fulfill its statutory and contractual mandates and the need to protect environmental resources. BiOp at 6-11. Indeed, most federal agency actions that require formal ESA § 7 consultation (e.g., timber harvests, construction of highways) involve a balancing of competing objectives. Contrary to the Tribe's claims, that BOR's proposed action is not designed solely for the benefit of listed species in no way renders NMFS's analysis in the BiOp arbitrary and capricious.

Nor is NMFS required to justify aspects of an agency action which another federal agency proposes to take pursuant to its statutory mandates. Rather, the ESA is clear that NMFS's obligation is to consider the BOR's proposed action and to issue a BiOp "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). NMFS did that here, and the Tribe's efforts to impose new legal obligations on NMFS to rationalize and regulate BOR's activities should fail. See, e.g., Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) ("courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA").

In addition, NMFS fully examined the proposed action's effects on the Snake River Basin steelhead DPS and its habitat as discussed below.

1. NMFS Fully And Reasonably Considered The Effects Of BOR's Proposed Drought Exemption.

First, the Tribe alleges that NMFS "conceded" that it did not consider the effects of BOR's drought exemption. Pl. Br. at 25 (citing and quoting BiOp at 50). The Tribe's arguments are specious. The section of the BiOp on which the Tribe relies explains to the reader where to find different parts of NMFS's analysis, explaining that NMFS's analysis of the effects of drought years is contained in the environmental baseline section of the BiOp. BiOp at 50. In turn, the environmental baseline section contains an extensive and complete discussion of how low flows, such as those that would be present when a drought exemption is invoked, are expected to affect steelhead and its habitat. See id. at 29-30, 32-40, 44-46. Thus, the Tribe's suggestion that the BiOp "concedes" that the effects of the drought exemption are not considered is patently false.

Contradictorily, the Tribe argues that there is no record basis for NMFS's determinations made in analyzing BOR's drought exemption, such as NMFS's determination that the "occasional drought exemptions . . . would likely occur at lower frequencies than events when stream flows are higher than the minimum flows." Pl. Br. at 26-27 (quoting BiOp at 69). The record demonstrates otherwise. NMFS reviewed ample stream flow data indicating that drought conditions would only occur one out of every seven years, based on observed conditions at Soldiers Meadow reservoir when the LOP was diverting all available water. BiOp at 8, 50, 56, 65, 69, 74; AR 11338, 12317, 12319-20, 12420-21, 13286 & Attachs. Moreover, NMFS analyzed stream flow data from the Lapwai Creek stream gage from 1975-2001, which revealed "a wide range of potential in discharge rates in summer months" due to the "occasional summer droughts and exceptionally wet years with late snow melt or summer rainfall." BiOp at 31, 37, 64, B-6; AR 11338, 13287 & Attachs., 12351-55. Thus, the record amply supports NMFS's determinations made in the BiOp.

Similarly, the Tribe argues that there is no support for NMFS's determination that "there are normally still pools available where some juvenile steelhead may survive, and so the entire year class

may not be lost" if a drought exemption is invoked. Pl. Br. at 27 (quoting BiOp at 27). Again, the BiOp and administrative record reveal, that over the past 60 years and in times where all available surface flows have been diverted, disconnected pools have remained in the lower reaches of Sweetwater and Webb Creeks. BiOp at 34-35, 38, 67, B-3, B-5. Furthermore, the administrative record contains evidence that steelhead have persisted in the action area over the past 60 year, likely due to the pools which remain the lower reaches of the streams. Id. at 40-45; AR 10104-09. Thus, the Tribe's conclusory claim that NMFS's analysis of BOR's drought exemption is arbitrary and capricious lacks merit. See id. at 32-40, 69, 72-74 (fully considering the effects of drought conditions on steelhead and its habitat); AR 12317.[21/]

2. NMFS Did Not Base Its Final Determinations On BOR's Proposal To Supplement Instream Flows With Water Savings Achieved Through LOP Improvement Projects.

Second, the Tribe argues that NMFS arbitrarily considered BOR's proposal to split equally any water savings achieved through canal improvement projects between diversions and instream flows. Pl. Br. at 27-29. While an aspect of BOR's proposed action, NMFS did not base any part of its jeopardy or adverse modification determinations on the effects of increased instream flows resulting from system improvement projects. See BiOp at 72-74 (making no mention of the beneficial effects resulting from this provision). While the Tribe suggests this may not be the case by referencing a reasonable and prudent measure ("RPM") contained in the incidental take statement

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[21/] Unable to substantiate its claims, the Tribe argues that NMFS's analysis of the drought exemption is arbitrary due to the "trigger" for the drought exemption. Pl. Br. at 26. Again, the Tribe's arguments misunderstand NMFS's obligations under the ESA. In a BiOp, NMFS must analyze the action as proposed. Here, BOR's drought exemption contained a "trigger" for invoking the drought exemption, but the relevant issue was how many times and under what circumstances it could be invoked. In accord, NMFS fully analyzed data indicating that, with BOR's proposed trigger, drought conditions would have occurred in only one out every seven years. See, e.g., BiOp at 8, 50, 56, 65, 69, 74. Moreover, NMFS analyzed BOR's proposed action, which indicated that a drought exemption will not be invoked more than once in a three year period. Id. at 32-40, 69, 72-74. Thus, NMFS fully considered and analyzed the relevant factors (i.e., the effects of the drought exemption, as proposed), and the Tribe's mere disagreement BOR's proposed action does not dictate otherwise.

("ITS"), Pl. Br. at 28, the ITS and RPMs are not part of the jeopardy and adverse modification determinations and instead constitute separate decisions made after the ultimate jeopardy and adverse modification determinations are issued. 16 U.S.C. § 1536(b)(4)(i)-(iii) (requirement to issue an ITS arises "after consultation under subsection (a)(2) of this section"); 50 C.F.R. § 402.14(i)(1)(ii) (purpose of a RPM is to minimize take incidental to an non-jeopardizing action).

Thus, the RPMs and ITS do not establish that NMFS relied on potential flow increases due to LOP improvement projects when issuing the BiOp. See AR 13087 (NMFS scientist explaining the basis for the effects analysis: "I assume in the BO that there are no additional flows beyond the 1 cfs in Sweetwater Creek for the first 10 years, and that the full amount of flows in Sweetwater and Webb Creeks would be provided after 10 years, and that this scenario does not add up to jeopardy or adverse modification of critical habitat."). The BiOp demonstrates that NMFS understood that any benefits to steelhead and its habitat from the water-savings aspect of BOR's proposed action are speculative, and NMFS appropriately did not consider such benefits in issuing its final determinations. BiOp at 8, 70, 79; Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 356 (E.D. Cal. 2007) (noting that an adaptive management measure did "not provide reasonable assurance admitted adverse impacts of the [project] will be mitigated"; therefore, the consulting agency should not have considered the beneficial effects of that measure).

3. NMFS Appropriately Did Not Base Its Final Determinations On The Effects Of Providing Fish Passage.

Third, and finally, the Tribe argues that NMFS's BiOp is arbitrary because it failed to consider the effects of providing fish passage at the Sweetwater Creek diversion dam. Pl. Br. at 30-32. BOR, however, did not propose to modify the diversion dam to provide for fish passage. See BiOp at 6-11; AR 12314-30 (BOR's proposed action). As such, NMFS was not required to consider the benefits of modifying the diversion structures to provide for fish passage. See Forest Conservation Council, 835 F. Supp. at 1217 (consulting agency is not "required to develop and evaluate alternatives to the

action proposed by the Forest Service; it must simply evaluate the effects of the proposed action").

The Tribe's reference to an engineering report developed by BOR does not support its claims. See Pl. Br. at 31-32.[22/] In an RPM identified by NMFS to minimize the effect of any incidental take associated with the LOP, NMFS stated that BOR must "complete preliminary actions to determine the feasibility of providing fish passage at the diversion dam at Sweetwater Creek . . ." BiOp at 78. The Tribe contends that these actions have already occurred, referring to BOR's engineering report. Pls. Br. at 30, 31-32. However, BOR explained – after the engineering report was issued – that "[s]everal concepts for different types of fish passage were evaluated and discussed in the predesign memorandum published in February 2005," but that "there were several issues and information needs identified during this process that need to be pursued and resolved before fish passage could be considered feasible." AR 12325. Thus, the Tribe's claim that BOR has already complied with the RPM is not supported and, even if it were, the Tribe fails to explain why BOR's compliance with an RPM renders NMFS's BiOp arbitrary and capricious.

The Tribe also argues, immediately after recognizing that NMFS evaluated the impact of the Sweetwater Creek diversion dam, that "the LOP BiOp does not reveal adequate consideration of the Sweetwater dam as a part of the 'problem' addressed in a Section 7 consultation." Id. at 31, 32. As the Tribe itself indicated, NMFS did fully consider the effects of the existence of the Sweetwater Creek diversion dam. Pursuant to its obligations under the ESA, NMFS fully considered how the existence of the Sweetwater Creek diversion dam impacts steelhead and habitat. See BiOp at 32. NMFS also assessed the effects that the Sweetwater Creek diversion dam would have under BOR's proposed operations of the LOP. See id. at 70. Accordingly, the Tribe's claim that NMFS ignored the effects of the Sweetwater diversion dam fail.

[22/] As stated above, the Tribe's reliance on extra-record materials, such as BOR's engineering report, is improper; thus, these materials should not be considered. See Standard of Review Section, supra. In any event, as explained below, Plaintiff's reliance on the engineering report is unavailing.

At bottom, NMFS's obligations under the ESA were to issue an advisory opinion on the likely effects of BOR's proposed action on the Snake River Basin steelhead DPS and its critical habitat. That the Tribe disagrees with BOR's proposed action does not render NMFS's BiOp arbitrary and capricious, nor does it demonstrate that NMFS otherwise abdicated its responsibilities under the ESA. The Tribe has offered no valid basis for disturbing NMFS's reasoned analysis and determinations in the BiOp, and NMFS is therefore entitled to summary judgment on the Tribe's First Claim for Relief.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant Defendants' Cross-Motion for Summary Judgment and dismiss the Nez Perce Tribe's First Claim for Relief in its entirety.

Dated this 21st day of December, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of December, 2007, I filed the foregoing "Combined Memorandum in Support of Defendants' Cross Motion for Summary Judgment and in Opposition to the 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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