

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 22, 2016

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

<p>WILD FISH CONSERVANCY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DAVE IRVING, in his official capacity as the Manager of the Leavenworth Fisheries Complex; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, in his official capacity as the Director of the United States Fish and Wildlife Service; UNITED STATES BUREAU OF RECLAMATION; LOWELL PIMLEY, in his official capacity as the Acting Commissioner of the United States Bureau of Reclamation,</p> <p style="text-align: center;">Defendants.</p>	<p>No. 2:14-CV-0306-SMJ</p> <p>ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF’S AND DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT</p>
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I. INTRODUCTION

This case concerns the U.S. Fish and Wildlife Services’ (FWS) and Bureau of Reclamation’s (BOR) operation and management of the Leavenworth National Fish Hatchery (the Hatchery). As required by the Endangered Species Act (ESA), FWS and BOR engaged in consultation with the National Marine Fisheries Service (NMFS) concerning the effects of the Hatchery’s operation on endangered

1 Chinook salmon and steelhead in Icicle Creek, and NMFS issued a Biological
2 Opinion (BiOp) and Incidental Take Statement (ITS). Wild Fish Conservancy (the
3 Conservancy) alleges NMFS's BiOp and ITS are arbitrary, capricious, an abuse of
4 discretion, and not in accordance with the law; that NMFS violated the National
5 Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact
6 Statement (EIS); and that, in relying on the BiOp, BOR and FWS violated the
7 ESA by failing to insure that Hatchery operations will not jeopardize listed
8 species.

9 As will be discussed below, the BiOp is arbitrary and capricious on one
10 narrow basis—NMFS failed to adequately consider the effects of climate change
11 in its analysis of the Hatchery's operations and water use. The remainder of the
12 Conservancy's arguments fail: the BiOp and ITS are not arbitrary and capricious
13 on any other alleged basis, NMFS had no obligation to conduct an EIS in
14 connection with its preparation of the ITS, and the BOR and FWS satisfied their
15 obligations under Section 7 of the ESA by relying on the BiOp and ITS.
16 Accordingly, Plaintiff's motion for summary judgment is granted with respect
17 only to whether the BiOp was arbitrary and capricious and denied with respect to
18 all other claims. Defendant's motions for summary judgment are denied in part
19 and granted in part on the same basis.

1 **II. BACKGROUND**

2 **A. The Endangered Species Act**

3 Congress passed the ESA in 1973. Its stated purposes were “to provide a
4 means whereby the ecosystems upon which endangered species and threatened
5 species depend may be conserved,’ and ‘to provide a program for the conservation
6 of such . . . species” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)
7 (quoting 16 U.S.C. § 1531(b)). The Secretaries of the Department of the Interior
8 and Department of Commerce are charged with implementing the ESA and have
9 delegated those responsibilities to FWS and NMFS, respectively. Generally, FWS
10 has ESA authority for terrestrial and freshwater species and NMFS has authority
11 for marine and anadromous species. *See* 50 C.F.R. §§ 17.2, 17.11, 223.102,
12 224.101.

13 Section 4 of the ESA establishes the mechanisms for listing threatened and
14 endangered species and for designating “critical habitat.” 16 U.S.C. §§ 1532(16),
15 1533(a). Section 9 makes it unlawful to “take” ESA listed species. 16 U.S.C. §
16 1538(a)(1)(B). “Take” is defined to mean “harass, harm, pursue, hunt, shoot,
17 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
18 16 U.S.C. § 1532. The term harm includes any act “which actually kills or injures
19 fish or wildlife,” including, as relevant here, “significant habitat modification or
20 degradation which actually kills or injures fish . . . by significantly impairing

1 essential behavioral patterns, including breeding, spawning, rearing, migration,
2 feeding or sheltering.” 50 C.F.R. § 222.102.

3 Section 7 of the ESA imposes a substantive obligation on federal agencies
4 to “insure that any action authorized, funded, or carried out by such agency . . . is
5 not likely to jeopardize the continued existence of any endangered species or
6 threatened species or result in the destruction or adverse modification of [the
7 critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). Section 7 requires that
8 any federal agency planning any action (the action agency) that may affect ESA-
9 listed species must consult with NMFS or FWS (the consulting agency). 16 U.S.C.
10 § 1536(a)(2); 50 C.F.R. § 402.14(a). At the conclusion of consultation, the
11 consulting agency must issue a Biological Opinion (BiOp). *Thomas v. Peterson*,
12 753 F.2d 754, 763 (9th Cir. 1985), *overruled on other grounds by Cottonwood*
13 *Envtl. Law Ctr. v. United States Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir.
14 2015).

15 The BiOp provides the consulting agency’s opinion concerning whether the
16 proposed action is likely to jeopardize the ESA-listed species or adversely modify
17 critical habitat, and it must be based on “the best scientific and commercial data
18 available.” 50 C.F.R. § 402.14(g)(8), (h)(2)–(3). If the BiOp concludes that
19 jeopardy or adverse modification is likely, the BiOp must describe reasonable and
20 prudent alternatives, if available, that would avoid such an outcome. 16 U.S.C. §

1 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the BiOp concludes that jeopardy or
2 adverse modification are not likely, or that reasonable and prudent alternatives
3 will avoid jeopardy or adverse modification, the consulting agency must issue an
4 incidental take statement (ITS). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

5 The ITS must state the anticipated level of incidental take that will result
6 from the proposed action, set terms and conditions to minimize impacts to listed
7 species, and set monitoring and reporting requirements. 16 U.S.C. §

8 1536(b)(4)(C)(i)–(ii), (iv); 50 C.F.R. §§ 402.14(i)(1)(i)–(ii), (iv), 402.14(i)(3).

9 Take in compliance with an ITS is exempt from liability under Section 9 of the
10 ESA. 16 U.S.C. § 1536(o)(2).

11 **B. Summary of Facts**

12 **1. Icicle Creek and ESA-listed Chinook and Steelhead**

13 Icicle Creek originates in the Cascade Mountains and flows into the
14 Wenatchee River at the City of Leavenworth. NMFS 11987. Its watershed covers
15 approximately 214 square miles. NMFS 45787. Icicle Creek is home to two ESA
16 listed species that are at issue in this case: the Upper Columbia River spring
17 Chinook evolutionarily significant unit, (*Oncorhynchus tshawytscha*) listed in
18 1999, 64 Fed. Reg. 14,308 (March 24, 1999), and the Upper Columbia River

1 steelhead¹ distinct population segment (*Oncorhynchus mykiss*), which was listed
2 in 1997, 62 Fed. Reg. 43,937 (Aug. 18, 1997). Upper Columbia steelhead were
3 downgraded to a threatened species in 2006. 71 Fed. Reg. 834 (Jan. 5, 2006).
4 Icicle Creek is not included in the designated critical habitat for Upper Columbia
5 River Spring Chinook. NMFS 11980. Icicle Creek is designated as critical habitat
6 for Upper Columbia River steelhead. 70 Fed. Reg. 52,630 (Sept. 2, 2005); NMFS
7 11978. A natural passage barrier prevents migration of steelhead and chinook past
8 River Mile (RM) 5.7.² NMFS 24915.

9 NMFS's recovery plan for Upper Columbia Steelhead sets a target for the
10 minimum number of naturally produced Steelhead reds in the Chiwawa River,
11 Nason Creek, Icicle Creek, Peshastin Creek, and Chumstick Creek to be either 5%
12 of the total number of reds within the Wenatchee population, or at least 20 reds,
13 whichever is greater. NMFS 5906. The Icicle Creek steelhead population has
14 exceeded these recovery criteria since 2008. NMFS 25932.

15
16
17 ¹ Steelhead and rainbow trout are members of the same species. NMFS 12058.
18 The difference between the populations is that steelhead are anadromous while
19 rainbow trout are not. NMFS 12058. The fish are indistinguishable at the juvenile
20 stage.

² River Miles are measured from the terminus of the stream, in this case, the
confluence of Icicle Creek and the Wenatchee River. For example, the passage
barrier at RM 5.7 is located 5.7 miles upstream of the point where Icicle Creek
enters the Wenatchee River in Leavenworth.

1 **2. The Leavenworth National Fish Hatchery**

2 The Leavenworth National Fish Hatchery (the Hatchery) is located on Icicle
3 Creek about three miles south of Leavenworth, Washington. NMFS 45941. The
4 Leavenworth National Fish Hatchery is one of several hatcheries authorized to
5 replace spawning grounds lost when construction of the Grand Coulee Dam made
6 the upper Columbia River basin inaccessible to anadromous fish. *Wild Fish*
7 *Conservancy v. Salazar*, 628 F.3d 513, 516–17 (9th Cir. 2010). FWS has managed
8 and operated the Hatchery since its construction in 1939. *Id.* The Hatchery rears
9 only spring chinook for harvest and is not intended to supplement or support
10 native Chinook salmon populations. NMFS 11944. The Hatchery’s spring
11 Chinook program is listed by the Yakima Nation and FWS’s anadromous fish
12 Management Agreement as “high priority.” NMFS 47206.

13 The Hatchery is supported by a complex water management system that
14 includes several existing instream structures. NMFS 17528, 45956. Structure 1,
15 located at RM 4.5 is a water intake that diverts up to 42 cubic feet per second (cfs)
16 from Icicle Creek to supply water to the Hatchery. NMFS 45942–44. The
17 Hatchery controls three high elevation reservoirs, which it uses to supplement
18 surface flows in Icicle Creek with up to 50 cfs in late summer and early fall.
19 NMFS 45945–46. The Hatchery also uses wells to draw water from a shallow
20 aquifer. NMFS 45945–46.

1 A head gate known as Structure 2 regulates flow between the Hatchery
2 Canal (a man-made channel constructed to facilitate hatchery operations) and the
3 historical channel of Icicle Creek at RM 3.8. NMFS 11960, 45947–48. Water
4 from the Hatchery canal returns to Icicle Creek near Structure 5, located at RM
5 2.8. NMFS 11960, 12063. Structure 5 consists of a bridge over Icicle Creek where
6 racks, flashboards, or traps can be inserted to control or prevent returning hatchery
7 fish from passing upstream. Prior to 2011, Structures 2 and 5 blocked fish passage
8 and severely constrained stream flows into Icicle Creek between the structures.
9 NMFS 45959. In 2011, FWS began modifying operations to allow more
10 consistent water flow in the historic channel and to limit in-river operations of
11 hatchery structures during steelhead migration, spawning, and rearing periods.
12 ECF No. 68-1 at 65, 134, 173–75.

13 FWS and BOR engaged in consultation with NMFS from 2009 to 2015
14 pursuant to Section 7 of the ESA to address the Hatchery’s effects on Upper
15 Columbia River steelhead, and spring Chinook salmon. NMFS issued the final
16 BiOp and accompanying ITS that are the subject of this case on May 29, 2015.
17 The BiOp concluded that operation and funding of the Hatchery is not likely to
18 jeopardize the continued existence of or result in destruction or adverse
19 modification of critical habitat for Upper Columbia River spring Chinook salmon
20 or steelhead. ECF No. 68 at 175–76. The BiOp identified a minimum instream

1 flow goal of 100 cfs in Icicle Creek and proposed eliminating operation of
2 Structure 2 in March if adult steelhead are present; eliminating operation of
3 Structure 2 for recharge in August; not reducing historic channel flow in
4 September when natural flows are less than 60 cfs; and, when the 100 cfs instream
5 goal is not met in dry years, maintaining instream flow goals of 40 cfs in October,
6 60 cfs from November to February, and 80 cfs in March in the Icicle Creek
7 historical channel. ECF No. 68-1 at 24–25.

8 **C. Procedural History**

9 Plaintiff Wildfish Conservancy (the Conservancy) filed this action on
10 September 16, 2014, alleging that the Hatchery’s operation causes take of listed
11 Upper Columbia River steelhead and spring-run Chinook salmon and threatened
12 bull trout, in violation of Section 9 of the ESA; failure to consult regarding
13 ongoing Hatchery maintenance and operations as required by Section 7 of the
14 ESA; failure to reinitiate consultation in light of new information; unlawful
15 commitment of resources prior to consultation; and failure to insure that Hatchery
16 operations are not likely to jeopardize ESA listed species. ECF No. 1. The
17 Defendants answered and moved to dismiss on November 17, 2014. ECF Nos. 8
18 & 9. The conservancy filed a First Amended Complaint on December 8, 2014,
19 clarifying and adding detail to the same substantive allegations. ECF No. 10. The
20 Court denied Defendants’ motion to dismiss as moot on January 8, 2015. ECF No.

1 632 F.3d 472, 481 (9th Cir. 2010) (“Alleged procedural violations of NEPA . . .
2 are reviewed under the [APA].”).

3 Under the APA, the court may set aside agency action that is “arbitrary,
4 capricious, an abuse of discretion or otherwise not in accordance with law.” 5

5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if:

6 the agency has relied on factors which Congress has not intended it to
7 consider, entirely failed to consider an important aspect of the
8 problem, offered an explanation for its decision that runs counter to
the evidence before the agency, or is so implausible that it could not
be ascribed to a difference in view or the product of agency expertise.

9 *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,
10 43 (1983). The court “must uphold agency decisions so long as the agencies have
11 ‘considered the relevant factors and articulated a rational connection between the
12 factors found and the choices made.” *City of Sausalito v. O’Neill*, 386 F.3d 1186,
13 1206 (9th Cir. 2004) (quoting *Selkirk Conservation All. v. Forsgren*, 336 F.3d
14 944, 953–54 (9th Cir.2003)). “A reviewing court ‘generally must be at its most
15 deferential when reviewing scientific judgments and technical analyses within the
16 agency’s expertise.’” *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836,
17 846 (9th Cir. 2013).

1 **IV. DISCUSSION**

2 **A. The BiOp issued by NMFS on May 29, 2015 is arbitrary and**
3 **capricious.**

4 The Conservancy argues that the 2015 BiOp is arbitrary and not in
5 accordance with the law because (1) NMFS’s evaluation the Hatchery’s water
6 diversions impermissibly relies on uncertain future improvements and fails to
7 adequately account for climate change, and (2) the ITS does not establish clear
8 standards and procedures for monitoring and evaluating harm caused by the
9 Hatchery’s operations. ECF No. 92 at 18. The Conservancy’s arguments fail
10 except with respect to one narrow, but dispositive issue. NMFS failed to
11 adequately consider the effects of climate change in the BiOp’s analysis of the
12 Hatchery’s operations and water use. Because NMFS failed to consider this
13 important factor, the BiOp is arbitrary and capricious.

14 **1. NMFS did not rely on uncertain future mitigation measures.**

15 NMFS may not rely on proposed future improvements in its analysis unless
16 there are “solid guarantees” the improvements will actually occur. *See Nat’l*
17 *Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2007).
18 This must include “specific and binding plans” and “a clear, definite commitment
19 of resources for future improvements.” *Id.* at 935–36. Additionally, an “agency
20 must consider near-term habitat loss to populations with short life cycles.” *Pac.*
Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation, 426 F.3d 1082,

1 1095 (9th Cir. 2005). And the agency must therefore discount the benefit of future
2 improvements in its jeopardy analysis if multiple generational cycles may occur
3 before the improvements will be made. *See id.* (“It is not enough to provide water
4 for the [species] to survive in five years, if in the meantime, the population has
5 been weakened or destroyed by inadequate water flows.”).

6 NMFS expressly did not rely on FWS’s long-term commitments made as
7 part of the consultation process. Specifically, the BiOp states that NMFS did “not
8 rely on implementation of these long term actions for [its] jeopardy and critical
9 habitat analyses. . . . [C]onsidering the uncertainty of implementation of the long-
10 term actions, NMFS considered that ongoing operations would continue into the
11 future under the proposed flow regime.” ECF No. 68-1 at 143-44. The
12 Conservancy argues that, contrary to NMFS’s statement, the record demonstrates
13 that NMFS did consider the proposed long-term actions. ECF No. 92 at 24–27.

14 As the Conservancy points out, a draft BiOp issued in April 2015 found that
15 Hatchery operations adversely modified steelhead critical habitat and proposed
16 alternatives requiring the Hatchery to operate diversions at Structures 1, 2, and 5
17 to avoid causing instream flows to fall below levels identified as necessary for
18 steelhead rearing and adult passage: 150 cfs year-round at Structures 1, 2, and 5
19 for juvenile rearing, and 200 cfs between March and June for adult passage at
20 Structure 5. NMFS 9735. FWS objected to this requirement, on the basis that it

1 would not be able to meet the goals in all years given existing Hatchery facilities.
2 NMFS 9819–29. In May 2015, FWS agreed to implement water saving
3 technologies within eight years to insure a minimum in-stream flow of 100 cfs at
4 all times. ECF No. 92 at 22.

5 On May 20, 2015, NMFS issued a revised draft BiOp that concluded the
6 Hatchery operations were not likely to adversely modify critical habitat, relying in
7 part on FWS’s commitment to stop diverting water at Structure 2 within 8 years.
8 NMFS 10705–06. A week later, however, the final BiOp explained that NMFS
9 analysis did not rely on FWS’s uncertain long-term commitments. NMFS 12070–
10 71.

11 These circumstances, taken alone, could suggest that NMFS improperly
12 relied on future, uncertain changes. However, the analysis in the BiOp considers
13 only the immediate Hatchery operations. ECF No. 68-1 at 98-169. Importantly,
14 NMFS did not analyze the potential water savings from changes proposed in the
15 longer-term plan. 2015 BiOp at 143. Additionally, the BiOp recommends
16 immediate implementation of several actions necessary to avoid jeopardy,
17 including: (1) Structure 2 will not be closed in March if steelhead are present; (2)
18 if Structure 2 is closed during spring Chinook broodstock collection, traps at
19 Structure 5 will be monitored twice daily and steelhead transported and released
20 above structure 5; (3) Structure 2 operation in August, an offset from two

1 reservoirs in dry years where operation of Structure 2 is necessary for aquifer
2 recharge; and adoption of approved fish salvage methods for identifying and
3 removing fish entrained in the water intake system. ECF No. 68 at 25.

4 The analysis in the BiOp does not improperly consider uncertain, long-term
5 proposals, and there is no basis for the court to reject the BiOp on this basis.

6 **2. NMFS failed to adequately considered climate change in**
7 **analyzing the effects of the Hatchery's operations and water use.**

8 The BiOp includes a detailed discussion of the effects of climate change on
9 salmonid recovery in the Pacific Northwest, including that models predict a
10 significant reduction in total snowpack and low-elevation snowpack, affecting
11 streamflow and water temperatures. ECF No 68-1 at 38, 58–59. Despite these
12 predicted changes, NMFS used historical stream-flow data from 1994 to 2014 in
13 the analysis of the Hatchery's operations and water use. ECF No. 68-1 at 142,
14 144–58, NMFS 12069–70. The Conservancy argues that by doing so, NMFS
15 failed to consider an important factor. ECF No. 92 at 29. Defendants argue that
16 NMFS properly considered the best available science concerning the region-wide
17 effects of climate change and relied on only historical averages to conduct its
18 analysis of Icicle Creek stream flows because no finer-scale climate change
19 analysis of Icicle Creek was available for NMFS to consider. ECF No. 98 at 8–12;
20 ECF No. 100 at 27. Defendants further argue that the Court should defer to
NMFS's highly technical determination of this matter. ECF No. 97 at 22.

1 First, it is important to note that while the Court must give deference to the
2 expert agency on highly scientific or technical questions, *see Nat'l Wildlife Fed'n*
3 *v. ACOE*, 384 F.3d 1163, 1174 (9th Cir. 2004), a voluminous and technical record
4 does not insulate a decision from judicial review under that deferential standard.
5 The Court is obligated to carefully review the agency's decision even if it is
6 complex and technical.

7 Defendants are correct that the agency is not required "to conduct new tests
8 or make decisions on data that does not yet exist." *San Luis & Delta-Mendota*
9 *Water Auth. v. Locke*, 776 F.3d 971, 995 (2014). Defendants' arguments that
10 NMFS did not need to consider climate change in its analysis nevertheless miss
11 the mark here. The best available science indicates that climate change will affect
12 stream flow and water conditions throughout the Northwest. ECF No. 68-1 at 58–
13 59. The fact that there is no model or study specifically addressing the effects of
14 climate change on Icicle Creek does not permit the agency to ignore this factor.

15 The problem with NMFS's analysis is not that it used recent historical
16 streamflow data to model the effects of hatchery operations and water use at
17 different flow levels. *See* ECF No. 68-1 at 142, 144–58. The problem here is that
18 NMFS included no discussion whatsoever of the potential effects of climate
19 change in the BiOp's analysis of the Hatchery's future operations and water use.
20 NMFS discusses the effects of climate change generally and then proceeds with

1 analysis on the apparent assumption that there will be no change to the hydrology
2 of Icicle Creek. NMFS does not necessarily need to conduct a study or build a
3 model addressing the impacts of climate change on the Icicle Creek watershed.
4 But its analysis must consider that the best available science, which it discusses
5 elsewhere in the BiOp, suggests that baseline historical flow averages may not be
6 effective predictors of future flows.

7 Defendants point out that NMFS did conclude that climate change is less
8 likely to affect Icicle Creek than other parts of the Pacific Northwest. ECF Nos. 98
9 at 8, 100 at 28. In context, the BiOp states that “climate change is likely to warm
10 and change the hydrology of the entire critical habitat for [Upper Columbia
11 Steelhead],” and notes that the effects of climate change “increase[] the
12 importance of restoring habitat in Icicle Creek, an area that will be less prone to
13 climate change affects. [sic]” ECF No. 68-1 at 175. However, this statement is
14 conclusory and unconnected to the analysis of the Hatchery’s operations and
15 water use. And in any case, the fact that Icicle Creek may be less prone to the
16 effects of climate change does not mean that there will be no changes.

17 Because NMFS failed to consider the potential effects of climate change on
18 stream flows in Icicle Creek in connection with its analysis of the effects of the
19 Hatchery’s operations and water use on listed salmonids and critical habitat,
20 NMFS failed to consider an important aspect of the problem, and the BiOp is

1 arbitrary and capricious. It is, of course, not the Court’s place to tell the agency
2 *how* to do consider climate change in its analysis, it simply must consider it.

3 **3. NMFS’s decision to use monthly average flows was not arbitrary**
4 **and capricious.**

5 The Conservancy argues that NMFS’s use of monthly flow averages
6 improperly misrepresents potential low flows. ECF No. 92 at 31. The
7 Conservancy is correct that low flow on any given day is the critical issue because
8 “fish require sufficient flows for their survival every day.” ECF No. 92 at 31. But
9 the BiOp specifically addressed this concern, and took steps to account for the
10 limitations of having only monthly data by considering other data and the
11 experience with actual operations of hatchery structures. ECF No. 68-1 at 142–47.
12 This is an area where the Court must defer to the judgment of the agency scientists
13 that monthly flow averages adequately capture the variability necessary to
14 evaluate the effects of Hatchery operations. It is not apparent that FWS’s decision
15 to use monthly data relies on a faulty assumption, is counter to the evidence, or is
16 implausible. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

17 **4. The ITS includes an adequate limit on take and monitoring**
18 **standards.**

19 The Conservancy argues that the ITS does not meet ESA standards for take
20 because (1) it does not set an adequate trigger for take; (2) it lacks adequate

1 monitoring requirements for take associated with the water intake system; and (3)
2 because it includes contradictory provisions. ECF NO. 92 at 33–42.

3 The ITS “functions as a safe harbor provision immunizing persons from
4 Section 9 liability and penalties for takings committed during activities that are
5 otherwise lawful and in compliance with its terms and conditions.” *Ariz. Cattle*
6 *Growers Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001)
7 (citing 16 U.S.C. § 1536(o)). “In general, [ITS’s] set forth a ‘trigger’ that, when
8 reached, results in an unacceptable level of incidental take, invalidating the safe
9 harbor provision, and requiring the parties to re-initiate consultation.” *Id.* at 1249.
10 The “trigger” should ideally be a number, but it may be a surrogate—“for
11 example, changes in ecological conditions affecting the species”—but “[i]f a
12 surrogate is used, the agency must articulate a rational connection between the
13 surrogate and the taking of the species.” *Wild Fish Conservancy v. Salazar*, 628
14 F.3d 513, 531 (9th Cir. 2010).

15 *i. The ITS’s trigger level is adequate.*

16 The ITS does not set a specific numerical level for take of Steelhead and
17 Chinook salmon anticipated to result from the Hatchery’s water diversion. Instead,
18 the ITS uses instream flow as a surrogate as follows: (1) 100 cfs from April to
19 July; (2) natural flows minus Structure 1 and other non-federal diversions in
20 August (no Structure 2 operations); (3) no Hatchery caused reductions in stream

1 flows in September where flows are less than 60 cfs, and (4) minimum instream
2 flows of 40 cfs in October, 60 cfs from November to February, and 80 cfs in
3 March in dry years where Structure 1 and 2 operations cause historical channel
4 flows to drop below 100 cfs. ECF No. 68-1 at 178, 180. These surrogate levels are
5 based on flow recommendations for passage and rearing of salmonids during
6 different life cycles and at each relevant stream location. ECF No. 68-1 at 147–58,
7 178, 180. NMFS rationally connected these surrogate trigger levels to take of the
8 species.

9 *ii. The ITS's monitoring requirements are adequate.*

10 The Conservancy argues that the ITS lacks sufficient monitoring procedures
11 for take resulting from the Hatchery's water intake system. Specifically, the
12 Conservancy notes that the Hatchery's primary diversion structure—Structure 1—
13 does not comply with NMFS's screening criteria and entrains fish. ECF No. 92 at
14 37. Fish entrained in this diversion, travel through buried pipes and are deposited
15 in the Hatchery's sand-settling basin, where they have no way to return to the
16 creek unless manually collected and transported. ECF No. 92 at 38; NMFS
17 13725–26.

18 The BiOp acknowledges that the unscreened diversion structure kills fish,
19 and the ITS sets a take limit of 550 juvenile and 20 adult steelhead and 1,000
20 juvenile Chinook. NMFS 12104–07; ECF No. 92 at 38. The ITS sets requirements

1 for visual monitoring of the sand-settling basin for trapped fish. ECF No. 68-1 at
2 181. Additionally, FWS has specific fish salvage procedures that comply with
3 NMFS recommended procedures. ECF No. 68-1 at 177, 179–80.

4 The Conservancy argues that the monitoring requirements are inadequate
5 because it is not clear the entire sand-settling basin can be observed. ECF No. 92
6 at 39. Defendants, however, point out that visual monitoring is more intensive
7 than simply standing on the edge of the pool, and includes snorkeling in the pool,
8 which has been used effectively in the past in Icicle Creek. ECF No. 98 at 20;
9 ECF No. 100 at 43; NMFS 12049–50. Defendants also argue that the record and
10 BiOp adequately demonstrate that juvenile fish entrained in the pool are readily
11 observable. ECF No. 100 at 43; ECF No. 68-1 at 132, 183.

12 The Court finds no basis to second-guess the scientific determination of the
13 expert agency on this issue. The ITS includes specific terms and conditions for
14 monitoring and removal of entrained juvenile fish. ETS No. 68-1 at 182–93.
15 These standards were developed in consultation with FWS. NMFS 1131–32. And
16 as the Federal Defendants point out, “NMFS was entitled to rely upon the official
17 representations of [FWS] that it would be able to conduct the conservation and
18 monitoring measures proposed in the action.” *Or. Nat. Desert Ass’n v. Tidwell*,
19 716 F. Supp. 2d 982, 1003–04 (D. Or. 2010).

1 iii. *The ITS does not contain contradictory provisions.*

2 The Conservancy argues that the ITS is internally contradictory with respect
3 to the operation of Structure 2 in March. ECF No. 92 at 43. Specifically, Term 2a
4 of the ITS requires that Structure 2 remain open in March for Steelhead spawning
5 and migration, when more than 50 Hatchery fish migrate upstream of Structure 5.
6 ECF No. 68-1 at 182. The ITS also provides that the Hatchery may deviate from
7 its instream flow goal of 100 cfs for the purposes of “aquifer recharge.” ECF No.
8 68-1 at 182. The Conservancy argues that this can only be accomplished by
9 closing the gates at Structure 2. ECF No. 92 at 43. However, in addition to the
10 provision of the ITS discussed by the Conservancy (Term 2a), the ITS prohibits
11 any operation of Structure 2 in March if adult Steelhead are present in the creek
12 (Term 2e). ECF No. 68-1 at 182. Term 2e therefore resolves any conflict within
13 Term 2a: if adult steelhead are present in March, FWS may not operate Structure
14 2, even for aquifer recharge. *Id*

15 **D. NMFS was not required to conduct an EA or EIS pursuant to NEPA
16 when it issued the Incidental Take Statement.**

17 The Conservancy argues that NMFS violated NEPA by failing to conduct
18 an EA or EIS in conjunction with the ITS. ECF No. 92 at 44–47. NEPA requires
19 federal agencies to prepare an environmental impact statement (EIS) for all
20 “major Federal actions significantly affecting the quality of the human
environment.” 42 U.S.C. § 4332(2)(C)(i). If the action at issue is one that does not

1 categorically either require or not require an EIS, the agency must prepare an
2 environmental assessment (EA) to determine whether to prepare an EIS or a
3 finding of no significant impact (FONSI). *Anderson v. Evans*, 371 F.3d 475, 488
4 (9th Cir. 2002).

5 The Ninth Circuit squarely addressed this issue in *San Luis & Delta-*
6 *Mendota Water Authority v. Jewell*, holding that the implementation of the BiOp
7 and ITS is what triggers NEPA, and that responsibility lies with the action agency.
8 747 F.3d 581, 642 (9th Cir. 2014). In that case, the court considered whether
9 FWS’s issuance of a BiOp was a “major federal action significantly affecting the
10 quality of the human environment.” *Id.* (quoting 40 C.F.R. §1508.18). The court
11 distinguished the case from *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), where
12 NMFS issued an incidental take statement to the states of Oregon and Washington
13 pursuant to a federal-state-tribal compact (the Columbia River Fish Management
14 Plan). *Id.* at 644. In that unique circumstance, the BiOp and ITS apportioned
15 rights to parties and was “functionally equivalent to a permit.” *Id.* (quoting
16 *Ramsey*, 96 F.3d at 444). By contrast, in an ordinary case, it is the action agency
17 that has the ultimate responsibility to determine whether and how to implement an
18 ITS. *Id.* The court concluded that there was “no reason to require a consulting
19 agency . . . to complete an EIS when an action agency . . . will either (1) prepare

1 an EIS when it implements [the consulting agency’s] proposal or (2) reject [the
2 consulting agency’s] proposal and prepare an EIS on whatever it implements.” *Id.*

3 *San Luis & Delta-Mendota* is dispositive. NMFS had no NEPA obligation
4 in this case.³

5 **E. FWS and BOR properly relied on NMFS’s BiOp and ITS to satisfy
6 their obligations under ESA Section 7.**

7 The Conservancy argues that FWS and BOR have violated their duty to
8 insure that Hatchery operations do not jeopardize ESA-listed species or adversely
9 affect their critical habitat. ECF No. 92 at 48. The conservancy argues that the
10 agencies cannot simply rely on the BiOp because the decision to rely on the 2015
11 BiOp must itself not be arbitrary and capricious. ECF No. 92 at 48. An action
12 agency has an independent duty to insure that its action is not likely to jeopardize
13 listed species or adversely modify critical habitat. *Pyramid Lake Paiute Tribe of
14 Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). The
15 agency’s decision to rely on the BiOp itself must not have been arbitrary and
16 capricious. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993).

17 Where there are factual objections to a BiOp, an action agency’s reliance on
18 even an “admittedly weak” BiOp is generally not arbitrary or capricious. *Id.*; *Defs.*

19 ³ The parties’ intend to file separate motions for summary judgment on Plaintiff’s
20 recently added claim that FWS and BOR were required to comply with NEPA and
produce an EIS. The court is scheduled to hear these motions in March, 2017.
ECF No. 117.

1 *of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir. 2005), *reversed on other grounds*
2 *by Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

3 However, an action agency may be held to account for relying on a legally
4 insufficient BiOp. *Id.*

5 In this case, the BiOp, in failing to consider an important factor in its
6 analysis, is factually, not legally, insufficient. FWS and BOR's reliance on the
7 BiOp satisfied their duties under ESA Section 7.

8 VI. CONCLUSION

9 For the reasons discussed, **IT IS HEREBY ORDERED:**

- 10 1. Plaintiff Wild Fish Conservancy's Motion for Summary Judgment
11 **ECF No. 92**, is **GRANTED IN PART and DENIED IN PART**.
- 12 2. Defendants' Cross-Motions for Summary Judgment, **ECF Nos. 97,**
13 **98, and 100**, are **GRANTED IN PART and DENIED IN PART**.
- 14 3. The Biological Opinion issued by National Marine Fisheries Service
15 is arbitrary and capricious for the reasons articulated in this opinion.
- 16 4. Plaintiff's Fifth Cause of Action and Seventh Cause of Action are
17 **DISMISSED**.
- 18 5. This matter is **REMANDED** for further consultation consistent with
19 this opinion.

