IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al.,

Plaintiffs,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.,

Defendants.
/

No. C 02-2006 SBA

Related Case No.
C 00-01955 SBA

ORDER

Plaintiffs' Counsel are directed to serve this order upon all other parties in this action.

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment [Doc. 147], the Federal Defendants' Cross-Motion for Summary Judgment [Doc. 166], the Water Users' Cross-Motion for Summary Judgment [Doc. 167], Yurok Tribe's Motion for Summary Judgment [Doc. 144], and Hoopa Valley Tribe's Motion for Summary Judgment on the Fourth Claim for Relief [Doc. 157]. Having read and considered the arguments and evidence presented to the Court in the papers submitted by the parties and at the telephonic hearing held on June 5, 2003, the Court hereby GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for Summary Judgment, GRANTS IN PART AND DENIES IN PART the Federal Defendants' Cross-Motion for Summary Judgment, GRANTS IN PART AND DENIES IN PART the Water Users' Cross-Motion for Summary Judgment, DENIES Yurok Tribe's Motion for Summary Judgment and DENIES Hoopa Valley Tribe's Motion for Summary Judgment.

I. Background

A. The Klamath Project

The present litigation concerns the operation of the Klamath Reclamation Project ("the Project") for the years 2002-2012. The U.S. Bureau of Reclamation (the "BOR") manages the Klamath Reclamation Project, which covers approximately 200,000 miles in Northern California and Southern

Oregon. See Kandra v. United States, 145 F.Supp.2d 1192, 1196 (D.Or. 2001). Water collects in the Upper Klamath Lake ("UKL"), which is relatively shallow and has a limited storage capacity available for use during dry years. Water is drawn from UKL into the Project via the A-canal, which sits above Link River Dam. Link River Dam regulates the flow of water into the lower Klamath River. Link River Dam is the first in a series of dams in the Project, the last being the Iron Gate Dam. From Iron Gate Dam, the Klamath River flows into the Pacific Ocean.

The BOR determines the level, timing, and rate of water flow through the Klamath Project. In managing the Project, the BOR must balance many interests and obligations, all potentially competing for the same valuable, but limited, resource. Pursuant to contracts authorized by the Reclamation Act, the Project provides irrigation water to farmers and communities in the area. Additionally, water from the Project supports two national wildlife refuges, the Lower Klamath and Tule Lake National Wildlife Refuges. The BOR must also preserve the tribal resources of three Native American Tribes whose territory falls within the Project-- the Hoopa, Klamath, and Yurok Tribes. See Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, 138 F.Supp.2d 1228, 1231 (N.D.Cal. 2001); see also Patterson v. Klamath Water Users Protective Ass'n, 204 F.3d 1206, 1213 (9th Cir. 2000) (citing United States v. Adair, 723 F.3d 1394, 1408-11, 1415 (9th Cir. 1983)). The preservation of tribal resources includes protection of the coho salmon and maintaining the tribes' water rights. See Kandra v. U.S., 145 F.Supp.2d 1192, 1197 (D.Or. 2001) Additionally, the Project must comply with the Endangered Species Act ("ESA"), Title 16 U.S.C. section 1531 *et seq.*, because its territory encompasses the habitat of the coho salmon, a threatened species under the Endangered Species Act. See 62 Fed.Reg. 24588, 24592 (May 6, 1997).[1] The coho salmon populate the waters below the Iron Gate Dam in the Klamath River and its tributaries, and the Klamath River from Iron Gate Dam to the Pacific Ocean has been designated critical habitat for the coho salmon.

B. Requirements Under the ESA

Under the ESA, the Project is prohibited from engaging in any action that is likely to "jeopardize

[1]The Ninth Circuit has found that the interests of the Tribes as well as compliance with the ESA take precedence over contracts with irrigators under the Reclamation Act. See Patterson, 204 F.3d at 1213-14.

the continued existence of" an endangered or threatened species or result in "destruction or adverse modification of [the designated critical habitat]." 16 U.S.C. § 1536(a)(2). An action "jeopardizes the continued existence" of a species when the action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02. An action results in "destruction or adverse modification" when the action results in a "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." Id.

Whenever an agency undertakes an action that "may affect" a species listed as threatened under the ESA, it must pursue consultation with the United States Fish and Wildlife Service ("FWS") or the National Marine Fish Service (the "NMFS"). The agency proposing the action (the "acting agency") may prepare a "biological assessment" ("BA") to evaluate the potential effects of a proposed action. 50 C.F.R. § 402.12(a). As part of the formal consultation process, the consulting agency will issue a "biological opinion" detailing how the proposed action will affect the listed species. 16 U.S.C. §1536(b)(3)(A). If the NMFS or the FWS determines that the agency action will jeopardize or adversely modify the species or its critical habitat, the NMFS or the FWS will suggest reasonable and prudent alternatives ("RPAs") that "avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or modification of critical habitat." 50 C.F.R. § 402.02; see also 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(b)(a)(3). In evaluating whether a proposed action is likely to avoid jeopardy or destroy or modify a critical habitat, the NMFS or the FWS must evaluate the "effects of the action," along with the "cumulative effects" on the species. 50 C.F.R. § 402.14(g)(3). "'Effects of the action' refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes...the anticipated impact of all proposed Federal projects in the action area that have already undergone...consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but are still reasonably certain to occur." 50 C.F.R. § 402.02. "'Cumulative effects' are those effects of future State or private activities,

not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." Id.

If the NMFS or the FWS determines that the proposed action or the RPA will not jeopardize a species, but may result in the taking of a threatened species that is incidental to the agency action, the NMFS or the FWS provides an "incidental take statement" ("ITS") along with the biological opinion. 16 U.S.C. § 1536(b)(4)(i)-(iii). The ITS specifies the impact of such incidental taking on the species and RPAs that are necessary or appropriate to minimize such impact. 16 U.S.C. § 1536(b)(4).

C. History of the BOR's Operating Plans and Compliance with ESA Requirements

Beginning in 1995, the BOR began issuing annual operating plans detailing, *inter alia*, the minimum flow levels in the Klamath River below the Iron Gate Dam. The plans specifically provided for flows in terms of cubic feet per second ("cfs") of water. The flows were planned upon weekly or monthly periods, based upon hydrological conditions for the year; e.g., Above Average, Below Average, Dry, and Critically Dry. These classifications were based upon estimates received from the Natural Resources Conservation Service. Generally, the accuracy of the estimates increased in temporal proximity to the planned action.

Since 1995, the BOR has also been attempting to prepare a multiple-year operating plan, including a biological assessment as required under the ESA. Before issuing the multi-year plan, the BOR consulted with Thomas Hardy, Ph.D. of the NMFS, to complete a comprehensive review of the status of all anadromous fish in the Klamath River. In August of 1999, Dr. Hardy released "Phase I" of his report, ("Hardy Phase I"), which recommended certain interim minimum flow levels necessary to protect the anadromous fish in the Klamath River. However, the Phase I report was only an interim report because further testing and analysis was desired, in particular site-specific studies. In November of 2001, Dr. Hardy released the draft version of the Phase II Report (the "2001 Hardy Draft Report"). That version included site-specific studies and further analysis. The 2001 Hardy Draft Report has not been issued in its final form.

In 2000, the BOR issued an operating plan which instituted various flow levels. However, the BOR did not seek formal consultation of the plan as required by the ESA. The Pacific Coast Federation of Fishermen's Associations ("PCFFA"), brought suit in this Court challenging the BOR's 2000 plan.

On April 3, 2001, the Court granted PCFFA's motion for summary judgment. See Pacific Coast Federation of Fishermen's Association v. U.S. Bureau of Reclamation, 138 F.Supp.2d at 1247. The Court found that "[d]espite the weight which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is clear that the Bureau of Reclamations failed to comply with these requirements before implementing its 2000 Operations Plan for the Klamath Project." Id. at 1243. Based on the substantial violation of the ESA's procedural requirements, the Court determined that an injunction was appropriate. Thus, the Court enjoined the BOR from sending water irrigation deliveries from the Project if the flows dropped below certain minimum amounts. See id. at 1250.

In order to determine what levels were appropriate, the Court looked to the best science available. The Court determined that the best science available at the time was the Hardy Phase I report.

> [The Hardy] Phase I report was based upon extensive input from the members of a technical team, including Bureau of Reclamation staff, and was created specifically to address the situation which the Bureau [BOR] apparently still is confronting, namely, the need to present instream flow recommendations without completed site-specific studies. Neither the Bureau nor Intervenor direct the Court to any better science. Nor do they offer a counter proposal concerning the type of injunction that should be entered.

Id. at 1249-50. By its terms, the order was to expire when the BOR adopted a plan which met the requirements of the ESA.

On April 6, 2001, three days after the Court issued its Order, the NMFS issued a biological opinion (the "2001 NMFS Biological Opinion") discussing the on-going impact of the Project on, *inter alia*, coho salmon. The 2001 NMFS Biological Opinion concluded that the low flow levels proposed by the BOR for 2001 were likely to jeopardize the continued existence of the coho salmon and adversely modify their habitat. The NMFS proposed a "reasonable and prudent alternative" for the Project's operations including minimum flow levels they believed were necessary to avoid jeopardizing the coho salmon.

On the same day, the FWS also issued an opinion stating that the Project needed to maintain certain levels at Upper Klamath Lake in order to mitigate any deleterious impact upon the shortnose and Lost River sucker fish, both of which have been listed as endangered. Based on these two opinions, and after further consultation with the NMFS and the FWS, the BOR indicated it would implement the

biological opinions in its 2001 operating plan. The 2001 plan called for drastically reduced deliveries of water to irrigation districts. This operating plan was challenged by irrigators and irrigation districts. However, the plan was upheld by the District Court for the District of Oregon. See Kandra v. United States, 145 F.Supp.2d 1192 (D.Or. 2001).

D. The NRC Report and the Interim Operating Plan

In December of 2001, the Department of the Interior ("Interior") and the Department of Commerce ("Commerce"), sought review of the 2001 NMFS Biological Opinion and the FWS biological opinion by the National Research Council ("NRC"), an arm of the National Academy of Sciences. The NRC convened a Committee on Endangered and Threatened Fishes in the Klamath River Basin consisting of twelve independent scientists and scholars (the "NRC Committee"). The NRC Committee conducted hearings and received opinions and evidence from other individuals affected by the Project or those knowledgeable in the field, including a member of the PCFFA and Dr. Hardy.[2] A report was prepared and circulated to nine independent reviewers for additional comment and critique. Finally, it was subject to a further independent examination by two external reviewers.

On February 6, 2002, the NRC Committee issued its "Prepublication Copy, Interim Report, Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin (2002)," (the "NRC Report"). The NRC Report recognized that "the reduction in stocks of native coho salmon in the Klamath River Basin has been caused by multiple interactive factors." Changes in the physical habitat associated with inadequate flows and water temperature were cited as examples. However, the NRC Report found that there was not a sufficient basis to support the proposed flows in the 2001 NMFS Biological Opinion.

> The proposed low-flow limits on the Klamath River may not be of significant benefit to the coho population. While the provision of additional flow seems intuitively to be a prudent measure of expanding habitat, the total habitat expansion that is possible given the limited amount of water that is available in dry years is not demonstrably of much importance to maintenance of the population. In wet years, any benefits from increased flow will be realized without special limitations. Year classes that have high relative strength should have emerged from the wet years of the recent past flow regime if flow is limiting. This does

[2] The NRC Committee did not consider the Hardy Phase II report which was only in draft form.

> not appear to have been the case in the past decade, however. Thus, factors other than dry-year low flows appear to be limiting to survival and maintenance of coho.....[A]vailable information provides little support for benefits presumed to occur through the increase of flows beyond those of the last decade.

AR at 2942-44. The NRC Report found that higher flows might disadvantage the young coho salmon between July and September because the additional flows would include water which has been warmed in retention lakes. Id. High water temperature was found to be one of the reasons for the decline of coho salmon. "This issue has apparently not yet been studied in any rigorous manner, yet it is critical to the evaluation of higher flows in the warmest months." Id. at 2943. The NRC Report also questioned whether the increased flows might have a detrimental effect upon thermal refugia which is critical to the coho salmon's habitat. Id.

The NRC Report found that,

> Progressive depletion of flows in the Klamath River main stem would at some point be detrimental to coho salmon through stranding or predation losses. Thus, incremental depletions beyond those that are reflected in the recent historical record could be accomplished only with increased risk to coho salmon. At the same time, the available information provides little support for the benefits presumed to occur through the increased flows beyond those of the last decade. While single-year or multiple-year averages of low-flow extremes beyond those presently reflected in the record cannot be supported, there is also presently little evidence of a scientific nature that increased low flows will improve the welfare of the coho salmon.

Id. at 2944. While the NRC Report did not find scientific support for the minimum flows proposed by NMFS, the NRC Report also found that the BOR's proposal in its 2001 biological assessment could not be justified. The NRC Report concluded that the BOR's 2001 biological assessment "could lead to more extreme suppression of flows than has been seen in the past, and cannot be justified either." Id. at 2945. Overall, the report concluded that "there is no convincing scientific justification at present for deviating from flows derived from operational practices in place between 1990 and 2000."[3] Id.

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[3] Subsequent to the release of this report, the NMFS sent a letter to NRC requesting clarification. Of particular importance, the NMFS inquired whether the NRC "considered the benefits of increased flows in the spring, when temperature is not a limiting factor." The NMFS propounded questions to the NRC on whether its recommendations about minimum flow levels were applicable to spring flows. On April 30, 2002, the NRC issued a letter in response to the NMFS' request for clarification. The NRC stated in its clarification letter that it "did consider whether there would be benefits to fry from increased

On February 25, 2002, the BOR issued its multi-year "Final Biological Assessment: The Effects of Proposed Actions Related to Klamath Project Operation (April 1, 2002-March 31, 2012)" (hereinafter "the 2002 Biological Assessment"). In accordance with the findings of the NRC Report, the BOR's 2002 Biological Assessment proposes flows that are intended to mimic the operational practices for the ten year period beginning with 1990.

On February 27, 2002, the BOR initiated formal consultation with the NMFS concerning its 2002 Biological Assessment. The NMFS indicated that its biological opinion reviewing the 2002 Biological Assessment would not likely be completed until June of 2002. In light of the fact that the NMFS was not likely to release its report prior to the spring operations, on March 27, 2002, the BOR issued an interim operating plan for April through May, 2002 (the "2002 Interim Operating Plan"). The 2002 Interim Operating Plan proposed minimum flows that were consistent with those in the 2002 Biological Assessment.

Based upon the BOR's 2002 Interim Operating Plan, on April 24, 2002, Plaintiffs PCFFA, Institute for Fisheries Resources, Northcoast Environmental Center, Klamath Forest Alliance, Oregon National Resources Council, the Wilderness Society, Waterwatch of Oregon, Defenders of Wildlife, Headwaters, and Representative Mike Thompson (collectively "Plaintiffs") filed a Complaint in this matter, along with a motion for a temporary restraining order. Plaintiffs argued that based upon the best science available, a much higher minimum flow of water from the Iron Gate Dam than set in the 2002 Interim Operating Plan was necessary to avoid a negative impact upon the coho salmon. Based on the Hardy Phase I report, the 2001 NMFS biological opinion, and the 2001 Hardy Draft Report, they asserted that coho salmon require higher instream flows of water into the lower Klamath River. Thus, Plaintiffs sought a temporary restraining order preventing the BOR from restricting the flow to those

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spring flows." It recognizes that the concerns about increased water temperature are not present in relation to the spring flows. However, the NRC asserted that it found "other weaknesses in the arguments for increased flows" and that the "projected increases in habitat for the fry seemed, in the opinion of the committee, quite modest at best." The NRC also found it unlikely that the coho salmon are "saturating the main stem habitat" or that the main stem was a significant rearing area for the coho salmon. Thus, the NRC's letter reaffirms its conclusion that there is no convincing evidence to support the minimum flows proposed in the NMFS's 2001 opinion. However, the NRC did acknowledge that the conclusions about benefits of increased flow levels might be correct pending more research and studies.

levels in the BOR's 2002 Interim Operating Plan, and mandating minimum flows in accordance with the 2001 Hardy Draft Report. Plaintiffs argued that the BOR had not completed a formal consultation with the NMFS as required under the ESA and that the putative informal consultation is invalid. Alternatively, Plaintiffs asserted that even if the informal consultation is valid, the NMFS' concurrence with the 2002 Interim Operating Plan violates the Administrative Procedures Act ("APA"), Title 5 U.S.C. sections 551 *et seq.*, because it is arbitrary, capricious, and contrary to law.

In an order filed May 22, 2002, the Court denied Plaintiffs' motion for a temporary restraining order. Although the Court concluded that the BOR failed to satisfy the procedural consultation requirements of the ESA, the Court found that the BOR could proceed with its 2002 Interim Operating Plan pursuant to ESA § 7(d), which allows an agency to proceed with its proposed action prior to completing consultation if it is determined that the activity would not irreversibly or irretrievably commit resources which would foreclose the development of an RPA. In its Order, this Court approved the BOR's use of the NRC report as the best science available, and declined to rely on the 2001 Hardy Draft Report as the best science, since that report existed only in draft form.

While the validity of the 2002 Interim Operating Plan was being litigated in court, the NMFS continued to assess the validity of the BOR's 2002 Biological Assessment and produced drafts of its biological opinion. On April 23, April 29, and April 30, 2002, the NMFS and the BOR met regarding the most recent version of the draft biological opinion, which proposed specific flow rates that were higher than those proposed in BOR's 2002 Biological Assessment. Id. at 4594. The BOR proposed that it should be responsible for the remedy to the extent that coho are harmed as a result of the Klamath Project. Id. Specifically, the BOR proposed that it should be responsible for providing 57% of the flows proposed in the draft biological opinion, based on the fact that 57% of the irrigable acres in the upper Klamath Basin are irrigated by Project contractors. Id. The NMFS noted that providing 57% of what it recommended as the appropriate target flows might be insufficient to avoid jeopardizing the coho, and therefore would not constitute a viable RPA. However, "[t]his problem was resolved when [BOR] agreed that it would use its authorities to establish a multi-agency task force/working group, comprising Federal, State, Tribal and, where possible, local agencies and interests, to develop the other 43% of the flows identified in the RPA. This approach anticipates that the States of California and Oregon will

participate in the process, step up enforcement of existing water rights or water rights laws, and develop programs to improve flows in the tributaries to the Klamath above and below the Project." Id.

On May 31, 2002, the NMFS issued its final biological opinion (the "2002 Biological Opinion"). The 2002 Biological Opinion concluded that the BOR's proposed action contained in the 2002 Biological Assessment "is likely to jeopardize the continued existence of SONC coho salmon" and "is likely to adversely modify critical habitat for the SONC coho salmon." Id. at 4590. The NMFS then proposed an RPA that could be implemented by the BOR that would avoid the likelihood of jeopardizing the existence of the coho salmon or adversely modifying their critical habitat. Id. at 4591. The RPA consists of the following elements: (1) specific water management measures over a ten-year period; (2) a water bank and water supply enhancement program to provide flows to the Klamath River below Iron Gate Dam; (3) an agreed-upon long-term flow target to be achieved by 2010; (4) an inter-governmental task force--the Conservation Implementation Committee-- to develop, procure, and manage water resources; and (5) an inter-governmental science panel to develop and implement a research program to identify and fill gaps in existing knowledge regarding coho and their habitat requirements during various life history states and water year types. Id. at 4591. These program elements are to take effect in various degrees during three phases. Phase I covers the years 2002-2005. During this time, the RPA requires the BOR to: 1) lay the ground work for gaining cooperation of Oregon, California, and Klamath River Tribes; 2) establish a scientific panel to guide investigations to address issues identified in the interim and final NRC committee reports on threatened and endangered fishes in the Klamath River Basin; 3) begin to develop water supplies that are devoted to increasing flows in the Klamath River below Iron Gate Dam; and 4) provide the minimum flows identified in BOR's 2002 Biological Assessment, as modified on an annual basis by agreed upon use of the water bank for improved spring and/or summer flows.[4] In Phase II, covering the years 2006-2010, the BOR is to 1) maintain a waterbank of 100 thousand acre-feet; 2) contribute 57% of the long-term RPA flow to the river below Iron Gate Dam or the flow identified in its Biological Assessment, whichever is greater; 3) implement non-flow

[4]In 2002, in addition to the flows proposed by the Biological Assessment for a below average year, BOR is to provide 30,000 acre-feet of water. In 2003-2005, in addition to the flows proposed in the 2002 Biological Assessment, BOR is to provide an additional 50,000, 75,000, and 100,000 of acre-feet of water, respectively. Id. at 4598.

mitigation measures in cooperation with the Conservation Implementation Program; and 4) continue to conduct investigation to refine RPA flows and relationship between flow and coho survival. Id. at 4601. In Phase III, covering years 2010-2011, the NMFS expects that implementation of the Conservation Implementation Program will have achieved the long-term flow targets set forth in the RPA. Id. at 4609.

The NMFS justifies this RPA by stating that it "provides a reasonable balance between the findings of the NRC Committee...and the findings of Hardy and Addley (2001)":

> While NMFS agrees with the NRC committee's conclusion that there is no direct evidence from the Klamath River that coho will benefit from increased flow, NMFS' professional judgment based on studies for the Columbia River...and the Sacramento and San Joaquin Rivers...is that augmentation of spring flows likely would benefit coho in the Klamath River. Therefore, this RPA includes a science program to refine flow recommendations, a water bank to improve spring flows for smolts, and recommended flow schedule to be implemented by 2010, unless modified by new scientific information. Further, NMFS thinks that this RPA is consistent with the findings of the NRC interim report because it provides for use of the water bank to buffer against allowing the average flows to decline below those of the reference period....Under this RPA, the water bank will be used to exceed the flows in Table 5.9 of the BA [2002 Biological Assessment] and contribute to improved spring time and, if appropriate, summer habitat conditions. This provides the precautionary mechanism to improve smolt out migration habitat and improve smolt survival during smolt migration to the ocean. The size of the water bank will increase from 30 TAF to 100 TAF through four incremental steps. In addition, Reclamation has committed to provide its share of the flows that are recommended by NMFS to optimize habitat for coho smolts in the main stem in the Shasta to Scott River reach of the Klamath River, and to a process that will include the States of California and Oregon in providing the remainder of those flows. Finally, Reclamation has committed to convening a science panel to oversee design and implementation of experiments to improve the quality of science regarding the relationship between flows and coho survival and recovery in the Klamath River. These experiments will be conducted to refine the long-term flow targets...established by NMFS based on the habitat suitability curves for coho fry contained in Hardy and Addley (2001). NMFS recognizes that Hardy and Addley (2001) habitat suitability criteria, upon which it relied to deriving long-term flow target...may change as the report progresses through public comment and peer review to a final report, and that even then new information from the science program embodied in this RPA could refine that information further. Therefore, NMFS views the flows recommended...as planning targets that could be adjusted as the body of scientific information increases. NMFS thinks this a risk averse approach that provides incremental improvements in habitat conditions while the science is developed to allow refinement of our understanding of the role of main-stem habitat in coho survival and recovery and it provides a mechanism to increase flows to the extent the need is supported by the science that is developed.

AR at 4592-4593. The BOR has notified the NMFS of its intention to follow the RPA in 2002 and 2003. Govindan Decl. Ex. 2.

Between September 20 and September 27, 2002, approximately 33,000 chinook, coho, and steelhead salmon died in the Klamath River. Plaintiffs filed a First Amended Complaint in this action

on September 25, 2002 against the BOR and the NMFS (collectively "the Federal Defendants"). On October 22, 2002, Yurok Tribe filed a motion to intervene; on November 22, 2002, the Water Users filed a motion to intervene; and on December 19, 2002, Hoopa Valley Tribe filed a motion to intervene. The Court granted these motions to intervene in an Order filed February 4, 2003. In addition to alleging that the actions of the Federal Defendants violate the ESA, Yurok Tribe and Hoopa Valley Tribe (collectively "the Tribes") allege that the BOR violated the Tribes' fishing rights by failing to provide adequate stream flows in August and September of 2002.

The parties have now filed cross-motions for summary judgment. Plaintiffs move the Court to declare that the NMFS' 2002 Biological Opinion for the Klamath Project is arbitrary and capricious and is in violation of the ESA, to order the NMFS to rescind this biological opinion and its accompanying incidental take statement, to declare that the BOR is in violation of its duties under the ESA, to order the BOR to reinitiate consultation with the NMFS, and to enjoin any and all irrigation deliveries from the Klamath Project that would cause Klamath River flows at Iron Gate Dam to fall below 100% of the flow levels identified by the NMFS in the May 16, 2002 draft biological opinion until the NMFS issues a valid biological opinion and the BOR complies with its terms. The Tribes join Plaintiffs' motion for summary judgment with respect to its claims alleging violations of the ESA. The Tribes additionally move this Court for an order declaring that the BOR violated the Tribes' fishing rights in 2002 by failing to provide biologically adequate stream flows, and for an injunction requiring the BOR to operate the Project in the future in a manner that satisfies the Tribes' fishing rights.

The Federal Defendants, along with Defendant-Intervenors the Water Users, move the Court to uphold the 2002 Biological Opinion issued by NMFS for the Klamath Project, and to find that the BOR's operation of the Klamath Project complies with the ESA and with the BOR's tribal trust responsibilities.

II. Motions for Summary Judgment Based on Violations of the ESA

A. Standard of Review

The 2002 Biological Opinion, including the RPA and its accompanying ITS, issued by the NMFS is a "final agency action" that is subject to review under the APA. See 5 U.S.C. §702; See Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998). Under the

APA, "an administrative decision involving the ESA will be set aside if the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action is found to be without observance of the procedure required by law." Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. United States Department of Energy, 232 F.3d 1300, 1305 (9th Cir. 2000). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). "Altnough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id. "This is especially appropriate where, as here, the challenged decision implicates substantial agency expertise." Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993). In engaging in its analysis, the court "shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. "The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). "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." Id. at 743-44.

B. Discussion

1. The RPA

As set forth in the Background section of this order, the NMFS' 2002 Biological Opinion concluded that the actions proposed in the BOR's 2002 Biological Assessment are likely to jeopardize the continued existence of the coho salmon and to adversely modify their critical habitat. The NMFS therefore, as required by the ESA, proposed an RPA that the NMFS believes would avoid the likelihood of jeopardizing the continued existence of the coho salmon and destroying or adversely modifying critical habitat. The RPA requires the BOR to meet minimum flow levels, provide an additional amount of water that gradually increases each year through a water bank, agree to specific long-term target flows, and to establish an inter-governmental task force to develop, procure, and manage water resources and an inter-governmental science panel to develop and implement a research program to further study coho

salmon and their habitat. During Phase I, the flow levels maintained by the BOR will consist of the minimum flows identified in the BOR's 2002 Biological Assessment, as modified by agreed upon use of the water bank. During Phase II, the RPA requires the BOR to provide 57% of the long-term flows or the flows proposed in the BOR's 2002 Biological Assessment, whichever is greater, in addition to maintaining a water bank of 100 thousand acre feet ("TAF"). In Phase III, the RPA indicates that it expects that implementation of the Conservation Implementation Program will have achieved the long-term flow targets listed in the RPA.

a. Adequacy of Flow Rates Proposed in the RPA

Plaintiffs assert that the NMFS' RPA is arbitrary and capricious because the target long-term flow rates proposed in the RPA are not supported by the record and that the short-term flow rates, the flow rates proposed for Phases I and II of the RPA, are insufficient to prevent jeopardy because they only require the BOR to provide a fraction of the long-term target flow rates.

With respect to the long-term flow rates, Plaintiffs point to the fact that the target long-term flow rates diminished between earlier drafts of the RPA and the final RPA contained in the 2002 Biological Opinion. Plaintiffs also note that the final RPA breaks down flows into monthly periods as opposed to two-week periods, as in previous drafts. However, the Ninth Circuit has made clear that a district court has "no reason to address the possible factors that might have motivated the [NMFS] in rejecting the draft RPA" since, when the NMFS considers different RPAs, it is "not required to pick the first reasonable alternative [it] came up with in formulating the RPA," nor is it "even required to pick the best alternative or the one that would most effectively protect the [species] from jeopardy." Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998). Rather, the NMFS "need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency." Id. Therefore, the question before this Court is whether the NMFS acted arbitrarily and capriciously or abused its discretion in adopting the long-term flow rates that were in the final RPA.

The Court finds that the NMFS did not act arbitrarily and capriciously in adopting the long-term flow rates in the RPA, since the RPA itself contains sufficient justification for the long-term flow rates. AR at 4602. The NMFS describes its rationale for the long-term flow rates for March through June, July

through September, and October through February. AR 4602-4608. The NMFS considered the 2001 Hardy Draft Report, the NRC Report, as well as field observations before calculating flow rates, and based the flow rates on the habitat suitability curves for coho fry contained in the 2001 Hardy Draft Report. Id. The flow rates take into account the life stages of the coho salmon during different times of the year, the habitat of the coho salmon, and differences in water temperature. Id. The target flow rates also depend on whether the year in question is dry, below average, average, above average, or wet. Id. After reviewing the NMFS' rationale for the long-term flow targets, the Court finds that the NMFS considered the relevant factors and did not act arbitrarily and capriciously in adopting the long-term target flow rates.

In addition to questioning the appropriateness of the long-term target flows, Plaintiffs challenge the short-term flow levels approved in the RPA. As indicated above, RPA's phased approach only requires a fraction of the long-term target flows to be achieved in the first two phases. In Phase I, the NMFS requires the BOR to provide the flows specified in the BOR's 2002 Biological Assessment, plus an additional annually increasing amount provided through a water bank. AR at 4596. In Phase II, the BOR is required to provide 57% of the long-term RPA flow rates or the amounts specified in the BOR's 2002 Biological Assessment, whichever is greater, as well as maintaining a water bank of 100 TAF. AR at 4601.

Plaintiffs argue that because the flow levels in Phase I are modeled after the flow levels in the BOR's 2002 Biological Assessment, they are insufficient to avoid jeopardy. Plaintiffs point to the fact that the NMFS rejected the BOR's 2002 Biological Assessment, finding that the action proposed in the 2002 Biological Assessment is likely to jeopardize the continued existence of the coho salmon and is likely to adversely modify critical habitat for the coho salmon. However, the Court notes that the RPA does not require the BOR to simply provide the flow levels from the BOR's 2002 Biological Assessment in Phase I. Rather, the RPA calls for modified flow levels from the 2002 Biological Assessment, [5] as supplemented by a water bank that provides annually increasing amounts of water. Moreover, even

[5]The flows proposed in the biological assessment were modified, since the biological assessment only considered 4 water type years, and the RPA converts these figures to water types for 5 water type years.

though the NMFS found that the 2002 Biological Assessment was insufficient to avoid jeopardy, significantly, this finding was based on an evaluation of the flows provided in the 2002 Biological Assessment over the course of ten years. AR at 4590. Therefore, while the NMFS found that providing the flow levels proposed in the 2002 Biological Assessment over the course of ten years is likely to jeopardize the continued existence of coho salmon and adversely modify critical habitat, the NMFS did not find that the flow levels proposed in the 2002 Biological Assessment would, in the short-term, jeopardize the continued existence of coho salmon or adversely modify critical habitat if the flow levels were increased over the course of ten years.

Plaintiffs additionally argue that the flow levels in Phase II, in which the BOR is required to provide the greater of the flows proposed in the biological assessment or 57% of the long-term flow rates, plus maintain a water bank of 100 TAF, is insufficient to avoid jeopardy to the coho salmon. The 57% figure corresponds to the fraction of irrigated land in the Klamath Basin that is served by the Project. AR at 4594. When the BOR and the NMFS met to discuss the flow rates proposed in a draft biological opinion, the BOR suggested that it should be responsible for 57% of the remedy, since 57% represents the fraction of irrigated land in the Klamath Basin that is served by the Project. Id. As Plaintiffs correctly note, the ESA does not provide that an agency is only responsible for remediating its share of the harm. Rather, the ESA mandate is simple and clear-- agencies may not undertake any action that results in jeopardy to the threatened species. In determining whether an action would result in jeopardy, the NMFS or the FWS must evaluate the "effects of the action" which includes evaluating the effects with respect to the environmental baseline, including the "impact of State or private actions." 50 C.F.R. § 402.14(g)(3); 50 C.F.R. § 402.02. Therefore, the focus should not be on the relative amount of harm contributed by Project actions, but simply whether, taking into account the environmental baseline, any action by the Project will result in jeopardy. See National Wildlife Federation v. Coleman, 529 F.2d 359, 374 (5th Cir. 1976)(stating that "irrespective of the past actions of others the [agency has] a duty to insure that [agency action does] not further threaten the crane and its habitat"). The NMFS acknowledged as much when, after the BOR suggested being responsible for 57% of the target flow rates, the NMFS "pointed out that establishing flows of only 57% of the RPA flows may not avoid jeopardy over the 10-year period of proposed Project operations, and therefore would not constitute a

viable RPA." AR at 4594.

However, the NMFS believed this problem "was resolved when [the BOR] agreed that it would use its authorities to establish a multi-agency task force/working group, comprising Federal, State, Tribal and, where possible, local agencies and interests, to develop the other 43% of the flows identified in the RPA. The water to achieve these additional flows would come from areas outside the boundaries of the Klamath Project. This approach anticipates that the States of California and Oregon will participate in the process, step up enforcement of existing water rights or water rights laws, and develop programs to improve flows in the tributaries to the Klamath above and below the Project." Id.

The remarks by the NMFS make clear that the NMFS believes the RPA would not be valid over the 10-year period if the BOR were simply to provide 57% of the long-term flows proposed in the RPA or the flows in the 2002 Biological Assessment. The remarks also make clear that the NMFS believes it is in fact necessary to achieve 100% of the target flow rates identified in the RPA by the end of 10-year period in order to avoid jeopardy to the coho salmon. However, the statements by the NMFS do not reflect a conclusion that it is necessary to consistently provide 100% of the long-term target flows throughout each phase of the program in order to avoid jeopardy to the salmon. In fact, implicit in the RPA's phased approach is the ultimate conclusion that maintaining a percentage of the long-term flow rates with the additional water provided by the water bank during Phases I and II will not jeopardize the salmon or adversely modify their critical habitat, provided that the long-term flow rates are eventually met by Phase III of the program. The question is therefore whether this implicit conclusion "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

As indicated above, under the RPA, during both Phases I and II, the BOR will meet or exceed a modified version of the Iron Gate Dam flows proposed in the 2002 Biological Assessment, and will provide additional water by maintaining a water bank. The NMFS states that the "additional water should improve instream flows for coho in the lower Klamath River main stem beyond the flows established in [the biological assessment] and could be used to: (1) improve downstream smolt survival and improve coho fry survival in the spring; (2) investigate effect on increased summer flows on summer rearing conditions for juveniles in the main stem; or (3) used to both achieve some combination of (1)

and (2). By March 31 of each year, NMFS and [BOR] will determine how this additional water will be distributed for release." AR at 4598.

The RPA does not explicitly engage in an analysis of what effect the water flows in Phases I and II, with the addition of the available water from the water bank, will have on the coho salmon or their critical habitat.[6] However, the phased approach described in the RPA is consistent with the NMFS' description of its RPA as a "reasonable balance" between the NRC Report and the 2001 Hardy Draft Report. During Phases I and II, the RPA requires the BOR to provide flow levels that are consistent with the flow levels deemed appropriate by the NRC Committee. The NRC Committee found that appropriate flow levels should mimic the operational practices of the ten year period between 1990 to 2000. The NMFS reviewed the NRC Committee's findings and agreed with the NRC Committee's conclusion that there is no direct evidence from the Klamath River that coho will benefit from increased flow; however, based on studies for the Columbia River and the Sacramento and San Joaquin Rivers, the NMFS concluded that augmentation of spring flows likely would benefit coho salmon in the Klamath River. Based on its conclusions, the NMFS structured the RPA to require the minimum flows proposed in the Biological Assessment (which attempted to mimic the flows recommended by the NRC committee), along with a water bank that can be used to supplement the flows. As described by the NMFS, "the water bank will be used to exceed the flows in Table 5.9 of the BA [Biological Assessment]

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[6] Plaintiffs provide testimony from Michael S. Kelly, a former employee at the NMFS who worked on drafts of the NMFS' 2002 Biological Opinion, that suggests such an analysis should have, and could have, been done. See Kelly Deposition at ¶42-43. Mr. Kelly states: "[A]t a minimum, you would want to look at what the resulting flows could possibly be once you use the water bank. Now, the water bank is what's being used to prevent these incremental depletions in average flows over the year. The water bank can be used to help out when you think it needs to be used, it would help the most. You should at least calculate what you could possibly do with 50,000 acre feet this year, 75,000 acre feet the next year, 100,000 feet the next year, to look at these flows and decide if they make sense in light of the other analysis that you've done....You've determined that these flows are necessary that the ten-year long recommended flows are necessary for the fish to avoid jeopardy, based on what you know. And, granted, there's not a lot of-- a lot of real certainty in the real information, but you had enough to develop those flows. So you need to look at whether the species is able to withstand not experiencing those flows for that time period. And as I mentioned in the whistleblower disclosure, there are ways to look at that, and part of that was certainly provided in the April 1st biological opinion. What does the population experience over time when it's not provided with flows that will help increase its resiliency. That should have been done." Kelly Deposition at 42-43. While Mr. Kelly's deposition testimony supports Plaintiffs argument, in light of the NRC report which found that increased flow levels were unnecessary to avoid jeopardy to the coho salmon, the Court declines to find that NMFS abused its discretion by failing to conduct such a study prior to finalizing its RPA.

and contribute to improved spring time and, if appropriate, summer habitat conditions."

Therefore, it is clear that the short-term flow rates in Phases I and II of the RPA are based on the findings of the NRC Committee, as modified by the NMFS, to prevent jeopardy to the coho salmon. On the other hand, the long-term target flow rates in Phase III, discussed above, more strongly reflect the 2001 Hardy Draft Report, since the NMFS based the long-term target flow rates on the habitat suitability curves for coho fry contained in this report. The RPA, with its phased approach, is therefore a "reasonable balance" between the NRC Committee's findings and the findings contained in the 2001 Hardy Draft Report. Because it is clear that the proposed short-term and long-term flow rates are based on a compromise between two conflicting studies regarding the effect of flow rates on coho salmon, the Court finds that the NMFS' decision to use a phased approach is not arbitrary and capricious, and the flow levels established for each phase are not arbitrary and capricious.

b. RPA's Reliance on Future Actions by State, Tribal, and Private Parties

Plaintiffs contend that the RPA's reliance on the establishment of a multi-agency task force to develop the remaining 43% of the long-term target flows is inappropriate. When evaluating a proposed action, ESA regulations direct the NMFS to consider the beneficial and harmful effects of "future State or private activities...that are reasonably certain to occur." 50 C.F.R. § 402.02. Plaintiffs argue that the actions by state, tribal, and private parties contemplated by the RPA are not reasonably certain to occur and therefore should not be considered in the jeopardy analysis. As described in the Background section of this Order, during Phase I, the BOR is to lay the groundwork for gaining cooperation of the states of Oregon and California, as well as the cooperation of the Klamath River Tribes, in an effort to create the Conservation Implementation Committee. In Phase II, the BOR is to implement non-flow mitigation measures in cooperation with the Conservation Implementation Program. In Phase III, the NMFS expects that the Conservation Implementation Program will have achieved the long-term target flows set forth in the RPA.

In support of the RPA, the Federal Defendants assert that the RPA's reliance on future actions is proper because it balances future benefits against future harms. The Federal Defendants direct the Court to the Ninth Circuit's decision in Southwest Center for Biological Diversity v. U.S. Bureau of

Reclamation, 143 F.3d 515 (9th Cir. 1998) (hereinafter "Lake Mead"). In that case, the Ninth Circuit affirmed the district court's approval of a proposed RPA that was comprised of several short-term and long-term provisions that would prevent the likelihood of jeopardy to the endangered species known as the Flycatcher. Id. The proposed RPA in that case required the acting agency to procure and protect a specified amount of habitat in the short term and to complement the short-term measures by implementing long-term measures such as an additional program of on and off-site compensation for the Flycatcher habitat, as well as the development of a Multi-Species Conservation Program ("MSCP"). Id. at 518. The Ninth Circuit found that the threatened species "could survive the loss of habitat at Lake Mead for eighteen months until 500 acres could be protected, then survive an additional two years until an additional 500 acres could be protected, and finally survive through the MSCP process until compensation could be made for the historical habitat." Id. at 523.

However, as Plaintiffs point out, the instant case is distinguishable from Lake Mead in at least one important respect--in Lake Mead, there was no dispute regarding whether the long-term acquisition of an alternative habitat was reasonably certain to occur. Under the ESA, a proposed action may only rely on beneficial and harmful effects of future State or private activities if these activities are "reasonably certain to occur." 50 C.F.R. § 402.02. In this case, there are serious concerns as to whether the future actions by states or the tribes that the RPA anticipates will provide the additional 43% of the flow rates necessary to avoid jeopardy in the long term are reasonably certain to occur. Cf. Lake Mead, 143 F.3d at 524 (finding, in that case, that "[t]here has been no indication that Reclamation [the BOR] cannot acquire and restore the needed replacement habitat as specified in the final RPA by the required deadlines.")

By the NMFS' own admission, meeting the long-term flow rates by 2010 that the NMFS has proposed in its RPA, "will likely require more contributions to flow than can be reasonably provided by [BOR] alone." AR at 4598. Therefore, in order to achieve the target long-term flow rates, the NMFS' RPA requires the BOR to establish in Phase I, by a Memorandum of Understanding ("MOU") among NMFS, FWS, BOR, BIA, the States of California and Oregon, and the Tribes, a "Conservation Implementation Committee." AR at 4599. In Phase II, the NMFS expects the Committee to "make progress toward increasing flows toward the longterm planning target, as modified by new information."

Id. at 4602. Finally, the NMFS states that it "expects that implementation of the Conservation Implementation Program will have resulted in achieving main stem lower Klamath River flow targets." Id.

While the NMFS's RPA "expects" to achieve the target flow rates by 2010, the NMFS provides no support for its assumption that the other state and private parties will agree to take part in the Conservation Implementation Committee, or that the Committee will in fact make progress toward and finally achieve the target flow rates. The ESA's regulations make clear that, in evaluating whether a proposed action will jeopardize the existence of a species, the NMFS is to consider the beneficial and harmful effects of future State or private activities "that are reasonably certain to occur." 50 C.F.R. § 402.02.[7] There is nothing to suggest that it is "reasonably certain" that the States and the Tribes will participate in the Conservation Implementation Committee. Furthermore, even with their participation, it is not "reasonably certain" that the Conservation Committee will achieve the target flow rates. In a letter dated May 24, 2002, the State of California's Department of Fish and Game, commenting on a draft opinion circulated by NMFS, stated:

> The BO [Biological Opinion] suggests that the USBR [the BOR] will take the lead to establish a multiagency task force comprising Federal, State, tribal and where possible local agencies and interests to develop the other forty-three percent of the flows identified

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[7]Defendant-Intervenors Klamath Water Users argue that the ESA does not require that actions proposed in RPAs be "reasonably certain to occur." In support of its position, the Klamath Water Users point out that the "reasonably certain to occur" requirement is found in the ESA regulations describing the consulting agency's review of another agency's proposed action. The guidelines state that, when making a determination as to whether any proposed action results in jeopardy to a species, the NMFS must consider the "cumulative effect" on the species, which include future State or private activities that are "reasonably certain to occur." 50 C.F.R. § 402.14(g)(3). The Klamath Water Users argue that this requirement is inapplicable to RPAs, since this requirement is contained in the section describing NMFS' responsibilites in reviewing another proposed agency action's compliance with the ESA. The Water Users essentially argue that NMFS's RPA need not meet the substantive standards NMFS applies when reviewing other agencies' proposed actions. The Court finds this argument illogical. An RPA is a proposed agency action. Its purpose is to provide an acting agency with a proposed course of action that will meet the jeopardy standard articulated in the ESA. See 16 U.S.C. §1536(b)(3)(A)("If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency....in implementing the agency action.") If the Court were to adopt the Water Users' position, the Court would be allowing NMFS to propose an agency action that would not pass the standards NMFS applies when reviewing other proposed actions. There is no support for such an illogical result, given that the purpose of RPAs is to provide agencies with a proposed action that will meet the standards of the ESA. The Court therefore finds that an RPA, like any other proposed agency action, should take into consideration only those future actions by State and private entities that are "reasonably certain to occur."

> in the RPA. The water to achieve these flows would come from areas outside the boundaries of the Project. The BO suggests that most of this water would come from stepped up water rights and water laws enforced by California and Oregon and programs to improve tributary flow above and below the Project so that by 2010 NMFS would expect the RPA flows to be realized unless those flows were modified by the results of scientific investigation. We have little confidence that such a complicated undertaking can be completed in eight years and will result in sufficient water to satisfy the long-term RPA flow target.

AR at 4492. This letter suggests that it is far from "reasonably certain" that the Conservation Committee will achieve the target flow rates by 2010. Achieving the target flow rates by 2010 is an important element in a comprehensive plan which the NMFS has proposed to avoid the likelihood of jeopardizing the continued existence of coho salmon and to avoid destruction or adverse modification of critical habitat over the years 2002-2012. Id. at 4591. Accordingly, the Court finds that the NMFS' issuance of the RPA was arbitrary and capricious since the RPA relies on actions by states and private parties that are not reasonably certain to occur to achieve its long-term target flow rates.[8]

2. The Incidental Take Statement

Plaintiffs additionally challenge the Incidental Take Statement ("ITS") that accompanies the NMFS' RPA. An ITS must "specify the impact, i.e., the amount or extent, of such incidental taking on the species." 50 C.F.R. § 402.14(i)(1). "Incidental Take Statements set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take...requiring the parties to reinitiate consultation. Ideally, this 'trigger' should be a specific number." Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management., 273 F.3d 1229, 1249 (9th Cir. 2001). However, a numerical limit is not required. Id. In situations in which impact cannot be calculated in terms of a precise number, the NMFS must establish that "no such numerical value could be practically obtained."

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[8]Plaintiffs additionally argue that the water bank requirement in the RPA is too vaguely defined to properly be part of the RPA. The Court disagrees. The RPA specifies the amount of water that BOR must provide through the water bank in each year, and the potential uses of the water bank, and that the decision regarding how the water in the water bank will be used will be determined by March 31 of each year. AR at 4598. Specifically, the water bank could be used to (1) improve downstream smolt survival and improve coho fry survival in the spring; (2) investigate effect on increased summer flows on summer rearing conditions for juveniles in the main stem; or (3) used to both achieve some combination of (1) and (2). Given the unpredictability of the type of water year, the Court finds that the flexibility in the RPA provided by the water bank does not make the RPA too vague. Instead, the water bank provides the BOR, in conjunction with the NMFS, with the ability to tailor water flow to the specific needs of a particular year.

Id. at 1250. If the NMFS establishes this, the NMFS may then use "ecological conditions as a surrogate for defining the amount or extent of incidental take... so long as these conditions are linked to the take of the protected species." Id.

In the instant case, the ITS does not specify the amount or extent of take in numeric terms. Instead, the ITS provides:

> NMFS expects some level of incidental take to occur due to implementation of some of the actions outlined in the reasonable and prudent alternative. However, the best scientific and commercial data available are not sufficient to enable NMFS to estimate a specific amount of incidental take of Klamath River coho salmon. The NMFS anticipates that water quality and habitat conditions for various coho salmon life stages that would result from implementation of the reasonable and prudent alternative would likely result in a level of take that does not constitute jeopardy to SONC coho salmon. Take of individual coho salmon would be difficult to detect because finding a dead or injured salmon is unlikely due to the fact that salmonids occur in dynamic habitat (i.e., flowing water, that makes such detection difficult). Water quality and habitat conditions resulting from the reasonable and prudent alternative, while minimally predictable, would have an impact that is not precisely known, and by extension, the impact to an unknown quantity of coho salmon expected to be present in the main stem Klamath River is not precisely known. However,...each incremental reduction in water quality and habitat in the stream channel represents a portion of the combined impacts to salmon in a given watershed.

AR at 4610-4611. The ITS further provides that "some take may occur due to spring time reductions in flow as the project transitions for uncontrolled spills to controlled operations....However, NMFS is unable to predict the water year types so NMFS cannot determine what actual flows will be below Iron Gate Dam in the future. Therefore, NMFS is not able to estimate number of strandings of coho salmon that might occur as result of reducing flows." AR at 4611.

These statements establish that it is impracticable for the NMFS to determine the specific amount of incidential take of coho salmon in the Klamath River due to a variety of factors: individual take would be difficult to detect; it is difficult to quantify the impact of water quality and habitat conditions; and the amount of flow depends on the water year types. However, while the NMFS need not establish a specific number of take, the ESA requires the NMFS to provide an ecological surrogate for defining the amount or extent of incidental take, which when reached, results in an unacceptable level of take. The terms of an ITS are "integral parts of a statutory scheme, determining among other things, when consultation must be reinitiated." Arizona Cattle Growers Association v. United Fish and Wildlife, Bureaur of Land Management, 273 F.3d 1229 (9th Cir. 2001). The ITS at issue in this case is simply

devoid of any threshold that, when reached, would indicate that an unacceptable level of take has occurred and would trigger reinitiation of consultation. This absolute failure to comply with the requirements of a valid ITS makes the NMFS' issuance of the ITS in this case arbitrary and capricious.

3. The BOR's Independent Substantive Obligation

The Federal Defendants acknowledge that, as the acting agency, the BOR has an independent substantive obligation to ensure that its actions satisfy the jeopardy standard. Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459 (9th Cir. 1984). In meeting this standard, the BOR may rely on the NMFS's determination if its reliance is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Stop H-3, 740 F.2d at 1459. The BOR has indicated that it will comply with the terms of the NMFS's biological opinion and RPA for the years 2002 and 2003. Therefore, the question is whether the BOR's decision to adopt the terms of the RPA for the years 2002 and 2003 is arbitrary and capricious and violates the jeopardy standard in the ESA.

The years 2002 and 2003 fall under Phase I of NMFS's RPA. In Phase I, the RPA requires the BOR to provide short-term flows plus additional water through a water bank, resulting in flows that meet or are higher than those found to be necessary to avoid jeopardy to the species by the NRC Committee report. In this Court's order filed May 22, 2002, the Court found that the NRC Report contained the best scientific evidence available, since the 2001 Hardy Report was only in draft form, and therefore the BOR could rely on the NRC Report. The state of the scientific evidence has not changed since this Court's last order. The only updated information in the administrative record is the NMFS's 2002 Biological Opinion, which reviewed both the NRC Report and the 2001 Hardy Draft Report.[9] Based on its analysis,

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[9] In determining whether the biological opinion prepared by the NMFS is arbitrary and capricious or whether the BOR acted in an arbitrary and capricious manner in implementing flow levels, the Court declines to consider post-decisional information, such as information regarding the cause of the September 2002 fish kill, that was not part of the administrative record in existence when the NMFS issued its 2002 Biological Opinion or when the BOR indicated that it would follow the recommendations in the NMFS' 2002 Biological Opinion. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985)("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") However, the Court finds it appropriate to consider evidence of the fish kill with respect to the Tribes' claim that the BOR's management of the Klamath Project violated the United States' fiduciary duty to protect the Tribes' fishing rights. The Tribes' claim for breach of fiduciary duty is legally distinct from claims that the NMFS and the BOR violated the ESA. When reviewing whether the NMFS and the BOR violated its trust responsibility to the Tribes, the Court reviews the NMFS and the BOR's actions under the same standards that this Court

the NMFS proposes that, in Phases I and II, the BOR provide an amount of water that meets or exceeds the amount recommended in the NRC Report, but that are lower than the flows recommended by the 2001 Draft Hardy Report. Given the conflicting and uncertain scientific evidence regarding whether increased flows will in fact benefit coho salmon, the Court declines to find that the BOR acted in an arbitrary and capricious manner in adopting the short-term flow levels proposed in the NMFS's 2002 Biological Opinion, the only study to have reviewed and incorporated the findings of both the NRC Report and the 2001 Hardy Draft Report.[10]

4. Interim Relief

As indicated above, the Court finds the NMFS' RPA and the accompanying ITS Statement arbitrary and capricious. The Court therefore REMANDS the 2002 Biological Opinion back to NMFS to amend the 2002 Biological Opinion to address the deficiencies noted in this order. However, the Court declines to vacate and set aside the 2002 Biological Opinion in the interim. While the Court recognizes that when an agency promulgates a regulation that is arbitrary and capricious in violation of the APA the regulation is normally held to be invalid and therefore set aside, "when equity demands, the regulation can be left in place while the agency follows the necessary procedures." Idaho Farm Bureau Federation v. Babbit, 58 F.3d 1392, 1405 (9th Cir. 1995). In the instant case, as addressed

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would employ in determining whether a private fiduciary had breached its duty of trust. See Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana, 792 F.2d 782, 794 (9th Cir. 1986). Therefore, unlike the Court's review of whether the NMFS and the BOR's actions violated the ESA, a review performed under the arbitrary and capricious standard of the APA and limited to the administrative record, the Court is not limited to the administrative record when analyzing whether the BOR and the NMFS breached their fiduciary duty to the Tribes.

[10]Plaintiffs request that the Court enjoin the BOR from making irrigation diversions at the Klamath Project unless flows in the Klamath River below Iron Gate Dam meet 100% of the higher flow levels that were proposed by NMFS in NMFS' May 16, 2002 draft biological opinion. However, the draft biological opinion is only a draft opinion. In formulating the draft biological opinion, as well as the final 2002 biological opinion, NMFS considered the findings of the NRC Report and the 2001 Hardy Draft Report. Ultimately, in its final biological opinion, the NMFS concluded that lower flow levels than proposed in the May 16, 2002 draft opinion would be sufficient to avoid jeopardy to the coho salmon. The NMFS was not required "to pick the best alternative or the one that would most effectively protect [the species] from jeopardy." Lake Mead, 143 F.3d at 523. Similarly, the BOR need not have adopted flows that would most effectively protect the coho salmon from jeopardy. To fulfill its substantive obligation under the ESA, the BOR must simply have adopted an action that complies with the jeopardy standard articulated in the ESA. In the instant case, based on the conflicting state of scientific evidence, the BOR did not act in an arbitrary and capricious matter by adopting proposed flow rates that are supported by the NMFS' 2002 Biological Opinion and the NRC Report, the best available science at the time.

above, the short-term and long-term flow rates proposed in the 2002 Biological Opinion are not arbitrary and capricious and are fully consistent with the current state of the best available science.[11] The Court finds the RPA invalid due to its improper reliance on actions by private and state third parties to achieve the long-term flow levels. However, under the RPA, third parties are not expected to contribute to the long-term flow levels until 2010. Until that time, the RPA relies solely on the BOR to provide the short-term flow levels. Since the Court finds that the short-term flow levels are not arbitrary and capricious, and that the problematic aspect of the RPA is not implicated until 2010, the Court finds it appropriate to leave the 2002 Biological Opinion in place until the NMFS issues a revised biological opinion that comports with the requirements discussed in this Order.

III. Motions for Summary Judgment on the Tribes Claim for Breach of Fiduciary Duty

A. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The party moving for summary judgment bears the initial burden of demonstrating the "absence of a genuine issue of material fact." Id. at 323. If the movant meets this burden, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Thus, an opposition which fails to identify and reference triable facts is insufficient to preclude the Court's granting of a properly supported summary judgment motion. See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam). Nonetheless, any inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. Matsushita, 475 U.S. at 587.

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[11]Indeed, the Final Biological Opinion appears to be the best available science, since it is the only report that has analyzed both the NRC Report and the 2001 Hardy Draft Report. Prior to the issuance of the Final Biological Opinion, the Court found the NRC Report, which recommends flow levels lower than those recommended in the Final Biological Opinion, to be the best available science.

B. Discussion

The Tribes argue that the BOR failed to provide adequate flow levels in the Klamath River in August and September 2002, resulting in the September 2002 fish kill that occurred on the lower Klamath River, in violation of the United States' fiduciary duty to protect the Tribes' federal reserved fishing rights.[12] It is undisputed that a fiduciary relationship exists between the Tribes and the BOR. The Ninth Circuit has stated that "the United States, as a trustee for the Tribes, has a responsibility to

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[12]In a footnote in its opening brief, Hoopa Valley Tribe asserts that BOR violated the Magnuson-Stevens Fishery Conservation and Management Act ("MSCMA"), 16 U.S.C. § 1855(b)(4)(B), and its trust responsibility "by failing to consult with NMFS by providing a written assessment of the effects of the Klamath Irrigation Project on EFH [Essential Fish Habitat]." The Court ordered supplemental briefing from the Federal Defendants and Hoopa Valley Tribe on this issue. Based on the briefing submitted by the parties, the Court finds that the failure by the Federal Defendants to comply with the procedural requirements of the MSCMA is not sufficient to establish a breach of fiduciary duty to the Tribes.

The MSCMA envisions a three-step consultation process between the acting agency, the BOR, and the NMFS. First, the acting agency "shall consult with the Secretary [NMFS] with respect to any action authorized, funded or undertaken or proposed...that may adversely affect any essential fish habitat." Then, the Secretary shall "recommend to such agency measures that can be taken by such agency to conserve such habitat." Finally, the action agency "shall provide a detailed response in writing...[which] include[s] a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat." In the instant case, the Federal Defendants did not follow this procedure. The BOR failed to approach the NMFS for consultation. The NMFS, relying on other sources of information, prepared and issued its recommendation. The BOR indicated that it would follow the NMFS' recommendation, but failed to provide a detailed response to the NMFS as envisioned by the MSCMA. Hoopa Valley Tribe asserts that this failure to follow the procedures outlined in the MSCMA is sufficient to establish a breach of fiduciary duty to the Tribes.

This Court disagrees. In United States v. Navajo Nation, 123 S.Ct. 1079 (2003), the Supreme Court indicated that to state a cognizable claim for breach of trust based on a violation of a federal statute, the Tribe must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." Id. at 1091. The Court further provided that, although 'the undisputed existence of a general trust relationship between the United States and the Indian people' can 'reinforc[e]' the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient" to support a claim for breach of fiduciary duty based on violation of the statute." Although United States v. Navajo Nation was decided in the context of a claim for damages under the Indian Tucker Act, the Court finds the reasoning of Navajo Nation extends to any breach of trust claim by an Indian tribe premised upon the Government's noncompliance with a federal statute. Here, the MSCMA does not itself impose fiduciary duties on the Federal Government, since it does not expressly subject the United States to duties of management and conservation with respect to Indian resources, and it does not specifically invest the United States with discretionary authority to make use of Indian land property held in trust. Cf. United States v. Mitchell, 463 U.S. 206, 224 (1983)(finding a fiduciary duty where a statute and regulation gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians"); United States v. White Mountain Apache Tribe, 123 S.Ct. 1126 (2003)(finding a fiduciary duty where the statute invested the United States "with discretionary authority to make direct use of portions of the trust corpus"). Accordingly, any procedural violations of the MSCMA are insufficient to establish as a matter of law that the Federal Government breached its fiduciary obligations to the Tribes.

protect their rights and resources...[and because BOR] maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators." Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213-1214 (9th Cir. 1999). As the Tribes' fiduciary, the United States "is held to strict standards and is required to exercise the greatest care in administering its trust obligations. Courts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries." Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana, 792 F.2d 782, 794 (9th Cir. 1986). In order for the Court to grant summary judgment on the Tribes' claims, the Court must find that no genuine issue of material fact exists regarding whether the BOR breached its fiduciary duty to the Tribes in its operation of the Klamath Project.

The Tribes have pointed to several documents in support of their position that the BOR's operation of the Klamath Project resulted in the September 2002 fish kill, evidence that the Tribes argue establishes a breach of fiduciary duty: 1) a declaration by Michael Belchik, the Yurok Tribe's senior biologist, 2) a report by the California Department of Fish and Game entitled "September 2002 Klamath River Fish Kill: Preliminary Analysis of Contributing Factors" ("CDG Report"), and 3) a report prepared by the FWS and members of the Trinity River Restoration Program entitled "Averting another adult salmonid die-off--A case for using an emergency allocation of Trinity River water, and possible scenarios to induce migration of Trinity River Fish through the lower Klamath River" (the "Federal Report").

Mr. Belchik, the Yurok Tribe's biologist, declares that he spent most of the week during the fish kill on the Klamath River making observations, taking data, and taking pictures. Belchik Decl. ¶8. According to his research and observations, Mr. Belchik concludes that the immediate cause of death for the fish was massive infection. Id. at ¶9. To determine what caused the infection, Mr. Belchik analyzed several variables including river flow, run size and timing, water temperature, other water quality parameters, and the presence of toxic chemicals. Id. Mr. Belchik concludes that a migration delay, caused in substantial part by low flows in the Lower Klamath River, contributed to the 2002 fish kill.

The CDG Report concluded that "[t]he September 2002 fish kill was likely caused by a combination of high densities of adult fish in the lower Klamath River (due to low flows and possibly inadequate fish passage) and warm water temperature conditions which are typical for this time of year. These conditions were favorable for a disease outbreak...which are commonly present in the aquatic environment. Flow management under the 2002 Biological Opinion (BO) [2002 Biological Opinion] compared to the 2001 BO is the only major factor DFG can identify over the past two years that differs substantially enough to have caused the 2002 fish kill....DFG concludes that low flows and other flow related factors (e.g. fish passage and fish density) caused the 2002 fish kill on the lower Klamath River. Furthermore, of the conditions that can cause or exacerbate a fish kill, flow is the only factor that can be controlled to any degree." Boyles Decl., Ex. C at 51-52.

Finally, the Federal Report indicates that the causative factors for the large scale fish die-off "may have included a relatively large return of adult fish compared to recent years, and potential behavioral or physical migration barriers that resulted in high densities of adult fish in the lower river." Franklin Decl., Ex. E at 2. The Federal Report concludes that "providing additional Trinity River water above normal water year flows may reduce fish densities in the lower Klamath and draw Trinity fish out of the Klamath and into the Trinity River." Id.

In opposition to the Tribes' motions for summary judgment,[13] the Water Users have provided the Court with a declaration from David Vogel, a fisheries scientist who previously worked for the FWS for fourteen years, for NMFS for one year, and has been a consulting fisheries scientist for the past thirteen years. Vogel Decl. ¶1. During the late summer and early fall of 2002, Mr. Vogel conducted a field

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[13]The Water Users assert that the Tribes lack standing to assert a claim that BOR's operation of the Klamath Project violated their tribal fishing rights. The Water Users premise their argument on the assertion that the Tribes' injury is not redressable through the remedy the Tribes seek. The Tribes seek a declaration that BOR violated the Tribe's fishing rights in 2002 by failing to provide biologically adequate stream flows, and an injunction requiring the BOR to operate the Project in the future in a manner that satisfies the Yurok Tribe's fishing right. The Court finds that the Tribes' injuries are redressable by the remedies sought. As with its operation of the Klamath Project in 2002, BOR has indicated that it will operate the Klamath Project consistently with NMFS' 2002 Biological Opinion in 2003. Additionally, the Tribes have provided evidence that "[c]onditions similar to those that existed in the lower Klamath prior to and during the die-off are likely to occur again this summer." Franklin Decl., Ex. E.

investigation to assess water temperatures in the main stem Klamath River to research "potential issues arising from naturally dry hydrologic conditions and possible attendant effects of water temperatures on fall-run Chinook salmon in the main stem Klamath River downstream of Iron Gate Dam." Id. at ¶16. Mr. Vogel found that the most plausible reason for the fish kill was a combination of factors: a large number of salmon entered the lower Klamath River earlier than usual and were exposed to two dramatic and uncharacteristic cooling and warming conditions that were chronically and cumulatively stressful to fish; and at the same time, river conditions in the upper Klamath River were unsuitably warm for salmon because the normal seasonal cooling trend had not yet occurred. Id. at ¶28. In Mr. Vogel's opinion, the operations of Iron Gate Dam during the summer and fall of 2002 did not cause and could not have prevented the fish kill in the lower Klamath River." Id. at ¶29.

In his Declaration, Mr. Vogel challenges both Mr. Belchik's conclusion and the conclusions of the CDG Report with respect to the cause of the fish kill. Mr. Vogel contends that Mr. Belchik's conclusion that the large salmon run and low Iron Gate dam flows explain the salmon kill in 2002 is improper, since in the year 1988, there was a much larger salmon run than in 2002, and the flows in the lower Klamath River were similar to those observed in 2002, yet there was no resulting fish kill. Id. at ¶24. Mr. Vogel additionally challenges the CDFG's report on the grounds that it contains several major errors. Id. at ¶28. Specifically, Mr. Vogel asserts that the CDFG used inappropiate monthly average air temperatures and water temperature to derive their conclusions, and the CDFG incorrectly plotted water temperature data in the area of the fish kill. Id. Mr. Vogel asserts that if CDFG had correctly plotted the data, it would have shown a sudden increase in water temperatures during the period when large numbers of salmon were present in the lower river and died. Id.

Based on the conflicting evidence presented by the parties regarding the cause of the fish kill, the Court finds that a triable issue of fact exists as to whether the BOR breached its fiduciary duty to the Tribes through its operation of the Klamath Project. Accordingly, the parties' motions for summary judgment with respect to the Tribes' claim for breach of fiduciary duty are DENIED.

IV. Conclusion

For the foregoing reasons, the Court hereby DECLARES that the RPA and ITS Statement contained in the NMFS' 2002 Biological Opinion are arbitrary and capricious, and therefore the NMFS'

2002 Biological Opinion is in violation of the Endangered Species Act. Accordingly, the Court REMANDS the 2002 Biological Opinion to the NMFS with instructions to amend the 2002 Biological Opinion to address the deficiencies noted in this Order. The 2002 Biological Opinion shall remain in place until the NMFS issues an amended biological opinion. The Court further DECLARES that the BOR's decision to adopt the measures suggested in the RPA for the years 2002 and 2003 is not arbitrary and capricious. Accordingly, Plaintiffs' request for injunctive relief is DENIED.

IT IS FURTHER ORDERED THAT the parties' motions for summary judgment with respect to the Tribes' claims for breach of fiduciary duty are DENIED.

IT IS FURTHER ORDERED THAT the parties shall appear telephonically for a case management conference on **Thursday, July 31, 2003 at 3:30 p.m.** The parties shall meet and confer prior to the conference and shall prepare a joint Case Management Conference Statement which shall be filed no later than ten (10) days prior to the Case Management Conference. Counsel for the Federal Defendants shall be responsible for filing the statement as well as arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at the above indicated date and time.

IT IS SO ORDERED.

Dated: 7-14-03

SAUNDRA BROWN ARMSTRONG
United States District Judge

United States District Court
For the Northern District of California