

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-72356

Center for Biological Diversity,
Petitioner,

v.

U.S. Bureau of Land Management, and U.S. Fish and Wildlife Service,
Respondents,

and

Ruby Pipeline, L.L.C.,
Respondent-Intervenor.

**PETITIONER'S EMERGENCY MOTION FOR INJUNCTION PENDING
APPEAL UNDER CIRCUIT RULE 27-3**

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CIRCUIT RULE 27-3 CERTIFICATE

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4. EXISTENCE AND NATURE OF CLAIMED EMERGENCY

Petitioner, the Center for Biological Diversity (the “Center”) respectfully requests an emergency injunction to halt construction of the Ruby Pipeline Project (“Pipeline” or “Project”), a 42-inch-diameter, buried natural gas pipeline that would span almost 700 miles, from Wyoming to Oregon, and cross over 1,000 streams, including 209 streams supporting endangered and threatened fish species – and at many of these crossings, blast the pipeline trench with explosives.

On July 12, 2010, the Bureau of Land Management (“BLM”) signed a Record of Decision (“BLM ROD”) granting rights-of-way and other permits to Ruby Pipeline, L.L.C., a subsidiary of the El Paso Corporation (“Ruby”), for the use of public lands in connection with the construction and operation of the Pipeline. The Federal Energy Regulatory Commission (“FERC”) authorized a Certificate of Public Convenience and Necessity for the Pipeline on April 5, 2010. FERC granted approval to Ruby on July 30, 2010, to commence construction of

“all compressor and meter stations “along all pipeline spreads of the Ruby Pipeline”. Since then, FERC has approved Notices to Proceed for Ruby to commence Pipeline construction activities at many additional locations.

During construction, the Pipeline will be “trenched” – and in many cases, “blasted” with explosives – through 1,069 perennial, intermittent, and ephemeral streams. 209 of these streams are habitat for threatened and endangered fish species: Lahontan cutthroat trout, Warner sucker, Lost River sucker, shortnose sucker, Modoc sucker, Colorado pikeminnow, razorback sucker, humpback chub, and bonytail chub. Some of these streams are designated “critical habitat” for Warner sucker, others are proposed as critical habitat for Lost River and shortnose suckers.

At four of these streams that are located near the Oregon-California border, it is “Definite” that Ruby will use explosives to blast the Pipeline trench. These include Twelvemile Creek and Twentymile Creek, which comprise Warner sucker critical habitat, and the Lost River and East Branch Lost River, which are occupied by and proposed critical habitat for the Lost River and shortnose suckers. At Twelvemile Creek, Twentymile Creek, and Lost River, suckers will be present when the blasting occurs. There is also a “high” certainty that blasting will occur at 32 additional streams, and some chance that it will happen at dozens more. This includes 75 waterbody crossings where Lahontan cutthroat trout will likely be

present at the time, resulting in the deaths of up to 230 trout and causing immediate as well as long-term impacts to almost 54,000 linear feet of trout habitat. These impacts will be severe, exacerbating existing threats and setting back longstanding recovery efforts.

Additionally, up to 402 million gallons of water resources will be used to test the Pipeline's pressure before it is put into service and for dust control. Extensive water withdrawals at these levels will reduce water flows and availability and can spread nonnative aquatic species, further impacting listed fish species.

Ruby has stated that it intends to construct the Pipeline in "one season" and put the Pipeline into service by March 2011. Blasting and other methods of stream crossings could begin at any time. Thus, absent an emergency injunction to preserve the status quo, construction of the Pipeline may commence at any time and would continue to proceed during pendency of Petitioner's Petition for Review, resulting in acute impacts and irreparable harm to Petitioner's interests and foreclosing measures that could conserve and mitigate the Pipeline's adverse effects to endangered and threatened species and their habitats. Accordingly, relief to avoid irreparable harm is needed within 21 days, and as soon as this Motion may be briefed.

5. NOTIFICATION AND SERVICE OF OPPOSING COUNSEL

On August 18, 2010, counsel for Petitioner spoke by telephone with Federal Respondents' attorney, Jennifer Scheller Neumann, and separately with Respondent-Intervenor's attorney, Aaron Courtney, and informed each counsel of Petitioner's intent to file this Motion.

Dated: August 18, 2010

Respectfully submitted,

s/ Amy R. Atwood

Amy R. Atwood

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INTRODUCTION

Pursuant to Circuit Rule 27-3(a), Petitioner Center for Biological Diversity (also the “Center”) moves for an Emergency Injunction to maintain the status quo pending adjudication of the Center’s Petition for Review. Petitioner seeks review pursuant to 15 U.S.C. § 717r(d)(1) of a July 12, 2010 decision by the Bureau of Land Management (“BLM”) to issue permits for the Ruby Pipeline Project (“Pipeline” or “Project”), a 42-inch-diameter, buried natural gas pipeline that would span almost 700 miles, from Wyoming to Oregon, and cross over 1,000 streams, including 209 streams supporting endangered and threatened fish species – and at many of these crossings, blast the pipeline trench with explosives. *See* Exhibit (“Ex.”) 1.

As demonstrated below, Petitioner is likely to prevail under the Endangered Species Act, 15 U.S.C. § 1531, *et seq.* (“ESA”), because a “Biological Opinion” regarding the Project’s effects to threatened and endangered fish species, *see* Ex. 2 (“BiOp”), fails to ensure that mitigation measures are reasonably certain to occur, but also relies on those measures to conclude that “jeopardy” will not result to listed fishes as a result of the Project. Meanwhile, the Pipeline is under construction and therefore causing irreparable harm to Petitioner’s interests now, and absent emergency injunctive relief, these harms will only intensify. The

balance of harms also favors injunctive relief, and injunctive relief is in the public interest.

BACKGROUND

On July 12, 2010, the Bureau of Land Management (“BLM”) signed a Record of Decision (“BLM ROD”) granting rights-of-way and other permits to Ruby Pipeline, L.L.C., a subsidiary of the El Paso Corporation (“Ruby”), for the use of public lands in connection with the construction and operation of the Pipeline. Ex. 3. The Federal Energy Regulatory Commission (“FERC”) authorized a Certificate of Public Convenience and Necessity for the Pipeline on April 5, 2010. Ex. 4. FERC granted approval to Ruby on July 30, 2010, to commence construction of “all compressor and meter stations “along all pipeline spreads of the Ruby Pipeline”. Ex. 5, 6. Since then, FERC has approved Notices to Proceed for Ruby to commence Pipeline construction activities at many additional locations. Ex. 7-19; Comola Dec., Attachments 1, 2.¹

During construction, the Pipeline will be “trenched” – and in many cases, “blasted” with explosives – through 1,069 “waterbodies”, *i.e.*, perennial,

¹ FERC has yet to issue final Orders on several Requests for Rehearing submitted in response to the Commission’s April 5, 2010 Certificate Authorization Order. Thus, any legal challenges to an Order of FERC are not yet ripe. 15 U.S.C. § 717r(b).

intermittent, and ephemeral streams. Ex. 20 at 3.² 209 of these streams are habitat for threatened and endangered fish species: Lahontan cutthroat trout, Warner sucker, Lost River sucker, shortnose sucker, Modoc sucker, Colorado pikeminnow, razorback sucker, humpback chub, and bonytail chub. Ex. 2 at 8-19 (Tables 1-4). Some of these streams are ESA-designated “critical habitat” for Warner sucker, others are proposed as critical habitat for Lost River and shortnose suckers. *Id.* at 8-11 (Tables 1, 2).

At four of these streams that are located near the Oregon-California border, it is “Definite” that Ruby will use explosives to blast the Pipeline trench. *Id.* These include Twelvemile Creek and Twentymile Creek, which comprise Warner sucker critical habitat, and the Lost River and East Branch Lost River, which are occupied by and proposed critical habitat for the Lost River and shortnose suckers. *Id.*; *see also* Strickland Dec. (Attachments) (photographs of Twelvemile Creek at Pipeline crossing). At Twelvemile Creek, Twentymile Creek, and Lost River, suckers will be present when the blasting occurs. Ex. 2 at 80. There is also a “high” certainty that blasting will occur at 32 additional streams, and some chance that it will happen at dozens more. *Id.* at 8-19 (Tables 1-4). This includes 75 waterbody crossings where Lahontan cutthroat trout will likely be present at the time, resulting in the deaths of up to 230 trout and causing immediate as well as

² All page cites are to the Exhibits’ PDF page numbers, not the documents’ internal page numbers.

long-term impacts to almost 54,000 linear feet of trout habitat. *Id.* at 105; *id.* at 86-100 (discussing long-term, indirect effects of the Project to fishes and their habitat); Ex. 21 at 8; Ex. 22 at 6. These impacts will be severe, exacerbating existing threats and setting back longstanding recovery efforts. *See, e.g.*, Ex. 22 at 15 (FWS expressing concern about Pipeline’s “crossings of multiple [Lahontan cutthroat trout] ... recovery streams in the Rock Creek Subbasin” for which the Pipeline “could substantially setback the organized recovery efforts”).

Additionally, 64 million gallons to 402 million gallons of water resources will be used to test the Pipeline’s pressure before it is put into service (*i.e.*, “hydrostatic testing”) and for dust control.³ Extensive water withdrawals at these levels will reduce water flows and availability and can spread nonnative aquatic species, further impacting listed fish species. Ex. 2 at 23.

Ruby has stated that it intends to construct the Pipeline in “one season” and put the Pipeline into service by March 2011. Ex. 23 at 2; Ex. 24 at 16. Thus, absent an injunction to preserve the status quo, construction of the Pipeline will continue to proceed during pendency of Petitioner’s Petition for Review, resulting

³ These water withdrawals will come from surface water sources in the area, and possibly groundwater sources as well. The BiOp states that about 64 million gallons of surface water will be used for these purposes. Ex. 2 at 23. However, FERC and BLM prepared a final environmental impact statement for the Project which states that 402 million gallons of surface- and ground-water will be necessary. Ex. 20 at 2; *see also* Ex. 3 at 17 (stating that 402 million gallons will be used). The reason for the discrepancy in water usage between the BiOp and FEIS and BLM ROD is unclear.

in acute impacts and irreparable harm to Petitioner's interests and foreclosing measures that could conserve and mitigate the Pipeline's adverse effects to endangered and threatened species and their habitats.

ARGUMENT

The standard for an injunction pending appeal is the same as a preliminary injunction. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). A party seeking an injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Defense Council*, 129 S.Ct. 365, 374 (2008). The Ninth Circuit's sliding scale provides that if the hardships tip decidedly in Petitioner's favor, and raising "serious questions" on the merits is sufficient for preliminary relief. *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2010 U.S. App. LEXIS 15537, at *18-19 (9th Cir. July 28, 2010) ("AWR").

I. THE PIPELINE IS CAUSING IRREPARABLE HARM TO PETITIONER.

Petitioner's members use areas along and near the Pipeline route, including streams that are subject to direct impacts from the Pipeline, for professional, recreational, and other purposes. Strickland Dec.; Duff Dec.; Comola Dec.⁴

⁴ Petitioner is a national, non-profit environmental conservation organization with over 42,000 members, whose mission is to secure a future for all species, great or

Irreparable harm is likely – indeed, certain – to result to Petitioner’s members in the absence of an injunction, because blasting and trenching the Pipeline across fish-bearing streams will impair their ability to view endangered and threatened fishes in their native habitats. *Id.*; *AWR*, 2010 U.S. App. LEXIS 15537, at * 20-21 (“[T]he Supreme Court has instructed us that ‘[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.’”) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, (1987)). Construction of the Pipeline will also have long-term effects, *e.g.*, to stream geomorphology, stream beds and banks, riparian vegetation, and from chemical spills, impacting the trout and other listed fishes’ recovery needs. Ex. 2 at 87. Pipeline construction will commence without further public review, and with little public notice. *See, e.g.*, Ex. 16-17 (Vya Construction Camp Application and Approval); Commola Dec. (Attachments 1, 2) (photographs of construction activities at Vya Construction Camp taken one week before Ruby request for, and FERC approval of, Notice to Proceed).

Even if blasting and water depletions are not yet occurring, Petitioner’s interests are still being irreparably harmed. This is because construction of Pipeline facilities is foreclosing practical consideration of meaningful alternatives, including alternatives that would avoid, minimize, mitigate, and compensate for small, hovering on the brink of extinction. *See* www.biologicaldiversity.org (last visited August 17, 2010).

adverse effects to, and maintain conservation options for, listed species. *See, e.g., Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987) (enjoining highway project pending agency conformance to the requirements of ESA section 7(a)(2), due to irreversible and irretrievable commitment of resources that would occur absent injunctive relief) (citing 16 U.S.C. § 1536(d); 50 C.F.R. § 402.14(l); (additional citation omitted)).

Thus, an injunction pending adjudication of the merits will preserve the status quo and avoid these harms and serve the purposes of the ESA and CWA. *See Biodiversity Legal Found. v. Badgley*, 284 F.3d 1046, 1057 (9th Cir. 2002) (“When federal statutes are violated, a party is entitled to an injunction when one is ‘necessary to effectuate the congressional purpose behind the statute.’”).

II. THE BALANCE OF HARMS AND PUBLIC INTEREST WARRANTS AN INJUNCTION PENDING APPEAL.

Respondents will likely present primarily economic injuries or administrative burdens that would result from issuing the requested injunction pending appeal. Yet, the loss of endangered and threatened species is permanent and cannot be translated into such simple terms, and economic harm is not irreparable, especially where such alleged harms are temporary. *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1124-25 (9th Cir. 2005); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001). Moreover, administrative burdens on BLM and FWS to conduct a new ESA section 7 consultation do not

outweigh the threat of irreparable environmental harm. *See, e.g., Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983). Preserving the environment is in the public's interest. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007); *AWR*, 2010 WL 2926463 *10. When violations of the ESA are at issue, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. The ESA's language, history, and structure of the ESA demonstrate that "the balance of hardships and the public interest tips heavily in favor of protected species." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citations omitted); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fish. Serv.* 481 F.3d 1224, 1235 (9th Cir. 2010) (federal agencies "have an affirmative duty to satisfy the ESA's requirements, as a *first* priority") (emphasis added).⁵

Accordingly, the balance of harms and public interest favor an injunction.

III. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF ITS ESA CLAIM.

A. The ESA's Statutory and Regulatory Scheme

Congress enacted the ESA in 1973 with the express purpose of providing a

⁵ As stated by the Supreme Court, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 194 (1978), because the "value this genetic heritage is, quite literally, incalculable." *Id.* at 178 (quoting H.R. Rep No. 93-412, pp. 4-5 (1973)).

“means whereby the ecosystems upon which endangered and threatened species depend may be conserved” and “a program for the conservation of such endangered species.” 16 U.S.C. § 1531(b). The Supreme Court has recognized that the ESA “is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. at 174, 180; *id.* at 184 (“the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost”). Principal responsibilities for implementing the requirements of the Act have been delegated to FWS, an agency within the Department of the Interior, and to the National Marine Fisheries Service (“NMFS”), an agency within the Department of Commerce.⁶

Once listed under the ESA by FWS as “threatened” or “endangered,” species are accorded the Act’s protections. Most pertinent of those protections here is section 7(a)(2), under which all federal agencies must, “in consultation with” FWS, “insure” that the actions that they fund, authorize, or undertake are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat; this is the agencies’ duty to “insure no jeopardy.” 16 U.S.C. § 1536(a)(2).

⁶ FWS is responsible for implementing the ESA for terrestrial species. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01. NMFS (also known as “NOAA Fisheries”) is responsible for implementing the ESA for marine species. *Id.* FWS is the relevant consulting agency for the Pipeline’s impacts.

The duty to insure no jeopardy is one of the ESA's clearest cornerstones for the conservation of listed species. As the Supreme Court has acknowledged, "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7" of the ESA, as clearly, "Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. at 173. To ensure compliance with this duty, section 7 and its implementing regulations set forth a detailed process that must be followed before agencies take or approve actions that may affect a threatened or endangered (*i.e.*, "listed") species or its critical habitat. Fulfillment of this process is the only means by which an "action agency" ensures that its affirmative duties under section 7(a)(2) are satisfied. *NWF*, 481 F.3d at 1235 ("ESA compliance is not optional."). Here, BLM is an action agency for the Project and FWS is the consulting agency.

Thus, pursuant to this process, any agency considering whether to authorize, fund, or undertake an activity must ask FWS whether any listed species are present in the area of the proposed action (the "action area"). 16 U.S.C. § 1536(c)(1). The "action area" includes all areas that would be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. If FWS determines that listed species may be present in the action area, the action agency must prepare a "biological assessment" to "evaluate the potential effects of the action" on those listed species

and habitat. *Id.*; 50 C.F.R. § 402.12.⁷ If the agency concludes in the biological assessment that the action is “likely” to adversely “affect listed species or critical habitat,” it must then enter into “formal consultation” with FWS. *Id.* at §§ 402.14(a), 402.01(b), 402.12(k).

In formal consultation, after evaluating all relevant information, FWS prepares a “biological opinion” which concludes “whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* at § 402.14(g)(4). The biological opinion is the heart of the formal consultation process, and results in either a “likely to jeopardize” or a “no jeopardy” conclusion, and, if designated critical habitat may be affected, a “likely to destroy or adversely modify” or “no destruction or adverse modification” conclusion. 16 U.S.C. § 1536; 50 C.F.R. § 402.14. If “jeopardy” or “destruction or adverse modification of critical habitat” is likely to occur, FWS must prescribe in the biological opinion “reasonable and prudent alternatives” to avoid these results. 50 C.F.R. § 402.14(g). The biological opinion must also include a written statement (referred to as the “incidental take statement”) specifying “the impacts of

⁷ A biological assessment may discuss or include the presence of listed species and their habitats, “views of recognized experts on the species at issue,” an “analysis of the effects of the action on the species and habitat, including consideration of cumulative effects” and an “analysis of alternate actions considered by the Federal agency for the proposed action.” 50 C.F.R. § 402.12(f).

such incidental taking on the species,” any “reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact” and the “terms and conditions” that the agency must comply with in implementing those “measures.” 16 U.S.C. § 1536(b)(4).

An agency’s violation of the consultation requirements in section 7(a)(2) of the ESA is reviewed under the APA. *See Env’tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1085 (9th Cir. 2001). Under the APA, a reviewing court must “engage in a substantial inquiry” and a “thorough, probing, in-depth review” of the challenged action. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)). An agency action is arbitrary and capricious and must be set aside where the agency has:

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

Pacific Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fish. Serv., 265 F.3d 1028, 1034 (9th Cir. 2001) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

B. The ESA Section 7 Consultation History For The Project

ESA Section 7 consultation for the Project officially began in January 2009. Beginning in 2008, FWS expressed concerns about the Pipeline's impacts, *e.g.*, to occupied Warner sucker streams and designated Warner sucker critical habitat. Ex. 21, 22. FWS also urged Ruby to develop alternative construction methods – such as the use of Horizontal Directional Drill – to “avoid impacts to sensitive habitats, and urged FERC to require the Project to ensure that “all fish bearing streams, for the entire Project's alignment, are crossed using (as a minimum protection) a dry ditch crossing method[.]” Ex. 22 at 4. FWS expressed further concerns about the Project's long-term impacts resulting from stream crossings, and questioned where and how the Project will obtain water “in the high desert environment for hydrostatic testing”. *Id.* at 5, 8. FWS stressed that the Project should “result in a clearly beneficial action for listed species” and “allow for both recovery and survival of the species.” Ex. 22 at 12. Toward that end, FWS urged FERC early on to engage in a dialogue about the “potential conservation actions that would be clearly beneficial to listed ... species and their habitats, and assist with conservation and recovery” of listed species. *Id.*⁸

⁸ Although FERC was the lead action agency during the Project's ESA section 7 consultation, other action agencies participated as well, including BLM. *See, e.g.*, Ex. 21 at 6 (“multiple federal agencies (*e.g.*, Forest Service, Bureau of Land Management, and Corps of Engineers) that will rely on [FWS's] Biological

By late 2009, Ruby and FWS developed a “Memorandum of Agreement” (“MOA”) to address conservation measures to which Ruby would commit for the benefit of threatened and endangered species. Ex. 26. These measures were collectively known as the “Endangered Species Act Conservation Action Plan” (“ESA CAP”) and included, *e.g.*, fish diversion projects, fish ladders, and habitat restoration projects. *Id.* The measures were “extracted from listed species recovery plans, other ESA action plans, or recovery team activities, and reflect high priority actions for these listed species and critical habitat”. *Id.* at 4 (citing 16 U.S.C. § 1532).

Despite the measures’ direct connection to furthering the recovery of listed species, however, FWS and Ruby made a deliberate choice to exclude the measures from the scope of the action and the Project’s ESA section 7 consultation – *i.e.*, from the analysis of the “Project’s Effects.” *Id.* at 3. Thus, in the final BiOp, FWS considers the ESA CAP measures as part of the Project’s “Cumulative Effects.” Ex. 2 at 104. Nevertheless, the BiOp relied in part on the ESA CAP measures in order to conclude that the Project will not jeopardize the continued existence of the Lahontan cutthroat trout or Warner sucker, and will not destroy or adversely modify critical habitat for the Warner sucker. *Id.* at 106-107 (collectively “No Jeopardy Finding”).

Opinion (BO) and Incidental Take Statement (ITS) for their associated Project activities and/or associated authorizations”).

C. The BiOp Is Arbitrary And Capricious And Contrary To The ESA Because It Excludes Mitigation Measures From The Project's Effects Analysis.

The BiOp is legally inadequate because it excludes analysis of the “voluntary” conservation measures that Ruby has committed to undertake in order to mitigate the adverse effects of the Pipeline to listed fishes – in particular, the Lahontan cutthroat trout and Warner sucker. Ex. 26; Ex. 2 at 104, 106-107. Although the BiOp relies on these measures for the No Jeopardy Finding, it excludes these measures from the scope of the Project. *See id.* Instead, the BiOp considers these measures as part of the Project’s “Cumulative Effects.” *Id.* This approach is arbitrary and capricious for two reasons.

1. First, it is arbitrary and capricious because the BiOp fails, as it must, to “analyze the effect of the *entire* agency action[.]” *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), *cert. denied*, *Sun Exp. & Prod. v. Luganm* 489 U.S. 1012 (1989) (emphasis added); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1155 (D. Ariz. 2002) (citing 16 U.S.C. § 1536(b)(3)(A); *cf. NWF*, 481 F.3d at 1233 (rejecting agency’s interpretation of ESA’s implementing regulations as excluding from review portions of the action “since this approach conflicts with ESA’s basic mandate”).

The ESA CAP measures are indisputably within the Project’s scope. Indeed, as made evident by the MOA, the ESA CAP measures are dependent upon the

Project going forward, because Ruby would not have committed to measures if it were not seeking federal permitting for the Pipeline. Ex. 26 at 3. The converse is also true, *i.e.*, the Project is dependent upon the ESA CAP measures, because Ruby could not construct and operate the Pipeline were it not also committing to implement the ESA CAP measures, because the ESA CAP measures support the No Jeopardy Finding and, thus, allow the Project to go forward as proposed. Ex. 2 at 105, 106-107. The ESA CAP measures were also selected because of their perceived conservation benefits for listed fishes and critical habitat. Ex. 26 at 3. Under these circumstances, the ESA CAP measures are inextricably linked to the Project and it was arbitrary and capricious for FWS to exclude the measures from the scope of the Project's Effects analysis in the BiOp.

2. Second, the BiOp's exclusion of the ESA CAP measures from the scope of the Project is arbitrary and capricious and contrary to FWS policies because, as a result of the exclusion of the measures from the Project's Effects Analysis, there is no ESA regulatory mechanism to ensure that jeopardy or the destruction or adverse modification is avoided if the ESA CAP measures are not implemented.

Under ESA section 7, "conservation measures" – *i.e.*, measures that are designed to mitigate an action's adverse effects or benefit the recovery of listed species and critical habitat – must be incorporated into the proposed project's

action's effects analysis. Ex. 27 at 97; *see also, e.g., Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 952 (9th Cir. 2003) (upholding biological opinion which concluded that a voluntary Conservation Agreement sufficiently mitigated project's effects on listed species). Here, the "beneficial effects" of the ESA CAP measures, which are "conservation measures" as they are designed to mitigate the Project's effects and benefit the recovery of the Lahontan cutthroat trout and Warner sucker, were therefore required to have been "taken into consideration for both jeopardy and incidental take analyses." Ex. 27 at 97.⁹

Because this did not occur, there is no ESA regulatory mechanism to ensure that ESA CAP measures will, in fact, be implemented, because the measures are not required as a part of the BiOp's Reasonable and Prudent Measures or Terms

⁹ There can be no serious dispute that the ESA CAP measures are "conservation measures" within the meaning of the ESA. *See id.* Indeed, the measures were selected because they will "further the recovery" of listed fishes and critical habitat and were "recommended in the species' recovery plan[.]" Ex. 26 at 3 (citing 16 U.S.C. § 1532). For instance, the BiOp states that the ESA CAP measures will "result in positive effects" for Lahontan cutthroat trout and Warner sucker, which will "eventually experience significant enhancement of habitat connectivity in the action area" as a result. Ex. 2 at 106-107. For Lahontan cutthroat trout, the BiOp states that the measures "identified in the Cumulative Effects section are anticipated to contribute to the recovery" of the species, and "will have a beneficial effect to LCT in the action area ... as well as rangewide". *Id.* at 106. Referring to the Warner sucker, the BiOp states that the measures are "are likely to occur in the action area that are anticipated to contribute to the recovery of Warner sucker and will have a beneficial effect to Warner sucker and its designated critical habitat in the action area as well as rangewide by improving habitat access and connectivity". *Id.* at 107. Additionally, the measures are "closely related" to the Project, and are "achievable within the authority of the action agency or applicant" as Ruby has "committed" to their implementation. Ex. 27 at 97; Ex. 26; Ex. 28; Ex. 29; Ex. 30.

and Conditions. Ex. 2 at 111-115; 50 C.F.R. § 402.16(b) (requiring reinitiation of consultation if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered”); *see also Bennett v. Spear*, 520 U.S. 154, 170 (1997) (the “Incidental Take Statement constitutes a permit authorizing the action agency to ‘take’ [listed] species so long as it respects [FWS’s] ‘terms and conditions’ and “[t]he action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril...”).¹⁰

Consequently, FWS and BLM will not be required to reinitiate consultation to reconsider the Project’s Effects in the event that the ESA CAP measures are not implemented for any reason. 50 C.F.R. § 402.16(b); *cf. Sierra Club v. Marsh*, 816 F.2d at 1388 (agency violated 50 C.F.R. § 402.16 by not re-initiating consultation because during initial consultation replacement habitat was deemed “necessary to minimize the project’s effects” but land was not secured, constituting new

¹⁰ The ESA CAP measures are included in the BiOp’s Conservation Recommendations. *See* Ex. 2 at 115. Conservation Recommendations, however, are discretionary; this further demonstrates how their exclusion from the Project’s “conservation measures” is fatal to the BiOp. *Rumsfeld*, 198 F. Supp. 2d at 1152 (mitigation measures must be “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations”) (citing *Sierra Club v. Marsh*, 816 F.2d 1376).

information that affected the listed species “in a manner or to an extent not previously considered”).¹¹

For example, there is no ESA regulatory mechanism to ensure that, in the event that the actual costs of the measures exceed the estimated costs or FWS is unable to find other sources of funding, Ruby will pay such additional costs to ensure that the measures are implemented and listed species are not jeopardized. To the contrary, under the terms of the MOA, which are “binding” on FWS, Ruby has “sole discretion” under such circumstances to decide whether to pay “reasonable costs” “beyond the current estimate to ensure the identified conservation action is completed.” Ex. 26 at 4, 6; *see Nat’l Wildlife Fed’n v. Nat’l*

¹¹ Notably, no such duty exists when there is new information regarding changes to an action’s “cumulative effects.” *See* 50 C.F.R. § 402.02 (definitions of “effects of the action” and “cumulative effects”); *id.* at 402.16(b) (requiring reinitiation of consultation if “new information reveals *effects of the action* that may affect listed species or critical habitat in a manner or to an extent not previously considered”) (emphasis added). Indeed, the cumulative effects analysis, by definition, seeks to account for the “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.” 50 C.F.R. § 402.02. Thus, in considering the Project’s cumulative effects, *e.g.*, the BA considered “[n]on-federal, reasonably foreseeable projects” in the action area, including two residential developments projects in Utah and a habitat restoration project in Nevada. Ex. 24 at 36. The BA’s cumulative effects analysis did not consider the ESA CAP measures. Here, the ESA CAP measures are properly viewed as “federal” as they “have been extracted from listed species recovery plans, other ESA action plans, or recovery team activities, and reflect high priority actions for these listed species and critical habitat”) (citing 16 U.S.C. § 1532). For this reason also, they are not properly included into the Project’s “Cumulative Effects.”

Marine Fish. Serv., 254 F. Supp. 2d 1196, 1213 (D. Or. 2003) (standard is not “reasonable chance” but “reasonable certainty”).

Thus, because the ESA CAP measures are properly viewed as “conservation measures” within the Project’s scope and not part of its “cumulative effects,” they should have been considered within the Project’s Effects analysis. FWS’s failure to do so in the BiOp was arbitrary and capricious as it was contrary to the agency’s own policies for implementing the ESA, which ensure that if such measures are not carried out, listed species do not bear the consequences. *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-688 (9th Cir. 2007).

CONCLUSION

In summary, the Pipeline will have acute and long-term impacts to the Warner sucker and its critical habitat and Lahontan cutthroat trout. These impacts are, by the BiOp’s admission, only offset to the degree that the ESA CAP measures are implemented. Ensuring that the ESA CAP measures are implemented requires their inclusion as part of the Project and a showing that they are reasonably certain to occur. This was not the case. Accordingly, an injunction is warranted. *See Thomas v Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (where “a project is allowed to proceed without substantial compliance” with the procedural requirements of the ESA, “there can be no assurance that a violation of the ESA’s substantive provisions will not result”).

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Respectfully submitted,

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