

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Ruby Pipeline, L.L.C.)	Docket Nos. CP09-54-000
)	PF08-9-000
)	
Application for Certificate)	(Ruby Natural Gas Pipeline)
_____)	

REQUEST FOR REHEARING OF THE CENTER FOR BIOLOGICAL DIVERSITY

Pursuant to Rules 101(e) and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. §§ 385.101(e), 385.713, the Center for Biological Diversity (the “Center”) hereby files this Request for Rehearing of the Commission’s April 5, 2010 initial Order (“April 5 Order”) authorizing a Certificate of Public Convenience and Necessity to Ruby Pipeline, L.L.C. (“Ruby”) for the Ruby Pipeline Project (“Pipeline” or “Project”) in the above-captioned proceedings. The Pipeline is a 677 miles-long, 42-inch-diameter natural gas that would transport up to 1.5 billion dekatherms of natural gas across four Western states, from Wyoming to Oregon, and slice through some of the West’s most pristine public lands and over 1,000 streams along the way.

The Center – a party in these proceedings by Commission Order of September 4, 2009 – seeks to file this Request for Rehearing now in light of new information that has been released since the final environmental impact statement was issued for the Project, and the Commission issued its April 5 Order granting certificate authorization. Such new information includes: (1) the U.S. Fish and Wildlife Service’s (“FWS”) June 18, 2010 completion of a final Biological Opinion, pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (“ESA”), regarding the environmental effects of the Pipeline to threatened and endangered fish species and critical habitat; (2)) the Bureau of Land Management’s July 12, 2010 Record of Decision approving rights-of-way and temporary use permits for the Pipeline; (3) FWS’s July 9, 2010 “Compatibility Determination” finding that use of the Sheldon National Wildlife Refuge would be compatible with the purposes for which Sheldon Refuge was established; and (4) analyses of impacts to historic properties and cultural resources that continue to be prepared and analyzed at this point. These studies or reports have all been released weeks after the Commission issued its April 5 Order, but nonetheless are required before Ruby may commence construction, and thus are part of the Commission’s ongoing certificate authorization for Ruby and precede a “final” authorization for the Project.

I. COMMUNICATIONS AND CORRESPONDENCE

All communications, correspondence, and documents related to this rehearing request shall be served upon the flowing person:

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II. RELEVANT FACTS

On January 31, 2008, the Commission granted the request of Ruby Pipeline, L.L.C. (“Ruby”) to use the Commission’s pre-filing environmental review process, and assigned the Project Docket No. PF08-9-000. The pre-filing process for the Project ended on January 27, 2009, with the filing of Ruby’s application. At that time, this proceeding was assigned Docket No. CP09-54-000.

On March 28, 2008, the Commission published a Notice of Pre-Filing Environmental Review for the Ruby Pipeline Project in the *Federal Register*. 73 Fed. Reg. 18788 (Apr. 7, 2008).

On October 2, 2008, the Commission’s Notice of Intent to Prepare an Environmental Impact Statement was published in the *Federal Register*. 73 Fed. Reg. 57347 (Oct. 2, 2008).

On January 27, 2009, Ruby filed an application with the Commission pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. 717f (“NGA”) and the Commission’s regulations at 18 C.F.R. Parts 157 and 284, for a Certificate of Public Convenience and Necessity for the Project.

On February 9, 2009, the Commission issued a Notice of Application for the Project that alerted other federal agencies issuing authorizations for the Project of the requirement to complete all necessary reviews and reach a final decision within 90 days of issuance of the Commission’s Final Environmental Impact Statement (“FEIS”) for the Project.

On June 26, 2009, the Commission published a Notice of Availability of its Draft Environmental Impact Statement for the Project (“DEIS”) in the *Federal Register*. 74 Fed. Reg. 30560 (June 26, 2009).

On August 10, 2009, the Center filed comments on the DEIS and a Motion to Intervene in this proceeding. In its comments on the DEIS, the Center stated that the DEIS failed to adequately describe and consider the Project’s environmental consequences and to describe mitigation measures with sufficient detail to conclude that impacts would be rendered to less-than-significant levels.

On September 4, 2009, FERC issued a preliminary determination (“PD”) addressing the non-environmental issues raised by Ruby’s application under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f (“NGA”), for certificate authorization to construct and operate a new 675-mile-long, 42-inch-diameter pipeline, with a transportation capacity of 1.5 billion dekatherms (Dth) per day, to transport natural gas from Rocky Mountain production areas to west coast markets. In the September 2009 Order, FERC determined that “contingent on a favorable result in our

pending environmental review, the proposed Ruby project will be required by the public convenience and necessity.” The September 2009 Order rejected several of Ruby’s rate proposals, and Ruby requested rehearing and/or clarification on each of these determinations. In addition, the Interstate Natural Gas Association of America (INGAA) filed requests for rehearing and/or clarification of the September 2009 Order.

On January 8, 2010, FERC staff issued a final environmental impact statement for the Pipeline. The FEIS identified many major issues of concern, including but not limited to impacts to cultural resources; impacts to federally-listed species; and route alternatives in northwestern Nevada. The FEIS concluded that even if the Pipeline were constructed and operated in accordance with applicable laws and regulations, it would result in adverse environmental impacts. FERC believed that most of these impacts would be reduced to less than significant levels with the implementation of Ruby’s proposed mitigation and FERC’s recommendations, although even with mitigation, the FEIS found that impacts on groundwater resources and sagebrush steppe habitat would be significant. Still, mitigation measures for endangered and threatened species were not identified in the DEIS or FEIS. *See, e.g.*, FEIS at 1-17 (stating that “Ruby continues to consult with the FWS regarding conservation and mitigation measures for endangered and threatened species that may be affected by the project”). Development of other mitigation measures – *i.e.*, for impacts to cultural resource impacts – were deferred to a later time. FEIS at 4-241 (mitigation of cultural resources “would need to be developed”). FEIS at Section 5.2. The FEIS included an assessment of impacts related to access roads to/from the proposed pipeline route. Some of those access roads are located on the Sheldon National Wildlife Refuge (“Sheldon Refuge”).

By letter dated March 18, 2010, Ruby transmitted a “Letter of Commitment” to FWS, memorializing its promises to “fund and/or implement conservation measures for the benefit of threatened and endangered species” that occur within the Project’s “action area.” Ruby stated that the measures described in its letter constitute its “Endangered Species Act Conservation Action Plan (“Plan”). Ruby stressed, however, that the conservation funding commitments and the Plan are ‘not in lieu of’ completing ESA Section 7 consultation with FERC. For specific details on the conservation measures that Ruby planned to fund, the Letter of Commitment referred to an attachment that was not released to the public.

On April 5, 2010, the Commission granted Ruby’s requested certificate authorization. The Commission’s approval was based on 46 “Environmental Conditions.” Among other requirements, these conditions required Ruby to address any comments on cultural resources survey reports and studies and to file: (i) any required, revised reports or studies and any comments thereon by FWS, State Historic Preservation Offices (“SHPO”), Native American tribes’, and other agencies; (2) any additional, required cultural resource survey and evaluation reports, and avoidance and mitigation/treatment plans; and (3) FWS’s, SHPOs’, and Tribes’ comment on the reports and plans. April 5 Order at Appendix A, Environmental Condition 44. In addition, FERC’s approval was conditioned on the Advisory Council on Historic Preservation commenting on the Project and FERC staff and the Director of Office of Energy Projects (“OEP”) approving the cultural resource reports and plans and notifying Ruby in writing that treatment plans and mitigation measures may be implemented and/or construction may proceed. *Id.* Environmental Condition Nos. 35 and 36 prohibit any construction from occurring in areas

where species concerns are present until the appropriate section 7 consultation is completed. Ruby's future compliance with these conditions provided the basis for the Commission's finding that the Pipeline would be in the public interest and present acceptable environmental risks. The April 5 Order included other mitigation measures, but none to mitigate adverse impacts to federally-listed species or cultural impacts.

On May 3, 2010, FWS responded to Ruby's March 18, 2010 Letter of Commitment and approved its Conservation Action Plan. Like Ruby's Letter of Commitment, FWS's response did not disclose the Conservation Action Plan to the public.

By letter dated May 11, 2010, Ruby agreed to initiate consultation with the California SHPO pursuant to section 106 of the NHPA, in light of new concerns about the Project's potential to affect cultural resources in California. Ruby agreed to complete all necessary surveys and other required documentation and file the information with the Commission, to allow the Commission to complete the appropriate consultations under section 106 of the NHPA. As of the date of this filing, the Center could locate no public record of this process having been completed.

On June 8, 2010, FWS released a final biological opinion for the Pipeline. The BiOp concluded that the Pipeline is likely to adversely affect nine species of fish – including the Lahontan cutthroat trout, Warner sucker, Modoc sucker, Lost river sucker, shortnose sucker, Colorado pikeminnow, humpback chub, razorback sucker, and bonytail chub – and adversely affect designated critical habitat for the Colorado pikeminnow, humpback chub, razorback sucker, bonytail chub, and Warner Creek sucker. The BiOp stated that the Pipeline will cross 1,069 perennial, intermittent, and ephemeral waterbodies in 11 major watersheds. Many of these crossings are in or connected to an ESA-listed sucker stream or designated or proposed sucker critical habitat. *Id.* at Tables 1-3. The BiOp also stated that Ruby would use 64 million gallons of water for hydrostatic testing and dust abatement during construction. *Id.*

On June 9, 2010, FWS released a document entitled "Supplemental Information to the Ruby Pipeline Project" FEIS, which stated (at p. 5) that Ruby's use of the Sheldon Refuge would result in irreversible effects to resources, including the "reduction in biological, cultural, and paleontological resources in the vicinity of the road system." In addition, FWS stated that an exchange of land to facilitate Ruby's use of what would be come formerly-Refuge lands would result in "negative effects to refuge resources" including effects on "habitat connectivity, localized wildlife use of the site, hydrology, and the physical environment." *Id.* FWS nevertheless dismissed these effects by highlighting the "expected" benefits of plans for "mitigation and enhancement actions" that had – at the time – yet to be finalized, and as of the date of this filing, have not been completed.

On July 9, 2010, FWS released a final Compatibility Determination and a Record of Decision approving a Special Use Permit for Ruby to use Sheldon Refuge roads to serve as access routes for pipeline construction vehicles traveling to and from the pipeline route. FWS found the use of access roads to be appropriate and compatible with the purposes of the Sheldon Refuge, even while it admitted that this use will negatively affect the Sheldon Refuge's purposes, *e.g.*, by increasing traffic volume, size, and noise; displacing habitat; increasing disturbance to Refuge wildlife; and conflicting with use of the Refuge by visitors, FWS, and others. Surveys for cultural resources were deferred to just prior to when earth-moving activities occur.

On July 12, 2010, BLM issued a Record of Decision granted two rights-of-way (“ROWS”) and 10 temporary use permits (“TUPs”) for the Pipeline. DOI/BLM, *Record of Decision, Ruby Pipeline Project* (July 12, 2010). To approve the ROWs and TUPs, BLM relied in part on the BiOp, as well as a the July 9, 2010 compatibility determination. The BLM ROD was issued prior to completion of consultation with the Advisory Council on Historic Preservation pursuant to Section 106 of the National Historic Preservation Act.

By letter dated July 12, 2010, the Advisory Council on Historic Preservation advised FERC of several concerns in connection with the Pipeline, including the lack of or inconsistent Government-to-Government consultation by FERC and BLM with Native American Tribes, lack of meaningful tribal input on the historic property identification and evaluation process, limited consultation with tribes regarding properties of religious and cultural significance, and concerns about the retrieval of and disposition of artifacts from archaeological sites that have significance for tribes. *See* Letter from Advisory Council on Historic Preservation to O’Donnell (July 12, 2010) at 2; *id.* at 2 (noting that “a number of Indian tribes [have] indicated in writing and verbally that they continue to have concerns about their limited involvement in some of the testing, identification research, and in reaching conclusions about eligibility, effect, and the treatment of adverse effects” as well as “concerns about the status of completion of some of the studies”). Accordingly, for the ACHP to proceed with its reviews of the Pipeline, it asked FERC to provide eight categories of information. *See id.* at 3 (seeking clarification or explanation about, among other things, “how FERC will modify mitigation and treatment plans to address tribal concerns” or “address long-term cumulative effects of the Ruby Pipeline Project on eligible landscapes and historic properties” as well as “concerns express by ... non-tribal consulting parties regarding identification of historic properties and the resolution of adverse effects”). In so doing, the ACHP stated that there are “unresolved issues related to effect determinations and the resolution of adverse effects at this juncture of project planning.” *Id.* By letter dated July 19, 2010, FERC dismissed ACHP’s concerns by reciting information already in the consultation record. *See* Letter from O’Donnell, FERC to Vaughn, ACHP (July 19, 2010).

III. STATEMENT OF REASONS

A. There Is Good Cause To Decide The Issues Raised In This Rehearing Request.

1. There is good cause to waive the 30-day time limit set forth in Rule 713 and decide the issues raised in this Request for Rehearing. 18 C.F.R. § 385.101(e) (the Commission may, for good cause, waive any provision of this part or prescribe any alternative procedures that it determines to be appropriate”). As described in detail in the Center’s Statement of Reasons, there is new information that gives rise to specific reasons for why the Commission should grant the Center’s Request for Rehearing and require lawful analysis of the Pipeline’s adverse environmental and cultural effects before approving the Project. These new issues are based on the release of several required environmental reports and studies – which are conditional to Ruby commencing construction – since the Commission issued its April 5 Order. These newly-released environmental reports and studies include the following:

- a. FWS's June 8, 2010 completion of a final Biological Opinion pursuant to the ESA regarding the environmental effects of the Pipeline to threatened and endangered fish species and critical habitat;
- b. BLM's July 12, 2010 Record of Decision approving rights-of-way and temporary use permits for the Pipeline;
- c. FWS's July 9, 2010 "Compatibility Determination" finding that use of the Sheldon National Wildlife Refuge would be compatible with the purposes for which Sheldon Refuge was established;
- d. Analyses of impacts to historic properties and cultural resources that continue to be assessed;
- e. Ongoing development of measures to mitigate adverse effects to threatened and endangered species, Sheldon Refuge, and cultural resources, where such impacts have been assessed; and
- f. New questions about how the Project will comply with new permitting requirements under the Golden and Bald Eagle Protection Act.

In addition, since the Commission issued its initial authorization on April 5, 2010, the BP Disaster – the nation's largest environmental disaster – occurred. The BP Disaster has made evident the fatal and tragic mistake of dismissing environmental analysis of potential disasters – whether the disaster is an explosion and oil spill, as with the BP Disaster, or whether it be an explosion and ruptures in a gas pipeline – by characterizing their potential to occur as "minimal." As made tragically clear by the BP example – and by ruptures in other natural gas pipelines owned and operated by El Paso, L.L.C., Ruby's parent corporation – the foreseeability of a rupture occurring in the Pipeline is not "extremely remote" but is, in fact, totally reasonable.

2. The issues that are raised by this new information are ones that could not have been raised by the due date for such requests on the Commission's April 5 Order, and as such, they would have been deemed waived had the Center filed its Request for Review within 30 days of the April 5 Order. *See id.* § 385.713(a)(3) (requiring rehearing requests to include a "Statement of Issues," *i.e.*, a "listing [of] each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; *any issue not so listed will be deemed waived*") (emphasis added).

3. Additionally, several requests for rehearing of the April 5 Order have been filed by parties other than the Center, and except for a few that have since been withdrawn, these other rehearing requests are still pending before the Commission, which has waived a provision that would have automatically deemed such requests denied in the absence of a FERC action within 30 days in order to provide additional time to consider the issues raised. Order (June 2, 2010). These pending rehearing requests raise a question as to whether the April 5 Order is a "final order" of the Commission. *See, e.g.*, Request for Rehearing of Defenders of Wildlife (May 5, 2010) at 3 (arguing that the April 5 Order is not a final order). Meanwhile, Ruby has relied on Commission statements to highlight the "incipient" nature of the Commission's April 5 certificate authorization. *See, e.g.*, Letter from Ruby to Mackiewicz, BLM Ruby National Project Manager (Apr. 16, 2010) at 5-6 ("we view the nature of a Commission order granting [National Gas Act] authorization as "an incipient authorization without current force and effect""") (quoting *AES Sparrows Point LNG*, 129 FERC ¶61245 (2009)) at 17 (additional

internal quotations omitted). Thus, the lack of “finality” in the April 5 Order is already a matter that FERC will necessarily address in deciding the still-pending rehearing requests. *See id.* (“Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.”). Accordingly, there will be no prejudice to this proceeding or the other parties if the Commission decides this Request for Rehearing in addition to the other pending rehearing requests.

4. Lastly, the Center is already a “party” to the proceeding, as determined by Commission Order dated September 4, 2009.

5. In summary, because of new information about the Project’s impacts, the ongoing nature of FERC’s approval of the Pipeline, granting rehearing at this stage of the proceeding will not cause undue delay or otherwise prejudice the proceeding or other parties, and the Center’s demonstrated interest in this proceeding, there is good cause to grant the Center’s Request for Rehearing. 18 C.F.R. §§ 385.101(e), 385.713.

B. FERC Is In Violation Of The Endangered Species For Relying On The Flawed Biological Opinion To Grant Certificate Authorization.

The Relevant Statutory and Regulatory Scheme

6. Recognizing that all of the country’s “species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” 16 U.S.C. § 1531(a)(3), Congress enacted the ESA in 1973 with the express purpose of providing both a “means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] ... a program for the conservation of such endangered species.” *Id.* at § 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.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 180 (1978). As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

7. Principal responsibilities for implementing the requirements of the Act for terrestrial species have been delegated to FWS, an agency within the Department of the Interior. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01.

8. Once listed under the ESA by FWS as “threatened” or “endangered,” species are accorded the Act’s protections. Most pertinent of those several 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). The duty to insure no jeopardy is one of the ESA’s clearest cornerstones for the recovery and conservation of listed species. Indeed, 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.

9. The ESA’s implementing regulations for section 7(a)(2) set forth a specific process that is “not optional” and is the *only* way to ensure that action agency’s – here, FERC’s – affirmative duties under section 7 are satisfied. *Nat’l Wildlife Fed’n v. Nat’l Marine Fish. Serv.*, 481 F.3d 1224, 1235 (9th Cir. 2007). Thus, as relevant here, FERC’s duties are to ensure that the Pipeline does not jeopardize the continued existence of any threatened or endangered species, and that the Pipeline does not destroy or adversely modify any listed species’ designated “critical habitat.”

10. Pursuant to this process, an 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” is defined to mean 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.

11. 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.*; *see id.* at § 402.12.¹ 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).

12. During formal consultation, 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 it results in either a “likely to jeopardize” or a “no jeopardy” conclusion – or, if designated critical habitat may be affected as well, 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. The biological opinion must also include a written statement (referred to as the “incidental take statement”) specifying “the impacts of 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).²

¹ For instance, 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).

² 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).

13. Section 7(d) of the ESA prohibits federal agencies from making any irreversible or irretrievable commitments of resources, pending the outcome of the formal consultation process. Congress enacted section 7(d) “to prevent Federal agencies from ‘steamrolling’ activity in order to secure completion of the projects regardless of their impact on endangered species.” *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996) (quoting *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C.), *aff’d in part and reversed in part on other grounds*, 206 U.S. App. D.C. 184, 642 F.2d 589 (D.C. Cir. 1980)). Section 7(d) thus “clarifies the requirements” of section 7(a) in order to “ensur[e] that the status quo will be maintained during the consultation process.” *Conner v. Burford*, 836 F.2d 1521, 1536 & n.34 (9th Cir. 1988); *see also Southwest Ctr. for Biological Diversity v. Babbitt*, 2000 U.S. Dist. LEXIS 22477 (D. Ariz. Sept. 22, 2000) (“the purpose of Section 7(d) is to ‘ensure that the status quo will be maintained during the consultation process’”) (quoting *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1986)).³ In *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) and *Lane County Audubon Soc’y v. Jamison*, 958 F.2d 290 (9th Cir. 1992), the Ninth Circuit Court of Appeals determined that “timber sales constitute *per se* irreversible and irretrievable commitments of resources under section 7(d) and cannot go forward during the consultation period.” *Silver v. Babbitt*, 924 F. Supp. 976, 983 (D. Ariz. 1995) (citing *Jamison*, 958 F.2d at 295; *Pacific Rivers*, 30 F.3d at 1057). These decisions turned on contents of the contracts at issue, not on the ground-disturbing activities that were actually taking place.

The Affected Listed Fishes And Their Habitat

14. Relevant here, the Pipeline poses a new threat to five threatened and endangered species of fish, including the Warner Creek sucker, Lost River sucker, shortnose sucker, Modoc sucker, and Lahontan cutthroat trout. To seek to address these threats, FERC prepared a biological assessment, which was finalized on January 20, 2010. On June 8, 2010 – a month after rehearing requests on the April 5 Order would have been due – FWS released a final biological opinion. FWS concluded in the BiOp that there would be no jeopardy to these species and no destruction or adverse modification of their critical habitat.

15. The Warner Creek sucker was listed as threatened, with critical habitat designated, in 1985. 50 Fed. Reg. 39117 (Sep. 27, 1985). Threats to the species include reduced range and population, and water diversions and artificial barriers that restrict movement and migration. Designated critical habitat for the Warner Creek includes 27 stream miles with 50 foot riparian buffers on both sides. FWS approved the Warner Creek Sucker Recovery Plan in 1998 and set out three primary goals for delisting the species: (1) establishment of a self-

³ Section 7(d) of the ESA provides in full:

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant *shall not* make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d) (emphasis added).

sustaining metapopulation (a group of populations of one species coexisting in time but not in space) that is distributed throughout the Twentymile, Honey, and Deep Creek (below the falls) drainages, and in Pelican, Crump, and Hart Lakes; (2) restored passage within and among the Twentymile, Honey and Deep Creek (below the falls) drainages so that the individual populations of Warner suckers function as a metapopulation; and (3) the existence of no threats that would likely threaten the survival of the species over a significant portion of its range.

16. The Lost River sucker and shortnose sucker were listed as endangered in 1988, because FWS found that dams, draining of marshes, diversion of rivers and dredging of lakes had reduced their ranges and numbers by more than 95 percent. 53 Fed. Reg. 27130 (July 18, 1988). FWS issued a Recovery Plan for both species in 1993, which set an interim objective to establish at least one stable population with a minimum of 500 adult fish for each unique stock by 2012. This interim objective includes conducting research and improving habitat conditions, by rehabilitating riparian areas and improving land management practices in the watershed, developing and achieving water quality and quantity goals, and improving fish passage, spawning habitat, and other habitat conditions. Thus, FWS considers that the survival and recovery of these species to depend on rehabilitated watershed conditions and improve water quality and habitat throughout their current range.

17. The Modoc sucker is found only in three stream drainages in the upper Pit River Basin in northern California and Nevada and south-central Oregon. The Modoc sucker was listed as endangered, and critical habitat was designated for the species, in 1985 as a result habitat loss from, *e.g.*, siltation and channelization, as well loss of natural barriers contributing to hybridization with another species. Fed. Reg. 24526 (June 11, 1985). Designated critical habitat encompasses 26 stream miles, including 50-foot riparian buffers on both sides, and was described these constituent elements: intermittent and permanent-water creeks, and surrounding land areas that provide vegetation for cover and protection from erosion. *Id.* There is not yet an official recovery plan for the Modoc sucker, but prior to its listing as endangered in 1984, FWS, the Forest Service, and the California Department of Fish and Game developed and signed an “Action Plan for the Recovery of the Modoc Sucker.” Several revisions were drafted through 1992, although none were officially adopted. Criteria to downlist the Modoc sucker to threatened, and delist it entirely, include “establishment of pure, safe populations (for 3 to 5 years) throughout Rush and Turner Creeks watersheds.” Criteria to delist the Modoc sucker are “establishment of pure, safe populations (for 3 to 5 years) throughout Rush and Turner Creeks watersheds (downlisting criteria), and in two additional streams within historic range.” Recovery tasks also include improving and securing habitat, and expanding the range of the species.

18. The Lahontan cutthroat trout was first listed as endangered in 1970, 35 Fed. Reg. 13520 (Aug. 25, 1970), then downlisted to threatened in 1975 to allow for sport-fishing of introduced populations. The species continues to be at risk from water diversions and introduction of exotic trout that compete for resources. A recovery plan was developed for the Lahontan cutthroat trout in 1995. The Recovery Plan seeks to delist the Lahontan cutthroat trout through securing habitat, reintroducing the species within its historic range, and preventing damage from land management.

The BiOp Contains New Information About The Pipeline’s Impacts That Must Be Considered Before Pipeline Approval.

19. There are many flaws in the BiOp that are explained below, but notably, the BiOp does constitute new information about the potential impacts of the Pipeline to threatened and endangered fish species, including questions about how these fishes will be adversely affected as a result of water extraction for hydrostatic testing and water depletions.

20. For example, water extractions for the Pipeline in an arid region with over-allocated water supplies will impact the fishes. As FWS explained during early consultation over the effects of the Pipeline in 2008:

Extraction of already-limited water for hydrostatic testing could have significant adverse effects to native aquatic species, regardless of whether the Project utilizes existing water rights or new water rights. Additionally, the location and timing of any water extractions will also have significant ramifications to aquatic systems. The Project should create a water extraction and management plan for hydrostatic testing, that seeks to avoid impacting key species, sensitive waters, and already over-allocated water supplies.

Letter from Henson, FWS to Salas, FERC (Dec. 22, 2008).

21. Water extraction is not the only way in which the Pipeline will adversely affect these fishes, however. The Pipeline must also “cross” 1,069 “waterbodies” – in other words, crossings of perennial, intermittent, and ephemeral streams where a five to 15-foot wide, seven foot-deep trench will have to be staked, cleared, trenched, and perhaps blasted in the sediment below the stream using explosives. Set forth below is a table with a summary of the Pipeline’s projected waterbody crossings, including crossings involving blasting with explosives, that will impact occupied habitat or critical habitat, or habitat that is connected to occupied or critical habitat (*i.e.*, a tributary or downstream reach):

Summary Table of Impacts of Ruby Pipeline on Endangered Fish from Crossings:

Species	Crossings				Blasting			
	Occupied	Crit Hab	Connected	Total	Definite	High	Low	Total
Warner Sucker	2	2	22	24	2	6	3	11
Lost Riv./Shortnose	3	2	14	16	1	5	7	13
Modoc Sucker	0	0	1	1	0	0	1	1
Lahontan cutthroat	0	0	168	168	0	23	95	118
Total	5	4	205	209	3	34	106	143

See BiOp at Tables 1-3. FWS recognized that these effects would be far-reaching, and on that basis incorporated an additional 88 streams into the analysis of the Pipeline’s “action area.” *Id.* at 88.

FERC's Duties Under Section 7(a)(2) Of The ESA Are Not Supportable By The BiOp, Which Fails To Consider Important Aspects Of The Pipeline's Impacts.

22. Despite acknowledging the Pipeline's far-reaching and long-term impacts, the BiOp reflected a lack of sufficient detail, specificity, and information about the Project's impacts, particularly to habitat for the fishes. *See, e.g.*, BiOp at 86-88. Indeed, FWS complained about this problem as early as 2008. Letter from FWS to Salas, FERC (Dec. 22, 2008) at 3. At that time, FWS specifically conveyed its "significant concern regarding where the Project will obtain water for hydrostatic testing in the dry, high desert environment" as well as a lack of both a "compensatory mitigation plan" and a "plan to conserve" listed species and their critical habitats. *Id.* at 2, 3.⁴

23. FWS continued to raise these concerns about the lack of specificity about Project impacts to fish throughout virtually the entire duration of the ESA consultation process. *See, e.g.*, BiOp at 2 (noting that in connection with reviews of FERC's draft biological assessment, "we included requests for additional information and specificity regarding waterbody crossings, waterbody crossing restoration, and monitoring of waterbody crossings post-restoration" but that FERC would not provide additional specificity or commitments); *id.* at 4 (noting that Ruby and FERC's failure to provide sufficient, specific information about their project forced FWS to gather it from a number of other sources); *id.* at 86 (stating that FWS "remains concerned that current waterbody crossing guidance from FERC (2003) and as incorporated into the BA, does not provide sufficiently detailed and specific information to ensure protection, restoration, and monitoring of geomorphological attributes of listed species streams that occur across the Projects' complex geographic and ecological settings").

24. Although FWS consistently emphasized the lack of information about the impacts waterbody crossings, it was eventually left with no choice but to analyze the Project's effects without the missing information anyway. *See* BiOp at 86 ("FERC continues to maintain that its waterbody crossing procedures, as well as additional site-specific measures for select waterbodies, does provide for adequate waterbody protection and restoration."); *id.* at 87-88 (redefining the Project's "action area" to incorporate 88 additional waterbodies that are connected to occupied listed fishes' habitat, such as upstream tributaries to occupied habitat; a stream reaches downstream of occupied habitat; or tributaries to a stream reach downstream of occupied habitat); 50 C.F.R. § 402.02 (defining "action area" to mean "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action"); *see also* BiOp at 88 ("Significant discussion regarding geomorphological and environmental impacts of waterbody crossings has occurred between the Service and the Project during formal consultation, and responsive information and new conservation measures are currently being developed by the Project to address the above Service concerns and recommendations").

⁴ FWS offered its willingness "to discuss potential conservation actions that would be clearly beneficial to listed species and their habitats, and assist with recovery of these species" – but stated that, in any event, "[t]he Project should provide an ESA conservation plan ... to assist with conservation of listed species and their habitats in the Project area." *Id.*

25. The analysis contained in the BiOp is based on a water extraction level of 64 million gallons. *See* BiOp at 23. However, using the figure set forth the FEIS, the April 5 Order states that the Pipeline will actually require the use of 402 million gallons of water. April 5 Order at 20 (¶ 54). This is a vast difference that has implications for the actual impacts of the Project on listed species and their habitat. If the BiOp only considered the surface water that the Project will require and omitted the amount of ground water that it will need, this would be an arbitrary distinction, because the interaction between surface and ground water resources is complex and the two are often hydrologically connected.

26. There is no analysis in the BiOp of the impacts of a Pipeline rupture. On page 94 of the BiOp, FWS applied FERC's characterization of the potential for a Pipeline rupture as follows:

[T]he pipeline would be designed, installed, tested, and maintained such that the chance of a pipeline rupture, and associated impacts if it were to occur at a listed fishes waterbody crossing, would not be reasonably likely to occur.

BiOp at 94. Thus, based on FERC's characterization of minimal risk of a pipeline rupture, and because FWS "has no information contrary to FERC's information associated with the likelihood of a pipeline rupture at a waterbody crossing, [FWS] [did] not address pipeline ruptures in this BO." *Id.* These sorts of blithe assertions echo the predictions made by the Minerals Management Service before the BP Disaster, and utterly fail to properly analyze the consequences if a rupture *did* happen – no matter how likely the chance. FERC and FWS are required to consider all of the potential effects of a pipeline rupture under the ESA.

27. Even if relative unlikelihood were an acceptable basis to avoid an effects analysis, such a rationale could not support the BiOp's failure to consider the risk of ruptures here, as a Pipeline rupture is in fact reasonably foreseeable. For example, El Paso, LLC has had two pipeline ruptures in the last decade. A 2000 explosion of an El Paso pipeline caused a fireball that killed 12 people near the Pecos River in New Mexico. *See* Report #559 (Nov. 10, 2008) (available at http://www.semp.us/publications/biot_reader.php?BiotID=559) (last visited July 26, 2010). Following an investigation, the U.S. Department of Transportation issued a "Corrective Action Order" which found that "the resumed and continued operation of El Paso' pipelines without corrective measures would be hazardous to life, property and the environment." *Id.* In November 2009, an explosion of another El Paso natural gas pipeline left 3 people hurt, and was due to a rupture where no evidence of a leak or defects was found. *Business World, Bushland Explosion Linked to Pipeline Fracture* (Dec. 17, 2009) (available at <http://www.elpaso.com/bushlandinfo>) (last visited July 26, 2010). Another pipeline rupture occurred in April 2008 in Virginia, exploding underground and releasing a fireball that scorched an area 1,125 feet in diameter, injured five people, and leveled and damaged homes. *See* Carrie J. Sidener, *Inspectors to Dig into Appomattox Pipeline* (Apr. 9, 2009). Thus, far from being "extremely remote" – as FERC characterized the risk in its January 2010 Biological Assessment for the Pipeline – just like the BP Disaster, ruptures in natural gas pipelines are in fact reasonably

foreseeable. FWS's failure to consider this risk in the BiOp was arbitrary and capricious. 5 U.S.C. § 706(2)(A).⁵

28. FERC's and Ruby's refusal to provide FWS with the information that it repeatedly requested or needed in order to adequately consider the Project's effects was contrary to the 50 C.F.R. § 402.14(d), pursuant to which FERC had "[r]esponsibility to provide best scientific and commercial data available" to FWS. Section 402.14(d) provides:

The Federal agency requesting formal consultation *shall* provide the Service with the *best scientific and commercial data* available or which can be obtained during the consultation for an *adequate review* of the effects that an action may have upon listed species or critical habitat.

Id. By stonewalling FWS's repeated requests for information and by failing to provide information about how the effects of a pipeline rupture would impact listed fishes, FERC failed to meet its duty under section 402.14(d).

29. The BiOp correctly recognized that "climate change impacts must also be considered in the waterbody crossing analysis", stating that when the Pipeline's lifespan of 50 years or more is considered in combination with climate change, "[d]epending upon location, it is reasonable to expect increased in peak flow, decreases in base flow, and potential changes in hydrologic regime (i.e. snow dominated to rain-on-snow dominated)." BiOp at 87. The BiOp noted that the implications of this would include "increased variability in both flow and sediment, and hence an increase in stream dynamism" resulting in the "stream occupying more and more space over time until the systems regains some level of dynamic equilibrium." *Id.* However, the BiOp never actually analyzed the Pipeline's impacts in combination with the threat of climate change. This was arbitrary and capricious. *See NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 369 (E.D. Cal. 2007) (internal citation omitted) ("At the very least, these studies suggest that climate change will be an 'important aspect of the problem' meriting analysis" in a biological opinion).

30. FERC's April 5 Order granting certificate authorization to the Pipeline was a violation of the ESA because it was issued before the BiOp was completed. Regardless of how FERC views the April 5 Order – "final" or "incipient" – like a timber sale contract, which often involves subsequent agency approvals before ground-disturbing activities can commence, FERC's certificate authorization altered the status quo constituted a *per se* violation of section 7(d). FERC steamrolled certificate authorization, just as it refused to provide FWS with the information necessary in order to facilitate the timely completion of ESA section 7 consultation. *See Pacific Rivers Council v. Thomas*, 936 F. Supp. at 745 (section 7(d) "to prevent Federal agencies from 'steamrolling' activity in order to secure completion of the projects regardless of

⁵ Incidentally, BP is one of several companies that have contracts to ship gas on the Ruby Pipeline. *See, e.g.*, Denver Business Journal, *Feds OK Ruby Pipeline To Carry Rockies Natural Gas To West Coast* (Apr. 5, 2010) (available at http://denver.bizjournals.com/denver/blog/earth_to_power/2010/04/feds_ok_ruby_pipeline_to_carry_rockies_natural_gas_to_west_coast.html) (last visited July 26, 2010).

their impact on endangered species”) (additional citations omitted); *Conner v. Burford*, 836 F.2d at 1536 & n.34 (section 7(d) “clarifies the requirements” of section 7(a) in order to “ensur[e] that the status quo will be maintained during the consultation process”).

31. To support the conclusions in the BiOp, FWS considered Ruby’s voluntary conservation measures to be “reasonably foreseeable” and therefore part of the Project’s “cumulative effects.” See BiOp at 5. This was a patent violation of the ESA. The voluntary conservation measures being taken by Ruby cannot be factored into the Pipeline’s cumulative effects by operation of law, because the “cumulative effects” is defined to include only “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.” Moreover, in the ESA context, voluntary measures are not generally considered “reasonably certain to occur.” Indeed, these measures were still in draft form when FERC issued the April 5 Order. Meanwhile, Ruby and FERC have repeatedly stressed that these voluntary conservation measures – habitat protection projects that Ruby has promised to fund – must not be considered as part of the ESA section 7 analysis for the Project’s effects. See, e.g., Ruby Letter of Commitment; Email from Young, FWS to Modde, FWS, *et al.* (Nov. 23, 2009) (stating that FERC WILL NOT include the ESA conservation plan in the FERC’s proposed action section of the BA” and “FWS’ eventual biological opinion will only briefly discuss these actions”). The BiOp is legally flawed because it does not “briefly discuss” these measures, and actually folds them into the proposed action’s cumulative effects in order to reach its conclusions, *i.e.*, that the Pipeline will not jeopardize the continued existence of the fishes, or destroy or adversely modify their critical habitat. BiOp at 5.

32. Meanwhile, totally absent from the BiOp’s cumulative effects analysis is any meaningful analysis of events that *are* reasonably certain to occur in the Pipeline’s action area – such as a pipeline rupture. See *supra* at 25, 26.

33. FWS’s BiOp failed to consider how the Pipeline will impact the recovery of the listed fishes, and considered only how the Pipeline would affect their survival, in violation of the ESA. In its 2008 letter, FWS noted a lack of “clear indication ... of how the Project would contribute to the *recovery* of listed species”, not just contribute to their *survival*. Letter from FWS to Salas, FERC (Dec. 22, 2008) at 6; see also *id.* (“Section 7(a)(1) of the ESA creates an affirmative obligation, directing Federal agencies to utilize their authorities to further the purposes of the ESA by carrying out conservation programs for listed species.”). Indeed, the absence of information about how the Project would contribute to the recovery of listed fishes and or the value of their critical habitat is evident in the BiOp. The Ninth Circuit Court of Appeals has held that projects must consider the project’s effects both to recovery and survival of the species. See *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004) (holding that the ESA requires FWS to address the twin goals of recovery and survival in the context of a section 7 consultation on a proposed action that may affect designated critical habitat); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (applying *Gifford Pinchot Task Force* to species effects analyses under section 7’s jeopardy analysis). As FWS noted in 2008, these decisions highlight the importance of demonstrating that the Project’s proposed action will not appreciably decrease the likelihood of

survival and recovery (jeopardy analysis), nor appreciably diminish the value of critical habitat for either survival or recovery of listed species.

The BiOp's Incidental Take Statement Fails To Accurately Quantify Take Or Explain How FWS Numerical Take Limit Relates To The Species' Survival And Recovery.

34. When the FWS concludes – as it did here – that an action will not jeopardize the existence of a listed species or adversely modify its habitat, but that the project is likely to result in incidental takings of listed species, FWS must provide a written statement with the BiOp that authorizes such takings. 16 U.S.C. § 1536(b)(4); *Ariz. Cattle Growers' Ass'n v. U. S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1233 (9th Cir. 2001). An incidental take statement must: (1) specify the impact of the incidental taking on the species; (2) specify the “reasonable and prudent measures” that the FWS considers necessary or appropriate to minimize such impact; (3) set forth “terms and conditions” with which the action agency must comply to implement the reasonable and prudent measures (including, but not limited to, reporting requirements); and (4) specify the procedures to be used to handle or dispose of any animals actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). An incidental take statement “must be associated with an underlying BiOp because the Incidental Take Statement's primary function is to authorize the taking of animals incidental to the execution of a particular proposed action” and “[t]he approval is effectively conveyed through the BiOp's ‘no jeopardy’ determination.” *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) (citing 50 C.F.R. § 402.14(g)-(h)).⁶

35. In the BiOp, FWS included an Incidental Take Statement (“ITS”) that purported to set forth a numerical limit for take of threatened or endangered species that will be “incidental” to the construction and maintenance of the Pipeline. BiOp at 108-110. However, the BiOp's ITS fails to accurately quantify take, discuss how the agencies came up with the numerical take limit that they did, or explain how numerical losses and linear feet of stream losses relate to whether jeopardy is avoided. The BiOp's ITS lacks any meaningful qualitative or quantitative explanation of how the habitat losses relate to the overall available habitat, and simply provides a flat numerical figure that could have been pulled out of thin air, with no analysis offered of how these species and habitat numbers relate specifically to the overall population and habitat. As such the ITS lacks a rational connection between the facts found and the conclusions made, and is therefore arbitrary and capricious, and contrary to the ESA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) (noting that the ITS “must be associated with an underlying BiOp because the Incidental Take Statement's primary function is to authorize the taking of animals incidental to the execution of a particular proposed action” and

⁶ “Take” is defined by the ESA's implementing regulations as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). “Harm” is defined as “an act which actually kills or injures wildlife” and “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687, 691 (1995).

“[t]he approval is effectively conveyed through the BiOp’s ‘no jeopardy’ determination.”) (citing 50 C.F.R. § 402.14(g)-(h) (additional citation omitted); *see also id.* (“Without the ‘no jeopardy’ determination contained in the underlying BiOp, the Incidental Take Statement potentially pre-authorizes take for an action that could subsequently be determined to jeopardize the existence of an endangered species. Such a result would be contrary to the ESA's fundamental purpose and scheme.”) (citing 16 U.S.C. §§ 1531(b)-(c), 1538(a)(1)(B)).

C. The Recently-Issued Record of Decision By BLM For Approval Of Rights-of-Way And Temporary Use Permits And FERC’s FEIS Fail To Adequately Disclose And Analyze The Project’s Adverse Environmental Impacts.

Relevant Statutory and Regulatory Scheme

36. NEPA is our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. NEPA’s fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental impacts of their actions by ensuring that they “will have available, and will carefully consider, detailed information concerning significant environmental impacts;” and (2) “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (citation omitted).

37. To accomplish these purposes, NEPA requires all federal agencies to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (“EIS”). *See* 40 C.F.R. Part 1502. An EIS must provide a “full and fair discussion of significant environmental impacts” of a proposed action, “supported by evidence that the agency has made the necessary environmental analyses.” *Id.* at § 1502.1. A limited discussion of impacts is permissible only where the EIS demonstrates that no further inquiry is warranted. *Id.* at § 1502.2(b).

38. Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), the adequacy of an EIS must be judged by whether it took a “hard look” at the potential significant environmental consequences of a proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. *See, e.g., Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

The BLM ROD and FERC FEIS Fail To Take A Hard Look At The Pipeline’s Impacts

39. Neither the BLM ROD nor the FERC FEIS include appropriate measures to mitigate the adverse effects of the Pipeline, because mitigation measures continue to be

developed on an ongoing basis. For instance, development of mitigation measures for cultural resource impacts were deferred to a later time. FEIS at 4-241 (mitigation of cultural resources “would need to be developed”). No mitigation measures for endangered and threatened species were identified in the DEIS or FEIS. *See, e.g.*, FEIS at 1-17 (stating that “Ruby continues to consult with the FWS regarding conservation and mitigation measures for endangered and threatened species that may be affected by the project”). The absence of a discussion of mitigation measures in BLM’s and FERC’s NEPA reviews is a violation of NEPA’s implementing regulations. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h).

40. FERC granted certificate authorization in the April 5 Order, before new information about the Pipeline’s impacts was available. FERC’s certificate authorization was based on the environmental review contained in its FEIS. Thus, FERC failed to apply NEPA at the earliest possible time, and unlawfully based its decision on an environmental review that did not contain an analysis of all of the Pipeline’s potential impacts, including impacts to threatened and endangered species, Sheldon Refuge, and cultural resources. *See Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (“we have observed ... that ‘proper timing is one of NEPA’s central themes’” and that a NEPA analysis “must be ‘prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made’”) (quoting *Save the Yaak*, 840 F.2d 714,718 (9th Cir 1988)); 40 C.F.R. § 1502.5.

41. Both the BLM ROD and FERC FEIS dismiss the risk of Pipeline rupture by claiming that such risk is too remote to consider. FEIS at 4-42. This is arbitrary and capricious, as the threat of a pipeline rupture is, in fact, not remote but is reasonably foreseeable. *See supra* at 25. Accordingly, FERC and BLM erred by refusing to consider the threat of a rupture in the Pipeline.

D. The Recently-Released Compatibility Determination For Sheldon National Wildlife Refuge Demonstrates Why Use Of The Refuge By Ruby Is Not Compatible With The Refuge’s Purposes.

42. “The mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2). The National Wildlife Refuge System Administration Act of 1966 requires FWS to review a proposed use within a National Wildlife Refuge, such as pipeline access roads, and determine whether it is compatible with the purposes for which the refuge was established prior to being allowed on a refuge. 16 U.S.C. 668dd-668ee. A compatible use is one which, in the, “...sound professional judgment [of the FWS Director or Refuge Manager], will not materially interfere with or detract from...” fulfilling the NWRS mission or the refuge’s purposes.” 603 FW 2.6 B.

43. Sheldon Refuge was established by Executive Orders, federal statutes, and Public Lands Orders as a refuge and breeding ground for wild animals and birds. Executive Order 5540 (Jan. 26, 1931); Executive Order 7522 (Dec. 21, 1936). For the use of roads on Sheldon Refuge, FWS prepared a final Compatibility Determination on July 9, 2010. Thus, the final

Compatibility Determination was not prepared prior to the Commission's April 5, 2010 Order granting Ruby certificate authorization. Completion of a final compatibility determination is required by the April 5 Order prior to final authorization of the Pipeline. April 5 Order at 51 (Environmental Condition 44). As such, the July 9, 2010 Compatibility Determination is part of the Commission's ongoing approval process for Ruby's certificate authorization, and the Center's Request for Rehearing of the Commission's approval on this basis is therefore timely.

44. As demonstrated by the Compatibility Determination itself, the use of Sheldon Refuge roads for the Pipeline is fundamentally *not* a compatible use of the Refuge, which was established to protect wildlife and birds. FWS's final Compatibility Determination found that the use of access roads will negatively affect the Sheldon Refuge's purposes by increasing traffic volume, size, and noise; displacing habitat; increasing disturbance to Refuge wildlife; and conflicting with use of the Refuge by visitors, FWS, and others. Although FWS relied on mitigation measures to determine that Ruby's use of Sheldon Refuge is, nevertheless, compatible, this is not permissible. As FWS regulations acknowledge:

Replacement of lost habitat and other compensatory mitigation may not be used to make compatible a refuge use which is otherwise not compatible. Instead, each proposed use of a refuge is evaluated on its face, and proposed ROWs and construction projects will be evaluated for compatibility without consideration of any proposed compensatory mitigation.

603 FW 2.11 C. Accordingly, FWS's July 9, 2010 Compatibility Determination is not in accordance with the National Wildlife Refuge Administration Act, FWS regulations and policies, and the Executive Orders establishing Sheldon Refuge.

E. FERC Has Yet To Take Into Account The Pipeline's Impacts To Cultural Resources And Meet Its Trust Obligation To Native American Tribes.

45. Under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470, *et seq.* ("NHPA"), federal agencies are required, when undertaking any federally assisted action within the United States, to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The NHPA establishes the Advisory Council on Historic Preservation ("ACHP"), *id.* § 470i, and delegates to the ACHP authority to promulgate regulations necessary to implement the section 106 "take into account" process. *Id.* § 470s. The section 106 regulations promulgated by the ACHP set forth a multi-step process by which an agency takes into account the effects of an undertaking, "*prior to the issuance of any license.*" 36 C.F.R. § 800.1(e) (emphasis added). "The Act imposes a dual obligation on federal agencies: the substantive duty to 'weigh effects' in deciding whether to undertake the federal action and the procedural duty to consult with [ACHP]." *See Save Our Heritage v. Fed. Aviation Admin.*, 269 F.3d 49, 58 (1st Cir. 2001). In order for a broad range of alternatives to be considered, including alternatives that will avoid impacts to cultural resources and historic properties altogether – or mitigate such impacts at the very least – an agency's findings and determinations must be sufficiently documented to enable reviewing parties to understand their basis. *Id.* § 800.11. Specifically, an agency's findings must describe: the undertaking, *id.* § 800.11(d)(1); its effects

on historic properties, *id.* § 800.11(e)(4); and if appropriate, any conditions or future actions to avoid, minimize, or mitigate the adverse effects. *Id.* § 800.11(e)(5). In addition, early completion of these findings is crucial to meet the agency’s substantive duty under the NHPA: “the agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning” 36 C.F.R. § 800.1(e).

46. FERC has failed to meet its dual obligation to “weigh effects in deciding whether to undertake the federal action” and to “consult with [ACHP]” “*prior to*” granting certificate authorization in the April 5 Order. As late as July 12, 2010, the ACHP was still asking FERC asking the agency to provide ACHP with additional information. *See* Letter from Advisory Council on Historic Preservation to O’Donnell (July 12, 2010) (stating there are “unresolved issues related to effect determinations and the resolution of adverse effects at this juncture of project planning.”).⁷ By letter dated July 19, 2010, FERC dismissed ACHP’s concerns, by simply reciting parts of the record that it believed already provided this information. *See* Letter from O’Donnell, FERC to Vaughn, ACHP (July 19, 2010). Meanwhile, the Project itself still lacks an analysis of impacts to cultural resources and historic properties, and defers such analyses to the point when ground-disturbing activities are imminent, if not occurring.

47. The implementing regulations for the NHPA are straightforward – federal agencies must meet their dual obligations under the statute *before* they approve licenses. To the extent that FERC maintains that the April 5 Order was a “final order,” it has violated this fundamental requirement. 36 C.F.R. 800.1(3).

48. If, on the other hand, FERC (and Ruby) consider the April 5 Order to be an “incipient approval without the force and effect of law,” *see* Letter from Ruby to Mackiewicz, BLM Ruby National Project Manager (Apr. 16, 2010) at 5-6, then FERC’s July 19, 2010 response to ACHP violates the NHPA, because it fails to provide ACHP with the information that it requires in order to complete the take into account process. 36 C.F.R. § 800.11. Simply reciting information from pre-existing sources is not sufficient – ACHP did not request such a recitation, and clearly asked FERC to provide more than that. *See, e.g.*, ACHP Letter at 1 (requesting “*additional* information regarding FERC’s coordination of the Section 106 consultation for the Ruby Pipeline”) (emphasis added). Furthermore, by refusing to provide ACHP with what it needed, FERC is itself failing to meet the purpose of Environmental Condition 44, which requires completion of any comment on cultural resources survey reports, addendum reports, and supplemental studies, and filing of “any other information that the SHPOs ... request” *before* construction begins. April 5 Order at 51 (Environmental Condition 44).

⁷ Thus, to allow it to proceed with its reviews of the Pipeline, ACHP asked FERC to provide eight categories of information. *See id.* at 3 (seeking clarification or explanation about, among other things, “how FERC will modify mitigation and treatment plans to address tribal concerns” or “address long-term cumulative effects of the Ruby Pipeline Project on eligible landscapes and historic properties” as well as “concerns express by ... non-tribal consulting parties regarding identification of historic properties and the resolution of adverse effects”).

49. Moreover, by violating the NHPA in these ways, FERC has failed to meet its “distinctive obligation of trust” to Native American Tribes. *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942)). This obligation arises from the federal government’s fiduciary duty as trustee, which imposes the strictest fiduciary obligations on federal agency’s control over Tribal properties. *Id.* (“[Where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.”) (internal citation omitted). The only way to meet the trust obligation is to faithfully comply with the law. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (“[the government’s general trust obligation] is discharged by [the government’s] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”). ACHP specifically conveyed to FERC its concern about the lack of FERC’s and BLM’s consultation with Native American tribes. Letter from ACHP to O’Donnell (July 12, 2010) (conveying concerns about the lack of or inconsistent Government-to-Government consultation by FERC and BLM with Native American Tribes, about the lack of meaningful tribal input on the historic property identification and evaluation process, about the limited consultation with tribes regarding properties of religious and cultural significance, and about the retrieval of and disposition of artifacts from archaeological sites that have significance for tribes).⁸ This concern was also expressed by the Klamath Tribes as well. *See, e.g.*, Letter from Chocktoot, Jr., Klamath Tribes to Boros, FERC (May 19, 2010) at 2. Thus, by violating by the NHPA as described above, FERC has also failed to meet its trust obligations to Native American Tribes with yet-undocumented cultural and sacred properties in the Pipeline’s pathway. *See* 25 U.S.C. § 3002 (noting the ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands).

F. No Environmental Review For The Project Addresses How It Complies With New Permitting Requirements For Take Of Bald Eagles And Golden Eagles Pursuant To Bald and Golden Eagle Protection Act.

50. The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d, prohibits the take of bald eagles and golden eagles unless pursuant to regulations, and in the case of bald eagles, take can only be authorized under a permit. On September 11, 2009, FWS finalized new regulations for the take and permitting of take of bald eagles and golden eagles. 74 Fed. Reg. 46836 (Sep. 11, 2009) (amending 50 C.F.R. Part 22).

51. The FERC FEIS acknowledges that bald and golden eagles are common in the Pipeline’s project area. *See* FEIS at Table 4.5.1-1. However, no environmental review document for the Pipeline – the FERC FEIS, BLM ROD, or other reviews – address how the

⁸ *See also id.* (noting that “a number of Indian tribes [have] indicated in writing and verbally that they continue to have concerns about their limited involvement in some of the testing, identification research, and in reaching conclusions about eligibility, effect, and the treatment of adverse effects” as well as “concerns about the status of completion of some of the studies”).

Pipeline will be in compliance with the newly-issued permitting requirements pursuant to the Bald and Golden Eagle Protection Act. FERC authorization of the Pipeline should be suspended pending compliance with these requirements as well.

RESPECTFULLY SUBMITTED this 27th day of July, 2010,

A handwritten signature in black ink, appearing to read 'AR Atwood', with a stylized flourish at the end.

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CERTIFICATE OF SERVICE

I hereby certify that I have served via email the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

DATED at Portland, Oregon, this 27th day of July, 2010,

A handwritten signature in black ink, appearing to read 'AR Atwood', with a stylized flourish at the end.

Amy R. Atwood