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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Center for Biological Diversity, et al.,  
Plaintiffs,  
v.  
Donald H. Rumsfeld, Secretary of Defense, et al.,  
Defendants,  
Coalition of Arizona/new Mexico Coalition of  
Countries for Stable Economic Growth,  
Defendant-Intervenor.

CIV99-203 TUC ACM

ORDER

A. Crossmotions for Summary Judgment  
Plaintiffs sue the United States Fish and Wildlife Service (the FWS) and the Department of the Army (Army) for violation of § 7 of the Endangered Species Act (the ESA), 16 U.S.C. § 1536(a)(2). Plaintiffs argue that the FWS's Final Biological Opinion (Final BO)— concluding that the Army's continued activities at Fort Huachuca, Arizona, will not cause jeopardy to the Huachuca water umbel (a plant) or the Southwestern willow flycatcher (a bird), or adversely modify critical habitat— is arbitrary, capricious, and contrary to law.  
Plaintiffs seek declaratory judgment that the Final BO is arbitrary and capricious and in violation of the ESA. Plaintiffs seek declaratory judgment that the Army's operations are likely to result in jeopardy to and adverse modification of critical habitat for the willow flycatcher and water umbel, and therefore, the Army is in violation of its independent duty under § 7 of the

(69)

1 ESA, 16 U.S.C. § 1536(a)(2), to not cause jeopardy or adverse modification to endangered  
2 species.

3 Defendants seek summary judgment, which they are entitled to as long as the FWS's  
4 decision was based on consideration of the relevant factors, and the FWS articulated a rational  
5 connection between the facts found and its decision. Marsh v. Oregon Natural Resources  
6 Council, 490 U.S. 360, 377 (1989); Baltimore Gas & Electric Co. v. Natural Resources Defense  
7 Council, Inc., 462 U.S. 87, 105 (1983); LaFlamme v. FERC, 852 F.2d 389, 399 (9<sup>th</sup> Cir. 1988);  
8 Pyramid Lake Paiute Tribe v. United States Dept. of Navy, 898 F.2d 1410, 1413 (9<sup>th</sup> Cir. 1990).  
9 Furthermore, Defendants assert that the Army did not violate its substantive obligation under  
10 § 7(a)(2) to ensure that its actions at Fort Huachuca are not likely to jeopardize the continued  
11 existence of the water umbel and flycatcher or to adversely modify flycatcher critical habitat.  
12 The Army may rely on the FWS's Final BO to satisfy this substantive obligation as long as its  
13 reliance on the Final BO is not arbitrary, capricious, an abuse of discretion, or otherwise not in  
14 accordance with law." Stop H-3 Association v. Dole, 740 F.2d 1442, 1459 (9<sup>th</sup> Cir. 1984), cert.  
15 denied, 471 U.S. 1108 (1985); Aluminum Company of America v. Bonneville Power Assoc.,  
16 175 F.3d 1156, 1160 (9<sup>th</sup> Cir. 1999), cert. denied, Columbia Falls Aluminum Comp. v.  
17 Bonneville Power Administration, 528 U.S. 1138 (2000); Pyramid Lake Paiute Tribe, 898 F.  
18 2d at 1415.

19  
20 **B. Plaintiffs' Motion for Summary Judgment**

21 Plaintiffs write, "The Upper San Pedro River and its surrounding habitat constitute a  
22 biological treasure chest, housing an astonishing number of mammals and reptiles, upland  
23 grasses, and native trees and shrubs. The river is the last undammed, free-flowing river in the  
24 southwest and, for the most part, flows year-round. Because it has not yet been dewatered, the  
25 San Pedro supports one of the few remaining riparian forests in the region, as well as a growing  
26 number of threatened and endangered species, including the Southwest willow flycatcher, a neo-  
27 tropical songbird, and the Huachuca water umbel, a semi-aquatic plant."  
28

1 This Court has considered the impact of growth related to Fort Huachuca on the San  
2 Pedro River once before, under the National Environmental Policy Act (NEPA). In 1995, this  
3 Court noted that "[i]t is hard to imagine anything more obvious than the impact of Sierra Vista's  
4 continued growth on the nearby San Pedro River and the federally protected and managed  
5 Riparian Area and species there." Southwest Center for Biological Diversity v. Perry, CIV 94-  
6 598 TUC ACM (Order filed August 30, 1995 at 21.) The Court concluded that "[c]reeping  
7 development and unrestrained draining of the aquifer represents a real threat to the Riparian  
8 Area" and that "[t]he Army must not turn a blind eye to this problem or to the fact that its  
9 actions may tend to exacerbate it." (*Id.* at 21-22.)

10 Recognizing the significant threat posed by development and uncontrolled groundwater  
11 pumping and Fort Huachuca's responsibility for that threat, the Army entered into consultation  
12 with the FWS as required by § 7 of the ESA, 16 U.S.C. § 1536(a)(2). The FWS issued the Final  
13 BO on September 27, 1999, concluding that the Army's operations do not cause jeopardy to  
14 either the willow flycatcher or water umbel or cause adverse modification of their critical  
15 habitat on the San Pedro. (Administrative Record (Admin. Rec.), Exhibit (Ex.) 2: Final BO.)  
16 Under § 7, the Army must consult with the FWS on any prospective agency action where  
17 implementation "will likely affect" an endangered species. 16 U.S.C. § 1536(a)(3); 50 C.F.R.  
18 § 402.14(a). Following consultation, the FWS must issue a BO, setting forth detailed  
19 conclusions about how the action affects endangered species and critical habitat. If the FWS  
20 finds that the action will jeopardize a species or adversely modify critical habitat in violation  
21 of § 7, the FWS must suggest "reasonable and prudent alternatives (RPA) that, themselves, will  
22 not cause jeopardy to the species or adverse modification of critical habitat. 16 U.S.C. §  
23 1536(b)(4)(A).

24 The FWS's decision to issue a "no jeopardy" Final BO was based on an agreement, the  
25 Memorandum of Agreement (MOA), entered into by the Army and the FWS after the Draft BO  
26 included a number of RPAs to address a finding of "jeopardy." The Army negotiated the MOA  
27 with the FWS as a way to amend the agency action to avoid a jeopardy finding and to avoid  
28 imposition of mandatory RPAs. The MOA replaced the RPAs in the Draft BO as the means for

1 mitigating the impacts to the water umbel and the willow flycatcher, and provided the basis for  
2 the FWS's finding of "no jeopardy."

3 Here, the FWS's "no jeopardy" Final BO hinged on two things: 1) the MOA between the  
4 FWS and the Army, which outlined mitigation measures to protect the water umbel and willow  
5 flycatcher and 2) an Effluent Recharge Project in Sierra Vista designed to delay the impacts of  
6 deficit groundwater pumping.

7 Plaintiffs challenge the ability of these measures to protect the water umbel and willow  
8 flycatcher. Plaintiffs assert that the Final BO is flawed because it does not require any specific,  
9 enforceable measures to control creeping development or unrestrained groundwater pumping  
10 resulting directly or indirectly from Fort Huachuca's actions. As a result, it does not protect the  
11 San Pedro or its riparian-dependent species. Although the Army promises that in three years  
12 it will come up with a plan to address the groundwater deficit, in the meantime Army  
13 operations, which clearly have growth-inducing effects, are permitted to continue virtually  
14 unchanged. Specifically, Plaintiffs challenge the Final BO as follows:

15 First, its mitigation measures to avoid jeopardy are vague, entirely voluntary, and, even  
16 if implemented, do not come close to balancing the groundwater deficit and protecting the San  
17 Pedro River;

18 Second, it covers a 10-year period, which makes it arbitrarily and unlawfully restricted  
19 in scope;

20 Third, the effectiveness of one of the most important mitigation measures, the Sierra  
21 Vista Water Recharge Facility, is subject to substantial uncertainty; and

22 Fourth, there is no rational connection between the FWS's analysis of growth and its  
23 conclusion that the Fort's operations will not jeopardize or cause adverse modification to  
24 endangered species.

25 Fifth, the Army's reliance on the FWS's "no jeopardy" analysis was arbitrary and  
26 capricious and violated its duty under § 7 of the ESA to avoid jeopardy to the willow flycatcher  
27 and water umbel, and adverse modification of the critical habitat of the willow flycatcher.  
28 Section 7 of the ESA contains both procedural and substantive requirements which are intended

1 to "insure that any action authorized, funded, or carried out by [an] agency (hereinafter . . .  
2 referred to as an 'agency action') is not likely to jeopardize the continued existence" of a listed  
3 species or result in "destruction or adverse modification of [designated critical habitat]." 16  
4 U.S.C. § 1536(a)(2). An agency action "jeopardizes the continued existence" of a threatened  
5 or endangered species when it "reasonably would be expected, directly or indirectly, to reduce  
6 appreciably the likelihood of both the survival and recovery of a listed species in the wild by  
7 reducing the reproduction, numbers or distribution of that species." 50 C.F.R. § 402.02.  
8 Destruction or adverse modification of critical habitat is defined as a "direct or indirect  
9 alteration that appreciably diminishes the value of critical habitat for both the survival and  
10 recovery of a listed species." Id.

11 The ESA makes no specific provision for judicial review of final agency actions,  
12 therefore, the scope of review of actions taken under the ESA are governed by the  
13 Administrative Procedures Act (APA). The BO represents a "final agency action" that is  
14 subject to review under the Administrative Procedures Act (APA), 5 U.S.C. § 702; Bennett v.  
15 Spear, 520 U.S. 154, 177-78 (1997). Under the APA, the Court is charged with conducting a  
16 thorough, probing, in-depth review" of the entire record to determine "whether the decision was  
17 based on a consideration of the relevant factors and whether there has been a clear error of  
18 judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

19 An agency decision is arbitrary and capricious if "the agency has . . . entirely failed to  
20 consider an important aspect of the problem." Lake Mohave Boat Owners Ass'n v. National  
21 Park Service, 138 F.3d 759, 763 (9<sup>th</sup> Cir. 1998) (quoting Dioxin/Organochlorine Center v.  
22 Clarke, 57 F.3d 1517, 1525 (9<sup>th</sup> Cir.1995)). Alternatively, an agency decision may be  
23 overturned if there is no rational connection between the facts found and the choice made.  
24 Pyramid Lake Paiute Tribe, 898 F. 2d at 1414.

25 The Court may not make up for deficiencies in the Final BO; nor may it supply a  
26 "reasoned basis for the agency's action that the agency itself has not given." Motor Vehicle  
27 Mfrs. Ass'n. v. State Farm Mutual Ins., 463 U.S. 29, 43 (1983). "An administrative decision  
28 involving the ESA will be set aside if the agency action was arbitrary, capricious, an abuse of





1 date of the Final BO." (Defendants' Crossmotion at 6.) The standard for challenging the  
2 FWS's Final BO is narrow; "the court is not empowered to substitute its judgment for that of  
3 the agency." Citizens to Preserve Overton Park, 401 U.S. at 416. It does not matter whether  
4 or not this Court would have decided the issue differently; instead, the Court only determines  
5 whether the decision was based on consideration of the relevant factors and whether there is a  
6 clear error of judgment." Id.; see also Marsh, 490 U.S. at 377; Baltimore Gas & Electric Co.,  
7 462 U.S. at 105; La Flamme, 852 F.2d at 399. The relevant inquiry is whether or not there is  
8 a rational relationship between the relevant factors and the agency's decision. Pyramid Lake  
9 Paiute Tribe, 898 F.2d at 1413.

10 The Defendants explain that the consultation process is designed to provide back and  
11 forth negotiations between the action agency and the FWS so that the action agency may refine  
12 its project to ensure that jeopardy does not occur. See e.g., Lone Rock Timber v. Department  
13 of Interior, 842 F. Supp. 433, 440 (Or. 1994) (the purpose of consultation is to allow the agency  
14 to utilize the expertise of the FWS in assessing the impact of the proposed project and the  
15 feasibility of adopting reasonable alternatives). Correspondingly, the FWS may alter its analysis  
16 and proposed mitigation measures as the consultation process proceeds. Defendants argue that  
17 the Final BO is fully supported by the record and takes into consideration all the relevant  
18 factors, and that, therefore, it is irrelevant that the Draft BO found there would be an adverse  
19 affect on the water umbel and flycatcher, and on the flycatcher habitat.

20 The Draft BO is, however, relevant to analyze the Defendants' argument that it was  
21 necessary to revise the Draft BO, specifically the RPAs, to enable the Army to work  
22 collaboratively with other water users in the region to resolve water deficits in the San Pedro  
23 River Basin.

24 The first paragraph of the RPAs, asserts that they are "alternative actions, identified  
25 during formal consultation, that (1) can be implemented in a manner consistent with the  
26 intended purpose of the action, (2) can be implemented consistent with the scope of the action  
27 agency's legal authority and jurisdiction, (3) are economically and technologically feasible, and  
28 (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of

1 listed species or resulting in the destruction or adverse modification of critical habitat.”  
2 (Admin. Rec. Ex. 32; Draft BO at 116.) If Defendants are correct, this assertion is false.

3 The Draft BO segregated the RPAs into four primary tasks, which required the Army to  
4 prepare and implement, within three years, a water and habitat management plan to address the  
5 deficit in the water budget and threats to the San Pedro River. The plan objectives were  
6 twofold: 1) to balance water use with recharge at Fort Huachuca, and 2) to provide technical and  
7 financial assistance to other water users in a regional effort to conserve water or enhance  
8 recharge on and off post, so that when taken together, the measures identified in the plan would  
9 negate on-post and off-post interrelated/ interdependent and cumulative effects. (Admin. Rec.  
10 Ex. 32; Draft BO at 116.)

11 The RPAs required implementation of the plan to be timely to prevent further significant  
12 depletion of flows in the San Pedro River and adverse effects to the water umbel, willow  
13 flycatcher, and critical habitat. The details of the plan were to depend upon an evaluation of the  
14 technical and economic feasibility of management options and the willingness of partners, such  
15 as the City of Sierra Vista and Cochise County, to work with the Fort and the FWS to develop  
16 a solution for protecting the San Pedro River. (Admin. Rec. Ex. 32; Draft BO at 116.)

17 The four tasks were as follows:

18 Task # 1 addressed the first objective of balancing on-base water use with  
19 recharge, and required the plan to include a schedule for implementation, as soon  
20 as possible, of measures that would result in groundwater withdrawals less than  
21 or equal to recharge on Fort Huachuca.

22 The mechanisms to achieve the plan objectives were at the discretion of the  
23 Army, but it was required to consider the following measures: a) improvements  
24 to the irrigations conservation plan to save an additional 200 acre-feet of water  
25 per year; b) watershed improvement plan for the East Range; c) to study and  
26 implement recommendations to increase groundwater recharge by 1,000 acre-feet  
27 per year; d) reuse or recharge all effluent generated on Fort to result in a savings  
28 of at least 460 acre-feet per year; e) eliminate irrigation at the Fort's golf course;  
f) halting all commercial and industrial uses of Garden Canyon spring water, and  
g) other water conservation or enhanced recharge measures.

Task # 1 addressed the second objective of balancing regional water use and  
involved financial and/or technical assistance to local governments for projects  
to offset effects of interrelated/interdependent activities on and off post, such as:  
a) a surface flow recharge project in Sierra Vista; b) retiring available agricultural  
lands; c) measures to improve watershed conditions; d) diverting flows of the San  
Pedro River into the St. David ditch to obtain a net gain in base-flow; e) water  
conservation programs; f) developing a buffer near the river to prevent new water  
extractions; g) treating effluent from Sierra Vista wastewater treatment plant to

1 reduce pumping of groundwater; h) pumping water from outside the flood-plain  
2 and dumping it into the river to sustain flows during the dry season; i) funding  
3 operation and maintenance of Sierra Vista's effluent recharge project after 2020,  
4 and j) other measures proposed by USPP. In the event the Army lacked authority  
5 to implement one or more of these alternatives, it was required to transfer funds  
6 to the FWS or a third party, which could perform the task.

7 Task # 2 required the Army to take specific measures to address threats to the  
8 water umbel on Fort Huachuca,

9 Task # 3 required the Army to assist others in the region, such as the BLM, the  
10 Coronado National Forest and private land owners, in managing water umbel  
11 habitat potentially affected by the Army's proposed actions. Assistance was to  
12 be in the form of funding and/or technical assistance in the amount of \$500,000  
13 over the next ten years.

14 Task # 4 required the Army to monitor the endangered species and monitor and  
15 report progress/results of implementation of the RPAs.

16 (Admin. Rec. Ex. 32: Draft BO at 116-121.)

17 In Task # 1, the FWS recognized that a long-term sustainable solution required all water  
18 users in the region to participate in a "well coordinated, comprehensive basin-wide plan... Fort  
19 Huachuca cannot solve the problem alone, but must be the leader in the coordination of a  
20 comprehensive solution." (Admin. Rec. Ex. 32: Draft BO at 119.) Task # 3 called for  
21 collaboration between the Army and others, and Task # 1 noted, "Implementation of some  
22 measures is contingent upon willing participation of management partners, such as local  
23 governments." (Admin. Rec. Ex. 32: Draft BO at 118.) Task #1 required the Fort to work with  
24 other water users, including providing financial and technical support to efforts offsetting  
25 interrelated, interdependent, and cumulative effects on the water umbel and willow flycatcher.  
26 (Admin. Rec. Ex. 32: Draft BO at 118.) Under the plain language of the Draft BO, the Army  
27 was not required to single-handedly remedy the groundwater deficit for the entire  
28 subwatershed.<sup>2</sup>

29 The Final BO mirrors the RPAs contained in the Draft BO. App. 1, the MOA to the  
30 Final BO, like Task # 1 of the RPAs, requires that within three years, the Army must prepare  
31 a plan for the Army, the AWRMP, to identify potential water conservation, effluent reuse and  
32 recharge projects. (Admin. Rec. Ex. 32: Draft BO at 117-119; Ex. 2: Final BO, App. 1, MOA

<sup>2</sup>See n. 3.

1 at 4.) App. 1, the MOA to the Final BO, like Task # 1 of the RPAs, requires the Army to  
2 participate in the USPP to develop a regional water resource management plan, the AWRMP,  
3 (Admin. Rec. Ex. 2: Final BO, App.1, MOA at 4.) App. 1, the MOA to the Final BO, like Task  
4 # 1 of the RPAs, requires the Army to submit the AWRMP to the USPP for adoption into the  
5 regional plan. (Admin. Rec. Ex. 2: Final BO, App. 1, MOA at 2.)

6 Projects similar to those listed in Task # 1 of the RPAs are included in App. A, the  
7 AWRMP, as conservation, recharge and effluent reuse projects. (Admin. Rec. Ex. 2: Final BO,  
8 App. A, AWRMP.) Task # 4 of the RPAs and the MOA require the Army to participate in and  
9 support surveys, censuses, and population monitoring of endangered and threatened species, and  
10 critical habitats, and conduct research. (Admin. Rec. Ex. 2: Final BO, App. 1, MOA at 4; App.  
11 A, AWRMP at I(c), VII.) Task # 1 and the MOA authorize the transfer of funds to support the  
12 Army's collaborative efforts off-base. The Draft BO, tasks # 2 and # 3 were included in their  
13 entireties in the Final BO, App. B, the ARCFC, except that Appendix B omits a \$500,000  
14 appropriation found in Task #3. (Admin. Rec. Ex. 2: Final BO, App. B, ARCFC at 1-2.)

15 The similarity between the provisions in the Draft BO and the Final BO, belie the  
16 Defendants' assertion that the Draft BO had to be modified because of a lack of authority to  
17 participate, implement, or fund the RPAs. Defendants offer no evidence regarding their  
18 assertions nor explain why the Army has funding authority under the MOA, but not the RPAs,  
19 nor do they explain why the Army may participate in a regional collaborative effort under the  
20 MOA, but may not take the leadership role assigned it pursuant to the RPAs. It seems more  
21 likely that the modifications in the Draft BO were, as Plaintiffs assert, to sidestep specific  
22 substantive requirements contained in the RPAs that are missing from the Final BO.

23 For example, Task # 1 in the RPAs required the Army to prepare a plan (or AWRMP)  
24 to balance on-base water use with recharge and required the plan to include a schedule for  
25 implementation, as soon as possible, of measures that would result in groundwater withdrawals  
26 less than or equal to recharge on Fort Huachuca. Task # 1 included a list of measures the Army  
27 had to consider in its quest to balance water use, as follows: "improvement to the irrigation  
28 conservation plan to save an additional 200 acre-feet of water per year;" "complete studies and

1 implement recommendations to increase groundwater recharge by 1,000 acre-feet per year,"  
2 "reuse or recharge all effluent generated on the Fort, resulting in a savings of at least 460 acre-  
3 feet per year;" "eliminate irrigation at Fort Huachuca's golf course;" "halt all commercial and  
4 industrial uses of Garden Canyon spring water;" "provide financial and/or technical assistance  
5 to Sierra Vista to implement as soon as possible a surface flow recharge project that would  
6 capture and provide for use or recharge up to 6,100 acre-feet of water per year;" "fund operation  
7 and maintenance of Sierra Vista's effluent recharge project," and "provide financial and or  
8 technical assistance to other water users in developing and implementing various other remedies  
9 to the regional problem." (Admin. Rec. Ex. 32: Draft BO at 118.)

10 Plaintiffs assert that "[i]n contrast to the specific nature of the FWS's proposed RPA's,  
11 the final mitigation measures in the MOA related to groundwater protection are vague, largely  
12 voluntary, and dependent on available funding."<sup>3</sup> (Admin Rec. Ex. 2: Final BO, App. 1, MOA.)  
13 Defendants respond that the draft proposal is not relevant to the Court's evaluation of the Final  
14

15 <sup>3</sup>There are more similarities than differences between the two biological opinions. Both the  
16 Draft and Final BO included detailed breakdowns of the interrelated and interdependent effects  
17 on the water umbel and willow flycatcher attributable to Fort Huachuca. See e.g., (Admin. Rec.  
18 Ex. 32: Draft BO at 108-110) (approximately 82 % of groundwater pumping is attributable to  
19 direct, indirect, and interrelated/interdependent effects of Fort Huachuca); (Admin. Rec. Ex. 32:  
20 Final BO at 114-117) (approximately 54-62 % of groundwater pumping is attributable to direct,  
21 indirect, and interrelated/interdependent effects of Fort Huachuca).

22 Both the Draft and Final BO included the same assessment regarding the cumulative  
23 effects of groundwater pumping. They estimated that the population and employment at Fort  
24 Huachuca was expected to remain fairly constant, but the population in the Sierra Vista  
25 subwatershed is expected to increase from the 1990 estimate of 51,400 to 73,900 in 2030.  
26 (Admin. Rec. Ex. 2: Final BO at 111, 118.) "Because the Fort is not expected to grow, this  
27 increase cannot be attributed to the Fort; although it is not possible to predict how growth in the  
28 subwatershed might be affected if the Fort was not present." Both, concluded that growth in  
the area has achieved momentum that is separate from any influence Fort Huachuca might have.  
(Admin. Rec. Ex. 32: Draft BO at 111, 118-119.)

In both opinions, the FWS recognized there was a regional problem which was best  
resolved through collaboration and did not require the Army to remedy the groundwater deficit  
for the entire subwatershed.

1 BO. In the Ninth Circuit, a Final BO that is less protective than the Draft BO does not violate  
2 the ESA. Southwest Center for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515,  
3 523 (9<sup>th</sup> Cir. 1998). The Secretary is not required to pick the first reasonable alternative  
4 formulated in the RPAs, nor is the Secretary even required to pick the best alternative. Id. "The  
5 agency decision need not be ideal . . . so long as the agency gave at least minimal consideration  
6 to the relevant facts contained in the record." Id. (citing Center for Marine Conservation v.  
7 Brown, 917 F. Supp. 1128, 1143 (S.D. Tex. 1996)). The relevant inquiry is whether the "no  
8 jeopardy" finding in the Final BO is supported by the record.

9 The Final BO requires the Army to develop and implement a plan, the AWRMP, to  
10 protect and maintain populations of listed species and habitats and requires the Army to  
11 participate with others in the development of a Regional Water Resources Plan, the RWRMP,  
12 to maintain baseflows in the upper San Pedro River sufficient to sustain protected species and  
13 habitats. (Admin. Rec. Ex. 2: Final BO at 122, 123; App. A, AWRMP at 1.) Under the Final  
14 BO, it is the regional plan, not the Fort's three year plan, that results in balancing water deficits. }

15 The Final BO gives the Army three years to prepare the AWRMP, identifying potential  
16 water conservation and effluent reuse and recharge projects for implementation. (Admin. Rec.  
17 Ex. 2: Final BO, App. 1, MOA at 5(c)(1), pg 4.) While the Army must implement some or all  
18 of the proposed projects found in App. A, the AWRMP, (Admin. Rec. Ex. 2: Final BO, App.  
19 1, MOA at 5(c)(11), pgs. 4-5), the projects listed in App. A lack specifications to quantify the  
20 remedial value of each project. The Army must actively participate in the USPP, and its  
21 development of a regional plan, RWRMP, for the subwatershed, including providing funding,  
22 technical assistance, and other support as needed for the USPP to complete and begin  
23 implementation of the RWRMP within three years. (Admin. Rec. Ex. 2: Final BO, App. A,  
24 AWRMP at IV; Final BO, App. 1, MOA at 5(c)(8), pg. 4); see also, (Admin Rec. Ex. 2: Final  
25 BO, App. A, AWRMP at VII) (the Army must continue supporting hydrological research in the  
26 subwatershed); (Admin Rec. Ex. 2: Final BO, App. A, AWRMP at I(C)) (and develop a  
27 monitoring program). The Army must conduct, assist, and/or support surveys, censuses, and  
28

1 population monitoring of endangered and threatened species, and critical habitat. (Admin. Rec.  
2 Ex. 2; Final BO, App. 1, MOA at 5(c)(4)-(6), pg. 4.)

3 The FWS must annually review the AWRMP. (Admin. Rec. Ex. 2; Final BO, App. 1,  
4 MOA at 5(b)(2), pg. 3.) The Army must prepare a written annual report for the FWS,  
5 documenting the progress and results of proposed projects. (Admin. Rec. Ex. 2; Final BO, App.  
6 A, AWRMP at IX.) Every year, within two months of Fort Huachuca receiving its annual  
7 environmental operating budget, the MOA requires the Army and the FWS must jointly develop  
8 an annual work plan to identify actions for implementation. (Admin. Rec. Ex. 2; Final BO,  
9 App. 1, MOA at ¶ 5(a)(9), pg. 3.)

10 The Final BO incorporated these requirements as mitigating factors to its proposed  
11 action, and the FWS issued its decision of "no jeopardy" for the following reasons: the Fort had  
12 committed to developing an Army Water Resources Management Plan (AWRMP) and to  
13 participating in the development of a Regional Water Resources Management Plan (RWRMP)  
14 with other water users in the subwatershed, ( Admin. Rec. at Ex. 2; Final BO at 122-123), and  
15 because of an effluent recharge project being developed in Sierra Vista, which was expected to  
16 delay the effects of groundwater pumping for perhaps as long as 20 years, (Admin. Rec. at Ex.  
17 2; Final BO at 122-123).

18 The FWS explained that although the Sierra Vista effluent recharge project will not  
19 alleviate the long-term threat to water umbel habitat on the San Pedro River, it is expected to  
20 provide time to develop and implement plans to address those long-term threats before further  
21 impacts to the water umbel or its critical habitat occur." (Admin. Rec. Ex. 2; Final BO at 123.)

22 The Final BO concluded, as follows:

23 The Service's findings that the proposed action is not likely to jeopardize the  
24 continued existence of the water umbel or result in adverse modification or  
25 destruction of critical habitat are based entirely on the successful and prompt  
26 implementation of the Sierra Vista effluent recharge project to avoid near-term  
27 impacts, the Fort's commitment to develop and implement water resources  
28 planning to protect in the long-term the water umbel and its habitat on the San  
Pedro River, and the Fort's proposed mitigation measures to protect the species  
and its habitat on-post. If these plans and mitigation measures are not  
implemented on schedule or do not reduce or eliminate adverse effects as  
predicted herein, then reinstitution of consultation is warranted and the Service  
would need to reevaluate its conclusion.

1 (Admin. Rec. Ex. 2: Final BO at 123) (citing 50 C.F.R. § 402.16 (b and c).)

2 The development and implementation of the AWRMP and the RWRMP, and the Sierra  
3 Vista effluent recharge project, were critical to the "no jeopardy" finding, as follows:

4 Taken together, they provide a framework for Fort Huachuca to work with other  
5 agencies, the City of Sierra Vista, and others to protect water umbel populations  
6 and critical habitat. The Service believes the Fort will be successful in  
7 developing with others in the basin water management plans within three years  
8 that, when implemented, would protect water umbel populations and critical  
9 habitat. If the effluent recharge project works as anticipated herein, effects to the  
10 river from groundwater pumping should be delayed long enough to devise and  
11 implement these plans before the water umbel or its critical habitat are  
12 significantly affected.

13 (Admin. Rec. Ex. 2: Final BO at 123); see also (Admin. Rec. Ex. 2: Final BO at 122) (the Final  
14 BO established that even with the successful implementation of all the proposed mitigation  
15 measures, even under optimistic conditions, water use in the aquifer will exceed supply and  
16 result in continuing growth in the already very large cone of depression under Fort Huachuca  
17 and Sierra Vista); (Admin. Rec. Ex. 2: Final BO at 122) (while the recharge project, if it is  
18 constructed and operated as expected, may insulate the river from the effects of groundwater  
19 pumping for perhaps as long as 20 years, ultimately, as long as the water budget is in deficit  
20 water umbel populations and critical habitat are threatened).

21 To avoid a substantive violation of the prohibition against jeopardy, the agency must  
22 develop mitigation measures - either as part of the proposed project or as RPAs in the biological  
23 opinion. 16 U.S.C. § 1536(a)(2). Mitigation measures must be reasonably specific, certain to  
24 occur, and capable of implementation; they must be subject to deadlines or otherwise-  
25 enforceable obligations; and most important, they must address the threats to the species in a  
26 way that satisfies the jeopardy and adverse modification standards. Sierra Club v. Marsh, 816  
27 F.2d 1376 (9<sup>th</sup> Cir. 1987). The question before this Court is whether or not the Final BO meets  
28 these criteria.

29 D. Analysis: The Final BO is Arbitrary, Capricious, and not in Accordance with Law

30 The Final BO does not require the Army to balance its water use on base or in the  
31 subwatershed. (Admin. Rec. Ex 2: Final BO, App. 1., MOA, ) It requires the Army to develop  
32 and implement a plan, the AWRMP, to protect and maintain populations of listed species and  
33 habitats; it is the Regional Water Resources Plan, the RWRMP, that is designed to maintain the  
34 baseflows in the upper San Pedro River sufficient to sustain the protected species and habitats.  
35 (Admin. Rec. Ex. 2: Final BO at 122, 123; App. A: AWRMP at 1.) The Army is only required

1 to participate in the USPP, an organizational partnership, aimed at identifying a regional  
2 solution to the water deficit problems of the San Pedro River Basin. Under the Final BO, the  
3 Army must support the USPP in the development and adoption of a regional water management  
4 plan, the RWRMP, within three years. The Army has no authority, however, over the  
5 implementation of this mitigation measure. The Court notes that this was Defendants objection  
6 to the RPAs included in the Draft BO.

7 There are no requirements in the Final BO to reduce reliance on groundwater pumping  
8 by any particular amount or to achieve any measurable goals with respect to water recharge.  
9 (Admin. Rec. Ex. 2: Final BO, App. A: MOA) There is no date certain implementation  
10 requirement. The MOA includes a laundry list of possible mitigation measures related to water  
11 conservation and recharge that the Army may implement, *id.*, but it does not establish which  
12 projects have to be undertaken, when, nor what the conservation objectives are for the  
13 respective projects. Without such specificity, the mitigation measures in the Final BO are  
14 merely suggestions. In combination with the provision to balance groundwater pumping  
15 through the RWRMP, the Final BO enables the Army to sidestep any direct responsibility for  
16 addressing deficit groundwater pumping.

17 The following comments made during the consultation process by the FWS staff are  
18 reflective of why there is no factual basis to support the FWS's decision of "no jeopardy:"

19 "It doesn't even come close" to mitigating the jeopardy/adverse modification  
20 decision because the "only somewhat substantive commitment by the Fort is to  
21 reduce net water use by 600 acre feet; however, they don't say for sure how this  
22 will be done and implementation is 'subject to available funding.'" (Admin. Rec.  
23 Ex. 37: Rorabaugh to Harlow and Gatz email, 4/16/99).

24 "The measures listed in Appendix A (which would make up the AWRMP if we  
25 go with what is currently on the table, as you suggest) would save about 600 acre-  
26 feet per year. The Fort's net use is properly about 1,900 acre feet per year. So,  
27 unless additional measures are developed the Fort would not be mitigating 'their  
28 own impact on the subwatershed's water resources' and of course this does not  
begin to address off-post pumping attributable to Fort Huachuca." (Admin. Rec.  
Ex. 6: email fr. Rorabaugh to Hessel, 11/15/99.)

29 The Defendants admit that even if all of the mitigation measures included in the Final  
30 BO, are taken together and under the best case scenario, water use in the aquifer will exceed  
31 supply and result in continuing growth in the already very large cone of depression under Fort

1 Huachuca and Sierra Vista, until groundwater pumping is balanced in the region. (Admin. Rec.  
2 Ex. 2: Final BO at 122.) Plaintiffs give numerous examples, supported by the record, of the  
3 Final BO's inability to mitigate the water deficit problems resulting from and related to the  
4 Army's proposed operations. See (Admin. Rec. Ex. 2: Final BO at 105-109, 121-124) (even  
5 in the best case scenario, the mitigation measures will not eliminate even the current 7000 acre-  
6 feet groundwater deficit, much less the 13,000 acre-feet deficit that is expected to exist by  
7 2030).<sup>4</sup>

8 The whole premise of the "no jeopardy" ruling, which is that within three years the Army  
9 and other interested parties will come up with a long-term plan to remedy the groundwater  
10 deficit problem, is an admission that what is currently on the table as far as mitigation measures  
11 is inadequate to support the FWS's "no jeopardy" decision. The FWS is looking to the plans,  
12 the AWRMP and the RWRMP, to be prepared within three years, to identify the necessary  
13 mitigation measures, which will prevent adverse impact to the water umbel and willow  
14 flycatcher. These measures, however, have to be identified and included in the Final BO, either  
15 as RPAs or incorporated into the Army's proposed action, to support a "no jeopardy" decision.  
16 Without these measures, there is no factual basis and no rational basis for the opinion.

17 The Army may not delay identifying the measures necessary to mitigate the effects of its  
18 ten-year plan based on the monitoring provisions in the Final BO nor on the short-term benefits  
19 of the Sierra Vista recharge project.

20 The Final BO's monitoring requirements do not measure the success or failure of the on-  
21 base and/or regional mitigation measures to reduce the groundwater deficit. It only requires

22  
23 <sup>4</sup>The Army proposes mitigation measures for saving 600 acre-feet of water per year and if  
24 the Sierra Vista Water Recharge project is successfully implemented, the deficit reductions may  
25 be about 2,000-3,800 acre-feet per year, which falls far short of balancing even the existing  
26 7000 acre-feet annual deficit. See (Admin. Rec. Ex 2: BO at 105-107, 122) (At the best, these  
27 measures could cut the current deficit by about 56 percent, but balancing withdrawals/outflow  
28 with recharge/inflow would require implementation of additional measures). "Without a  
balancing of the water budget, the cone of depression will continue to grow and continue to  
pose a long-term threat to flows in the San Pedro River." (Admin. Rec. Ex. 2: Final BO at 107.)

1 the Army to develop "a monitoring program designed to assess progress," (Ps' SOF at Ex. 2:  
2 MOA, App. A at 1), and requires an annual review of the AWRMP, as to which projects have  
3 been implemented the past year and which are to be implemented in the coming year.  
4 Especially since the Final BO and the AWRMP fail to quantify the remedial value of the  
5 proposed projects, simply reporting project implementation is not a meaningful assessment of  
6 the success or failure of the mitigation measures in protecting the water umbel, willow  
7 flycatcher, and critical habitat from adverse impact. Such an assessment would require  
8 systematic monitoring of either San Pedro baseflows or the groundwater aquifer.

9 Even if the Final BO provided a meaningful monitoring mechanism to annually assess  
10 whether or not the San Pedro baseflow or aquifer was or was not being adversely affected, this  
11 is not a proper way to mitigate adverse impact. This type of analysis permits the Army to  
12 continue deficit-inducing operations when a longer-term analysis would reveal those operations  
13 to be causing jeopardy.

14 FWS also basis its "no jeopardy" opinion on the Sierra Vista Water Recharge Project,  
15 which is under construction and designed to capture treated wastewater and sewage in large  
16 infiltration ponds so that the city's effluent will seep into the groundwater and recharge the  
17 aquifer. (Admin. Rec. Ex. 5: Planning Aid Memorandum at 10.) Assuming the project is  
18 successful, its positive effects will be short-term and inadequate. It will recharge roughly 1,516  
19 acre-feet per year from 2000 to 2010 and 1,762 acre-feet per year from 2010 to 2020, a small  
20 fraction of the growing deficit. (Admin. Rec. Ex. 2: BO at 93; Ex 48: Rorabaugh to Hessil  
21 email, 11/9/98.) At this point, Sierra Vista is obligated to recharge its effluent only until 2020,  
22 reducing impacts to endangered species for 20 years at the most. (Admin. Rec. Ex. 47:  
23 Biological Assessment, San Pedro River Wastewater Effluent Recharge Project at 3.)

24 This recharge project is not intended to compensate for or mitigate the effects of  
25 groundwater pumping. The project is designed to create a "mound" of groundwater between  
26 the cone of depression and the river that will, in theory, prevent baseflow from the San Pedro  
27 from flowing back into the groundwater during the next twenty years. (Admin. Rec. Ex. 5:  
28 Planning Aid Memorandum at 10.) This will delay and mask the effects of the deficit

1 groundwater pumping, (Admin. Rec. Ex. 2: Final BO at 121), but this is not a mitigating factor  
2 in relation to the Army's ten-year plan. While the FWS has argued that the recharge project will  
3 delay impacts for at least three years, it has not presented any evidence regarding the projects  
4 ability to mitigate the effects of a lesser proposed agency action, such as the Army's operations  
5 and activities planned over the next three years. See also, National Wildlife Federation v.  
6 Coleman, 529 F.2d 359, 374 (5<sup>th</sup> Cir. 1976) (proposed action of other agencies may not be relied  
7 on to mitigate impact, especially if other agency's action is not sufficient to make up for the loss  
8 of habitat caused by the federal agency).

9 The ESA mandates that the biological opinion analyze the entire agency action to ensure  
10 that the action is fully protective of the endangered species and its habitat. 16 U.S.C. §  
11 1536(b)(3)(A). The scope of the agency action is critical to whether the consultation process  
12 considers all the effects of the action and adequately mitigates potential impacts. Courts have  
13 consistently held that a biological opinion has to "analyze the effect of the entire agency action,"  
14 Conner v. Burford, 848 F.2d 1441, 1453 (9<sup>th</sup> Cir. 1988), cert. denied, Sun Exploration &  
15 Production v. Lugann 489 U.S. 1012 (1989) (emphasis added), including all indirect and  
16 cumulative affects of the action on threatened and endangered species, 50 C.F.R. §  
17 402.14(g)(3); 50 C.F.R. § 402.02. An agency may not ignore future aspects of a federal action  
18 by segmenting that action into phases. In fact, in Conner, the Court held that all phases of oil  
19 and gas leasing had to be evaluated for potential impacts at the leasing stage, even though the  
20 final phase -construction of oil and gas wells - was uncertain to occur. Conner, 848 F.2d at  
21 1453-1458; See also North Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980  
22 (agency may not deal exclusively with one stage of the project).

23 In Conner, the FWS issued a biological opinion only with regard to the leasing stage  
24 because it did not have sufficient data to render a comprehensive opinion beyond the initial  
25 leasing phase. Instead of issuing a comprehensive biological opinion, the FWS concluded that  
26 the leasing phase did not jeopardize endangered species. The FWS envisioned an "incremental-  
27 step consultation approach, with additional biological evaluations prior to subsequent activities.  
28 The court rejected this. The fact that insufficient evidence was available did not excuse the

1 FWS from rendering a comprehensive opinion on the entire agency action. The court  
2 explained, as follows:

3 Although we recognize that the precise location and extent of future oil and gas  
4 activities were unknown at the time, extensive information about the behavior and  
5 habitat of the species in the areas covered by the leases was available . . . We  
6 agree with appellees that incomplete information about post-leasing activities  
7 does not excuse the failure to comply with the statutory requirement of a  
8 comprehensive biological opinion using the best information available.

9 Conner, 848 F.2d at 1453-1454.

10 This is not the type of case that can be distinguished from Conner. This is not like Swan  
11 v. Turner, 824 F. Supp. 923, 932 (Mont. 1992), where FWS structured its review, envisioning  
12 future ESA evaluations at the developmental stages of specific projects, after adoption of the  
13 biological opinion, which included standards and guidelines to protect species and habitat.  
14 Here, the Final BO covers all proposed activities and projects planned at Fort Huachuca over  
15 the next ten years, without including standards and guidelines. These will be developed and  
16 implemented in three years. The Court also rejects the notion that the annual review  
17 requirement, combined with the Army's obligation to reinitiate consultation in the event that  
18 mitigation measures are not as effective as anticipated, supports a staged analysis of jeopardy  
19 and relieves the FWS of performing a comprehensive biological opinion at this time.

20 Generally, the period covered by a biological opinion is defined by the life of the project  
21 or agency action. In this case, the actions consist of on-going activities scheduled to occur over  
22 the next ten years at Fort Huachuca. So, the breadth and scope of the analysis must be adequate  
23 to consider all the impacts that are likely to jeopardize the species or adversely modify critical  
24 habitat, which can be anticipated for these projects using the best available science. In assessing  
25 jeopardy, each agency shall use the best scientific and commercial data available. 16 U.S.C. §  
26 1536(a)(2). Looking at the best scientific and commercial data available is a standard that  
27 requires far less than conclusive proof. Greenpeace v. National Marine Fisheries Service, 55  
28 F. Supp. 2d 1248, 1262 (Wash. 1999). This standard recognizes that better scientific evidence  
will most likely always be available in the future.

The FWS must consider the Army's ongoing and programed operations and activities  
planned for Fort Huachuca over the next ten years and assess the impacts of those operations

1 based on the best scientific evidence available today, not 3 years from now. Essentially, the  
2 FWS has attempted to sidestepped its obligation to make an accurate "no jeopardy" decision  
3 based on the best available evidence and seeks to postpone, for three years, this assessment  
4 which must be made as part of the process of issuing the Final BO. This, it cannot do.

5 Because the Final BO is inadequate as a matter of law, the Court does not address the  
6 Plaintiffs' other challenges, such as: "there is no rational connection between the FWS's analysis  
7 of growth and its conclusion the Fort's operations will not jeopardize or cause adverse  
8 modification to endangered species." (Ps' MSJ at 3, 46-49.)

9  
10 B. Analysis: Fort Huachuca Operations are Likely to Result in Jeopardy to the Water Umbel  
and the Willow Flycatcher

11 The ESA affords endangers species "the highest of priorities," TVA v. Hill, 437 U.S.  
12 153, 174 (1978). The ESA, therefore, imposes an absolute prohibition on any federal action that  
13 is likely to jeopardize the continued existence of a listed species or result in adverse  
14 modification of critical habitat. 16 U.S.C. § 1536(a)(2). The FWS must not authorize any  
15 action that reasonably would be expected, directly or indirectly, to reduce appreciably the  
16 likelihood of both the survival and recovery of a listed species by reducing the reproduction,  
17 numbers, and distribution of the species. The ESA does not, however, give the FWS a veto  
18 power over the actions of other federal agencies. National Wildlife Federation v. Coleman, 529  
19 F.2d 359, 371 (9<sup>th</sup> Cir. 1976), cert. denied, Hotelier v. National Wildlife Federation, 429 U.S. 979  
20 (1976).

21 After consulting with the FWS, the federal agency involved must determine whether it  
22 has taken all necessary action to insure that its actions will not jeopardize the continued  
23 existence of an endangered species or destroy or modify habitat critical to the existence of the  
24 species. Id. In other words, under the ESA, the Army has an independent duty to insure that  
25 its actions satisfy § 7 and the jeopardy standard. 16 U.S. C. § 1536(a)(2).

26 "Following the issuance of a Biological Opinion, the Federal agency shall determine  
27 whether and in what manner to proceed with the action in light of its section 7 obligations and  
28 the Services's biological opinion." 50 C.F.R. 402.15(a). The Ninth Circuit has explained that

1 "[c]onsulting with the Service alone does not satisfy an agency's duty under the Endangered  
2 Species Act. An agency cannot 'abrogate its responsibility to ensure that its actions will not  
3 jeopardize a listed species; its decision to rely on a Service biological opinion must not have  
4 been arbitrary or capricious.'" Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1304 (9<sup>th</sup>  
5 Cir. 1994 (quoting Pyramid Lake Paiute Tribe, 898 F.2d at 1414.

6 Here, the Final BO failed to include the necessary mitigation measures to address the  
7 long term adverse impacts of the Army's proposed activities over the next ten years. Instead,  
8 the Final BO proposed to identify mitigation measures within three years. As a matter of law,  
9 the Final BO omitted a critical component.

10 The Army knew of the need to take immediate and drastic measures to maintain flows  
11 in the San Pedro River. (Admin. Rec. Ex. 30: e-mail fr. Hessil to Rorabaugh, 6/30/98.) The  
12 Army, however, refused to commit to any specific mitigation measures related to its  
13 groundwater use or to balance water use on base, much less in the Sierra Vista subwatershed.  
14 See (Admin. Rec. Ex. 46: email fr. Spotila to Green, 8/29/99 (recognizing that the Fort  
15 Huachuca golf course is the "soft engineering underbelly of the water problem on base, but  
16 insisting on maintaining and irrigating it.) Instead, the Army sought to rely on the FWS's  
17 arbitrary and capricious determination that its action was not likely to cause jeopardy. The  
18 Army committed a clear error in judgment when it relied on the Final BO, which failed to  
19 consider all the relevant factors.

20 Accordingly,

21 **IT IS ORDERED** that the Plaintiffs' Motion for Summary Judgment (document 35) is  
22 **GRANTED**; declaratory judgment is warranted because the Final BO is arbitrary and capricious  
23 and in violation of the ESA. Declaratory judgment is also warranted against the Army for  
24 violating its independent duty under § 7 of the ESA to not cause jeopardy or adverse  
25 modification to endangered species and critical habitat.

26 **IT IS FURTHER ORDERED** that the Defendants' Crossmotion for Summary Judgment  
27 (document 39) is **DENIED**.

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**IT IS FURTHER ORDERED** that the Defendants-Intervenor's Motion for Summary Judgment (document 53) is DENIED.

**IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment according.

DATED this 5 day of April, 2002.

  
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Alfredo C. Marquez  
Senior United States District Court Judge