

1 **WO**

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

7

8

9

Grand Canyon Trust,

)

No. CV-07-8164-PHX-DGC

10

Plaintiff,

)

ORDER

11

vs.

)

12

U.S. Bureau of Reclamation, et al.,

)

13

Defendants.

)

14

15

This case concerns the United States Bureau of Reclamation’s operation of Glen Canyon Dam on the Colorado River. Plaintiff Grand Canyon Trust claims that Reclamation is violating the Endangered Species Act (“ESA”) in its operation of the Dam. Specifically, the Trust alleges that Reclamation’s operation of the Dam under a moderate low fluctuating flow regime (“MLFF”) jeopardizes and takes the endangered humpback chub and adversely modifies its critical habitat. The Trust also claims that Reclamation and the United States Fish and Wildlife Service (“FWS”) have failed to comply with relevant federal statutes, including the National Environmental Policy Act (“NEPA”), the Administrative Procedure Act (“APA”), and the ESA.

24

For the reasons that follow, the Court will deny the Trust’s motion to vacate the Court’s previous rulings on Claims 1, 2, and 9, and will deny the Trust’s motion for summary judgment on Claims 3, 12, and 13. The Court will grant summary judgment to the Defendants on Claims 3, 12, and 13. Because this ruling will resolve all outstanding claims, the Court will direct the Clerk to terminate this case.

25

26

27

28

1 **I. Background.**

2 The Court has issued three previous orders addressing the merits of this case: *Grand*
3 *Canyon Trust v. United States Bureau of Reclamation*, No. CV-07-8164-PCT-DGC, 2008
4 WL 4417227 (D. Ariz. Sept. 26, 2008) (*Trust I*); *Grand Canyon Trust v. United States*
5 *Bureau of Reclamation*, 623 F. Supp. 2d 1015 (D. Ariz. 2009) (*Trust II*); and *Grand Canyon*
6 *Trust v. United States Bureau of Reclamation*, No. CV-07-8164-PHX-DGC, 2010 WL
7 2643537 (D. Ariz. June 29, 2010) (*Trust III*). This order presumes familiarity with the facts,
8 analysis, and holdings of *Trust I, II, and III*.

9 In its most recent decision – *Trust III* – the Court granted in part and denied in part
10 the Trust’s motion for summary judgment on Claim 9 and granted summary judgment to
11 Reclamation and FWS on Claims 1, 2, 10, and 11. *Id.* The Court remanded the 2009
12 Incidental Take Statement (“ITS”) to FWS for further consideration and deferred ruling on
13 Claim 3 until the 2009 ITS had been reconsidered. *Id.*

14 FWS re-issued the ITS on September 1, 2010 (the “2010 ITS”). Doc. 255-1.¹ The
15 2010 ITS replaced the 2009 ITS. Doc. 255-1 at 1. Dissatisfied with the 2010 ITS, the Trust
16 supplemented its complaint to include two more claims: Claim 12, asserting that the 2010
17 ITS violates the ESA, and Claim 13, asserting that the 2010 ITS violates NEPA. Doc. 264.

18 On October 1, 2010, the Trust filed a motion for summary judgment on Claims 3, 12,
19 and 13. Doc. 265. The Trust also filed a motion to vacate the Court’s order in *Trust III* on
20 Claims 1, 2, and 9. Doc. 266. The Trust later moved to withdraw these motions in light of
21 a development in Dam operations.

22 The Dam currently is being operated under a 2008 Experimental Plan that has been
23 discussed at length in the Court’s previous orders. One of the chub conservation measures
24 being implemented by Reclamation under the plan is the mechanical removal of rainbow
25 trout – a nonnative to the Colorado River that preys on the chub. Due to concerns expressed
26

27 ¹ The September 1, 2010 ITS, which will be referred to in this order as the “2010
28 ITS,” but should not be confused with another ITS included by FWS on November 9, 2010,
concerning cancellation of the 2010 mechanical removal of trout. Doc. 274-1 at 20.

1 by the Zuni Tribe, Reclamation cancelled the mechanical trout removal trips scheduled for
2 May and June of 2010. Doc. 222. This cancellation resulted in renewed consultation
3 between FWS and Reclamation, and in November of 2010 FWS issued a new Biological
4 Opinion and ITS that specifically addressed the cancellation of the trout removal. Doc. 274.

5 In response to this new Biological Opinion and ITS, the Trust moved to withdraw its
6 October motions so that it could again modify its claims. Doc. 275. The Court granted the
7 motion to withdraw. Doc. 282. However, during a telephone conference in February of 2011
8 (Doc. 285), the Trust changed its mind in light of a discussion concerning the future schedule
9 of this case. Federal Defendants explained during the conference that FWS and Reclamation
10 currently are in consultation regarding mechanical trout removal for the years after 2010, and
11 that this consultation likely will produce additional agency documents in May or June of this
12 year. Rather than waiting to file additional claims once these new documents are produced,
13 the Trust suggested that the Court simply rule on the motion to vacate and motion for
14 summary judgment that had been filed on October 1, 2011 and later withdrawn. After
15 considering this suggestion, the Court agreed. Doc. 286.

16 This order will therefore address the motion for summary judgment dated October 1,
17 2011 and subsequent briefing. Docs. 266, 267, 271-73. The Court will also address the
18 motion to vacate. Doc. 265. Given the Court's familiarity with this case, oral argument is
19 not necessary.

20 **II. Standard for Review.**

21 The ESA and NEPA do not provide standards for judicial review of agency actions.
22 Therefore, the Court must evaluate the administrative decisions of Reclamation and FWS
23 using the APA. *See Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007)
24 (ESA claims reviewed under APA); *Akiak Native Cmty. v. USPS*, 213 F.3d 1140, 1146 (9th
25 Cir. 2000) (NEPA claims reviewed under APA).

26 A court may set aside an agency's decision under the APA only if the decision is
27 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5
28 U.S.C. § 706(2)(A); *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*,

1 265 F.3d 1028, 1034 (9th Cir. 2001). An agency’s decision is not arbitrary and capricious
2 if the agency “articulated a rational connection between the facts found and the choice
3 made.” *Ariz. Cattle Growers’ Ass’n v. USFWS (Ariz. Cattle I)*, 273 F.3d 1229, 1236 (9th Cir.
4 2001). The APA standard is “highly deferential, presuming the agency action to be valid and
5 affirming the agency action if a reasonable basis exists for its decision.” *Nw. Ecosystem*
6 *Alliance v. USFWS*, 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotes and citation
7 omitted). “The reviewing court is not empowered to substitute its judgment for that of the
8 agency.” *Ariz. Cattle I*, 273 F.3d at 1236.

9 **III. The Motion to Vacate.**

10 The Trust asks the Court to vacate its *Trust III* ruling on Claims 1, 2, and 9. The
11 motion is based on Reclamation’s decision to cancel mechanical trout removal in May and
12 June of 2010. The Trust contends that this cancellation rendered the 2009 Biological
13 Opinion invalid and requires that the Court’s prior rulings on Claims 1, 2, and 9 be vacated.
14 Doc. 267 at 9. The Court does not agree.

15 **A. Dam Operations Continue Under a Valid Biological Opinion.**

16 The Trust argues that nonnative fish removal was fundamental to FWS’s 2009
17 Biological Opinion, that the 2010 cancellation has fundamentally undermined the validity
18 of the 2009 Biological Opinion, that FWS has issued no new Biological Opinion, that Dam
19 operations therefore are occurring without a valid Biological Opinion, and that the basis for
20 *Trust III*’s ruling on Claims 1, 2, and 9 has been eliminated. Doc. 267 at 7-8. In the months
21 since the Trust first made this argument, FWS has issued a supplemental Biological Opinion
22 and ITS (the “2010 Biological Opinion”). Doc. 274. The Court subsequently addressed a
23 different motion to vacate filed by the Trust (Doc. 277), and held that the 2010 Biological
24 Opinion did not supersede the 2009 Biological Opinion and ITS but instead supplemented
25 them (Doc. 284). The Court held that 2010 Biological Opinion did not undermine the basis
26 for *Trust III*, and therefore declined to vacate *Trust III*. *Id.* The Court stands by that
27 decision.
28

1 **B. Other Arguments.**

2 The Trust argues that predation by rainbow trout constitutes a substantial threat to the
3 humpback chub, that FWS relied heavily on mechanical trout removal in its 2009 Biological
4 Opinion, that FWS and Reclamation have re-initiated consultation due to cancellation of the
5 2010 removal trips, and that the Court therefore should vacate its rulings on Claims 1, 2, and
6 9 in *Trust III*. Doc. 267 at 9-13. The Court agrees that predation by rainbow trout has been
7 identified as a substantial threat to the chub and that the mechanical removal of trout has
8 been viewed as a significant component of chub preservation and recovery. The Court also
9 agrees that the prospect of discontinuing the mechanical removal of trout raises serious
10 questions about potential adverse effects on the chub. For several reasons, however, the
11 Court does not conclude that the cancellation of the 2010 removals requires that the Court's
12 previous decisions on Claims 1, 2, and 9 be vacated.

13 First, FWS and Reclamation have completed their renewed consultation concerning
14 cancellation of the removal trips scheduled for May and June of 2010, and FWS has opined
15 that cancellation of those two trips will not jeopardize or improperly take the chub, or
16 adversely modify its critical habitat. Doc. 274. The Trust has not challenged this 2010
17 Biological Opinion. *See* Doc. 273 at 12 (“the Trust’s October 1, 2010 Motion does not
18 challenge the 2010 Biological Opinion”).²

19 Second, although predation by trout has been identified as a significant risk factor for
20 the chub, the science does not support a conclusion that the chub population will decline
21 merely because the mechanical removal of trout has been cancelled for one year. Studies
22 suggest that the chub population began to increase before mechanical trout removal was
23

24
25 ² The Court recognizes that the Trust planned to challenge the new opinion if further
26 proceedings in this case were to occur, but the Trust instead elected to have the Court rule
27 on its October 1, 2010 motions. Doc. 286. Because the Trust has not challenged the 2010
28 Biological Opinion and has provided no basis for setting it aside, the Court will accept the
opinion at face value – the cancellation of trout removal in May and June of 2010 will not
jeopardize or improperly take the chub, or adversely modify its critical habitat.

1 commenced, suggesting that the increase was due to factors other than, and independent of,
2 trout removal. As the 2009 Biological Opinion explained:

3 The [increase in chub population] was due to an increase in recruitment that
4 began before many actions predicted to improve [chub] status such as
5 mechanical removal of nonnative fishes or warming of mainstem water
6 temperatures in the Colorado River. Mainstem warming and mechanical
7 removal effects both started in 2003 and could have begun affecting the
8 abundance of age-2 recruits in 2004 and later, (brood-years 2002 and later).
9 But the increase in recruitment appears to have at least doubled from the
10 mid-1990s before the population was exposed to warmer Colorado River water
11 temperatures and reduced nonnative abundance near the mouth of the LCR.

12 Doc. 180-1 at 36. If chub population increases were occurring before trout removal, the
13 Court cannot conclude that the population suddenly will decrease when one year's removal
14 effort is cancelled.

15 Third, the parties were well aware of the 2010 cancellation before briefing the issues
16 addressed in *Trust III*. See Doc. 222. The cancellation was addressed in the briefing and in
17 *Trust III*:

18 The Trust notes that the mechanical removal of rainbow trout planned
19 for May and June of 2010 was postponed by Reclamation in response to
20 concerns expressed by the Zuni Tribe of the Zuni Indian Reservation. The
21 Zuni Tribe regards the confluence of the [Little Colorado River] and mainstem
22 as sacred, and objects to the mass killing of trout in such a location. In
23 response to this concern, Reclamation postponed the 2010 fish removal
24 pending further consultations with FWS and the Zuni Tribe. This experience
25 aptly illustrates the complex set of interests Reclamation must balance in
26 operating the Dam. Those interests include not only the endangered species
27 below the Dam, but also tribes in the region, the seven Colorado River basin
28 states, large municipalities that depend on water and power from Glen Canyon
29 Dam, agricultural interests, Grand Canyon National Park, and national energy
30 needs at a time when clean energy production is becoming increasingly
31 important. In any event, the Court cannot conclude from the postponement of
32 the 2010 trout removal that FWS's 2009 Supplement is invalid. The Zuni's
33 concerns about fish killing present just as much of an obstacle to the
34 mechanical removal of warm water predators (the Trust's preferred course of
35 action) as it does for the removal cold water predators. The Trust cannot
36 reasonably rely on this obstacle as a basis for opposing FWS and
37 Reclamation's actions while at the same time arguing that any increase in
38 warm water predators could readily be handled by mechanical removal. Stated
39 differently, the concerns expressed by the Zuni Tribe present just as much
40 difficulty for the Trust's requested remedy – steady flows that might result in
41 an increase in warm water predators – as it does for the agency's actions, and
42 therefore cannot be relied on to invalidate those actions.

43 *Trust III*, 2010 WL 2643537, at *19 (citations and footnote omitted).

1 Fourth, much of the Trust's argument in the motion to vacate focused on the fact that
2 no Biological Opinion had been issued by FWS with respect to the 2010 cancellation of trout
3 removal. *See* Doc. 273 at 13-15. FWS has now issued the Biological Opinion. Doc. 274.
4 The arguments about operating the Dam in the absence of a Biological Opinion, including
5 the parties' arguments regarding Reclamation's finding under section 7(d) of the ESA, 16
6 U.S.C. § 1536(d), are therefore moot. *See* Docs. 271 at 11-15, 273 at 8-10.

7 Fifth, the Trust asserts that mechanical trout removal has been suspended indefinitely.
8 The Court does not agree. Reclamation has announced a suspension of only the 2010
9 removal trips. *See* Doc. 222. Consistent with this announcement, the 2010 Biological
10 Opinion focuses solely on cancellation of the 2010 trips. *See* Docs. 271-1, 274-1. The future
11 of trout removal is the subject of ongoing consultation between FWS and Reclamation. *See*
12 Doc. 271 at 14 n.12. This ongoing consultation has not been completed, and it clearly would
13 be improper for the Court to act on the basis of an assumption about what the agencies might
14 or might not decide. Stated differently, the Court could not find the agencies to be acting
15 arbitrarily and capriciously on the basis of a decision they have not yet made.

16 **IV. Claim 12.**

17 As the Ninth Circuit has explained, Incidental Take Statements set forth a "trigger"
18 that, when reached, results in an unacceptable level of incidental take, invalidating the safe
19 harbor provision of 16 U.S.C. § 1536(o)(2), and requiring Reclamation and FWS to
20 re-initiate consultation. Ideally, this "trigger" should be a specific number. *Ariz. Cattle I*,
21 273 F.3d at 1249.

22 Claim 12 alleges that the 2010 ITS violates the ESA and the APA. Doc. 264 at 33.
23 The Trust contends that the 2010 ITS is insufficient for three reasons: (1) there is no support
24 for FWS's claim that take of the young humpback chub cannot be quantified; (2) there is no
25 support for the causal link between the consultation trigger and the take of the chub; and
26 (3) FWS's reason for not including additional "reasonable and prudent measures" lacks
27 support. Doc. 267 at 19-23. The Court will address each argument separately.
28

1 **1. Quantifying Take.**

2 The 2009 ITS found that take likely would occur primarily among young chub and
3 that this take could not be quantified because of their small size and remote location.
4 Doc. 180-1 at 87. The Court found this to be an adequate explanation of why the take of
5 young chub could not be quantified. *Trust III*, 2010 WL 2643537, at *22. The 2010 ITS
6 reiterates this explanation, finding it difficult to “(1) predict the extent of the young-of-year
7 and juvenile populations that will be exposed to take-causing conditions or (2) detect take
8 due to the small size of the individuals likely to be affected, the large size and remoteness of
9 the action area, and the fact that, in part, the take involves ingestion of chub by nonnative
10 fish.” Doc. 255-1 at 6.

11 The Trust again argues that this assertion is incorrect. Doc. 267 at 18-19. The Trust
12 cites various studies that have identified spawning trends in the mainstem or measured young
13 chub in particular locations at particular points in time. Doc. 267 at 18-19. The Trust does
14 not, however, cite any study that has accurately measured the take of young and juvenile
15 chub in the mainstem and Little Colorado River (“LCR”) during a particular year. The Trust
16 dismisses Reclamation’s concerns that the area of chub habitat is too remote, noting that
17 rafters float through the area regularly.

18 Critical habitat for the chub is found in a 173-mile stretch of the Colorado River in
19 Marble and Grand Canyons, and in an eight mile stretch of the LCR above its confluence
20 with the Colorado River. Although it is true that the river is used frequently for raft and
21 kayak trips, this does not show that it is readily accessible for detailed annual surveys of
22 young and juvenile humpback chub. The mainstem of the Colorado River has been described
23 by the Ninth Circuit in these words:

24 Once in the Grand Canyon, the river flows some 4,000 to 6,000 feet below the
25 rim of the Canyon through cliffs, spires, pyramids, and successive escarpments
26 of colored stone. Access to the bottom of the Grand Canyon can be gained
27 only by hiking, riding mules, or floating the river. Those floating the river
28 typically do so in motor-powered rubber rafts, oar-or paddle-powered rubber
rafts, oar-powered dories, or kayaks. Floating the river through the Grand
Canyon is considered one of America’s great outdoor adventures and includes
some of the largest white-water rapids in the United States.

1 *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1068 (9th Cir. 2010); *see also Trust*
2 *II*, 623 F.Supp.2d at 1018 (“The [humpback chub] lives in the relatively inaccessible canyons
3 of the Colorado River.”).

4 The take of young chub at the confluence of the mainstem and the LCR is described
5 by the 2010 ITS in these words:

6 Cold water is a significant impediment for young-of-year and juvenile
7 humpback chub. Mass movement of larval and juvenile chub out of the LCR
8 occurs during the summer, especially during monsoon rainstorms in late
9 summer. Young humpback chub that are washed into the mainstem are
10 subjected to a drastic change in water temperature which can be as much as
10 °C or more. This results in thermal shock of young fish, and a reduction
in swimming ability which also increases their vulnerability to predation. Cold
water by itself also likely results in mortality of eggs and larval fish (Hamman
1982, Marsh 1985).

11 Doc. 255-1 at 5.

12 The confluence of the LCR and the mainstem is 76 river miles downstream from Glen
13 Canyon Dam and approximately 60 river miles downstream from Lees Ferry, the last point
14 where rafts may be launched on the river before entering the Grand Canyon. *See* Doc. 225-6
15 at 28; Doc. 136, Ex. 1 at 10. Although it is true that monitoring teams can access this remote
16 location by floating 60 miles on rafts, the Trust does not explain how they could reliably
17 measure the number of young chub consumed by rainbow trout, or the number of chub eggs
18 that succumb to cold temperatures or are consumed by trout, especially with the limited
19 equipment and time available on such a raft trip. Nor does the Trust explain how this
20 monitoring could occur over the 20 kilometers of the mainstem (9 kilometers above and 11
21 kilometers below the confluence) where chub typically range. *See* Doc. 230-7 at 3. The
22 Trust’s citation to discrete measurements of young chub in discrete locations in the canyon
23 does not show that reliable measurements of the overall annual take of young chub could be
24 achieved at this large and remote location. The Court again finds that FWS has reached a
25 rational conclusion, and therefore has not acted arbitrarily or capriciously, in concluding that
26 take cannot be quantified due to “the small size of the individuals likely to be affected, the
27 large size and remoteness of the action area, and the fact that, in part, the take involves
28 ingestion of chub by nonnative fish.” Doc. 255-1 at 6.

1 Congress has recognized that there are certain instances where it may not be possible
2 to quantify take. *Or. Natural Res. Council*, 476 F.3d 1031, 1037 (2007). For example, “it
3 may not be possible to determine the number of eggs of an endangered or threatened fish
4 which will be sucked into a power plant when water is used as a cooling mechanism.” *Id.*
5 (quoting H.R.Rep. No. 97-567, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2827).
6 In such instances, a surrogate measure of take may be used.

7 The Trust cites *Miccosukee Tribe of Indians of Florida v. United States*, 566 F.3d
8 1257 (11th Cir. 2009), as support for its contention that take of the young chub must be
9 quantified. In *Miccosukee Tribe*, however, scientists conducted annual population counts of
10 the birds in question over the course of many years, making the FWS’s argument that the
11 birds were difficult to detect unpersuasive. *Id.* at 1275. The Trust has identified no such
12 annual surveys of young or larval chub.

13 In addition, whether the take of young chub in remote reaches of the Grand Canyon
14 can be measured reliably is a matter within the expertise of FWS. When an agency is acting
15 within the area of its expertise, at the frontiers of science, “a reviewing court must generally
16 be at its most deferential.” *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*,
17 462 U.S. 87, 103 (1983). Applying appropriate deference, the Court cannot conclude from
18 the Trust’s study citations that FWS has acted arbitrarily or capriciously in concluding that
19 the take of young chub cannot be quantified.

20 **2. Casual Link.**

21 When take cannot be quantified and a surrogate is used for the incidental take
22 determination, the surrogate “must be able to perform the functions of a numerical
23 limitation,” must “contain measurable guidelines to determine when incidental take would
24 be exceeded,” and must be “linked to the take of the protected species.” *Or. Natural Res.*
25 *Council*, 476 F.3d at 1038. The 2009 ITS adopted as a take surrogate the reconsultation
26 trigger identified by FWS under 50 C.F.R. § 402.16(b) – a significant decline in the number
27 of adult chub in any single year or a drop in the population of adult fish below 3,500.
28 Doc. 180-1 at 18. The Court found the 2009 ITS insufficient because FWS did not explain

1 how this “adult-based consultation trigger . . . either accurately measures the take of young
2 chub or correctly identifies the level at which the take of young chub becomes excessive.”
3 *Trust III*, 2010 WL 2643537, at *23.

4 On remand, FWS adopted a higher trigger: “if the number of adult chub fall[s] below
5 the 6,000 population estimate at the time of the 2008 opinion, and if such reduction cannot
6 be attributed to any other cause(s) besides the direct and indirect effect of implementing
7 current operations, such reduction would indicate that the amount of anticipated incidental
8 take was likely underestimated.” Doc. 255-1 at 6. FWS explained that this adult-based
9 consultation trigger “is appropriate because it represents the species’ ability to reproduce,
10 survive, and recruit during the life of the project which provides information on the health
11 of the overall population.” Doc. 255-1 at 7. The Trust argues that although the 2010 ITS
12 explains how the adult-based consultation trigger is linked to the take of the species, it fails
13 to timely identify a point at which the permitted level of take has been exceeded. The Trust
14 argues that it will take “one to three years before lack of recruitment [into adulthood] will
15 manifest itself.” Doc. 267 at 20.

16 Although it is true that the adult-chub surrogate will necessarily include a delayed
17 recognition of any excessive take of young chub, this results from the nature of the surrogate.
18 The Trust identifies no other feasible surrogate FWS could use to measure the take of young
19 chub. FWS credibly has concluded that the actual take of young chub and larvae cannot be
20 quantified, as discussed above. FWS has also concluded that habitat destruction cannot be
21 used as a surrogate because the relationship between habitat and chub population is not well
22 understood. Doc. 225 at 35; Doc. 271 at 19 n.17.³ FWS has selected as the surrogate an
23 adult-population measurement, obtained regularly, that reflects the health and well being of
24 the chub. In adopting this surrogate, FWS notes that the adult population measurement has
25 shown a steady increase in the adult chub population over the last nine years to a current
26 level of at least 7,650. *Id.*

27
28 ³ Reclamation’s ongoing Nearshore Ecology Study is investigating this relationship.
Doc. 180-1 at 73, 83.

1 The Trust essentially argues that the only ITS measure that would be legally sufficient
2 in this case is the precise number of young and larval chub taken by operation of the 2008
3 Experimental Plan. The Court cannot agree that such precision is required, particularly when
4 measuring the loss of young and larval chub in this large and remote location has not been
5 shown to be feasible. Although numerical limits on actual take are preferred, the Ninth
6 Circuit has made clear that estimates can suffice if reasonably linked to the take: “We have
7 never held that a numerical limit is required. Indeed, we have upheld Incidental Take
8 Statements that used a combination of numbers and estimates.” *Ariz. Cattle I*, 273 F.3d at
9 1249. “[W]hile Congress indicated its preference for a numerical value, it anticipated
10 situations in which impact could not be contemplated in terms of a precise number.” *Id.*

11 FWS has concluded that the take of young and larval chub that will be caused by Dam
12 operations under the 2008 Experimental Plan will not result in a decrease of the adult chub
13 population. Doc. 255-1. FWS has also reasonably concluded that a drop in the adult
14 population below 6,000 would signify an excessive take of young chub sufficient to warrant
15 the reopening of consultations. The Court concludes that this trigger constitutes a reasonable
16 measure of the effects of Dam operations on the chub, particularly given the remote location
17 of the chub’s habitat and the fact that actual take of young and larval chub cannot be
18 quantified. The trigger is “able to perform the functions of a numerical limitation,” contains
19 “measurable guidelines to determine when incidental take [will] be exceeded,” and is “linked
20 to the take of the protected species.” *Or. Natural Res. Council*, 476 F.3d at 1038. The Court
21 accordingly concludes that it is not arbitrary and capricious.⁴

22
23 ⁴ The Trust also argues that a two- or three-year delay in detecting any adverse take
24 of young chub will mean that the take cannot be acted upon within the life of the 2008
25 Experimental Plan, which runs only through 2012. Doc. 267 at 20. The Court does not agree
26 that this constitutes a fatal flaw in the 2010 ITS. First, any excessive take of the chub during
27 the first years of the 2008 Experimental Plan (2008 and 2009) will be shown in the adult
28 chub population before the expiration of the plan. Second, this is not a case where the
federal action will end before the take can be measured, resulting in a meaningless
reconsultation trigger. *See, e.g., Or. Natural Res. Council*, 476 F.3d at 1039. Reclamation’s
operation of the Dam will continue well beyond 2012.

1 The Trust also argues that the consultation trigger is imprecise because it includes a
2 confounding qualification – that the drop in chub population below 6,000 must be due to “the
3 indirect and direct effects of implementing current operations,” and not to other causes.
4 Doc. 255-1 at 6. Elsewhere, FWS is more precise: “if monitoring detects a decrease in the
5 adult chub population below the 6,000 estimate that is not attributable to other factors (such
6 as parasites or diseases), that decrease is reasonably indicative of higher than expected levels
7 of juvenile mortality caused by the proposed action.” *Id.* at 7. The Court reads this language
8 to mean that *any* drop in the adult chub population below 6,000, except one clearly resulting
9 from an identifiable non-MLFF cause such as a specific parasite or disease, will trigger
10 reconsultation under the 2010 ITS. This interpretation is reinforced by FWS’s statement that
11 drops due to “indirect and direct effects” of MLFF will trigger reconsultation. *Id.* at 6.

12 So construed, the Court does not find the 2010 ITS unworkable. The trigger is
13 reasonably precise, and is not “within the unfettered discretion” of FWS, “leaving no method
14 by which the applicant or action agency can gauge their performance.” *Ariz. Cattle I*, 273
15 F.3d at 1250.

16 **3. Measures to Minimize Take.**

17 Section 7 of the ESA requires that FWS “specify those reasonable and prudent
18 measures [“RPMs”] that [FWS] considers necessary or appropriate to minimize” incidental
19 take. 16 U.S.C. § 1536(b)(4)(ii). The 2009 ITS set forth only one RPM to be used by
20 Reclamation to minimize take – monitoring of the chub’s condition and reporting to FWS.
21 In *Trust III*, the Court found that although the 2009 ITS did “set forth the terms and
22 conditions (including, but not limited to, reporting requirements) that must be complied with
23 by [Reclamation] to implement the [RPMs],” it did not explain why monitoring was “the only
24 RPM necessary to minimize the take of young chub through MLFF.” 16 U.S.C.
25 § 1536(b)(4)(iv); *Trust III*, 2010 WL 2643537, at *24.

26 The 2010 ITS explains why FWS included only monitoring as an RPM. It notes that
27 the 2008 Experimental Plan includes a number of chub conservation measures and explains
28 that “FWS was not aware of any additional measures that would minimize the impact of take

1 of the chub and not alter the basic design, location, scope, duration, or timing of the action
2 in more than a minor way as required by the regulations at 50 CFR 402.14(i)(2).” Doc. 255-
3 1 at 9. FWS further states that “the conservation measures under the [2008 Experimental
4 Plan] were considered by the FWS to be sufficient to provide for the continued upward trend
5 in humpback chub numbers, and in this way to serve to adequately minimize the impacts of
6 take of young chub on the species.” *Id.*

7 The chub conservation measures included in the 2008 Experimental Plan have
8 previously been described by the Court:

9 (1) Reclamation and FWS will reinitiate consultation concerning the chub if
10 the population drops in any single year below 3,500 adult chub; (2) Reclamation, through AMP, will develop a comprehensive plan for the
11 management and conservation of chub in the Grand Canyon; (3) Reclamation
12 will work with the National Park Service to establish spawning populations of
13 the chub in tributaries of the Colorado River such as Havasu, Shinumo, and
14 Bright Angel Creeks; (4) Reclamation, through AMP, will continue to control
15 non-native fish that prey on the chub; (5) Reclamation will takes steps to
16 minimize variations in flow between months – variations that can adversely
17 affect backwater habitat; (6) Reclamation will undertake a nearshore ecology
18 study to examine the effects of flow variations on nearshore habitat;
19 (7) Reclamation and FWS will create a humpback chub refuge in a fish
20 hatchery to protect against catastrophic loss of the chub in the Colorado River;
21 and (8) Reclamation will continue to help other stakeholders in the Little
22 Colorado River watershed develop a plan that protects watershed levels for the
23 chub.

24 *Trust II*, 623 F.Supp.2d at 1023-24.

25 The Trust argues that FWS’s reliance on these conservation measures is unreasonable
26 because the only measure that could possibly minimize take is the mechanical removal of
27 trout, and that measure has been cancelled indefinitely. Doc. 273 at 19. As noted above,
28 mechanical removal has been cancelled only for the year 2010, not indefinitely, and FWS has
issued the 2010 Biological Opinion finding that the one-year cancellation will not jeopardize
or improperly take the chub or adversely modify its critical habitat. Doc. 274. Moreover,
the Court does not agree that mechanical removal of trout is the only conservation measure
that could minimize take of the chub. The 2008 Experimental Plan includes the
establishment of new spawning populations of humpback chub – a step already taken
successfully in Shinumo Creek and above Chute Falls on the LCR. *Trust III*, 2010 WL

1 2643537, at *15. The plan also includes steps to minimize variations in flow between
2 months that can adversely affect backwater habitat; a Nearshore Ecology Study to examine
3 the effects of flow variations on nearshore chub habitat; and creation of a humpback chub
4 refuge in a fish hatchery to protect against catastrophic loss of the chub – a step completed
5 when the refuge was created at the Dexter National Fish Hatchery and Technology Center.
6 *Id.* at *9, *21. In addition, the 2008 Experimental Plan includes the conservation measures
7 of a high-water release in March of 2008 to build beach and backwater habitat, and steady
8 flows in September and October of each year from 2008 to 2012. *Id.* at *2. What is more,
9 the Ninth Circuit has recognized monitoring – the one RPM added by the 2010 ITS – as a
10 “concrete measure” to minimize take. *Or. Natural Res. Council*, 476 F.3d at 1039 n.7.

11 The Court thus cannot accept the Trust’s argument that the 2010 ITS is insufficient
12 because the only concrete chub conservation measure has been cancelled indefinitely. That
13 step has not been cancelled indefinitely, and other concrete conservation measures are
14 specified in the 2008 Experimental Plan and are being implemented by Reclamation. FWS’s
15 reliance on these existing conservation measures, as a reason for not specifying others as
16 RPMs, is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
17 with the law. FWS has “articulated a rational connection between the facts found and choice
18 made.” *Ariz. Cattle I*, 273 F.3d at 1236.

19 **4. Conclusion.**

20 The 2010 ITS sufficiently explains why the take of young chub cannot be quantified,
21 provides a causal link between the adult-based surrogate and the take of young chub, and
22 provides a rational explanation as to why no additional RPMs are necessary. The Court
23 accordingly will enter summary judgment in favor of Defendants on Claim 12.

24 **V. Claim 13.**

25 Claim 13 alleges that FWS violated NEPA when it issued the 2010 ITS without first
26 preparing an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”).
27 Doc. 264 at 35. NEPA requires that federal agencies prepare these documents to evaluate
28 the potential environmental impact of any proposed “major Federal actions significantly

1 affecting the quality of the human environment.” 43 U.S.C. § 4332©. The Trust contends
2 that the 2010 ITS is a major federal action. Doc. 267 at 23. The Court previously addressed
3 a similar contention in Claim 10, which was directed at the 2009 ITS:

4 FWS did not prepare an EIS before issuing the 2009 ITS. The Trust
5 contends that this violated NEPA. Significantly, the Trust brings Claim 10
6 against FWS, not Reclamation. It is not the operation of the Dam, but FWS's
7 issuance of the 2009 ITS, that the Trust claims to be a “major federal action.”
8 FWS argues that this claim fails because Reclamation, not FWS, will be taking
9 action under the 2009 ITS. The Court agrees.

10 Courts repeatedly have declined to require consulting agencies to
11 comply with NEPA when a separate federal agency takes the action. *See*
12 *Consolidated Salmonid Cases*, 688 F.Supp.2d 1013, 1025 (E.D.Cal.2010)
13 (“[I]t is the operation of the projects by Reclamation, not the issuance of the
14 BiOp that triggers NEPA.”); *San Luis & Delta-Mendota Water Auth. v.*
15 *Salazar (Delta Smelt)*, 686 F.Supp.2d 1026, 1044 (E.D.Cal.2009)
16 (Reclamation rather than FWS is the “appropriate lead agency under NEPA.”);
17 *Miccosukee Tribe of Indians of Fla. v. U.S.*, 430 F.Supp.2d 1328, 1335
18 (S.D.Fla.2006) (“[A]ny physical impacts on the environment result from
19 actions taken by the action agency (the Corps) in response to the ITS,” and, for
20 this reason, “the Corps” and not FWS “was required to . . . undertake its own
21 NEPA review.”); *City of Santa Clarita v. U.S. Dep’t of Interior*, No.
22 CV02-00697 DT (FMOx), 2006 WL 4743970, * 19 (C.D.Cal. Jan.30, 2006)
23 (FWS “is not the ‘action agency’ with regulatory jurisdiction to approve this
24 project,” but rather “BLM is the federal agency that approved the Project and
25 that approval is a ‘major federal action’ for NEPA purposes.”).

26 The Trust cites *Ramsey v. Kantor*, 96 F.3d 434, 437 (9th Cir.1996), in
27 support of its argument. In *Ramsey*, the [National Marine Fisheries Service
28 (“NMFS”)] issued an ITS that allowed taking of endangered salmon in the
Columbia River. The ITS did not concern the actions of another federal
agency, but was issued so the states of Oregon and Washington could
promulgate regulations governing fishing in the Columbia River. Because
Oregon and Washington were not federal agencies required to comply with
NEPA, and yet could not promulgate fishing regulations without the ITS, the
Ninth Circuit found that the ITS was “the functional equivalent to a permit”
and that the NMFS action of issuing the permit constituted a major federal
action triggering NEPA compliance. *Ramsey’s* holding has been construed
narrowly. *See, e.g., Sw. Ctr. for Biological Diversity v. Klasse*, No. CIV
S-97-1969 GEB JF, 1999 WL 34689321, * 11 (E.D.Cal. Apr.1, 1999)
(*Ramsey’s* holding “evinces that it did not intend to require the FWS to file
NEPA documents every time it issues an incidental take statement to a federal
agency”). As courts have noted, there was “no action agency in [*Ramsey*] that
was responsible for NEPA compliance.” *Miccosukee*, 430 F.Supp.2d at 1335.
NMFS was the only federal agency involved. When another federal agency
will take the action authorized by the ITS, courts interpreting *Ramsey* have
held that the action agency, not FWS or NMFS, must comply with NEPA. *See*
Consolidated Salmonid Cases, 688 F.Supp.2d at 1022; *Delta Smelt*, 686
F.Supp.2d at 1044; *Miccosukee*, 430 F.Supp.2d at 1335; *City of Santa Clarita*,
2006 WL 4743970 at * 19. . . .

1 The Court concludes that FWS was not required to conduct a NEPA
2 analysis when it issued the 2009 ITS. FWS is entitled to summary judgment
3 on Claim 10.

4 *Trust III*, 2010 WL 2643537, at *25-26. For the same reasons, FWS is entitled to summary
5 judgment on Claim 13.

6 The Trust argues that the EA performed by Reclamation for the 2008 Experimental
7 Plan did not address the action authorized by the 2010 ITS and therefore cannot satisfy
8 NEPA's requirement. The Court is not convinced this is correct. The EA did address a
9 consultation that would apply if the chub population significantly declined in any single year
10 or reached a population estimate of 3,500. Doc. 136-1 at 19. The 2010 ITS sets a higher
11 trigger of 6,000. Doc. 255-1. But even if the Trust is correct in arguing that Reclamation's
12 EA did not address the 2010 ITS, Claim 13 is not brought against Reclamation, the agency
13 that will implement the action authorized by the 2010 ITS. As the cases cited above hold,
14 the action agency, not FWS, bears the burden of NEPA compliance.

14 **VI. Claim 3.**

15 Claim 3 alleges that Dam operations under the MLFF regime constitute an illegal take
16 of the chub in violation of the ESA. Doc. 264 at 24. Given that the 2010 ITS is valid under
17 the ESA, NEPA, and the APA, Reclamation is not unlawfully taking chub as prohibited by
18 the ESA. *See* 16 U.S.C. §§ 1536(o)(2), 1538(a)(1)(B), 1539(a)(1)(B).

19 The Trust argues that even if the 2010 ITS is deemed valid, it does not cover take that
20 will occur as a result of the cancelled 2010 mechanical trout removal. Doc. 267 at 14-16.
21 As noted above, however, FWS has issued a 2010 Biological Opinion and ITS that
22 specifically address the cancellation. Doc. 274-1. The Trust does not challenge the validity
23 of these documents. Given this separate ITS, Reclamation is not unlawfully taking the chub
24 by virtue of the 2010 cancellation of mechanical trout removal. *See* 16 U.S.C. §§ 1536(o)(2),
25 1538(a)(1)(B), 1539(a)(1)(B).

26 The Trust also argues that larval chub are washed from the LCR into the mainstem
27 from April through June, the larval chub succumb in the cold water of the mainstem, the
28 2010 ITS fails to cover this take of larval chub, and Reclamation therefore is violating the

1 ESA by this form of take. Doc. 267 at 16. But the 2010 ITS does address this form of take.
2 See Doc. 255-1 at 5 (“Mass movement of larval and juvenile humpback chub out of the LCR
3 occurs during the summer, especially during monsoon storms in late summer. . . . Cold water
4 by itself . . . likely results in mortality of eggs and larval fish.”). The 2010 ITS concludes,
5 nonetheless, that “the number of adults is a suitable surrogate for measuring the incidental
6 take of young chub.” *Id.* Because this form of take is specifically addressed in the ITS and
7 covered by the take surrogate, it does not result in a violation of the ESA. See 16 U.S.C.
8 §§ 1536(o)(2), 1538(a)(1)(B), 1539(a)(1)(B).

9 **IT IS ORDERED.**

- 10 1. The Trust’s motion to vacate (Doc. 265) is **denied**.
11 2. The Trust’s motion for summary judgment (Doc. 266) is **denied**.
12 3. Summary judgment is **granted** to Defendants on Claims 3, 12, and 13.
13 4. This ruling resolves all outstanding claims in this case. The Court’s decisions
14 in *Trust I, II, III* and this order are deemed final judgments for purposes of
15 appeal. The Clerk is directed to terminate this action.

16 DATED this 29th day of March, 2011.

17
18 

19
20 _____
21 David G. Campbell
22 United States District Judge
23
24
25
26
27
28