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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*

Defendants.

Civil No. 01-640-RE

**REPLY IN SUPPORT OF
FEDERAL DEFENDANTS'
CROSS MOTION FOR
SUMMARY JUDGMENT AND
OPPOSITION TO PLAINTIFFS'
AND INTERVENOR-
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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ABBREVIATIONS

APA = Administrative Procedure Act

BA = Biological Assessment

BiOp = Biological Opinion

BMP = Best Management Practice

BOR = Bureau of Reclamation

BPA = Bonneville Power Administration

BRT = Biological Review Team

CA = Comprehensive Analysis

COMPASS = Comprehensive Fish Passage

COP = Configuration and Operation Plan

CRITFC = Columbia River Inter-Tribal Fish Commission

CWA = Clean Water Act

DPS = Distinct Population Segment

ESA = Endangered Species Act

ESU = Evolutionarily Significant Unit

FCRPS = Federal Columbia River Power System

FWS = U.S. Fish & Wildlife Service

HGMP = Hatchery and Genetic Management Plans

HSRG = Hatchery Scientific Review Group

ICTRT = Interior Columbia River Basin Technical Recovery Team

ISAB = Independent Scientific Advisory Board

ISRP = Independent Science Review Panel

IT = Implementation Team

ITS = Incidental Take Statement

LCREP = Lower Columbia River Estuary Partnership

MOA = Memorandum of Agreement

MPG = Major Population Group

NOAA = National Oceanic and Atmospheric Administration

PIT = Passive Integrator Transponder

PCE = Primary Constituent Elements

PWG = Policy Work Group

QET = Quasi-Extinction Risk

RIOG = Regional Implementation Oversight Group

RME = Research, Monitoring and Evaluation

ROD = Record of Decision

RPA = Reasonable and Prudent Alternative

R/S = Recruit-per-Spawner

RSW = Removable Spillway Weir

SCA = Supplemental Comprehensive Analysis

SR = Snake River

SRKW = Southern Resident killer whale

SRWG = Studies Review Work Group

TRT = Technical Recovery Team

TSW = Prototype Temporary or Top Spill Weir

UCR = Upper Columbia River

INTRODUCTION

With hundreds of pages of legal arguments, technical declarations, and a hydrosystem so complex that no one person can truly understand all of its intricacies, it is easy to lose track of why we are here. We are here because the region has been embroiled in a lengthy and bitter fight over how to run the Federal Columbia River Power System (“FCRPS”). However, for the first time ever, most of the sovereigns in this region (Federal, State, and Tribal) stand before this Court with a collective desire to put their differences aside and turn our energies to salmon and steelhead. We urge the Court to take this opportunity and allow the Biological Opinion (“BiOp”) and the collaborative process to work for the next ten years.

All of the parties agree that juvenile and adult salmon and steelhead (“salmon”) face a number of different adverse effects during their migrations. Be it recreational fishing or power generation, these actions and many others take their toll. But the last two decades have been marked with significant improvements in developing mitigation for these adverse effects, and, as explained previously, these actions are starting to bear fruit. The National Wildlife Federation (“NWF”) and the Nez Perce Tribe do not meaningfully dispute that there have been significant improvements. Oregon takes this one step further by honestly acknowledging that “[a]s of October 29 this year, 16,420 adult Snake River fall Chinook had passed Lower Granite Dam, more than ten times the seasonal average for the preceding ten years and a record since dam counts began.” See Or. Mem. Supp. Mot. for Inj. Relief at 16 (Doc. No. 1624). By highlighting the recent returns, Federal Defendants do not suggest that they can rest on these accomplishments; rather we note these returns to demonstrate that mitigation among all four “H’s” is proving effective.

The 2008 BiOp and Fish Accords build on this foundation. The number of actions and amount of funding will increase significantly over the next ten years. An increase from a foundation that already is contributing to record returns bodes well for the future. Plaintiffs seek to distract the Court from this conclusion by arguing that NOAA’s analysis is arbitrary for a variety of technical

reasons, none of which NOAA ignored, and all of which were discredited by the best available science. The fact is that we do not have a complete understanding of the lifecycle of salmon, and there is no one correct view of the science. The current state of knowledge does not provide a definitive, simple solution as to the specific actions necessary to meet the statutory requirements. This Court recognized the state of the science, and urged the parties to collaborate to seek better understanding of the various views that would lead to greater alignment. This approach has resulted in success with more agreement in the region today than has ever existed before. While consensus does not equal scientific validity, the obverse is also true. The outliers to consensus have been unable to convince the majority that their views represent the best available science. Those who have heeded the Court's urging to actively participate in a collaborative effort await the ruling of this Court in order to determine whether their efforts will be rewarded with the opportunity to focus on implementation activities for the next ten years and continue to rely on the collaborative process to resolve issues that will invariably arise as new information becomes available.

Despite the many arguments to the contrary, the reality is that with the Court's oversight, the 2008 BiOp has crossed the end line – it is fully consistent with the ESA, the best scientific information, and importantly, this Court's orders. Perhaps recognizing this, Plaintiffs do not credibly rebut the legal and scientific validity of the BiOp, but instead attempt to convince the Court to move the end line. Indeed, if Plaintiffs' response demonstrates anything, it is that their position is a constantly moving target. The examples are replete. Plaintiffs challenged the 2000 BiOp jeopardy analysis as arbitrary and illegal; today, they contend that NOAA erred in not using this same analysis. Plaintiffs previously contended (and the Ninth Circuit agreed) that the recovery prong of the jeopardy standard was whether there was an "adequate potential for recovery." Having used and met that standard in the 2008 BiOp, Plaintiffs now contend that this is insufficient. Plaintiffs previously complained that relying on modeling and agency actions decades into the future was too uncertain to legitimately support an ESA analysis. Now, they insist that the analysis must

model events decades into the future to meet their standard. And, Plaintiffs also previously complained that future actions without funding commitments could not be relied upon to reach a no jeopardy determination. Yet, now that the Action Agencies have entered into historic agreements committing to provide nearly one billion dollars to salmon mitigation and recovery, this too falls short under Plaintiffs' new conception of the ESA.

The bottom line is that Plaintiffs' challenge is designed to achieve one end – a jeopardy threshold that is impossible to attain without Snake River dam removal. Indeed, to its credit, NWF does not hide the fact that it seeks to legislate through litigation. NWF Reply at 2. This is the quintessential “unilateral approach.” In contrast, with the input of their biologists and staff, the United States, the States of Washington, Idaho, and Montana, as well as the Warm Springs, Yakama, Umatilla, Colville, Kootenai, Salish-Kootenai, and Shoshone Bannock Tribes have concluded that this BiOp is predicated on the best available science and that the methods, analysis, and findings reached therein are reasoned. While we agree with Oregon that consensus alone does not equate to a scientifically valid BiOp, these independent verifications among multiple sovereigns, which often have directly competing interests, cannot be ignored. This broad and diverse consensus on the scientific underpinnings and analysis of the BiOp confirms that the lengthy fight over how to operate FCRPS can end, and that the focus of the region may move back to where it belongs – on implementing actions for listed salmon and steelhead.

Finally, Plaintiffs suggest that the Fish Accords are not threatened by the current litigation. Unfortunately, these statements miss the point. Whether the funding obligations will continue if there is an adverse ruling, is an express condition that the respective parties negotiated amongst themselves, and the agreed-upon language in those documents speaks for itself. But as the Treaty Tribes rightly point out, this is not what the Fish Accords are about. The Fish Accords are about implementing actions for salmon. They are about mutual respect for the sovereigns' expertise. They are about cooperation. Further litigation threatens to unravel these partnerships and guiding

principles. Only one thing is definitive on this front – an adverse ruling will create uncertainty in a number of different forums, and this uncertainty will divert attention away from implementing actions for salmon. This would be truly unfortunate considering how far the region has come in the last three years and the collective desire to turn our attentions to salmon recovery. We respectfully request an opportunity to implement these actions and allow the BiOp and collaborative process to work for the next ten years.

ARGUMENT

It bears emphasis that Oregon and the Nez Perce Tribe affirmatively support NOAA’s analysis underlying the FCRPS BiOp, albeit in other forums. When squarely presented with this inconsistency, the Nez Perce Tribe remained silent, which itself speaks volumes. NPT Reply at 3 n.1. Oregon’s response, however, is far more troubling. Oregon does not dispute that it affirmatively supports the same analysis employed in the FCRPS BiOp in *United States v. Oregon*. Instead, it attempts to reconcile its inconsistent positions by asserting that “[e]ven if the analysis supporting that no-jeopardy conclusion is defective, Oregon has no occasion to take issue with the [harvest] opinion.” OR Reply at 3. But this is not what Oregon represented to Judge King.¹ Oregon cannot now assert – in this courtroom – that the same analysis in both the FCRPS and harvest BiOps is “defective.” OR Reply at 3. Oregon has taken a position before Judge King and must be held to that position, if, for nothing else, the stability of a ten-year Management Agreement

^{1/} Specifically, the joint motion and proposed order signed by Oregon (and the Nez Perce Tribe) very clearly stated that the Management Agreement “is fundamentally fair, adequate, and reasonable, both *procedurally and substantively*, in the public interest, and *consistent with applicable law*, and that it has been negotiated by the parties in *good faith*.” See *United States v. Oregon*, 68-CV-513-KI, All Parties’ Joint Motion and Stipulated Order Approving 2008-2017 *United States v. Oregon* Management Agreement at 6-7 (emphasis added) (Doc. No. 2546). Oregon knows that the law of the case requires a valid BiOp before the Management Agreement can be signed. See *United States v. Oregon*, 68-CV-513-KI, Sept. 3, 1998 Opinion and Order at 3. Moreover, these inconsistent positions were brought to Oregon’s attention prior to the joint motion and proposed order being submitted to Judge King. Nevertheless, Oregon decided to move forward, take a position on the harvest BiOp, and signed the joint motion and proposed order.

in *United States v. Oregon*. See *New Hampshire v. Maine*, 532 U.S. 742, 742-43 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

I. NOAA’S JEOPARDY ANALYSIS IS A REASONABLE INTERPRETATION OF THE ESA AND ITS IMPLEMENTING REGULATION.

There are only two relevant criteria in this jeopardy analysis. The statutory standard of whether the agency action is “likely to jeopardize the continued existence” of listed species, 16 U.S.C. § 1536(a)(2), and NOAA’s interpretation of that statutory language as reflected in the consultation regulation: “to reduce appreciably the likelihood of both the survival and recovery of a listed species”. 50 C.F.R. § 402.02. Everything else is an interpretation of the statutory and regulatory language.

The fundamental problem with Plaintiffs’ argument is that they seek to elevate their own interpretation, not NOAA’s, into law by asking the Court to find “regulatory components” embedded in the language of the regulation itself. NWF Reply at 5. They argue that the plain language of the regulation actually requires NOAA to calculate: (1) “population levels [that] would constitute a recovered ESU/DPS”; (2) “relevant time frame or range for reaching that benchmark”; and (3) “the level of population growth necessary to achieve recovery.” NWF Br. at 13. But none of these criteria, much less the words, appear in ESA § 7 or the regulation. Nor do any of the cases Plaintiffs cite provide that there must be a determination as to the “timeframe” for achieving specific “abundance levels.” Indeed, this three-pronged approach appears only in one place – the statutory provision for recovery planning. 16 U.S.C. § 1533(f)(1)(B)(iii) (“estimates of the *time* required . . . to achieve the plan’s *goal* [of recovery] and to achieve *intermediate steps* toward that goal.”)

(emphasis added).²

Plaintiffs' efforts to convince the Court that their criteria can be found under the guise of regulatory interpretation fails, as the Ninth Circuit has spoken directly to this issue. In *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008), the *en banc* Ninth Circuit overruled prior precedent and the underlying panel decision because previous courts – at the urging of plaintiffs – had grafted their own “regulatory components” into a statute and implementing regulation under the guise of regulatory interpretation without any supporting language. *Id.* (explaining that the prior courts had inserted an “on-site soil analysis” requirement into the statute and the regulations). While the notion of an “on-site soil analysis” is unquestionably relevant to the issue of a species viability and the effect of logging, no such requirement appeared in NFMA or the regulation. In the absence of specific language providing for such a requirement, the Ninth Circuit concluded that “we are not free to ‘impose on the agency [our] own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.” *Id.* at 993. The Ninth Circuit then reaffirmed and clearly instructed future courts that they may not “impose ‘procedural requirements [not] *explicitly enumerated* in the pertinent statutes.’” *Id.* at 993-94 (emphasis added) (citations omitted); *see also League of Wilderness Defenders v. Forest Service*, – F.3d –, CV-04-00982 at 16217-18 (9th Cir. Dec. 11, 2008) (recently confirming this instruction “to the extent that 40 C.F.R. § 1508.7 does not

² Plaintiffs attempt to distance themselves from this position by contending that Federal Defendants are disputing a “caricature” of their argument or have created a “strawman.” NWF Reply at 3; NPT Reply at 5. These contentions are belied by Plaintiffs' briefing. Plaintiffs' opening brief clearly outlined these three factors, which have an uncanny, if not identical, resemblance to recovery planning. In their replies, Plaintiffs continue to advance this position by maintaining that NOAA must provide a timeframe for achieving recovery. *See* NWF Reply at 7 (NOAA must “describ[e] recovery in some fashion and the time necessary to reach it.”). Of course, the “time necessary to reach it” is just a function of what occurs during that time, i.e., a population growth rate (or objective criteria for reaching that goal). Although the couching of Plaintiffs' standard may have changed on reply to avoid the obvious implication that they seek to import § 4 into § 7, their rephrased standard nonetheless still entails the three same recovery planning criteria, as reflected in ESA § 4(f). *See* NPT Reply at 9 (a proper recovery analysis includes “population abundance levels or recovery time-frames.”).

explicitly provide otherwise, the Forest Service is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the Forest Service what specific evidence to include, nor how specifically to present it.”).

The regulatory language at issue here, to “reduce appreciably the likelihood of both the survival and recovery,” does not require identification of population thresholds, population growth rates, or even a specific timeframe for achieving recovery. *Compare* 50 C.F.R. § 402.02, *with* NWF Br. at 13. These are all factors that Plaintiffs seek to graft into the regulatory language. Indeed, the only word held in common between Plaintiffs’ urged regulatory components and 50 C.F.R. § 402.02 is “recovery”, which does not even appear in 16 U.S.C. § 1536(a)(2). The regulation does not demand this three-pronged inquiry, nor does NOAA share this interpretation. More fundamentally, whether Plaintiffs agree with NOAA’s interpretation is beside the point. NOAA has set forth a reasonable interpretation of both the statute and regulation – after undergoing public comment – and even if other interpretations were plausible, NOAA’s interpretation must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (citations omitted). NOAA’s interpretation easily passes this test and accordingly must be upheld. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007) (regulation interpreting ESA § 7, promulgated after notice and comment, entitled to *Chevron* deference).

A. Plaintiffs Again Misrepresent the Jeopardy Analysis By Seizing on Isolated Quantitative Recovery Metrics.

Plaintiffs focus their entire argument on three quantitative metrics that were used within the recovery prong of the jeopardy analysis to demonstrate a trend with certain populations. Based on these selected metrics, they continue to characterize NOAA’s position as one where if an agency action merely “makes things better than yesterday” or adds “one more fish” to the population, NOAA’s jeopardy standard has been met. NWF Reply at 6 n.7; OR Reply at 10. This

mischaracterizes both the jeopardy analysis and the recovery inquiry.³

NOAA did not state that a “trend” alone was sufficient to avoid jeopardy. Instead, the BiOp very clearly provided that the jeopardy standard would be met if:

the species can be expected to *survive* with an *adequate potential for recovery* (e.g. trending towards recovery) under the effects of the action, the effects of the environmental baseline, and any cumulative effects . . .

BiOp at 1-10 (emphasis added). This standard has two distinct, yet joint, considerations. Under NOAA’s interpretation, an action is not likely to jeopardize the listed species if: (1) there is high probability of survival (extinction risk); and (2) whether there is an adequate potential for recovery informed by an analysis of multiple factors (both qualitative and quantitative). *Id.* at 7-11.⁴

NOAA’s recovery analysis is based on whether the action would allow for an “adequate potential for recovery.” BiOp at 1-10. This was the inquiry that was cited with approval by Judge Marsh in *American Rivers v. NMFS*, 1997 WL 33797790, at *6 (D. Or. 1997) (“The ... BiOp

³ Plaintiffs continue to insist that Federal Defendants “abandoned” the conceptual framework, and instituted a “unilateral” jeopardy analysis. NWF Reply at 54. A “unilateral” position is marked by only one sovereign’s point of view, which clearly is not the case here. *See e.g.*, NOAA C1148 (Treaty Tribes Supplemental Comments) (“But as we have said in other processes, this advice and information [TRT products] is not a requirement for avoidance of jeopardy and may not, in all cases and on all matters, be what the Tribes believe is the best available science. Likewise the 10-step framework analysis developed in collaboration with the PWG and considered by the Action Agencies’ throughout that process is informative, but it does not supplant the ESA’s implementing regulations nor does it constitute in all cases the best available science.”). Further, Plaintiffs completely fail to address the fact that this Conceptual Framework information was completed by the Action Agencies in the CA, and was considered by NOAA in the BiOp. *See e.g.*, CA at 5-24; *see also* BiOp at 7-27. The fact that the tenth step of the Conceptual Framework expressly stated that NOAA would conduct its independent jeopardy analysis belies any argument that the Conceptual Framework itself was supposed to be NOAA’s jeopardy standard. *See* Fed. Br. at 6-7.

⁴ NWF spends a considerable amount of time arguing that NOAA’s inquiry must be forward looking. NWF Reply at 7. This argument is bizarre considering that is exactly what the BiOp does. As NOAA explained, “[this inquiry] calls for a forward looking evaluation of the listed species and critical habitat once the action is implemented and thus added to the ongoing and future effects of the environmental baseline and activities with cumulative effects. It looks at the aggregate of all such effects going forward . . .” BiOp at 1-12. NOAA’s analysis evaluates the effect of the RPA (“current to prospective”) with environmental baseline and cumulative effects and predicts how this will affect salmon for the next ten years. BiOp at 7-11.

focuses upon interim measures designed to ensure survival and *potential* for recovery.”) (emphasis in the original), and the Ninth Circuit in *NWF v. NMFS*, 524 F.3d 917, 933 (9th Cir. 2008). NOAA found that there was an adequate potential for recovery when an ESU demonstrated an upward trajectory, in addition to other factors. Clearly, whether there is an upward trend is a relevant factor in determining whether there is an adequate potential for recovery, but that is not the only consideration. Plaintiffs mistake these factual findings (trend) for the nature of the inquiry (adequate potential). The myopic obsession with the word “trend” reflects only one discrete part of this analysis.

This error manifests in their treatment of how the recovery analysis was done. NOAA considered much more than these three quantitative metrics to make its determination. BiOp at 7-35 to 7-37. NOAA examined a number of qualitative factors to inform its recovery analysis, such as the Viable Salmonid Population (“VSP”) characteristics of abundance, productivity, spatial structure and diversity. BiOp at 7-35 (“The qualitative factors relevant to evaluation of the potential for recovery prong of the jeopardy standard are the VSP factors: abundance, productivity, spatial structure and diversity.”). It evaluated spatial structure, which includes “consideration of the number and spatial arrangement of major spawning areas (MaSA) and minor spawning areas (MiSA), the proportion of the historical range that is occupied, and increases or decreases in gaps between MASAs.”). BiOp at 7-37. And the evaluation of diversity includes consideration of “retention of major life history expressions (e.g., summer vs. spring runs), maintenance of phenotypic and genetic variability, maintenance of natural patterns of gene flow (including various criteria for assessing impacts of hatchery programs, and reduction of selective changes resulting from human activities (e.g. large fish selection in fisheries).”). Based on these and other qualitative considerations, as well as the quantitative metrics, NOAA was able to provide a “reasonable assurance” that there is an “adequate potential for recovery.”

More broadly, as explained in the BiOp, the temporal component of the jeopardy analysis

is conducted through the survival inquiry. BiOp at 7-4 to 7-11 (explaining current to prospective and survival gaps); Fed. Br. at 42. For example, NOAA determined that each ESU would have less than a 5% chance of going extinct over the next 24 years. BiOp at 7-8 to 7-11. This means, as a result of the RPA, each ESU is likely to exceed a level where there is no longer a significant biological risk of extinction. *See e.g.*, BiOp at 8.2-29 to 30 (“the combination of factors above indicates that the SR fall Chinook ESU is likely to have a low short term extinction risk . . .”). But the analysis did not stop there. After finding that each ESU will survive, NOAA then turned to the issue of whether action would allow for an adequate potential for recovery. *Id.* at 8.2-26 to 29, 31-32. As part of this consideration, NOAA applied various metrics, as described above, and examined the effect of the action on the populations, and then rolled these considerations up to the ESU level. *Id.*

It is the dual or joint consideration of survival *and* recovery that Plaintiffs miss. *See* BiOp at 7-5 (“While each metric primarily informs one of the two prongs of the jeopardy standard, each metric contributes to both prongs.”); *NWF v. NMFS*, 524 F.3d at 932 (“the agency had consistently interpreted 50 C.F.R. § 402.02 as requiring a joint analysis of both survival and recovery impacts.”). By evaluating both extinction risk and whether the ESU is growing in size, NOAA is able to determine: (1) the point of risk for the ESU; (2) whether the action (as projected out into the future) will exceed that point of risk; and (3) whether the action will impair an ESU’s prospects for recovery.⁵ The consideration of survival dovetails with consideration of recovery, thereby ensuring

⁵ As *amicus*, the Nez Perce Tribe suggests that NOAA’s consideration of survival subsumes the recovery inquiry because the Consultation Handbook’s definition of survival “includes ‘the potential for recovery’” NPT Reply at 8. Notably, this argument directly contradicts NWF’s and Oregon’s previous positions. *See e.g.*, Ninth Cir. Or. 2005 PI Br. at 25 (Fed. Defs.’ MSJ Ex. 1) (“Ultimately, *impairment* of the *potential* for recovery must be considered when evaluating jeopardy, just as impairment of the potential for recovery must be considered when evaluating degradation of critical habitat.”) (emphasis added); NWF Reply at 9 (“As this guidance highlights, assessing whether an action will ‘appreciably delay’ recovery is relevant to a jeopardy analysis.”). In any event, the Nez Perce’s argument fails to acknowledge that these are joint inquiries, and the Consultation Handbook reflects the nature of this joint consideration.

that a species does not linger at too low of an abundance level that would impair its prospects for recovery.⁶ By evaluating two separate, yet interrelated concepts, NOAA can say with confidence that this action is not likely to jeopardize the continued existence of the respective ESU. This is the “*reasonable assurance* that the agency action in question will not appreciably reduce the odds of success for *future recovery planning*, by tipping a listed species too far into danger.” *NWF v. NMFS*, 524 F.3d at 936 (emphasis added).

This dual or joint inquiry also addresses the court’s concerns in *ALCOA v. BPA*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999). The court in *ALCOA* was concerned that a showing of incremental improvement irrespective of the projected extinction risk was insufficient. *Id.* at 1162 n.6 (“NMFS correctly viewed incremental improvements as insufficient to avoid jeopardy in light of the already vulnerable status of the listed species.”). This is precisely why NOAA performed an in-depth extinction risk analysis and required the Action Agencies to provide mitigation sufficient to avoid such risk. The mitigation not only ensures that the pre-action condition will be improved, but it will be improved *to such an extent* that the species is no longer in danger of extinction *and* its prospects

⁶ On a more technical level, Plaintiffs’ theories are not supported by the best available science. *NWF Reply* at 6 n.6. They argue that if a population lingers at a specific abundance size for too long a period of time, that period of time and size creates a risk to the population, like a genetic bottleneck, and thereby precludes recovery at some point in the future. Thus, according to Plaintiffs, it is necessary to assign a specific timeframe to the recovery analysis to avoid such a risk. *Id.* As explained in the Declaration of Dr. Chris Toole, there is currently no data or studies that suggest there is a specific maximum time period beyond which recovery would be precluded for salmon. Toole Dec. ¶¶ 20-21 (“it is difficult to generalize regarding what constitutes such a bottleneck and whether this would impair the ultimate ability of a population or species to recover. Perhaps in part due to these difficulties, there is no analysis or recommendations in the ICTRT viability paper (ICTRT 2007a AR B.194) regarding a maximum time period, beyond which reduced genetic diversity or any other factor would preclude recovery.”). Indeed, when confronted with this reality, Mr. Bowles ignores this altogether, except for correcting his earlier errors that ICTRT abundance thresholds represents a point of risk. *Bowles R. Dec.* ¶ 30. In short, Dr. Toole put it best by explaining that, “while it is of course important to achieve recovery as quickly as possible, the best scientific information available to NMFS did not indicate that there is a specific time period beyond which recovery of Columbia basin salmon and steelhead will be precluded because of loss of genetic variation or other factors.” Toole Dec. ¶ 21.

for recovery will not be impaired.⁷ This analysis is much more sophisticated than “one more fish than yesterday.”

What Plaintiffs fail to grasp is that NOAA can fully evaluate whether there is an adequate potential for recovery without actually knowing when recovery will occur. This is the import of the court’s holding in *Arizona Cattle Growers Ass’n v. Kempthorne*, 534 F. Supp. 2d 1013 (D. Ariz. 2008). The litigants there argued that the U.S. Fish and Wildlife Service (“FWS”) could not determine the Primary Constituent Elements (“PCEs”) of critical habitat without first calculating a recovered status because it was “impossible to know what features are essential to Owl conservation without first identifying at what point that ultimate goal [recovery] will be attained.” *Id.* at 1025. *Id.* However, the court was not persuaded and found that FWS could analyze the factors for recovery – designation of PCEs – without having a clear picture of the habitat necessary for a recovered species. *Id.* at 1026. This conclusion is confirmed by the structure of the statute because ESA § 4(f) demonstrates that Congress was aware it could direct FWS to describe the desired status of recovery, but it purposely chose not to import this requirement into the statutory provisions for designating critical habitat. *Id.* (citing 16 U.S.C. § 1533(f)).

The situation here is no different. Just as FWS evaluated the PCEs for the owl without knowing the amount of habitat that would be needed for a recovered population, nothing precludes NOAA from evaluating whether the likelihood of achieving the factors necessary for recovery are appreciably reduced without actually calculating the timeframes necessary to reach a certain threshold of abundance that would constitute recovery. *See* Toole Dec. ¶ 24 (“Just from a logical

⁷ NWF seems to take issue with the language “impair[s] the potential for recovery” and “deterioration of the pre-action condition,” terming these statements as a “fundamental misreading[s] of the jeopardy regulation.” NWF Reply at 6,7 (citing Fed. Defs.’ Br. at 30 n.21). However, the words “deterioration in the pre-action condition” are the Ninth Circuit’s description of the nature of a jeopardy inquiry, *NWF v. NMFS*, 524 F.3d at 930 (“Agency action can only ‘jeopardize’ a species’ existence if that agency action causes some deterioration in the species’ pre-action condition.”), and the language “impair the potential” is Oregon’s, which was explicitly adopted by NWF. *See* Fed. Br. at 20 (Exhibit 1 and 2).

standpoint, one can determine *whether* a condition can be attained independently from calculating *when* that condition will be attained.”). For example, NOAA can evaluate spatial structure and future productivity, and make a determination as to the probability of these factors being impaired or delayed without knowing when a particular population will achieve a certain abundance level. There is nothing impermissible, or even unusual, with NOAA analyzing recovery with factors like productivity instead of calculating how long it will take a population to reach a certain abundance level. *See Humane Society v. Gutierrez*, 08-CV-357-MO, *slip opinion* at p. 9 (D. Or. Nov. 25, 2008) (affording NOAA’s interpretation of the Marine Mammal Protection Act (“MMPA”) *Chevron* deference where NOAA “used ‘productivity’ as a proxy for ‘decline or recovery.’”) (Fed. Defs. Ex. 3); *see also id.* (“NMFS thus interpreted ‘significant negative impact on the decline or recovery of salmonid fishery stocks’ to mean a measurable negative impact on productivity that is comparable to other impacts that required corrective action under the ESA.”). Indeed, the ICTRT’s entire analysis does just that – it evaluates these factors, but it does so without specifying a timeframe. *See Toole Dec.* ¶ 25 (discussing the ICTRT delisting criteria in the Final Recovery Plan for UCR Spring Chinook and Steelhead which did not specify a timeframe for recovery). ESA § 7(a)(2) does not require the inquiry Plaintiffs demand.⁸

⁸ Plaintiffs’ efforts to distinguish *Salmon Spawning Alliance & Recovery v. Lohn*, No. C06-1462RSL, 2008 WL 782851 (W.D. Wash. Mar. 20, 2008) (appeal pending), border on anemic. Notwithstanding NWF’s characterization that this was merely “based on a unique set of regulations related to fish harvest”, this case squarely dealt with NOAA’s interpretation of 50 C.F.R. § 402.02 and, in particular, the recovery prong of a jeopardy analysis. *See id.* at *12 (“Plaintiffs contend that NMFS’s no-jeopardy determination in the BiOp is contrary to law ‘because it does not address the prospects for recovery of the listed salmon, expressly and impermissibly omitting that goal from its analysis.’”). NOAA did not provide any timeframe for recovery in its jeopardy analysis, but rather only analyzed the impacts to recovery through harvest exploitation rates. *Id.* at *13 (“NMFS analyzed recovery risks by utilizing rebuilding exploitation rates.”). To the extent NWF suggests that the “modest interim goals in its jeopardy analysis” are a subset of recovery goals or TRT products, that assertion is false. NWF Reply at 10 n.11. The thresholds used in the Risk Assessment Process (“RAP”) were decidedly not recovery goals, subset thereof, or TRT products – indeed, that was the reason for the plaintiffs’ challenge. *Id.* at *6-7. It is telling that the one case that has squarely dealt with NOAA’s interpretation of “recovery” in a jeopardy analysis is ignored by

B. NOAA Provided a Reasoned Explanation As To Why It Did Not Use The 2000 BiOp Jeopardy Analysis.

In Plaintiffs' opening briefs, they argued that NOAA failed to provide any explanation as to why it did not use the 2000 jeopardy analysis. *See e.g.*, NWF Br. at 18 ("NOAA has not provided a single legal or other rational basis . . ."). On reply, Plaintiffs concede their opening position was wrong, and acknowledge that NOAA provided an explanation, but now disagree with NOAA's reasoning. NWF Reply at 12. The crux of Plaintiffs' argument is that the Court's opinion concerning the 2000 BiOp did not foreclose NOAA from making assumptions about future actions that would occur during the next 48 to 100 years, as was done in the 2000 BiOp. *Id.*

It is revealing that Plaintiffs, and NWF in particular, urge a return to the 2000 jeopardy analysis when not so long ago they argued that this analysis was deficient. *See* NWF Reply at 3 ("The 2000 BiOp clearly articulated a jeopardy framework based on the question the jeopardy regulation asks."), *but see* NWF Br. at 15 n.9 ("NWF challenged this 50% probability metric for allowing much more than an appreciable reduction in a species' likelihood of recovery but the Court did not reach the issue."). What is even more remarkable is that NWF simultaneously argues that NOAA should have assumed that certain actions would occur 48 to 100 years from now, but then a mere two pages later argue that NOAA's analysis is deficient for allegedly relying on future actions that are not reasonably certain to occur. *See e.g.*, NWF Reply at 15. This feigned indignation at the fact that NOAA did not wholeheartedly subscribe to the very analysis NWF previously challenged and that was ultimately struck down is not compelling.

Plaintiffs premise their new position on a revisionist interpretation of prior proceedings. NWF asserts that "the Court did not fault the agency's assessment . . .of population projections over 48 or 100 years to evaluate jeopardy." NWF Reply at 13. In truth, and as NWF recognizes in its

Oregon and the Nez Perce, and labeled as "even less relevant" by NWF.

opening brief, the Court did not reach this issue even though NWF asserted that NOAA's analysis was wrong. NWF Br. at 15 n.9. More importantly, the population projections that occurred in the 2000 jeopardy analysis relied on assumed actions that would occur in the future, like the Mid-Columbia Habitat Conservation Plans ("Mid-C HCPs"). Fed. Br. at 37-38; *see also NWF v. NMFS*, 254 F. Supp. 2d 1196, 1208 (D. Or. 2003). It was these assumptions about particular future actions that aided NOAA in making reliable population projections out to 48 or 100 years. The assumed future actions (in addition to those in the RPA) reduced the uncertainty and bolstered the ESU conclusions. It was the assumption of actions, which in turn reduced uncertainty, that made the jeopardy analysis meaningful. However, the assumption of future actions was also the reason this Court struck down that BiOp. *Id.* at 1207-09, 1215 (listing the various actions and finding improper reliance). During this remand, NOAA reasonably concluded that assuming future actions out to 48 or 100 years to make the analysis more statistically meaningful would also run afoul of this Court's previous instruction. NOAA C1155. It is hard to conceive of a more reasonable position than deciding not to return to a standard that generated multiple legal challenges – from these very Plaintiffs – and that was struck down by this Court.

NWF also attempts to draw a parallel between NOAA's 24 year survival inquiry and the 2000 BiOp's 48 and 100 year recovery inquiry. NWF Reply at 13-14. This argument highlights the depth of NWF's misunderstanding between survival and recovery, and how both inquiries were conducted.⁹ As explained in the BiOp, the survival analysis only assumed current conditions (with pessimistic climate assumptions) and the effects of the RPA to make a judgment about the next 24

⁹ The survival inquiry (or extinction risk analysis) in the 2008 BiOp asks a fundamentally different question than the 2000 BiOp recovery analysis. In brief, an extinction risk analysis asks whether an ESU will fall below a certain abundance threshold thereby endangering that ESU; in contrast, the recovery analysis in the 2000 BiOp asked whether an ESU would achieve the desired status (recovery abundance) in the future. *Compare* BiOp at 7-14, *with* BiOp at 7-20 to 21. The proverbial "line" in each inquiry is different. Indeed, if Plaintiffs' overly-simplistic comparison was followed to its logical end, that would mean each of the ESUs are viable for the next 24 years.

years. BiOp at 7-17 to 7-18 (“A conservative approach assumes that extinction risk will not be influenced by any improvements associated with the Prospective Actions. . . A more optimistic assumption is that all Prospective Actions and all effects of those actions expected to occur within the next 10 years will affect short-term risk of extinction.”). It does *not* assume future actions beyond those in the RPA. *Id.* The survival analysis only relies on current conditions and the effects of the RPA, at best, and assumes the base period will continue into the future. It does not assume new conditions will occur during the course of those 24 years. *But see* NWF Reply at 13-14. In contrast, the 2000 jeopardy analysis assumed that many different actions would occur within the 48 or 100 year timeframe, like the Mid-C HCPs, which had not undergone consultation. 2000 BiOp at 1-12. That was the reason the Court invalidated that approach.

Moreover, NOAA also found, and explained, that future projections become increasingly more unreliable the further one goes out into the future, i.e., the uncertainty of the estimates increases with time. *See* BiOP at 7-18 (explaining that the “precision of risk decreases with longer time horizons.”). That is precisely why NOAA chose to use a 24-year timeframe with the survival analysis, rather than 48 or 100 years. *Id.* Plaintiffs’ assertions that NOAA’s analysis creates too much uncertainty, while at the same time urging a standard and modeling that would create even more uncertainty, is not compelling. The survival inquiry does not assume future actions beyond the RPA and limits the amount of uncertainty in the estimate. NOAA’s decision not to return to the 2000 standard was explained and is reasonable.

II. 2009 FCRPS OPERATIONS REFLECT THE BEST AVAILABLE SCIENCE.

Federal Defendants will provide the Court with detailed explanations as to the effect of 2009 FCRPS Operations on February 13, 2009, but Plaintiffs’ misrepresentations in their summary judgment briefs and declarations cannot be left unaddressed. *See e.g.*, OR Reply at 3. The issue of hydro operations was probably the most significant and difficult issue the sovereigns encountered during the collaboration. Great care was given to all of the underlying hydro issues during the

Technical Workgroup meetings, within the Policy Work Group (“PWG”), and even within the Fish Accords negotiations. Even so, NOAA looked outside the collaboration to the ISAB on operational issues like spill and flow. The FCRPS 2009 Operations reflect this input and are based on the best available science.

Plaintiffs’ contention that Federal Defendants have ignored the recent ISAB report on transportation and spill is disingenuous. *See id.*; *see also* Bowles R. Dec. ¶¶ 48-67. The sovereigns have met twice within the Regional Implementation and Oversight Group (“RIOG”) and discussed this report at length. Based on these discussions, the Action Agencies have decided to modify operations and follow the ISAB’s recommendation so that there is no curtailment of spill in mid-May.¹⁰ *See* Peters R. Dec. ¶¶ 3-10; Graves R. Decl. ¶¶ 3-6. Operations will continue to provide the same amount of spill at each project throughout all of May. *Id.* This is a nearly identical spring operation as to the one that occurred in 2008, with minor modifications to account for new data, structural improvements, and new research projects.¹¹ *Id.* Plaintiffs’ assertions that there will be less spring spill as a result of transport is simply not true. More broadly, we find it wholly

¹⁰ This decision represents NOAA’s and the Action Agencies’ willingness to modify operations through the BiOp’s adaptive management process and was arrived at with significant input from the other sovereigns within the RIOG. As reflected by the difference in opinion in the RIOG, this decision does not come without impacts. Modeling shows that maintaining spill operations in mid-May will significantly affect SR Steelhead, and in particular B-Run Steelhead. Although there are a number of considerations, this modification may impact B-Run Steelhead to such an extent that it may affect treaty and non-treaty harvest. As a result, Federal Defendants have decided to limit this modification to only one year so that new data may be collected to determine the full extent of these effects.

¹¹ Oregon also appears to take issue with the summer spill operations as well. As explained previously, summer spill is now contingent on how many fish are migrating in the river. Fed. Br. at 25. This was an explicit term that the Treaty Tribes negotiated in the Fish Accord. *See* Corps 00372 at 005356. Moreover, under this 300 fish trigger, using last year as an example, spill would have continued until August 30, 2008 (one day shy of actual 2008 operations). Peters Dec. ¶ 23. Finally, the Plaintiffs completely ignore the critical point – the biological effect of summer spill. The current data on SR fall Chinook, the relatively high returns, and the unique life history of rearing during the winter in freshwater rather than migrating as sub-yearling, all counsel in favor of the 300 fish trigger. *See* Graves Dec. ¶¶ 52-59

inconsistent for Oregon, in particular, to purport to rely on ISAB reports, but then urge a completely different spill regime from that recommended by the ISAB (2008-5) in their preliminary injunction motion, and also stubbornly refuse to acknowledge the ISAB's reports on COMPASS and latent mortality. Issue Summaries at 23 (April 6, 2007 ISAB Review of Latent Mortality); *id.* (June 2, 2008 ISAB Review of COMPASS). It seems Oregon is content to pick and choose isolated phrases from an ISAB report when those phrases happen to coincide with their particular philosophical vision of the hydrosystem, but ignore entire reports when they do not. Compare ISAB 2008-5 at 3 ("Spill-transport operations like those of 2006 and 2007 should be continued . . ."), with Or. Mot Inj. Relief, Attachment A (seeking 24/7 gas-cap spill).

Plaintiffs also take issue with flow operations. See Bowles R. Dec. ¶¶ 38-47. While almost entirely incorrect in their factual assertions, here again Plaintiffs ignore the region's findings as well as multiple ISAB reports. Their primary contention is that there is a reduction in the volume of flow as a result of "the Montana operation." This assertion first ignores that there have been no flow reductions "at all" during spring, the primary migration period. Graves Dec. ¶ 13. Second, the ISAB already addressed the Montana operation. Issue Summaries at 10 (November 9, 2004, ISAB Review of Mainstem Amendments at 2-3) (determining that the effect would be "small" and that the "hypothesis that the effects on survival of salmonids in the lower Columbia River will be indiscernible is probably reasonable."). The release of this water out of Libby and Hungry Horse dams comes at an expense to the resident species in those areas, some of which are listed under the ESA. Issue Summaries at 9-11. As they did in the collaboration, Plaintiffs still fail to provide a cogent reason for scarifying the needs of resident species when there is no measurable biological benefit to releasing additional water from Libby and Hungry Horse dams. It makes no sense to send more water for SR fall Chinook (which have had record returns), especially when that water will have no measurable benefit to the ESU, but will work to the detriment of other listed species. This stark reality is perhaps one of the reasons why Trout Unlimited (a member of NWF's coalition)

refused to join in the request for injunctive relief on flow. *See* Or. Mot Inj. Relief at 3 n.1.

As to the Upper Snake, Plaintiffs also fail to calculate that water will likely be shifted from summer to spring flow augmentation so that this colder water will produce a maximum benefit for migrating salmon. *See e.g.*, BiOp at 8.2-20. Finally, underlying all of this is a fundamental difference of opinion as to whether there is a biological benefit from increasing water particle travel time over a certain volume. This issue was thoroughly discussed in the collaboration and the sovereigns found that no new science has emerged on this topic since the last time the Court examined this issue. *See* Opinion and Order, December 29, 2005, at 16. More specifically, the science no longer supports the paradigm upon which Plaintiffs rest their entire flow request. *Id.* (“The prevailing flow-augmentation paradigm, which asserts that in-river smolt survival will be proportionally enhanced by any amount of added water, is no longer supportable.”) (quoting ISAB’s *Review of Flow Augmentation: Update and Clarification*). Federal Defendants will provide more detailed responses to the Plaintiffs’ request for injunctive relief, but Plaintiffs’ assertions, which all appear designed to cast doubt on the biological integrity of the BiOp, fail to provide the Court with the entire picture of how these operations were arrived at among the sovereigns and their true biological effect.¹²

III. THE ACTIONS IN THE 2008 FCRPS BIOP ARE REASONABLY CERTAIN TO OCCUR.

A. The Action Agencies’ Decision to Condition Hatchery Funding Will Have an Effect.

¹² On November 20, 2008, the Spokane Tribe filed an amicus brief supporting some of the Plaintiffs’ legal positions. Doc. 1611 While we disagree with the Spokane’s assessment of the BiOp for the reasons set forth in our briefing, we acknowledge the Tribe’s interest in Grand Coulee and the impacts any significant draw-down will have on cultural resources. These considerations were analyzed extensively and taken into considerations in the decision documents. *See* BiOp at RPA Table p. 6 (RPA 4) (draft limits for Grand Coulee and recognition of the CRWMP); *see also* FCRPS BA at B.2.1-19 to 20 (dry year water studies); B.I-1-10 (protection of cultural resources); B.1-4-10 (resident fish).

Federal Defendants' opening brief explained that Plaintiffs failed to acknowledge that the Action Agencies' decision to create funding criteria for hatcheries was part of the agency action consulted upon in the 2008 FCRPS BiOp, and that although NOAA did not assume any benefit for future site-specific hatchery modifications that were not specified in the RPAs, it could not ignore the Action Agencies' request to consult on hatchery funding criteria and the effect of that programmatic change. Fed. Br. at 51. NWF now shifts its argument, apparently recognizing NOAA's distinction between future site-specific consultations and the programmatic consultation, but takes issue with NOAA's assessment of the effects of the decision to create funding criteria and Best Management Practices ("BMPs") for hatcheries. In NWF's estimation, it believes that the Action Agencies' decision to adopt programmatic criteria for funding will have *no effect* on listed salmon, and thus, any recognition of an effect by NOAA in the BiOp is impermissible. NWF Reply at 16 ("the Programmatic Hatchery Action is a label with no content . . ."); ("[what] NOAA has allegedly consulted on is just two sentences from RPA 39 . . .").¹³

Here again, NWF did not actually review what the Action Agencies proposed to NOAA.¹⁴

¹³ NWF mistakenly believes that the creation of BMPs for specific hatcheries is the only action here. NWF Reply at 16. This is wrong. The Action Agencies' proposal entails criteria on which future funding will be conditioned, as well as the formulation of BMPs. BA at B.2.3-12. One of the funding criteria requires that hatcheries are to be consistent with BMPs. *Id.* at B.2.3-13.

¹⁴ NWF cites a number of emails purporting to demonstrate that there is no effect associated with the creation of BMPs. NWF Reply at 15 n.18. All but one of these emails pre-date the BA before the Action Agencies and NOAA arrived at a more detailed agreement as to what this proposal would contain. *Id.*; *see also* FCRPS BA (signed August 2007). As for the one remaining email that post-dates the Action Agencies' proposal, NWF's selective quotation fails to provide the entire passage, where the author clearly recognizes that there will be a beneficial effect with Action Agencies' proposal. *See* AR Excerpt HA-6 ("It is fair to say that using the BMPs to guide future decisions will make things better, but how much better, how much benefit to closing survival gaps could vary greatly...."). As this discussion illustrates, NWF seeks to focus the Court's inquiry away from the BiOp and its supporting analysis to emails generated by agency staff throughout the administrative process. *See, e.g.*, Doc. 1613 (appendix of emails). However, these emails in no way undermine or render arbitrary the final analysis and conclusions of the BiOp. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2530 (2007) ("the only 'inconsistency' respondents can point to is the fact that the agencies changed their minds-something that, as long

For example, the Action Agencies identified the following criteria and objectives that will condition future funding:

- FCRPS mitigation hatcheries . . . are to use BMPs adapted to effectively address site-specific circumstances so that they contribute to the increased viability of ESA-listed natural fish and recovery goals. The BMPs will minimize, to the greatest extent possible, effects on ESA-listed natural fish with a goal of negligible or no negative effect.
- New artificial propagation mitigation programs must not jeopardize ESA-listed ESUs or impede recovery . . . and must incorporate BMPs as described above.
- The Action Agencies will reevaluate the funding of existing programs that may have negative effects on the viability of ESA-listed ESUs through HGMPs for site specific hatchery consultations . . .
- The Action Agencies will fund safety-net programs for populations at high risk of extinction and conservation programs to improve viability and contribute to recovery
- The Action Agencies will conduct RM&E to confirm that these objectives are being met.
- If numbers of natural spawners near recovery goals, the Action Agencies will require that funding for development plans to reduce/modify/or eliminate hatchery programs operated for a conservation purpose are consistent with NMFS' recovery plans.

BA at B.2.3-12 to B.2.3-13 (“The Action Agencies will use these objectives in making future funding decisions related to their hatchery programs.”). These are not empty words. As the text of the BA makes clear, the Action Agencies’ funding for hatcheries will be guided by the principles

as the proper procedures were followed, they were fully entitled to do.”). Indeed, these emails show that the BiOp was in fact informed by a lively debate on all relevant issues and that the remand process worked exactly as it should. *See National Wildlife Federation v. Corps of Engineers*, 384 F. 3d 1163, 1174 (9th Cir. 2004) (rejecting reliance on staff e-mail communications to overturn agency decision because such communications “are preliminary and not the official view of any agency”); *National Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 227 (D.D.C. 1990) (“That the administrative record . . . reflects a certain amount of disagreement among the countless individuals involved in developing or commenting on the [draft finding] is inevitable and indicates that the debate was as open and vigorous as Congress intended.”); *Ctr. for Biological Diversity v. Federal Highway Admin.*, 290 F. Supp. 2d 1175, 1194 (S.D. Cal. 2003).

above, some of which will result in significant changes in how hatcheries will be run. *Id.* To be sure, the Action Agencies will add more definition to these criteria and are in the process of doing so, but these objectives will not change. In addition, the Best Management Practices (“BMPs”) will be developed following as closely as possible the “HSRG’s operation guidelines for integrated and segregated programs (HSRG 2004b and 2004c).” BA at B.2.3-13. The decision to condition funding consistent with the objectives above, and the adoption of BMPs that aid in fulfilling these criteria, will have an effect. Besides NOAA’s factual assessment, as a legal matter, the Ninth Circuit has repeatedly recognized that programmatic documents such as these have an effect and *must* be consulted on under ESA § 7(a)(2).¹⁵ *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994) (holding that management plans (LRMPs) have an “on-going and long-lasting effect” even though the site-specific projects will occur later in time).

Moreover, the citations that Plaintiffs provide to the BiOp – presumably demonstrating that NOAA impermissibly analyzed these effects – clearly draws the distinction between future site-specific actions (future on-the-ground actions) and the programmatic consultation (decision to condition future funding in accordance with these criteria). *See* NWF Reply at 15 (citing BiOp at 8-37); *but see* BiOp at 8-37. The sole citation that NWF provides is to an ESU analysis addressing hatcheries, which very clearly makes these distinctions. NWF Reply at 15 (referencing Snake River spring/summer chinook at BiOp at 8.3 -39), *but see* BiOp at 8.3-39 (“further hatchery improvements

¹⁵ NWF also attempts to rely on Dr. Williams to support its assessment that the adoption of these funding criteria and the development of BMPs will have no effect on listed species. *See* NWF Reply at 16 n.19. The general thrust of his opinion is that the Action Agencies’ proposal is not sufficiently detailed. Dr. Williams’ assessment however ignores the stated objectives in the BA, as well as an entire appendix providing more definition to the BMPs. *See* FCRPS BA at B.2.3-4-1 to B.2.3-4-3. For example, the BMPs will contain guidelines specifying that “[t]he proportion of natural origin fish in the broodstock must exceed the proportion of hatchery origin fish on the spawning grounds (pNOB>pHOS). . . .” *Id.* at B.2.3-4-2. This is just one of approximately 20 specific sets of guidance from the HSRG for the BMPs that Dr. Williams entirely ignores. *See* Williams R. Dec. ¶ 24, *but see* BA at B.2.3-4-2.

will be implemented to reduce the likelihood of longer-term problems associated with continuing hatchery programs *although subject to future hatchery-specific consultations after which these benefits may be realized.*") (emphasis added). These candid assessments of the effect of funding criteria and BMPs, with the appropriate acknowledgment of limitation and NOAA's careful analysis which did not assign any benefits to future site-specific actions, are a far cry from an impermissible assignment of benefits that NWF insinuates. *See NWF v. NMFS*, 524 F.3d at 936 n.17.

B. Habitat Benefits Are Reasonably Certain To Occur.

There is no dispute among the parties that habitat actions are important for salmon mitigation. These actions will provide safer passage and create new areas for adults to spawn and juveniles to rear. Federal Defendants are committed to ensuring that the money is available, that these actions are implemented, and the survival benefits achieved. But beyond the funding mechanisms and the technical methodologies, there is a collective desire among the sovereigns to work together so that these actions occur and the fish realize the benefits. While subtle, this shift cannot be overstated. The Action Agencies and NOAA are willing to allow the other sovereigns, and in particular their biologists, to play a role in assessing what limiting factors are in the most critical need of being addressed, as well as monitoring these projects to assure the benefits are achieved. This is not a unilateral approach. Federal money, the exchange of expertise, and monitoring that is overseen by a collection of sovereigns, ensures that these habitat actions are reasonably certain to occur.

NWF characterizes this new partnership as well as the habitat actions in the BiOp and Fish Accords as a "simpl[e] promise to figure it all out at some future time" and a "kick-the-can-down the road approach." NWF Reply at 21. These are gross misrepresentations of the collaboration, the habitat methodologies, and the actions that will occur to benefit salmon. Oregon and the Nez Perce Tribe are less concerned with the approach that was applied, but seemingly insert themselves into this debate for the sole purpose of making sure their particular habitat projects are funded first. *See*

Or. Reply at 20 (concerned that their proposed habitat projects will be moved “to the back of the queue.”). While the Action Agencies will fully evaluate the Oregon and Nez Perce proposals and implement those that are sound and meet the relevant criteria, the collective refusal to honestly evaluate what the other sovereigns have done with habitat, or to use this as leverage for habitat funding, does a disservice to all of the biologists and staff (including Oregon and Nez Perce) that dedicated countless hours to ensure that these habitat actions will work.¹⁶

Plaintiffs’ entire argument is premised on an extrapolated standard from *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp 2d 1139 (D. Ariz. 2002). They contend that this district court case requires the Action Agencies to specify each habitat action that will occur over the next ten years, down to the project level, before NOAA can make any consideration of these effects. NWF Reply at 18 (arguing there needs to be “actual identified projects . . .”); Or Reply at 20 (“the 2008 biological opinion improperly relies on unspecified, yet-to-be-determined projects . . .”). No such “project-level standard” exists in *Rumsfeld*, Ninth Circuit precedent, or the consultation regulation.

Plaintiffs’ interpretation of *Rumsfeld* – that every detail of a project must be specified before

¹⁶ Tellingly, Plaintiffs begin their habitat discussion not by focusing on the Hillman method, Fish Accords, or even the commitment to habitat and survival improvement, but instead turn their discussion to the hydrosystem. See NWF Reply at 18-19 n.22 (arguing that the need for habitat actions “would change, perhaps dramatically” if the agencies would make “structural changes to some dams (such as dam removal . . .”). This highlights the fundamental difference between the Plaintiffs and the rest of the sovereigns. Plaintiffs apparently believe that modifications to the hydrosystem are the only way to truly benefit salmon. But this does not comport with the best available science. See NOAA B.197 at 90 (“Our results also indicate that the level of proposed changes to survival through the hydropower system alone, even in environmental periods with a positive effect, are not likely to be sufficient to meet viability goals for most populations.”); see also *id.* at 91 (“Given the uncertainty associated with future climate conditions, it is important to continue efforts to increase survivals through actions that could additionally affect survival outside of the hydropower corridor, including improvements to tributary habitat conditions and actions aimed at further reductions in potential latent mortality associated with the range of hydropower system effects.”). In contrast, Federal Defendants and other sovereigns believe that mitigation can occur throughout all of the 4-Hs, and in particular habitat, to provide meaningful benefits to salmon.

it may be analyzed in an RPA – is not an accurate representation of what that court meant by “reasonably specific.” 198 F. Supp 2d at 1152. This is illustrated best by the court’s discussion of the draft RPA. 198 F. Supp 2d at 1150; *see also* NWF Reply at 19 n.23. The draft RPA in that case set forth a requirement for the Army to create a plan “that would result in groundwater withdrawals less than or equal to recharge” of the aquifer. *Id.* at 1150. NWF attempts to distinguish the fact that the court in *Rumsfeld* cited this draft RPA with approval by arguing that the draft RPA also had “specific actions the Army would use to meet [the broad commitment].” NWF Reply at 19-20 n.23 (emphasis in the original). However, the draft RPA “included only a list of measures the Army *had to consider* in its quest to balance water use . . .” and did not include a list “specific actions” or projects for the Army to implement as NWF suggests. 198 F. Supp 2d at 1150 (emphasis added). Ultimately, the Army was left with one substantive commitment of reducing groundwater withdrawal at a level “less than or equal to recharge.” 198 F. Supp 2d at 1150. It was this specific commitment that the Court presumably found sufficient. *Id.* In contrast, the final RPA the court ultimately found deficient was little more than an unspecified plan that had only a “somewhat substantive commitment . . . to reduce net water use by 600 acre feet . . . [where] implementation is ‘subject to available funding.’” 198 F. Supp 2d at 1153.¹⁷ The “reasonabl[e] specificity” the court alluded to did not stem from specific projects or activities, but rather a specific commitment to mitigate for the effects of the action. *Id.*; *see also* *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007).¹⁸

¹⁷ It is notable that in similar instances where plaintiffs have tried to extend the holding in *Rumsfeld*, other district courts have declined to follow. *See Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1306 (D. Colo. 2007); *Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1093-94 (D. Az. 2005).

¹⁸ In *Kempthorne*, the plaintiffs generally complained that the agency’s commitment to supply water to protect listed species was not “reasonably certain to occur.” *Id.* at 357-58. The court declined to accept the plaintiffs arguments, noting that the action agency has a “duty to have available or acquire those necessary [water] resources” and that the agency had several available means of doing so.”

This conclusion is supported firmly by other Ninth Circuit precedent. In *Southwest Center for Biological Diversity v. BOR*, 143 F.3d 515 (9th Cir. 1998) (“*Lake Mead*”), both the district court and Ninth Circuit found the RPA was sufficient to avoid jeopardy. That particular RPA required a general commitment of protecting habitat (1400 acres) but did not specify the particular parcels or locations. *Id.* at 518 (“The FWS did not identify specific areas available and suitable for acquisition and restoration, and did not mandate that the replacement habitat be established at a date certain before the destruction of the Lake Mead Habitat.”). In addition, the RPA relied, in part, on long-term goals such as undefined compensation for historical habitat and the “continued development” of a collaborative program designed to provide protections “beyond the five-year time frame of the [BiOp].” *Id.* at 518 & n.1. Based on this commitment to habitat improvement, albeit largely unspecified, the Ninth Circuit found the RPA sound. *Id.* at 524; *Rock Creek Alliance v. U.S. Fish & Wildlife Service*, 390 F. Supp. 2d 993, 1009-10 (D. Mont. 2005) (“FWS is right that *Southwest Center* controls-it is permissible that the mitigation lands are not yet bought and even that there might be some difficulty.”).

Here, the deficiencies within particular areas (limiting factors) have been identified through the regional collaboration by on-the-ground biologists and recovery planners. These local experts have calculated the amount of possible benefit that could be attained if these particular limiting factors are addressed. *See e.g.*, CA at C-1-32. The sovereigns, as well as NOAA, have reviewed and/or performed these calculations. *See e.g.*, NOAA C0357. The Action Agencies have committed themselves to addressing a certain percentage of survival benefits through habitat improvement. BiOp at RPA Table p.40 (RPA 34); *id.* RPA Table p.47 (RPA 36-38). There are deadlines for performing these actions. *See e.g.*, BiOp at RPA Table p. 41 (Implementation Plans). There will

Id. at 358. The court concluded: “A court must leave to the agency the application of its expertise and authority to manage the complex hydrologic, legal, financial, physical, and logistical aspects of protecting the [listed species].” *Id.* at 358-59.

be monitoring by the Action Agencies and the local biologists to determine if the actions were successfully implemented, and if not, these entities will aid in the development of replacement projects that will achieve the required improvement. *Id.* Underlying all of this is a firm, legally enforceable financial commitment that Plaintiffs practically concede is unassailable. *See* NWF Reply at 24 n.26 (“Nor does NWF have any objections to the ‘Fish Accords’ or the funding certainty they provide. . . .”); Or. Reply at 20 (“Oregon does not dispute that the MOAs concluded between various sovereigns and BPA provide reasonable assurances”). The RPA complies with the Ninth Circuit’s standards, and the habitat actions are reasonably certain to occur.¹⁹

1. Tributary Habitat Actions Are Reasonably Certain to Occur.

According to Plaintiffs, NOAA’s tributary habitat methodology consisted of merely defining a threshold necessary to avoid jeopardy and requiring the Action Agencies to achieve that threshold. *See e.g.*, NWF Reply at 21. While it is notable that Plaintiffs do not contest that NOAA’s threshold is sufficient to avoid jeopardy, their portrayal of the analysis that underlies the commitments in the

¹⁹ NWF’s discussion of the Northwest Power and Conservation Council and the role the Independent Scientific Review Panel (“ISRP”) plays in habitat project selection is instructive as to their overall litigation position. NWF professes that the habitat actions are “less likely to occur”, but that ISRP review presents “economic, administrative or legal hurdle[] which remain[s] to be cleared.” NWF Reply at 26 n.28. While NWF’s position is less than clear, it seems NWF is suggesting that although these projects will indeed occur, there is some legal barrier for NOAA to consider these actions because they are subject to ISRP review under the Northwest Power Act and thus cannot be properly considered in the BiOp. However, if NWF’s logic is accepted, any project that is subject to ISRP review could not legally be considered “reasonably certain to occur” and could not be analyzed in the BiOp. Thus, NWF pits the Northwest Power Act squarely against the ESA. However, it cannot be that Congress, by desiring ISRP review, intended to foreclose thousands of habitat projects designed to aid salmon from ESA § 7(a)(2) consideration. Instead, the Federal Defendants and the Council agree that “Bonneville has the final decision whether to fund, under Section 4(h)(10)(A) of the Power Act. But that decision-making is informed and constrained by the standards in Section 4(h)(10)(A) and by the record on which Bonneville bases its decision.” *See* Second Memorandum of Amicus Northwest Power and Conservation Council, Doc. 1590 at 3. Moreover the Council, BPA and Accord partners have already proposed a streamlined process for reviewing Accord projects. *See* <http://www.nwcouncil.org/fw/projectselection/accord/Default.asp> (Council webpage showing draft science review guidance-and first set of Accord projects undergoing review).

RPA is factually incorrect.

Obviously, Plaintiffs' characterizations are incorrect as to the first trimester of habitat actions that are already in development and specify project level descriptions. *See* FCRPS BA at B.2.2-2 (Attachment B.2.2-2: Tributary Habitat Action Tables, specifying each of the projects that will occur from 2007-2009).²⁰ As to the improvements that will occur from 2010-2018, that process involved much more than a simple commitment. The process began with local biologists compiling a "list of primary limiting factors for each population or assessment unit." CA at C-1-32 to C-1-38. That is, the local biologist would examine his or her particular tributary and identify the limiting factors, like channel complexity or lack of woody debris, that, if corrected, would aid salmon. The local biologist would then evaluate the "current status of each limiting habitat variables", compile another list of "habitat actions that would address the primary limiting factors. . . .", and finally "estimate of the potential status of limiting habitat variables if those variables were treated with the habitat actions." CA at C-1-32.

This information was then taken by the Action Agencies and the remand habitat workgroup and a calculation was made as to "local habitat conditions for each assessment unit." CA at C-1-33. This involved a two step process whereby a determination was made as to the effect of certain actions on that local habitat, and then this was used to calculate the "overall habitat quality" for the entire population. *See e.g.* CA at C-1-34 (Table 1: providing an example of the change in habitat improvement for road decommissioning with the Selway steelhead population.). The final step in

²⁰ The Nez Perce Tribe agrees that the tributary habitat methodology is sound, but argues that NOAA's analysis will continue to be deficient until it actually lists the Tribe's projects as part of its RPA. Apparently, they seek to circumvent the scientific vetting and Council process. *See also* NPT Reply at 24 ("the Tribe is left with the burden to demonstrate to the Action agencies, the Power Council, and others in the Region, the extent to which NOAA relied upon the Tribe's projects and work."). Moreover, the Tribe's stated position of merely wanting further analysis is belied by its recent support of Plaintiffs' injunction request asking this Court to order that all of the Tribe's projects to be funded.

this process calculated a survival benefit associated with addressing the limiting factor. CA at C-1-35 (“After considerable discussion, the [remand habitat workgroup] decided that a simple linear relationship between habitat quality and egg-smolt survival was the most appropriate relationship and should be used to guide professional judgment.”). Based on this four-pronged assessment, conducted by the biologists who know these tributaries best, the Action Agencies and NOAA had information as to the status of these areas, how much benefit could be achieved, and the survival benefit if the primary limiting factors were improved in function or corrected. This was how NOAA calculated the survival improvements in RPA Table 5.

In addition to ignoring all of this work, Plaintiffs argue that NOAA’s calculations are too uncertain. NWF Reply at 26. Yet, they do not offer another methodology, and they certainly do not offer another methodology that was developed within the collaboration among all of the sovereigns and received what is perhaps the closest consensus position on a biological methodology this region has ever seen. *See Sierra Club v. U.S. Dept. of Transp.*, 310 F. Supp. 2d 1168, 1189 n. 7 (D. Nev. 2004) (“The Court will not second guess FHWA's choice of the appropriate scientific methodology, particularly where other government agencies have approved these models.”) (*citing Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir.2000)). Instead, they contend that there is insufficient monitoring, but here again their assertions fall flat. The monitoring will be reported annually and will include a comprehensive review at three-year intervals. BiOp at RPA Table p. 41-42. The monitoring will use performance metrics like cubic feet per second, number of screens, miles of access, miles of complexity restored to track implementation and the effect of projects. BiOp at RPA p. 42 (RPA 35 / Evaluation Reports); *see also* BA at B.2.2-10 to 11. During these reviews, if “habitat quality improvement benefits were significantly overstated the Action Agencies will implement replacement projects to provide benefits sufficient to achieve the habitat quality improvement and population - or MPG - specific survival benefit estimated for the original project or projects.” BiOp at RPA Table p. 43. Any uncertainty or over-estimation is accounted for through

monitoring. The remand habitat workgroup, Action Agencies, and NOAA all recognized that there would be uncertainty, but that is why they developed a process by which the local experts, in conjunction with NOAA and the Action Agencies, would monitor implementation of projects to ensure that they do occur, or if not, design replacement projects to meet the required habitat improvement and survival benefit. *Id.*

2. The Estuary Benefits Methodology

NWF critiques the specific estuary habitat improvements in RPAs 36-38, primarily because it disputes NOAA's reliance upon the methodology used to calculate these benefits. NWF Reply at 22-23. As explained previously, this estuary benefits methodology is based on, and consistent with, the best available data concerning limiting factors in the estuary and actions needed to address them, as identified in the estuary recovery plan module, a planning tool designed to guide recovery actions. For the BiOp, the method in the module was scaled down to a project-level analysis to determine survival improvements reasonably achievable from the actions in the estuary.²¹ Fed. Br. at 58-62. In an attempt to discount the methodology, Plaintiffs' declarants continue to engage in a game of numbers. NWF Reply at 22-23; Or. Reply at 23. Though lengthy, these critiques merely underscore that Plaintiffs do not understand, or do not accept, the methodology. Kratz Dec. ¶¶ 26-32; Kratz R. Dec. ¶¶ 23-44. NOAA appropriately determined that the benefits estimates, with the continued evaluation of the regional expert panel and research and monitoring efforts, demonstrates that RPAs 36-38 are likely to achieve the projected survival improvements. Finally, offering nothing more than a difference of opinion, Oregon continues to maintain that actions that acquire or protect existing habitat may not be assigned a survival benefit. Or. Reply at 22. However, NOAA reasonably determined that a benefit is appropriate as acquisition is an often an important

²¹ In disputing that this methodology was vetted through the collaboration, NWF Reply at 22 n. 24, NWF ignores record documents demonstrating that the entire approach of scoring projects based on LCREP criteria and the recovery module was discussed in the collaboration. NOAA C509 at 3, 13, 76-79. Perhaps for this reason, Oregon does not echo this argument.

phase of future restoration projects; even if not associated with later restoration efforts, assignment of a benefit is still appropriate because acquisition adds increased survival benefits by arresting further degradation and allowing the habitat to be naturally restored. Kratz R. Dec. ¶¶ 39-41; Fed. Br. at 61-62; Kratz Dec. ¶ 30.

While Plaintiffs' declarants provide their own opinion of how these benefits should be estimated, they do not question the fact that the Action Agencies have committed to achieve the survival benefits estimated. Therefore, the overall concern with the estuary methodology seems to be that it has not been conclusively demonstrated to achieve the mitigation commitments. However, this is not required. *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 635 (8th Cir. 2005) (rejecting claim that § 7 violated due to lack of evidence that proposed mitigation measures will work and citing with approval continued monitoring and adaptive management of mitigation measures). Here, there is a specific process for selecting projects based on identified factors limiting estuary habitat, the methodology reasonably estimates the expected benefits of estuary actions, and the RPAs require involvement of regional experts in order to evaluate and refine the methodology as projects are implemented.²² Despite attempts to discredit the BiOp's habitat analysis, both the tributary and estuary methodologies provide reasonable estimates of the benefits associated with habitat mitigation, are based on the best available data, and are reasonably certain to occur.

IV. THE JEOPARDY ANALYSIS IS BASED ON THE BEST AVAILABLE DATA.

Plaintiffs continue their factual attack on the analysis performed but fail to demonstrate that the analysis is based on anything but the best available science and data. While Plaintiffs may reach a different conclusion, the manner of this Court's review requires deference to NOAA's resolution of these complex matters. *Northwest Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1051 (9th Cir. 2008) (courts must defer to the expert agency on questions of scientific judgment);

²² This aspect of the RPA, and the similar requirement for tributary actions, addresses Oregon's concern about monitoring to ensure the effectiveness of the habitat projects. Or. Reply at 23.

Lands Council, 537 F.3d at 988 (federal courts should not act as a panel of scientists, choose among scientific studies, or order the agency to explain every possible scientific uncertainty).²³

A. NOAA Appropriately Considered and Accounted for Statistical Uncertainty.

Even a cursory examination of Plaintiffs' declarations and briefs reveals that they demand a standard that eliminates uncertainty from the BiOp. *See, e.g.*, NWF Reply at 28. Because an estimate derived through statistical analysis is seldom free of uncertainty, the standard they urge upon this Court is an impossibility. Even the best models, like COMPASS, do not produce a definitive answer. It is NOAA's duty under the ESA to apply its expertise to consider and address the attendant uncertainties surrounding those results. That Plaintiffs' declarants disagree with NOAA is not surprising. However, such disagreement is not a grounds for this Court to invalidate the analysis. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) ("To set aside the Service's determination in this case would require us to decide that the views of Greenpeace's experts have more merit than those of the Service's experts, a position we are unqualified to take.").

Plaintiffs argue that the uncertainty indicated by the confidence intervals surrounding estimates of base-period metrics makes those estimates unreliable. NWF Reply at 29; Or. Reply at 15. Plaintiffs notably do not respond to the explanation that the point estimates represent the most accurate estimates possible and that such an approach is an accepted statistical practice, as long as uncertainty is acknowledged, as it was here. Hinrichsen Dec. ¶ 8. As for Plaintiffs' complaint that there are no confidence intervals for the habitat, hatchery, and hydro multipliers, the record shows that the methods of determining these multipliers varied from the calculation of the base-period

²³ Plaintiffs continue to rely upon the extra-record opinions of their declarants. While this Court recently declined to strike Plaintiffs' declarations in their entirety, it did note that it would determine whether an applicable exception allowed consideration of specific points made in those declarations. *NWF v. NMFS*, Case 01-CV-640-RE(D.Or.), Opinion and Order at 4-5 (Doc. 1619). Federal Defendants maintain that the points relied upon to attack and second-guess the jeopardy analysis do not fall into any of the applicable exceptions and should not be considered by this Court. *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

estimates, sometimes requiring the best professional judgment of the collaboration. *See, e.g.*, CA at 3-13 – 3-20. Since these multipliers were not generated statistically, it is not possible to calculate confidence intervals. Toole R. Dec. ¶¶ 13-14. NOAA and the Action Agencies utilized the best available data in estimating these multipliers and the lack of statistical confidence intervals does not mean that uncertainty was ignored. In many cases, these concerns are addressed qualitatively or through monitoring and performance standards.

Plaintiffs ignore the fact that ESA § 7 does not require an absolute answer, but rather that NOAA use the best available science in making its determination. 16 U.S.C. § 1536(a)(2) (rejecting a scientific certainty standard by providing that an agency must ensure that an action is "not likely" to jeopardize listed species). Nor does the presence of scientific uncertainty in the jeopardy analysis indicate that NOAA is improperly "placing the risk of error on the species." NWF Reply at 32. Rather, the Ninth Circuit has upheld "no jeopardy" determinations despite the uncertainty of data, so long as the agency utilized the best available data, as it did here. *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1458-60 (9th Cir. 1984); *Greenpeace Action*, 14 F.3d at 1337; *see also Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 219 *clarified on other grounds* 389 F. Supp. 2d 4 (D.D.C. 2005) ("Time and again courts have upheld agency action based on the 'best available' science, recognizing that some degree of speculation and uncertainty is inherent in agency decisionmaking, even in the precautionary context of the ESA.")

NWF's uncertainty critique is designed to attack the approach of treating the estimates as "precise indicator[s] of whether a population is 'trending towards recovery.'" NWF Reply at 29. However, NOAA never advanced this approach in the BiOp. While the quantitative estimates certainly inform the overall conclusions, NOAA appropriately considered qualitative factors before reaching the jeopardy determinations. *See, e.g.*, BiOp at 7-20. Despite arguing that NOAA failed to provide a set "recipe" for applying qualitative factors, NWF also faults the consideration of qualitative factors for being "formulaic." NWF Reply at 30. As previously explained, NOAA

considered and applied a consistent set of qualitative factors. Fed. Br. at 50. The fact that the same set of qualitative factors applies to, and results in similar conclusions for, various salmonid population utilizing the same mainstem, estuary, and, to some extent, tributaries, is not surprising.²⁴ NWF's recognition that NOAA consistently and faithfully applied these qualitative factors both at the MPG and the ESU level is fatal to their argument that the qualitative analysis is not transparent.

B. NOAA Appropriately Analyzed The Benefits and Risks Facing the ESUs.

In a cursory and single-spaced argument, NWF argues that the jeopardy analysis is not based on the best scientific information and does not follow rationally from the available information. NWF Reply at 32-34. Yet, in hundreds of pages of declarations and briefs, NWF does not once allege that NOAA failed to account for a critical new study, use a better model, or perform a significant aspect of the jeopardy analysis. Instead, NWF and its declarants disagree with NOAA's conclusions. Even with the most transparent consultation ever conducted, and with an enormous administrative record that they concede is complete, they can do nothing more than level unsubstantiated accusations which fail to find any support in the record.

NWF continues to critique the base-current hydro adjustment for SR steelhead, not questioning the actual rationale for calculating the multiplier with a different method, but merely

²⁴ NWF also complains that NOAA did not use the TRT's roll-up standards. NWF Reply at 31. NOAA explained that the different focus of the § 7 jeopardy analysis warranted a different roll-up analysis of viability. BiOp at 7-49 –7-50. While the effects on an ESU's likelihood for recovery are not measured by the TRT's roll-up standards, each ESU-level conclusion of why an ESU is deemed trending towards recovery sets forth a reasonable and rational analysis of how the qualitative factors support that determination. For example, although NOAA cannot quantitatively demonstrate that all populations in the SR spring/summer chinook will be increasing, the detailed population- and MPG-level discussions, *see* BiOp at 8.3-18 – 8.3-39, support NOAA's conclusion that "the majority of populations are likely to increase in abundance and enough populations are likely to be increasing to conclude that the ESU as a whole will be trending toward recovery." *Id.* at 8.3-42. The fact that these factors do not fit neatly into Plaintiffs' desire for a "recipe" does not invalidate the result, as the BiOp and the record show that NOAA considered and explained the role of qualitative factors.

arguing that this creates the “appearance” of selectively choosing between data.²⁵ NWF Reply at 32-33. NOAA had valid technical reasons for the change in base-current calculation for this multiplier, yet still applying the post-Bonneville survival relationships with respect to other multipliers for this ESU and for similar ESUs. Graves Dec. ¶¶ 33-37; Graves R. Dec. ¶¶ 23-26, 47-50. While NWF disagrees on this point, NOAA’s rationale for estimating the base-current hydro adjustment for Snake River steelhead is sound.

NWF also mischaracterizes the treatment of avian predation. NWF Reply at 33. While NOAA considered application of a hypothesis calling for 50% reduction to account for the possibility of compensatory mortality, the BiOp is clear that NOAA ultimately determined not to apply this hypothesis. BiOp at 8.3.5.6. NWF alleges that this 50% reduction of the multiplier cannot be deemed insignificant while other adjustments, though quantitatively smaller, were utilized. This position does nothing more than second-guess NOAA’s determination. Graves R. Dec. ¶ 52. Next, NWF incorrectly asserts that the BiOp ignores cormorant predation altogether, NWF Reply at 33, despite our prior explanation of how cormorants are treated in the BiOp. Fed. Br. at 46; Graves Dec. ¶¶ 46-50; *see also* NWF Reply at 33 (listing emails that show a consideration of cormorant predation). While there are recent indications that cormorant populations may increase, resulting in predation above the level reflected in the Current estimates, the data is preliminary and interpretation is open to scientific debate. Graves R. Dec. ¶ 53. Nevertheless, NOAA analyzed the issue based on the best available data at the time, recognized the threat from cormorants, and required RPA 46 specifically to address the cormorant threat. *Id.* ¶¶ 54-55.

²⁵ NWF alleges that NOAA “failed to disclose” the change in calculation. NWF Reply at 33. However, the record shows that NOAA technical staff considered this issue, *see* Graves Dec. ¶ 34, and the relevant tables in the SCA show that the Scheurell-Zabel hypothesis was not used in the calculation of this multiplier, in clear contrast to the calculation for other ESUs in the tables. Graves R. Dec. ¶ 47. This change was made transparently, as demonstrated by Plaintiffs’ ability to identify the difference in methodology and calculate an alternate numerical value for this adjustment.

With respect to the kelt reconditioning plan, NWF Reply at 33, the critiques raised in Mr. Olney's rebuttal declaration are inapplicable to the kelt reconditioning analysis, due to an inadvertent oversight in Mr. Graves previous declaration. Graves R. Dec. ¶¶ 59-62. Due to this error, this extra-record debate does not alter the analysis in the SCA, which reasonably estimates that a 6% survival increase can be achieved through the kelt reconditioning programs.²⁶ *Id.* Additionally, the proposed 2009 operations should increase the survival of migrating kelts and the condition of kelts available for use in the kelt reconditioning program. *Id.* ¶ 57.

NWF continues to misunderstand both the purpose and recognized limitations of the base-current hatchery multiplier.²⁷ NWF Reply at 34. As previously explained, the hatchery multiplier reflects the measurable changes in productivity resulting from management improvements in particular hatchery practices. Fed. Br. at 49. The method considers the contribution of all naturally-spawning fish to the next generation, both hatchery and natural origin, in order to accurately capture the productivity of the entire population. Jones R. Dec. ¶ 7. In calculating overall productivity, the method simply provides an estimate of the current productivity of the naturally-spawning population. *Id.* Though unable to be reflected in the model, the BiOp recognizes the long-term impacts of hatcheries on natural productivity, and this factor will be addressed through development of hatchery best management practices. BiOp Appendices C, D, and I; RPA Action 39. NWF also

²⁶ The record emails cited by NWF do not support their argument. The first two emails detail the development of the methodology and demonstrate nothing more than the recognition by NOAA scientists this they are on unknown ground, but using the best available data. NWF AR Excerpt K-1, K-2. Email K-5 is an early review expressing a preference for qualitative analysis due to other factors, but noting that in this area of science there is no "right or wrong". NWF AR Excerpt K-5.

²⁷ This is apparent by the record documents cited to support their argument. NWF Reply at 34 n.35. NWF AR Excerpt HA-16 addresses broader-scale hatchery issues, not the base-current multiplier. Likewise, although one sentence in HA-13 asks whether comments on the base-current multiplier have been circulated, the remainder of the email chain concerns broader hatchery issues. NWF's characterization of HA-23 is completely off base, as it addresses the interaction of harvest and hatchery fish.

continues to allege that NOAA arbitrarily applied this method to particular populations, but raises no new critique. The SCA clearly states that populations which would show a measurable change were those where hatchery reforms, such as significantly improving broodstock management protocols, eliminating non-local broodstock, and curtailing hatchery-origin fish straying into natural populations. SCA Appendix I at 16. The nine populations for which the multiplier was calculated were the populations which experienced major changes as a result of hatchery practices, the effects of which were not adequately captured in the baseline but which we can now predict will experience measurable effects going forward. Jones Dec. ¶¶ 17-21. Contrary to the accusations by Mr. Williams, Williams R. Dec. ¶¶ 32-34, other populations do not meet this criteria. Jones R. Dec. ¶¶ 17-18.

Finally, only Oregon continues to nitpick the start and end dates of the data sets utilized to calculate the base-period metrics, Or. Reply at 14-15, despite the straightforward explanation that NOAA reasonably chose to use the same dates employed by the TRT. Fed. Br. at 45-46; Toole Dec. ¶¶ 26-32; Toole R. Dec. ¶¶ 3-7.; BiOp at 7-11, NOAA C1155 at 5. Far from supporting their insinuation that NOAA manipulated the dates to achieve favorable results, the emails highlighted by Oregon show NOAA's insistence that the TRT data sets be utilized. *See* NOAA C673, C1096. Oregon's argument concerning these data sets is roundly contradicted by the BiOp and the record.

C. The Jeopardy Analysis Appropriately Considers Climate Change.

We previously demonstrated that the BiOp accounts for the known and potential impacts of climate change through capture of past and current impacts of climate change in the environmental baseline, conservative and pessimistic modeling of future ocean condition scenarios, and incorporation of the ISAB's recommendations for proactively reducing the impacts of future climate change into numerous RPA actions. *See* Fed. Br. at 46-48; Toole Dec. ¶¶ 45-49. In response, NWF addresses only one of these methods, questioning whether the ISAB's recommendations are

sufficient to address potential impacts of future climate change for freshwater life stages.²⁸ NWF Reply at 34-37.

NWF alleges that the ISAB report is “general” and that NOAA should have performed further analysis to identify specific actions as part of an RPA. *Id.* at 35-36. However, the RPA does require identification and implementation of specific actions to address climate change. BiOp at 8.20-8.23. For example, under RPA 34, the Action Agencies will implement specific tributary projects to address water temperatures as well as improve summer flows, closely tracking the ISAB’S recommendations.²⁹ BiOp at 8.18-8.20. For future project selection, RPA 35 envisions that criteria for future projects will include consideration of the anticipated effects of climate change. *Id.* at 8.20. NOAA found that the RPA as a whole has sufficient actions to meet current and anticipated climate changes, while retaining sufficient flexibility to tailor mitigation projects to address new information concerning climate change effects.³⁰ *Id.* at 8.22.

²⁸ NWF half-heartedly questions NOAA’s means of responding to critiques of the climate change analysis in the draft BiOp. *Id.* at 34-35. Despite NWF’s opinion of whether additional modeling should have been conducted, the ESA requires the agency to use only the best data available. *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000)(reversing district court order for FWS to conduct independent study of population numbers, because ESA requires assessment of only the best available data). Despite early consideration of additional modeling, NOAA ultimately determined that “it was not possible to definitively quantify future effects on freshwater life stages at this time at a level sufficient to permit meaningful analysis.” NOAA C1155 at 20; *see also* BiOp at 7-14.

²⁹ NWF argues that particular types of projects cannot both provide necessary habitat improvements to increase survival while simultaneously addressing the limiting factors expected to arise from future climate change. NWF Reply at 37. NWF’s narrow view finds no support, as the Battin study questions the effectiveness of particular land-use changes called for in the Snohomish River Basin. Glick Dec. ¶ 26. Here, the research and monitoring required through the adaptive management approach will inform the Action Agencies how and where to best address the impacts of climate change on salmonids and ensure their effectiveness.

³⁰ To the extent that the NOAA scientists found ISAB’s climate change report to be missing “key elements,” the document refers to data and analytical tools not available at the time of the report. NWF AR Excerpt CC-8 at 1-2. Addressing this concern, the BiOp requires further investigation on the impacts of climate change on salmonids. RPA 7. Any new data on climate changes impacts will be integrated through adaptive management. BiOp at 8.22.

NWF tries to dismiss the important aspect of adaptive management by arguing that NOAA already “ignored a wealth of information” concerning climate change.³¹ NWF Reply at 37. Yet, they point to no relevant factor overlooked. This unsupported allegation cannot distract from the fact that NOAA utilized the latest information on climate change, conducted quantitative modeling where possible, incorporated the proactive recommendations of the ISAB, and required the Action Agencies to adjust to new data concerning climate change. Contrary to NWF’s allegation, this is the very definition of “best available data.”

D. NOAA Provided A Sound Jeopardy Analysis for Snake River Sockeye.

Plaintiffs again maintain that NOAA did not conduct a jeopardy analysis for SR sockeye. Although the BiOp clearly refutes this assertion, *see* BiOp at 8.4-3 to 8.4-24, it seems Plaintiffs’ true complaint is that NOAA used SR spring/summer Chinook data as a surrogate for the quantitative SR sockeye analysis. NWF Reply at 38. But Plaintiffs do not present any alternatives to this analysis. The simple fact is that NOAA has very little data on SR sockeye. BiOp at 8.4-17. That is why it uses SR spring/summer Chinook as a surrogate. *Id.* (“Until better data are developed, NOAA Fisheries uses information developed for juvenile SR spring/summer Chinook as a surrogate for estimating the effects of the Prospective Actions in the mainstem migration corridor.”). This allows NOAA to estimate the effect of the hydrosystem in the absence of sockeye data. BiOp at 8.4-17 (“Based on this information, the survival of juvenile sockeye is likely to increase with the implementation of surface passage routes at Little Goose, Lower Monumental, McNary and John Day dams in concert with training spill (amount and pattern) to provide safe egress (i.e, reduce delay

^{31/} It is NWF that has ignored relevant information on climate change as their position advocating dam removal fails to recognize that, unlike other sources, the power generated by the hydropower system results in no carbon emissions. If the power generation from the four Snake River dams had to be replaced with coal and natural gas based power generation, by the year 2024, annual carbon dioxide production would be 3.6 million tons greater. *See* Corps 1245 at 12 (“Carbon Dioxide Footprint of the Northwest Power System,” November 2007).

and vulnerability to predators.”). While this is not perfect, it is best available science – a fact that NWF does not dispute. *Northwest Ecosystem Alliance v. FWS*, 475 F.3d 1136, 1147 (9th Cir. 2007).

V. THE CRITICAL HABITAT ANALYSIS IS LEGALLY CORRECT AND FACTUALLY SUPPORTED BY THE ADMINISTRATIVE RECORD.

A. NOAA Correctly Assessed Impacts on the Species’ Critical Habitat.

NWF and Oregon’s critique of the critical habitat analysis continues to mirror their incorrect critique of the jeopardy analysis. In their interpretation, “[r]equiring some attention to recovery issues,” *NWF v. NMFS*, 524 F.3d at 936, translates into a prerequisite for NOAA to identify recovery population levels and the survival rates necessary to reach them, before NOAA can perform an adequate critical habitat analysis. NWF Reply at 39-40. Plaintiffs’ argument that this does not import recovery planning into § 7 is belied by the plain language of the recovery planning provision, 16 U.S.C. § 1533(f)(1)(B)(ii),(iii), and it is clear that the development of such standards is the province of ESA § 4(f). *See Arizona Cattle Growers Ass’n*, 534 F. Supp. 2d at 1026 (while viewing § 7 in isolation might make it seem logical “to insert a requirement that the Service determine the point where the species will be conserved . . . instead, Congress explicitly instructed the Service to make this determination in the species's recovery plan.”); *see also Lands Council*, 537 F.3d at 993(court cannot “impose ‘procedural requirements [not] explicitly enumerated in the pertinent statutes.’”)(citation omitted).

NWF’s focus on *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1070 (9th Cir. 2004), works against their argument. NWF Reply at 39. In rejecting the “adverse modification” regulation, *Gifford Pinchot* clarified that Congress viewed conservation and survival as distinct though complementary goals, focusing on the statute’s use of the term “conservation” in connection with critical habitat’s role in the species’ recovery. *Id.* In this BiOp, NOAA analyzed how the RPA would affect the function and conservation role of each PCE, together with the environmental baseline and cumulative effects, to determine whether the PCEs would remain functional, or retain

their current ability to become functional, after implementation of the RPA. Fed. Br. at 23-24. If a PCE is fully functional, it is already fulfilling that particular conservation need of the species; if a PCE retains its current ability to become functional after the implementation of the RPA, then the RPA has not diminished that PCE's contribution to the species' recovery.³² Analyzing the impacts to the functionality of critical habitat expressly accounts for the conservation needs of the species. In disputing this, Plaintiffs fail to understand that since PCEs are based entirely on features essential to the *conservation* of the species, ensuring that an action does not adversely modify the PCE's current functionality, or its current ability to contribute to the species' conservation, incorporates consideration of the action's effects on the species' chances for *recovery*.

Moreover, NWF's argument completely ignores the work done through COMPASS to assess the risks and benefits to the safe passage element of critical habitat. In-river survival rates and the expected improvement of in-river survival rates were modeled through COMPASS, showing that the RPA is not only avoiding adverse modification of the safe passage element of critical habitat, but improving it. Fed. Br. at 65 n. 47. Plaintiffs refuse to address this point, instead recycling the same incorrect argument that the only satisfactory critical habitat analysis is one that identifies recovery population levels and the survival rates necessary to reach them. NWF Reply at 40. Despite Plaintiffs' dislike of COMPASS, they offer no alternative and COMPASS is the best available data on what set of operations will improve the safe passage element of critical habitat.

Finally, the BiOp and the record belie Plaintiffs' allegation that NOAA deferred consideration of the RPA's impacts to the value of critical habitat for "actual recovery" to some

^{32/} In focusing on the "environmental baseline" comparative approach at issue in the 2004 BiOp, NWF mistakes one part of the critical habitat analysis for the entire analysis. NWF Reply at 42 n.41. It is perfectly acceptable for NOAA to assess the *effects of the action* by using the current conditions of critical habitat as a benchmark. *See* Fed. Br. at 67-68. However, effects of the action are just one part of the analysis. Since at least the 2006 Lohn memo, NOAA has been clear that the entire critical habitat analysis employs an aggregate approach. NOAA B343 at 3-4.

“future recovery planning and implementation process . . .” NWF Reply at 39. The RPA includes multiple provisions based on the recognition of factors limiting the value of habitat to the species’ recovery, most notably in the tributary and estuary habitat methodologies which themselves were based on the draft recovery plans available at the time and will require future projects to be developed in coordination with recovery planning efforts. *See, e.g.*, BA at 2-36 – 2-37, 2-40 – 2-42, B.2.2-2, B.2.2-11. Indeed, countless actions in the BiOp as well as the Fish Accords provide actions that are designed to protect and restore designated critical habitat, all of which will create new areas for spawning and rearing thereby increasing the functionality of these PCEs and in turn, allowing critical habitat to fulfill its role in the species’ recovery. For Plaintiffs to assert that NOAA and the action agencies ignored the value of species’ habitat for recovery in this consultation is simply unsupported.

B. The *Nez Perce* Decision Is Inapplicable to the 2008 BiOp.

NWF pays undue attention to the unpublished, district court *Nez Perce* decision, despite the fact that the *Nez Perce* ruling is premised in large part on statements and findings specific to the biological opinion under review there. *See* Fed. Br. at 69-70. In reply, NWF unsuccessfully seeks to draw three “exact parallels” between the cases. NWF Reply at 41-43. First, NWF incorrectly alleges that in both cases, the current condition of critical habitat put the future of the ESU in doubt, despite the fact that the 2008 BiOp states no such thing. NWF Reply at 41. NWF’s attempts to reach such a conclusion into the analysis based on TRT’s 100-year extinction risks falls flat. Second, NWF broadly overstates the argument that in both cases NOAA improperly found that proposed action would eventually improve habitat conditions despite few short-term improvements. *Id.* As explained in our opening brief, the RPA here distinctly requires both short-term and long-term actions in order to further improve the functioning of critical habitat. Fed. Br. at 68. No comparison can be drawn to the *Nez Perce* biological opinion, which condoned little to no improvement in completely degraded habitat conditions.

Finally, NWF alleges that the BiOp's conclusions that critical habitat will at least retain its current ability to serve its conservation role are equal to the *Nez Perce* finding that, there, NOAA failed to analyze critical habitat in terms of recovery.³³ NWF Reply at 42. NWF's attempts to parallel the FCRPS BiOp reveal the legal and factual flaws in their argument. *Id.* (alleging that action that maintains the current degraded conditions of the PCEs in hopes of a better future is improper and that action must arrest those adverse effects and improve the PCEs so that the habitat can improve and support species recovery). This statement reflects NWF's overreaching legal interpretation of § 7 as a mandate to federal agencies to actually move the species closer toward recovery, when in fact, the consideration of recovery in the critical habitat analysis "simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *NWF v NMFS*, 524 F.3d at 936. Factually, because the RPA will improve the function of many of the PCEs, critical habitat conditions overall will improve and are far from the "status quo" operation invalidated in *Nez Perce*. Fed. Br. at 68; BiOp at 8.2-31–8.2-32 (the RPA will substantially improve the functioning of many of the PCEs, including safe passage, water quality, natural cover, forage, riparian vegetation, and space.) NOAA and the Action Agencies have crafted an RPA that addresses factors limiting the conservation value of critical habitat, and substantially improves conditions in many cases, strengthening the species' status on the path to recovery.

C. Hydrosystem Improvements Benefitting Habitat Are Reasonably Certain to Occur.

In NWF's opening brief, it argued that installation of surface passage improvements called for the 2004 BiOp and development of Configuration and Operation Plans ("COPs") were not

³³ In fact, in *Nez Perce*, NOAA did discuss whether long-term flows would promote recovery, but the court found that the conclusion that in some years flows would exceed the minimum flows necessary for survival, thereby promoting recovery, was arbitrary because it was not supported by NOAA's own analysis. *Nez Perce*, 2008 WL 938430 at *11.

reasonably certain to occur. NWF Br. at 45-46. We demonstrated that they were incorrect on both counts. Fed. Br. at 70-72. In reply, NWF seems to concede these points, and so shifts focus even further back to the 2000 BiOp, weakly arguing that because some of those proposed modifications were delayed or modified, NOAA cannot include benefits from future plans and commitments to improve surface passage in the 2008 BiOp. NWF Reply at 43. While not relevant to whether measures in the 2008 BiOp will occur, modifications to proposals in the 2000 BiOp were done with consensus of the regional fish managers, and typically because of feasibility or efficacy issues. Peters R. Dec. ¶¶ 21-27. To make this argument stick, NWF also must ignore completely the myriad structural improvements and operational modifications that have been implemented, including the RSWs and TSWs at issue in the previous litigation.³⁴ See e.g. BA at Appendix A; Peters Dec. ¶ 28.

What is different about this BiOp is the commitment to achieve the juvenile passage performance standards, through operational and configuration modifications at each project. Plaintiffs' focus on particular types of surface passage modifications misses the point - survival improvements are the currency of the BiOp, not discrete structural modifications. Because each project has multiple variables which factor into survival, it is appropriate to employ various techniques to maximize survival through the entire system. See BA at B.2.1-26 ("The Action Agencies will compare biological effectiveness and costs to determine the optimum configuration and operation at each project that will contribute to achievement of performance requirements.") Despite the fact that the language in each COP allows for flexibility to achieve this result, see NWF

³⁴ While past improvements alone do not justify reliance on future modifications, there is more here than the "general desire" found lacking in the previous BiOp. *NWF v. NMFS*, 524 F.3d at 935-36. As previously explained, the Action Agencies initially concluded that the operation of FCRPS was likely to jeopardize these ESUs and developed their own Proposed RPA, addressing this Court's concern with the lack of certainty in a proposed action versus a RPA. Fed. Br. at 9-10. NOAA specifically found these habitat improvements were reasonably certain to occur because they are "required by NOAA Fisheries' RPA". See, e.g., BiOp at 8.2-32.

Reply at 43-44,³⁵ the commitment to configure and operate each project to meet the performance standards is a required aspect of RPAs 18-25.

Finally, Plaintiffs attempt to argue that such improvements do not represent a “definite commitment of resources” because they are funded through annual appropriations. NWF Reply at 44 (citing *NWF v. NMFS*, 524 F.3d at 936). Suggesting that future appropriations must be guaranteed grossly overstates the Ninth Circuit’s statement - neither that court nor any other has ever held that an action is not reasonably certain to occur because of the federal appropriations process.³⁶ The expenditure of appropriations to achieve the operations and configurations necessary at each project to reach performance standards is “in fact under agency control,” *NWF*, 524 F.3d at 936, and reasonably certain to occur. *See* Corps 26 at 21, 27; Peters R. Dec. ¶¶ 16-18 (describing regional recommendation process for prioritizing funding priorities, research, and configuration actions).

VI. NWF’S CLAIM CHALLENGING NOAA’S CONCURRENCE ISSUED FOR THE SOUTHERN RESIDENT KILLER WHALES MUST BE DISMISSED.³⁷

³⁵ NWF’s confusion on this point is apparent in its argument that a particular structural modification at Bonneville is not reasonably certain to occur because it is an alternative to operational changes. NWF Reply at 44 n. 42. As noted, the Bonneville COP has seven actions recommended to achieve juvenile passage goals. *Id.* Before the COP calls for evaluation of structural changes to the spillway, it calls for permanent spill operation changes if testing results demonstrate spillway survival increases. Corps 428 at 2. If permanent spill operation changes achieve the fish passage results, there is no need to explore structural changes. Despite Plaintiffs’ odd focus on structural changes over survival improvements, the COPs demonstrate that the agencies are focused on achieving the fish passage goals and that all options are on the table to meet those goals.

³⁶ ESA § 7 does not require the consulting agency to make such a determination before evaluating a proposed action. This lack of assurance concerning a federal agency’s funding sources stands in stark contrast to ESA § 10, where Congress did require such commitment with respect to a private party’s conservation and mitigation actions. 16 U.S.C. § 1539(a)(2)(B)(iii) (before issuing incidental take permit, Secretary must find that the applicant will ensure that adequate funding for the plan will be provided).

³⁷ NWF has failed to establish Article III standing to challenge NOAA’s concurrence issued for the Southern Resident killer whales (“SRKW”). *Valley Outdoor, Inc. v. City of Riverside*, 446 F.3d 948, 952 (9th Cir. 2006) (standing is evaluated “on a claim-by-claim basis”). The declaration of Michael Garrity, a Conservation Director with American Rivers, is the only standing declaration that speaks to the SRKWs. *See* Doc. 1601. Yet, in stark contrast to the other standing declarations, *see* Doc.

Even aside from the jurisdictional bar to NWF's claim, NWF cannot show that NOAA's concurrence is arbitrary and capricious or otherwise contrary to law. The main thrust of NWF's reply is that NOAA's analysis is less comprehensive than a formal consultation. NWF Reply at 45-48. This argument is not borne out by the record. During remand, NOAA engaged in formal consultation and issued a BiOp regarding the effects of the harvest actions authorized under the *U.S. v. Oregon* Management Agreement. See NOAA B377, Ch. 9. NOAA's formal consultation in *U.S. v. Oregon* mirrors the analysis conducted in the FCRPS consultation, and both opinions are based on the same comprehensive analysis in the SCA. See SCA, Ch. 9. While the effects of the *U.S. v. Oregon* action and the FCRPS RPA are obviously different, there is no material difference between the scope or depth of NOAA's analysis in the FCRPS informal consultation and the *U.S. v. Oregon* formal consultation.³⁸ Thus, NWF's bald assertion that NOAA's analysis is "superficial" or less

1604, ¶ 5; Doc. 1603, ¶ 1, Mr. Garrity does not claim to be a member of American Rivers. Thus, NWF has failed to show that a member of a plaintiff organization otherwise would have standing to sue, as is required under the Article III. See *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997) ("An association has standing to sue . . . only if *its members* would have standing in their own right.") (emphasis added). Nor is Mr. Garrity's testimony (e.g., Doc. 1601, ¶¶ 6, 8, 19) regarding the interests of or injury to unidentified American Rivers' members admissible or sufficient. Fed. R. Civ. P. 56(e) (declaration must be based on personal knowledge); *Doe v. Stincer*, 175 F.3d 879, 886-87 (11th Cir. 1999) (affidavit stating that there were "many" individuals who could make the requisite showing "was insufficient"). Because this Court must not "'presume' the missing facts," NWF has failed to demonstrate standing and its SRKW claim must be dismissed. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *Washington State Farm Bureau v. NMFS*, No. C06-3882, 2006 WL 4914810, *6 (W.D. Wash. Dec. 20, 2006).

³⁸ In *U.S. v. Oregon*, the harvest actions result in the direct take of wild Chinook and depletes, on a yearly basis, the amount of prey available to the SRKW. NOAA B377 at 9-19 to 9-21. Unlike the FCRPS, there is no corresponding action, such as the funding of hatcheries, that produces Chinook salmon and contributes salmon to the whales' prey base. *Id.* Since the *U.S. v. Oregon* Management Agreement depletes only the SRKW's prey base, there is nothing "puzzling" with NOAA's decision to engage in formal consultation in *U.S. v. Oregon* and informal consultation here. NWF Reply at 48 n. 48; See 50 C.F.R. § 402.14(a) (action likely to adversely effect a listed species requires formal consultation). Furthermore, the *U.S. v. Oregon* BiOp directly supports NOAA's concurrence, as even the direct reduction in the SRKW's prey base – without off-setting mitigation – was found through formal consultation to satisfy the substantive mandates of § 7. NOAA B377 at 9-21; see also NOAA B341 at 44; NOAA B528 at 47.

rigorous than a formal consultation finds no support in this record. *See* NWF Reply at 48.

NWF's assertion that formal consultation was required is also legally unsound. In support of its claims, NWF relies solely on the formal consultation regulations and the Ninth Circuit's analysis of the formal consultation process in *NWF v. NMFS*, 524 F.3d at 929-30. NWF Reply at 44-46. However, NOAA's finding was made pursuant to the informal consultation regulatory framework, *see* 50 C.F.R. §§ 402.13, 402.14(b), a regulatory process that repeatedly has been upheld by the Ninth Circuit, *see Forest Guardians v. Johanns*, 450 F.3d 455, 457-58 (9th Cir. 2006). Thus, NWF cannot successfully challenge NOAA's finding by ignoring the applicable regulatory framework.³⁹

NWF's failure to address the applicable regulatory scheme leads to several distracting and uninformed challenges to NOAA's analysis. For instance, NWF asserts that NOAA's finding is flawed because it purportedly failed to address the impacts stemming from the historical decline in Columbia River stocks, which it concedes are not "effects" of the RPA. NWF Reply at 45. Yet, under the informal consultation regulation, NOAA is not required to consider these historical and baseline impacts. *See* 50 C.F.R. §§ 402.13, 402.02 (limiting inquiry to the effects of the action, which do not include baseline impacts). NOAA's finding is not rendered unlawful because NWF demands an inquiry not required by the applicable regulation. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

More fundamentally, NWF simply ignores NOAA's finding in asserting that the environmental baseline and cumulative effects, and thus the impacts of the historical declines, were

³⁹ NWF's assertion that the uncertainty in the available data requires formal consultation is also baseless. NWF Reply at 45. As unaddressed by NWF, NOAA acknowledged the uncertainty and reasonably employed a conservative methodology to ensure that it erred on the side of caution. *See* Fed. Br. at 72-75; *see Greenpeace Action*, 14 F.3d at 1337; *Natural Resources Defense Council v. EPA*, 529 F.3d 1077, 1085 (D.C. Cir. 2008) ("EPA acknowledged that the data was not comprehensive, but compensated for this uncertainty by erring on the side of protecting public health. We think that is a reasonable position.").

not considered by NOAA. *See* NWF Reply at 45-46. The record plainly shows that NOAA examined the environmental baseline and cumulative effects. *See* BiOp at 9-9 to 9-14; SCA at 9-9 to 9-14. Within that analysis, NOAA explicitly examined the effects of current Chinook production in the Columbia River on the SRKW, and this analysis revealed that SRKWs require approximately 221,000 adult Chinook annually in the coastal waters and that approximately 3.5 million adult Chinook are available today within the coastal waters and range of the SRKW. *See* BiOp at 9-9 to 9-10, 9-17 (approximately one million adult Chinook available to the SRKWs originate from Colombia River stocks); NOAA B372. There is “no complete failure to consider crucial factors,” and NWF’s contrary claims do not withstand scrutiny. *Greenpeace Action*, 14 F.3d at 1333.

Nor does NWF’s speculation that current stock levels are adversely effecting the SRKW undermine NOAA’s analysis. *See* NWF Reply at 46. NWF relies heavily on a statement in the Recovery Plan that “[p]erhaps the single greatest change in food availability for [SRKW] since the late 1800s has been the decline of salmon from the Columbia River basin.” NWF Reply at 46 (quoting NOAA B364 at II-82). However, the Recovery Plan goes on to explain that, “[w]ith so many fish once present, salmon returning to the Columbia River mouth *may have been* an important part of the diet of Southern Residents.” NOAA B364 at II-82 (emphasis added); NOAA B236 at 81 (lack of detailed studies prior to loss of major salmon runs in the Colombia River make it difficult to reach any conclusions concerning historical distribution of SRKWs); Corps 101763 at 58 (State of Washington’s Status Report identifying the historical declines and then noting that “salmon are currently considered relatively numerous in a number of areas (when hatchery fish are included)” and that “resident killer whales may have lost some seasonally important sources of prey, while perhaps gaining others”). In contrast to the Recovery Plan and the Status Report, NOAA did address whether or how the current abundance levels from the Columbia River are affecting the SRKW, and

NWF has presented no challenge to the adequacy of this analysis.⁴⁰

Finally, NWF repeats its claim that NOAA ignored various factors, mainly some purported differences between hatchery and wild salmon. NWF Reply at 46-48. As explained in our opening brief, NWF erroneously seeks to attribute differences documented in specific hatchery stocks in the Pacific Northwest to all hatchery fish and, specifically, to all Columbia River hatchery fish. *See* Fed. Br. at 75-78. It does not follow that, because some hatchery stocks diverge significantly from wild stocks, all hatchery stocks possess the same characteristics. *See, e.g., id.* at 77 (demonstrating that Columbia River hatchery stocks do not show compressed run timings, unlike the Washington hatchery coho stocks identified in the Recovery Plan); 70 Fed. Reg. 37,160, 37,176-79 (June 28, 2005) (due to similarities, numerous hatchery stocks are included as part of the listed ESUs).⁴¹

⁴⁰ NWF's assertion that Columbia River Chinook abundance has "dramatically declined" since the mid-1980s fails for the same reasons. Merely citing a snapshot of Columbia River Chinook says nothing about whether current production levels are affecting SRKWs. *See* NWF Reply at 47 n. 46 (citing NOAA B364 at II-78, Table 7, which estimates Chinook during specific years based on data ending in 2002). Further, NWF ignores NOAA's consideration of a trend analysis performed with data from 1980 to 2007. BiOp at 9-17; NOAA B90 at 11-12. This more directed and up-to-date analysis showed "a large annual variability in adult Chinook returns to the mouth of the Columbia River" and "indicate[d] a slight positive trend, with average abundance of approximately 800,000 Chinook." BiOp at 9-17; *see also* NOAA B90 at 11 (explaining trend analysis and data relied on); NOAA B364 at II-82 ("salmon distribution is believed to have remained consistent in this region since at least the 1960s").

⁴¹ Nor is it rational to presume, as NWF does, that all or a significant proportion of Columbia River hatchery stocks adversely impact SRKWs. *See* NOAA B364 at II-77 (Recovery Plan noting that hatchery fish "may represent an important part of the diet for" SRKWs). Instead of supporting its claims, this demonstrates that NWF misunderstands NOAA's analysis. For instance, notwithstanding the fact that NOAA did not consider the effects, either qualitatively or quantitatively, associated with future hatchery reforms, *see* BiOp at 9-15, 9-17--9-19, NWF asserts that NOAA's finding is arbitrary because it relied on future federal hatchery reforms, NWF Reply at 47 n. 45. In addition, NOAA's analysis expressly differentiated between spring/summer and fall Chinook and considered only the Chinook actually available to SRKWs in its coastal waters, *see* BiOp at 9-7, 9-15 - 9-19; B372, rendering NWF's hypothetical example purporting to illustrate flaws in NOAA's analysis divorced from the facts of this case, *see* NWF Reply at 47 (opining that NOAA "may" have masked certain effects by failing to differentiate between spring/summer and fall Chinook, and by considering Chinook outside the coastal waters available to SRKWs). Thus, NWF's arguments are not supported by the record and do not support its challenge.

Importantly, NOAA expressly analyzed Columbia River hatchery stocks during the consultation process and found that, while there are differences between individual Chinook (both hatchery and wild), there is “no information available suggesting that [SRKWs] would be affected differently by consuming natural or hatchery salmon.” BiOp at 9-10; SCA, Appendices C, D (detailed analysis of Columbia River hatcheries). NOAA also expressly acknowledged and accounted for differences in individual wild and hatchery Chinook (such as size, fat content, and caloric value), and the availability of Columbia River Chinook to the SRKWs, as part of its conservative methodology. *See* Fed. Br. at 75-76; *see also* NOAA B372 at 5-6. Thus, NWF points to no data or factors ignored by NOAA, and its opinion that NOAA’s analysis should be cabined to the Recovery Plan mistakes NOAA’s obligation to consider the best available science, which includes both the Recovery Plan and “new data that became available more recently.” BiOp at 9-3; NOAA B372 (detailed analysis of Recovery Plan and new data). NWF’s failure to address NOAA’s actual finding – which it does not even reference in its reply – falls well short of showing that NOAA’s findings are “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council*, 537 F.3d at 987. As such, NOAA’s finding should be upheld.

VII. CWA SECTION 401 CERTIFICATION IS NOT REQUIRED BECAUSE THE INCIDENTAL TAKE STATEMENT IS NOT A LICENSE OR PERMIT THAT AUTHORIZES ACTIVITY THAT MAY RESULT IN ANY DISCHARGE INTO NAVIGABLE WATERS.

As explained in our opening brief, an ITS does not trigger CWA § 401 requirements because the Action Agencies are not “*applicant[s]* for a Federal *license or permit* to conduct any *activity* . . . which may result in any discharge into the navigable waters.” 33 U.S.C. § 1341 (emphasis added). Fed. Br. at 79-89. NWF’s strained theory of statutory construction ignores the plain language of the statute and conflicts with the reasonable and authoritative interpretation of both the ESA and the CWA by the agencies charged with their interpretation.

NWF's interpretation of the statute suffers from at least three flaws. First, NWF suggests that the Corps and BOR are "applicants" for the ITS because they "ask" NOAA for consultation pursuant to § 7 of the ESA. NWF Reply at 49 n. 51. However, under ESA § 7, action agencies do not apply for consultation or for an ITS.⁴² NWF ignores Congress' clear and consistent distinction between applicants and action agencies throughout ESA § 7. *See, e.g.*, §§ 7(a)(3), (b)(1)(B), (b)(2), (b)(3)(A), (c)(1), (d) and (g). NWF's broad interpretation of "applicant" is also at odds with the definition of "applicant" in the regulations implementing the ESA, which is not even referenced by NWF: An "applicant" is a person "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 402.02. Neither the Corps nor BOR requires formal approval from NOAA or any other federal agency to conduct FCRPS operations. NOAA's role is only as a consulting agency, and the activity is neither approved by NOAA nor authorized by the ITS. NWF does not suggest otherwise.

Second, NWF contends that the ITS is a "federal license or permit" as that term is used in CWA § 401. NWF again ignores the plain language of the statute. Congress did not use the word "permit" in ESA § 7(b)(4) when providing for an ITS. That term is used in ESA § 10 in which Congress added the provisions for incidental take permits. § 10(a)(1)(B). Congress can be presumed to have deliberately chosen not to use "permit" in § 7, just as it deliberately chose to use the term "permit" in § 10. *See*, Pub. L. No. 97-304, §§4 and 6, 96 Stat. 1411 (1982).

To the extent there is any ambiguity in the term ITS, NOAA's interpretation is entitled to deference. NWF has failed to address - at all - the interpretation of an ITS as adopted by both NOAA and FWS, the co-administrators of the statute. *See* Fed. Br. at 81-82. The interpretation is

⁴²The section 7 consultation process is triggered when an agency action may affect listed species - not by an application process. 50 C.F.R. § 402.14(a). And an ITS issues based on certain statutory findings, not by an application. 16 U.S.C. § 1536(b)(4).

set forth in the regulations implementing the statute, 51 Fed. Reg. 19,926, 19,953 (June 3, 1986) (the ITS is a limited exemption from potential liability, rather than as a license or permit affirmatively authorizing underlying actions or a take of listed species) and in NOAA's Consultation Handbook (an ITS exempts action agencies from the ESA § 9 prohibitions if they comply with the reasonable and prudent measures and the implementing terms and conditions of the ITSs); and in response to comments on the BiOp ("NOAA Fisheries' incidental take statements attached to biological opinions for federal actions are not permits.") NOAA C1155 at 45. This reasonable interpretation of the statute is entitled to deference. *National Ass'n of Homebuilders*, 127 S. Ct. at 2533-35 (ESA § 7 regulations are entitled to *Chevron* deference); *Northwest Ecosystem Alliance*, 475 F.3d at 1141 (policy which went through public notice and comment procedures afforded *Chevron* deference).

The Environmental Protection Agency ("EPA"), the agency charged with interpretation of the CWA, concurs with NOAA's interpretation that an ITS is not a "license or permit" as that term is used in CWA § 401.⁴³ EPA's interpretation, as set forth in the Federal Defendants' Brief, is also entitled to deference. *Long Island Care at Home Ltd. v. Coke*, 127 S.Ct. 2339, 2349 (2007) (an agency's interpretation is entitled to deference, even if the views are articulated in response to litigation and set forth in a legal brief).

NWF continues to rely on the dicta in *Bennett v. Spear*, 520 U.S. 154 (1997) and *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) to support its position that an ITS is a "permit" that triggers compliance with CWA § 401. However, neither of those cases addressed an ITS in the context of

⁴³Although EPA is not a named defendant before this Court, the briefs filed by the Department of Justice are filed on behalf of the United States, and represent the unified position of all United States agencies. EPA was consulted and concurred in the views expressed by the Federal Defendants in their principal brief, and in this Reply Brief.

CWA § 401.⁴⁴ This issue remains a matter of first impression for this Court, and this Court should defer to the reasonable interpretation of the agencies who are delegated the authority to interpret the statutes. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, neither the *Bennett* Court nor the *Ramsey* Court had the benefit of NOAA's authoritative interpretation of the ITS as presented to this Court. The Supreme Court has explained that when an agency's interpretation of the statute is entitled to *Chevron* deference, as is NOAA's interpretation of the ITS, that interpretation trumps a prior judicial construction of the statute unless the prior court decision holds that its construction "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005). Neither the *Bennett* Court nor the *Ramsey* Court made such findings, thus NOAA's interpretation of the term "trumps" the prior judicial construction.

Third, NWF's interpretation of CWA § 401 incorrectly assumes that the ITS authorizes the activity that results in discharge - - i.e., the operation of the dams. NWF Reply at 51. The Action Agencies do not dispute that the operation of the FCRPS may result in discharge to navigable waters; but the ITS does not authorize that activity. The construction and operation of the FCRPS is expressly authorized by Congress, and the Congressional authorization does not trigger CWA § 401 requirements.⁴⁵ It is the application for a license or permit to conduct the activity which may result in any discharge that triggers the certification requirement, and the Action Agencies do not require such a license or permit.

NWF argues that there should be no difference between dams operated by private parties and

⁴⁴NWF goes to great lengths to distinguish *Arizona Cattle Growers*, 273 F.3d 1229 (9th Cir. 2001) on grounds that the Court did not determine the "legal effect of an ITS." NWF Reply at 49, n. 50. Yet, neither did *Bennett* nor *Ramsey* determine the "legal effect" of an ITS in the context of CWA § 401.

⁴⁵NWF's effort to distinguish between construction and operation of the dams (NWF Reply at 51) is a red herring. Neither the construction nor the operation of the FCRPS is authorized by the ITS.

those operated by Federal agencies. NWF Reply at 51-52. Congress disagrees. Private parties are required to obtain a FERC license to operate dams. The federal Action Agencies are not. The difference is critical, since it is the FERC license, not the operation of the dams, that triggers compliance with CWA § 401. *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006). If the operation of the dams were authorized by an ITS, as NWF contends, then a private party could operate a dam without a FERC license, as long as it obtained an incidental take permit pursuant to ESA § 10.⁴⁶ That, of course, is not the case. Conversely, if the operation of dams were authorized by an ITS as NWF contends, then issuance of an ITS would be required in every case. Clearly, it is not, as there are many situations where a dam operation is “not likely to adversely affect” a listed species and no incidental take statement is issued, yet the action still goes forward. The ITS and the FERC license serve entirely different purposes, and are not interchangeable.

NWF advances a “but for” argument, suggesting that the Action Agencies could not legally operate the dams “but for” the ITS. NWF Reply at 50. NWF has failed to address the causation requirement implied by the statutory language that the activity “may result in discharge,” indicating that the discharge must “arise as a consequence” of the activity. *North Carolina v. FERC*, 112 F.3d 1175, 1188 (D.C. Cir. 1997) (quoting Webster’s New Int’l Dictionary (3d ed. 1961). The discharge from the FCRPS does not arise as a consequence of the ITS. Indeed, as a physical reality, discharge will continue with or without an ITS. There is simply no causal connection between the ITS and the discharge; rather, the discharge results from the existence and operation of the dams, and the ITS merely provides protection from potential liability associated with incidental take that may result

⁴⁶The ITS resulting from the § 7 consultation process applies only to federal agencies. A private party whose otherwise authorized activity may result in an incidental take of a listed species is required to obtain an incidental take permit pursuant to § 10 of the ESA. However, the issuance of the incidental take permit does not authorize the activity. In the case of dam operation, the private party would require a FERC permit to authorize the activity.

from that activity.

In sum, the NWF interpretation must be rejected. It is inconsistent with the plain language of the statute. It is not reasonable because it is not consistent with the purpose of either the ESA or the CWA and leads to absurd results.⁴⁷ An ITS does not authorize the operation of the FCRPS, and does not trigger the certification requirements of CWA § 401.⁴⁸

CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request that the Court grant our cross-motion for summary judgment and deny Plaintiffs' motions for summary judgment.

Respectfully submitted: December 17, 2008.

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⁴⁷NWF misses the point in arguing that the several significant conflicts that would result from its interpretation as identified by the Federal Defendants are irrelevant. The practical conflicts are relevant to inform the interpretation of legislative intent. Congress is deemed not to have passed laws that conflict with each other and statutes should be interpreted so as to avoid potential conflicts.

⁴⁸NWF has incorrectly asserted that failure to comply with CWA § 401 invalidates the 2008 BiOp as well as the ITS. NWF Reply at 54. See also, NWF Br. at 59, arguing that the two are “inextricably connected,” citing *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007). The *ONRC* case recognized, properly, that an ITS must be associated with a BiOp and cannot stand alone. But the reverse is not true. A BiOp can, and on occasion does, issue without an ITS. Accordingly, any perceived defect in the ITS need not have any effect on the validity of the BiOp. It would effect only the ITS and the protection provided by the ITS. It means only that the action agencies would be operating without the safe harbor provided by the ITS, and any incidental taking could be subject to § 9 liabilities. “Because an ITS is issued only to protect an agency and private individuals from liability under § 9, Plaintiffs’ allegation, that a deficient ITS renders a “no jeopardy” opinion arbitrary and capricious, is simply wrong as a matter of law.” *Friends of the Clearwater Alliance for the Wild Rockies v Lohn*, (unpublished) D. Id., CV 04-384-C-EJL (Mar. 31, 2005) at 44-45 (citing *Arizona Cattlegrowers*).

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on December 17, 2008, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

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