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THE HONORABLE JAMES A. REDDEN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants.	Case No. CV 01-00640-RE (Lead Case) Case No.: CV 05-00023-RE (Consolidated Cases) **AMENDED JOINT REPLY MEMORANDUM OF WASHINGTON, IDAHO AND MONTANA IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

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Washington, Idaho and Montana ("States") jointly submit the following reply memorandum in support of their cross motion for summary judgment on the 2008 biological opinion for the Federal Columbia River Hydropower System ("FCRPS").

I. GENERAL OBSERVATIONS ABOUT THIS LAWSUIT.

Plaintiffs dismissively refer to the federal agencies' "herculean effort at listening, collaboration, commitment and analysis" as nothing more than "atmospherics about changed attitudes and perspectives" evidenced by NMFS' use of the trending towards recovery analysis within the 2008 biological opinion. NWF Reply Mem. at 54-55. The States laud the agency's approach and find nothing odd whatsoever about a commitment to develop a reasonable and prudent alternative ("RPA") that actually goes beyond a determination that current recovery prospects will be maintained, and that affirmatively commits to an action that will contribute to future recovery prospects. This approach, along with the associated memoranda of agreement entered into by Bonneville Power Administration, has unquestionably enhanced and strengthened the biological opinion to a point beyond any of its predecessors. A collateral benefit of the new collaborative approach, it must be emphasized, is that it will also greatly improve the region's ability to implement the myriad terms and conditions of the 2008 biological opinion, and to work together for the conservation of listed salmon.

The nature of the dissent over the 2008 biological opinion, as it has been expressed in this latest round of briefing, causes us great concern not just because it attacks the biological opinion per se – if the States were sensitive about dissent they would never have survived the collaborative process – but because the dissent expressed contributes so little to narrowing our differences and aggressively seeks to diminish the progress toward a new regional collaborative model that resulted from the last remand. Having failed to achieve all of their individual goals during the remand collaboration, Plaintiffs and Oregon return to litigation with a vengeance. In addition to their

overarching attack – a broad conceptual claim that there is a legal defect in the basis for evaluating whether the RPA will avoid an appreciable reduction in the odds of success for future recovery planning – Plaintiffs have marshaled their team of scientists to highlight every instance within the biological opinion where they feel they might mine some scientifically debatable issue and turn this into a fatal flaw, either individually or collectively.

The States agree with the comment of the three lower river Tribes that the preoccupation "with false precision, and the numerous mini-debates among 'experts' …distract[s] from the ultimate goal of robust salmon restoration sought by the tribes." *Amici Curiae* Warm Springs, Umatilla and Yakama Tribes Mem. at 4. It is an attempt to kill the product of the remand collaboration through "death by a thousand cuts." However, that kind of approach, if allowed to gain traction, will ultimately paralyze the Region's ability to move forward and impair our ability to actually achieve what Judge Marsh hoped for – real progress based upon both a genuine commitment to change and the corresponding commitment of resources to effect that change.

Judge Marsh also acknowledged in his 1994 decision that the consultation process is distinct from the recovery planning process, refusing to draw bright judicial lines between the two endeavors and leaving it to the federal Defendants to sort out priorities. His only, albeit important, warning was that NMFS needed to focus on the listed species and faithfully embrace the jeopardy avoidance mandate of Section 7 when conducting any consultation. The remand collaboration was committed to that effort and struck a balance between Section 7 and Section 4 efforts. As evidenced in the various briefs supporting the biological opinion's validity, some would say that the RPA goes beyond what Section 7 requires, while others are less inclined to pick a bright line between jeopardy avoidance and recovery implementation. However, regardless of which of those two views is correct, there can be no doubt that the remand collaboration produced a commitment to developing an RPA which, when implemented, will halt and actually reverse any declining trajectory for listed

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salmon ESUs. This is positive change and it is time for Plaintiffs to fairly acknowledge that change rather than using litigation to leverage their now virtually idiosyncrative positions. Instead, let them commit to a focus on region - wide recovery plan development and implementation.

NWF and Oregon are not shy about citing all the scientific uncertainties associated with the use of habitat for off-site mitigation, yet they are no less unreserved in the absolute correctness of their own one-size fits all purported hydro fixes. Consistent with that approach, their three "standing" declarations are actually message pieces presented *pro forma* as unequivocal statements of fact. NMFS knows what common sense suggests - that in truth the science is seldom so black and white. Plaintiffs' call for sweeping changes to the system in the face of growing realizations that responsible science is now at the limits of predicting what such changes will produce in terms of realistic benefits for fish also ignores or sidesteps the legitimate central approach of this biological opinion: A recognition that each listed stock has its own set of problems, frequently involving a few targeted populations, and that solutions require not an uniform, across-the-board fix, but a fine-tuned response. In light of that observation, the remand collaboration made the deliberate decision to shift from broad scale solutions with uncertain and diminishing returns to a focus on the limiting factors for individual populations within each ESU. States Open. Mem. at 1-3. That eminently reasonable yet critically important shift in thinking was adopted very early in the remand collaboration and subjected to painstaking scrutiny and debate. NMFS then produced an issue summary paper to explain the hard choices that had to be made where complete consensus could not be reached. Accordingly, Plaintiffs' claim that the RPA simply enshrines the status quo, and reflects some refusal to do what it takes to meet the Section 7 obligation, demeans the remand collaboration, and is frankly quite disingenuous when it suggests that there was some failure to follow this Court's directives.

Furthermore, if we are expected to gracefully accept criticism that the remand collaboration failed to produce complete consensus, it is only fair to point out that commonly held solutions have been offered up but then ignored or discredited. For example, without dissent, the Policy Work Group incorporated the Oregon formulation for actions that would be considered reasonably certain to occur (*See e.g. Amicus Curiae* Oregon Mem. (Dkt. 311) at 6, 9), which was endorsed by this Court in its 2003 opinion (*NWF v. NMFS*, 254 F. Supp. 2d 1196, 1213-14). In response, the federal agencies committed to a substantial increase in funds, and worked as partners with state and tribal sovereigns to provide the required certainty of implementation. But this is now deemed to be inadequate. Oregon Reply Mem. at 19-24. Similarly, in an effort to build toward a common regional position, Oregon, along with Washington, Idaho and Montana developed a preliminary agreement with the federal agencies in 2005 ("Preliminary Agreement," NMFS AR C.46) for the management of the FCRPS. This preliminary agreement had none of the alleged precision, and few of the hydro provisions, that Oregon now insists upon. That proposal also included the so-called Montana operations, which are now also opposed by Oregon as litigation resumes.

The goal posts continually move. Oregon now charges that the hydro system can do more. Oregon Reply Mem. at 19; Second Declaration of Edward Bowles at 48. However, the issue is not whether it is merely possible to manipulate the hydro system in some new manner, but whether NMFS abused its discretion in either the adoption or application of the jeopardy and adverse-modification standards used in the 2008 Biological Opinion. As discussed in the following sections of this brief, the region-wide collaboration set in motion by this Court, of unparalleled scope and complexity, corrected previous deficiencies, produced a set of measures designed to ensure that continuing FCRPS operations will not jeopardize listed salmonids or adversely modify critical habitat, and was analyzed in conformity with the ESA, implementing regulations and court provided guidance.

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At the end of the day, this round of litigation makes it quite clear that, as far as Plaintiffs are concerned, there is no pathway to basin-wide recovery other than through dam breaching. Oregon, for its part, asserts that the support by the other sovereigns for this biological opinion does not demonstrate its scientific validity, and adds that, "[j]ust as the mere presence of dissent does not render the biological opinion invalid,…neither does a purported 'regional consensus' render it lawful." Oregon Reply Mem. at 2. The States agree, of course, with the proposition that regional agreement by itself does not mean this is a good biological opinion. Likewise, dissent alone does not mean the biological opinion is invalid, and dissent stated in dogmatic terms does not weaken that proposition.

It is time to call the question on this debate. This is the Columbia Basin's opportunity to turn talk into meaningful action that not only avoids jeopardy to these species but, along with the broader regional recovery efforts currently underway (States' Open. Mem. at 2-3), will also preserve and enhance their path to recovery.

II. LEGAL ARGUMENT

Turning more specifically to Plaintiff's response briefs, this memorandum will discuss the obvious flaws in Plaintiffs' arguments on (A) the biological opinion's jeopardy standard; (B) the analysis of adverse modification of critical habitat; and (C) the proposed tributary and estuary habitat projects. In our view, this case is nowhere near a close call on whether the appropriate legal standards in the APA and ESA have been met – the administrative record more than amply supports the conclusions in the BiOp and the application of the best available science.

A. THE JEOPARDY ANALYSIS

1. The ESA Section 7 recovery analysis and the ESA Section 4 recovery planning process are complementary but distinct components of the ESA.

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Plaintiffs acknowledge, as they must, that "a proper jeopardy analysis does not require recovery planning." (NWF reply br. at 3) *See e.g. Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008) (holding that the jeopardy regulation requires some attention to recovery issues but does not require the importation of recovery planning processes). However, their ensuing treatment of the recovery regulation fails to maintain this discipline and results in a jumbled reading of the ESA, the case law, and the *Endangered Species Consultation Handbook* in an effort to argue that their preferred recovery analysis reflects "essential regulatory components." (NWF reply br. at 5)

We can all agree that one of the principle aims of the ESA is to conserve listed species - bringing them "to the point at which the measures provided pursuant to [the ESA] are no longer necessary. Based upon that overarching conservation aim, we know that the Section 7 analysis must give "some attention to recovery issues," 524 F.3d at 937, and that there must be a full analysis of those [recovery] risks and their impacts on the listed species "continued survival." *Id.* at 933. We can even agree that it makes sense to approach a system as complex as the FCRPS using an all-H approach – focusing on the many factors contributing to the listing of salmon populations beyond just the FCRPS – when evaluating whether a set of future FCRPS operations can be structured to meet the no jeopardy obligation of Section 7. But we must also recognize that the Section 7 process has a limited, though important, role in the ESA's overarching conservation objective. In the context of recovery, Section 7 works solely to provide "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." 524 F.3d at 937. In this light, it is clear that the 2008 BiOp analysis must ensure that future FCRPS operations will leave listed salmonids in a position where

long term recovery plans can be effective. However, the recovery work itself is the domain of Section 4 and the associated recovery planning and implementation process.[1]

2. NMFS's recovery analysis is a forward looking evaluation of the prospects for recovery considering the affects of the proposed action aggregated with other future effects. Accordingly, it constitutes the kind of full analysis of recovery impacts envisioned by the ESA.

Consistent with the guidance provided by the Ninth Circuit Court of Appeals, NMFS's recovery analysis considers "whether the RPA will result in the impairment of the potential for recovery." (Fed. Br. at 30 & n.21). Plaintiffs concede as much, but surprisingly proceed to argue that this approach "reflects precisely the view of the jeopardy inquiry this court and the Ninth Circuit have already rejected." (NWF reply br. at 7) That argument cannot be squared with the Ninth Circuit's conclusion that the Section 7 recovery analysis simply provides some reasonable assurance that the proposed action "will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." 524 F.3d *at 937*. NMFS's focus on preserving the potential for recovery by ensuring that proposed FCRPS operations will not impair the ability to recover listed fish runs true to the Section 7 obligation and does nothing to demean the conservation objective that everyone seeks to promote within the Columbia River Basin.

Plaintiffs justify their criticism by resurrecting the status quo theme that first emerged in Judge Marsh's 1994 opinion, *Idaho Fish & Game Dep't v. NMFS*, 850 F. Supp. 886 (D. Or. 1994), and that was echoed in the *NWF* decision rejecting the 2004 biological opinion's focus on whether proposed FCRPS actions were appreciably worse than what might exist under some baseline

[1] While this principle is clear from the text of the ESA and its accompanying regulations, and further reinforced in the *NWF* opinion, it also makes intuitive sense. ESA consultations focus on a singular proposed action, but we know that a listed species often suffers from the harm imposed by many actors. In the case of Columbia Basin salmon there is general consensus that habitat loss, harvest activity, hatchery practices, and hydro operations have all contributed to the listing status. No single contributor to this situation is capable of fully ensuring that Columbia Basin salmon are conserved. And thus it is apparent that a Section 7 analysis, being focused as it is on a single entity, is ill suited to actually achieve the ESA's conservation objective and was not designed for that purpose. Forcing an individual entity undergoing Section 7 consultation to shoulder that burden would also have the perverse effect of reducing the incentive for other actors within the Columbia Basin to come together and collectively contribute to a fully robust recovery plan.

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operation.[2] They argue that NMFS's impairment-focused recovery analysis is a preservation of the status quo and legally insufficient given the Ninth Circuit's reference to a jeopardy analysis that considers what "might result from the [action] agency's proposed actions in the present and future human and natural contexts." In essence, they argue that NMFS's jeopardy analysis perpetuates the status quo, and is not forward looking, because it focuses on whether a current trajectory toward recovery is impaired by undertaking the RPA.[3] This argument fails because it does not appreciate the forward-looking perspective that is built into the aggregation aspect of the jeopardy analysis and because it fundamentally mischaracterizes the underlying objective of the "trending towards recovery" approach that NMFS proposed as part of the remand collaboration.

The reference to an analysis that considers present *and* future human and natural contexts that the Plaintiffs extract from the *NWF* opinion was a reference to the entire jeopardy analysis, not just a recovery analysis. 524 F.3d at 930. More importantly, the quoted reference reflects the court's rejection of NMFS's 2004 failure to aggregate the effects of the action with baseline conditions and any cumulative effects in favor of a reading of the jeopardy analysis that requires a broader look taking into account past, present and future impacts.

Recall that, in the 2004 biological opinion, NMFS simply compared the effects of the proposed action to a reference baseline operation (assuming operation of the FCRPS in a manner allegedly maximized for fish survival) and then concluded that no harder look was required if the comparison did not demonstrate an appreciably worse level of survival. The Ninth Circuit rejected this incremental approach on the basis that it failed to provide the appropriate "actual" context for the jeopardy analysis required by Section 7 and the accompanying service regulations. *Id.* As the Court went on to hold, the appropriate context is provided by aggregating the effects of the proposed

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[2] The 2004 biological opinion was also premised on the notion that the jeopardy analysis could focus solely on whether the proposed action would affect the survival of the listed species and did not need to consider recovery impacts. *NWF*, 524 F.3d at 921.

[3] Oregon's characterization of NOAA's approach is a bit more generous to the extent that it acknowledges that the trend towards recovery approach actually seeks to produce more abundant runs of listed salmon, but ultimately belittles the approach as insufficient because, in the abstract, the application of such an approach might be viewed as good enough if just one more fish were produced. As discussed below, States' Reply Br. at 17, the record does not support any claim that the approach was applied in such a strained and stingy manner.

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action with the baseline conditions (that might include other *future* federal action which have under gone consultation) and with any cumulative effects (*future* non federal actions that are reasonably certain to occur). In essence the Court recognized that the hard look mandated by Section 7 does not require NMFS to treat the proposed action as if it were the cause of all aggregated effects, but does require NMFS to analyze the effects of the proposed action in the broader context of past, present and future impacts.

This is *precisely* the form of analysis performed in the 2008 Biological Opinion (BiOp at 1-10 noting that the jeopardy analysis is performed after aggregating the effects of the RPA, baseline and cumulative effects) and no claim is made by any of the plaintiffs that NMFS failed to adequately aggregate all these effects. This contextually correct analysis is based upon a hard look at the aggregation of past, present, and future effects and is inherently forward looking.[4] The 2008 Biological Opinion "looks at the aggregate of all such effects fling forward" and focuses on "the resulting survival and recovery potential." BiOp at 1-12. Accordingly, Plaintiffs' complaint that NMFS's recovery analysis improperly focuses on whether the proposed action will impair recovery, and is either backward looking or maintains the status quo, is simply inconsistent with the guidance provided by the Ninth Circuit regarding the appropriate framework for the overall jeopardy analysis and specifically the recovery component of that analysis.[5]

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[4] The opening brief of the three states (Br. at 24-25) also pointed out that the trending towards recovery analysis begins with a characterization of past performance that is then adjusted to the present in a "base-to-current" adjustment to reflect "ongoing and completed management activities that are likely to continue into the future." BiOp at 7-11. This yields an expected population trajectory with the assumption that "*future performance*" of the populations will continue on that trajectory if no further action is taken. (Emphasis supplied) Furthermore, the impairment based analysis does not stop with a determination that the projected recovery trajectory will be maintained into the future under the effects of the RPA. Recovery metrics were utilized in an iterative process to build an RPA that will improve the trajectory to the point that populations are increasing in abundance in cases where there is currently a downward trend. Plaintiffs fail to rebut our argument that this reflects both a forward looking and proactive approach to the recovery analysis.

[5] Plaintiffs' citation to *Pacific Coast Fed'n of Fishermen's Assoc. v. NMFS*, 426 F.3d 1082, 1093 (9th Cir. 2005) does nothing to support their argument because the case simply bolsters what the Ninth Circuit held in *NWF* – that the jeopardy analysis cannot be limited to a proportional share of an action agency's impacts but must instead proceed based upon the appropriate wider context. However, once the jeopardy analysis moves forward using the appropriate contextual reference, the recovery prong considers whether implementing the proposed action will appreciably impair the prospects for future recovery. 524 F.3d at 937.

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3. Plaintiff's argument that their preferred form of recovery analysis contains "essential regulatory component" is not supported by the text of the ESA or its accompanying regulations.

Plaintiffs urge a preferred conceptual framework for the recovery analysis on the premise that it contains "essential regulatory components" missing from NMFS's analysis,[6] but a return to the text of the ESA and its implementing regulations reveals the flaw in this assertion. Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat...." 16 U.S.C. § 1536(a)(2). The jeopardy component is further defined by regulation to encompass "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R § 402.02. At no place in the ESA, or its implementing regulations, is there any suggestion that a specific form of recovery analysis is required. Instead, as noted by the Ninth Circuit, the analysis NMFS chooses must simply provide some reasonable assurance that future recovery planning efforts will not be impaired, 524 F.3d at 937, and that analysis must be undertaken within the appropriate context, as set forth in 50 C.F.R. § 402.02, by evaluating the effects of the proposed action after aggregating them with other impacts associated with past, present and future impacts that are reasonably certain to occur. 524 F.3d at 930.[7]

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[6] Plaintiffs advocate for a framework that describes a future population level needed to achieve recovery, followed by a prediction of when that recovery level should be obtained, and then a calculation of the probability of achieving that population within in the desired time frame. (NWF Opening Br. at 9-10)

[7] To the extent that plaintiffs seek some regulatory "formula" for a jeopardy framework beyond the Ninth Circuit's guidance, it is found in 50 C.F.R. § 402.14(g)(1) where the Service's responsibilities in a formal consultation are set forth. This regulation reflects the contextual frame of reference identified by the Court in 524 F.3d at 937 – evaluation of the current status of the species, the effects of the action, and any cumulative effects, followed by an evaluation of whether the effects of the action, "taken together with" the other identified past, present, and future effects, will jeopardize a listed species. As discussed above, the essence of this approach is the aggregation of past, present and future impacts.

Ultimately, NMFS's broad framework for the recovery portion of the jeopardy analysis remains the same as it has in past – to ascertain "whether the species can be expected to survive with an adequate potential for recovery." BiOp at 1-10 – reflecting the joint survival and recovery aspect utilized in prior biological opinions and approved in *NWF*, 524 F.3d at 932-33. *See also Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1070 (9th Cir. 2004). What has changed are the metrics and population centered approach to this analysis that is then rolled up to the Evolutionary Significant Unit (ESU) level for each listed species utilizing limiting factors to develop, iteratively through that analysis, an RPA that avoids jeopardy. The fact that the metrics and ESU limiting factor approach are new is unimportant provided that it is a reasoned approach to fulfilling the overall no-jeopardy objective. *Motor Vehicle Mfg. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 41-42 (1983).

Plaintiffs concede that NMFS is not bound to follow lockstep with its prior approach to the question of whether any listed species has an adequate potential for recovery, NWF Reply Br. at 5, but then hasten to recall NMFS's overarching recovery objective in prior biological opinions (the same "adequate potential for recovery" objective called for in the 2008 Biological Opinion) and the more specific metric used in the past biological opinions for measuring that objective (a basic probabilistic analysis of whether an ESU will have a "moderate to high likelihood" of achieving recovery in the future) as if that were some required basis for any analysis.[8] However, NMFS has provided an explanation for why it chose a new form of specific analysis to inform the long standing "adequate potential for recovery" inquiry. NMFS felt it was appropriate to embrace the remand collaboration's determination that an ESU by ESU rollup of population specific dynamics, guided by specific limiting factors for each population, would provide a better basis for building a solid

[8] Ironically, while Plaintiffs criticize NMFS for its departure from prior methodologies, they offer their own new general framework and do so without providing a specific set of metrics, preferring instead to offer criticism about the specific metrics that were thoroughly vetted in the remand collaboration in an open manner with a specific explanation by NMFS for why it made a reasoned choice among competing views where there were differences of opinion. *See e.g.* Biological Opinion Issue Summaries at 25 (responding to Oregon's comments regarding the COMPASS model.)

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RPA that avoids jeopardy.[9] NWF and Oregon also devote considerable attention to the issue of uncertainty in the data and how it was dealt with. *See* NWF Reply Br. at 28, Or. Reply Br. at 15. The various criticisms include, that productivity metrics are "unreliable," confidence intervals for extinction risks are not the best measure of that risk, that the timeframe for applying those measures was wrong, and that no confidence intervals were expressed beyond the base-period metric values. These arguments vividly illustrate the degree to which this case has ventured beyond the normal boundaries of APA record review, into an impenetrable thicket of declarations that, unlike the many discrete products that comprise the Biological Opinion, have never been tested, reviewed or subjected to scientific scrutiny. Rather than compound that problem, suffice to say that NMFS more than met the arbitrary and capricious APA standard and the ESA's best available science standard when:

(1) From the outset of the remand it acknowledged - together with the other sovereigns in a transparent discussion that is reflected in the administrative record - the existence of uncertainty in the quantitative measures of extinction risk and that confidence intervals are a way to measure that uncertainty (BiOp at 7-11);

(2) It identified the reasonable 24 year horizon to measure extinction risk, which as the BiOp notes exceeds the timeframe of most of the Prospective Actions by more than double (so as to be conservative), and responded to the problems inherent in Oregon's suggestion of a 100 year horizon, namely that it does not provide a valid picture of extinction risk (*Id.*); and

(3) It made its best professional judgment for some habitat, hatchery and hydro multipliers for which no confidence intervals could be calculated, and then recognized that in such instances it is especially "important to have an effective monitoring program and adaptive management contingencies" to react if the estimates proved to be inaccurate (BiOp at 7-35).

Even considering the voluminous declarations submitted by Plaintiffs, on these points just as with many others there is no real allegation that NMFS ignored some scientific principle in rendering its professional judgment. Rather, the claim is that Plaintiffs' biologists are right and

[9] Plaintiffs continually debase the Biological Opinion's no-jeopardy finding as if it was code language meant to absolve the FCRPS from its past and present effects on listed salmonids. That hardly gives necessary legal import to the completely legitimate overall objective of the remand collaboration – to devise an RPA that avoids jeopardy. It also fails to recognize that the action agencies made their own jeopardy call on current FCRPS operations to set the stage for the development of a no-jeopardy RPA that could be faithfully implemented under the ESA. Insisting upon a jeopardy call within the BiOp, followed by RPAs that would mitigate that jeopardy call, is simply PR form over substance.

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NMFS's biologists (and presumably all the others those who worked in the remand for the States and Tribes) are wrong.

NMFS also explained its use of Technical Recovery Team data products, its basis for a recovery analysis time horizon, and both its quantitative and qualitative approach to the analysis of both the survival and recovery components of the jeopardy analysis. Under those circumstances, and where NMFS has incorporated the additional guidance provided by this Court and the Ninth Circuit as discussed above, NMFS's development and use of a new basis to evaluate whether listed species will survive with an adequate potential for recovery suffers no deficiency in terms of its essential regulatory components.

Plaintiffs also complain that the remand parties deviated from the agreed upon conceptual framework to avoid having to make painful choices to avoid jeopardy. *See e.g.* NWF Reply Br. at 31 (alleging the "roll up" of population level information "declined to adopt the standards" of the conceptual framework); Or. Reply Br. at 5-6 (arguing that NMFS "completely abandoned" the concept of linking its jeopardy analysis to recovery criteria). The problem with these arguments is twofold. First, they stem from the false premise that the BRT and ICTRT products were created as the basis for determining jeopardy, when in fact they were - as the BiOp states - "developed as primary sources of information for the development of delisting or long-term recovery goals." BiOp at 8.2-5. Second, there was never an abandonment of the recovery information; it was considered when NMFS made the jeopardy call in accordance with the 2006 Lohn memoranda. *Id.*

The fallacy of claiming that the collaborative process detoured from the agreed-upon stepwise approach is readily shown by reference to the conceptual framework itself. *See* AR C. 04043. The document is quite clear in explaining that it was created to provide " a scientifically defensible *basis* for the jeopardy analysis," not as a substitute for NMFS's jeopardy determination, which is set forth as Step 10: "With Steps 5 and 6 completed and Steps 7-9 included in the Proposed Action, NOAA Fisheries can perform the Section 7(a)(2) jeopardy analysis of the Action Agencies' new proposed FCRPS action (resulting from Sub-Step 5A) and render a new Biological Opinion with the required incidental take statement." (Emphasis supplied).

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This argument has long been in the making. More than two years ago in a status conference, NWF strenuously complained - before the work under conceptual framework was even completed - that ""NOAA has thus far failed to describe or articulate the actual jeopardy standard it will employ to evaluate a proposed action or RPA," which begs the question why NWF would now claim that the conceptual framework was itself the source of the jeopardy analysis, when at that time it was clamoring for NMFS's jeopardy standard. *See* NWF Response to Federal Defendants' Third Status Report (Dkt. #1268, 7/13/06). As the federal agencies explained at the time, the collaborative "workgroup is developing overviews that describe long-term recovery goals and estimates of gaps and examining current fish abundance, productivity and viability." Fed. Def.s' Third Remand Report, Ex. 1, p. 2 (Dkt. #1265, 7/3/06). The Court may recall the vigorous argument that took place at the status conference held on July 21, 2006, at which counsel for the United States explained in detail the role of the conceptual framework and how it would be considered by NMFS when the jeopardy analysis was conducted, which is in fact what occurred, as the Biological Opinion and the Lohn memoranda describe.

Overall, the argument regarding the alleged deviation from or disregard of the conceptual framework is without factual support, and is merely an artificial construct manufactured for the purpose of assigning a pejorative motive to the work of the collaborative parties. Otherwise, Plaintiffs' preferred approach is no more than an effort to mandate a different analysis that may provide another way to address the fundamental inquiry – whether the RPA will leave listed salmonids with an adequate potential for recovery. The holding in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (*en banc*) precludes the Plaintiffs from insisting upon the use of such an alternate approach.

4. The "trending towards recovery" objective is a rational basis for evaluating whether listed salmonids will retain an adequate potential for recovery and goes even further by affirmatively contributing to region-wide recovery planning and implementation efforts.

Both the Plaintiffs and Federal Defendants agree that the "trending towards recovery" concept arose from NMFS's belief that this Court's opinion in *American Rivers v. NOAA Fisheries*,

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04-CV-00061-RE (Opinion and Order on Summary Judgment – May 23, 2006, Dkt. #263) mandated an affirmative obligation under Section 7(a)(2) of the ESA to "halt and reverse the trend towards species extinction" (quoting from *TVA v. Hill*, 437 U.S. 153, 184-85 (1978)). (NWF's Opening Br. at 7, AR Doc. B.343 at 2 (July 12, 2006 Jeopardy Memo at 2). NMFS's sense that its 7(a)(2) analysis would have to embrace this affirmative obligation also reflects a liberal reading of the opinion in *NWF*, where the Court of Appeals criticized the jeopardy analysis on the basis that the effects of the proposed action were only compared to a reference operation baseline without the full context of other past and future impacts. The Court characterized this as an approach that allows a listed species to suffer numerous sufficiently modest insults, none of which individually departs appreciably from the baseline reference, but will ultimately allow a listed species to be "gradually destroyed." 524 F.3d at 930. The court concluded that such a "slow slide into oblivion … is one of the very ills the ESA seeks to prevent." *Id.*

As Plaintiffs argue, this may not be an authoritative expression of the jeopardy regulation. (NWF's Opening Br. at 7) However, that does not lead to the inevitable conclusion that NMFS's incorporation of an affirmative recovery approach within the Section 7 recovery analysis fails the fundamental obligation - providing some reasonable assurance that the RPA will not appreciably reduce the odds of success for future recovery planning. To the contrary, when the "trending towards recovery" concept is fairly stated, it is quite clear that NMFS and the action agencies were committed to the principle that any ESU with a negative abundance trend would be placed onto a positive trend into the future by implementing the RPA. Accordingly, regardless of whether NMFS correctly interpreted the guidance from either this Court, or the Ninth Circuit, regarding an affirmative obligation to reverse any observed slide towards extinction, the adoption of such an approach clearly goes beyond either maintaining the general status quo or preserving any pre-action recovery trend that NMFS projected after its base-to-current adjustment of the listed species' status. Nothing in the ESA prevents that kind of approach and the action agencies' commitment to a more affirmative and protective approach is actually consistent with Section 7(a)(1) commanding federal agencies to utilize their authorities to carry out programs for the conservation of listed species. 16 USC § 1536(a)(1).

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As discussed above, the Plaintiffs' arguments fail to reveal any real inconsistency between NMFS's conceptual approach and either the text of the ESA (and its implementing regulations) or the case law providing additional guidance on the breadth of the jeopardy regulation. Plaintiffs attempt to strengthen their legal argument by characterizing the "trending towards recovery" commitment as an incremental, do as little as possible approach, with the hope that this will resonate with their other repeated refrain that NMFS and the action agencies can only be trusted to do as little as possible for listed fish while constantly focusing on how to make more money. But Plaintiffs' support for this notion relies on grossly inaccurate characterizations of the trending towards recovery objective. For example, NWF asserts that the trending toward recovery standard would be met if a population "grows by one fish per year" even if this means it takes more than 17 centuries to reach the targeted recovery abundance.[10] NWF Reply Br. at 6, n. 7. However, NWF cites to no place in the record where the recovery trend objective is actually applied in such a narrow and stingy manner. Accordingly, it is simply a convenient mischaracterization of the actual manner in which the "trending towards recovery" objective was applied.

A fair reading of the objective would acknowledge that NMFS and the action agencies committed to a recovery trend objective that is far more substantive than simply passing one fish past a replacement rate of return spawners. The 2008 Biological Opinion specifies that the adequacy of the recovery potential produced by placing an ESU on a trend towards recovery "is sensitive to the present obstacles for planning or achieving recovery." BiOp at 1-12. The concept is also applied in relation to an ESU's limiting factors with a view to assessing whether those factors "will be lessened or eliminated." *Id.* Furthermore, the objective is applied in practice to ensure that the listed species will have a "high probability of continued survival." *Id.*

This last point – that the recovery analysis occurs jointly with the survival analysis – is a particularly important observation that is absent from Plaintiffs' analysis. The concept of a joint

[10] Oregon similarly describes the trending towards recovery concept as a meaningless objective because it allegedly tolerates improvements that are "marginally over replacement." (Or. Response Br. at 8). But Oregon fails to provide any real demonstration that the described RPA improvements in abundance trends are actually "marginal" in their effect. This bald assertion is a particularly egregious mischaracterization of the trending objective in those cases where the RPA actually reverses an otherwise negative trend that might be expected to continue in the absence of the RPA.

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survival and recovery analysis was discussed by the Ninth Circuit in *NMFS v. NWF* as part of its evaluation of the regulatory basis for the recovery analysis. *Id.* at 932. The opening/response briefs of the federal and intervening defendants point out that the Ninth Circuit's regulatory analysis confirms that a jeopardy finding, based solely on recovery considerations, will only occur in "exceptional circumstances." *Id.* The point of that discussion is not to render the recovery aspect of the jeopardy analysis as something secondary to survival and of relatively little importance.[11] Instead, it reflects what Judge Marsh noted in *Idaho Fish & Game Dep't v. NMFS* - that there is no scientific or legislatively clear distinction between survival and recovery. 850 F. Supp. at 894-95 and 899-900. Accordingly, it was not unreasonable for NMFS to take the position that recovery prospects would be placed at risk where the population is quantitatively and qualitatively assessed to be trending downwards. Plaintiff's argument to the contrary, NWF Reply Br. at 6, n.6, has no merit when it suggests that NMFS's basis for defining a recovery risk threshold remains the same as NMFS's position in the 2004 Biological Opinion where it asserted that recovery is subsumed within the survival analysis. That is patently untrue. The 2008 Biological Opinion gives full consideration to both survival and recovery even though it may not be possible to cleanly distinguish between these two concepts, as noted by Judge Marsh.

The federal agencies, Tribes and States started the remand collaboration, and resulting Biological Opinion analysis, with the premise that a downward trend in ESU abundance would impair both survival and recovery. It is important to realize, however, that any downward trend identified after performing the "current to base" adjustment is not appropriately characterized as an effect of the RPA under review, but instead represents a potential future trend that informs the analysis of the effects of implementing the RPA. This is the exactly the aggregation approach discussed in *NWF*. Next, the iterative process for creating the RPA, and performing the ultimate jeopardy analysis, turned to the goal of producing an RPA, the effect of which is to both reverse any

[11] We do not seek a debate about whether some of the ESUs of listed salmonids may be in a position that are "exceptional" and might warrant a jeopardy call, based upon recovery considerations alone, if the wrong set of actions are proposed. Instead, because the jeopardy analysis utilizes a trending to recovery objective that, when applied, seeks to actually halt and reverse any negative abundance trend that might continue *in the absence of the RPA's implementation*, we think it only fair that this proactive commitment be placed into an appropriate legal context.

downward trend (and to actually obtain a positive trend in abundance and productivity) while *also* ensuring the continued survival of each ESU as those steps toward recovery gather speed. This reflects a joint survival and recovery analysis whose objective is to consider both the risks to the persistence of listed species and the prospect that future recovery actions will be successful.

NWF argues that the risks to survival and recovery might be better analyzed if NMFS used NWF's preferred recovery modeling format, hypothesizing that this would somehow better gauge the point at which recovery might be impaired, NWF Reply Br. at 6, n.6 (asserting that NMFS's approach lacks any temporal dimension to its risk analysis). But this is, once again, simply a claim that Plaintiffs' experts have devised a better way to assess recovery risks rather than a convincing argument that NMFS's approach produced by this Court's collaborative process is legally insufficient.[12] We do not dispute that a temporal dimension is important; the point is that the specific method for assessing risk in a temporal sense, whether for survival or recovery, is not specifically mandated by the regulations or any court guidance. Instead, NMFS must ensure that it does not fail to rationally consider risk in some appropriate temporal context (e.g. it cannot irrationally assume that short term risks will be fully mitigated by longer term mitigation absent some reasoned explanation - *NWF*, 524 F.3d at 934-35). It was entirely rational for NMFS to conclude that a proposed action which has the effect, over its term, of reversing any negative trend in the abundance and productivity of a listed ESU, and that actually produces positive gains, will not have a jeopardizing effect.

Plaintiffs object that recovery would be better facilitated, or be faced with even less risk, with swifter or more dramatic moves towards the attainment of target abundance and productivity levels. However, at this point their complaint is really more that the Section 4 recovery planning process needs to accelerate than it is a fair assertion the Section 7 process has failed. The Ninth Circuit has clearly held that the Section 7 process is limited to an analysis of whether the action

[12] Plaintiffs' promise of a superior basis for clarifying the boundary between survival and recovery that the regulations and Judge Marsh recognize as unclear is, of course, highly debatable. Even if the Court is of a mind to entertain Plaintiffs' proposed format, which it should not under the usual rules of APA litigation, there is nothing of substance to work with. All the Plaintiffs have offered in their briefing is a very abstract framework for an alternate analysis.

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under review might produce some jeopardy rather than an effort to see how much recovery work an action agency can be made to bear. *NWF*, 524 F.3d at 930.

The Ninth Circuit required a jeopardy analysis that "appropriately consider[s] the effects of … actions within the context of other existing human activities that impact the listed species", *Id.* at 930 citing to *ALCOA v. BPA*, 175 F.3d 1156 (9th Cir. 1999), and that provides some reasonable assurance the RPA "will not appreciably reduce the odds of success for future recovery planning." 524 F.3d at 937. NMFS's aggregation of past, present and future effects, together with its quantitative and qualitative evaluation of whether listed ESUs within this context will be placed on a trend towards recovery as an effect of the RPA, clearly fulfills the obligation of ensuring that an adequate potential for recovery is preserved after the RPA is implemented.

B. ADVERSE MODIFICATION OF CRITICAL HABITAT

NWF advances the same criticism of NMFS' adverse modification standard that it lodges against the jeopardy standard: "The 2008 BiOp's 'trend toward eventual recovery' standard—which is satisfied by a projection that a population is likely to grow or increase by as little as one individual per year—has virtually nothing to do with the risks posed to actual recovery of listed ESUs." NWF Reply Mem. at 39. It adds that NMFS cannot possibly "determine whether the 'safe passage' conditions of critical habitat can 'support increasing populations up to at least a recovery level' when the agency employs a critical habitat assessment standard that disregards both recovery population levels and the survival rates necessary to reach them." *Id.* at 40; *accord* Oregon Reply Br. at 24. The authority cited for this position is, as well, the same: the Ninth Circuit's opinions in *NWF* and *Gifford Pinchot* and the partial summary judgment ruling in *Nez Perce Tribe v. NMFS*, No. 3:07-cv-00247-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008). With respect to the application of this standard, NWF argues that the Corps' hydro improvement commitments under the RPA—which have been accepted in the agency's Record of Consultation and Statement of Decision (Corps AR 00026)—are "[h]ighly [u]ncertain" and thus not suitable for inclusion in determining the "effects of the action." NWF Reply Mem. at 43. In NWF's view, NMFS "relies on proposed modifications in the Corps' non-binding Configuration and Operation Plans (COPs) rather than setting forth a specific and *binding* plan." *Id.*

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Neither proposition finds support in the ESA's text, its implementing regulations, relevant case law, or the administrative record. Plaintiffs' rhetoric aside, this is not a case where affected ESU populations will increase by "one individual per year." NMFS instead anticipates that, as a byproduct of the RPA, the population *trend* for the interior Columbia River ESUs—on which NWF and Oregon focus their challenge—will slope toward replacement rates equal to or greater than 1.0. Part and parcel of this determination is an analysis of the primary constituent elements ("PCEs") of those ESUs' critical habitat that reflects an overall improvement in mainstem and tributary passage routes. Contributing to this improvement are hydro modifications, including the measures committed to by the Corps in its COPs. NWF's contention that these commitments are illusory or otherwise so fragile as to remove their expected impact from the scope of "effects of the action" misapplies that term and, if credited, would sound a death knell for the long-term planning necessary to manage the relationship between complex, congressionally-mandated activities like the FCRPS and endangered species. To facilitate its argument, NWF simply asks this Court to ignore the deference due NMFS' assessment of the reasonable certainty issue under settled judicial review principles.

1. NFMS Formulated an Appropriate Standard for Determining Whether the RPA Will Destroy or Adversely Modify Critical Habitat in the Context of This Consultation

Section 7(a)(2) proscribes agency actions that will "result in the destruction or adverse modification of habitat of such species" and, as discussed in the States' opening brief, is construed by NMFS and the United States Fish and Wildlife Service ("FWS") to encompass those actions that "considerably reduce the capability of designated or proposed critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species." *Endangered Species Consultation Handbook* 4-34 (Mar. 1998) ("*Consultation Handbook*"). Importantly, NWF does not contend that the RPA *further* degrades the PCEs of relevant critical habitat from their existing condition, and NMFS explicitly found the contrary. *See* BiOp at 8.2-31 (Snake River Fall Chinook) ("Although some current and historical effects of the existence and operation of the hydrosystem and tributary and estuarine land use will continue into the future, critical habitat *will retain* at least its *current* ability for PCEs to become functionally established and to serve its conservation role for

the species in the near- and long-term. Prospective Actions will *substantially improve* the functioning of many of the PCEs") (emphasis added); *accord id.* at 8.3-45 (Snake River Spring/Summer Chinook); 8.4-23 (Snake River Sockeye); 8.5-49 (Snake River Steelhead); 8.6-33 (Upper Columbia River Spring Chinook); 8.7-43 (Upper Columbia River Steelhead); 8.8-46 (Middle Columbia River Steelhead). Accordingly, NWF's challenge rests on the proposition that NMFS' concept of what constitutes "recovery" is somehow deficient.[13]

NWF argues that no valid adverse modification finding could be made without articulating what constitutes "recovery" in terms of an ESU-specific target population level and the replacement rate deemed necessary to achieve the target level. NWF cites nothing in the ESA itself, the consultation regulations in 50 C.F.R. Part 402, or the *Consultation Handbook* to support this contention, and its failure to do so comes as no surprise because there is no explicit directive or guidance to that effect. The applicable regulations and guidance instead impose a duty not to affect the functioning of PCEs in such a manner as to make achieving recovery appreciably less likely than it would be in the absence of the agency action. *E.g.*, 50 C.F.R. § 402.02 (defining "destruction or adverse modification of critical habitat" as an "alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species"); *id.* § 402.14(g)(4) (NMFS responsible for "[f]ormulat[ing] its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat").

Where, as here, NMFS determines that the RPA will have the effect of placing the Interior Columbia River ESUs on a trend toward recovery, and where it additionally determines that the RPA, at a minimum, will *do nothing to compromise* the present functioning of critical habitat PCEs, no statutory obligation exists to relate its no-adverse modification finding to a particular recovery *level* or replacement *rate*. This conclusion comports with the principle that the PCEs necessary for the survival and recovery of a listed species can be determined without specifying numeric recovery thresholds. In other words, if the recovery considerations for purposes of identifying critical habitat

[13] Neither NWF nor Oregon suggests that the RPA fails to satisfy the adverse modification standard with respect to the survival prong.

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PCEs can be met without reference to those thresholds, so too can the question of whether a particular agency action adversely modifies them in a manner sufficient to compromise their current functionality for recovery purposes. *See Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1026 n.4 (D. Ariz. 2008).[14]

As with its opening brief, NWF continues to rely upon bits and pieces from *NWF* and *Gifford Pinchot* and a more detailed, but no more helpful, discussion of *Nez Perce*. NWF Reply Mem. at 39-43. Accordingly, the statement in *NWF* that this Court "correctly held that NMFS inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery" (524 F.3d at 936) must be understood in the context of the 2005 summary judgment decision's stress on NMFS' *lack of knowledge* concerning "'[t]he in-river survival rate necessary for recovery'" (2005 WL 1278878, at *16). Here, in contrast, NMFS undertook extensive quantitative and qualitative analysis as to the six Interior Columbia River ESUs and determined that their replacement rates currently are trending or, upon the RPA's implementation, will trend toward recovery. The agency therefore possessed a firm "'in-river survival rate'" basis against which to assess whether the critical habitat effects associated with operation of the FCRPS, to the extent consistent with the RPA, would modify PCEs adversely.[15]

[14] The term "critical habitat" is defined as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the *conservation* of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A) (emphasis added). The term "conservation" is defined in relevant part as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). The endpoint of "conservation" is thus recovery.

[15] This Court's reference to "in-river survival rate" was taken from the 2004 biological opinion's critical habitat conclusions regarding the Snake River Spring/Summer Chinook ESU in which NMFS explained that "[t]he purpose of safe passage, relative to 'survival or recovery' of a listed species, is survival through the migratory corridor at a rate sufficient to support increasing populations up to at least a recovery level." 2004 BiOp at 8-7 – 8. The present judicial review context differs markedly because, as stated above, NMFS engaged in substantial ESU-specific analysis to address the replacement *rate* issue with respect to, *inter alia*, the Snake River Spring/Summer Chinook ESU.

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Gifford Pinchot—which NWF cites in support of its assertion that the "'trend toward eventual recovery standard' . . . has virtually nothing to do with the risks posed to actual recovery"—says nothing relevant. Its focal concern was an improper definition of "destruction or adverse modification" in 50 C.F.R. § 402.02 and the corresponding absence of *any* substantive analysis of recovery by FWS in making the challenged critical habitat finding. *See* 378 F.3d at 1070 ("[i]f the FWS follows its own regulation, then it is obligated to be indifferent to, if not to ignore, the recovery goal of critical habitat").[16] The Court of Appeals simply did not address the question of what standards should be applied when undertaking the requisite recovery analysis.

As for the *Nez Perce* decision, NWF labors to extract "three critical elements" from that opinion to show "nearly exact parallels between the circumstances of that case and those present here." NWF Reply Mem. at 41. Those "elements" consist of the district court's conclusion that: (1) "the current condition of the critical habitat for Snake River steelhead put the future of the ESU in doubt" (*id.*); (2) "NMFS based its improper no-adverse modification conclusion on finding that the proposed action, despite having few short-term benefits to steelhead, would eventually lead to improvements in the currently poor habitat conditions for these fish" (*id.* at 42); and (3) the resulting biological opinion was "ultimately" deemed to be invalid because it failed to "'examine the flows necessary for recovery'" (*id.*).

The 2008 FCRPS consultation and biological opinion cannot be characterized as possessing the same deficiencies as those identified in *Nez Perce*, nor are the cases similar: Here, NMFS reviewed an exceedingly complex set of federal actions, not just increased flows as in the Idaho litigation. The FCRPS flow regime embodies not only improvements in the mainstem juvenile passage corridors, but also habitat improvements affecting tributary corridors. NMFS determined

[16] The *Gifford Pinchot* Court thus considered, and rejected, FWS' contention that any error related to the recovery analysis was harmless. 378 F.3d at 1071-75. It characterized much of the recovery analysis as "descriptive" and stressed that "[n]owhere in the four [biological] opinions is there a hint of recovery discussion, or any hint that the agency went beyond its [improperly narrow] regulation." *Id.* at 1073; *see also id.* at 1074 ("[t]here is no discussion of the specific impact on recovery and no evidence that the FWS looked beyond its regulation when it made the 'adverse modification' conclusion").

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that the RPA's effects would commence or maintain a positive trend toward eventual recovery. In connection with these analyses, NMFS analyzed PCE functionality discretely and with care.

Perhaps most importantly, NWF ignores the fact that the *Nez Perce* court did not fault the adverse modification analysis for any failure to specify a relevant recovery level or the replacement rate necessary to reach such level over a particular period of time. Instead, the *Nez Perce* court invalidated a particular stream-connectivity finding made by NMFS that was central to NMFS' determination that the short-term operational plan was adequate under section 7(a)(2), after concluding that the finding was "more of a guess than a reasoned estimate." 2008 WL 938430, at *9. The district court was concerned that this unsupported "guess" "will be enshrined, right or wrong, for a decade" because the plan had no provision for increased flows in the event the presumed hydrological connectivity proved to be absent. *Nez Perce* held that NMFS' analysis of the long-term operational plan was deficient for two additional reasons, the second of which was the plan's failure to "examine the flows necessary for recovery." *Id.*, at *11. The court's holding in this regard was predicated on a paucity of data to "support the prediction that summer flows in 'many years' in Sweetwater Creek will exceed 2.5 cfs." *Id.* In other words, NMFS "posit[ed] a dramatic increase in flows without explaining where they would come from." *Id.*, at *12. Nothing in *Nez Perce* itself supports the extravagant reading accorded it by NWF.[17]

2. Deference Is Due NMFS' Reasonable Certainty Determination with Respect to the Corps' RPA-Based Commitments

NWF characterizes the COPs—which are referenced in RPA Nos. 18 through 25 for the eight Corps-operated FCRPS mainstem projects—as "provid[ing] little more than good intentions

[17] The clearly strained quality of NWF's reliance on the *Nez Perce* decision becomes even more apparent when the briefing of the *amicus curiae* Nez Perce Tribe here is reviewed. The Tribe neither addresses critical habitat issues nor cites *Nez Perce* for *any* purpose. Dkt. 1505, 1588. In its summary judgment memoranda in the *Nez Perce* litigation, moreover, the Tribe did not argue that the recovery analysis failed to comply with section 7(a)(2) by virtue of NMFS' not assessing recovery in terms of the requisite recovery level and the replacement rate necessary to achieve such level. *Nez Perce Tribe v. NOAA Fisheries et al.*, No. 3:07-cv-00247-BLW (D. Idaho), Docs. 23, 33, 34.

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when it comes to structural improvements." NWF Reply Br. at 44.[18] A brief review of those RPA components tells a different story. In each, the agency commits to "investigat[ing][] and implement[ing]" specified "reasonable and effective measures to reduce passage delay and increase survival of fish passing through the forebay, dam, and tailrace as warranted." The various items then identify every "[i]nitial modification[]" that the Corps "will likely include" in the "first phase" of remedial measure implementation for the particular project. They further require periodic updates to the COPs, annual progress reports describing the "status of the actions taken in COP and the results of the associated RM&E," and "Comprehensive RPA Evaluation Reports" in 2013 and 2016 that "will include an analysis of the actions taken to meet the dam passage survival performance standard." NMFS considered the commitments in the several completed and to-be-completed COPs in its assessment of juvenile dam passage improvements. BiOP at 8-3 – 5.

NWF's claim that such consideration runs afoul of the reasonable certainty standard, like other challenges to NMFS' decision-making here, is subject to ordinary Administrative Procedure Act deference principles. The preamble to the 1986 regulations in Part 402 leaves no doubt that NMFS and FWS are charged with the task of making reasonable certainty determinations as a necessary incident to assessing an agency action's "indirect effects" and cumulative effects from nonfederal activities. *See* 51 Fed. Reg. 19,926, 19,933 (June 3, 1986) ("For State and private actions to be considered in the cumulative effects analysis, there must exist more than a mere possibility that the action may proceed. On the other hand, 'reasonably certain to occur' does not mean that there is a guarantee that an action will occur. The Federal agency and the Service will consider the cumulative effects of those actions that are likely to occur, bearing in mind the economic, administrative, or legal hurdles which remain to be cleared"). Reasonable certainty determinations thus are merely another instance where agency expertise and experience must be brought to bear and where the judicial branch's review authority is circumscribed narrowly.[19]

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[18] Initial COPs have been completed for Bonneville, The Dalles and John Day. BiOp RPA Nos. 18-20. Initial COPs for McNary, Ice Harbor, Lower Monumental, Little Goose and Lower Granite are scheduled to be completed by 2010. BiOp RPA Nos. 21-25.

[19] Although the issue need not be addressed given the breadth of NMFS' decision-making concerning the certainty issue in this consultation, the States note that the "reasonable certainty" requirement, by the consultation regulations' own terms, applies only to assessing (1) the indirect

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Here, NMFS had ample cause to believe that the RPA measures would be implemented. First, it conditioned the biological opinion's incidental take statement ("ITS"), pursuant to its authority under section 7(b)(4)(A), 16 U.S.C. § 1536(b)(4)(A), on the Corps' adoption of the involved RPA measures. ITS coverage is essential, as a practical matter, to the Corps' carrying out its congressionally-mandated functions with regard to the FCRPS. *Bennett v. Spear*, 520 U.S. 154, 170 (1997) ("[t]he action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment").

Second, NMFS and the Corps have been dealing with ESA compliance issues related to the FCRPS operations since at least the listing of Snake River Sockeye in 1991. 56 Fed. Reg. 58,619 (Nov. 20, 1991); *see also* 58 Fed. Reg. 68,543 (Dec. 28, 1993) (related critical habitat designation). NMFS' experience in this regard provides both a technical and an historical perspective from which judgments can be made concerning the likelihood of the Corps' complying with the RPA measures. The Corps' experience in day-to-day operation of the FCRPS projects gives it a unique perspective on the technical and fiscal feasibility of the COPs-related RPA commitments adopted through the Record of Consultation and Statement of Decision. Indeed, these experience-based considerations were identified in the biological opinion as relevant factors in the reasonable certainty assessments.

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effects component of the "effects of the action" definition and (2) cumulative effects. 50 C.F.R. § 402.02. Neither NWF nor Oregon contends that the effects from the involved RPA items fall into the "indirect effects" prong of the definition, while effects from the RPA's implementation are necessarily excluded from the "cumulative effects" definition given the federal nature of the action generating them. This Court's 2003 summary judgment decision invalidating the 2000 biological opinion is not to the contrary, because it addressed the reasonable certainty issue specifically with reference to non-federal activities. 254 F. Supp. 2d at 1213-15. The Ninth Circuit's *NWF* decision did not address the reasonable certainty issue at all in concluding that certain RSW installation-related plans were not sufficiently binding to warrant inclusion in the agency action for purposes of section 7(a)(2) analysis. 524 F.3d at 935-36. Where an agency—as here—accepts an RPA following formal consultation, compliance with it should ordinarily be assumed. The analysis, in other words, should be directed toward the propriety of NMFS concluding that the agency has the requisite legal authority and practical ability to carry out the RPA *as proposed*. *See* 16 U.S.C. § 1536(b)(3)(A) (requiring that an RPA "can be taken by the Federal agency or applicant in implementing the agency action"). As discussed above, that issue should be resolved by the review standard in 5 U.S.C. § 706(2).

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See BiOp at 1-12 ("NOAA Fisheries also looks for the certainty that planned actions can and will be implemented by the FCRPS Action Agency and result in the expected effects. The FCRPS Action Agency's experience and past success with similar actions will be indicative of certainty. This is particularly true of the FCRPS Action Agency's ability to obtain annual funding appropriations necessary for the action, especially for actions requiring implementation over multiple years. Where actions are dependent upon feasibility investigations or upon the decisions of third parties, certainty will be less likely"). This Court should decline NWF and Oregon's invitation to second-guess NMFS' judgment call.

C. HABITAT MITIGATION

Plaintiffs express considerable disdain over the use of tributary and estuary habitat projects within the 2008 biological opinion on the basis that such projects simply paper over deficiencies in the hydro system operations (NWF Reply Mem. at 17) and that the proposed habitat mitigation fails to address the life stages at which listed species are imperiled (Or. Reply Mem. at 23). NWF nonetheless concedes that there are meritorious projects, and that "habitat restoration required to mitigate the impacts of past habitat destruction would still remain important for many populations". NWF Reply Mem. at 19, n.22. Oregon, for its part, expresses a continuing interest for habitat projects like the kind it denigrates to "be considered" within that State. Or. Reply Mem. at 20. Moreover, neither NWF nor Oregon suggests that any of the myriad habitat-related initiatives is inappropriate biologically or otherwise counterproductive to the RPA's overall mitigation objectives. The States cannot help but take away from those criticisms the abiding belief that *no* set of habitat measures in a long term FCRPS biological opinion would ever satisfy NWF or Oregon. That belief derives from the core fact that none of their criticisms is justified under either generally applicable law or the specific law of this case.

1. <u>The proposed tributary and estuary habitat actions are reasonably certain to occur.</u>

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Plaintiffs assert that the identification of tributary and estuary habitat actions in the RPA is "too vague and uncertain" (NWF Reply Mem. at 21), "rel[y] upon unspecified, yet-to-be-determined projects" (Or. Reply Mem. at 20) and, therefore, are not reasonably certain to occur. They do not dispute, however, that actions to improve tributary habitat (RPA No. 34) and to improve estuary habitat (RPA No. 36) for implementation in 2007-2009 have been specifically identified. Their claims instead focus exclusively on tributary habitat actions (RPA No. 35) and estuary habitat actions (RPA Nos. 37 and 38) that are to be more specifically identified for implementation in the 2010-2018 period.

These claims contradict the formula for identifying reasonably certain to occur actions that was proposed by Oregon itself in its challenge to the 2000 biological opinion. That formulation provided that actions should be adequately specific, adequately funded, supported by adequate authority, and adequately assured. This Court expressed approval in its 2003 summary judgment ruling. *See NWF*, 245 F. Supp. 2d at 1213-15. Accordingly, that formulation was adopted in principle by the remand Policy Work Group, without objection by Oregon AR C.331. The mitigation proposed in the current biological opinion meets this standard, regardless of whether it consists of near-term projects that have been identified, or actions that have been prescribed for later years.

These concrete habitat actions specified in the biological opinion consist of specifically described *projects* being implemented in the 2007-2009 period and of specifically prescribed *forms of action* in the 2010-2018 period. Consistent with the over-arching goal of this Biological Opinion to target actions to the needs of specific populations, the "out year" actions are further delineated in terms of specific performance objectives (*i.e.*, habitat quality and survival improvement targets) to be achieved by addressing identified limiting factors for those individual populations. Projects implementing prescribed actions will be identified and selected through a specific vetting process

(RPA Nos. 35 and 37). The action agencies have funding commitments for the specifically identified habitat projects along with an open commitment for funding needed to implement future projects that are necessary to attain the identified performance objectives (RPA Nos. 35 and 37). Adequate *authority* to fund habitat actions is clear from the commitments made by the actions agencies in the opinion, and in particular through the Bonneville Power Administration's authorities under the Northwest Power Act. The existence of these authorities is confirmed historically by the demonstrated capacity of federal, state and tribal entities in the Columbia Basin to plan and implement funded habitat projects in both recovery plans and various sub basin plans. There is adequate assurance that specific projects, or prescribed actions, will be implemented during the term of the biological opinion based upon the commitments to performance objectives in RPA Nos. 35 and 36, together with the implementation oversight and reporting requirements found in RPA Nos. 1-3 and 34-38.

Plaintiffs fail to recognize that the "action" commitments in 2010-2018 (RPA Nos. 35, 37 and 38) require more than the mere identification of a more specific habitat project at some point in the future. The actions called for in those RPA measures are comprised of not only a *prescribed form of action* (to produce outcomes addressing limiting factor) but also a *vetting process* to identify, review, select, fund, implement, monitor, and evaluate those future project actions. This prescription of limiting factor-based actions, a robust vetting process, and the commitment that future projects must achieve the habitat quality and survival improvement targets for individual populations detailed in RPA No. 35 (Table 5), together provide the reasonable assurance that the actions and corresponding benefits will accrue.

However, NWF and Oregon apparently expect contract-ready projects to be specifically identified for the 2010-2018 period. Aside from not comporting with the applicable law in this case, that approach ignores the fundamental practical problems with identifying specific projects to be

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implemented eight to ten years into the future. Although it might be possible to script out specific future projects now, it defies common sense to require project "description certainty" rather than "action objective" certainty for projects beyond the immediate horizon. Focusing on forms of actions that relate to identified population limiting factors, coupled with performance standards is a reasoned and appropriately adaptive method for ensuring that commitments to survival improvements from habitat actions are actually realized. Anything else would be counterproductive and wasteful.

2. The estimated biological benefits of tributary and estuary actions are reasonable.

Plaintiffs argue that the estimation of potential benefits from tributary and estuary habitat actions is uncertain and arbitrary (NWF Reply Mem. at 21) and not supportable (Or. Reply Mem. at 22). They also imply that estimates of survival benefits are based upon the need for survival improvements rather than the estimates of potential habitat improvement that could be achieved from implementing habitat actions. *See id.* at 22. However, the identified habitat quality and survival improvement targets are based on a methodology developed by the remand Habitat Work Group using the best information and science that was available for this purpose (Comprehensive Analysis, Appendix C; Biological Opinion Section 7.2.2).

The fact that fishery biologists throughout the region, including Plaintiffs' own representatives, have called for and supported habitat restoration efforts demonstrates that it is logical and reasonable to presume there is some biological benefit from such projects. However, Columbia Basin scientists have not agreed upon a uniform method for estimating with precision the mitigation value of such efforts. To ensure that habitat projects remain a meaningful component of a Section 7 *all*-H consultation, the remand collaboration developed a methodology to generate reasonable estimates of the approximate biological benefits resulting from such actions. The Habitat Work Group's method estimated the approximate habitat quality improvements—which address key

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limiting factors associated with habitat quality—and the corresponding survival increases in the egg-to-smolt life stage that could reasonably be expected from those improvements. This method was developed using the best available and comparable scientific information for all populations and their habitat in all affected ESUs and DPSs above Bonneville Dam and incorporated the professional judgment of local biologists and recovery plan experts.

The estimates of habitat quality change and associated survival increases generated using this methodology were not intended to be, and were never characterized as, precise estimates. But they did reflect the experts' consensus concerning the benefits that reasonably could be expected from the particular set of measures. This was the best method the Habitat Work Group could develop given the time constraints of the remand process and available data. Even if this approach ultimately can be improved through more time, experience or data, it represents a step forward in an inherently uncertain area of scientific inquiry.[20] The actions agencies worked with a consultant and other experts familiar with Columbia River estuary habitat to develop an equivalent methodology for estimating the biological benefits from implementing actions to improve estuary habitat. This method also relied upon best available information and professional judgment on estuary habitat and the relation of estuary habitat to smolt survival (Comprehensive Analysis, Appendix D; NMFS AR S.47).

[20] Plaintiffs claim that the federal agencies somehow manufactured the habitat methodology, and the resulting survival improvement targets, to meet the needs of the survival gaps analysis rather than developing a coherent methodology, estimating the results of actions pursuant to that methodology, and then assessing actions needed to meet genuine survival targets. *See* NWF Reply Mem. at 19 n.22, 25 n.27. This claim is not supported by the record. The methodology for estimating tributary habitat quality change, and associated survival increases, was completed by the Habitat Work Group before the Action Agencies developed the CA and PA (BiOp Section 7.2.2). Furthermore, the Habitat Work Group products were developed independently from the survival gaps analysis (Comprehensive Analysis, Appendix C, BiOp Section 7.2.2). The Actions Agencies based their subsequent estimates of habitat quality and survival improvement on the subset of specific projects identified for 2007-2009 using the same methodology developed by the Habitat Work Group. These estimates provided the basis for the habitat quality and survival improvement targets in RPA No. 35 (Table 5).

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3. Imprecision and a degree of uncertainty in estimates of biological benefit from tributary and estuary actions are unavoidable and best addressed by implementation and effectiveness monitoring.

Among other arguments made about the ability to predict the future, Plaintiffs claim that the certainty of whether the habitat actions will produce the predicted survival benefits is not fully addressed because the RPA fails to include effectiveness monitoring for these projects. NWF Reply Mem. at 26; OR Mem. at 23. As we just discussed, there is no question that the estimates for habitat quality and survival improvement targets cannot achieve high precision under present science and, necessarily, entail a degree of uncertainty. *See* Comprehensive Analysis, Appendices C and D; BiOp, Sections 7.2.2 and 7.2.3. The RPA therefore emphasizes both implementation and effectiveness monitoring, and there is no reasonable basis for criticizing that approach. A plain reading of the language of RPA No. 50 (fish population status monitoring), RPA No. 56 tributary habitat condition monitoring), RPA No. 57 (tributary habitat actions monitoring), RPA No. 58 (estuary fish performance monitoring), RPA 59 (estuary migration characteristics and condition monitoring), RPA No. 60 (estuary habitat action monitoring), and RPA No. 61 (estuary critical uncertainties evaluation) clearly confirms an extensive commitment in the RPA to rigorously assessing both the implementation and the effectiveness of tributary and estuary habitat actions.[21]

4. The estimates of benefits to estuary habitat from actions that include protection are reasonable.

Plaintiffs assert that the commitment to estuary benefits from habitat actions is "ultimately fanciful" (NWF Reply Mem. at 23) and "exceed the maximum possible under the Estuary Module NMFS relied upon" (Or. Reply Mem. at 23). Oregon further claims, through an extra-

[21] Implementation monitoring, it should be added, applies to *all* funded actions. Effectiveness monitoring is applied selectively to high-priority subbasins and categories of actions to maximize the value of the funding investment. The agencies, States and Tribes in the collaborative process believed that it made perfect sense to target effectiveness monitoring, as the RPA does, to high-priority populations and subbasins and to address key uncertainties with the reasonable expectation that lessons learned about action effectiveness in high-priority subbasins or about key uncertainties can be applied to other areas or issues.

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administrative record submission, that the biological opinion "does not explain the assignment of large survival benefits to protective actions" in the estuary. Second Bowles Declaration at 51. The administrative record refutes those claims.

The Estuary Module (NMFS AR C.931) is a scientifically-based document. It is being used to guide recovery actions for ESA-listed salmon and steelhead that utilize the lower Columbia River and estuary. It has compiled with, and relies upon, the best available information on the estuary, has been reviewed by technical experts, and includes a set of management actions and improvement targets.[22] The action agencies relied upon the module as the basis for identifying estuary habitat actions to be implemented and estimating what could reasonably be expected to result from such actions in terms of improvements in habitat and associated increases in smolt survival. As with the bulk of their other arguments, Plaintiffs' criticisms of these estimates is based largely upon their own assumptions and calculations - which the Court is expected to accept in lieu of the collaboratively-developed BiOp - about the actions selected from the module by the agencies for purposes of calculating the benefits of RPA Nos. 36, 37 and 38. These estimates were used by the agencies to develop the survival improvements that they have committed to undertake within the estuary. There is a suite of specific actions and types of actions identified in the module, but it is important to recall that the action agencies are not limited to any subset or even the entire set of actions currently in the module. Ultimately, the agencies are committed to and obligated by those RPA measures to achieve actual performance, the smolt survival increases (*i.e.*, 9% for ocean-type; 5.7% for stream-type) for ESA-listed salmon and steelhead populations using estuary habitat. This

[22] The module has not been peer-reviewed as an academic exercise and has never been represented as such. Peer review ordinarily takes significant time. Within the context of a temporally-constrained agency remand effort, the approach followed by NMFS to develop this module embodied an entirely proper exercise of its professional judgment entitled to deference in an APA judicial review proceeding.

is a firm, explicit commitment and is further buttressed by the implementation and effectiveness monitoring commitments made in RPA Nos. 58 through 61.

III. CONCLUSION

The summary judgment motions filed by NWF and Oregon should be denied. The States' summary judgment motion should be granted.

DATED: December 17, 2008.

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Pursuant to Local Rule Civil 100.13(c), and Fed.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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