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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civ. No. CV 01-00640-RE

Treaty Tribes' Joint Memo in Support
of Plaintiffs' Motion for Summary
Judgment (2004 FCRPS BiOp)

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INTRODUCTION

In 2000, NOAA, evaluating the same species, assessing a nearly identical set of Federal Columbia River Power System (FCRPS) operations, and using the same Endangered Species Act (ESA), the same ESA regulations, and the same ESA handbook, issued the 2000 FCRPS biological opinion (BiOp) determining that without significant help in the form of “Reasonable and Prudent Alternatives” (RPAs) from other actions and other actions in the Basin, these ongoing operations would jeopardize eight ESA-listed salmon and steelhead ESUs. In 2003, this Court concluded that NOAA’s no-jeopardy conclusion in the 2000 BiOp was arbitrary and capricious. National Wildlife Fed’n v. National Marine Fisheries Serv., (NWF v. NMFS), 254 F. Supp. 2d 1196, 1211-1212 (D. Or. 2003). NOAA's primary task during remand was to remedy the specific deficiencies in the 2000 BiOp identified by the court. In addition, the remand period was intended to provide an opportunity for further consultation and cooperation between NOAA, the states of Oregon, Washington, Idaho, and Montana, tribes, local governmental entities, and interested private parties, and to allow NOAA additional time to determine if sufficient funding would be available to fulfill the requirements of the RPAs. Ultimately, NOAA abandoned the 2000 BiOp’s approach and utilized an radically new jeopardy analysis framework that departs from every jeopardy analysis NOAA has done for the FCRPS since salmon were first listed under the ESA.

Despite the concerns expressed throughout the remand process about the sea change in NOAA’s jeopardy framework by the tribal and state fishery managers, NOAA remained steadfast in this new approach. As the Treaty Tribes demonstrate below, the declines of these fish have not suddenly reversed, and the impacts of the FCRPS on these fish have not changed drastically.

Instead, NOAA's 2004 FCRPS BiOp reaches its no-jeopardy conclusion by truncating the jeopardy analysis in a way that renders the status and trend of a species, as well as the species' prospects for recovery, irrelevant. It also excuses enormous amounts of mortality associated with the FCRPS (98% in the case of Snake River spring/summer chinook) and renders delayed mortality irrelevant. NOAA's new framework leaves some populations such as Snake River spring/summer chinook in Wilderness Areas in Idaho with few survival and recovery options. It also shifts the FCRPS' impacts onto other Hs. It undermines any efforts to obtain funding to fix the problem, and contains no back-up plan. Remarkably, the Federal Executives have been bold enough to suggest that this "[r]esponse to the Court meets all the requirements of the law." Bob Lohn (NOAA Fisheries), Steve Wright (BPA), General Grisoli (Corps) and Bill McDonald (BuRec), *Seattle Times*, February 3, 2005 (Cummings Dec., Exh. B). As set forth below, the Treaty Tribes strongly disagree, and join with the State of Oregon and the Plaintiffs in urging this Court to grant their motions for summary judgment.

STANDARD OF REVIEW

Judicial review of NOAA's final agency action under the ESA is governed by the Administrative Procedures Act (APA), which provides that an agency's actions, findings, and conclusions of law may be held "unlawful and set aside" where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

This Court must overturn agency action where the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important part of the problem, offered an explanation for its decision that runs county to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of

agency expertise.” Pacific Coast Fed’n of Fishermen’s Associations, Inc. v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001)(citing Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983)). An essential part of this Court’s inquiry is to assess “whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Id. at 1034.

In applying these standards, the court must perform a “thorough, probing, in-depth review.” Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 482 (W.D. Wash. 1988)(citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)). This review may not “rubber stamp. . . decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 (1983). Courts “do not hear cases merely to rubber stamp agency actions. . . The Service cannot rely on ‘reminders that its scientific determinations are entitled to deference’ in the absence of reasoned analysis. . .” NRDC v. Daley, 209 F.3d 747, 755 (D.C. Cir. 2000)(quoting A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995)).

ARGUMENT

The Columbia River Treaty Tribes believe that the answers that NOAA provides to the following list of simple and straight-forward questions in the 2004 FCRPS BiOp and its accompanying administrative record vividly illustrates that NOAA’s decision is arbitrary, capricious, and otherwise not in accordance with the Endangered Species Act.

1. Has the status of the listed fish significantly changed?

No. NOAA’s own admissions in the 2004 BiOp and in its status review of the species indicate that the status of the runs have not significantly changed since the 2000 BiOp, even

when the returns of the past few years are considered. Indeed, as NOAA itself expressly states in the 2004 FCRPS BiOp, long term trends in productivity for most of the listed ESUs remain below replacement in spite of recent years' returns:

Even under the most optimistic scenario, increases in abundance [due to recent improved ocean productivity] might be only temporary and could mask a failure to address underlying factors for decline. It is reasonable to assume that salmon populations have persisted over time under pristine conditions through many such cycles in the past. Less certain is how the populations will fare in periods of poor ocean survival when their freshwater [including FCRPS effects], estuary, and nearshore habitats are degraded.

(Section 4.3, p. 4-3). The state and tribal fishery managers universally concurred with this assessment. WDFW (C.247, p.3) (noting that "We anticipate a few more years of favorable ocean conditions before survivals, again, begin to drop. We must take advantage of these favorable years, and ensure fish populations are ready to withstand the upcoming low-ocean-survival periods."); Idaho, C.234, p.6; CRITFC, C.231, Appendix A, p.6. The reality is, as Idaho put it quite succinctly, "While abundance has increased recently due to more favorable climatic conditions, IDFG does not believe that populations could be sustained at these levels with current FCRPS configuration and operations under less favorable conditions." (C. 234, p.6).

A "Viable Salmon Population" consists of more than just abundance; diversity, population growth rates, and spatial structure are equally important. NOAA's own Biological Review Team recently found that all of the Snake River stocks are at some level of risk for at least one, and in some cases, all four VSP factors. As Oregon noted (C.237, p. 19):

The test of a population's persistence, viability, and recovery is how well it survives through inevitable cycles of low natural mortality. Even poorly functioning populations may be expected to do well or at least persist when marine conditions are favorable, but many upriver populations barely survived the depressed marine conditions that occurred in the early 1990s. The test for survival and recovery of upriver populations will be how well they survive the next period of depressed marine survival. The recent trend of

physical parameters suggest that we may be submitting the populations to such a test within the next five years.

Thus, NOAA's own documents indicate that there is not a significant change to the status of the fish since the 2000 FCRPS BiOp.

The even larger problem is that under NOAA's new jeopardy analysis, the status of the species or the risk to the species in light of the VSP factors is rendered irrelevant. As discussed more fully below, the state and tribal fishery managers expressed extreme concern that under NOAA's new jeopardy, analysis, population trends - even substantial downward population trends - are rendered irrelevant. This is particularly troubling given that the ESA's regulations dictate that the status of the species is the first step of any jeopardy analysis, 50 C.F.R. § 402.14(g)(2)-(4), and should, as it has in the past, play a central role in NOAA's ultimate determination of whether the FCRPS poses jeopardy to the listed species.

2. Have the impacts on salmon from the FCRPS significantly changed?

No. The impact of the FCRPS has been especially adverse to the survival and recovery of anadromous salmonids. "For Snake River spring/summer chinook juveniles migrating inriver, ... estimated survival through the eight mainstem Federal dams is now between 28% and 58%...." 2004 BiOp 5-20. In other words, the FCRPS dams may kill as much as 72% of the juvenile spring/summer salmon migrating downstream from the Snake River Basin. Tables 10.3 and 10.4 of the 2004 BiOp provide estimates of the total FCRPS mortality documenting the very large mortalities imposed by the FCRPS. 2004 FCRPS BiOp p. 10-4, 10-5.

In terms of the amount of additional survival needed to overcome these mortalities, little has changed since 2000. For many stocks the magnitude of survival increases needed to assure

survival and recovery is still very large. Dr. Oosterhout using the 2000 BiOp analyses and recent data, found that:

the survival improvements... that... would be necessary to avoid jeopardy under the analytic framework of the 2000 FCRPS BiOp, after taking into account survival improvements from the proposed hydrosystem measures of the UPA, would still be quite large. Assuming that ocean conditions continue to be as good for another 43 years as they have been in recent years, and that any survival increases achieved through hydrosystem improvements are sustained, and that spawning and rearing habitat conditions do not further degrade, Wenatchee chinook still need a sustained life-cycle survival increase of 162% - 183% (more than double to nearly triple); UCR steelhead need 115% - 321.3% (more than double to more than quadruple the current survival); SR steelhead need 131% - 424% (more than double to more than quintuple the current survival).

Oosterhout Dec. ¶ 17. In other words, the survival needs remain very significant, but this is lost in the new jeopardy analysis.

3. Have the FCRPS operations significantly changed? Are the mitigation measures previously contained in the Reasonable & Prudent Alternative (RPA) now reasonably certain to occur and now captured in the Updated Proposed Action (UPA)?

No. One of this Court's questions with the 2004 Draft BiOp was to inquire (C. 187):

If defendants have incorporated the mitigation measures from the 2000BiOP Reasonable and Prudent Alternative into the Updated Proposed Action (see Updated Proposed Action, p. 13), on what basis can defendants now assert that those mitigation measures are reasonably certain to occur and otherwise comply with the requirements outlined in the court's Opinion and Order dated May 7, 2003?"

The UPA actually appears to be NOAA's slight-of-hand maneuver to get around the Court's May 2003 order. NWF. v. NMFS, 254 F.Supp.2d 1196, 1215 (D.Or. 2003). By moving RPA actions into the proposed action, NOAA apparently believes that the actions are no longer reviewed under the regulatory definitions of "cumulative effects" and "effects of the action," the definitions on which the Court based its May 2003 order on.

The 2004 FCRPS BiOp is distinct from its predecessors with respect to the lack of details that define the actions the consulting agencies must implement to avoid jeopardy. The 2000 FCRPS BiOp set forth 199 specific actions in the form of a reasonable and prudent alternative (RPA) for the action agencies to implement. The hydro measures comprised over 100 of these actions and were set forth with particularity (over 80 pages of detailed measures (B.156, pp. 9-55 to 9-133)). In contrast, the 2004 BiOp sets forth no specific operating regime. That detail is left to the UPA, which describes the intended hydro operations in less than 5 pages of text.

Moreover, although the UPA baldly asserts that it “continues many of the actions contained in the 2000 BiOp” and that it “continues most of the uncompleted and ongoing actions in the 2000 BiOp” there is no explicit accounting of what these actions are, whether they are reasonably certain to occur, whether or when they will be implemented, what benefits they have or will provide, and when those benefits are expected to accrue. As Oregon noted (C. 237, p. 4): “By casting together a proposed action that means anything to anybody and nothing to everyone, the Action Agencies have avoided any meaningful consultation with NOAA Fisheries on the role of survival and recovery of listed salmonids in the Columbia basin.” These matters are generally deferred to implementation plans that are yet to be developed by the Action Agencies outside the consultation process.

Even a cursory review of the UPA indicates that it does not include actions formerly included in the RPAs to the 2000 BiOp. For example, the UPA does not contain an action like RPA 32 from the 2000 BiOp, which provided that “The Action Agencies shall acquire water for instream from ... Idaho Power Company’s Hells Canyon Complex during the spring and summer flow augmentation periods to improve the likelihood of achieving spring and summer flow

objects at Lower Granite Dam”.¹

Washington, Idaho, Oregon and the Tribes all noted that the UPA and BiOp provide little detail with respect to the actual intended operations. As Oregon stated, “the UPA is so vague and undefined regarding what actions are proposed that it creates a situation where it is impossible even for those familiar with the (FCRPS) to understand what the agencies are proposing to do, let alone the public.” C.237, p. 3. Washington asked that a more complete suite of actions be identified and that the 2000 BiOp RPAs be revisited and screened for certainty of implementation. C.247, p. 6. NOAA and the Action Agencies have done nearly the opposite.

Accountability for implementation and performance is difficult to discern in the 2004 BiOp and UPA. Moreover, the operational assumptions that NOAA has analyzed in its computer modeling are very optimistic and NOAA has completely failed to analyze alternatives deemed to be more realistic by NOAA’s expert peers, e.g. ODFW, WDFW, IDFG, CRITFC, NPT, and ADFG, or even its own technical staff in the case of summer spill in the Snake River. As described in the declaration of Tom Lorz, NOAA made optimistic assumptions about turbine survival improvements and Removable Spillway Weir survival benefits. Lorz Decl ¶ 25. At the same time, NOAA discounted the value of spill operations. Lorz Decl ¶ 13. NOAA fails to explain this seeming bias in favor of those actions that least impact hydropower operations.

In *IDFG v. NMFS*, this Court set aside a biological opinion for FCRPS operations in part because “NMFS[] fail[ed] to adequately explain why it prefers uncertain favorable model results

¹ As Oregon aptly notes “the Action Agencies’ UPA provides no additional clarity of what specific actions are being proposed but instead generally describes strategies to implement hydrosystem configurations and operations, fish transportation, and non-hydro measures. The UPA lacks schedules for completion of projects, and also lacks contingencies in case performance measures aren’t met.”

and rejects other equally uncertain model results tending to undermine a no jeopardy conclusion." 850 F. Supp. at 899. NOAA's consultation on the UPA presents a similar circumstance. In 2004, NOAA has not only failed to explain its choice of biological assumptions, here NOAA and the Action Agencies have failed to even enumerate the suite of actions upon which the consultation (and computer modeling) is based.

The UPA's overall FCRPS performance standard is described as as "the estimated difference in survival between the current hydrosystem operations and the NOAA Fisheries designated reference operation" (UPA, p. 7). However, as Oregon notes "a performance standard that equals the difference in survival between two operational scenarios is no standard at all, it is simply a description of a difference or, as the agencies call it, a gap." C. 237, p. 5 (Oregon).

The 2004 BiOp relies heavily on the installation of Removable Spillway Weirs (RSWs)² to achieve what the UPA asserts to be "improved juvenile survival at federal dams compared with existing conditions for all ESUs." (C.289, p.3). However, the survival benefits associated with RSWs are speculative, it is doubtful that the devices provide any real survival improvement over other system operations, and NOAA's assumptions are optimistic. The RSWs appear to provide more of an economic benefit than any survival benefit. Moreover, NOAA relies on the assumed RSW benefits in its analysis of the effects of the UPA, even though installation of all RSWs will not be finalized until 2010 or even 2014.

The survival benefits attributable to RSWs have not been thoroughly tested and are

²An RSW is a structural configuration that is added to the existing spillbay of an individual project to aid in juvenile passage. See Lorz Decl. ¶ 23 for further description. RSWs provide spillway passage from the top of water column, and it is theorized that this action attracts more juveniles to the (RSW) spillway and results in greater project survival than a traditional spillway. RSWs require less spill water to operate than a traditional spillway. Id.

speculative. Currently, there is only one RSW installed in the FCRPS, which is at Lower Granite Dam, and there is only one year of analysis (2003) on the survival performance of this RSW's operation. Lorz Decl. ¶ 24. With this single year of data, NOAA extrapolates asserted benefits of RSWs to three other -- yet to be installed-- RSWs in its analysis of the effects of the UPA.³ 2004 FCRPS BiOp at D-41. NOAA assumes such "benefits" despite having only the single year of Lower Granite data and despite the fact that there is not indication or assurance that RSWs will perform similarly at different projects. As Idaho states (C. 234, p.25):

It appears that there is substantial reliance on Removable Spillway Weir (RSW) technology to "fill the gap" and reach a no-jeopardy conclusion. This technology has only limited testing, and it is acknowledged that because of the unique configuration of each dam, the specific survival benefits attributable to each RSW are actually unknown. As a consequence, assumed benefits are very speculative. While IDFG believes the technology is worth pursuing, appropriate testing and evaluation must be a component of the UPA to ensure assumptions are validated in the context of avoiding jeopardy.

More importantly, the survival benefits attributed by NOAA to the RSWs are dubious. Under the 2003 Lower Granite RSW analysis, the RSW and the spillway produced different point estimates of direct (per fish) survival, however these point estimates were not statistically different, and thus the direct survival differences were not found to be statistically different either. Lorz Decl. ¶ 24; C-293, p.1-30 (NOAA Resp. to Comments)(acknowledging that there is no direct survival benefit - in terms of per fish survival - at Lower Granite between the RSW and a traditional spillbay).⁴

³The UPA calls for and relies upon the installation of three more RSWs: Ice Harbor (2005), Lower Monumental and Little Goose in 2007 and 2008, or McNary in 2008 and 2009. UPA at 45 (C.289).

⁴NOAA's asserted survival benefit stems from the *number* of fish passing through the alternate spill passage scenarios (i.e., with RSW or without), with NOAA asserting a 14-17% spillway passage improvement with RSWs. Lorz Decl. ¶ 25. The 2003 Lower Granite RSW

NOAA's analysis of the effects of the UPA assumes survival benefits from installation of RSWs at four FCRPS projects despite the uncertainties associated attributing survival benefits to RSWs and despite the fact that benefits will not be realized at all the projects until at least 2010. 2004 BiOp at D-41, D-42. As the co-managers point out, NOAA seems to be “counting its chickens before they're hatched”:

The regime proposed in the 2004 BiOp institutes immediately the measures that will surely reduce the survival of the fish. The beneficial effects of additional RSWs, corner collectors, and improved tributary habitat will not be available until at least 2010, and likely not until 2014. Relying on good ocean survival during this period is a serious risk.

Alaska Department of Fish and Game (C. 240, p.3).

The reliance on RSWs appears to be driven by economics and not by a desire to improve juvenile fish passage. With survival benefits uncertain, the only definite benefit the RSWs provide is an economic one since an RSW allows for less water to be spilled and thus allows more water to pass through turbines and produce electricity. Without knowing how 24 hour RSW operations compare to a standard 24 hour BiOp spill program, it is misleading for NOAA to say that the RSW provides any survival benefit. It is more appropriate to say that the RSW

test, however, compared 24 hour/day RSW spill to 12 hour nighttime only traditional spill (without an RSW) to come up with its asserted 14 -17% RSW passage benefit. *Id.* The co-managers have requested that the Action Agencies perform a more even-keeled comparison of the two spillway options (24 hours operation of both) to discern whether RSWs provide survival benefits over traditional spillways. *Id.* It is likely that such a test might find equal survival with 24 hours spill through traditional spillways. Without such test, the asserted RSW survival benefits remain uncertain: are the benefits the result of the RSW, or the additional 12 hours of spill? NOAA addresses these issues by merely suggesting the Action Agencies to “evaluate juvenile project-specific passage survival both before and after configuration and/or operation modifications [at mainstem FCRPS projects] to ensure that these modification result in improved passage survival.” NOAA Resp. to Comments (C. 293, p.1-38). NOAA's vague suggestion hardly assures a meaningful test.

allows for less spill and provides more water for turbine generation. The fact that RSWs are really economically driven is evident from the current schedule for RSW installation which does not appear to consider survival implications. Ice Harbor is the next location for an RSW, with installation scheduled for early 2005. Lorz Decl. ¶ 27. However, current operations appear to generate very high project survival at this project: 98% juvenile spring Chinook use of the spillway at a survival rate of 97%. *Id.* It is very unlikely that the RSW will be able to improve on (or maybe even achieve) these levels of passage survival and thus the motivation for the RSW must be to allow for reduced spill. *Id.* Notably, BPA has identified RSWs as “an opportunity for reduction” in its total fish and wildlife program. BPA's Budget Setting Process at 37 (Cummings Dec., Exh. D) RSWs may provide economic benefits at the currently scheduled installation sites, but they will not be able to provide a survival benefit that could not be achieved by merely changing the spill pattern from flat to bulk, the spill volume, or duration from 12 hours to 24 hours where necessary.

4. Is NOAA's new jeopardy framework, which represents a dramatic departure from every prior jeopardy analysis for the FCRPS, consistent with the ESA, its regulations, NMFS' consultation handbook, and the controlling case law?

No. The Endangered Species Act define the “jeopardize the continued existence of” as “engaging in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both 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.

NOAA's new interpretation of this regulation, found in the 2004 BiOp, consists of two steps:

- first, NOAA asserts that it must determine whether the effects of the proposed action, standing alone, will “reduce [] the reproduction, numbers, or distribution of a species.” 2004 FCRPS BiOp at 1-12.

- second, NOAA asserts that if a proposed action, considered in isolation, has “no net effect” on a species’ current reproduction, numbers or distribution, the jeopardy inquiry is at an end, and the only appropriate finding is “no jeopardy.”

NOAA explicitly sets forth this two step interpretation as follows:

[I]f, in step 3, NOAA Fisheries determines that the proposed action would either not affect or would result in a net improvement in survival or habitat conditions for a given ESU, NOAA Fisheries would conclude that the action is not likely to jeopardize the ESU or adversely modify critical habitat. Because there would be no net reduction in the productivity, abundance or distribution of the ESU, there could not be an appreciable reduction in the likelihood of both survival and recovery in accordance with the regulatory definition of “jeopardize the continued existence of” 50 C.F.R. 402.02).

2004 FCRPS BiOp at 1-12 (emphasis added); see also 8-1.

Thus, under NOAA’s interpretation, if NOAA concludes that there will not be a net reduction in the species’ reproduction, numbers or distribution as a result of the proposed action, then it never needs to reach what it asserts is the second inquiry into whether the net reduction has an “appreciable effect on the species’ prospects of survival and recovery.” In other words, according to NOAA, it is only if it reaches this second step that it must consider the additive elements of the jeopardy analysis set forth in the ESA regulations (50 C.F.R. § 402.14(g)): that is, the proposed action taken together with the status of the species, the effects of the environmental baseline, and any cumulative effects. As NOAA further articulated, in responding to criticism about its approach:

this Opinion isolates the precise action, the operation of the FCRPS, from its environmental baseline. Focusing on the proposed action, NOAA Fisheries determines the extent to which the action “reduces the reproduction, numbers, or distribution of a listed species.” The weight of past actions, which is the environmental baseline, is properly considered when determining whether any adverse effect caused by the action appreciably reduces the likelihood of both survival and recovery.

NOAA Response to comments, 3.1.9 (C.293) (emphasis added).

NOAA's "net effects" analysis evaluates the effects of the action "compared to the environmental baseline." 2004 FCRPS BiOp at 1-12 (emphasis added). Here, NOAA uses a hypothetical reference operation to represent the environmental baseline and compares this to the effects of the proposed action, NOAA concludes that the action will have "no net effect" and hence cannot cause jeopardy. 2004 FCRPS BiOp at 6-68, 8-7. And, once NOAA finds no net effect, the story is over; NOAA contends it is not actually necessary for it to consider the environmental baseline, combined with cumulative effects. NOAA explicitly admits, in Chapter 8 of the BiOp, that the environmental baseline and the cumulative effects" are not part of the actual analysis itself, but are offered merely "to provide context for this analysis." 2004 FCRPS BiOp at 8-1. NOAA emphasizes the dispositive nature of this inquiry, stating that because the comparative analysis of net effects in chapter 6 of the BiOp "indicates that there are not likely to be any net adverse effects to an ESU from the proposed action, NOAA Fisheries' conclusion will necessarily be that the action is not likely to jeopardize the ESU's continued existence." Id.

NOAA's approach is contrary to the Endangered Species Act, its implementing regulations, the ESA consultation handbook, and the controlling law of this circuit.

The ESA's implementing regulations require NMFS, in conducting a jeopardy analysis, to:

- (1) Evaluate the current status of the listed species or critical habitat.
- (2) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
- (3) Formulate 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.

50 C.F.R. § 402.14(g)(2)-(4). The regulations define the “effects of the action” that the agency must evaluate to include the “direct and indirect effects of an action . . . together with effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R. § 402.02. The regulations define the “environmental baseline” to include “all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone” their own consultation and any “contemporaneous” state or private actions. *Id.* Finally, the regulations define “cumulative effects” to include any “future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area.” 50 C.F.R. § 402.02.

NMFS’s Consultation Handbook confirms this comprehensive approach. The Handbook states that when “determining whether an action is likely to jeopardize the continued existence of a species, the action is viewed against the aggregate effects of everything that has led to the species’ current status. . . . The final analysis then looks at whether, given the aggregate effects, the species can be expected to both survive and recover.” Consultation Handbook at 4-35 (emphasis added).

Indeed, the new comparative approach employed in the 2004 FCRPS BiOp – which allows the agency to find that a narrowly defined set of FCRPS operations will have “no net effect” on listed salmon and steelhead as compared to the existing effects of past activities – has been rejected by the Ninth Circuit and this Court in earlier cases involving the FCRPS. In ALCOA v. BPA, 175 F.3d 1156 (9th Cir. 1999), for example, industrial power users challenged BPA’s adoption of the RPA from the 1995 FCRPS BiOp. The Ninth Circuit specifically rejected

their argument that NMFS' jeopardy analysis should have been limited to determining whether the proposed action would have an incremental negative effect as compared to past actions:

NMFS correctly viewed incremental improvements as insufficient to avoid jeopardy in light of the already vulnerable status of the listed species. We agree with NMFS that the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.2, does not mean that an action agency can 'stay the course' just because doing so has been shown slightly less harmful to the listed species than previous operations. Here the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery.

Id. at 1162, n.6; see also id. (finding that NMFS "appropriately considered the effects of future FCRPS operations within the context of other existing human activities that impact listed species.").

In IDFG v. NMFS, 850 F. Supp. at 899, Judge Marsh specifically rejected the same comparative approach to making a jeopardy determination that NMFS has adopted in the 2004 FCRPS BiOp. In that case, intervenor-defendants Public Power Council ("PPC") and Pacific Northwest Generating Cooperative (also intervenor-defendants here) argued that "any agency proposal found to result in improved 'survival' as a matter of law could not be said to have 'reduced both the likelihood of survival and recovery' so as to constitute jeopardy." Id. at 899 (emphasis in original). Judge Marsh rejected this argument because it was:

[C]ontrary to legislative intent (i.e. that there be no clear distinction between survival and recovery) and could lead to an incongruous result. For example, if 100 listed species are expected to survive downstream juvenile migration in 1993 and 99 survived in 1990, PPC's argument would mandate a 'no jeopardy' finding – even though a 100 survival level may still be considered so low as to constitute a continued threat to the species' existence.

Id. at 899.

The courts have consistently reiterated the ESA regulations' plain command that NMFS

must make a jeopardy finding for an action in light of the current status of the species and the combined effects of the action, the environmental baseline, and any cumulative effects. In doing so, the courts have specifically rejected the comparative, “net effects” approach NMFS employs in the 2004 FCRPS BiOp. For example, in Kandra v. United States, 145 F. Supp.2d 1192 (D. Or. 2001), this Court rejected an argument for the same approach NMFS employs in the 2004 FCRPS BiOp. In that case, irrigators claimed that the Bureau of Reclamation’s 2001 Annual Operations Plan (“2001 Plan”) for the Klamath Project was arbitrary and capricious because it “failed to develop an environmental baseline to determine the actual effects of the Project.” 145 F. Supp.2d at 1206. Plaintiffs argued that “an environmental baseline must be established so as to compare ‘some thing or some condition’ to ‘something else or some other condition.’” Id. (emphasis added).¹ The Court rejected this argument, holding that:

[A]ll human activities that impact the listed species must be considered in the environmental baseline. The effects of the proposed action are then addressed “in conjunction with the impacts that constitute the baseline.” Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121, 127-28 (D.D.C.2001) The environmental baseline is part of the entire “effects of the action” on the listed species or habitat that must be considered, rather than some concrete standard or condition to which other standards or conditions are compared.

145 F. Supp.2d at 1207 –08 (emphasis added).

In sum, the courts have consistently held that section 7 requires a comprehensive jeopardy analysis that includes consideration of all of the impacts of the environmental baseline, the direct and indirect effects of the proposed action, and any cumulative effects in order to determine the “total effect” to the species, not a comparative analysis limited to determining whether the

¹ Ironically, as a defendant in Kandra, NMFS vigorously opposed the plaintiffs’ argument that jeopardy could be determined through a comparative, net effects approach.

proposed action will have a “net effect” on the species when compared to the environmental baseline.

5. Doesn't NOAA's new jeopardy framework renders the status of the species –even if the population is undergoing a severe downward trend–irrelevant? Doesn't NOAA's new jeopardy framework excuse an enormous amount of mortality imposed by the FCRPS, 98% in the case of Snake River spring/summer Chinook?

Yes and yes. Due to the net effects analysis performed by NOAA and the similarities in of the operations that are “netted” against each other, most of the mortality attributable to the FCRPS falls out NOAA's jeopardy determination. Olney Dec.¶¶ 18-19. The “net effects” analysis is new to the 2004 BiOp and reflects NOAA's attempt to distinguish between those mortalities associated with the discretionary operation of the FCRPS and those mortalities associated with the non-discretionary operation of the FCRPS and its existence. By constructing a hypothetically fish-friendly reference operation and comparing its effects to those associated with the updated proposed action, NOAA identifies a survival gap. Mortalities not included in this gap are assumed to be part of the environmental baseline. As was observed by Idaho in its comments on the draft (C. 234, p. 7):

much of the FCRPS mortality is common both to the reference and to the proposed action (i.e., baseline mortality). As a result, most mortality factors out in the determination of the gap and whether the UPA will reduce appreciably the likelihood of major ESU population survival.

For some populations, such as Snake River spring/summer Chinook, more than 98% of the mortality imposed by the FCRPS is excluded from the jeopardy analysis as a result of the "net effects" construct used by NOAA. CRITFC (C. 231, App. A, p. 4).

The magnitude of FCRPS mortality overlooked by this biological opinion is astounding and the implications of the new jeopardy standard and framework for analysis are dramatic. The

productivity increases identified in the 2000 BiOp for listed stocks as needed to meet the jeopardy standard have all but disappeared.

For example, the gap for Snake River spring/summer chinook is 1.5% relative difference (2004 BiOp Table 6.7). By contrast, the survival improvement needed for this ESU to achieve a 50% probability of recovery in 50 years under the 2000 BiOp was, on average, approximately 40%. (2000 BiOp Table A-5).

CRITFC, (C. 231). The gap analysis seriously understates the impacts of the FCRPS on listed stocks. For Snake River spring/summer chinook, the allowable take (gap) is 1% (Table 10.1) whereas the more realistic FCRPS mortality is identified as 56% in the second set of tables (a combination of juvenile and adult mortality; (Tables 10.3 and 10.4 combined.)). The vast majority of the hydrosystem's effects are thus excluded by NOAA's new jeopardy framework and do not play a role in NOAA's jeopardy evaluation.

NOAA's jeopardy analysis is at odds with common sense and its own regulations. NOAA's regulations direct it to evaluate the "effects of the action" which are defined to include the "direct and indirect effects of an action . . . together with effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. Clearly, the discretionary operations of the FCRPS dams are interdependent and interrelated with the dams' existence. But for the existence of the dams, there would be no operations at all. NOAA must evaluate the "effects of the action" including the interrelated effects of the dams' existence on the listed species in its jeopardy analysis. See 50 C.F.R. § 402.14(g)(2)-(4) (which does not exempt interdependent or interrelated effects from jeopardy analysis). Moreover, the District Court of Oregon has twice rejected similar attempts to truncate jeopardy analyses. See Kandra v. United States, 145 F. Supp.2d 1192 (D. Or. 2001). In that

case, irrigators claimed that the Bureau of Reclamation's 2001 Annual Operations Plan was unlawful because it "failed to develop an environmental baseline to determine the actual effects of the Project." 145 F. Supp.2d at 1206. The court agreed. The environmental baseline is part of the entire "effects of the action" on the listed species or habitat that must be considered, rather than some concrete standard or condition to which other standards or conditions are compared. 145 F. Supp.2d at 1207-08.

In IDFG v. NMFS, 850 F. Supp. at 899, Judge Marsh considered and specifically rejected intervenor-defendants Public Power Council and Pacific Northwest Generating Cooperative claim that "any agency proposal found to result in improved 'survival' as a matter of law could not be said to have 'reduced both the likelihood of survival and recovery' so as to constitute jeopardy." Id. at 899. Judge Marsh rejected this argument because it was:

[C]ontrary to legislative intent (i.e. that there be no clear distinction between survival and recovery) and could lead to an incongruous result. For example, if 100 listed species are expected to survive downstream juvenile migration in 1993 and 99 survived in 1990, PPC's argument would mandate a 'no jeopardy' finding - even though a 100 survival level may still be considered so low as to constitute a continued threat to the species' existence.

Id. NOAA's 2004 jeopardy framework suffers from the same flaw fatal to PPC's and PNGC's position. There is no bright line distinction between survival and recovery under the ESA. NOAA's efforts to manufacture such a distinction are contrary to Congress' intent.

6. Doesn't NOAA's new jeopardy analysis render delayed mortality irrelevant?

Yes. The total mortality (direct and delayed) due to the FCRPS is important when considering the effects of the action. This mortality, including delayed mortality, it is extremely high; the vast majority of peer-reviewed scientific research continues to indicate that the delayed

hydrosystem mortality of Snake River spring/summer chinook may be, on average, approximately 80%.

The problem is that NOAA has excluded consideration of delayed mortality in contrast to past FCRPS BiOps. As Idaho puts it (C. 234, p. 11-12):

The total mortality (direct and delayed) due to the FCRPS is important to put effects of the proposed action into context.... However, NOAAF excluded any delayed hydrosystem mortality of inriver migrants in estimating FCRPS mortality for the proposed action (e.g. Table 6.2a), in contrast to the explicit consideration of “Extra Mortality” hypotheses in the 2000 FCRPS BiOp analysis.

The importance of considering the total mortality is significant from the species’ perspective. As Oregon states: “Not including latent hydrosystem mortality in the assessments precludes an adequate analysis of overall (life cycle) effects of the operations.” (C.237, p. 24). Delayed mortality should be a critical component in the ultimate jeopardy determination, as Idaho notes (C. 234, 18):

IDFG emphasizes that NOAAF should account for total FCRPS mortality, including delayed hydrosystem mortality, in estimating the effects of the environmental baseline, reference conditions, and proposed actions to provide proper context for the Section 7(a)(2) consultation under the NOAAF jeopardy framework...

Indeed, totally missing is any reference to the multi-year, multi-million dollar scientific studies that were generated in prior BiOp processes, as Idaho notes (C.234, p.7):

[N]otably missing from the 2004 BiOp are any references to the Plan for Analyzing and Testing Hypotheses (PATH), and literature citations from PATH relevant to the subject of delayed mortality. These major scientific studies need to be identified, particularly since they were undertaken under previous FCRPS BiOp processes and, in IDFG’s opinion, produced information applicable to the 2004 BiOp.

Not only does NOAA not include this information, it also does not include the latest scientific information concerning the delayed mortality of in-river migrants for the Snake River. As Oregon

notes (C.237, p.24) :

Additional new information is available regarding the extent of delayed mortality for in-river migrant Snake River spring/summer Chinook from recently published workshop proceedings of the Comparative Survival Study (CSS; available at: <http://www.fpc.org/>). The new estimates take into account common year effects, differential mortality and delayed mortality estimates derived from spawner and recruit information. According to these studies, the updated estimates of delayed mortality of inriver migrants from the Snake River averaged 81%, after accounting for direct reach survival and differential transport survival "D". These results are supported by SAR comparisons from Snake River and John Day River spring/summer Chinook and spring Chinook populations.

Idaho, in an almost identical statement adds that:

These estimates [of delayed mortality from the CSS workshop] are generally comparable to earlier results from PATH, and contrary to speculation in the NOAAF December 2003 draft technical memo (Williams *et al.* 2003) that delayed mortality was now much reduced.

WDFW expressed concern that "NOAA did not incorporate any of that information [from the CSS workshop] into the Draft BIOP." (C. 247, enclosure p.2). Delayed mortality is critical from the species' perspective. As Idaho states, "IDFG believes technical consideration of this issue [delayed mortality] is extremely relevant to crafting survival and recovery measures." (C. 234, Attachment A IDFG Technical Comments on BiOp Remand collaboration process, 7) and C.234, 6 (same). In a classic understatement of how NOAA's new jeopardy analysis renders delayed mortality irrelevant, Idaho notes (C. 234, 6-7) that "It appears that the delayed mortality issue may not be as pivotal to NOAAF's jeopardy framework in the 2004 BiOp as it would have been pursuant to the original 2000 FCRPS Biological Opinion...."

7. **Doesn't the 2004 FCRPS BiOp's maximization of fall chinook transportation and minimization of spill run counter to the NOAA's own information and the fishery co-managers "spread the risk" approach?**

Yes. One of the key uncertainties in the 2004 BiOp relates to the survival of transported

Snake River fall Chinook. *E.g.* 2004 BiOp at pp. 5-26, 5-27 (“survival rate of transported SR fall chinook salmon is highly uncertain”); 6-78, 6-79 (great uncertainty regarding differential survival of transported and non-transported fish below Bonneville Dam.... “the specific survival of transported fish is unknown....”). Despite this uncertainty or perhaps because of this uncertainty, NOAA and the Action Agencies continue their policy of maximizing the transportation of Snake River fall chinook salmon.² Yet, the 2004 BiOp and UPA both fail to reveal that a decade ago NOAA explicitly recognized the absence of data needed to determine the effectiveness of Snake River fall chinook transportation and specifically called for that the action agencies to conduct the research to gather this information. Moreover, both the BiOp and UPA disregard the best available, albeit limited, science regarding the passage of juvenile fall chinook in the Snake River.

Oregon, Washington, and the Tribes recommendations as to the appropriate response to the available scientific information concerning transportation of juvenile fall chinook were disregarded by NOAA. Each of the non-federal co-managers took the view that providing summer spill at the Snake River dams would represent an improvement over the no-spill maximum transport operation that is contained in both the UPA and Reference Operation. Olney Dec. ¶¶ 40-44. Citing NOAA’s own technical memorandum, Williams et al. 2004, CRITFC observed that NOAA and other scientists had concluded, contrary to the BiOp and its analysis,

² The UPA and BiOp are remarkably non-specific when describing the actual intended summer transportation operation in the Snake River. The UPA simply states that transportation operations will in accordance with the Juvenile Fish Transportation Plan. UPA p. 50. The Juvenile Fish Transportation Plan is not part of or appended to the UPA. The 2004 BiOp indicates that the reference operation calls for maximizing transport of Snake River fall chinook, “i.e. no spill at collector projects and all collected fish would be transported from Lower Granite, Little Goose, Lower Monumental and McNary dams.” 2004 BiOp p. 5-16. Turning to a separate chapter, one finds that the proposed action and reference operations with regard to Snake River fall chinook transport are identical. 2004 BiOp 6-78.

that (C.231, App. A, p. 11):

the best available, although limited, data indicates that there is no advantage to transporting these migrants over allowing them to migrate in river (FPC 2004). These data have prompted NOAA Fisheries' scientists to recommend a "spread the risk" operation with roughly half of the migrants transported and half allowed in-river migration (Williams et al. 2004).

Oregon reached a similar conclusion (C.237, p. 23):

The benefits of summer spill for increasing survival of Snake River fall Chinook have been thoroughly documented (Oregon 2000; Oregon 2003; ODFW 2004a; JTS 2004a); therefore, the summer spill reference operation should include spill at collector projects (spring levels). This operation will improve survival of Snake River fall Chinook by increasing spillway passage and reducing the proportion of fish transported.

Instead of analyzing the data and directly addressing these co-manager recommendations, NOAA response hides behind the scientific uncertainty that exists because NOAA and the action agencies have not conducted the necessary research prescribed more than a decade prior.

Since its inception, the practice of collecting juvenile salmon at the Snake River dams via bypass screens, placing the juveniles in barges or trucks, and shipping them below Bonneville Dam for release has been described as "interim" or "experimental". E.g. 1995 BiOp p. 112. (NOAA describes transportation as an interim measure). Unfortunately, the track record of the government in actually conducting experiments on this interim operation for Snake River fall chinook has been abysmal. In 1995, NOAA observed that:

There is insufficient information to determine how transportation may affect the survival of listed fall chinook salmon ... since available information was collected in places outside the Snake River Basin and many not be applicable inside that basin. 1995 BiOp p. 61.

Recognizing that information on the survival of transported fall chinook was key to making long term system configuration changes, NOAA's 1995 Reasonable and Prudent Alternative pledged:

Immediate planning and evaluations to.... Evaluate in-river migration versus transport under the best conditions achievable without major structural modifications, using adult returns of PIT-tagged juveniles. 1995 BiOp p. 91.

NOAA observed that by late 1999 there will be

Three years of adult returns from the transportation studies and several years of information on in-river juvenile survival from PIT tag studies. This information should help clarify whether transported fish suffer delayed loss, or whether transportation is likely to provide the highest levels of survivals for downstream migrants.... 1995 BiOp p. 94.

NOAA's 1999 decision on system configuration hinged on data to be developed that would shed light on the efficacy of Snake River fall chinook transportation.

By the time NOAA issued a new FCRPS BiOp in 2000, neither the action agencies nor NOAA had conducted any significant new research concerning the fate of transported Snake River fall chinook. Olney Decl. ¶ 46-49; 2000 BiOp p. 6-22 (B.156) ("this species has not been the subject of formal transportation studies"). Among other things, it had become apparent that transmission system constraints affected the Corps' ability to provide summer spill in the Snake River without impacting BPA's transmission operations. See 2000 BiOp p. 9-80 ("The ability to provide summer spill at Snake River dams will require modifications of the electrical transmission system. These upgrades are expected to be completed by 2004.") Such spill was key to evaluating in-river migration versus transport "under the best conditions achievable."

In 2000, NOAA continued its policy of maximizing Snake River fall chinook transport. 2000 BiOp p. 9-77 (*Action 42*: The Corps and BPA shall operate the collector projects to maximize collection and transportation during the summer migration (i.e., no voluntary spill except as NMFS deems necessary for approved research).) NOAA acknowledged that:

despite full use of the best science available, substantial uncertainty remains about

the effectiveness of measures available to meet the biological requirements of listed ESUs. In hydro, for example, the projected effect of the hydro measures, or of the alternative of breaching dams, depends largely on the degree to which there is delayed mortality associated with juvenile fish passage at those dams, either inriver or with barge transportation, 2000 BiOp page 9-4.

NOAA again called for a comprehensive Snake River fall chinook transport study. This time the study was to be initiated in 2001 and by 2005 would be conducted in manner intended to maximize in-river survival conditions.

Now a decade after NOAA called for Snake River fall chinook transportation evaluations to help it make fundamental system configuration studies, NOAA and the action agencies' proposal again calls for study of Snake River fall chinook transportation.

A comprehensive evaluation of Snake River fall Chinook transportation is planned to begin when RSWs or other surface-oriented passage is provided at the Snake River collector dams to provide more favorable passage conditions (2007/2008). UPA p. 93.

Once again, the government has made the studies contingent on some future event. This time, the government's justification is the need to wait until RSWs or other surface oriented passage is provided at the Snake River dams. Neither NOAA nor the Action Agencies explain why it is now necessary to wait for RSW installation, when neither the 1995 BiOp nor the 2000 BiOp suggested that RSWs were necessary for a Snake Riverfall chinook transport evaluation. Even though an RSW has been installed at Lower Granite Dam for the last three years, no tests of the effectiveness of this device in safely passing Snake River fall chinook have been performed. Lorz Decl. ¶ 25. The Tribes assert that the real justification that lies behind further delay of Snake River fall chinook studies is not achieving "more favorable in-river passage conditions." The real reason is the government's desire to avoid the cost of spilling water at the Snake River dams during summer months. As discussed in the Lorz declaration, RSW tests to date have not demonstrated

survival improvements beyond those achievable with spill. Lorz Decl. ¶ 25-27. While RSWs may achieve survival comparable to that which can be obtained through spill, the real difference between RSW operations and spill operations is not the additional biological benefit, it is the lesser volume of water needed to achieve a similar biological result. Lorz Decl. ¶ 28. By diverting lesser flows away from the dams' turbines, electricity generation is not impacted to the same degree as with spill measures unaided by the RSW technology. Thus, BPA has identified RSW installation as "an opportunity for reduction" in BPA's total fish and wildlife program cost. BPA Power Function Review Slides, p. 37 (Cummings Dec., Exh. D).

The tribes and others requested that NOAA consider a reference operation that would provide summer spill in the Snake River to "spread the risk" associated with the unknowns associated with Snake River juvenile fall chinook transport and spill operations. In lengthy comments, ODFW and CRITFC both challenged NOAA's treatment of Snake River summer spill management as set forth in the draft BiOp. Olney Dec. ¶¶. While the final BiOp purports to answer Oregon's and the Tribes' concerns, it does not. Much of NOAA response is directed to emerging science related to "reservoir-type" Snake River fall chinook, which misses the point. Lorz Dec. ¶¶ 16-17. NOAA could have constructed a reference operation with a legitimate "spread the risk" operating scenario, which would have provided summer spill levels such as those recommended by Oregon and the Tribes and would have considered a range of "D" values. Had NOAA done so, the survival gap between the UPA and reference operation would have been large. Lorz Dec. ¶ 15. Unfortunately, NOAA chose to ignore the best available science. As such, the specter of spilling water during the summer months disappeared from NOAA's consideration.

Contrary to the ESA's mandates, the government has failed to consider the best available

science and has considered an inappropriate factor in its decision putting the cost of spilling water ahead of the biological needs of the resource. Section 7 of the ESA embodies an explicit Congressional decision to give first priority to conserving endangered species, a priority that overrides the other statutory missions of federal agencies. TVA v. Hill, 437 U.S. 153, 185 (1978). Rather than carefully considering the biological information from its own scientists and the views of other expert resource managers and engaging in an analysis of risk, NOAA retreats behind the veil of uncertainty. Rather than "give the benefit of the doubt to the species," Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987), NOAA effectively gives the benefit of doubt to hydropower operations.

8. What are the consequences of NOAA's new jeopardy analysis for Snake River populations, such sht the Middle Fork Salmon River populations, in wilderness areas?

One of the most dramatic consequences of NOAA's new jeopardy framework is that for some populations, such as Snake River populations in wilderness areas, there are few options to improve survival and recovery outside the FCRPS. As Idaho puts it (C. 234, 5):

IDFG has previously commented that for some populations and major population groupings of Snake River listed ESUs (e.g., Middle Fork Salmon River populations in wilderness areas) few options exist outside the FCRPS itself for recovery and survival measures. This observation is also generally borne out by the 2004 BiOp which concluded that, as to wild populations in wilderness areas, offsite actions did not substantially contribute to closing the survival gap relative to the jeopardy framework analysis.

9. Does NOAA's new jeopardy framework shift the impacts of the FCRPS onto other H's?

Yes. A universal concern among the Columbia Basin's sovereign states and tribes were concerns that NOAA's new jeopardy analysis shifts the burden of the impacts from the FCRPS onto others. Oregon's governor stated (C.237 (Cover Letter, p.2)):

From Oregon's perspective, however, the Action Agencies and NOAA Fisheries have taken a very significant step away from the Four Governor's consensus, in a manner that risks unfairly shifting the responsibility of conserving listed salmon in the Columbia basin to the region's private landowners, local communities and farming and fishing industries.

Washington's governor expressed similar concerns, stating (C.215, 1):

The 2000 BiOp, for example, included recovery of species as a FCRPS objective. The new version greatly narrows the FCRPS scope of responsibilities under the Endangered Species Act (ESA) and, through technical and new legal arguments, essentially eliminates its role in a comprehensive fish recovery strategy for the Columbia Basin. This leaves Columbia Basin salmon and steelhead to an uncertain future, especially given the adverse effect of dams on these fish populations, as acknowledged in your draft BiOp.

[m]y concern is that by narrowing FCRP's 9[sic] scope of responsibilities, the ESA obligations for fish recovery included in the 2000 BiOp will be transferred to local governments, landowners, and fishing and agricultural communities.

These concerns were echoed in WDFW's comments as well (C.247, 2):

As noted in my introductory remarks, and in preceding sections, the draft 2004 BiOp eliminates recovery objectives from the jeopardy analysis. This new approach has the effect of transferring the "costs" of recovery to everyone else: non-FCRPS hydro, harvest, hatchery and local habitat stewards such as agriculture, private landowners and state and local governments.

Idaho also noted that NOAA's new jeopardy standard deviates from an approach it had previously supported (C. 234, 5):

This is a departure from an approach, which garnered the State of Idaho's support (State of Idaho 2000), where Idaho specifically commented that "[i]n the past, NMFS has too often been willing to make a 'no jeopardy' finding based on incremental reductions in mortality for a particular activity without examining whether these mortality reductions are sufficient to meet the biological requirements of the listed species across all life stages.... The jeopardy analysis used in this [2000] BiOp holds the hydropower sector to an appropriate bottom line standard: whether the measures are sufficient to meet the overall biological needs of the listed species. All other sectors should be held to the same standard."

Indeed, under NOAA's new jeopardy approach, fisheries are treated as "an operational cost" of the FCRPS (Idaho, C. 234, 9):

Harvest of healthy runs is viewed widely as a benefit, and restoring healthy, sustaining, harvestable anadromous fish runs is an Idaho and regional goal. For context, it is important to understand that mortality from the FCRPS baseline and operations reduce productivity of upriver runs, forcing harvest reductions by fishery management agencies and eventual listing of Snake River species under the ESA. In the FCRPS jeopardy framework, an already reduced harvest framework is accounted for only as an FCRPS operational cost, and restoration, as opposed to avoiding appreciable reduction, of productive, harvestable levels is not an objective of the jeopardy analysis.

10. Does NOAA's new jeopardy framework essentially undermine any efforts to obtain funding to fix the problem?

Yes. As this Court acknowledged in its initial opinion and again in the remand process, one of the key practical elements of the 2000 BiOp and what it characterized as an "aggressive non-breach" approach was the significant amount of funding required for its implementation:

The State of Oregon's decidedly more pessimistic view of the likelihood that NOAA's off-site mitigation programs will be implemented appears to be based upon the absence in the record of any binding commitments by the States, Treaty Tribes, and private parties to fund or implement the responsibilities devolved upon them by NOAA in the 2000 BiOp, as well as the lack of certainty as to range-wide off-site mitigation actions..."

NWF v. NMFS, 254 F. Supp. 2d 1196, 1213-1214 (D.Or. 2003).

The court granted the year-long remand period, left the 2000 Biological Opinion for the FCRPS in place, and endorsed the collaborative process currently underway on the belief that defendant would actively solicit and successfully obtain funding necessary to implement and improve the mitigation measures set forth in the 2000 BiOp. In the court's view, a concerted and adequately-funded effort by defendant, the action agencies, and other interested parties can result in mitigation measures reasonably certain to occur that will allow the Northwest to enjoy plentiful hydropower and salmon. The court is concerned, however, that the requested six-month extension of time to complete the revised 2000 BiOp will be essentially futile because adequate funding is not in place and will not likely be secured in the near future.

NWF v. NMFS, Opinion and Order, May 13, 2004 (Docket #496).

The primary, practical implication of NOAA's new jeopardy analysis is that it essentially undermines efforts to obtain the dollars necessary for an "aggressive non-breach approach."

Remarkably, after announcing its new “no jeopardy” FCRPS BiOp, NOAA is now bemoaning what it refers to as “Salmon Funding Fatigue” or the increasing scrutiny and difficulty of obtaining funding.³ Certainly, to the extent that NOAA’s “no jeopardy” conclusion signals that there is no need for significant additional mitigation required because of the impacts of the FCRPS on salmon or the need to have a backup plan in place, then it is not surprising that obtaining funding for salmon will be difficult.

In the action agency’s response to comments, BPA, the Corps and the Bureau state that BPA will achieve the commitments in the UPA “within the existing available funds for the Fish and Wildlife Program averaging \$139 million in expense across 2003-2006... and within the budget associated with the upcoming rate period.” UPA Response to Comments, p. 6. While BPA has yet to decide what budget commitments for fish and wildlife it will take into the next rate period (FY2007- FY2009), BPA’s “placeholder” budget levels do not envision an increase in the current funding level of \$139 million. BPA Power Function Review Slides, pp. 27, 37-38. (Cummings Dec., Exh. D). This is consistent with a recent editorial column authored by Bob Lohn (NOAA Fisheries), Steve Wright (BPA) General Grisoli (Corps) and Bill McDonald (Bureau Reclamation) entitled “A commitment to ensure survival of Columbia Basin salmon,”

³ NOAA’s recently made a presentation to the Northwest Power Planning Council and the Nez Perce Tribe, including the following PowerPoint slide (Cummings Dec., Exhibit C):

Increasing Scrutiny of Budgets

- aka Salmon Funding Fatigue
- In a war-time economy
- Increasing calls for explanations of:
 - Budgets
 - Priorities
 - Implementation
 - Accomplishments
- By Congress, OMB, Commerce, NOAA, NOAA Fisheries, Legislatures

Seattle Times, Thursday, February 3, 2005. (Cummings Dec., Exh. B.) According to the Federal Executives, “[r]atepayers and federal taxpayers will invest about \$600 million a year—6 billion over the coming decade—in the endeavor.” While this statement would suggest and connote a substantially increased additional investment, a rough breakdown of cost components of the can be found in BPA’s power function review public information materials dated February 7, 2005. According to BPA’s materials for FY2007-FY2009 more than \$357 million of its total fish and wildlife program of \$690 million is its foregone revenue and power purchases: the “cost” associated with river operations. In other words, most of this investment budget reflects money BPA might have generated from power sales were it not for salmon related river operations requirements. Moreover, the investments envisioned by the region’s federal executives, to the extent based on BPA’s breakdown of costs, do not reflect any increases in direct funding levels beyond current budgets.

In the end, the Tribes are left with the distinct impression that there is downward pressure on appropriated funds and the BPA funding commitment is likely to continue at current levels (unadjusted for inflation) for the foreseeable future.⁴ It is against this backdrop that Tribes view the NOAA’s decision to excuse the baseline mortality associated the reference case from the reach of its jeopardy analysis and decision making. WDFW put it concisely in stating (C.247, p. 7):

While we understand that federal agencies believe that recovery obligations are more appropriately addressed in terms of Section 7(a)(1) rather than the Section 7(a)(2) process of consultation, the reality is that the federal government has a poor record of funding anything meaningful in this regard and treats Section 7(a)(1) as more a matter of discretion rather than imposing any obligation that provides

⁴ In FY2002 and FY2003 BPA cut approximately \$80 million from its fish and wildlife budget. CRITFC App A-27-29; UPA Response to Comments, p. 6 (BPA recognizes there is continuing disagreement regarding ... actual expenditures.”)

substantive results.

11. Does NOAA's 2004 FCRPS BiOp include a back-up plan?

No. The 2004 BiOp, in contrast the 2000 BiOp, contains no back-up plan. As this Court recognized, under the 2000 BiOp “the consequences of insufficient implementation include hydropower mitigation actions, up to and including [obtaining authority for] the breaching of Snake River dams. 2000 Biological Opinion, Ch. 9, p. 9-44.” NWF v. NMFS, Supp. Order, Docket # 444 (July 3, 2003). Thus, during the remand period, to keep the federal defendants on track in addressing the deficiencies the Court had found, the Court directed them to develop status reports: the first status “shall include the government’s consideration of hydropower mitigation action options should the habitat and hatchery options falter”; “[i]f meaningful and specific progress has not been made, the second report must identify specific plans for hydropower mitigation actions available to the government, up to and including those referred to in the aforementioned section of the 2000 Biological Opinion”; and finally, “if meaningful and specific progress again has not been made, the third report [must] provide a specific timetable for implementation of the planned hydrosystem mitigation actions that the government has identified in its earlier progress reports.” *Id.* at 3.

Although the Treaty Tribes expressed their concerns about the lack of a backup plan in the 2004 FCRPS BiOp (Treaty Tribes’ “Five Most Serious Questions,” C.193), NMFS arbitrarily abandoned any notion of backup plan. Not only has NOAA abandoned any consideration of a back-up plan, but the federal executives appear to be leading a frontal attack against any consideration of a backup plan, issuing the following statement:

“The reality is that removing the four lower Snake River dams would impose economic

hardship and would not help salmon throughout the Columbia River Basin.” Seattle Times, Thursday, February 3, 2005 (Cummings Dec. Exh. B). This statement is inaccurate, misleading, and not supported by the science. In the 2000 biological opinion, NOAA’s own scientists found that the partial removal of the four lower Snake River dams was the surest and best way to protect and restore salmon and steelhead in the Snake River. See BiOp 2000 at 9-5 (“...breaching the four lower Snake River dams would provide more certainty of long-term survival and recovery than would other measures.”). In fact, NOAA’s analysis indicates that removing the four lower Snake River dams would, under all assumptions, provide significantly higher proportional changes in juvenile salmon passage survival as compared to the action and the RPA. See Table A-9, BiOp 2000 at A-28 to A-67 (showing the percent changes in survival under a dam removal scenario).

CONCLUSION

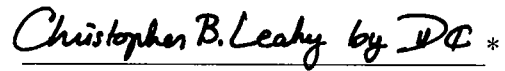
For the foregoing reasons, NOAA’s 2004 FCRPS BiOp is arbitrary, capricious, and otherwise not in accordance with law and the Endangered Species Act. The Treaty Tribes urge this Court to grant the State of Oregon’s and the Plaintiffs’ motions for summary judgment.

DATED this 11th day of February, 2005.

Respectfully submitted,



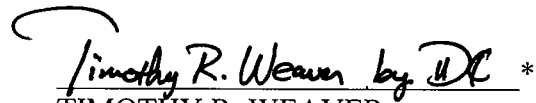
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