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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants.

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Civil No. 01-640-RE

**FEDERAL DEFENDANTS'  
RESPONSE TO THE  
COURT'S MAY 18, 2009,  
LETTER**

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## INTRODUCTION

At our April 2, 2009, meeting, the Court began by noting that the Obama Administration was in the process of reviewing a number of environmental decisions in the Pacific Northwest, and in some cases had decided to withdraw those agency decisions. During the course of that meeting, the Court inquired whether the new political leadership from the agencies, and in particular NOAA Fisheries, would review and provide its position on the 2008 Federal Columbia River Power System Biological Opinion ("FCRPS BiOp"). To honor the Court's request, over the last five months the new political leadership from each of the agencies as well as the White House Council on Environmental Quality conducted an extensive review of the scientific bases of the FCRPS BiOp and the underlying legal issues. This review included listening to the viewpoints of the parties to this litigation, as well as expert scientists inside and outside of the government, site visits to Ice Harbor and Lower Monumental dams, and numerous briefings, all to aid in the Administration's efforts to fully understand the scientific analyses and biological conclusions in the FCRPS BiOp.

Based on this review and the Court's May 18, 2009, letter, the new political leadership directed the development of, and approved, the Adaptive Management Implementation Plan ("AMIP" or "Plan"), a more detailed and aggressive plan for implementation of the Reasonable and Prudent Alternative ("RPA") set forth in the FCRPS BiOp. (Fed Defs.' Ex. 1). Utilizing the RPA's adaptive management provisions, the AMIP:

- Immediately accelerates and enhances particular RPA actions;
- Enhances research, monitoring and evaluation ("RM&E") to increase and improve the data and analytic tools available to gauge salmon and steelhead status and to inform responses, if the fish are declining;
- Establishes new biological triggers that, when exceeded, will activate near- and

long-term responses to address significant fish declines;

- Identifies and establishes the process for implementing those near- and long-term responses if a trigger is exceeded; and
- Includes a wide range of specific rapid response and longer-term contingency actions, including the potential for John Day drawdown and lower Snake River dam breaching.

It is this Administration's position that the FCRPS BiOp and the RPA, as implemented through the AMIP, are biologically and legally sound, based on the best available scientific information, not likely to jeopardize the continued existence of the listed species (including providing an adequate potential for recovery), and not likely to destroy or adversely modify designated critical habitat. *See* September 14, 2009, Letter from Dr. Jane Lubchenco to Action Agencies at 2-3 ("NOAA Letter") (Fed. Defs.' Ex. 2); *see also* September 11, 2009 Letter from Action Agencies to NOAA Fisheries ("Action Agency Letter") (Fed Defs.' Ex. 3).

This Administration also recognizes the tremendous gains that have been achieved in the remand, and is cognizant that these are largely attributable to the Court-ordered collaborative process. The significance of the alignment of three States and seven Tribes with four Federal agencies, in any context, cannot be understated. Continuation of the regional collaborative process is of paramount importance to this Administration. The Fish Accords and the underlying collegial relationships have the potential to benefit these fish more than anything that has been attempted in the Columbia and Snake River basins to date. We acknowledge that there are other sovereigns that do not share this view, and who have differences of opinion on the law and science. The Administration has seriously considered these viewpoints over the last several months and, in many cases, incorporated provisions into the AMIP in response to their concerns. However, after its

review, the Administration believes the BiOp as implemented through the AMIP – which includes enhanced and accelerated mitigation actions, enhanced research, monitoring and evaluation, and specific triggers for new near and long term contingency measures – meets the requirements of Section 7 of the Endangered Species Act (“ESA”).

Consistent with the Court's request, NOAA Fisheries and the three Action Agencies conducted outreach to the Plaintiffs in an effort to find common ground. This outreach included the active involvement of the new Administration leadership, including the NOAA Administrator Dr. Lubchenco. Unfortunately, these discussions did not succeed in resolving the differences among the parties, and we do not believe that continued discussions in an effort to reach a global resolution would be fruitful. Accordingly, the Federal agencies urge the Court to reject Plaintiffs’ challenges to the BiOp because it is the legally correct result, and more importantly to the fish, it will allow the agencies to focus on the implementation of actions which will benefit the species.

The Administration appreciates the Court’s patience in allowing an in-depth review of the FCRPS BiOp to occur. After this review, the course is clear. The FCRPS BiOp as implemented through the AMIP meets the requirements of the ESA, and is a significant step forward for listed salmon and steelhead in the Columbia and Snake River basins. Our focus for the future should be on implementing actions to benefit listed salmon and steelhead through the BiOp's collaborative and adaptive management processes, instead of diverting limited resources to perpetuate the cycle of litigation that has plagued this region for over 15 years. It is time to put the litigation aside and allow the States, Tribes, and this new Administration to work for salmon and steelhead. The Court should grant Federal Defendants’ motion for summary judgment.

## OVERVIEW

### **I. THE BIOLOGICAL OPINION REVIEW PROCESS**

After initial briefings from their respective agencies, the new Administration leadership<sup>1</sup> came to Portland to listen to the views of the affected States and Tribes regarding the FCRPS BiOp, as well as receive in-depth briefings from federal scientists concerning the scientific basis underlying the BiOp. On May 26, 2009, the Administration principals met with regional scientists, many involved in developing the science underlying the BiOp or regional recovery plans, to hear their individual views on six questions covering key topics such as the jeopardy standard, habitat restoration, climate change, and appropriate contingencies. *See* App. 1, Exhibit A Session 1 (participant list), Exhibit B (questions). During the afternoon of May 26, the Administration leadership met with representatives of the four states and eight Indian tribes, to understand these sovereigns' perspectives on the same six key questions. *See* App. 1, Exhibit A Session 2 (participant list). On May 27, the Administration leadership was briefed on operations and toured Lower Monumental and Ice Harbor dams, inspecting a Removable Spillway Weir and fish passage and research facilities. During the afternoon of May 27, Dr. Lubchenco and NOAA's Science Center hosted a series of listening sessions with highly-respected independent and agency scientists, including members of the Independent Science Advisory Board ("ISAB") and the Recovery Science Review Panel, to hear their views on the six key questions. *See* App. 1, Exhibit A Session 3 (participant list). In addition, at the request of non-sovereign parties to the litigation, the

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<sup>1</sup> Four different Cabinet-level agencies and the White House were represented in this process. The lead official for each agency in this review was: NOAA Administrator Dr. Jane Lubchenco for the Department of Commerce; Council on Environmental Quality Chair, Nancy Sutley for the White House; Principal Deputy Assistant Secretary of the Army, Terrence "Rock" Salt for the Department of Defense; Associate Deputy Secretary, Laura Davis for the Department of Interior; and, for the Department of Energy, Bonneville Power Administration Administrator Steve Wright. *See* AMIP, Appendix 1 ("App. 1") at 1.

Administration leadership held two additional listening sessions in Washington D.C. on June 25, 2009, chaired by Dr. Lubchenco, one for the National Wildlife Federation plaintiffs and the second for various defendant-intervenors. *See* Exhibit A, Sessions 4 & 5 (participant lists). During these sessions, the parties were permitted to present whatever information they deemed appropriate to the new leadership.

The views expressed by the sovereigns, other parties, and the scientists prompted the Administration to convene a workshop of some of these same independent expert scientists to further aid in the Administration's effort to fully understand the key scientific underpinnings of the BiOp. In mid-June, these scientists were invited to a two-day workshop in Washington D.C. on July 7-8, 2009. *See* App. 1, Exhibit A Science Workshop (participant list). In advance of the workshop, the scientists were provided the BiOp and its supporting analyses. *See* App. 1, Exhibit C. At the outset of the workshop, the scientists were asked to focus, and provide their individual views on, the science underlying the BiOp in five key areas: the quality of the scientific analyses, the effectiveness of the RPA actions, the effectiveness of measures used to monitor the species status, the adequacy of contingency measures, and the adequacy of the climate change analysis. App. 1 at 4. At the end of the workshop, the scientists expressed their individual views to the Administration leadership for their consideration.

As part of the review, the Administration leadership also considered the Court's concerns with the BiOp and its suggestions for enhanced adaptive management, identified in the Court's May 18, 2009 letter, as well as the other correspondence received from the parties throughout the review. Consideration of these concerns and suggestions occurred over the entire course of the review, and informed the Administration leadership's position on the BiOp and development of the AMIP. The AMIP includes measures that directly address many of the Court's points, with a more detailed

response to the Court's letter included as Appendix 1 to the Plan.

As stated in our letter of August 10, 2009, this last month has been utilized to explain our process and position on the FCRPS BiOp while seeking input from the parties prior to finalizing and presenting our position to the Court. Briefings were conducted with defendant-intervenors and defendant-*amici* (including the Tribes of the Umatilla, Yakama, Warm Springs, Colville, Kootenai of Idaho and Confederated Salish-Kootenai, the States of Washington, Idaho, Montana, the Northwest River Partners and other energy and river users). App. 1 at 5. Individualized briefings were conducted with the Nez Perce Tribe, the National Wildlife Federation (“NWF”) plaintiffs, and several meetings were held with the State of Oregon. *Id.* In addition, an additional settlement meeting was jointly held between the NWF plaintiffs, the State of Oregon, the Nez Perce Tribe and the federal agencies. At all of these meetings, the review process was explained and input was sought for the development of the AMIP. The federal agencies also sought to determine if there was any common ground on the Administration's position on the FCRPS BiOp as implemented through the AMIP. Unfortunately, the parties could not resolve their differences at these meetings.

The total sum of all these efforts has informed the Administration's position on the FCRPS BiOp. The Administration determined that the science underlying the BiOp is fundamentally sound. However, there are uncertainties in some of the predictions regarding the future condition of the listed species. Further contributing to these uncertainties is the Administration's understanding about how climate change may affect these species and their habitats. The Administration also identified the need to better understand the impact of invasive species and predators on the listed species, as well as the interactions among the listed species. Accordingly, the Administration determined that implementation of the BiOp would be improved by enhanced research and monitoring, which allows the agencies to better ensure achievement of the estimated benefits of RPA

actions as well as addressing the potential local impacts of climate change; by improved analytic tools to better inform future adaptive management decision-making; by adding new specific and readily-available contingency actions, should the agencies detect a significant decline in the species; and by accelerated or enhanced implementation of some existing RPA actions to provide additional safeguards for the species. The Administration consequently directed the development of the AMIP to address these issues, taking a more precautionary approach in implementing the RPA through the existing adaptive management provisions.

## II. THE ADAPTIVE MANAGEMENT IMPLEMENTATION PLAN

As the Court recognized in its May 18, 2009, letter, the FCRPS BiOp contains an adaptive management mechanism that allows the agencies to implement additional and/or modified mitigation actions within the structure of the existing BiOp.<sup>2</sup> *See* May 18, 2009, Letter to Counsel from Court, at p.2 (“Doc. No. 1699”) (“It is clear that the concept of ‘adaptive management’ is flexible enough to allow us to implement additional and/or modified mitigation actions within the structure of the existing BiOp . . . I urge you to consider implementing some, or all, of the following measures as part of the adaptive management process . . .”). The Administration agrees with this guidance. With a BiOp addressing the effects of a complicated system on species with complex lifecycles, it is not possible nor advisable to specify every action that will occur over the course of ten years. That is why the Action Agencies’ Biological Assessment (“FCRPS BA”) and the BiOp’s RPA provisions specifically contemplated that additional definition and specificity would be

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<sup>2</sup> The Plaintiffs will undoubtedly contend – as they have already – that the AMIP is some kind of “post-hoc rationalization” or an “effort to evade judicial review.” Pls.’ Joint Request for Status Conf. at 14 n.8. Plaintiffs’ anticipatory objections ring particularly hollow considering they were the ones who emphatically and repeatedly urged this Court to provide informal guidance for the Administration’s review process and development of a response. *See e.g.*, March 17, 2009 Letter from NWF Plaintiffs.

provided in future plans as the agencies gained further knowledge and information through RM&E. AMIP at 8; *see also* App. 2. Although there are important complexities, in its most basic form, this is an existing two-pronged requirement: (1) adaptive management provisions providing critical feedback as to current conditions and knowledge; and (2) various periodic implementation plans that specify definitive actions reflecting and incorporating the adaptive management information. FCRPS BA at 2-10 (commitment to implementation plans); *see also e.g.*, FCRPS BiOp at RPA Actions 50-73. It is through these requirements that the Action Agencies formulate and specify particular actions as they implement the RPA, and in turn, NOAA is able to monitor these actions to ensure the benefits of the RPA's actions are being achieved. *Id.* Just as the Court indicated, this BiOp expressly calls for future implementation plans and adjustments based on adaptive management. Doc. No. 1699 at 2.

In developing the AMIP, the agencies have utilized, and in some cases improved upon, these existing requirements. Importantly, the AMIP, while a significant step forward for these endangered and threatened fish, is nonetheless only a further refinement of the existing RPA (i.e., implementation of the FCRPS BiOp). The RPA sets forth as much detail as was possible at the time the BiOp was issued and relies on future implementation plans to specify actions within each year. The AMIP was developed in accordance with the Court's instruction so that it is consistent with the adaptive management mechanisms within the BiOp and does not exceed the scope of the existing consultation. *See* NOAA Letter at 2 (the AMIP is "consistent with the RPA and . . . reinitiation of consultation is therefore not required."). All of the actions and processes described below are part of the BiOp, but provide more definition and specificity so that the RPA can be implemented in a more precautionary manner to safeguard against future uncertainties.

The AMIP consists of four basic components: (1) immediate acceleration and enhancement

of RPA mitigation actions; (2) enhanced RM&E to increase and improve the data and analytic tools available to know how salmon and steelhead are performing and to inform what to do if they are declining; (3) new biological triggers that, if exceeded, will activate a range of specified near- and long-term responses to address significant fish declines; and (4) clearer definition of regional collaboration, scientific review and dispute resolution. AMIP at 10-14. This plan builds upon the existing BiOp and in no way reduces any previous commitment in the RPA or Fish Accords. AMIP at 14.

The first two components of the plan (accelerated/enhanced actions and enhanced RM&E) will aid in implementing the RPA and will be critical in evaluating whether the conclusions in the BiOp will come to fruition. In contrast, the “triggers” and contingency plans, while set at a level that may admittedly occur throughout the duration of the BiOp due to the inherent variability of the salmon and steelhead runs, are not intended to gauge the accuracy of the conclusions in the BiOp, but rather, to provide additional insurance in the unlikely (*i.e.*, low probability) event that the analyses and predictions in the BiOp are not fulfilled. Underlying all of these components is an enhanced commitment to regional collaboration, scientific review, and a more formalized dispute resolution process. AMIP at 40-41. Briefly described below are the four primary components of the AMIP.

**A. Accelerated and Enhanced Mitigation Actions**

As part of the precautionary approach, the AMIP includes commitments from the agencies to accelerate and enhance certain actions for the attainment of benefits in estuary habitat, species reintroduction, predatory and invasive species controls, and spill. AMIP at 16-19. As the Court is aware, in response to the concern expressed at the March 6, 2009, summary judgement hearing, the Action Agencies accelerated ongoing negotiations with the State of Washington to achieve the

Washington Estuary Memorandum of Agreement (“Estuary MOA”). This agreement secures an additional \$40.5 million dollars and specific habitat projects, in order to ensure the estuary benefits estimated in the BiOp are realized. *Id.* at 16; *see also* App. 3 (providing a list of estuary MOA projects, location map, and preliminary benefits calculation). The Estuary MOA will be executed on September 16, 2009. *Id.* Although the infusion of money at an earlier point in the term of the BiOp will accelerate certain projects, the real benefit to this agreement is the partnership with the State of Washington which can more easily facilitate the construction and implementation of site-specific projects on state and private lands. *Id.*

The AMIP also provides a commitment to evaluate possible reintroduction projects by December 2010. *Id.* at 16-17. This analysis and report will be compiled by the NOAA Science Center and provide valuable insight as well as possible contingency actions. *Id.* at 17. Similarly, the Action Agencies committed to developing a research study design proposal by November 2009 for shad, catfish, and smallmouth bass and will request expedited review from the Independent Scientific Review Panel (“ISRP”) so that they can begin field studies by the next season, anticipated by December 2010. *Id.* at 17-18. Although both of these actions will have their initial stages completed by December 2010 and further refinements will take additional time, ultimately these actions will provide valuable survival benefits that have not been otherwise assumed in the existing BiOp.

Finally, the agencies are fully aware that this Court has suggested that there should be a continuation of court-ordered spring and summer spill. Doc. No. 1699 at 3. The agencies, in particular NOAA, respectfully disagree that one spill operation throughout the life of the BiOp is appropriate. New data and changing conditions demand that the agencies manage the system adaptively, thereby foreclosing any predetermined 10-year operation. However, the agencies have

made the commitment in the AMIP to evaluate existing data for spring spill within the Regional Implementation Oversight Group (“RIOG”) process, just as the ISAB suggested, and there will no longer be a presumptive spring spill/transport operation for the last two weeks of May, as set forth in the BiOp. AMIP at 18-19.

With summer spill, the agencies remain committed to the operation as specified in the Fish Accords with the Lower River Tribes. *Id.* at 19. Snake River fall Chinook, the only ESU migrating at this time on the Snake River, is currently exceeding all expectations and has repeatedly demonstrated there is a robust wild population. The agencies are encouraged by these noteworthy numbers, but realize that the current health of this ESU cannot be taken for granted. Thus, the Action Agencies committed to developing through the RIOG process a safeguard based on the abundance of adult Snake River fall Chinook, to be in place prior to the 2010 juvenile fish outmigration season. *Id.* If exceeded, the safeguard would require the continuation of summer spill at Snake River projects until August 31 of the following year. *Id.*

**B. Enhanced Research, Monitoring, and Evaluation.**

RM&E allows the Action Agencies and NOAA to evaluate whether the BiOp’s mitigation actions are having the intended effect and forms the foundation for adaptive management by improving scientific understanding of the entire salmonid lifecycle. The AMIP provides a greater commitment to RM&E by significantly expanding its geographic coverage and improving statistical certainty. AMIP at 20-25. The AMIP entails six primary enhancements: (1) the development of improved life-cycle modeling; (2) improved adult status and trend monitoring; (3) improved juvenile status and trend monitoring; (4) habitat condition status and trend monitoring; (5) further development and use of Intensively Monitored Watersheds (“IMWs”); and (6) improved climate change monitoring and evaluation. *Id.* The AMIP describes each of the enhancements in detail,

but each enhancement is underscored by a commitment from the Action Agencies and NOAA to fund these actions (sometimes jointly) and specific deadlines.

Perhaps of greatest concern to the Court, the additional funding and attendant enhancements were designed in part to ensure that the survival benefits assumed from habitat projects in the BiOp will be attained. *See id.* at 24 (coupling habitat monitoring and adult and juvenile monitoring allows the agencies “to assess fish survival and habitat productivity improvements . . .”). These efforts will provide the necessary feedback so that implementation can incorporate and adapt to changing conditions, *id.* at 22, and will be readily available to the RIOG so as to increase the transparency of the BiOp. *Id.* at 20. The Administration is confident that these new RM&E enhancements combined with the significant existing obligations<sup>3</sup>, will allow NOAA to effectively monitor whether the conclusions in the BiOp are accurate and guard against inherent uncertainties as a result of limited data. AMIP at 11 (RM&E provides “ongoing mechanisms to track salmonids, evaluate the effectiveness of RPA actions, and thus address inherent uncertainties in knowledge or the potential for unanticipated changes.”).

### **C. Triggers and Contingency Plans**

The Court has expressed concern that various ESUs may not perform as anticipated in the BiOp and in that event there should be accurate and discernable metrics by which to gauge an unexpected downturn followed by readily-available contingency measures. Particular attention has been paid to the Court’s concern and accordingly the agencies have developed an expanded contingency process. AMIP at 26-39; *see also* AMIP Fig. 2 (flow chart describing the enhanced

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<sup>3</sup> It is worth underscoring the significance of the existing RM&E obligations in the BiOp. *See* FCRPS BiOp RPA Actions 50-73. For example, in the estuary, \$6.6 million is spent each year determining whether the projects are having their intended effects. Put another way, that means for every \$1 that is spent on projects in the estuary, the agencies are also roughly spending \$1.25 ensuring the intended effect is attained.

contingency plan). With collaboration from the NOAA Science Center, the agencies developed a number of metrics or “triggers” that will indicate whether an unexpected and significant decline in species abundance is occurring. *Id.* at 30-32; App. 4. Building on these triggers, a number of short-term contingency measures (“Rapid Response Actions”) have been identified so that these actions can be implemented as soon as possible, but no later than 12 months upon activation of a trigger. AMIP at 32-34. The agencies have also identified and will continue developing long-term contingencies in the event there is a significant decline and the Rapid Response Actions are not sufficient. AMIP at 34-39.

1. Early Warning Indicator and Significant Decline Trigger.

There are two basic triggers. The first is the “Early Warning Indicator”, which is “when the running four-year mean of adult abundance falls below a 20% likelihood of occurrence.” *Id.* at 30.<sup>4</sup> This is a “soft” trigger that is evaluated annually and that if exceeded, will result in an immediate assessment of whether the Significant Decline Trigger is likely to occur by looking at factors that may be influencing the decline.<sup>5</sup> If the 20% threshold is exceeded, within 120 days the agencies will evaluate the species’ likely future status and determine whether or what Rapid Response Actions to take to address the concern. *Id.* If Rapid Response Actions are appropriate, they will be implemented as soon as practicable after a decision is made, but no later than 12 months after the Early Warning Indicator is observed. *Id.* It is possible that during the early course of the BiOp, an ESU may exceed this soft-trigger. However, to be clear, this is not a function of the BiOp’s conclusions, but rather results from setting this trigger at a sufficiently precautionary level so as to

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<sup>4</sup> The Action Agencies and NOAA will develop, in coordination with the RIOG, at least one additional Early Warning Indicator by December 2010. *Id.*

<sup>5</sup> Examples of these considerations include, but are not limited to: low jack counts, forest fires, virulent pathogens, new invasive species, and prolonged drought. AMIP at 30.

be sensitive to moderate trends or declines.<sup>6</sup> AMIP at 30 n.5.

The second, “Significant Decline Trigger”, uses the same running four-year mean of adult abundance, but is exceeded if these annual numbers fall below a 10% likelihood of occurrence. AMIP at 31. This is a “hard” trigger, which means that if exceeded, a determination of which Rapid Responses to implement will occur within 90 days. *Id.* Unlike the Early Warning Indicator, if this hard trigger is exceeded, the only remaining question is which Rapid Response will be implemented. *Id.* Once that determination is made, the selected Rapid Response Actions will be implemented as soon as practicable, but no later than 12 months after the Significant Decline Trigger is exceeded. Further, within four to six months of a Significant Decline Trigger being exceeded, the agencies will determine if the Rapid Response Actions are likely to be sufficient, or if Long-Term Contingency actions will need to be implemented, and if so, what actions to implement. *Id.* at 32.<sup>7</sup> If necessary, those Long-Term Contingency actions will be implemented as soon as practicable. *Id.* Both of these triggers are currently in place. However, additional work will continue and the agencies committed to improving the Significant Decline Trigger by adding a trend component by no later than December 2010. *Id.* The Agencies will also evaluate the potential development of a future

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<sup>6</sup> As indicated in the AMIP, the Early Warning Indicator has been set at a level that is sufficiently sensitive so that it can detect moderate trends in a species status. For example, had this trigger been in effect during 2008 adult migration season, Upper Columbia spring Chinook would have exceeded the 20% criterion for the Early Warning Indicator. Because this Administration is committed to a precautionary approach and even though the 2008 adult migration for this ESU largely passed prior to the 2008 BiOp becoming effective, the agencies will treat this ESU as if the Early Warning Indicator has been exceeded. Accordingly, NOAA Fisheries will notify the Action Agencies of this exceedance, which will result in a 120 day assessment. AMIP at 30. During this time, it is likely that the 2009 adult data will become available and the agencies will closely evaluate that information.

<sup>7</sup> With respect to lower Snake River dam breaching, technical studies will be initiated within six months of a Significant Decline Trigger being exceeded, unless the best available science demonstrates that dam breaching is not necessary to address and alleviate the biological trigger conditions for the applicable Snake River species. AMIP at 38.

Significant Decline Trigger based on information for juvenile salmon and steelhead. AMIP at 32; App. 4.

## 2. Short-Term Contingencies

The Rapid Response Actions were selected for their potential to immediately improve fish survival upon implementation. AMIP at 33. The Rapid Response Actions include, among other hydro measures, possible modifications to the system that exceed juvenile dam passage performance standards in the BiOp by altering spill. *Id.* The suite of potential Rapid Response Actions could also include aggressive efforts to target predators and invasive species, modifications to harvest management (within existing agreements), and the possible use of safety-net hatcheries. *Id.* at 33-34. Within 90 days of exceeding a Significant Decline Trigger, the Action Agencies and NOAA, in coordination with RIOG, will determine which action(s) will be implemented. *Id.* at 33. The idea behind the rapid response is to have readily available actions that will enhance the survival of the ESU before next year's migration. This approach then allows adequate time for a more in-depth, all-H diagnosis and lifecycle analysis and potentially implementation of more dramatic and difficult long-term contingencies. These Rapid Response Actions are "on-the shelf" in case they are needed, just as the Court suggested on April 2, 2009. These actions will be further refined by December 2011, in a Rapid Response Plan which will include further details as to these actions together with implementation milestones. *Id.* at 33.

## 3. Long-Term Contingencies

Substantial effort and time was directed to the formulation of a long-term contingency framework. The AMIP identifies potential Long-Term Contingency actions, which will be further refined over the next two years. AMIP at 34-38. Specifically, by December 2011, the agencies will develop a Long-Term Contingency Plan, which will include a detailed description of the Long-Term

Contingency actions, a selection process and implementation milestones.<sup>8</sup> *Id.* at 34.

In many respects, these Long-Term Contingency actions represent a marked change from previous positions. Possible actions include implementation of Phase II hydro actions such as the installation of new RSWs or TSWs, or other dramatic system changes, *see* FCRPS BA at B.2.1-26 to 47, while others include a candid look at reintroduction, hatchery reform, and potentially modifications to existing harvest management and agreements. AMIP at 35-36. The remaining two long-term contingency actions have been controversial within the region for a long time and are two issues the Plaintiffs and the Court made clear they wanted addressed during this review.

The first is operating John Day reservoir to minimum operating pool (“MOP”). *Id.* at 36. With regard to this operation, by December 2011 the Corps, in coordination with the other agencies, will complete a study plan to include scope, schedule, and budget as well as the appropriate decisionmaking process for this particular reservoir drawdown. With the completion of the study plan in hand, if a Significant Decline Trigger is exceeded, the scientific review process (particularly an All-H diagnosis and the new life-cycle modeling to be developed by the NOAA Science Center) will evaluate which contingencies are warranted. If operating John Day to MOP were among the Long-term Contingency Actions that had the potential for redressing the significant decline of the affected ESU, the Corps would undergo the process to evaluate the effectiveness of this contingency. If after completing the evaluation and decisionmaking processes, it was determined that this operation was necessary, the Corps would seek the appropriate authorities to disrupt irrigation, municipal water supplies, hatchery water supplies, wildlife refuges and fish habitat. *Id.*

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<sup>8</sup> The agencies have endeavored to provide specific deadlines and timeframes, many of which are detailed throughout the AMIP, but some of the longer-term contingencies are controversial within the region, and as the Court may appreciate, it will take time to work through these issues in a collaborative manner.

The second is lower Snake River dam breaching. At the March 6, 2009 hearing, the Court advised the agencies that studying dam breaching needed to be considered, but it also remarked that it “hopes it’s never done” and only maintained as “the last fallback.” *NWF v. NMFS*, 01-CV-640-RE, March 6, 2009, Transcript p. 198. The Administration also acknowledges that dam breaching must be considered as part of a robust contingency plan, but given the impact dam breaching would have on local communities, the broader region, and the environment, dam breaching is considered a “contingency of last resort.” AMIP at 37. As this Court knows, the Corps does not have the authority to breach lower Snake River dams, and any process of this magnitude will take time. Nevertheless, the agencies are not going to stand idle and will begin work immediately so that they are in a position to respond, if, and only if, sound science indicates that this contingency is warranted.

Starting immediately and ending no later than March 2010, the Corps, in coordination with the other agencies, will complete a study plan to include scope, schedule, and budget to conduct and complete technical studies, as well as the appropriate decisionmaking process. *Id.* Technical studies would include, but are not limited to, an evaluation of aquatic ecosystem effects, socio-economic effects, other environmental effects (like sedimentation), and additional engineering analysis. *Id.* at 37-38. By December 2012, NOAA will work with the Action Agencies to develop a module for the life-cycle analysis that will be able to evaluate short-term, transitional and long-term effects of dam breaching. *Id.* at 38. That is, NOAA will immediately begin building its modeling capability to evaluate a dam-less scenario on the lower Snake River. If a Significant Decline Trigger for a Snake River ESU<sup>9</sup> is exceeded and (1) an All-H analysis (with the aid of NOAA’s new life-cycle

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<sup>9</sup> This does not include Snake River sockeye, which is effectively already managed under ongoing contingency actions including a safety-net hatchery program and other measures. AMIP at 36, n. 11.

model) indicates that lower Snake River dam breaching is necessary to address and alleviate the biological trigger conditions for the applicable Snake River ESU(s); (2) the analysis is inconclusive whether dam breaching is necessary to address and alleviate the biological trigger conditions for the applicable Snake River ESU(s); or (3) the analysis is not completed within six months, then the Corps will begin the comprehensive technical studies, including the appropriate independent review. *Id.* If the technical studies warrant and after a decision from the Administration, the Corps would begin its NEPA process for a comprehensive evaluation with public involvement. If it is determined that moving forward with breaching lower Snake River dams is appropriate, the Corps would seek the requisite congressional authority. *Id.* The Administration realizes that this process, if employed, will take time, but in light of the current status of Snake River ESUs and the significant effects to communities and environment, a decision of this magnitude must be driven by the best available science and taken with careful consideration.

Collectively, these provisions of the AMIP are directly responsive to the Court's request to develop a contingency plan that includes the possibility of "reservoir drawdowns, as well as what it will take to breach the lower Snake River dams if all other measures fail . . ."). Doc. No. 1699 at 3.

**D. Regional Collaboration, Science Review, and Dispute Resolution.**

Under the existing BiOp, the Action Agencies, in coordination with NOAA, are required to compile annual reports as well as comprehensive evaluations at 2013 and 2016 to inform adaptive management and to allow NOAA to determine whether the RPA is being implemented correctly. RPA Actions 2-3. There is also an existing commitment to continue the collaborative process through the RIOG. *See* RPA Table - Adaptive Management Actions. The AMIP of course retains these requirements and either provides further definition as to how these processes will work or

enhances the commitments already made. *See* AMIP at 40; *see also* App. 1, 22-23. Particular emphasis will be placed on involving the NOAA Science Center in the implementation of the RPA and seeking independent scientific review of significant scientific issues in dispute within the RIOG. App. 1 at 22. In addition, expert panels will continue to provide independent scientific review for the selection process for tributary and estuary habitat projects. AMIP at 40; App. 1 at 7-14. And, all of the plans, progress reports, and comprehensive evaluations will be available to the public at [www.salmonrecovery.gov](http://www.salmonrecovery.gov). To the extent there is disagreement at the regional level, this Administration will become more actively involved through the Salmon Policy Team.

### **III. THE ADMINISTRATION'S POSITION ON THE FCRPS BIOLOGICAL OPINION.**

Instead of acquiescing to Plaintiffs' demands to set the FCRPS BiOp aside, at the April 2, 2009 meeting and in its May 18, 2009 letter, the Court asked the Administration to review and bolster *this BiOp* through the existing adaptive management mechanisms. *See* Doc. No. 1699 at 2. That is exactly what this Administration has done.

The review process evaluated both the legal and factual issues, honing in on the key points in each category. With respect to concerns about the jeopardy standard, the Administration supports the "adequate potential for recovery" formulation of the recovery prong of the jeopardy standard, as set forth in the BiOp and reiterated in the AMIP. *See* NOAA Letter at 2 ("the RPA as implemented through the Plan satisfies the jeopardy standard that has been articulated by the Ninth Circuit, that is, its effects are not likely to jeopardize the continued existence of the listed species (i.e., combined with the effects of the environmental baseline and cumulative effects, the species are expected to survive with an adequate potential for recovery), nor likely to destroy or adversely modify designated critical habitat.").

With respect to concerns about the science and biology, the Administration recognized that,

as with any prediction of the future, there are inherent uncertainties as a result of the state of our scientific understanding, and this uncertainty is compounded by the growing body of climate change information. That is why this Administration has developed the AMIP - to employ a more precautionary approach to guard against any unforeseen downturns. Action Agencies Letter at 3 (“This two pronged approach (heightened monitoring and robust contingency plans) provides a backstop to guard against biological uncertainties and allows the Federal agencies to be attentive to the requirements of these fish for the term of the 2008 BiOp.”); *see also* AMIP at 8. As implemented through the AMIP, it is this Administration's position that the FCRPS BiOp and the RPA are biologically and legally sound, based on the best available science, not likely to jeopardize the continued existence of the listed species (including providing an adequate potential for recovery) and not likely to destroy or adversely modify designated critical habitat.

This Administration supports the FCRPS BiOp as implemented through the AMIP. Both regional and D.C. agency staff, at the Administration's direction, have worked diligently under a very compressed time frame to prepare this Plan and believe this addresses the Court's concerns. As Dr. Lubchenco's letter notes, “the culmination of our recent efforts represents a significant step forward for listed salmon and steelhead in the Columbia and Snake River basins.” NOAA Letter at 2. It is time to let the new Administration get to work on implementing these actions under this Plan.

### **DISCUSSION**

The Court's May 18 letter expressed a tentative position on the validity of the FCRPS BiOp, raising both legal and factual concerns. We respectfully disagree with the Court's tentative position and believe the Court can and should re-evaluate that position based on the Administration's review process, the AMIP, and the responses provided below.

## I. THE JEOPARDY STANDARD COMPLIES WITH THE ESA.

The Court's May 18 letter expresses lingering doubt about whether the 2008 BiOp employed a correct interpretation of the regulatory definition of the statutory phrase "jeopardize the continued existence of", commonly referred to as the "jeopardy standard."<sup>10</sup> This specific legal issue was thoroughly evaluated with heightened attention paid to whether or not the BiOp as implemented through the AMIP satisfies the Ninth Circuit standard, *i.e.*, that the listed species are expected to survive with an "adequate potential for recovery." The Administration has concluded that the FCRPS BiOp employed a correct interpretation of the ESA jeopardy standard and that the RPA as implemented through the AMIP satisfies the Ninth Circuit standard. To the extent there is any remaining confusion or concern that "trend towards recovery" is the legal standard, as described in our previous pleadings and incorporated here by reference, it is not, and any suggestion to the contrary is incorrect. *See* Fed. Defs.' Mem. at 29-43; Fed. Defs.' Reply at 5-14.

Since the close of briefing and oral argument, the Ninth Circuit has upheld the "survival with an adequate potential for recovery" interpretation of the survival and recovery prongs of the jeopardy standard in a very similar dispute over the proper consideration of recovery in ESA Section 7 consultations. *Salmon Spawning & Recovery Alliance v. NMFS*, 2009 WL 2487917 (9th Cir. Aug. 14, 2009).<sup>11</sup> As explained in our briefing, the litigants there asserted that NOAA's consideration of the recovery prong of the jeopardy standard was improper because the Section 7 analysis did not measure the impacts of the action against numbers of projected abundance used by the Technical

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<sup>10</sup> "Jeopardize the continued existence of" means "to engage in 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.

<sup>11</sup> Pursuant to Ninth Circuit Court of Appeals Rule 36-3(b), this decision may be cited to this court.

Recovery Team (“TRT”) to describe an element of recovered salmon populations. *See* Fed. Defs. Mem. at 34-35. We argued that Plaintiffs’ similar tactic here would improperly import the requirements of Section 4 recovery planning into the Section 7 analysis. Affirming the district court, the Ninth Circuit agreed with this line of reasoning, emphasizing the distinction between the two separate provisions and clarifying that “ultimately, the [agency action] need not boost the Chinook’s chances of recovery: *NMFS must only determine those chances are not ‘appreciably’ diminished by the plan.*” *Id.* \*1(emphasis added). The Ninth Circuit also reiterated the proper standard of review applicable to Section 7 analysis, recognizing that “[d]eciding how to assess, and indeed the assessment of, the impact of [an agency action] on an ESU’s potential for recovery ‘involves a great deal of predictive judgment. Such judgments are entitled to a particularly deferential review.’” *Id.* (citing *Trout Unlimited v. Lohn*, 559 F.3d 945, 959(9th Cir. 2009)).

In addition, Judge Mosman of this District has also recently rejected overly prescriptive interpretations of the required jeopardy analysis. In that case, the plaintiffs argued that NOAA must quantify the authorized take for every other project affecting the species, relying on the *NWF v NMFS* Ninth Circuit language that NOAA must know “roughly at what point survival and recovery will be placed at risk.” *Northwest Env'tl. Def. Ctr. v. NMFS*, – F. Supp.2d –, 2009 WL 2486039 at \*12 (D. Or. Aug. 12, 2009)(citing *NWF v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008)). However, because “the ESA does not prescribe how the jeopardy prong is to be determined,” the Court upheld the analysis based on the “abundant information in the BiOp about the current state of each of the listed species and the state of critical habitat. . .” *Id.* at \*13 (citing *Gifford Pinchot Task Force v. Fish & Wildlife Serv.*, 378 F.3d 1059, 1067 (9th Cir. 2004)). In so doing, the Court rejected the attempt to elevate the Ninth Circuit’s language into additional procedural requirements of a jeopardy analysis, as the Plaintiffs here also seek to do. *See, e.g.*, *NWF Br.* at 10.

Plaintiffs cannot dispute that the FCRPS BiOp considered the action's impacts on the likelihood of recovery. Their dispute is whether the agency action does enough to further the species' recovery, a requirement which the Ninth Circuit has confirmed is not part of the ESA Section 7 jeopardy standard. At bottom, Plaintiffs seek to impose a standard by which the FCRPS not only becomes the guarantor of the status of all ESUs, but is responsible for the recovery of each ESU. While the BiOp implemented through the AMIP contains massive amounts of mitigation and actually *increases* the species' likelihood of recovery, it is important to remember that the regulation only speaks in terms of *reducing appreciably* the likelihood of survival and recovery. Putting aside all of Plaintiffs' manufactured arguments, an RPA that increases the chances of recovery cannot be said to reduce the chances of recovery. The survival "with an adequate potential for recovery" standard used in the BiOp ensures that the Section 7 analysis "provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning." *NWF v. NMFS*, 524 F.3d at 936. Furthermore, recent Ninth Circuit and District of Oregon law confirms that Plaintiffs' attempt to add procedural requirements to the recovery prong of the jeopardy standard is improper. This Court should reject Plaintiffs' procedural and substantive challenges to the FCRPS BiOp's jeopardy standard.

## **II. NOAA'S CONCLUSIONS ARE REASONABLE AND BASED ON THE BEST AVAILABLE DATA.**

The Court's May 18 letter expressed additional concerns with portions of the BiOp's analysis. Before the Court issues its summary judgment ruling, we request reconsideration of how the ESA's requirements are satisfied by these elements of the BiOp and the additional measures implemented through the AMIP. In so doing, we reiterate that a court should not "act as a panel of scientists that instructs the [agency] . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty." *See Lands Council v. McNair*, 537 F.3d

981, 988 (9th Cir. 2008) (en banc). The court should also "conduct a 'particularly deferential review' of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Id.* at 993.

After the close of briefing and argument in this case, the Ninth Circuit again confirmed this most deferential standard of review in an ESA context when evaluating the agency's resolution of scientific issues. *Trout Unlimited*, 559 F.3d at 956 (noting that the court would "stay our hand" and not "second-guess" NOAA's resolution of a scientific question when plaintiffs and NOAA were "engaged in a good faith disagreement that is supported by science on both sides.>").

**A. The Habitat Benefits are Reasonable, Reasonably Certain to Occur, and the AMIP's Enhanced RM&E Further Ensures Those Benefits Are Realized.**

The foundation of this BiOp is an "all-H" approach, which shaped the proposed operations and proposed mitigation as well as informing future contingency planning. The habitat arm of that approach calls for an extensive habitat improvement program both in the tributaries and the estuary. Ongoing monitoring under the BiOp and further expansion under the AMIP will ensure those benefits are realized.

The expanded habitat program is supported by a significantly increased habitat funding commitment, doubling that under the 2000 BiOp. App. 1 at 7. In addition, much of the \$900 million from the Fish Accords will go to habitat actions benefitting listed salmon and steelhead. *Id.* These commitments are already translating to on-the-ground projects benefitting fish. *See* App. 1, Attachments 1 (spreadsheets of estuary and tributary habitat projects for 2007-2009).

The new Washington Estuary MOA, to be signed by September 16, 2009, increases this habitat funding by an additional \$40.5 million between 2010 and 2018. The agencies worked together with the Washington Department of Fish & Wildlife to identify 21 project sites. *See* App. 3. Utilizing the methodology employed in the FCRPS BiOp, these projects were evaluated to

preliminarily estimate the survival benefits for each, which will be confirmed by the expert regional technical group. App. 1 at 8; App. 3. This Estuary MOA provides additional money, commitment from a new partner, and most of all, additional habitat projects - all of which will help ensure that the estuary survival benefits in the BiOp are achieved. The Estuary MOA will join the five other Fish Accords in providing the commitment of resources to ensure the BiOp's habitat improvements are reasonably certain to occur.

Perhaps from Plaintiffs' focus on this issue, the Court has mistakenly concluded that the agencies do not have specific projects identified beyond 2009. Doc. No. 1699 at 2, 3. However, through the Columbia Basin Fish and Wildlife Program, the Fish Accords Projects, and the Washington MOA, projects have been identified throughout the life of the BiOp. *See* App. 1, Attachments 1-2, 5-10 (spreadsheets of estuary and tributary habitat projects for 2007-2017). The agencies have also provided a list of all projects currently detailed at this juncture. *See* App. 1 Attachments 2, 7-8.

Despite these unprecedented regional agreements and the range of identified potential projects, Plaintiffs have complained that the BiOp's assumption of habitat benefits is deficient if not every site-specific project was selected for a particular year at the time of the BiOp. Plaintiffs are factually and legally incorrect. We previously explained that the level of specificity desired by Plaintiffs is not required by the Act. *See* Fed. Defs. Mem. at 56-58; Fed. Defs. Reply at 24-26. Nor is it practical. Because habitat conditions, limiting factors, available projects,<sup>12</sup> and the state of the science will all change, the expert panel selection process in the BiOp ensures the best projects will be implemented in each project period. Fed. Defs. Mem. at 56-57. The expert panels, variously

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<sup>12</sup> As detailed in our opening brief, the Nez Perce Tribe's experience with the "Glory Hole" project demonstrates that locking in all future projects does not allow for the flexibility required to address such unforeseen obstacles. Fed. Defs. Mem. at 56, n.37.

composed of Federal, State, and Tribal staff, will ensure that the habitat projects and associated improvements will be identified in accordance with the best available science. *See* App. 1 at 8-14. Without these processes it would be impossible to import continuing independent scientific review into these projects, as will be done under the BiOp.

This approach works because the evaluation that it is feasible to achieve these benefits is not tied to one particular project or another. Rather, both the estuary and tributary habitat methodologies utilized local expertise, available recovery planning information, and local limiting factors to identify specific and definite benefits that can be achieved in each area through the 10-year habitat program. Fed. Defs.' Mem. at 55-62; Fed. Defs.' Reply at 27-31. The majority of tribal, state, and federal scientists involved in the remand supported these methodologies. This is exemplified by Plaintiffs' inability to point to an alternative methodology. In short, this is the best available science.

Related to this point, the Court has questioned whether some critiques of the estuary methodology from NOAA's Science Center were appropriately resolved. The Science Center's review analyzed a different and older subset of 2000-2006 projects than the 2007-2009 projects upon which the Action Agencies based their estimate of benefits, which were chosen together with the LCREP, using their project selection criteria. App. 1 at 9-10. NOAA determined that the 2007-2009 projects provided a more realistic estimate of benefits achievable under the BiOp and noted the important commitment from the Action Agencies to achieve the estimated benefits, not just implement a set list of projects. *See* NOAA C688 at 2. NOAA's assessment and resolution of these critiques are entitled to deference. *Trout Unlimited*, 559 F.3d at 958 (decision based on 'best available science' even if the administrative record contains evidence for and against its decision; matter in which agency resolves conflicting evidence is entitled to deference). Going forward, it is

worthwhile noting that the Science Center is involved in applying the estuary methodology through the RPA 37 expert panel process and will continue to be actively involved. App. 1 at 10.

Finally, the Court has questioned how the agencies will measure whether the habitat improvements will result in the predicted survival improvements. Doc. No. 1699 at 2. While the habitat methodologies are sound, NOAA and the Action Agencies recognized the possibility for uncertainty or over-estimation of benefits. The BiOp' habitat program requires constant research and monitoring in order to confirm that the habitat actions are having their intended effect. Defs. Reply at 29-31. For both tributary and estuary habitat projects, the monitoring will be reported annually and will include a comprehensive review at three-year intervals. FCRPS BiOp at RPA Actions 35-37. During these reviews, if it is determined that habitat quality improvement benefits were significantly overstated, the Action Agencies will implement replacement projects to provide benefits sufficient to achieve the benefit estimated for the original project. *Id.*

The AMIP further expands on this program of robust habitat monitoring to ensure these habitat benefits are being realized. AMIP at 22. Such monitoring projects will address uncertainties on the relationship between habitat improvements and survival, as well as emerging climate change information. The information will be utilized by the expert panels to select the best projects for each watershed or the estuary, and will allow the agencies to meet the survival improvements set forth in the BiOp.

**B. Spill and Transport Operations Are Based on the Best Available Science And Will Be Adaptively Managed Consistent with the Administration's More Precautionary Implementation Approach and the Most Recent Scientific Information.**

Because the best passage results vary by dam, species, season, and water conditions, the BiOp does not lock these operations in place for ten years, but instead calls for spill, bypass, and transport to be adaptively managed on an annual basis. These operations will be based on the best

available data, including recent returns as well as biological studies designed to identify the operations which meet the BiOp's performance standards.<sup>13</sup> While the Court's letter did not indicate a concern with this general approach, the Court's letter questioned the BiOp's analysis and explanation for the particular spring spill/transport operations as well as summer spill cessation set forth in the BiOp. Doc. No. 1699 at 2. The BiOp explains the significant difference in adult returns of transported and in-river migrants for Snake River steelhead and Chinook, especially steelhead, which formed the basis of the recommendation to terminate spill from May 7-20, as these species are shown to return at higher rates when transported. FCRPS BiOp at 8.5-19-20; Fed. Defs. Mem. at 11. With respect to summer spill, NOAA determined that shaping summer spill termination around a fish-presence trigger provides sufficient protection for this ESU, finding that additional spill after the trigger would not substantially improve the status of Snake River fall Chinook because the very few fish present represent an extremely small proportion of the naturally-produced component of the ESU. *See, e.g.*, Graves Decl., ¶¶ 52-59. Negotiated with the three lower river Tribes as part of the Fish Accords and included in the BiOp, this fish-trigger operation employs a precautionary approach, reviving summer spill based on counts of 500 fish for two consecutive days. *See, e.g.*, Three Treaty Tribe Accord pp. 4-5; FCRPS BiOp at RPA Action 29 Table 2 fn 5.

The agencies' adjustment of 2009 spring spill and transport operations after the ISAB's

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<sup>13</sup> As called for in the Configuration and Operation Plan for each project, if the performance standards are not being met, Phase II contingency actions such as additional surface passage improvements, will be implemented as needed. FCRPS BA at B.2.1-26. As part of the AMIP, Phase II actions could be implemented as a long-term contingency even if the performance standards are being met. AMIP at 35.

2008 review<sup>14</sup> referenced in the Court's May 18 letter, is a perfect illustration of how adaptive management lets the agencies incorporate the latest scientific data and reviews. After reviewing passage options for spring migrants, the ISAB acknowledged that most of the existing data suggest that transportation in late April through May benefits Chinook and steelhead. Peters Dec. ¶ 11. However, the ISAB advised that "whenever river conditions allow during the late April-May period, a strategy allowing for concurrent transportation and spill is prudent" and that "spill-transport operations like those of 2006 and 2007 should be continued long enough to determine how much influence such operational changes have on downriver migration and total adult returns." Graves Dec. ¶ 30. After evaluation of the ISAB's recommendations, the 2009 spring spill and transport operations were adaptively modified, with the agreement of the RIOG, so that May spill was not curtailed. However, because of the concern that this operation will result in a significant loss of Snake River steelhead, compared to BiOp operations, there is now a commitment to evaluate fall return data each year before setting spring spill and transport operations. AMIP at 18-19; App. 1 at 20-21. Defendants continue to support this approach and believe that spring operations should be based on the best available data, not on Plaintiffs' philosophical view that spill is the only beneficial method of dam passage. Accordingly, as explained previously, NOAA cannot agree to a static operation, but there will no longer be a presumptive spring spill/transport operation for the last two weeks of May and the agencies will continue to work through RIOG to evaluate the data each year before a decision is made on spring spill/transport operations. AMIP at 10.

The Action Agencies and NOAA strongly believe that a biological trigger for summer spill is a reasonable approach to summer operations. The effect of spilling until August 31 on Snake

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<sup>14</sup> The ISAB review was limited to spring spill and transport operations and did not evaluate the cessation of summer spill. *See* ISAB 2008-5.

River fall Chinook - an ESU that is currently doing very well -- is largely insignificant to the ESU. App. 4, Tables 1-2. Contrasted to this insignificant benefit are the facts that continued spill results in a system loss of ability to reliably integrate wind power, results in additional carbon dioxide production from alternative power sources, and costs ratepayers an additional several million dollars. *See* Corps AR 13 at 21, 35-37. Although Federal Defendants believe that the spill cessation trigger is fully justified, the summer spill program will nevertheless add an additional adaptive management component consistent with a more precautionary approach. Through regional collaboration, the agencies will develop a safeguard trigger based on adult returns which, when the safeguard is exceeded, will result in summer spill for the following juvenile migration season through August 31, regardless of the number of juveniles collected daily during that subsequent migration. AMIP at 19. This safeguard will be in place for the 2010 juvenile fish migration. *Id.* However, because Snake River fall Chinook have been doing very well, this safeguard is unlikely to be needed for 2010 or beyond.

**C. The Flow Operations in the BiOp Protect Listed Species and the AMIP Includes a Flow-Related Contingency.**

While not mentioned as a concern about the BiOp's analysis, the Court did inquire whether the Action Agencies could, through adaptive management, commit additional flow to both the Columbia and the Snake rivers. Doc. No. 1699 at 3. The flow regime as set forth in the FCRPS BiOp reflects a system constrained by limited storage capacity that must be managed within each year's forecasted water supply. Some of these demands include flood-control operations, spring refill operations, and varying minimum and maximum outflows as well as ramping rates for the benefit of myriad fish species. FCRPS BA at Appendix B.2.1-6. There is a limited amount of water for these operations and each flow objective has associated species tradeoffs. *Id.* at B.2.1-10. However, about 5 to 6 million acre feet (MAF) of stored water are annually devoted to enhancing

flow conditions for juvenile migrations, and the FCRPS BiOp operations were able to slightly improve flow in April and June over past operations. FCRPS BiOp at 8-8--8-9. The summer flow regime has improved substantially, with the flows from Dworshak Dam timed to provide cooler temperature conditions and additional flow from the upper Snake,<sup>15</sup> all benefitting Snake River fall Chinook, an ESU with remarkable recent return numbers. App. 4, Tables 1-2. Based on the most recent data concerning the proclivity of Snake River fall Chinook to overwinter, NOAA determined that temperature rather than flow becomes the most important factor in July and August, which is addressed by the current Dworshak flow and temperature operations . FCRPS BiOp at 8-9. The BiOp found this flow regime to be sufficiently protective of the species and the Administration supports these findings.

However, the BiOp does commit the Action Agencies to undertake actions under their control to maximize the limited storage capacities for the benefit of listed fish, including optimizing U.S. storage project operations, the development of dry year strategies to lessen the impact of any low runoff years on listed fish, and improved volume forecasting which will increase forecast reliability and address potential climate change impacts. App. 1 at 18-20. With respect to additional flows from Canada, the Corps and BPA negotiate annual agreements with Canada to provide 1 MAF of Treaty storage space by April 15, in order to provide the greatest flexibility possible for releases from May through July to benefit listed fish. App. 1 at 19. These agreements have been executed every year since 1994, with the exception of 1997, a very high flow year, when Canadian storage

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<sup>15</sup> Contrary to the Court's characterization of these flows as "oft-promised (but seldom delivered)", Doc. No. 11699 at 3-4, Reclamation has provided the maximum volume identified in the BiOp in 4 of the last 5 years, including this year. App. 1 at 18. And even in the poor water year of 2007, Reclamation still provided 428 KAF, the maximum volume targeted for such water years. *Id.* Additionally, FERC will require Idaho Power Company's Hell Canyon Complex to continue to provide 237 KAF from Brownlee Reservoir each summer, as it has since 2005. *Id.*

was not required for U.S. fisheries flow augmentation. *Id.* These efforts are expected to be successful in the future. Finally, in keeping with the Court's request that include flow augmentation and/or reservoir drawdown as a contingency, Doc. No. 1699 at 3, the AMIP includes John Day MOP as a potential long-term contingency. AMIP at 36. As with the other options considered if the significant decline trigger is activated, implementation of this contingency would depend on the results of the All-H Diagnosis and life-cycle modeling. In addition, the Corps must conduct an evaluation and prepare the appropriate NEPA documentation in order to seek authority from Congress to mitigate for drawdown impacts. *Id.* However, this contingency is now squarely on the table and is responsive to the Court's request for a contingency related to flow.

**D. The BiOp and the AMIP Provide Ample Opportunities for Regional Oversight and the Involvement of Independent Science Review.**

The Court has also inquired whether, as part of the adaptive management process, the Federal Defendants would consider providing periodic reports to the court and allowing for independent scientific oversight of the habitat mitigation actions. Doc. No. 1699 at 3. With respect to the first request, periodic reports would require this Court to exercise continuing jurisdiction, which the Administration does not support, as it believes this BiOp as implemented through the AMIP is legally and biologically sound and already provides oversight mechanisms. App. 1 at 22. The general exercise of such continuing jurisdiction also runs contrary to the Ninth Circuit's recent guidance, where it observed in evaluating the legal behemoth *United States v. Washington* has become, "[t]he Constitution does not establish the district courts as permanent administrative agencies." *United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) (characterizing the case as "a Jarndyce and Jarndyce"). However, periodic reports to the Court is not the only way for the Court or the parties to obtain information concerning implementation of the BiOp. Annual progress reports and implementation plans, as well as the comprehensive evaluations in 2013 and 2016, will

all be available to the public at [www.salmonrecovery.gov](http://www.salmonrecovery.gov). App 1 at 22.

Transparency and oversight are part of the BiOp, through the sovereigns' RIOG process, which is an extension of the remand collaborative process established by the Court. In addition to reviewing the annual progress reports, RIOG technical groups, consisting of federal, state, and tribal scientists, will be involved in formulation of annual water management and fish passage plans, as well as habitat and hatchery implementation plans. RPA Action 1; AMIP at 40. In addition, the RIOG will be substantially involved in the adaptive management process, evaluating new data from the monitoring and life-cycle analyses and working with the agencies to develop potential adjustments to RPA actions. App 1 at 22. The RIOG has already developed initial operating guidelines to ensure transparency throughout this adaptive management process. *Id.* at 22-23.

As explained above, independent scientists will not only be reviewing these actions, but are significantly involved in the project selection process (the expert panel process for the tributaries) or providing input to inform the project selection process (ISRP review and the estuary regional technical work group). *Supra* pp. 25-27; App 1 at 8-14. NOAA and the Science Center will provide the latest information on climate change impacts, and both ISAB and Science Center will brief RIOG teams on scientific topics, as during the remand collaboration. AMIP at 40. The Science Center will be involved in reviewing the annual progress reports and the 2013 and 2016 Comprehensive Evaluations. *Id.*; App. 1 at 22-23. In addition, significant scientific issues in dispute within the RIOG reviewed by the ISAB, the ISRP, or other appropriate scientific body, consistent with the now-developed RIOG guidelines. App. 1 at 22.

These measures provide a strong framework for both transparency and regional collaboration and oversight for the life of the BiOp, continuing principles established by this Court during the last remand process. These measures also involve independent scientists in ongoing implementation

decisions and continue the remand process of resolving significant scientific issues by requesting independent scientific review when appropriate. On the whole, this framework should provide the Court with the confidence that there are meaningful sideboards on implementation which address its previous concerns.

### **CONCLUSION**

We have hopefully reached the end of a long litigation road presided over by this Court for nearly a decade spanning two prior administrations. Due in no small part to the Court's rulings, the FCRPS BiOp is the most comprehensive and robust BiOp ever issued on the FCRPS and includes the commitments to unprecedented funding that the Court had sought in 2003. And now a new Administration, adhering to the Court's admonition, has bolstered this BiOp even further to ensure serious and real mechanisms are in place to promptly detect and address situations where an ESU might not perform as anticipated. Together this package fulfills not just the requirements of ESA Section 7(a)(2) but the spirit as well. The substantial regional support, as a result of the collaboration encouraged by this Court, increases our confidence that the plan will succeed. For the sake of the salmon and steelhead, it is time to let it work.

Respectfully submitted: September 15, 2009.

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**CERTIFICATE OF SERVICE**

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on September 15, 2009, 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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