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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

Civil No. 01-0640-RE (Lead Case)
CV 05-0023-RE
(Consolidated Cases)

NORTHWEST RIVERPARTNERS' MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTION

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I. INTRODUCTION

The 2008 Biological Opinion ("BiOp") produced by NOAA Fisheries ("NOAA") for the Federal Columbia River Power System ("FCRPS") not only meets the consultation requirements of section 7(a)(2) of the Endangered Species Act ("ESA" or the "Act"), but far exceeds them. Indeed, the 2008 BiOp is like none other. Its *sui generis* nature stems from the remand order issued by this Court requiring NOAA and the action agencies—for the first time in the history of this protracted litigation—to work together with the four states and numerous tribes possessing sovereign interests in the FCRPS and the Snake/Columbia River Basin more generally to produce a BiOp and Reasonable and Prudent Alternative ("RPA") that are not only consistent with the ESA, but which promote a broader, regional consensus in favor of the listed fish. *See* BiOp at 1-6–1-7.[1]

Indeed, representatives from the federal action agencies and NOAA, and each of the sovereign entities,[2] came together after a series of literally hundreds of policy and technical meetings involving hundreds of interested persons, to craft a proposed action together with an RPA that is based on the best available science and that more than meets the action agencies' legal obligation to insure against jeopardy and to avoid the destruction or adverse modification of the species' critical habitat. By targeting and reducing the key factors limiting survival and recovery, not only does the RPA avoid jeopardy, it also takes affirmative steps to ensure that

[1] For ease of reference, this memorandum will cite directly to the individual pages of the 2008 BiOp (NOAA AR Doc. A0001), rather than the voluminous Administrative Record.

[2] The group of collaborating sovereigns include the states of Oregon, Washington, Idaho, Montana, the Nez Perce Tribe, the Confederated Tribes of Warm Springs, the Confederated Tribes of the Yakama Nation, the Confederated Tribes of the Umatilla Reservation, the Kootenai Tribe of Idaho, the Spokane Tribe, and the Confederated Tribes of the Colville Reservation.

listed species are moving toward recovery—steps well beyond anything required under ESA section 7(a)(2), or the law of the case. Indeed, the BiOp increases the species' survival through a suite of measures that includes far more than just flow and spill, while mitigating the adverse effects produced by other federal and non-federal actions, including hatchery production, the *U.S. v. Oregon* Harvest Management Agreement, and other habitat degrading activities. This historically monumental effort is backed by concrete funding commitments to structural improvements (many of which are already complete) and operational modifications, and by an unprecedented agreement to fund nearly a *billion* dollars' worth of mitigation and recovery efforts through entry of a series of Memoranda of Agreement with the States and Tribes.

In the face of this unprecedented collaborative effort, which is backed not only by staggering funding commitments but by a legal analysis which fundamentally exceeds the standards required by the law of the case, Plaintiffs mount challenges that promote a completely unworkable jeopardy standard that cannot be accomplished within the legal structure and corresponding time frames set forth under the Act. Indeed, the core arguments advanced by the Plaintiffs attempt to import recovery planning obligations into the more narrow requirements of ESA section 7(a)(2), and thus to transform the fundamentally negative or prohibitory mandate of ESA section 7(a)(2) to avoid jeopardy, into some sort of affirmative all-encompassing recovery and conservation mandate, contrary to the law of the case, and the plain language of the statute.

As the BiOp reveals, the decline in salmon and steelhead over the last one hundred years was caused by a host of factors, including over-harvest, habitat destruction, hatchery practices, and federal and nonfederal hydro operations. *See, e.g.*, BiOp at 8.2-3. Salmon recovery will thus require considerable time and cooperation amongst federal agencies, local and state governments, Indian tribes, private landowners, industry representatives, and environmental

activists, and contrary to Plaintiffs' urging, cannot be achieved on the back of the hydro system alone, let alone during the 10-year period of the BiOp.

Plaintiffs' efforts to create an unworkable jeopardy standard that cannot be satisfied is further evidenced by their unprecedented Clean Water Act ("CWA") claim. This procedural claim is contrary not only to the plain language of that act, but is in conflict with the plain language of the ESA. Plaintiffs urge the revocation of the BiOp's Incidental Take Statement ("ITS") on the grounds that it required certification by four states and a number of Indian tribes pursuant to CWA section 401. By asserting a claim that no state or tribe has ever asserted nationally, let alone in this case, Plaintiffs seek to give the state and tribal sovereigns veto power over the FCRPS and its governing BiOp, and to transfer to them the ultimate authority to protect listed species, even though the ESA unmistakably vests that authority uniquely in the Services.[3]

Northwest RiverPartners ("RiverPartners") intervened in this third of three separate challenges brought by these same Plaintiffs over the course of nearly a decade because our more than 100 public and private members are passionately committed to a river system and, more specifically, a BiOp that supports the co-existence of renewable energy produced by the FCRPS, along with healthy, self-sustaining salmon populations. Since our founding in 2005, RiverPartners' membership has expanded to include a broad regional constituency that includes local governments, ports, public and private utilities, agricultural interests, businesses, and barge operators who are united in their desire to maintain the multiple public purposes of the federal hydropower projects on the Columbia and Snake waterways. The FCRPS was originally created by Acts of Congress to provide multiple benefits to the Pacific Northwest including clean, low-

[3] The "Services" include NOAA Fisheries and the U.S. Fish and Wildlife Service.

cost renewable energy; a transportation passageway essential to the region's economy; and numerous other flood control, irrigation, and recreation benefits that are vital to our members.

Recognizing the numerous parties with a vested interest in this case, RiverPartners has chosen to respond separately and defend against only a critical subset of the issues raised by Plaintiffs—a subset which we believe reflects Plaintiffs' core strategy to promote an unworkable legal framework leading to perpetual litigation and continued judicial intervention. By creating a legal standard from whole cloth that surpasses the statute, the law of the case, and even NOAA's ambitious 2008 effort, Plaintiffs hope to generate political momentum for a dam removal scenario that otherwise does not exist.

For the reasons set forth below and those stated in the federal government's motion and supporting memoranda, this Court should reject Plaintiffs' claims and uphold the 2008 BiOp in its entirety, enabling the action agencies, together with their sovereign regional partners, to move forward aggressively with its implementation to expeditiously aid these fish.

II. ARGUMENT

A. Plaintiffs' Jeopardy Argument Places an Affirmative Burden on NOAA That Is Not Found Under Section 7(a)(2) and Ignores the Fact That NOAA's "Trending Toward Recovery Test" Itself Exceeds Its Statutory Mandate

In enacting the ESA, Congress crafted separate and distinct consultation, conservation, and recovery obligations under sections 7(a)(2), 7(a)(1), and 4(f) of the Act. The obligation imposed by ESA section 7(a)(2) is a negative one prohibiting the agency from jeopardizing the species or adversely modifying its critical habitat. By using a "trending toward recovery" methodology to measure whether the proposed FCRPS action will reduce appreciably the likelihood of the listed salmonids' survival and recovery, NOAA actually imposes a greater burden on itself and the action agencies than either the statute or the law of the case requires.

While the jeopardy methodology employed in the 2008 BiOp clearly requires more than what is statutorily compelled, Plaintiffs insist that the BiOp remains deficient as it fails to require still more with respect to the recovery prong. Because Plaintiffs' interpretation utterly transforms the jeopardy analysis into an affirmative recovery or conservation mandate, and obliterates the separate and distinct obligations imposed under sections 4(f), 7(a)(1), and 7(a)(2) of the Act by effectively merging them all into one all encompassing obligation under section 7(a)(2), their arguments must be rejected. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* ("*NWF v. NMFS*"), No. CV 01-640-RE, CV 05-23-RE, 2005 WL 1278878, at *17 n.14 (D. Or. May 26, 2005) (while NOAA must consider recovery impacts as part of jeopardy standard, jeopardy analysis is separate from recovery planning obligations and thus does not include formulation of specific recovery plan).

1. The Statutory Obligation to Consult Is Separate and Distinct from the Obligations to Conserve and to Recover

The consultation obligations established in section 7(a)(2) of the Act impose a prohibitory or negative obligation on action agencies to ensure that the actions they propose to undertake are *not likely to jeopardize* the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added); *see, e.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, No. 1:06-CV-00245 OWW GSA, 2008 WL 2851568, at *50, *52 (E.D. Cal. July 18, 2008) (federal defendants bear burden of demonstrating *absence of jeopardy or nonjeopardy* under section 7(a)(2)). Accordingly, the joint consultation regulations define "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 the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02 (emphasis added). As interpreted by the Ninth Circuit in this case, the section 7(a)(2) obligation is a

negative mandate which allows an agency to take an action that either does *not deepen* the jeopardy by causing additional harm or that lessens the degree of jeopardy. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* ("*NWF*"), 524 F.3d 917, 930 (9th Cir. 2008).[4]

In addition to imposing a prohibitory mandate, section 7(a)(2) must conclude in a relatively short 90-day time frame, with the BiOp issuing promptly thereafter. 16 U.S.C. § 1536(b)(1)(A), (3)(A). Because of this short time frame, ESA section 7(a)(2) instructs the Services to rely on the best scientific and commercial data "available" and allows NOAA to issue a BiOp even when the available data is less than perfect. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992) (agency satisfied its 7(a)(2) obligations by relying on best "available" science, even when that science was admittedly weak). In no event is NOAA under an "obligation to conduct independent studies" to discharge its section 7(a)(2) duties. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

In contrast, Congress, under section 7(a)(1), requires all agencies to use their statutory authorities *affirmatively* by carrying out programs for "the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Separate and apart from their obligations to consult on an individual proposed action, agencies affirmatively discharge their "conservation" obligations by "us[ing] all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no

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[4] *See also* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 Envtl. Law 1101, 1161-62 n.263 (1995) ("[T]he jeopardy prohibition in section 7(a)(2) is stated as a negative duty. . . and thus cannot be understood as embodying the complete universe of affirmative duties federal agencies bear under the ESA." (emphasis omitted)).

longer necessary." 16 U.S.C. § 1532(3) (defining term "to conserve"). Agencies are afforded great deference in choosing how best to discharge this requirement and often do so programmatically. 16 U.S.C. § 1532(a)(1); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990) (statute affords agency discretion to decide how best to fulfill affirmative conservation duty).

In promulgating the joint consultation regulations, the Services understood that the 7(a)(1) and 7(a)(2) obligations were both separate and distinct *and that the consultation obligations imposed under section 7(a)(2) are not to be used to prohibit an action that fails to conserve a species. See* 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (preamble to joint consultation rules). Indeed, the preamble to the regulations clarifies that the affirmative obligation to conserve is an entirely separate obligation that is not imported into the more limited obligation to not jeopardize established in section 7(a)(2). *Id*. (further distinguishing between affirmative obligations set forth in section 7(a)(1) and prohibitory mandate established by section 7(a)(2) consultation obligations). Any other regulatory interpretation of these two statutory subsections would render one of them superfluous and violate elementary maxims of statutory construction. *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (statute must be read as whole, giving effect to each provision to avoid rendering any subsection superfluous).

Indeed, the Ninth Circuit has acknowledged the significance of this statutory distinction. *See generally Pyramid Lake*, 898 F.2d 1410 (construing differing obligations of section 7(a)(1) and 7(a)(2)); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 (9th Cir. 1984) (contrasting negative obligation under section 7(a)(2) with affirmative obligation under section 7(a)(1)); *see also Envtl. Prot. Info. Ctr. Inc. v. Pac. Lumber Co.*, 67 F. Supp. 2d 1113,

1121 (N.D. Cal. 1999), *vacated in part*, 257 F.3d 1071 (9th Cir. 2001) (same); *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1125 (S.D. Cal. 2006) (same).

The distinct nature of the consultation requirement is also evidenced in relationship to the recovery planning obligations imposed on the Services under ESA section 4(f)(1)(B). Section 4(f)(1)(B) directs the Services to develop and implement recovery plans, and to include in each plan a description of such site-specific management actions as may be necessary to achieve the plan's goal for conservation and survival of the species. Congress imposed no time limit on NOAA's obligation to complete a recovery plan, which must include, *inter alia*, "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list," and include "estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." 16 U.S.C. § 1533(f)(1)(B)(ii), (iii). While section 4(f) imposes on the Services the affirmative recovery planning and implementation obligations and contemplates that the Services will create the necessary data to do so without dictating or constraining the time frame necessary to complete that mandate, section 7(a)(2) consultations must be completed within a 90- to 150- day time frame, using only the best science available. 16 U.S.C. § 1536(a)(2).

2. NOAA's Trending Toward Recovery Standard Exceeds the Statutory Obligation Imposed Under ESA Section 7(a)(2)

Given the statutory distinctions established above, the 2008 BiOp goes further than what is mandated under ESA section 7(a)(2) by requiring the proposed action to establish an affirmative trend toward recovery for each of the Environmentally Significant Units ("ESUs") [5]

[5] The Act defines a "species" to include "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. 16 U.S.C. §1532(16). The

or Direct Population Segments ("DPS") at issue. As explained by the 2008 BiOp, the trending toward recovery standard establishes the changes needed to ensure that the species are moving affirmatively toward the recovery goal, even though full recovery is not achievable during the period of the proposed action. *See* BiOp at 7-7. By requiring that the BiOp ensure that the proposed action result in a short-term extinction risk sufficiently low to meet the survival prong of the jeopardy standard while simultaneously ensuring that the action actually result in a positive, self-sustaining salmonid growth rate, NOAA subsumes into the jeopardy analysis the otherwise separate duties imposed under ESA section 7(a)(1) and 4(f)(1)(B) and thereby demands more than what is required under section 7(a)(2). *See* BiOp at 7-5, 7-27 (ensuring that abundance and productivity of all ESUs will increase over course of 10-year BiOp).

It is against this analytical framework that Plaintiffs' statutory arguments must be evaluated. By establishing performance standards to ensure that salmonid population rates continue on an upward, sustainable trajectory as a result of the proposed action, NOAA exceeded its obligation to ensure that the continued operation of the FCRPS will not "appreciably reduce the odds of success of future recovery planning, by tipping a listed species too far into danger." *NWF*, 524 F.3d at 936; *NWF v. NMFS*, 2005 WL 1278878, at *15 (requiring that NOAA consider impacts of proposed action on not only survival but recovery).

Plaintiffs' attempts to deprecate NOAA's analysis as demonstrating nothing more than "one more fish" are belied by the technically robust recovery prong analysis actually conducted. For each of NOAA's three recovery metrics (average returns per spawner, median population

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Services further define a population, or group of populations to be "distinct" if it represents an evolutionarily significant unit of the biological species. *See NOAA Technical Memorandum NMFS F/NWC-194 "Definition of "Species" Under the Endangered Species Act: Application to Pacific Salmon"* (March 1991).

growth rate, biological review team trends), NOAA compared the effects of the proposed action against the effects previously engendered by hydrosystem operations during two prior distinct time frames: during the historic baseline period (approximating the last 20 years) and during the current, or status quo time frame (which includes effects produced from recently completed or almost completed system improvements). *See* BiOp at 7-8 (describing base, current, and future analysis). By comparing the status of listed species at these three time periods—past, present, and future—NOAA was able to quantitatively compare the impact of the proposed RPA against current and past actions and, thus, analyze whether the proposed action would "appreciably reduce" the likelihood of recovery. *See, e.g.,* BiOp at Table 8.6.2-4 (comparing base and current impacts for Upper Columbia spring chinook to identify "gaps" that must be closed by RPA).

In every instance where it had sufficient data available to employ these comparative metrics, NOAA demonstrated that the ESU or DPS are projected to increase at a rate that reverses the historic downward survival and recovery trends. *See, e.g.,* BiOp at 8.6-18 (concluding for Upper Columbia spring chinook that "Prospective Actions will ensure that adverse effects of the FCRPS and Upper Snake Projects will be reduced from past levels"). This analysis does not simply show a positive growth rate as Plaintiffs contend, but in most cases a significant positive improvement over current and baseline conditions *that result from the proposed action*.

Because each of those metrics has its own limitations, NOAA refused to rely solely on any one metric to substantiate its BiOp on a quantitative basis and instead relied on all three. *See* BiOp at 7-4, 7-5. In addition to its robust quantitative analysis, NOAA carefully analyzed a host of qualitative factors impacting recovery as well. *Id*. NOAA identified the key limiting factors for each ESU and further identified the RPAs targeted at eliminating or reducing each of those

limiting factors. *See, e.g.,* BiOp at 8.6-27. NOAA also considered abundance targets, growth rates, genetic diversity, and recovery time periods in its qualitative analysis. BiOp at 7-26, 7-27. Finally, NOAA evaluated all of the RPA's effects in the aggregate along with the environmental baseline and cumulative effects and concluded that the status of each ESU was anticipated to improve. *See, e.g.,* BiOp at 8.6-27 ("the status of the ESU as a whole is expected to improve compared to its current condition and to move closer to a recovered condition").

While it did not use the recovery metrics advocated by Plaintiffs in the manner they advocated, NOAA did, nonetheless, consider data generated by the Interior Columbia Technical Recovery Teams ("ICTRT")—including current abundance numbers and the statistics necessary to recover the species—to establish the survival and recovery metrics utilized in the 10-year BiOp. *See, e.g.,* BiOP at 8.6-34 (incorporating ICTRT recovery abundance recovery thresholds); NOAA AR B0343 at 2-3 (explaining reasons for not using ICTRT metrics); *Comments and Responses* at 8 (acknowledging that it is relevant to compare survival changes expected from prospective actions with survival changes needed to attain recovery, and providing this comparison in BiOp's Aggregate Analysis Appendix).[6] Thus, contrary to Plaintiffs' arguments, by utilizing these three independent metrics (average returns per spawner, median population growth rate, biological review team trends) to ensure that survival rates increase—not at nominal, but at sustainable levels—NOAA more than satisfied the recovery prong of the jeopardy analysis.

[6] In addition to the record, *Comments and Responses* are available at http://www.nwr.noaa.gov/Salmon-Hydropower/Columbia-Snake-Basin/upload/Final-Cmnts-Response.pdf.

3. Plaintiffs' Construction of the Jeopardy Standard Impermissibly Imports the Conservation and Recovery Mandate Established Under Sections 7(a)(1) and) 4(f) into the Consultation Obligation

In light of the above, the recovery arguments advanced by Plaintiffs impermissibly rewrite the statute to create an affirmative obligation on the action agencies to conserve under ESA section 7(a)(2) where it does not statutorily exist. Plaintiffs argue that the BiOp fails because it does not go far enough in promoting recovery by only ensuring that the proposed action is less harmful than the status quo: (1) without first evaluating what population level would constitute a recovered ESU/DPS; (2) without articulating when recovery must be reached so it can determine the rate of growth needed to reach that population goal; and (3) without providing a scientific analysis demonstrating that the level of population growth necessary to achieve recovery will not be reduced by the proposed action. NWF Op. Br. at 13. Plaintiffs further insist that unless NOAA can quantitatively ensure that the proposed action actually achieves that level of affirmative recovery necessary to ensure that ultimate recovery will be accomplished within a biologically reasonable time frame, the jeopardy standard is not satisfied.

These arguments are simply misguided. As established above, the BiOp, by imposing a "trending toward recovery" standard as the litmus test against which the proposed action is evaluated, goes further than what is legally required. Thus, by first creating a quantitative methodology to evaluate just how much a proposed action actually promotes recovery, and then arguing that the BiOp's failure to embrace that methodology is somehow legally fatal, Plaintiffs create a legal strawman that crosses the statutory divide between subsections subsections 7(a)(1) and 7(a)(2) and merges these distinct obligations in a manner that is contrary to the plain language of the statute. 51 Fed. Reg. 19,934; *Boise Cascade*, 942 F.2d at 1432 (statute must be read as whole, giving effect to each provision to avoid rendering any subsection superfluous);

Agredano v. Mut. of Omaha Cos., 75 F.3d 541, 544 (9th Cir. 1996) (terms of same statute are not to be construed so as to be redundant).

Plaintiffs also conflate the Services' broad regional recovery obligations imposed under ESA section 4(f)(1)(B) with the action agency's far more narrow obligation to ensure that any action it proposes to undertake does not jeopardize listed species under ESA section 7(a)(2). The standard Plaintiffs seek to impose through this individual consultation on the FCRPS is one that Congress imposes on the Services regionally, across a spectrum of federal, state, and private actions, in the context of regional recovery planning under ESA section 4(f)(1)(B). 16 U.S.C. § 1533(f)(1)(B)(ii), (iii) (requiring Services to establish plan for recovery based on objective measurable criteria, including estimates of time required to carry out measures, and to achieve intermediate steps towards recovery).

By insisting that the BiOp establish a quantum that measures the amount of recovery this action must achieve to ensure that it is not appreciably reducing the likelihood of recovery for each of the ESUs at issue, Plaintiffs turn the BiOp into an affirmative recovery planning document and advance a legal theory that finds no support in the plain language of the statute. Indeed, to perform recovery planning, NOAA must obtain the necessary data and metrics required under ESA, section 4(f)(1), and is not limited in its ability to discharge this multiyear programmatic objective using only the science that is "best available" and in the compressed time frame contemplated by ESA section 7(a)(2). *Compare* section 7(a)(2) *with* section 4(f)(1) section 4(f)(1). The legal paradigm created by Plaintiffs not only exceeds what is statutorily required, but is fundamentally unworkable, as no agency can reasonably develop a recovery plan within the strictures of 7(a)(2).

Plaintiffs' arguments are also at odds with the law of the case and governing Ninth Circuit case law. *See NWF*, 524 F.3d at 936 (requirement to analyze recovery impacts in jeopardy analysis does not import broader recovery obligations into more narrow consultation obligation). While both this Court and the Ninth Circuit interpreted the jeopardy analysis to include a recovery component, the law of the case requires only that NOAA prove a negative—*i.e*, that the proposed action is *not* causing additional injury that tips the listed species from a state of precarious survival into a state of likely extinction. *Id.* at 930, 936. An action can only "jeopardize" a species' existence if that agency action causes some deterioration in the species' pre-action condition. *Id.*; *NWF v. NMFS*, 2005 WL 1278878, at *17 n.14 ("[R]ecovery must be considered separately as part of the jeopardy analysis" but "[t]his does not mean that a jeopardy analysis must include the formulation of a specific recovery plan. Recovery planning is governed by section 4 of the ESA.").

Put otherwise, the recovery prong of the jeopardy standard "simply provides some reasonable assurance that the agency action in question will *not appreciably reduce the odds of success* for future recovery planning." *NWF*, 524 F.3d at 936 (by requiring some consideration of recovery effects, court did not improperly import recovery planning obligations into consultation equation) (emphasis added); *see also Salmon Spawning & Recovery Alliance v. Lohn*, No. C06-1462RSL, 2008 WL 782851, at *8 (W.D. Wash. Mar. 20, 2008) ("[t]o the extent recovery . . . is limited by current habitat conditions, it cannot be said that the operation of the [action] at issue in this case is appreciably reducing the likelihood recovery").

The consultation regulations further establish that the recovery component is intertwined with the survival prong of the jeopardy analysis, as they are essentially two sides of the same coin. While NOAA must consider recovery and survival effects as part of the jeopardy analysis,

the Ninth Circuit held that a jeopardy opinion should issue only if a proposed action causes actual impairment of recovery efforts which "rise to the level of jeopardizing the continued existence of a listed species." *NWF*, 524 F.3d at 932 (internal quotation marks and citation omitted). As acknowledged by the Ninth Circuit, NOAA typically evaluates recovery *in the context of survival*, because the emphasis of the jeopardy analysis is on the continued existence of the species—the *sine qua non* to recovery. *Id*. at 932 n.11; 51 Fed. Reg. 19,934. It is, therefore, difficult, if not impossible, to hypothesize an instance where the likelihood of survival is not appreciably diminished but the likelihood of recovery is. It is no less difficult to hypothesize the converse—*i.e.*, a reduction in the likelihood of survival, without a corresponding appreciable reduction in the likelihood of recovery.

Accordingly, NOAA appropriately declined to wholesale import recovery planning metrics it uses in other regulatory contexts into the consultation process for the FCRPS projects. NOAA explained those longer-term recovery metrics advocated by Plaintiffs correspond to long-term regional recovery goals which are broader in scope, and legally inappropriate for use in a section 7(a)(2) consultation, and which, in any event, are otherwise unattainable during the life of the 10-year BiOp at issue. *See Comments and Responses* at 3-4.

Indeed, were NOAA to have used the Interior Columbia Technical Recovery Team's metrics, it would have had to (1) rely on the regional recovery efforts of others that may not be certain to occur, (2) forecast effects far into the future, and (3) bank on uncertain future results, which may or may not transpire, all in derogation of the law of the case. *See* July 12, 2006 Memo at 3; AR B0343; *NWF*, 524 F.3d at 936 n.17. A similar argument was addressed and rejected by the Western District of Washington in the *Salmon Spawning & Recovery Alliance* case. 2008 WL 782851. Quoting the Ninth Circuit's recent opinion in *NWF v. NMFS*, Chief

Judge Lasnik held that NOAA was not required to use the long-term recovery goals developed by the technical recovery team in the context of a BiOp because they were developed for a recovery plan under ESA section 4(f) and because consideration of recovery in a jeopardy analysis under section 7(a)(2) is a more narrow inquiry, legally distinct from ensuring recovery of the species. *Id*. at *8-9.

Thus, by insisting that NOAA engage in a detailed, quantifiable, and independent recovery assessment to discharge its consultation obligation, Plaintiffs impermissibly introduce an affirmative obligation where there is none. Plaintiffs' attempts to further increase NOAA's consultation burden beyond the trending toward recovery threshold—which by itself exceeds the consultation requirement—transforms the section 7(a)(2) mandate into something no longer statutorily recognizable and impossible to achieve within the 90 days' consultation process contemplated by section 7(a)(2).

B. NOAA Properly Applied the Adverse Modification Standard

In addition to attacking NOAA's application of the jeopardy standard, Plaintiffs attack its application of the adverse modification analysis also dictated by section 7(a)(2). Consistent with the arguments they advance under the jeopardy standard, Plaintiffs maintain that NOAA needed to first establish at what point the critical habitat would be restored to no longer need the protections of the statute, so as to logically assess whether the proposed action is likely to adversely modify that habitat in violation of section 7(a)(2). According to Plaintiffs, unless we know how far we have to go to improve the critical habitat and thus recover the species, we cannot ascertain whether the proposed action is going far enough to ultimately accomplish that recovery goal. *See* NWF Op. Br. at 42 (criticizing NOAA for not identifying the level of salmon survival needed to actually achieve recovery).

Plaintiffs are once again wrong. Like the obligation not to jeopardize, the obligation not to adversely affect critical habitat, is a negative—not an affirmative—obligation. Section 7(a)(2) prohibits the action agency from undertaking an action that would result in the destruction or adverse modification of the species' critical habitat. 16 U.S.C. § 1536(a)(2). "Destruction or adverse modification" is further defined to mean

> a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02.[7] The law of the case establishes that an action "appreciably diminishes the value of critical habitat" only when it would result in some additional or new harm to the function of that habitat. *NWF*, 524 F.3d at 934. Accordingly, Plaintiffs can point to no statutory or regulatory provision, or judicial precedent, requiring NOAA to demonstrate that the proposed action is affirmatively achieving some measure of recovery so as to satisfy the adverse modification prong of the consultation obligation.

Instead, the assessment NOAA was required to make was a comparative one, designed to ascertain the aggregate effects of the proposed action on critical habitat. By definition, NOAA was required to conduct an analysis that compared the aggregate effects of the proposed action (when added to the baseline and cumulative effects) on the species' critical habitat, against the effects produced by the status quo set of FCRPS operations on that same habitat, to ensure that the proposed action was not resulting in an appreciable diminution in the value of the critical

[7] Recognizing that the Ninth Circuit in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir. 2004) previously invalidated NOAA's construction of this obligation as impermissibly excluding the recovery prong of this analysis, NOAA properly performed the adverse modification analysis in this BiOp to separately assess both recovery and survival effects.

habitat for both the survival and recovery of the species. *See* Consultation Handbook at 4-34 ("appreciably diminish the value" means to "considerably reduce the capability of critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species; *id*. at 4-39- 4-40 ("[i]f an action affects critical habitat, but does not appreciably diminish the value of constituent elements essential to the species' conservation, the adverse modification threshold is not exceeded").

And that is exactly what NOAA did in this case. *See* BiOp at 7-51, 7-52 (detailing NOAA's analytical method for critical habitat). For each listed species (or major population group) NOAA compared the pre-action status of critical habitat (the environmental baseline) with the post-action status of critical habitat (*i.e.,* the effects of the proposed action and any cumulative effects, when added to the baseline). *Id*. If critical habitat was currently functional, NOAA determined whether the effects of the proposed action, when taken together with the environmental baseline and cumulative effects, would allow the critical habitat to remain functional and serve its intended conservation role. *Id*. If critical habitat was not currently functional, then NOAA determined whether the effects of the proposed action, when added to the environmental baseline and cumulative effects, would retain the current ability for the primary constituent element ("PCE") to become functionally established.[8] *Id*. In short, NOAA determined whether the proposed action would impair critical habitat over current conditions—that is, "appreciably diminish the value of critical habitat." For each ESU or DPS analyzed, the BiOp concluded not only that the RPA would not negatively impact critical habitat, but that the

[8] "Primary constituent elements" are those habitat features deemed essential to the conservation of the species. 16 U.S.C. §1532(5)(A)(i). *See* 50 C.F.R. 424.12(b) (PCE's are those physical and biological features essential to the conservation of the species including "spawning sites . . . feeding sites, [and] . . . water quality or quantity").

RPA would actually substantially improve the conservation value of critical habitat over baseline conditions. *See, e.g.*, BiOp at 8.2-31 (RPA will improve habitat quality for Snake River fall chinook, by increasing improving surface passage routes, reducing predation, improving water quality and shelter, etc.).[9]

By insisting that NOAA was obligated to know the "survival rate needed for the listed species to actually achieve recovery" in order to properly assess whether impacts to critical habitat diminish the value of that habitat for recovery (NWF Op. Br. at 40-42), Plaintiffs cross the line and impermissibly import the statute's recovery planning obligations into the far more limited section 7(a)(2) consultation analysis, in contravention of the Ninth Circuit's ruling in this case. *NWF*, 524 F.3d at 936 (emphasizing that requirement to analyze recovery impacts does not import broader recovery obligations into more narrow consultation obligation); *cf. Homebuilders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518 (E.D. Cal. Nov. 2, 2006) (rejecting argument that Services were required to first determine at what point protected species will be deemed conserved before determining what primary constituent elements are essential to conservation of that species); *Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025-26 (D. Ariz. 2008) (refusing to impose recovery planning obligations set forth under ESA section 4(f) into obligation to designate critical habitat and primary constituent elements thereof).

Although Plaintiffs' argument is "tempting in its logical simplicity," these courts have each individually and collectively rejected arguments analogous to those advanced here,

[9] Thus the holding in *Nez Perce Tribe v. NOAA Fisheries*, No. CV-07-247-N-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008) is distinguishable because in this case, NOAA concluded that the RPA would not adversely modify critical habitat, but instead would put it on a trend toward recovery. *Cf. id.* (concluding that continued operation of water storage project that degraded critical habitat and threatened recovery cannot be justified under section 7(a)(2)).

attempting to require NOAA to utilize the type of data it must amass in the recovery planning process, including "'objective, measurable criteria' specifying the point of conservation." *Ariz. Cattle Growers' Ass'n*, 534 F. Supp. 2d at 1026 (citation omitted); 16 U.S.C. § 1533(f)(1)(B). While Congress imposed that quantitative, step-wise obligation on NOAA under section 4(f)(1)(B)(ii), it chose not to do so under ESA section 7(a)(2). Congress's choice in this matter must be construed as deliberate, especially in light of the fact that Congress required consultations to be completed on the basis of the "best scientific and commercial data available" within a 90- to 150-day period but imposed no similar data availability restrictions or timeline on NOAA to complete its recovery planning obligations. *Compare* ESA sections 7(a)(2) *and* 7(b)(1)(A) *and* (B) *with* ESA section 4(f)(1)(B)(ii) *and* (iii); *Hamdan v. Rumsfeld*, 548 U.S. 557, 578-80 (2006) (when Congress includes particular language in one section of statute but omits it in another, it is presumed that it acts intentionally). Thus, because Plaintiffs' arguments are premised on a reading of the statute that is at odds with its plain meaning, it must be rejected.

Plaintiffs also attack NOAA's critical habitat analysis by claiming that because the spill and flow measures established in the RPA are allegedly less than that previously provided in prior BiOps, the RPA must be adversely modifying critical habitat because flow and spill are essential to safe passage—a primary constituent element of the river system. Plaintiffs' contentions aside, it is simply not relevant whether the amount of flow and spill provided in the 2008 RPA is less than that provided at any one time in the past because spill and flow are not PCEs in and of themselves and any alleged reduction in those measures—*in isolation*—has little bearing on whether the proposed action *as a whole* is appreciably reducing the value of the PCEs essential for recovery. The more relevant inquiry is whether the proposed action—when viewed

in its totality with its RPA—is adversely modifying critical habitat, not whether some isolated measures in the proposed action are less than what they might have been previously.

Plaintiffs also complain that the analysis is deficient because NOAA somehow "manipulated" the baseline to reflect the current degraded status of the PCEs resulting from the status quo hydro operations. But NOAA did exactly as the regulations and the law of the case require. NOAA compared the status quo against the effects of the proposed action and then aggregated those effects in determining that the proposed action was not likely to adversely modify the species' critical habitat. *See* BiOp at 7-52; *see also* Consultation Handbook at 4-40 (requiring Service to assess whether aggregate effects of baseline, when combined with cumulative effects and effects of proposed action, appreciably diminish value of critical habitat in sustaining both survival and recovery of species).

When NOAA lacked sufficient data to perform this sort of quantitative analysis, it performed a qualitative analysis using the best available science as required under ESA section 7(a)(2). More was not required. *NWF*, 524 F.3d at 936 (holding that section 7(a)(2) adverse modification mandate is merely to "provide[] some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger").

C. Plaintiffs' CWA Claims Also Fail

In addition to their ESA claims, NWF asserts a novel procedural CWA argument, contending that the BiOp is invalid because it contains an incidental take statement ("ITS") that Plaintiffs claim required state certification under CWA section 401, 33 U.S.C. § 1341, as a condition precedent to its issuance. Plaintiffs seek to invalidate the BiOp on grounds that the action agencies failed to seek "certification" pursuant to CWA section 401(a)(1) prior to

NMFS's issuance of the BiOp and resulting ITS. *See* 33 U.S.C. § 1341(a)(1) (prohibiting issuance of any license or permit to conduct activity that results in discharge unless affected state issues certification under CWA section 401(a)(1) that underlying activity will not violate applicable water quality standards).

Congress added section 401 to the CWA in 1972 to provide states a mechanism to protect water quality by conditioning or vetoing any federal license or permit "to conduct any activity which may result in a discharge" that might potentially impact state water quality. *See id.* § 1341(d) (providing authority to condition project); 40 C.F.R. § 121.1(a) (defining "license or permit" under CWA section 401). Although no state has ever asserted CWA section 401 authority over an ITS, nor have any of the four affected states in this case, Plaintiffs insist that an ITS is a "license or permit" authorizing the operation of the FCRPS, and further contend that the FCRPS results in a discharge within the meaning of the CWA. As established below, these CWA arguments should be rejected because they contravene the plain language of both the CWA and the ESA and their implementing regulations, create an irreconcilable conflict between these two environmental laws, and lead to results which are both absurd and counterproductive for the species at issue. Because these arguments also contravene governing Ninth Circuit authority and the law of this case, they must be rejected.

1. Plaintiffs' Argument Is Contrary to the Plain Language of Both the CWA and the ESA

Section 401(a)(1) of the CWA provides:

> Any *applicant* for a Federal *license or permit* to *conduct any activity*, including, but not limited to, the construction or operation of facilities, *which may result in any discharge* into the navigable waters, shall provide *the licensing or permitting agency* a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of [the CWA].

33 U.S.C. § 1341(a)(1) (emphasis added). Thus, for section 401 to be triggered, Plaintiffs must establish that the statutory conditions set forth under CWA section 401(a)(1) are all present, including (1) the existence of an "applicant" for (2) a permit or license which (3) authorizes an activity which gives rise to a CWA discharge. *Id*.

As established below, the ITS is not a "license or permit," the FCRPS action agencies are not "applicants," and the ITS does not authorize an activity which may result in a discharge within the meaning of CWA section 401. Because Plaintiffs cannot establish the existence of any one of these mandatory certification triggers, let alone all three, their CWA procedural argument must be rejected.

a. The ITS Is Not a License or Permit

An ITS is not a permit or license. It is instead a "written statement" that authorizes no activity at all, not even the taking of endangered species. The ITS derives from ESA section 7(b)(4), requiring the Secretary, when issuing a BiOp, to issue a "written statement" describing the impact of the incidental take:

> the Secretary shall provide the Federal agency and the applicant concerned, *if any*, with a *written statement* that –
>
> (i) specifies the impact of the such incidental taking on the species,
>
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
>
> (iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to taking, and
>
> (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

16 U.S.C. § 1536(b)(4)(C) (emphasis added). Contrary to Plaintiffs' assertions, while section 7(b)(4) "specifies" the impact of incidental take—and the RPAs necessary to minimize that level of take—and further "sets forth terms and conditions" which the action agencies must satisfy, it neither "authorizes" any activity, nor exempts any such activity from take liability.

Indeed, the exemption from "take" liability comes not from ESA section 7(b)(4), but from section 7(o):

> any taking that is in compliance with the terms and conditions specified in a *written statement* provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

16 U.S.C. § 1536(o)(2) (emphasis added).

In exempting the incidental take that occurs when an agency complies with specified terms and conditions, Congress, in enacting section 7(o), specifically chose the words "written statement"—not "permit." *Compare Webster's Third New International Dictionary* 2229 (2002) (defining "statement" as "something stated . . . a report or narrative (as of facts, events, or opinions)") *with id*. at 1683 (defining "permit" as "to consent to expressly or formally: grant leave for or the privilege of"). Had Congress intended the ITS established in ESA section 7(b)(4) to be a "permit," it would have said so, as it did when it simultaneously enacted ESA section 10, 16 U.S.C. § 1539. *See Ariz. State Bd. for Charter Schs. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (interpretation of statute begins with its plain meaning).

ESA section 10 authorizes the Secretary to issue a "permit" for either (1) the intentional take of listed species for "scientific purposes" or "propagation" or (2) the incidental taking of listed species in conjunction with a habitat conservation plan. 16 U.S.C. § 1539(a)(1). Unlike a section 7(b)(4) "statement," which is produced as part of a bilateral consultation process and which authorizes no activity at all, an incidental take "permit" is based on an "application" which

allows the Secretary to "permit . . . any taking otherwise prohibited by section 1538(a)(1)(B)." *Compare* 16 U.S.C. § 1539(a)-(d) (establishing "permits," describing "application" for such permits, and "granting" exception to liability established in section 9), *with* 16 U.S.C. § 1536(b) (describing written statement that sets forth "opinion of Secretary" produced from section 7 consultation, which includes "written statement" that "specifies" expected impact on species and measures necessary to minimize that impact).

In addition to the above, the illogic of Plaintiffs' argument is further illustrated by a comparison of the use of the term "statement" in sections 7(b)(1) and 7(b)(3), with its use in section 7(b)(4). If an incidental take "statement" issued under section 7(b)(4) qualifies as a "permit" of some sort, then, any "statement" issued under section 7(b)(1)—extending the time to complete a consultation, and any "statement" issued under section 7(b)(3)—setting forth the Secretary's opinion as to the biological effects of the proposed action and the information upon which that opinion is based, must also constitute "permits." *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1061 n.7 (9th Cir. 2008) ("[I]t is a well-established principle of statutory construction that the same words or phrases are presumed to have the same meaning when used in different parts of a statute." (internal quotation marks and citation omitted)); *Lockerby v. Sierra*, 535 F.3d 1038 (9th Cir. 2008) (courts must interpret various sections of statute as consistent with one another in order to comport with legislative purpose).

When Congress intended something to function as a permit, it knew how to do so, and did so expressly, and its decision *not* to use the term "permit" in ESA section 7(b)(4) must be presumed to be intentional. *Hamdan*, 548 U.S. at 578 (fundamental rule of statutory construction "is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"); *Rusello v. United States*, 464

U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and citation omitted)).

b. The ITS Is a "Safe Harbor" Provision

Rather than functioning as a permit, an ITS operates as a safe harbor provision. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001) (ITS is "advisory" and functions as "safe harbor" provision immunizing persons from section 9 liability, so long as the activity is undertaken in compliance with ITS's terms and conditions). Indeed, section 7(o)(2) excludes from the definition of prohibited take any action that is in compliance with the terms and conditions of an ITS. 16 U.S.C. § 1536(o)(2) ("[A]ny taking that is in compliance with the terms and conditions specified in a written statement . . . shall not be considered to be a prohibited taking of the species concerned."). Thus, as established above, it is not the section 7(b)(4) "statement" that provides an exemption from liability; that exemption is provided by ESA section 7(o).

The distinction between a permit, which affirmatively authorizes an otherwise illegal take activity, and a "safe harbor provision," which exempts an actor from take liability altogether, is further demonstrated by comparing the language of ESA sections 7(o), 9, and 10. Section 9 prohibits the take of listed species except if in compliance with a section 10 permit or as part of a section 6 program. *See* 16 U.S.C. § 1538(a)(1)(B) ("Except as provided in sections [6(g)(2)] and [10] of this title . . . it is unlawful for any person . . . [to] take any such species."). Unlike a section 10 incidental take permit, which expressly permits incidental take, section 7(o) excludes from the definition of prohibited take any action that is in compliance with the terms and

conditions of an incidental take statement, and thus establishes an outright statutory exemption. 16 U.S.C. § 1536(o); *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1239 (section 7(o) functions as statutory exemption); S. Rep. No. 97-418, at 5 (1982) (establishing that "action that is in compliance with measures to minimize takings in section 7 consultations will be exempt from prohibition in section 9 against incidental takings").

That an ITS is a safe harbor from section 9 liability is further evidenced by the regulations implementing ESA section 7 and the Services' interpretation of those regulations:

> If the action proceeds in compliance with the terms and conditions of the incidental take statement, then any resulting incidental takings are exempt from the prohibitions of section 4(d) or 9 of the Act. *No permit is required* of the Federal agency or any applicant in carrying out the action, as one commenter contended. *The biological opinion, plus the incidental take statement, operate as an exemption under section 7(o)(2) of the Act.*

51 Fed. Reg. 19,926, 19,953 (June 3, 1986) (emphasis added); *see also* 50 C.F.R. § 402.14(i)(5) (any incidental taking in compliance with terms and conditions of ITS is not prohibited taking and "no other authorization or permit under the Act is required").

Thus the "written statement" in section 7(b)(4) provides a kind of roadmap (a "report or narrative" or "opinion") of what an agency must do to take advantage of that statutory safe harbor—but it does not itself either affirmatively authorize an activity, or exempt an actor from take liability. *See* S. Rep. No. 97-418, at 22 (section (b)(4) statement provides terms and conditions that afford action agency "some certainty" that if it has "in good faith taken all reasonable and prudent steps necessary to minimize or avoid incidental takings," it will fall within that safe harbor). In short, the statutory plain language, implementing regulations, and the corresponding legislative history all evince an intention to establish through section 7(b)(4) a

statutory safe harbor against take liability for any agency action in compliance with its section 7(a)(2) obligations.[10]

c. The FCRPS Action Agencies Are Not "Applicants" Within the Meaning of CWA Section 401

CWA section 401 is triggered only when an "applicant" for a "federal license or permit" seeks a permit to conduct an activity that may result in a discharge. 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.1(a) (establishing that CWA section 401 applies to "any license or permit granted by an agency of the Federal government to conduct any activity which may result in any discharge"). According to Plaintiffs, the activity that gives rise to a discharge in this case is the on-going operation of the FCRPS. *See* NWF Op. Br. at 56-57 (arguing that operation of dams gives rise to discharge). To advance this theory, Plaintiffs rely on the holding in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 376 (2006), which held that the operation of a dam—licensed by the Federal Energy Regulatory Commission—results in a discharge requiring CWA section 401 certification. However, while asserting that the operation

[10] The *dicta* relied on by Plaintiffs in *Bennett v. Spear*, 520 U.S. 154, 170 (1997), and *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), for the proposition that an ITS "constitutes a permit" or is the "functional equivalent" of a permit, provides no authority to the contrary. Neither of these cases dealt with the definition of "license or permit" under CWA section 401 or 40 C.F.R. § 121.1(a), and neither of these cases compared that authority against the statutory text of ESA sections 7(b)(4) and 7(o)(2), or its legislative history.

Bennett dealt instead with the *practical impact* of an ITS for purposes of standing, and *Ramsey* construed the practical impact of an ITS in determining whether an action was a "major federal action" under the National Environmental Policy Act. As CWA section 401 does not apply to any action that has the *practical effect* of a permit or license, but instead applies to "any license or permit *granted* by an agency of the Federal government *to conduct any activity* which may result in any discharge," these cases do not provide any insight into the issues presented at bar. 40 C.F.R. § 121.1(a) (emphasis added) (establishing that CWA section 401 applies to any permit to conduct activity that may result in discharge). Subsequent to *Bennett* and *Ramsey*, the Ninth Circuit engaged in a more detailed analysis of the legal import of an ITS and concluded that an ITS is merely a "safe harbor" provision. *Ariz. Cattle Growers*, 273 F.3d at 1239.

of the FCRPS causes a discharge, Plaintiffs do not (and cannot) contend that the Corps and the Bureau of Reclamation "applied" for a permit to operate that system.

That the FCRPS action agencies are not "applicants" within the meaning of CWA section 401(a) is demonstrated by the fact that no permit is required for the on-going operation of the FCRPS. Authority to construct and operate that system was established by Congress under Rivers and Harbors Act of 1925 and the Northwest Power Act.[11] Thus, if no formal governmental license or permit is required for the on-going operation of the FCRPS, there can logically be no "applicant" within the meaning of CWA section 401(a). 33 U.S.C. § 1341(a); 50 C.F.R. § 402.02 (defining applicant within meaning of ESA as person who needs approval from action agency to undertake activity).

Nor can it be argued that the action agencies applied for an ITS issued under ESA section 7(b)(4). First, as established above, an ITS authorizes no activity, let alone the operation of the FCRPS. Second, the ITS results from the bilateral consultation process, not from a unilateral "application" process seeking some sort of formal governmental consent. Indeed, Plaintiffs make no argument to the contrary and, instead, ignore the "applicant" prong of CWA section 401(a) altogether. Having effectively conceded that the FCRPS action agencies are not

[11] There is no single act authorizing all of the dams that constitute what we refer to as the FCRPS. Most of the dams were independently authorized by Congress. *See, e.g.*, Pub. L. No. 75-329, 50 Stat. 731 (1937) (authorizing construction, maintenance, and operation of Bonneville Dam); Pub. L. No. 74-409, 49 Stat. 1028 (1935) (authorizing construction, operation, and maintenance of Grand Coulee Dam); Pub. L. No. 79-14, 59 Stat. 10, 21 (1945) (authorizing construction and operation of McNary Dam; (authorizing construction of "such dams as are necessary . . . for purposes of providing, slack water navigation and irrigation" in Snake River); *see also Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1166 (9th Cir. 2004) (discussing Congress's authorization to build and operate lower four Snake River Dams under Pub. L. No. 79-14).

"applicants" within the meaning of CWA section 401(a), Plaintiffs cannot prevail on their CWA procedural claims.

d. Assuming, Arguendo, that an ITS Is a Permit, It Is Not a Permit That "May Result in a Discharge"

Even assuming that an ITS is a "license or permit" (which it is not), its issuance cannot trigger CWA section 401 jurisdiction because it does not authorize an activity which may result in a discharge. *See North Carolina v. Fed. Energy Regulatory Comm'n*, 112 F.3d 1175 (D.C. Cir. 1997) (CWA section 401 implies causation; permit does not trigger certification authority unless it authorizes activity which may cause discharge). As established above, if the ITS can arguably be said to authorize anything (and it cannot), it authorizes the take of listed species, not the on-going operation of the FCRPS. Yet, because the take of listed species does not give rise to a discharge, an ITS is not the sort of governmental action that triggers CWA section 401 authority. *See S.D. Warren*, 547 U.S. at 376 (concluding that "discharge" under CWA 401 means "'flowing or issuing out'"). More pointedly, because the incidental take of fish does not result in a "flowing or issuing out," it cannot be said to constitute a discharge, and Plaintiffs do not argue the contrary.

Indeed, a survey of CWA section 401 case law reveals that section 401 certification does not apply to every conceivable permit—only those permits that authorize an "activity" that may result in a discharge. 33 U.S.C. § 1341(a) (issuance of "license or permit to conduct any activity . . . which may result in any discharge" triggers section 401 jurisdiction); 40 C.F.R. § 121.1(a) (defining license or permit under CWA section 401 as any license or permit granted by agency "to conduct any activity which may result in any discharge"). Cases finding CWA section 401 to be triggered involve a "discharge" from the underlying "activity" which is authorized by the "license or permit." *Compare PUD No. 1 of Jefferson County v. Wash. Dep't*

of Ecology, 511 U.S. 700 (1994) (discharge resulted from both release of dredged and fill material authorized by CWA section 404 permit and tail race authorized by underlying FERC license), *and Hells Canyon Pres. Council v. Haines*, No. CV 05-1057-PK, 2006 WL 2252554 (D. Or. Aug. 4, 2006) (defendants did not dispute that mining activities authorized by Forest Service's Record of Decision may result in discharge), *with North Carolina*, 112 F.3d 1175 (CWA section 401 certification not required for FERC license amendment allowing new water withdrawal because withdrawal did not result in discharge).

Having failed to identify any "discharge" purportedly authorized by the ITS, Plaintiffs engage in obfuscation by insisting instead that "the ITS incontrovertibly allows the operation of facilities that result in discharges." *See* NWF Op. Br. at 58. As demonstrated above, this claim begs the question because the ITS authorizes no activity at all, let alone the taking of listed species or the operation of a hydropower system.

In fact, while an ITS under ESA section 7(b)(4) provides the action agencies with the terms and conditions to qualify for an exemption from take liability pursuant to ESA section 7(o), it in no way constitutes an approval to conduct the underlying activity and presumes instead that the underlying activity is otherwise lawful. *See* 50 C.F.R. § 402.02 (defining "incidental take" as "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity"); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 942 (9th Cir. 2006) ("otherwise lawful activity" means any action that meets all state and federal legal requirements except for ESA's prohibition on take).

To be sure, a biological opinion which contains an ITS helps insure against jeopardy by providing the action agencies with expert insight as to the action's impact on listed species and the measures they should take to avoid that impact. The authority, however, to decide whether to

proceed with the underlying agency action in light of the issuance of the ITS and biological opinion, remains vested with the action agencies. *See* 50 C.F.R. § 402.15 ("following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion."); 51 Fed. Reg. at 19,928 (by consulting with action agencies, Services perform strictly advisory functions and lack power to require any affirmative conservation measures); *see also Ctr. for Biological Diversity*, 450 F.3d at 942 (ITS does not authorize underlying action or relieve action agency from securing all necessary state or federal permits); *cf. S.D. Warren*, 547 U.S. 370 (private dam operator required FERC license to operate dam; thus operation of dam required certification because it resulted in CWA discharge). Because the ITS does not authorize the on-going operation of the FCRPS projects, it does not trigger CWA section 401(a) authority.

2. Plaintiffs' Section 401 Argument Pits the CWA Against the ESA, Creating an Avoidable Statutory Conflict

In addition to contravening the plain meaning of both the CWA and the ESA as established above, Plaintiffs promote an interpretation of these statutes that results in an avoidable statutory conflict. By insisting that an ITS is subject to the various states' CWA certification authority, Plaintiffs imbue the states with the authority to either certify the ITS as in conformity with state water quality standards (with or without necessary water quality conditions), or alternatively, to veto the ITS as violative of applicable state water quality standards. 33 U.S.C. § 1341(a)(1) ("no license or permit shall be granted until the certification required by this section has been obtained or has been waived" and "no license or permit shall be granted if certification has been denied by the State").

In so doing, Plaintiffs vest the protection of endangered species with the various states, thereby divesting NOAA of the exclusive role Congress afforded it with respect to the species'

protection. 16 U.S.C. § 1536(a)(2), (b)(3), (b)(4) (granting to Secretary power to engage in consultations, to issue biological opinions, and to set forth terms and conditions in ITSs that protect listed species). Indeed, throughout the course of this long-standing litigation, Oregon has repeatedly urged draconian views as to how best to protect endangered species by advocating more spill and flow in addition to the drawdown of certain reservoirs, measures in which the other states do not concur. The ESA avoids such a balkanized approach to the conservation of listed species by vesting the Services with the sole authority to establish measures protective of listed species based on the best available science. The ESA does not, in contrast, vest such authority with the states, who, in this case, have historically advanced interests based on the more parochial interests of their constituents.

In addition to vesting authority where it does not lie, Plaintiffs' attempt to subject the ITS to CWA 401 certification would also create a potentially irreconcilable statutory conflict with respect to the statutory time frames for the completion of a section 7 consultation and the time frame allotted for the completion of the CWA section 401 certification process. Concerned that the consultation process could become too prolonged, Congress added express deadlines to ESA section 7 to ensure that a consultation would be completed within a 90- to 150-day time frame. 16 U.S.C. § 1536(b)(1). Certification under CWA section 401, in contrast, can extend up to one year, or more, if the certifying agency concludes that it lacks sufficient information to issue a certification.[12] 33 U.S.C. § 1341(a)(1) (certification shall issue within reasonable period of time,

[12] The certification process for hydropower projects is both technically and legally complex, as well as time consuming. Despite the one year statutory deadline imposed by section 401, the certification process frequently migrates well beyond the statutory deadline. Indeed, many states, like Washington, refuse to waive certification when it becomes clear that certification cannot be accomplished within the one-year deadline, and, instead, instruct the applicant to withdraw their application and reapply so as to extend the certification process anew, or face certain denial. *See* Washington State DOE "Water Quality Certifications for

not to exceed one year, after receipt of such request, or be waived); *Airport Cmtys. Assoc. v. Graves*, 280 F. Supp. 2d 1207, 1217 (W.D. Wash. 2003) (CWA section 401 certification must be completed within one-year period). Thus, if an ITS were subject to certification authority under CWA section 401, the underlying biological opinion and ITS would not issue until the certification is first issued, which, according to CWA section 401(a)(1), could be in a year's time frame or more, although ESA section 7(b)(3) requires that it issue more quickly. This problem would be greatly exacerbated by protracted litigation over each state or tribal certification which typically ensues at both the state and federal levels when controversial projects, like this one, are at issue. *See, e.g., Graves*, 280 F. Supp. 2d at 1214 (explaining problems that ensue when state certification was appealed first to administrative tribunal for three-week trial which resulted in amended certification issued by Hearings Board well after one-year statutory period, subsequent appeal (first to state supreme court, and then finally to federal district court).

Thus, by imbuing the states with the authority Congress vested exclusively in the Services, Plaintiffs urge an interpretation that results in a repeal by implication, an interpretation that is routinely disfavored by the courts. *See Cal. Trout, Inc. v. Fed. Energy Regulatory Comm'n*, 313 F.3d 1131, 1137 (9th Cir. 2002) (rejecting interpretation of CWA 401 that would result in "partial repeal by implication" of provisions of Federal Power Act). In light of the above, this Court should decline to adopt Plaintiffs' arguments.

Existing Hydropower Dams: Guidance Manual," Pub. No. 04-10-022, at 16 (Mar. 2005), *available at* http://www.ecy.wa.gov/pubs/0410022.pdf.

Washington's practice of requiring withdrawal and re-application has become a commonplace mechanism for circumventing the one year limitation implied on the certification process. *See, e.g.*, Washington DOE's 401 Certification of Rocky Reach, *available at* http://www.ecy.wa.gov/programs/wq/ferc/existingcerts/rockyreach.pdf (noting application was withdrawn twice en route to 21 month-consultation).

3. Plaintiffs' CWA Arguments Lead to Absurd Results That Would Contradict Ninth Circuit CWA Precedent and This Court's Collaborative Remand Order

In addition to creating a statutory conflict and an impermissible repeal by implication, Plaintiffs' arguments, if accepted, would lead to absurd results which undermine statutory intent and applicable Ninth Circuit precedent. For example, if an ITS were subject to CWA section 401 certification, jurisdiction under that section would not be asserted over federal dams uniformly, but only over those federal dams where endangered or threatened species are present and likely to be adversely affected.[13]

Thus, rather than being triggered by a potential discharge which could impact water quality, Plaintiffs would have CWA section 401 triggered by the presence of listed species. Although all federal dams discharge within the meaning of *S.D. Warren*, those located in an area lacking listed species, or not anticipated to impact listed species, would not trigger CWA section 401 authority, while those dams affecting listed species would. This result would impermissibly convert the "touchstone" of CWA section 401 jurisdiction from an activity which may result in a discharge to an activity which impacts a listed species.

Moreover, if an ITS were a permit as advocated by Plaintiffs, NMFS would be required to engage in a consultation on the effects of that permit, leading to a never-ending circular

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[13] The FCRPS is thus not the only interstate federal project that would be impacted by a decision subjecting an ITS to a multistate CWA 401 certification process. As an initial matter, the Bureau's Upper Snake water storage and withdrawal projects would be similarly impacted; if an ITS is required for the FCRPS project, it would be required for the Upper Snake projects as well. In addition, projects operated by the U.S. Army Corps of Engineers in other parts of the country would be similarly vulnerable to attack on this basis. *See, e.g., In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005) (Corps' operation of flood control dams require consultation); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164 PCT-DGC, 2008 WL 4417227 (D. Ariz. Sept. 26, 2008) (Bureau of Reclamation must consult on operation of Glenn Canyon).

pattern of permit issuance and self-consultations. *See* 50 C.F.R. § 402.02 (defining "action" subject to ESA section 7(a)(2) to include agency decision to issue a "permit"). As the action agency under ESA section 7(a)(2), NMFS would have to consult with itself on its decision to issue the ITS, forcing it into the ridiculous position of consulting on the results of its own consultation, and thus, an endless loop of permit-issuance-consultations. Nor is this the only circularity created by Plaintiffs' logic. If the states' conditions materially impact the section 7(a)(2) analysis, NOAA would then be required to issue a new RPA that includes both the states' conditions while satisfying the section 7(a)(2) mandate; once revised, the new RPA would be further subject to CWA section certification, possibly leading to newly imposed state conditions, and commencing the consultation process over again in a potentially endless cycle.[14]

Moreover, by issuing an ITS, NMFS would be transformed from a consulting agency into an action agency, although the joint consultation regulations and case law prohibit that result. *See, e.g., Miccosukee Tribe of Indians of Fla. v. United States*, 430 F. Supp. 2d 1328, 1334 (S.D. Fla. 2006) (in issuing incidental take statement under section 7, Service acts as "consulting agency" and not "action agency"); 51 Fed. Reg. 19,953 (by virtue of the enactment of ESA section 7(o), no permit is required to exempt agency action from prohibition otherwise established in ESA section 9). Ninth Circuit precedent cautions that a statutory interpretation that results in this type of absurdity is one that should be rejected in favor of a common-sense reading. *Arizona State Bd. for Charter Schs.*, 464 F.3d at 1008 (well-accepted rules of statutory construction caution against statutory interpretations that produce absurd results).

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[14] Following Plaintiffs' logic, if the ITS in this BiOp triggers CWA section 401 certification authority, then the ITS that resulted from the Harvest BiOp recently issued for the *U.S. v. Oregon* Harvest Management Agreement would be similarly subject to state certification authority and would be invalid in the absence of those requisite state certifications.

In addition to leading to absurd results, a decision that the ITS is subject to CWA section 401 authority would contravene existing Ninth Circuit precedent, including that established by *NWF v. U.S. Army*, 384 F.3d 1163 (9th Cir. 2004). In *NWF v. U.S. Army Corps*, the Ninth Circuit concluded that the CWA had to be read in *pari materia* with the Rivers and Harbors Act, which authorized the construction and on-going operation of the FCPRS. In so holding, the court concluded that it is not the mere existence or status of the dams that triggers the obligation to comply with water quality standards, but rather a discretionary agency action to operate those dams. The *NWF v. U.S. Army Corps* court further held that the Corps is immune from water quality standards liability resulting from the dams' mere existence and can only be held accountable for its discretionary actions that violate applicable standards. *Id.* at 1178-79.

Rather than gearing their procedural CWA claim to a discretionary agency action, Plaintiffs focus their CWA section 401 argument on the existence of the dams itself. Indeed, neither Plaintiffs' 60-day notice, complaint, or summary judgment memorandum identifies any "discretionary" operations that are impacting water quality. Instead, Plaintiffs contend that the ITS authorizes the on-going operation of the dams, and that "the existence and operation" of the dams "alter or affect water quality by, among other things, heating the water, causing dissolved gas supersaturation during periods of involuntary spill, and drastically reducing turbidity and sediment transport." *See* Docket 1492, Ex. B at 8 (Plaintiffs' 60-Day Notice letter). Because the effects Plaintiffs seek to condition under CWA section 401(a)(1) are precisely those previously found immune from CWA liability by governing Ninth Circuit precedent involving these very dams, Plaintiffs' CWA procedural claims should be rejected.

Finally, Plaintiffs' CWA section 401 argument results in seriously undermining this Court's remand order and the regional collaborative process that led to the issuance of the 2008

BiOp. As established above, subjecting the ITS to each state's certification authority under CWA section 401(a)(1) vests each state with potential veto power over the ITS, which, if exercised, would seriously impact the on-going operation of the FCRPS. Individual conditions or modifications which could not be secured in the collaborative remand process, either because they were not supported by the best available science or because they were not necessary to avoid jeopardy, might ironically become mandatory conditions on FCRPS operations by virtue of the authority provided under CWA section 401(a)(1), (d); 33 U.S.C. § 1341(d) (any certification issued under this section shall set forth effluent limitations and other limitations necessary to assure compliance with state standards "and shall become a condition on any Federal license or permit subject to the provisions of this section").

For all these reasons, Plaintiffs' CWA arguments abrogate the plain language and intent of the statutes, implementing regulations, and governing case law, and lead to absurd results. Because subjecting the ITS to CWA section 401 certification authority is akin to forcing a square peg into a round hole, the Court should decline to do so and should instead find in favor of the government on these claims.

D. NOAA Was Not Required to Propose Dam Breaching as an RPA

The Nez Perce Tribe attacks the BiOp on grounds that NOAA failed to evaluate dam removal as an alternative to the proposed action.[15] Because NOAA was not obligated to consider dam breaching in lieu of the proposed action, and because the record does not otherwise support such a drastic measure, these arguments are without merit.

RPAs under section 7(b)(4)(A) are limited to:

[15] It is questionable whether the tribe, as *amicus curiae*, has the right to interject this argument as neither NWF nor the state of Oregon have embraced this argument.

> [a] alternative actions identified during formal consultation than can be implemented in a manner consistent with the intended purpose of the action, [b] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [c] that is economically and technically feasible, and [d] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02.

The Tribe does not contend, nor could it, (a) that breaching of any Snake River dam is within the scope of the Corps' legal authority and jurisdiction, or (b) that dam breaching is an alternative action that can be implemented in a manner consistent with the intended purpose of the proposed action. Dam breaching is plainly inconsistent with the authorized purposes established by Congress for the lower Snake River dams. Pub. L. No. 79-14, 59 Stat. 10. Because dam breaching is outside the legal scope of an RPA as defined by regulation, it need not have been considered. *See* NOAA AR S77 at 37, 40-41 (*NOAA's Issue Summaries* explaining that because dam breaching is outside action agencies' legal authority, it is not reasonably certain to occur); *Comments and Responses* at 39-42.

But NOAA did, nevertheless, evaluate dam breaching on the merits and concluded that, "[b]ased on best scientific information available, it is biologically not necessary to include dam breaching as an RPA or contingency to achieve survival and recovery of listed salmon and species." NOAA AR S77 at 40. In fact, dam breaching at best can help only four of the 13 listed species, and would, moreover, create adverse impacts to navigation, cultural resources, and recreation. *Id*. at 39-41. Dam breaching would also result in loss of power generation, water quality degradation, and a potential increase of environmental effects due to carbon emissions from replacement power. *Id.* at 40-41. More specifically, removing the dams and replacing the power with the most likely fossil-fuel resource would add 5.4 million tons of carbon dioxide

every year to the region's air, adding to climate change concerns while polluting the environment. *Id.*; *Comments and Responses* at 41.

In addition to these adverse consequences, the power lost as a result of dam breaching could only be replaced with natural gas fired turbines, and the cost of replacing that lost power would range between $400 and $550 million annually. NOAA AR S77 at 40. For all these reasons, the Northwest Power and Conservation Council concluded that removing the lower Snake River dams would be "counterproductive." *Id.*

Even if dam breaching were considered to be a viable alternative (and it is not), NOAA is not required to pick "the best [RPA] alternative or one that would most effectively protect the [species] from jeopardy. . . . [It] need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency." *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998). Nor is NOAA required to explain why it chose one RPA over another or to justify its decision based solely on apolitical factors. *Id.*; *see also Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 986 (D.N.M.) (stating that ESA "does not require FWS to choose the best or most effective RPA that will avoid jeopardy"), *appeal dismissed*, 46 F. App'x 929 (10th Cir. 2002).

Finally, contrary to the Tribes' assertions, NOAA is permitted to take into consideration political and economic interests when issuing RPAs. Indeed, the Ninth Circuit has emphasized that if "two proposed RPAs would avoid jeopardy, the Secretary must be permitted to choose the one that best suits all of its interests, including political and business interests." *Sw. Ctr. for Biological Diversity*, 143 F.3d at 523 n.5; *accord Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1268 (W.D. Wash. 1999) ("[A]lthough NMFS must explain how the RPAs would avoid jeopardy

and adverse modification, they do not have to discuss or recommend every management measure that would achieve these results.”).

In short, NOAA issued a comprehensive RPA that incorporates 73 proactive hydro, habitat, hatchery, and harvest measures to satisfy its obligations under ESA section 7(a)(2). *See BiOp Executive Summary* at 5. Its “All-H strategy includes continued fish passage improvements at the Snake River dams such as surface collection and bypass improvements in addition to offsite actions including habitat and hatchery improvements, to meet the needs for listed fish.” *Comments and Responses* at 42. Its decision not to incorporate a measure that would have the practical effect of “eliminating the generation of 1,022 average megawatts of emissions-free electricity per year, enough to power the City of Seattle,” was entirely within the realm of its discretion. NOAA AR S77 at 40. For all these reasons, the Tribe’s dam breaching arguments should be rejected.

III. CONCLUSION

It is time to put an end to this endless cycle of litigation. Through the issuance of this BiOp, NOAA and the action agencies have finally achieved their mandate to establish a proposed action and reasonable and prudent alternative that more than satisfies the jeopardy and adverse modification standards set forth in ESA section 7(a)(2). The government has closely adhered to—and indeed, exceeded— the law of the case. It has engaged the efforts of the region as a whole in using the best available science to evaluate the effects of the action and to establish an RPA that will not only not jeopardize the species, but will more affirmatively put the species on a trend toward ultimate recovery. Recognizing that a ruling in favor of these Plaintiffs on any one of their claims would not only invalidate the best regional consultation effort to date but would also invalidate the Upper Snake and *U.S. v. Oregon* Harvest Management BiOps—joined

as they are by a common legal and scientific analysis and through common mitigation measures set forth in the FCRPS BiOp—this Court should be wary of accepting any one of Plaintiffs' arguments.[16] In light of the arguments set forth above, Northwest River Partners respectfully urges this Court to reject Plaintiffs' challenges in their entirety to grant the federal government's and Defendant Intervenors' cross motions for summary judgment and to affirmatively declare the FCRPS BiOp to be fully compliant with the ESA's mandates.

DATED this 24th day of October, 2008.

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[16] *See* BiOp at 1-4 (explaining that FCRPS BiOp is based on Supplemental Comprehensive Analysis that employs a common legal analysis that supports both the hydro BiOp, and the Bureau of Reclamation's BiOp for Upper Snake Water Storage Projects). The SCA further "integrate[s] its consideration of the activities called for by the *U.S. v. Oregon* settlement agreement into the SCA, considering those activities to be part of the Prospective Action for that analysis." *Id*. ("The [three] biological opinions each explicitly incorporate information from the SCA necessary to support their respective determinations. In this way the multiple biological opinions are tiered off of the common SCA.").

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed.R. Civ. P. 5(d), I certify that on October 24, 2008, the forgoing *Northwest Riverpartners' Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Summary Judgment Motion* will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first class U.S. mail:

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