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The States of Washington, Idaho and Montana (“Three States”) jointly submit the following supplemental memorandum in opposition to the supplemental summary judgment motions filed by Plaintiffs, State of Oregon and Nez Perce Tribe, and in support of the Three States’ supplemental motion for summary judgment.

I. INTRODUCTION

The parties in this case have covered a lot of ground in the decade spanning the 2000 biological opinion (“BiOp”) that began this litigation and the 2010 BiOp that is now before this Court. The 2000 BiOp is said to have fallen short largely because it failed to provide sufficient commitments to support its ambitious aims to facilitate basin recovery plans. The 2004 BiOp polarized the parties in the region, and was ultimately found to be an unhelpful exercise in legal gymnastics rather than a focused effort on curing the deficit in programmatic commitments associated with the 2000 BiOp. With this Court’s assistance, the federal government has gone back to the original task of producing a BiOp that is scientifically sound, firmly grounded in the ESA’s mandates, and that reflects a commitment to do what is necessary to ensure that continued operation of the FCRPS will not appreciably reduce the likelihood that wild salmon will continue to survive and ultimately recover.

The 2008 BiOp, and the 2010 Supplemental BiOp (“2010 BiOp”) that updates and further improves its predecessor, also represent true collaboration - a shared commitment to consider and work together towards the best interests of listed salmonids in the Columbia Basin. While this paradigm shift in the way we work together on salmon conservation and recovery may not have been an overt objective of this Court’s first remand order, it is a welcome bonus and perhaps the silver lining to the diversion created by the 2004 BiOp. The fact that the 2008 and 2010 BiOps have not produced a completely unanimous hurrah of support is certainly not

surprising, and in no way detracts from the major shift in approach they reflect and their return to the original task at hand when the 2000 BiOp was remanded by this Court - to cure its legal deficits and make good on its resource protection commitments. As observed in our opening summary judgment briefs, having accomplished what this Court originally required, we now yearn to focus on implementation rather than continued litigation. To do so, we must conclude this final chapter of the litigation and ask this court to grant summary judgment sustaining the validity of the 2010 BiOp.

Notwithstanding the foregoing, the Three States keenly appreciate the limited nature of this supplemental briefing. Our original summary judgment briefs fully elaborate the basis for upholding the 2008 BiOp. The 2010 BiOp, and the Adaptive Management Implementation Plan (“AMIP”) it incorporated, are not radical re-workings of the 2008 BiOp. Rather, they embody refinements to the reasonable and prudent alternative (“RPA”) set out in the 2008 BiOp. In a real sense, the enhanced RPA reflects the very type of flexible responses to changing science or on-the-ground conditions – *e.g.*, ocean temperature or terrestrial drought – that inevitably occur during the course of a lengthy biological opinion. The necessity of such flexibility takes on particular acuity where, as here, there is an extraordinarily large action area and, with respect to salmonids, numerous listed species are involved. The evolving scientific and technical knowledge base compounds the difficulty, making the task of determining the “best available science” a singularly daunting endeavor. Nevertheless, the fundamental task remains the same: satisfying the survival and recovery requirements in section 7(a)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2).

The sheer complexity of the biological, engineering and planning challenges presented by the FCRPS consultation, together with fact that the highest degree of expertise was brought to

bear on those challenges (not only by the federal agencies but also the Basin's non-federal sovereigns), underscores the propriety of giving deference to the RPA as initially formulated and as amended in the 2010 BiOp. Such deference, of course, is part and parcel of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. We have never argued that the Court should not take a hard look at the work of NOAA or the action agencies. However, we do argue that in a world full of scientific uncertainty and debate, the mere fact that Plaintiffs can muster a group of divergent scientific opinions critical of the federal government is no reason to be skeptical of the legal adequacy of the decisions made and the actions adopted, particularly given the federal government's commitment to collaboration both now and in the future. Indeed, the fact that reasonable scientists differ on these topics speaks both to the rigor involved in all of the consultations, and to the axiom of deference to the final decision maker. Otherwise, there is little or no hope for our ability to move beyond this litigation.

Turning to the supplemental summary judgment motions, the Three States address three specific areas of the 2010 BiOp – its jeopardy analysis as to the Interior Columbia River species, its habitat/estuary analysis, and its research, monitoring and evaluation measures – because those areas capture the heart of the challenge to the BiOp by NWF and Oregon and because the latter two areas have particular day-to-day importance to the Three States. In each instance, NWF and Oregon ask this Court to second-guess the scientific or technical determinations made by NOAA Fisheries (“NOAA”) – most of which were made in direct collaboration or consultation with the Basins' non-federal sovereigns. The Three States will not repeat here the Standard of Review section contained in their memorandum in support of the summary judgment motion directed to the 2008 BiOp. *See* Dkt. 1557 at 17-19. They do reiterate below certain of those review principles in the context of arguments directed to the three aspects of the 2010 BiOp upon which

their analysis focuses because, again, deference to NOAA's decision-making on highly complex issues controls the ultimate outcome here.

II. ARGUMENT

I. NOAA'S FACTUAL CONCLUSIONS CONCERNING THE IMPACT OF THE NEW QUANTITATIVE DATA ON ITS PREVIOUS ANALYSIS WAS AN APPROPRIATE ADDITION TO THE 2010 BIOP AND SHOULD BE ACCORDED SUBSTANTIAL DEFERENCE.

Oregon focuses much of its supplemental memorandum on the contention that NOAA's quantitative methodology was remiss in concluding that the newly available data for the Interior Columbia Basin (ICB) DPS/ESUs did not require a change in its overall jeopardy assessments for those species in the 2008 BiOp. Dkt. 1802 at 14-24. Oregon also claims that NOAA substituted adaptive management and related "triggering" criteria for the trending-towards-recovery jeopardy approach used in the 2008 BiOp. *Id.* at 9-11. NWF, in contrast, devotes little attention to NOAA's technical analysis. Dkt. 1794 at 22-24. Ultimately, both memoranda mischaracterize the analysis, and neither comes to grips with the deference due NOAA'S technical findings – particularly where the agency addresses the significance of temporally limited, partial data.

A. NOAA's Evaluation Of New Quantitative Data Supplemented Its Jeopardy-Analysis Metrics.

Oregon argues that NOAA inserted the AMIP into the 2010 BiOp at least in part to "enable[] [the agency] to rely on its triggers, in addition to other standards that are not part of NOAA's 'trending towards recovery' analysis, that have never been determined adequate to avoid jeopardy, and that drop critical concerns that NOAA claims to have relied on in the 2008 BiOp's jeopardy analysis." Dkt. 1802 at 9. The "other standards" reference apparently relates to the BiOp's consideration of DPS/ESU abundance data in connection with its jeopardy

determination. *See id.* at 10. NWF similarly criticized NOAA for “focus[ing] on recent increases in salmon abundance as evidence that there is no need to revisit the jeopardy analysis or conclusions of the 2008 BiOp.” Dkt. 1794 at 23. A straightforward review of the 2010 BiOp, however, lends no support for their assertion that, *sub silentio*, NOAA has transitioned to a new jeopardy standard.

To its credit, NOAA incorporated data compiled by the Northwest Fisheries Science Center (“NWFSC”) that was not available at the time the 2008 BiOp issued, for purposes of conducting its statistical analysis of the ICB DPS/ESUs. 2010 BiOp § 2.1.1.1.3 at 8, 9 (Tables 1 & 2). However, the depth of the additional data available for review should not be overstated. The data was not available for all population groups and, with respect to steelhead DPSs, existed only for eight of 46 groups. Additional data was available for 16 of 28 Chinook populations. The period covered by the new data varied in length among the DPSs and ESUs, ranging from three to five years for steelhead populations and two to five years for Chinook populations. The data, in short, was limited in nature and thus provided a limited basis upon which to draw conclusions concerning the 2008 BiOp – as might be expected for a review conducted two years into a ten-year biological opinion.

NOAA used the additional data to recalculate the earlier BiOp’s base period estimates for the affected population groups but cautioned that, while changes in such estimates “are relevant to the 2008 BiOp analyses, . . . the critical quantitative information for the BiOp’s conclusions were the ‘prospective’ estimates that included the effects of RPA implementation and of continuing current management actions that were not reflected in the base period population performance.” 2010 BiOp § 2.1.1.2 at 11. NOAA further cautioned that it could not make a definitive quantitative reassessment of either base-to-current or current-to-prospective estimates

“because all of the information necessary to do this is not currently available.” *Id.*¹ It therefore employed the new data to perform a “qualitative[] evaluat[ion]” of its impact on the 2008 BiOp’s prospective estimates:

NOAA Fisheries considered information such as the magnitude of the base period changes and how close the 2008 BiOp’s prospective estimates were to metrics indicative of a low risk of extinction and a positive population growth rates in determining if the 2008 BiOp’s prospective analyses were likely to change. For R/S, lambda, and BRT trend, the magnitude of the base period change was most appropriately expressed as the ratio of the extended base period vs. the 2008 BiOp base period estimates, since the productivity estimates are essentially survival rates. However, this approach did not apply to extinction risk estimates because survival gaps were not available for new extinction risk estimates. The ultimate goal of this evaluation was to determine whether any of the 2008 BiOp’s prospective productivity estimates were likely to change from a slope or rate greater than 1.0 (the critical value indicative of increasing population growth) to one less than 1.0 and if any of the 2008 BiOp’s prospective extinction risk estimates were likely to change from less than 5% risk (the critical value indicative of “low” extinction risk in the 2000 and 2008 BiOps and in the ICTRT’s [Interior Columbia Technical Recovery Team’s] viability analysis) to greater than 5% risk. Changes in values within the low risk category (e.g., less than 5%) were less important relative to 2008 BiOp conclusions than were shifts from low risk to higher risk categories.

Id. at 11, 12. The qualitative analyses of the four metrics appear in sections 2.1.1.2.2 (24-year extinction risk), 2.1.1.2.3 (R/S), 2.1.1.2.4 (lambda), and 2.1.1.2.5 (BRT trend) of the BiOp. *Id.* at 14-27. In another section, NOAA used the new NWFSC-supplied data to update a respective affected population group’s extended base period and to re-calculate the most recent ten-year

¹ Under the 2008 BiOp, NOAA estimated three “survival gaps” for each ICB DPS and ESU population group—base, current, and future—to assess the population’s potential for recovery and the possibility of extinction in the short-term. 2008 BiOp at 7-7. The several quantitative metrics then were applied sequentially with reference to each “survival gap” category to facilitate comparison of the estimated population performance by the end of the BiOp’s ten-year term with current performance. *Id.* at 7-4, 7-11. The four metrics were, as the 2010 BiOp explains, 24-year extinction risk, average recruits-per-spawner (“R/S”) productivity, median population growth rate (“lambda”), and NOAA Fisheries West Coast biological review team (“BRT”) population trend methodology. 2010 BiOp § 2.1.1.2 at 10; *see also* 2008 BiOp at 7-22 – 7-26, 7-35 – 7-36. The 2008 BiOp applied these metrics for quantitative purposes and examined recent abundance as a qualitative factor potentially “informative” with regard to short-term extinction risk. *Id.* at 7-35.

geometric mean abundance estimate. *Id.* § 2.1.1.2.1 at 12 & Table 3. Again, the abundance updating and re-calculations were possible for less than one-fifth of the steelhead DPSs and just over one-half of the Chinook ESUs.

NOAA summarized its overall qualitative analysis with respect to the four quantitative metrics in section 2.1.1 (pages 4-5). Detailed reporting of the statistical estimates appears in Table 4 of section 2.1.1.2.2 and Appendix B (24-year extinction risk); Table 5 of section 2.1.1.2.3 (R/S productivity); Table 6 of section 2.1.1.2.4 and Appendix C (lambda); and Table 7 of section 2.1.1.2.5 and Appendix D (BRT trend). This painstaking analysis and statistical reporting of the new data's impact on the estimates contained in the 2008 BiOp negate any reasoned contention that the 2010 BiOp employed a sleight-of-hand maneuver substituting one metric – recent abundance – for the four applied in the earlier BiOp. The agency instead explained why it used the new abundance data as it did and why it was compatible with NOAA's use of abundance data under the 2008 BiOp—*i.e.*, as a potentially “informative” factor. In contending otherwise, NWF and Oregon simply ask this Court to ignore the careful and thoroughly explained method that NOAA devised to tease from an extremely limited data set some elucidation on the 2010 BiOp's estimates for the four survival-recovery metrics.

Oregon advances a lengthy attack on various discrete aspects of the 2010 BiOp's technical analysis. It argues initially that NOAA Fisheries “relie[d] on the wide confidence interval of the [Quasi-Extinction Threshold] analysis [in the 2008 BiOp] in a manner that suggests the new metric values are falling randomly across the intervals” and that, consequently, “NOAA's explanation of the results would appear to be one purely of convenience, not of science, and therefore irrational.” Dkt. 1802 at 16. NOAA, however, stated in its summary analysis of the additional data's impact on the 2008 BiOp's extinction-risk estimates that, as with

the three other metrics, it “could not re-calculate prospective extinction risk estimates due to a lack of some critical information” but nonetheless, “examination of the magnitude of the change in base period extinction risk estimates, coupled with an evaluation of how close the 2008 BiOp’s prospective estimates were to the critical value of 5% risk, indicated that the new information would have limited influence on prospective extinction risk estimates.” 2010 BiOp § 2.1.1.3 at 29. The key consideration, in other words, was not wide confidence intervals. Rather, it was a qualitative determination that the magnitude of what *could* be measured – the data’s effect on base period metrics – was not large enough to alter the 2008 BiOp’s prospective extinction risk estimates with respect to the 5% risk standard except, as the agency immediately explained, for two population groups. *Id.* at 29-30. Thus, to claim that NOAA’s re-assessment of the extinction-risk metric in light of the revised base period estimates reflected an approach controlled by “convenience” and not “science,” markedly mischaracterizes the careful treatment of the issue in the 2010 BiOp given the absence of the data necessary for undertaking a quantitative analysis of the new data comparable to the one contained in the 2008 BiOp.

No less tenable are Oregon’s criticisms of NOAA’s qualitative methodology for assessing the implications for base-to-current and prospective estimates reported in the 2008 BiOp. Dkt. 1802 at 20-24. As to the base-to-current analysis, Oregon pointed to the agency’s failure to “estimate[] anew” the 2008 BiOp’s statistical results and to consider “the significance of the new base-period calculations, namely, what they say about the validity of the intervening base-to-current survival benefits that the 2008 BiOp assigned to habitat work, hydro system changes, and other mitigation efforts.” *Id.* at 22. The first alleged shortcoming ignores the fact that NOAA could not update the base-to-current estimates quantitatively because of data limitations, while the second alleged shortcoming is belied by the analysis in section 2 of the

2010 BiOp that devotes substantial attention to the inferences that NOAA concluded were properly drawn from the base period's re-estimates.

Oregon repeats the latter of these complaints with respect to the prospective estimates concerning the extinction risk metric, arguing that “[t]here is no discussion, for example, of how many populations per ESU (if any) are still believed likely to achieve the BiOp’s survival standards, what weight (again, if any) NOAA assigns to the populations that are not likely to achieve those standards, or any other considerations that allows NOAA to adhere to its prior conclusions for each of the species.” *Id.* at 24. Yet again, Oregon asks this Court to effectively redact from the 2010 BiOp the agency’s detailed discussion of precisely that issue, species by species. 2010 BiOp § 2.1.1.2.2 at 14-17; *see also id.* § 2.1.1.4 at 29-30 (summarizing overall extinction risk conclusions, and addressing the two populations – the Snake River spring/summer Chinook Tucannon population and the East Fork population of the South Fork spring/summer Chinook major population group – whose prospective extinction risk, on the basis of the updated data, “would be likely to change relative to the 5% extinction risk target in the 2008 BiOp”).

B. NOAA’s Technical Analyses And Conclusions Are Entitled To Deference.

The judicial review standards applicable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, are well known to this Court but nevertheless bear iteration given the nature of NWF’s and Oregon’s challenges to NOAA’s technical analyses. As the Court of Appeals explained in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (*en banc*),

[O]ur proper role is simply to ensure that the Forest Service made no “clear error of judgment” that would render its action “arbitrary and capricious.” . . . To do so, we look to the evidence the Forest Service has provided to support its conclusions, along with other materials in the record, to ensure that the Service has not, for instance, “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that

it could not be ascribed to a difference in view or the product of agency expertise.” [¶] This approach respects our law that requires us to defer to an agency's determination in an area involving a “high level of technical expertise.” . . . We are to be “most deferential” when the agency is “making predictions, within its [area of] special expertise, at the frontiers of science.” . . . A number of our sister circuits agree that we are to 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 (citations omitted). Subsequent Ninth Circuit three-judge panels have reiterated the same core principle of deference to agency decision-making generally, but especially as to technical issues within the agency's particular area of expertise. *E.g.*, *League of Wilderness Defenders Blue Mountain Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quoting *Lands Council*, and observing that “[t]his deference is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise”); *Ariz. Cattle Growers' Assn. v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (“[i]n recognition of the agency's technical expertise the court usually defers to the agency's analysis, particularly within its area of competence”); *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009) (“deference is especially warranted when ‘reviewing the agency's technical analysis and judgments, based on an evaluation of complex scientific data within the agency's technical expertise’”); *Trout Unlimited v. Lohn*, 559 F.3d 946, 955 (9th Cir. 2009) (“we defer to the informed exercise of agency discretion, especially where that discretion is exercised in an area where the agency has special ‘technical expertise’”).

The same deference is due agency decision-making even when predicated on incomplete, possibly equivocal information. The Supreme Court thus has recognized that “[i]t is not infrequent that the available data does not settle a regulatory issue and the agency must then

exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion” and counseled that the agency nevertheless may act even “on the basis of serious uncertainties if supported by the record and reasonably explained.” *Motor Vehicles Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). It appears clear, moreover, that judicial caution in second-guessing agency factual determinations and related conclusions is especially important where less than complete data must be assessed. *See Pub. Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986) (“When the evidence can be reasonably interpreted as supporting the need for regulation, we must affirm the agency’s conclusion, despite the fact that the same evidence is susceptible of another interpretation. Our expertise does not lie in technical matters”). The Ninth Circuit has so suggested. *See Lands Council*, 537 F.3d at 988 (court does not “act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty”); *see also Ecology Ctr. v. Castaneda*, 574 F.3d 652, 659 (9th Cir. 2009) (“[t]hough a party may cite studies that support a conclusion different from the one the Forest Service reached, it is not our role to weigh competing scientific analyses”).

NWF’s and Oregon’s challenge to NOAA’s statistical determinations concerning the ICB DPSs and ESUs can be distilled down to the proposition, as stated by the latter, that although “it is only rational to expect some part [of the anticipated improvement] to have manifested itself by now[,] . . . even if NOAA were to suggest otherwise, it would be hard pressed to explain why species status declined over that same period.” Dkt. 1802 at 19-20; *see also* Dkt. 1794 at 22 (“NOAA’s updated analysis of population productivity in the 2010 BiOp . . . reveals that almost

all of the populations with updated analyses have shown survival rate declines even from the original base-period productivity numbers – let alone from the base-to-current upwardly adjusted numbers – for each of the 2008 BiOp’s trending towards recovery metrics”). There are at least three flaws in this criticism, all of which underscore the propriety of deferring to NOAA’s science-based determinations.

First, as developed above, NOAA specifically addressed the effect of the new data, and related base period adjustments, on the base-to-current and prospective estimates set out in the 2008 BiOp for each of its four metrics. The agency further explained why it found those estimates, when qualitatively considered in the absence of the requisite data to replicate the quantitative statistical analysis in the 2008 BiOp, did not support a contrary jeopardy finding. This is not an instance of an agency’s failing to articulate the rationale for its technical determinations with specific reference to available data. *See Lands Council*, 537 F.3d at 994 (agency “must explain the conclusions it has drawn from its chosen methodology, and the reasons why it considers the underlying evidence to be reliable”). Agency actions have been sustained on substantially less than what NOAA generated here. *See e.g., Oregon Trollers Assn. v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir. 2006) (deferral to agency’s technical decision-making appropriate even though the agency did not file the entirety of an earlier administrative record relied upon where the record filed “contain[ed] enough excerpts of that record” to sustain determination).

Second, the assertion that the survival or recovery prospects of the several DPSs and ESUs have declined since the 2008 BiOp issued betrays a fundamental misapprehension of the estimations described by NOAA. The fact that the base-to-current or prospective estimates may not be as favorable as reported in the 2008 BiOp does not mean that the ESA-related status of a

species has deteriorated from their *actual* environmental baseline condition, as determined with reference to the new data, as opposed to the environmental baseline estimated with data available at the time the 2008 BiOp was developed. NOAA, in any event, explained at length why it concluded the additional data did not support a jeopardy finding differing from the 2008 BiOp. NWF and Oregon plainly disagree, but not only are their assertions based on misinterpretations of the administrative record, they once again run headlong into settled principles of deference to agency conclusions concerning novel or otherwise controversial technical matters. *Ranchers Cattleman Action Legal Fund v. USDA*, 415 F.3d 1078, 1094 (9th Cir. 2005) (district court erred in “accepting the scientific judgments of R-CALF’s experts over those of the agency”); *Natl. Assn. of Home Builders v. Norton*, 340 F.3d 835, 843 (9th Cir. 2003) (“[c]ourts defer to agencies ‘[w]hen specialists express conflicting views,’ because ‘an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive’”) (some internal quotation marks omitted).

Third, NWF and Oregon would have this Court draw far too much from far too little. NOAA repeatedly emphasized the limitations on the data with which it had to update base condition estimates and its inability to do anything more than to evaluate, qualitatively, the base-to-current and prospective condition estimates. Even were it assumed *arguendo* that the environmental baseline may be lower than expected for some populations in light of the additional data, that fact would provide no basis to conclude – only two years into the 2008 BiOp’s implementation – that the actions already taken, or that will be taken under the RPA, will not satisfy the “trending towards recovery” objective.² NOAA fully evaluated the new

² It bears noting that the Three States do not concede that the environmental baseline has deteriorated in any appreciable manner. As discussed at length by NOAA in the 2010 BiOp and

information and explained why the RPA is consistent with the required Section 7 jeopardy standard. Its determination, made with reference to partial data for periods of time predating commencement of the 2008 BiOp, requires judicial deference. *E.g.*, *Nw. Coalition for Alternatives to Pesticides v. USEPA*, 544 F.3d 1043, 1060 (9th Cir. 2008) (*Lands Council* precludes a court from “requir[ing] the agency ‘to always demonstrate the reliability of its scientific methodology or the hypotheses underlying the [agency’s] methodology.’ . . . *Lands Council* teaches that our proper role is simply to ensure that the agency, in its expertise, made no clear error of judgment rendering its action arbitrary and capricious”); *Envtl. Def. Ctr., Inc. v. USEPA*, 344 F.3d 832, 869 (9th Cir. 2003) (“[i]n areas implicating technical expertise and judgment, courts do not require ‘perfect stud[ies] or data’”).

II. HABITAT ACTIONS IN THE 2008 BIOLOGICAL OPINION COMPLIED WITH THE ESA, AND THE AMIP AND 2010 SUPPLEMENTAL BIOLOGICAL OPINION CONFIRM THEIR VALUE.

The habitat actions contained in the 2008 BiOp pursued the Court’s directive to evaluate and review valuable off-site habitat measures as a legitimate means to mitigate the impacts of FCRPS operations and avoid jeopardy. In fact, the 2008 BiOp goes beyond its predecessors in commitments to habitat improvement. Furthermore, it contained a far more vigorous mechanism for evaluating habitat benefits to avoid potential reliance on marginal or even counterproductive projects. Nevertheless, NWF continues, as it always has, to denigrate these habitat initiatives and their contribution to the RPA. Imposing artificially high standards for identifying

in Federal Defendants’ response brief, the 2008 BiOp anticipated that certain metrics such as productivity may vary up or down because such variability is a normal part of natural systems, and because of anticipated population dynamics such as density dependence that can produce declines in productivity after there are increases in abundance. Moreover, the very short nature of the two-year data collection window from 2008 to 2010 means that any status trends must be evaluated objectively with caution, not with hyperbole to support some agenda.

meritorious habitat projects and ensuring they are carried out, facilitates the apparent goal of ensuring that, regardless of the true value of habitat improvement, it can never serve to avoid jeopardy, which by design places as much pressure as possible on hydro actions. That tactic contravenes the unequivocal direction from the Court to put all “H’s” on the table in the consultation and review process, and is nothing more than a request that the Court substitute Plaintiffs’ minority opinions for that of NOAA, the Action Agencies, and the greater number of other tribes and sovereigns. By now it is abundantly clear that especially when it comes to identifying and managing habitat improvement, it is not the Plaintiffs who “know best,” but it is the experts in the local areas where the projects will be conducted, and who helped identify them in the first place.

The Three States, along with tribal sovereigns, are integrally involved in the identification of habitat measures, how their benefits are calculated, and are parties to agreements to make sure they happen. Because these sovereigns have such a large role in overseeing the implementation of these projects, they take particular interest in Plaintiffs’ criticism of the weight assigned under the RPA to the habitat measures for survival and recovery analysis purposes.

A. The Habitat Measures In The RPA Were The Product of Close Inter-Sovereign Collaboration, And NOAA’s Weighting Of Those Measures Easily Passes Muster Under Applicable Judicial Review Standards.

The contentions of NWF, Oregon, and the Nez Perce Tribe regarding habitat measures are built on the fundamentally incorrect premise that the 2008 BiOp contained insufficient habitat actions and the 2010 BiOp was obligated to provide more. There is no dispute that the AMIP and 2010 BiOp arose from the Court’s desire to have the Obama Administration review the 2008 BiOp and where possible, to improve it. But it is not fair for NWF to have pressured

the Court and the Administration for that review, and now re-write that history because the new Administration disagrees with NWF's rigidly narrow views. While completely new habitat projects were not created in the 2010 BiOp, it is flatly incorrect to contend that the whole program for identifying and implementing future habitat measures was not improved, and even more off-base to claim that such projects were insufficiently identified in the 2008 BiOp. *E.g.* Dkt. 1794 at 10; Dkt. 1795 at 10; Dkt. 1802 at 29. The habitat argument of NWF and aligned parties is designed to burden the AMIP and 2010 BiOp with standards they were never legally or practically charged with achieving. A fair reading of the 2008 BiOp, however, reveals that the Action Agencies and NOAA have lawfully constructed a mechanism for identifying, evaluating, and implementing habitat measures required by the RPA.

As the Three States noted in addressing virtually this same argument made by NWF against the 2008 BiOp, there was nothing wrong with NOAA's reliance upon implementation of habitat plans that the agencies and sovereigns determined would provide the anticipated benefits that provide for increased survival for fish life stages within the improved habitat. That reliance was based upon the best available information at the time the 2008 BiOp was drafted, with significant input from the States and other sovereigns who have on the ground knowledge of both habitat conditions and the projects slated to improve habitat. 2008 BiOp at 7-45; CA App. C at 1-9, 11, 12; *see also* NOAA A2 at 7-44 ("SCA") ("[t]his approach is thus based on best available information from local field biologists and recovery planners and general empirical relationships between habitat quality and salmonid survival") Dkt. 1559 at 7. The 2010 BiOp then extensively reviewed new habitat condition information. *See* 2010 BiOp § 2.2 at 37-109. Contrary to Plaintiffs' contention that there was no transparency about that process, in the latest review, NOAA candidly identified various potentially negative impacts on salmon or steelhead

presented by that new information. *E.g.*, 2010 BiOp § 2.2.1.3.2.5 at 50 (lower migration survival for juveniles at higher temperatures from climate change, and lower survival for late migrating Columbia sockeye); *id.* at 52 (impacts on estuary habitat); *id.* at 55 (evolutionary responses to climate change). After reviewing the newest science, the 2010 BiOp continued to endorse recommendations by the Independent Scientific Advisory Board (“ISAB”) to, *inter alia*, undertake tributary, estuary and mainstem habitat measures to mitigate these potential impacts. *Id.* at 56-58. This updated information supplements the 2008 BiOp’s treatment of habitat measures, which is based on the estimates of habitat change observed by local recovery planners and technical advisors familiar with the habitat actions implemented in past years. That in turn was considered by the remand Habitat Work Group, and then used by the action agencies as the basis for their quantification of habitat change and survival increase estimates. Dkt. 1559 at 33.

Although the 2008 BiOp squarely addressed habitat status, NWF and the Nez Perce Tribe complain nevertheless that specific habitat projects are inadequately identified, not identified at all, or not confirmed to occur with sufficient certainty. *See* Dkt. 1794 at 5 (“NOAA still has not identified the actual habitat actions to achieve these benefits...”); Dkt. 1795 (“What specific actions, projects, and work did NOAA rely upon to produce the substantial improvements it relies upon to reach its no-jeopardy conclusion?”) The answer to these charges requires nothing more than simply reading the 2008 BiOp, where the allegedly missing projects can be found, in detail. Plaintiffs’ contention that habitat projects are not to be found is rooted in their tactical decision to transform the AMIP and the 2010 BiOp into foils they can use *against* the 2008 BiOp. This tactic ignores the fact that the current RPA includes not only the habitat measures from the 2008 BiOp, but also the additional estuary mitigation, tributary habitat enhancements, acceleration of projects and enhanced RM&E imposed by the AMIP the 2010 BiOp.

The Three States remind the Court, first, that the habitat measures in the 2008 BiOp were developed using an unprecedented collaborative process:

The method to identify the status and potential to improve survival and recovery of listed salmon and steelhead through improvement of tributary habitat conditions is based on an approach developed by the Remand Collaboration Habitat Workgroup (CHW). The CHW convened at the request of the Policy Work Group (PWG), formed as part of the court-ordered remand of NOAA Fisheries' 2004 FCRPS Biological Opinion. The CHW reviewed and updated the method described in Appendix E of the 2004 FCRPS Biological Opinion (NMFS 2004a). The Appendix E method was employed by NOAA Fisheries in 2004 to estimate the potential improvement from habitat mitigation actions. The approach in Appendix E used the best available information at the time to estimate effects of the tributary habitat proposed action for the 2004 FCRPS Biological Opinion. However, additional information has become available from recovery planning and other efforts that have occurred since the 2004 FCRPS Biological Opinion was issued.

Likewise, the means of evaluating the benefit of habitat improvement was always a transparent, step-wise process:

The CHW's approach to estimating habitat benefits relies on the following sequence of steps:

1. Identify the primary factors limiting the recovery of salmon and steelhead populations,
2. Identify the tributary habitat actions (or types of actions) that could be implemented to address those limiting factors,
3. Estimate the current habitat function,
4. Estimate the habitat function that could be obtained by 2018 (within 10 years) by implementing all tributary habitat restoration actions that were identified for implementation by 2018,
5. Estimate the habitat function that could be obtained after 2018 (within 25 years) by implementing all tributary habitat restoration actions that were identified as planned by 2018, and
6. Convert estimated overall habitat functions to survival estimates.

2008 BiOp at 7-43 - 44.

The collaborative process turned to local experts to meet the challenge of balancing the need to apply the best available science with the issue of widely varying local conditions:

This approach is thus based on best available information from local field biologists and recovery planners and general empirical relationships between habitat quality and salmonid survival. Local biologists considered the primary limiting factors identified in recovery planning as well as the tributary habitat actions needed to address those limiting factors. These biologists then estimated the change in habitat function that would accrue if habitat actions were completed as intended. Professional judgment by expert scientists provided a large part of the determination of habitat function in all locations given the limited extent of readily available empirical data and information. Although NOAA Fisheries recognizes that empirical data and information provides the best insight for determining habitat functioning and salmonid survival, the extent of readily-available empirical data was not adequate to make a precise determination of habitat function and salmonid response uniformly throughout the Columbia River Basin. NOAA Fisheries finds that the approach developed, and information gathered, through the CHW and subsequently applied here represents the best available information that consistently can be applied over the larger Columbia Basin to estimate the survival response of salmonids to habitat mitigation actions.

Id. at 44-45.

The habitat measures in the 2008 BiOp were fully briefed previously, and it is not the intention here to merely repeat that argument. Suffice to say that the 2008 BiOp, while identifying the habitat actions that the science supported in the first few years of the BiOp, is no longer a stand-alone document, as a result of the review, confirmation and updating in the AMIP and 2010 BiOp:

The Action Agencies used this method to estimate survival improvement from specific actions completed from 2000 to 2006 and those to be implemented from 2007 to 2009 (see Table 1-6 in Attachment B.2.2-2 to Appendix B of the FCRPS BA [Corps et al. 2007b]). The FCRPS Action Agencies also identified further survival commitments for specific populations which will guide their development of projects to be implemented from 2010-2018. These population-specific survival commitments are identified in CA Appendix C-1, Tables 1-5 (Corps et al. 2007a). Although these future projects have not yet been identified, the resulting estimated survival will be determined during the project selection

process using the same approach as described in Appendix C of the CA. The performance of this habitat mitigation program will be measured against these survival commitments.

Nevertheless, NOAA Fisheries expects that future projects will be selected in a similar method as those identified for 2007 through 2009, as the Action Agencies have committed to implement habitat projects that address population-specific limiting factors to achieve identified population survival commitments. The Action Agencies will implement a habitat restoration strategy which will result in both short and longer-term accrual of survival benefits to focus populations. In NOAA Fisheries' analysis it is assumed that for the duration of the Biological Opinion the Action Agencies will continue to implement a mixture of actions which will result in short and long-term accrual of survival benefits to those populations.

Id. See also 2010 BiOp § 3.3 at 3 (NOAA integrated the 2008 BiOp, the AMIP, and the 2010 BiOp.)

The AMIP and 2010 BiOp added significant value to both the tributary and estuary habitat actions of the 2008 BiOp, contrary to NWF's claims: "The Administration's review of the 2008 BiOp identified several RPA mitigation actions that should be accelerated and enhanced as part of its more precautionary approach to implementation." AMIP at 16. The AMIP also, *inter alia*: (1) incorporated additional estuary habitat actions contained by way of agreement with the State of Washington (*id.*); (2) strengthened the link between habitat improvement data and ongoing Research, Monitoring and Evaluation, and Intensively Monitored Watersheds (*id.* at 11, 22, 24, 25); (3) used new climate change information to inform the selection and prioritization of tributary and estuary habitat projects (*id.*); and (4) incorporated independent scientific review into the selection of tributary and estuary habitat projects. *Id.* at 40.

The legal standard for the Court's review of NOAA's habitat conclusions is no different than the standard applicable to the rest of the biological opinion, *i.e.*, the BiOp meets the

requirements of the APA if “there [is] a rational connection between the facts found in the BO and the choice made to adopt the final RPA.” *San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1155 (E.D. Cal. 2009). In its review the Court “must defer to the special expertise of [NOAA] in drafting RPAs that will sufficiently protect endangered species” in making that determination. *Id.* In the *San Luis* case, the Court found instructive the Services’ Consultation Handbook provisions on development of RPAs:

When a reasonable and prudent alternative consists of multiple activities, it is imperative that the opinion contain a thorough explanation of how each component of the alternative is essential to avoid jeopardy and/or adverse modification. The action agency and the applicant (if any) should be given every opportunity to assist in developing the reasonable and prudent alternatives. Often they are the only ones who can determine if an alternative is within their legal authority and jurisdiction, and if it is economically and technologically feasible.

Id. at 1149, quoting NOAA/FWS Consultation Handbook. (available at http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf.) The Court’s determination whether the development of the RPA was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law must be based on the *entire* administrative record, which is “everything that was before the agency pertaining to the merits of its decision.” *Id.* at 1157. While NWF and its supporters would have the Court read each document in isolation, the administrative record in this case now includes the information produced in connection with the 2008 BiOp, the AMIP and the 2010 BiOp. Even a cursory review of the voluminous record pertaining to habitat measures shows that NOAA not only met the APA standard and complied with the direction of the Consultation Handbook, it exceeded both the Handbook and legal standards by orders of magnitude. After all, the ESA “require[s] only that [NOAA] evaluate ‘the current status of the listed species or critical habitat,’ ‘the effects of the action,’ and the ‘cumulative effects on the listed species or critical habitat.’” *Butte Env’l Council*

v. *USACE*, 620 F.3d 936, 948 (9th Cir. 2010) (rejecting claim that the biological opinion should have addressed the rate of loss of critical habitat). To find otherwise would require the Court to override the reasoned judgment represented by all the expertise brought to bear by the sovereigns in identifying the local projects and determining their benefits, which is the hallmark of the habitat actions in these FCRPS documents.

B. The RPA, Together With The Administrative Record Supporting It, Contains More Than Sufficient Certainty And Specificity Regarding Habitat Actions.

NWF and the Nez Perce Tribe continue to misconstrue the purpose and effect of the AMIP and 2010 BiOp in their attack on the specificity of tributary and estuary habitat measures. Put bluntly, their claims about habitat leave one wondering whether they are reading the same administrative record the government has produced in support of both the 2008 BiOp and the 2010 BiOp. For example, NWF argues that habitat measures have not been specifically identified (Dkt. 1794 at 5); that they have not been adequately evaluated (*id.* at 9-10); and that they are not reasonably certain to occur. *Id.* at 11-12. In sum, NWF reduces the monumental effort made by NOAA (along with the Action Agencies and the sovereigns) in developing habitat actions as an attempt to “monitor its way out of habitat difficulties.” Dkt. 1794 at 10. These claims completely ignore both the many specific habitat projects set forth in the 2008 BiOp, and the commitments made in the AMIP and 2010 BiOp to identify and fund additional projects that, after all, are required to meet the ultimate goal of avoiding jeopardy.

Nor is it accurate to contend that there is a weak, if not non-existent, link between the projects identified and the benefits to be realized. First, the 2008 BiOp, NOAA qualitatively analyzed the habitat actions and found significant benefits in some instances. SCA at 11-3, 11-8. Specific projects were created with specific habitat improvement goals in mind:

The Action Agencies will provide funding and technical assistance *necessary to implement the specific projects identified for implementation in 2007 to 2009 (FCRPS BA, Attachment B.2.2-2, Tables 1-5a) as part of a tributary habitat program to achieve the population-specific overall habitat quality improvement identified in Table 5.*

If projects identified for implementation in 2007-2009 prove infeasible, in whole or in part, the Action Agencies will implement comparable replacement projects in 2010-2013 to maintain estimated habitat quality improvements to achieve equivalent survival commitments at the population level, or alternatively at the major population group (MPG) or ESU level. Habitat and population-specific survival benefits in each implementation plan cycle must also compensate for not meeting estimated benefits in the previous implementation plan cycle. Replacement project selection will follow Action 35 below.

2008 BiOp at RPA 35 (emphasis added). As part of the extensive collaborative process with which the Court is quite familiar (including most notably local and regional experts provided by the sovereigns), each specific habitat improvement project was analyzed qualitatively to determine the extent of benefit, if any. *See* 2008 BiOp at Table 5. Each project targeted a particular ESU. *Id.*

Similar habitat analyses provisions were undertaken for estuary projects, as were corresponding mandatory funding commitments. *See* 2008 BiOp, at RPA 36 and 37. Lastly, an additional RPA was included to require a piling and dike removal program. *Id.* at RPA 38. No one can reasonably contend that these habitat measures were created, evaluated, or implemented other than in a completely transparent process – a conclusion that is obvious from the voluminous administrative record created in the collaboration by the technical working groups, if not from the plain language of the 2008 BiOp, as strengthened by the AMIP and 2010 BiOp.

To further minimize the efficacy of the habitat measures, NWF dismisses the Fish Accords, to the extent it addresses them at all. The Fish Accords represent major additional habitat commitments that are, of course, readily found in the administrative record for the 2008 BiOp. *See* Corps 00372 (Treaty Tribe Memorandum of Agreement (“MOA”)); 00380 (Montana

MOA); 00404 (Idaho MOA); 00397 (Colville MOA); *see also* the corresponding Records of Decision (Corps 00026 (Corps ROD); 00013 (BPA ROD); BOR 00005 (BOR ROD)) (discussing the value of the Fish Accords in avoiding jeopardy). The primary focus of all the Fish Accords is on habitat, including commitments by the Accords' parties (almost all of the Columbia Basin's sovereigns) to implement projects to improve spawning and rearing conditions, *targeted to specific populations*. Corps 00403 at 8. Despite Plaintiffs' disregard for the benefits derived from the Fish Accords, the fundamental basis for the habitat measures including in the Accords was the tributary habitat methodology developed in the lengthy collaboration, discussed above and in previous filings.

Relying on legally impermissible declarations filed by NWF for the purpose of "explaining the errors and omissions in the 2008 BiOp" (Dkt. 1794 at 9, fn 12), NWF devotes several pages of its brief savaging NOAA's analysis of specific habitat projects and their possible benefits, while simultaneously claiming that the projects are "unidentified." *Id. at passim*. Similarly, the Nez Perce Tribe suggests that the reliance on habitat projects here is no different from the legally unsuccessful 2000 BiOp. Dkt. 1795 at 14, *citing NWF v. NMFS*, 254 F. Supp. 2d at 1205-1216. These claims severely miss the mark. First, they depend once again on reading each operative document (2008 BiOp, AMIP, and 2010 BiOp) and their corresponding administrative records in isolation from the other. That tactic, for example, facilitates the inaccurate claim that the RPA relies on projects that NOAA is "refusing to identify," (Dkt. 1795 at 12), even though the 2008 BiOp explicitly incorporates, for the first two years, a long list of projects contained in the Biological Assessment upon which the 2008 BiOp is based. *See* BA, Attachment B.2.2-2, Tables 1-5a; Dkt. 1559 at 55. Secondly, unlike the 2000 BiOp, all habitat measures have either already undergone Section 7 consultation as part of the

remand, or will be identified, evaluated and carried out in conformance with the RPA and the vigorous adaptive management regime set up by the 2008 BiOp, AMIP, and 2010 BiOp. Thirdly, it is not legally remarkable, much less improper, for the government to rely on off-site habitat measures for a habitat RPA. In *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), the Court approved reliance on a conservation agreement that contained no funding commitment, in contrast to the Fish Accords here. In that case, the Court found it appropriate to rely on a proposed mitigation action if “the Agreement imposes enforceable obligations on the parties, to assure that the proposed mitigation measures will actually be implemented.” *Id.* at 956.

Reviewing one of the Fish Accords discloses the specificity, commitment, enforceability, and certainty that NWF, *et al.* claim are absent. For example, the Agreement between the FCRPS Action Agencies and the Three Treaty Tribes describes the ground-up approach to identifying habitat projects:

- BPA and the Tribes seek to provide certainty and stability regarding BPA commitments to implement fish and wildlife mitigation activities in partnership with the Tribes, including additional and expanded actions which further address the needs of ESA-listed anadromous fish.
- Projects funded under this Agreement are linked to biological benefits based on limiting factors for ESA-listed fish. See Attachment G.
- Projects funded under this Agreement are consistent with recovery plans and subbasin plans now included in the Columbia Basin Fish and Wildlife Program. More specific linkages will be documented as a function of the BPA contracting process.
- Projects may be modified by mutual agreement over time based on biological priorities, feasibility, science review comments, or accountability for results.

CCC0004 at 10. The Fish Accords describe the types of projects that will be funded and the amount of such funding:

BPA is committing to funding a suite of projects and activities that is summarized in Attachment B, with a total average annual funding commitment of \$51.61 million/year for non-hatchery expense projects, plus additional commitments for existing, expanded and new hatchery operations and maintenance expenses as summarized in Attachment B. The projects or actions are categorized as follows:

- Ongoing actions (currently or recently implemented through the Columbia Basin Fish and Wildlife Program), which can be found in Attachment B. The actions include actions addressing ESA-listed salmon and steelhead (“ESA actions”) as well as non-listed species.
- Expanded actions in support of FCRPS BiOp and Program implementation, which can be found in Attachment B.
- New actions benefiting ESA-listed and non-listed species, which can be found in Attachment B. The same projects in the three categories above can also be categorized or sorted with a “Category” system that allows for particular reference to ESA/BiOp or NWPA implementation as follows:
- Category 1 and Category 2c ongoing – Ongoing actions (currently or recently implemented through the Columbia Basin Fish and Wildlife Program). These actions address ESA-listed salmon and steelhead (“ESA actions”) as well as non-listed species.

The total average annual budget commitment for this category of work is \$17.09 million per year, as summarized in Attachment B.

Id.

It is true that when the 2008 BiOp issued, habitat projects beyond 2009 were not developed to the degree of including work contracts. However, the RPA mandates implementation of future projects, tied to performance standards and developed using the requisite enhanced RM&E, to provide reasonable assurance that objectives will be met. Furthermore, the Fish Accords, which are contracts themselves, set budget earmarks for habitat projects over the ten-year life of the 2008 BiOp. *E.g.*, 2008 BiOp: Corps 00403 at 007802; Corps 00372 at 005393-005395. Thus, the Fish Accords do in fact provide financial certainty that implementation will be achieved. Furthermore, the Court should not simply assume that funding will not occur, which NWF implicitly at least suggests. *See, e.g., Sw. Ctr. for Biological*

Diversity, 143 F.3d at 524 (finding that because there was “no indication that Reclamation cannot acquire and restore the needed replacement habitat as specified in the final RPA by the required deadlines,” it was not arbitrary to adopt the final RPA even though the mitigation parcels were not presently known).

NWF correctly cites (Dkt. 1794 at 10-11) *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Ariz. 2002) for the proposition that habitat mitigation projects “must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Id.* at 1152. Looking at the entire administrative record in this case, not just portions of the AMIP and the 2010 BiOp, discloses that the habitat actions meet and exceed the standards described in the *Rumsfeld* case. The habitat actions, *inter alia*:

- Target the limiting factors for each ESU and therefore the impacts that may jeopardize them. 2008 BiOp at 7-44 (“Local biologists considered the primary limiting factors identified in recovery planning as well as the tributary habitat actions needed to address those limiting factors.”)
- Were, and continue to be, developed by the parties who have the expertise to identify the benefit to be derived from addressing those factors. *Id.* (“These biologists then estimated the change in habitat function that would accrue if habitat actions were completed as intended.”)
- Are subject to funding commitments in either the 2008 BiOp or the contractual obligations represented by the Fish Accords. 2008 BiOp at RPA 35 (“The Action

Agencies will provide funding and technical assistance necessary to implement the specific projects identified...”); *see also* CCC0004 at 10 (Treaty Tribes Fish Accords) (“BPA is committing to funding a suite of projects and activities”)

- Are identified and evaluated using the best science that has been available, or will become available over the life of the ten-year BiOp. *E.g.*, AMIP at 16 (“The Administration’s review of the 2008 BiOp identified several RPA mitigation actions that should be accelerated and enhanced as part of its more precautionary approach to implementation.”); *see also* 2010 BiOp §2.2, et seq. (evaluating the impact of climate change and ocean conditions on habitat).

To require more would mandate that which the law does not require. It is not “appropriate for a court to ‘create a requirement not found in any relevant statute or regulation.’” *San Luis & Delta-Mendota Water Auth.*, 666 F. Supp. 2d at 1158. While the ESA and APA require that “there must be a rational reason to expect [mitigation measures] to work as intended, and while they must in fact be possible to implement, there is no requirement for [NOAA] to ensure the overall success of the plan.” *In Re Operation of the Mo. River Sys. Litigation*, 421 F.3d 618, 635 (8th Cir. 2005), citing *Sw. Ctr. for Biological Diversity*, 143 F.3d at 523-24. NWF tepidly suggests that habitat restoration is “generally a good idea” (Dkt. 1794 at 9), but does not allow the FCRPS habitat actions sufficient time to demonstrate their benefit. Further, because NWF would require that all habitat projects be identified at the beginning of a ten-year BiOp, it would remove all discretion from the habitat experts to identify the most beneficial projects using the latest scientific information. That attack, coming merely two years into the 2008 BiOp, is a rush to judgment inconsistent with both sound science and federal law governing the Court’s review of these actions.

III. NOAA FISHERIES UTILIZED ADAPTIVE MANAGEMENT IN A MANNER CONSISTENT WITH ITS GUIDANCE DOCUMENTS AND WITH CASE LAW RECOGNIZING THE UTILITY OF ADAPTIVE MANAGEMENT.

The Three States' opening brief in opposition to Plaintiff's motion for summary judgment and in support of their cross-motion for summary judgment detailed the reasons why the 2008 BiOp's use of adaptive management principles to identify out-year habitat projects is consistent with the requirements of the ESA. Dkt. 1557 at 30-32. The 2008 BiOp utilizes specific forms of habitat mitigation that address limiting factors for ESUs, with specific targets to implement, that will be translated into specific projects based upon the needs of listed fish within constrained ESUs. These projects will be developed taking into account all of the information on habitat mitigation viability and utility that is gathered as part of the BiOp's research monitoring and evaluation (RM&E) prescriptions as part of the regional collaboration produced by this litigation.

This adaptive management approach includes a menu of identifiable project types, is connected to required performance objectives related to the survival and recovery of listed fish, has funding commitments, and includes RM&E feedback loops to evaluate progress and provide for course corrections if progress is not being made. Accordingly, the adaptive management approach utilized by NOAA in the 2008 BiOp is consistent with the legal and scientific parameters for any sound biological opinion. *See, e.g., Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007) (“NRDC”) (“mitigation measures must incorporate *some* definite and certain requirements that ensure needed mitigation measures will be implemented”).

The 2010 BiOp continues to employ adaptive management - combining the RPA of the 2008 BiOp with the accelerated actions, enhancements and ramped up RM&E developed in the 2009 AMIP together with further amendments and enhancements developed during the voluntary

remand effort (as described in Section 3.2 of the 2010 BiOp). NWF and Oregon argue that the 2010 BiOp represents a retreat from the 2008 BiOp and a failure to faithfully employ adaptive management. While we appreciate their implicit acknowledgement, finally, that adaptive management is an appropriate technique consistent with ESA requirements (*see e.g.* Dkt. 1802 at 4), their criticisms of its use within the 2010 BiOp show no real willingness to embrace this important tool.

A. Performance Measures, Implementation Plans, Monitoring For Effectiveness And A Commitment To Achieving Mitigation Objectives Are Manifest Throughout The 2010 BiOp.

NWF argues that NOAA's use of adaptive management fails to incorporate the structural components called for in the agency's own white paper on that subject. Dkt. 1794 at 27-29. The record does not support NWF's argument. To the extent that adaptive management is relied upon in the 2008 BiOp, it is utilized with specific reference to the structural components referenced in NOAA's 2007 white paper and the framework suggested in *NRDC*, 506 F. Supp. 2d at 355 – “some form of measurable goals, action measures, and a certain implementation schedule.” There are population specific targets for habitat improvements (2008 BiOp - RPA 35, Table 5), a process for selecting and reviewing projects that will be implemented to ensure that the projects are designed to provide the benefits needed (2008 AR B.89; 2008 BiOp at RPA 35, Table 5), together with a detailed RM&E process to evaluate progress, learn from successes and failures, and implement corrective action (*id.*).

The AMIP that was amended and combined with the 2008 BiOp to produce the 2010 BiOp continues in this same vein. First, in response to this Court's inquiries, the AMIP adds additional mitigation projects within the Columbia River Estuary (AMIP, Appendix 3, Attachment 1) with specific funding for those projects. The AMIP also accelerates and enhances

pre-existing mitigation commitments made in the 2008 RPAs. AMIP, Appendix 1. Second, consistent with the ESA-focused adaptive management framework of the 2008 BiOp, the AMIP relies upon performance standards and specific targets (AMIP – Appendix 2, § 2.1.2 - table 2-2) together with periodic action implementation plans in 2009, 2012 and 2015 that utilize annual progress reports and comprehensive evaluations to gauge the progress being made and adjust the development of specific projects in out-years. AMIP – Appendix 2, § 2.1.3. Overall, the effect of the amended AMIP is to enhance and accelerate the mitigation measures found in the 2008 BiOp with additional emphasis on RM&E to ensure that the best available science is utilized and to provide additional reasonable assurances that the desired mitigation outcomes are actually produced.

Stripped of its rhetoric, NWF's core complaint is that NOAA's adaptive management approach focuses on a single performance target – juvenile fish passage. While this is a bit ironic given the almost universal focus by all parties (including NWF) on juvenile survival as a key component of salmon recovery in the Columbia Basin, the argument ultimately has no merit because it is both inaccurate and legally insufficient.

NOAA's use of adaptive management utilizes both specific performance standards by which the FCRPS actions are held accountable, and performance targets that are the survival improvements identified in the lifecycle modeling. AMIP – Appendix 2, pg. 5. The overarching performance standards are grounded in fish survival metrics, and are specific to *both* adult and juvenile survival through the hydro system. NWF may have ignored the use of adult survival as a specific adaptive management metric target because those objectives have largely been met or exceeded due to prior actions, but they remain an important objective criteria against which continued FCRPS operations and mitigation actions must be gauged. And, as NWF must

concede, NOAA's adaptive management clearly employs specific juvenile survival standards. AMIP – Appendix 2, Attachment B.2.6-2 to the SCA. Long-term performance standards related to the survival improvements inherent in the lifecycle modeling are also utilized to assess whether expected progress is being made. This combination of targets and standards also informs the performance expectations that are associated with the suite of habitat, hatchery, and predation control mitigation measures. *E.g.*, AMIP – Appendix 2, §2.1.2.4.

Aside from providing an inaccurate assessment of NOAA's use of adaptive management, NWF's critique is also legally insufficient. They claim that NOAA should have adopted a performance standard that measures "population specific productivity" and/or provided "a specific survival standard for habitat actions for a particular species in a particular tributary." Dkt. 1794 at 28. As was the case with their arguments about the appropriate jeopardy framework, NWF's argument here is that they have a better standard, yet with no explanation of why their preferred approach is required by law.

When developing mitigation options for an RPA, NOAA's legal obligation is to ensure that a meaningful "no jeopardy" call can be made considering the suite of RPA measures it proposes. Consistent with the legally required jeopardy analysis, this means NOAA must be able to assess whether RPA implementation is achieving its biological goals. The specific recovery targets NWF identified as part of its preferred jeopardy analysis, and that it now wishes to impose here as well, are not a legally mandated metric for the Section 7(a)(2) analysis. *See e.g. Butte Env'l Council*, 607 F.3d at 582-83 (rejecting an argument that a biological opinion must calculate a rate of loss of critical habitat in order to be legally sufficient analysis because neither the ESA nor its implementing regulations require such an analysis); *In re Delta Smelt Consolidated Cases*, Nos. 1:090-cv-00407 OWW DLB *et al.*, slip op. at 170-73, (E.D. Cal. Dec.

14, 2010) (rejecting an argument that specific recovery thresholds must be set in order to provide a legally sufficient jeopardy analysis). What is legally required is some meaningful basis for evaluating jeopardy and the development of RPAs that address the jeopardy concern with some reasonable certainty. Adaptive management is an appropriate tool for developing RPAs, particularly for out-year mitigation measures, if it has “some form of measurable goals, action measures, and a certain implementation schedule.” *NRDC*, 506 F. Supp. 2d at 355. There is nothing irrational or unlawful for NOAA to utilize adult and juvenile hydro system survival as a performance standard when evaluating whether the complex suite of RPA measures is producing the intended survival and recovery objectives.

B. Oregon’s Critique Of The 2010 BiOp Conflates NOAA’s Use Of Adaptive Management With The Separate Safety Triggers Provided In The Amended AMIP.

Oregon’s criticism of NOAA’s use of adaptive management generally mirrors the untenable arguments made by NWF, but adds the claim that “now NOAA openly relies on the AMIP’s triggers to avoid jeopardy.” Dkt. 1802 at 9. But, as discussed in the previous section, this ignores the substantial detail and discussion in both the 2008 BiOp and the AMIP outlining the numerous RPA measures that form the basis for specific mitigation commitments that are designed to produce survival and recovery benefits to listed fish and which will be designed, implemented and evaluated to ensure that specific performance targets and standards are being attained. More fundamentally, this additional critique simply conflates two very separate components of the AMIP – the component that accelerates and enhances pre-existing mitigation commitments developed and implemented via adaptive management using enhanced RM&E (AMIP at 26 to 39) and the separate component that provides additional contingency plans with specific triggers (AMIP at 26 to 39). The “Early Warning Indicator” and the “Significant

Decline Trigger” are not specifically designed to address the jeopardy determination. Instead, they represent an additional layer of precautionary monitoring above and beyond the RPAs that are implemented via adaptive management. *See also* Dkt. 1733 at 6-8. NOAA’s development of an additional contingency plan does nothing to diminish the mitigation commitments made in the 2008 RPA. Similarly, those contingency plans do nothing to diminish the mitigation enhancements made in the 2009 AMIP, including the ramped up RM&E that will be utilized to guide the development and implementation of the 2010 BiOp’s overall mitigation package.

Finally, Oregon argues that the 2010 BiOp represents a retreat, not progress, from the 2008 BiOp. This is simply nonsensical because the 2010 BiOp is really an accumulation of both the 2008 BiOp as originally crafted, together with the 2009 AMIP with amendments. Rather than retreating from the 2008 BiOp, the 2010 BiOp adds more mitigation measures, accelerates mitigation measures, and provides additional RM&E to increase the assurances that mitigation objectives will be met and jeopardy avoided.

In this case, NOAA has hitched a suite of mitigation options to meaningful performance targets and standards, driven by periodic implementation plans that are required throughout the span of the BiOp, guided by a detailed and robust RM&E process, and fueled with specific funding commitments. Nothing more is required.

III. CONCLUSION

For the reasons set forth in this brief, and the opening brief filed by the Three States in support of their 2008 cross-motion for summary judgment, the Three States’ cross-motion for summary judgment should be granted, and Plaintiffs’ and Oregon’s motions for summary judgment should be denied.

DATED: December 23, 2010

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and Fed. R. Civ. P. 5(d), I certify that on December 23, 2010, 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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