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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 THE FEDERAL GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Due in no small part to this Court's oversight, the 2008 Biological Opinion as recently supplemented by the 2010 Biological Opinion (hereafter "BiOp") represents a historic milestone in the federal government's efforts to ensure that the Federal Columbia River Power System ("FCRPS") continues to operate in a manner that does not jeopardize the continued existence of listed salmonids, or result in the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2) (ESA section 7(a)(2)). No other biological opinion has committed the staggering amount of ratepayer funds allocated through this BiOp to habitat, hatchery, and operational mitigation. No other biological opinion has so thoroughly employed the collective scientific expertise of the regional sovereign salmon managers in studying the effects of the federal action, to deriving its Reasonable and Prudent Alternative ("RPA"), and to overseeing the successful implementation of the scientifically robust adaptive management plan contained therein. Finally, no other biological opinion has gone so far beyond the requirements of ESA section 7(a)(2) (as this one has) and in so doing, directly paved the way forward toward successful recovery.

For these reasons, and those submitted by the federal defendants[1] and the three states,[2] Northwest RiverPartners ("RiverPartners") urges this Court to uphold the BiOp and to deny the Supplemental Motions for Summary Judgment filed by Plaintiffs National Wildlife Federation, et al. ("NWF"), the State of Oregon, and the Nez Perce Tribe (collectively "Plaintiffs").

[1] Northwest RiverPartners endorses and incorporates the cross-motion and opposition briefs of the federal defendants.

[2] Montana, Washington, and Idaho.

Rather than repeating the arguments made by others, RiverPartners writes separately (and briefly) to address three discrete issues. First, RiverPartners addresses the appropriate statutory standard under ESA section 7(a)(2) for evaluating a biological opinion. As with their prior briefing, Plaintiffs continue to advocate a jeopardy standard that is contrary to the statute, unworkable, and impossible to satisfy. Second, RiverPartners responds to the Nez Perce Tribe's arguments that more must be done with respect to dam breaching. The federal defendants have already done more than the ESA requires by developing such fail-safe contingency plans, and by doing all that the Court has asked. Finally, RiverPartners responds to NWF's ill-conceived climate change arguments. Disregarding the fact that the FCRPS produces 8,800 average megawatts of *carbon-free* (and thus greenhouse-gas-neutral) power annually, Plaintiffs seek to turn the science of climate change on its head by elevating this global phenomenon as the cause célèbre for drastically diminishing the region's largest carbon-free and renewable power source.

II. BACKGROUND AND LITIGATION CONTEXT

In resolving the current slew of pending summary judgment motions and opposition briefs, the Court should not overlook the tremendous advances in salmon mitigation, enhancement, and recovery actions that have occurred since this litigation began. The long-term declines in salmon populations that led to the listing under the ESA in the early 1990s occurred because of a broad range of anthropogenic factors, including over-harvest, habitat modification, and hatchery practices – not just hydropower. In addition to these anthropogenic factors, climatic, natural factors, such as those that influence ocean conditions, have had a confounding impact on the status of the listed species. While the FCRPS does not stand alone in causing impacts to listed salmon, it now clearly leads the way toward recovery by funding projects to protect, enhance, and recover ESA-listed salmonids. Indeed, the FCRPS is now by far the single

largest source of such funding, committing more than a billion dollars specifically to salmon habitat and hatchery related projects over the 10-year period of the BiOp, in addition to operational changes that will cost ratepayers multiple billions during the same time period.

Perhaps even more importantly, as a result of the decisions of this Court, these efforts to restore salmon are occurring as part of a dynamic and collaborative process. Due to this Court's efforts, NOAA produced the BiOp through the collaborative efforts of the federal agencies, states, and tribes, leading to the development of a strong regional partnership as embodied in the state and tribal fish accords. This regional partnership is now fully engaged in implementing the BiOp in an adaptive and iterative manner, on the basis of a robust, and one-of-a-kind monitoring and evaluation program.

The Court can also take great comfort in the fact that the BiOp is the product of a recently conducted peer-review process, directed by Dr. Jane Lubchenco – a nationally renowned marine scientist from Oregon State University – who has devoted her career to studying and advising administration policy on climate change, and in protecting the Pacific Northwest marine ecosystem. Dr. Lubchenco was appointed by President Obama to take personal ownership of, and to undertake a rigorous new look at, the science and the legal and technical assumptions underpinning the 2008 BiOp. As the newly appointed Administrator of NOAA, and the Undersecretary of Commerce for Oceans and Atmosphere, Dr. Lubchenco has a mandate to protect the region's listed salmonids through the FCRPS ESA section 7(a)(2) consultation process. The 2008/2010 BiOp is now not only strongly endorsed by Dr. Lubchenco, it is the direct product of her rigorous analytical oversight.

Yet Plaintiffs are not satisfied, and will not be, unless the lower Snake River dams are de-commissioned. However, as this Court keenly knows, that option is not within the authority of

NOAA or the action agencies and such relief is beyond the purview of any court. Based on the unprecedented regional effort put forward to date, the government's satisfaction of its legal requirements, and the massive financial commitment of the federal agencies as paid for by the region's ratepayers, nothing more is required at this time for this Court to endorse the BiOp. To ensure salmon restoration efforts move forward in the Columbia Basin, this Court should end the litigation, and affirm the BiOp, so that the region can both focus and redouble its efforts in carrying out this historic and ambitious plan.

III. ARGUMENT

A. The 2010 BiOp Adequately Insures That Jeopardy Is Not "Likely."

As with their prior briefing, Plaintiffs continue to argue for an unachievable jeopardy standard that is not grounded in the applicable law. Although Plaintiffs' various briefs focus on different parts of NOAA's 2010 BiOp, Plaintiffs uniformly contend that NOAA has not done enough to *guarantee* that the operation of the FCRPS will avoid jeopardy and result in recovery. Principally, Plaintiffs attack NOAA's projections of anticipated benefits for various mitigation projects, claiming that these survival improvements are just "unsupported predictions," and that there is no basis to conclude that these anticipated benefits "can be made reasonably certain to occur." NWF's Br. at 4, 11; *see also* Oregon Br. at 2 (NOAA has "not demonstrated that the survival benefits it attributed to the BiOp's mitigation measures were reasonably certain to occur"). Based on this alleged failure to *guarantee* against jeopardy, Plaintiffs insist the agencies have violated section 7(a)(2) of the ESA.

The fundamental flaw in all of these arguments is that they drastically depart from what the statute actually requires. Section 7(a)(2) requires that federal agencies "insure that any action authorized, funded, or carried out by such agency . . . *is not likely to* jeopardize the continued

existence of any endangered or threatened species." 16 U.S.C. § 1536(a)(2) (emphasis added). As demonstrated more fully below, Congress' decision to infuse the phrase "not likely" into the statute reflects a commonsense approach to the consultation process. Indeed, the plain language of the statute requires NOAA to rely on its expertise and sound judgment in forming a reasoned prediction about the effects of a proposed action; it does not require absolute certainty.

The phrase "not likely" is critical to understanding an agency's consultation obligations. That phrase was specifically inserted into ESA section 7(a)(2) in 1979. Before that time, ESA section 7(a) required federal agencies to "insure that any action authorized, funded, or carried out by [that] agency . . . does not jeopardize the continued existence of any endangered species." Pub. L. No. 95-632, 92 Stat. 3751, 3752 (1978) (emphasis added). But in 1979, Congress removed the "does not" language and replaced it with "is not likely to." Pub. L. No. 96-159, 93 Stat. 1225, 1226 (1979). In so doing, Congress turned a hard and fast rule – "does not" – into one that necessarily involves agency expertise and judgment as to the probability of certain events occurring or not occurring. In other words, section 7(a)(2) does not require agencies to guarantee that jeopardy will not occur.

The legislative history of section 7(a)(2) confirms this plain reading of the statute. As explained by one of the bill sponsors, the "does not" language was an "unrealistic and unachievable standard." S. Comm. on Env't and Public Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, at 1373 (1982) ("*ESA History*")[3] (reprinting Oct. 24, 1979 Congressional Record coverage of House Consideration and Passage of H.R. 2218) (statement of Rep. Forsythe). Indeed, "[n]o

[3] *Available at* http://training.fws.gov/EC/Resources/Advanced_Sec_7/ESA_Section_7_Legislative_History/Part_5_pages_1358-1387.pdf.

agency can or should be expected to give a 100-percent guarantee of no adverse impact." *Id*. at 1368 (statement of Rep. Breaux). For that reason, Congress substituted the "not likely" language to reflect a "commonsense" approach to consultations to ensure that "agencies consider the probability or likelihood of jeopardizing a listed species in deciding whether to go ahead with a particular action." *Id*. at 1367. As one of the bill sponsors explained, "[t]o require more would . . . be asking the impossible." *Id*. at 1368. Thus both the plain language of the statute and its legislative history demonstrate that section 7(a)(2) requires a prediction by the agency based on that agency's informed judgment.

It is equally clear that the 2010 BiOp's reasoned predictions are entitled to deference by this Court. As explained in RiverPartners' prior briefing, predictions about mitigation benefits from the RPA are *factual determinations* involving complex scientific determinations within NOAA's special expertise. *See* Dkt 1643 at 19. For these kinds of determinations, Courts must be at their *most* deferential. *See Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008). Any other standard of review would improperly force the Court to act "as a panel of scientists that instructs the [agency] how to validate its hypotheses regarding wildlife viability." *Id.* at 988. Rather than delving into an area well beyond its expertise, the Court's more limited role is to review the agency's decision against the underlying administrative record to see if the agency's path can be reasonably discerned. *Nw. Coal. for Alternatives to Pesticides v. U.S. EPA*, 544 F.3d 1043, 1048 (9th Cir. 2008); *see also Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) ("the ESA accepts agency decisions in the face of uncertainty" and does not require agency to "justify its decision with absolute confidence"). If the path is reasoned, courts must defer to congressionally delegated agency expertise.

The District of Columbia Circuit Court of Appeals applied this commonsense probability approach in *Oceana, Inc. v. Gutierrez*, 488 F.3d 1020 (D.C. Cir. 2007). The plaintiffs in *Oceana* challenged a biological opinion for a fishery management plan that addressed the incidental catch of listed sea turtles. The RPA for that biological opinion led to a no-jeopardy opinion by (1) relying on a "comprehensive outreach program" to educate fishermen on how to use required mitigation gear and minimize release injuries; (2) increasing observer coverage for monitoring; and (3) providing triggers, based on annual data collection, that prompted immediate corrective action. *Id*. at 1023-24. Based on that RPA, the NOAA predicted a 13.1 percent mortality rate and concluded that jeopardy would not likely occur. *Id*. at 1024.

Plaintiffs in *Oceana* – much as here – attacked those predictions, citing contrary data showing that the mortality would actually be much closer to 31.9 percent. The court easily rejected those arguments, explaining that agencies "make predictive judgments like this all the time." *Id*. at 1025. These predictive judgments rest "on the agency's evaluation of past performance and its expert judgment about how the measures it implemented will operate in the future." *Id*. If those predictions turn out to be incorrect, "adjustments must be made," but the court will uphold an agency's judgment if it "is within the bounds of reason." *Id*. Although there was no "guarantee" that the predictions made by the agency were correct, the plaintiff similarly "cannot know that the RPA will fail." *Id*. Moreover, the court explained that the RPA contained a "backstop" through "ongoing monitoring, and adjustment in the event that anticipated take and mortality levels are not met." *Id.* Based on these factors, the court upheld the biological opinion as within the bounds of reason.

This Court should affirm the 2010 BiOp for the reasons cited by the court in *Oceana*. The RPA for the 2010 BiOp makes reasoned predictions about survival and recovery benefits

that will accrue under the 2010 RPA. *See* BiOp, Section 2. As in *Oceana*, those predictions were based on NOAA's "evaluation of past performance and its expert judgment about how the measures it implemented will operate in the future." *Oceana,* 488 F.3d at 1025; BiOp, Section 4. The RPA further insures that those benefits will accrue, through an intensive program of monitoring, evaluation, and adaptive management. *See* BiOp, Section 3. And finally, as in *Oceana*, the BiOp provides a "backstop" through research, monitoring, and evaluation and a robust adaptive management plan to ensure the agencies' predictions are correct. *See* 2008 BiOp RPA Actions 50-73; Adaptive Management and Implementation Plan ("AMIP") at 26-42. These measures collectively insure that jeopardy is not likely to result from the continued operation of the FCRPS.

For these same reasons, Plaintiffs' attacks on the certainty of these predictions necessarily fail as a matter of law. NOAA is not required to guarantee that these survival improvements will actually occur. It is enough that its judgment is "reasoned." *Oceana*, 488 F.3d at 1024. Indeed, to require more would be asking the "impossible" based on an "unrealistic and unachievable standard." *See ESA History* at 1373, 1378.

Similarly, Plaintiffs efforts' to subject NOAA's survival predictions to a more stringent "reasonably certain to occur" standard also fail as a matter of law. As explained above, predictions about the benefits of an RPA are scrutinized only to see if they are "within the bounds of reason," not to ensure that they are reasonably certain to occur. *Oceana*, 488 F.3d at 1025; *see also Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1093 (D. Ariz. 2005) (rejecting argument that jeopardy prediction must be reasonably certain to occur in favor of "not likely" standard, which is "intended to give the agencies the ability to weigh the probability of a

proposed action resulting in jeopardy"); 51 Fed. Reg. 19,926, 19,933 (June 3, 1986) ("'reasonably certain to occur' does not mean that there is a guarantee that an action will occur").

In short, the ESA contemplates that NOAA will use its expert judgment in making reasoned predictions about the benefits of an RPA and whether or not jeopardy is "likely" to occur. Accordingly, Plaintiffs' efforts to require a higher level of certainty necessarily fail.

B. The BiOp Sufficiently Addresses Dam Breaching As A Contingency.

Plaintiffs fault the BiOp for not going far enough in devising a plan to carry out dam breaching. Yet as the Nez Perce and their compatriots surely realize, dam breaching is not now and can never be put forward as an RPA within the meaning of 50 C.F.R. § 402.14(h)(3). RPAs must be "consistent with the scope of the Federal agency's legal authority and jurisdiction," as well as "economically and technologically feasible." 50 C.F.R. § 402.02. Only Congress can order dam breaching; the federal government is obligated to continue to operate the system as an integrated whole. That includes the lower Snake River dams, to the fullest extent possible and in compliance with applicable law, including, as relevant here, the ESA.

Indeed, the BiOp reasonably concludes that dam breaching is not necessary to avoid jeopardizing the continued existence of the affected Snake River species, especially since the best available scientific information demonstrates that Snake River fall Chinook are currently making record returns, and have been (more or less) for several years, and since Snake River sockeye and steelhead are now similarly experiencing incredible runs. Moreover, the BiOp acknowledges that breaching lower Snake River dams would have "significant [negative] effects [both environmentally and economically] on local communities, the broader region and the environment." AMIP at 37.

In light of the complexities that abound when contemplating the dam breaching issue, the government has fully responded to this Court's concerns by ensuring that the BiOp includes a contingency plan that begins the process of studying and planning for the possible implementation of dam breaching, should that drastic remedy ever be authorized by Congress. In so doing, the government has gone as far as – if not further than – current biological circumstances (as revealed by the best available science) and the law require. The Corps has begun to model how to study the significant short- and long-term environmental and biological effects of dam breaching, and has begun to budget, engineer, and anticipate the necessary schedule for dam breaching. AMIP at 37-38; *see also* Federal Defendants' Response to the Court's May 18, 2009 letter at 17-18, Dkt 1712. More is not required.

In short, while the Nez Perce may advocate for a self-executing, ready-made, off-the-shelf dam breaching implementation plan, such a plan is neither possible nor legally mandated. Moreover, neither the ESA nor best available science requires the Administration to radically shift gears and move from a BiOp implementation mode to a dam-breaching mode. Indeed, the region has just committed billions of dollars towards ensuring that the hydro-system and salmon can safely co-exist. Logic, common sense, and the law compel that we give the BiOp a chance to succeed before declaring failure and embarking on a costly and resource-intensive effort to radically diminish the region's primary source of carbon-free renewable energy.

C. Plaintiffs' Climate Change Arguments Are Unavailing.

The federal government has fully explained why Plaintiffs' climate change arguments lack merit as a matter of law. RiverPartners writes separately on this issue only to point out the absurdity of Plaintiffs' arguments.

Plaintiffs' overarching desire throughout the course of this litigation has been to reduce or eliminate hydropower generation, either by increased spill or by outright removal of the lower Snake River dams. Putting aside for a moment the impacts on fish, there can be no doubt that the federal hydro-system is exceedingly positive from a global warming standpoint. If the region had to replace the hydropower from the FCRPS, the likely substitute would be gas-fired combustion turbines or coal-fired plants, which emit air pollutants, including carbon dioxide, sulfur dioxide, and mercury, to name a few. Removing the lower Snake River dams alone would increase carbon emissions by 3 million tons per year. *See* Northwest Power and Conservation Council, Sixth Power Plan, Document 2010-01, February 2010. Thus, by any measure, the FCRPS has been slowing climate change impacts for the last 70-plus years, and will continue to do so for the foreseeable future.

In addition, the renewable energy generation produced by the FCRPS is a critical component of the region's rapidly growing wind power generation. Thousands of megawatts of wind power rely on the FCRPS's ability to quickly respond to the vicissitudes of wind conditions to convert the variable nature of wind energy into a reliable alternative energy source. Without the FCRPS, substantial amounts of natural gas combustion turbines would be required to back up energy generation from wind facilities. A return to natural gas would significantly diminish the renewable, and carbon-free benefits of wind power, as compared with the FCRPS.

Under these circumstances, it is nothing short of incredulous to argue (as Plaintiffs do here) that based on the speculative impacts of global warming and the BiOp's supposed failure to adequately consider these impacts the Court should overturn the BiOp and enjoin current hydropower operations. Ironically, that result would necessarily dictate an outcome that is *certain* to increase greenhouse gas emissions. Although Plaintiffs may quixotically tilt at dam

removal, the ESA obligates the Court to stay rooted in practical reality. If greenhouse-gas-induced climate changes pose a threat to salmon at some point in the future, then the FCRPS and its carbon-free power are part of the solution. *See* Bonneville Power Administration Record of Decision on the 2008 BiOp at 21 (operation of FCRPS helps avoid and minimize future climate change impacts). For these reasons, the Court should reject Plaintiffs' efforts to manipulate the speculative and uncertain impacts of climate change in urging an outcome that would only worsen these impacts.

IV. CONCLUSION

The Court has before it a historic opportunity to embrace an unprecedented and collaborative regional effort to protect listed salmonids in the Columbia/Snake River Basin. In establishing the consultation process required under ESA section 7(a)(2), Congress contemplated that NOAA would use its informed technical expertise and best professional scientific judgment to reduce the likelihood of harm to these protected salmonids. Through the hard work expended personally by Dr. Lubchenco and that of her team of esteemed scientists, this BiOp represents NOAA's best professional judgment at the *highest* levels of office. Indeed, through the issuance of the 2008/2010 BiOp, NOAA and the action agencies have fully achieved their mandate to insure that the continued operation of the FCRPS is not likely to jeopardize listed species as required by the ESA. After nearly 20 years of nearly perpetual litigation, it is time to put salmon first, put politics aside, and follow the lead of the region's federal, state, and tribal salmon managers and Dr. Lubchenco and her team of independent and NOAA scientists in taking action pursuant to the BiOp and regional recovery plans to ensure the region's prized salmon resources are placed on a firm path toward recovery.

It is also time to end this cycle of litigation. In light of the arguments set forth above, RiverPartners respectfully urges this Court to reject Plaintiffs' challenges in their entirety, grant the federal government's cross-motions for summary judgment, and affirmatively declare the FCRPS BiOp to be fully compliant with the ESA's mandates.

DATED this 23rd day of December, 2010.

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CERTIFICATE OF SERVICE

Pursuant to LR 100-8 and Fed. R. Civ. P. 5(d), I certify that on December 23, 2010, the foregoing *Northwest RiverPartners' Memorandum in Opposition to Plaintiffs' Supplemental Motion for Summary Judgment and in Support of the Federal Government's Cross-Motion for Summary Judgment* 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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