

Pursuant to the Court's Order of January 5, 2011, the States of Washington, Idaho, and Montana ("Three States") jointly submit the following reply memorandum in support of the Three States' supplemental motion for summary judgment.

INTRODUCTION

After insisting on filing another round of briefs to address alleged new matters in the summary judgment filings of the Federal Defendants and aligned parties, Plaintiff National Wildlife Federation ("NWF") and Intervenor-Plaintiff State of Oregon (collectively, "Plaintiffs") have used the opportunity to repeat the same arguments they have already made in at least two other briefs, if not more. The Three States are tempted to simply note that fact and point the Court to the responses exposing the flaws in Plaintiffs' claims. However, our urge for brevity is overcome by the weight of the decision before this court and the substantial effort these sovereigns have invested in drafting and supporting a BiOp in 2008 unlike any preceding it anywhere in the country. It would not be appropriate to let the latest claims of NWF and Oregon that they "know best" when it comes to salmon conservation and recovery go unchallenged, especially in the face of so many years of solid APA and ESA law directing the Court *not* to do what Plaintiffs invite it to do.

It is time to decide whether the immense undertaking reflected in the 2008 and 2010 BiOps is consistent with the focused remand direction from this Court when the 2000 BiOp was invalidated. Perhaps because Plaintiffs sense that the opportunity to advance their own agendas is waning (with NWF unabashedly acknowledging in public that it seeks removal of the dams), their latest briefs even more stridently paint everything that NOAA and the Action Agencies have done in the last ten or more years as abject failure. In this brief, the Three States have done their best to avoid merely repeating the arguments they have made, a somewhat problematic task because the Plaintiffs' briefs raise nothing new.

ARGUMENT

I. NWF’S AND OREGON’S CRITICISM OF THE 2010 BIOP’S JEOPARDY ANALYSIS RECYCLES THEIR EARLIER ARGUMENTS AND REFLECTS ONLY THEIR DISAGREEMENT WITH NOAA’S TECHNICAL ASSESSMENTS THAT ARE ENTITLED TO JUDICIAL DEFERENCE

The Three States addressed in some detail NWF’s and Oregon’s initial arguments directed to the 2010 BiOp’s jeopardy analysis. Dkt. 1820 at 4-14. NWF and Oregon do little more than repeat those arguments in their supplemental reply memorandums and do so in a strikingly similar manner: NWF focuses on several claimed flaws (Dkt. 1831 at 4-10), while Oregon devotes its entire memorandum to second-guessing NOAA’s assessment of the new data in myriad contexts (Dkt. 1834 at 2-16). Both arguments, however, ultimately suffer from the same two deficiencies: First, Plaintiffs fail to acknowledge that the 2010 BiOp was not intended to be a major restructuring of the 2008 BiOp (nor did the Court direct such an effort); rather, it was a review of limited new data and an effort to strengthen the already valid 2008 BiOp utilizing its adaptive management principles. Second, Plaintiffs refuse to apply and give effect to settled deference principles that control this Court’s judicial review authority, preferring to poison this Court’s views of the collaborative remand by characterizing it as a rehash of the past.

A. NWF’s Jeopardy-Analysis Criticisms

NWF begins by recycling its contention that the 2008 BiOp’s jeopardy analysis fails to satisfy section 7(a)(2) because “a jeopardy standard must address whether an action or RPA appreciably reduces the likelihood a population will achieve recovery levels within an identified time frame.” Dkt. 1831 at 5. This argument, of course, is nothing new and has been addressed previously by various parties in memoranda filed in connection with the pending cross-motions for summary judgment directed to the 2008 BiOp. *E.g.*, Dkt. 1557 at 23-27 (Three States’

opening memorandum).¹ Indeed, it is outside the scope of the briefing authorized by this Court in its June 8, 2010 order. *See* Dkt. 1766 (“[t]he parties shall not re-litigate issues raised in the summary judgment motions currently pending before the court unless the 2010 Supplemental Biological Opinion, its Administrative Record, and/or the Amended Records of Decision directly affect those previous arguments.”)

NWF moves next to the question of whether NOAA, in reaching the 2010 BiOp’s no-jeopardy determination, “fail[ed] to provide a rational explanation for preferring different metrics at different times as well as consistently preferring the metric that currently shows favorable results.” Dkt. 1831 at 7. NWF points most specifically to NOAA’s discussion of abundance data. *Id.* at 8 (NOAA attempts “to justify its preference for a new abundance metric” by reliance on flawed statistical-variation-range estimates adopted in 2008 BiOp and density-dependence effects). Once again, this component of NWF’s analysis simply repeats earlier argument.²

The criticism of NOAA’s statistical variation methodology, distilled to its essence, unabashedly asks this Court to invade an area agency expertise to which deference is due. Moreover, NWF’s claim that there is no factual basis to support the 2010 BiOp’s conclusion that productivity likely was affected by the density-dependency phenomenon ignores the 2008 BiOp’s discussion of the negative effect that density dependence may produce with respect to

¹ As the Three States explained in the earlier memorandum, NOAA’s jeopardy analysis in the 2008 BiOp was directed ultimately to whether the RPA, when aggregated with the environmental baseline and cumulative effects, would ensure the affected species’ survival with an adequate potential for recovery—*i.e.*, “trending toward recovery.” *See* 2008 BiOp at 1-10. In making this determination with respect to the Interior Columbia Basin species, NOAA in part applied four quantitative metrics--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. NOAA additionally examined all species subject to the 2008 BiOp qualitatively with reference to the listing criteria in ESA section 4(a)(1), 16 U.S.C. § 1533(a)(1), and the four viable salmonid population factors—abundance, productivity, spatial population structure and genetic diversity..

² *See* Dkt. 1794 at 23 (“[a]part from dismissing the almost uniformly unfavorable updated productivity analyses as not ‘significant deviations’ from the 2008 BiOp, NOAA focuses on recent increases in salmon abundance as evidence that there is no need to revisit the jeopardy analysis or conclusions of the 2008 BiOp”); *id.* at 24 n.27 (“To the extent NOAA believes the nearly uniform productivity declines for the metrics it used in the 2008 BiOp jeopardy analysis are a consequence of density-dependence, . . . NOAA has failed to provide any evidence to support such a conclusion. And, in fact, in the 2008 BiOp NOAA expressly rejected using models that incorporate density dependence and instead stated that its estimates did not account for this factor. . . . NOAA cannot reverse fields on yet another issue without a full explanation”).

species productivity, and the fact that the “more complex modeling approaches incorporating density dependence are currently available only for a limited number of populations.” 2008 BiOp at 7-30; *see also id.* at 7-31 (describing “pessimistic assumption[]” model for life-cycle analysis that, in part, considered “[o]nly density-independent survival changes”—*e.g.*, “quantitative survival changes related to increasing habitat capacity only represent the effects of increased capacity at low density”). NOAA employed its technical expertise and concluded that density dependence was affecting the productivity metrics of specific ESUs even though that effect could not be estimated quantitatively through available quantitative modeling. These observations relied upon the limited newly available data. NOAA’s conclusions regarding the significance of these observations, and the manner in which they are consistent with the 2008 BiOp, were fully explained. *See also infra* at 6-7 discussing relationship between abundance and density dependence effects).

B. Oregon’s Jeopardy-Analysis Criticisms

Oregon begins with the fundamental assertion that the 2010 BiOp “demonstrates NOAA’s unwavering and uncritical allegiance to the no-jeopardy conclusions it reached long ago.” Dkt. 1834 at 1-2. Oregon then argues that:

(1) this “allegiance” is reflected in the 2010 BiOp’s “focus[] on species abundance” (*id.* at 2);

(2) NOAA’s treatment of the new data was unreasoned because, aside from “focus[ing] on an isolated metric”—*i.e.*, abundance—the “BiOp does not rationally explain the new data, and in particular the implications that this information has for the accuracy of NOAA’s earlier assumptions, in a manner that satisfies the APA” (*id.* at 5);

(3) NOAA continues to rely on “outdated base-to-current multipliers” because those multipliers “reflect actions with well-established survival benefits” because “what matters for . . . jeopardy analysis purposes is whether or not they achieve the survival increases that NOAA

assigned them in the jeopardy analysis” (*id.* at 9);

(4) NOAA “unduly relies on ‘density dependence’ to explain the widespread and apparently unanticipated downturn in productivity that [the agency’s] updated data revealed” (*id.* at 12); and

(5) the 2010 BiOp “lacks the means to ensure that the actions of the RPA are on track and providing the biological benefits that NOAA found necessary to avoid jeopardy” (*id.* at 15).

Oregon’s prolonged arguments add nothing new and serve chiefly underscore its disagreement with NOAA over technical conclusions drawn from the new data and explained with care by that agency. *See Ariz. Cattle Growers Ass’n v. USFWS*, 273 F.3d 1229, 1236 (9th Cir. 2001) (“[w]e are deferential to the agency’s expertise in situations, like that here, where ‘resolution of this dispute involves primarily issues of fact’”). Oregon’s strongly held views on the appropriate fishery science and analytical conclusions are not shared by NOAA – the entity to whom Congress has committed implementation of the ESA. This Court is not being asked to “‘rubber-stamp’” a determination that omitted “‘a reasoned evaluation of the relevant factors.’” The Three States merely argue that it is correct for this Court to recognize the limits on its authority imposed by applicable APA judicial review principles and very practical institutional competency considerations. *Wilderness Watch, Inc. v. USFWS*, No. 08-17406, 2010 WL 5157167, at *7 (9th Cir. Dec. 21, 2010) (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003)); *see also Nat’l Wildlife Fed’n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989) (“an [agency’s] action . . . need only be a reasonable, not the best or most reasonable, decision”).

1. Oregon’s first, second and fourth points turn on NOAA’s use of the new abundance data. The contention that the 2010 BiOp either replaced the several metrics applied in the 2008 BiOp or added a new, and largely controlling, metric in the form of adult-return abundance was a core claim in Oregon’s initial memorandum that is repeated with no more

persuasive force in their new briefing. The Three States' memorandum in support of their supplemental summary judgment motion fully addressed these claims. To recapitulate, the 2010 BiOp contains a detailed review of the four metrics—24-year extinction risk, R/S, lambda, and BRT population trend—analyzed in light of the newly available data. 2010 BiOp §§ 2.1.1.2, 2.1.1.2.2 – 2.1.1.2.5. That review was necessarily constrained by the relatively short period covered by the data and their availability for less-than-all population groups. *See id.* § 2.1.1.1.3 at 8, 9 (Tables 1 & 2). The most recent 10-year geometric mean abundance estimate therefore proved to be a useful consideration (*id.* at § 2.1.1.2.1 at 13 (Table 3)) insofar as “there is a relationship between abundance and productivity, such that abundance will increase following a change in survival and productivity” (2008 BiOp at 7-11). NOAA's analysis considers this abundance/productivity relationship recognizing that increased abundance can lead to decreased productivity because “as abundance increases, density-dependence interactions will also increase, which reduce average productivity over time.” *Id.* The 2008 BiOp accordingly predicted that “the estimates of average prospective productivity calculated in this analysis are not expected to be maintained indefinitely and over time will be reduced to a lower rate.” *Id.* NOAA merely concluded in the 2010 BiOp that the new data did not warrant modifying its existing R/S and lambda estimates at this time because they “were within the range of statistical uncertainty in the 2008 BiOp.” 2010 BiOp at § 2.1.1 at 4. Oregon continues its dogged effort to engage in a technical debate over whether NOAA's adherence to the 2008 BiOp's estimates was the most appropriate course to follow, but scientific differences do not demonstrate arbitrary or capricious decision-making by NOAA. This litigation cannot become a forum for resolving divergent scientific views without invading the deference that the APA and Congress have accorded NOAA's expertise.

2. Oregon also continues to express its dissatisfaction with NOAA's methodology in using the new data to revise downward the 2008 BiOp's base-to-current and, presumably, its

current-to-prospective estimates. The Three States discussed this criticism in their opening memorandum and will not repeat that analysis. Dkt. 1820 at 5-6 (discussing NOAA's use of a qualitative evaluation for purpose of assessing the new data's impact on base-to-current and current-to-prospective estimates, and quoting from § 2.1.1.2 of 2010 BiOp). Oregon's argument serves principally to underscore its desire to have this Court invalidate the 2008 BiOp based on data gathered over the two-year period since the RPA's adoption by the Action Agencies. NOAA's technical judgment call—*i.e.*, the significance to be accorded time-limited and otherwise incomplete data—presents a quintessential example of where deference to agency decision-making ought occur. *See Cent. Ariz. Water Conservation Dist. v. USEPA*, 990 F.2d 1531, 1539-40 (9th Cir. 1993) (“[T]he Supreme Court has advised that ‘a reviewing court must generally be at its most deferential’ when the agency is ‘making predictions, within its area of special expertise, at the frontiers of science.’ . . . In such situations, this court is to ‘defer to the agency's interpretation of equivocal evidence, so long as it is reasonable.’”) (citations omitted).

3. Oregon's final criticism of the 2010 BiOp—alleging that there is an insufficient basis to measure whether “specific, measurable biological benefits to the species” will result from implementation of the RPA (Dkt. 1831 at 15)—ignores the extensive research, monitoring and evaluation procedures adopted in the 2008 BiOp, as augmented by the Adaptive Management Implementation Plan (“AMIP”) and the 2010 BiOp. Oregon seizes on NOAA's candid statement that precise measurement of survival improvements from particular mitigation measures remains a daunting task and observes dismissively that “[t]he fact that NOAA scientists may be working on a problem does not mean that the problem does not exist.” Dkt. 1831 at 16. Needless to say, that is not the import of NOAA's statement.

The very need for the life-cycle approach adopted in the 2008 BiOp, and strengthened in the 2010 BiOp, stems from the hugely complex task of improving the survival and recovery prospects of the anadromous species at issue here. Teasing out the quantitative effect of

particular mitigation actions or even the full suite of mitigation actions associated with a given “H,” indisputably presents as-yet unresolved complexities. However, that is not the test of NOAA’s decision-making. The controlling standard is whether the agency used the “best scientific and commercial data *available*” (16 U.S.C. § 1536(a)(2) (emphasis added)), and, as with other ESA provisions committed to NOAA’s technical expertise for implementation, this demands a high level of judicial deference. *See, e.g., N. Alaska Env’l Ctr. v. Kempthorne*, 457 F.3d 969, 981 (9th Cir. 2006) (rejecting challenge to Fish and Wildlife Service’s assumptions concerning potential oil and gas activity); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (“[w]hen an agency relies on the analysis and opinion of experts and employs the best evidence available, the fact that the evidence is ‘weak,’ and thus not dispositive, does not render the agency’s determination ‘arbitrary and capricious’”). The extraordinary care and collaboration brought to bear by NOAA in fashioning both biological opinions, the AMIP and the resulting RPA in the face of these analytical uncertainties more than amply warrant this Court’s deference.

II. AT ITS CORE, PLAINTIFFS’ CRITICISM OF THE BIOP’S HABITAT MEASURES REFLECTS THEIR DESIRE TO PLACE AS MUCH PRESSURE AS POSSIBLE ON HYDRO ACTIONS

As with their jeopardy arguments, there is little if anything new regarding habitat measures in the latest briefs filed by Plaintiffs. Here too, the BiOp opponents continue to minimize well-established legal authority requiring the Court to defer to the technical judgment of NOAA and the action agencies, by equating judicial deference with a mere request to “trust us.” The latest briefs continue the assertion that the habitat related RPA reflects inadequate certainty and commitment, an argument that the administrative record flatly contradicts, as shown in the Three States’ supplemental brief. *See* Dkt. 1820 at 19 (citing 2007-2009 projects and population specific survival commitments driving selection of 2010-2018 projects). *See also* 2008 BiOp at 7-43 – 44 (process for identifying habitat projects).

A. The Habitat RPA Meets Both APA And ESA Standards

Essentially, the habitat arguments of NWF assert that NOAA and the Action Agencies should have identified, evaluated, and funded in 2010 (if not earlier in 2008), all habitat projects upon which the RPA is based over the ten-year life of the BiOp, so they and the Court can review and critique them now. *See e.g.* Dkt. 1831 at 14 (characterizing habitat improvement measures as “try harder” and “plan more.”) But in real world terms, the adaptive management and collaborative consultation processes of the 2008 and 2010 BiOps that have already identified, evaluated and implemented projects, and that will continue to do so over the term of the BiOp, are much more likely to produce positive effects with meaningful application, than the “model it all now” approach advocated by Plaintiffs. Projects that will be implemented several years hence benefit from evolving science relating to the needs of salmon and the utility of mitigation techniques if they are designed using the most up to date information. Accordingly, it makes little sense for the Plaintiffs to insist that their “model it all now” approach is the only and best approach to the implementation of habitat mitigation. Their approach ignores any science that becomes available at a more immediate date. Indeed, the attraction of adaptive management is that it provides a progressive and measured approach to the implementation of mitigation techniques over a timeframe as knowledge of the need for, and effectiveness of, mitigation options are identified and refined.

Aside from this practical deficiency in the plaintiff’s argument, they provide no legal basis mandating their approach. The ESA simply does not require the habitat actions in the RPA to be subjected to the degree of scrutiny Plaintiffs seek. Their preference that all habitat projects be identified and funded up front limits the best available science to one date – the day the BiOp issues. Conversely, and as discussed in the Three States briefing on adaptive management, the case law does allow for the progressive review and implementation of identifiable forms of mitigation strategies provided that they are funded, utilize firm commitments to action and rely

upon measurable goals. See Dkt. 1820 at 29-33 (discussing the appropriate use of adaptive management.) Lately, Plaintiffs have begrudgingly acknowledged the unprecedented level of effort the 2008 and 2010 BiOps brought to bear on the goal of avoiding jeopardy to endangered species from the FCRPS. However, they give no credit whatsoever to the same rigorous process that will be used to evaluate and identify future habitat actions.

Despite NWF's efforts to distinguish it, the *Lake Mead* case disposes of the notion that all habitat projects must be identified in advance, funding commitments made, and scientifically evaluated to be properly included in the RPA. See *SW Ctr. for Biological Diversity v. BOR*, 143 F.3d 515, 523 (9th Cir. 1998) (it is sufficient that the BiOp ensures enough mitigation occurs to avoid jeopardy, and that it rationally explains the connection between habitat projects and survival). NWF attempts to distinguish *Lake Mead* from this case by describing *Lake Mead* as having "established a threshold level of specific and available mitigation acres that had to be protected by a date certain," whereas (according to NWF) the 2008 and 2010 FCRPS BiOps merely "experiment with uncertain actions." Dkt. 1831 at 11 n.17. That description does not match the actual content of the habitat provisions of the 2008 and 2010 BiOps. See, e.g., Comprehensive Analysis for 2008 BiOp, Appendix C-1, Tables 1-5. Furthermore, it is difficult to see any appreciable difference between the federal commitment to protect a specific amount of acreage (stressed by NWF in its *Lake Mead* analysis), and the requirement in the 2008 BiOp that "the Action Agencies will provide funding and/or technical assistance to implement specific habitat projects to achieve the specified habitat quality improvements listed in Table 5." As the Court knows, Table 5 lists the specific percentage of tributary habitat improvement that must be achieved for specific ESUs. 2008 BiOp, App. 1, RPA 35, Table 5. It is unreasonable to describe this approach (together with the additional measures in the 2010 BiOp and the Fish Accords, addressed in previous filings) as half-baked measures that fail to meet the standard set forth in *Lake Mead*: "Because there was a rational connection between the facts found in the BO and the

choice made to adopt the final RPA, and because we must defer to the special expertise of the FWS in drafting RPAs that will sufficiently protect endangered species, we cannot conclude that the Secretary violated the APA.” *SW Ctr. for Biological Diversity*, 143 F.3d at 524.

In addition, NWF’s heavy reliance on *Sierra Club v. Marsh* 816 F.2d 1376 (9th Cir. 1987), cannot be squared with the Court of Appeals’ subsequent decision in *Lake Mead*. The latter panel noted the ruling in *Sierra Club* that if an agency plans to rely on a habitat project to mitigate the destruction or adverse modification of other habitat, the mitigation project must be completed in time to avoid jeopardy to the listed species. *SW Ctr. for Biological Diversity*, 143 F.3d at 524. However, that sensible pronouncement could not be used to sustain a claim that BiOp RPA mitigation measures were inadequate simply because they were “comprised of many short and long-term components” for habitat preservation efforts that would occur over time. *Id.* at 518. The RPA at issue in *Lake Mead*, like here, utilized an adaptive management component to ensure similar mitigation outcomes if the originally planned habitat preservation efforts could not be realized. *Id.*

Ultimately, the holding in *Lake Mead* reflects deference to an ESA consulting agency’s imposition of a firm RPA commitment designed to offset the negative impacts of the action agency’s proposed activity, and a rejection of arguments that such commitments are insufficient because they require future mitigation actions. The *Lake Mead* court distinguished the outcome in *Sierra Club*, where the originally proposed habitat preservation RPA had not occurred as planned, and the action agency refused to reinstate consultation based upon speculation that it might still acquire the preservation property in litigation. *SW Ctr. for Biological Diversity*, 143 F.3d at 524. Under those facts, the action agency’s continued reliance upon the previously prescribed RPAs was arbitrary and capricious. In contrast, the *Lake Mead* court concluded that “there has been no violation of any of the terms of the RPA. There has also been no indication that Reclamation cannot acquire and restore the needed replacement habitat as specified in the

final RPA by the required deadlines.” *Id.* The same is true here. In this case, Plaintiffs predict the demise of the RPA before it has been given a chance to work, and before its projects are even necessary to achieve the goals upon which the no-jeopardy finding depends.

C. Putting “The Risk On The Project” Does Not Mean Ignoring Past Or Future Habitat Actions And Improvements Made To FCRPS Operations

Perhaps the most troubling aspect of NWF’s anti-habitat arguments is the proposition running throughout, that if the project has not already occurred and its benefits demonstrated, this Court must ignore it for ESA § 7(a)(2) analysis purposes. Here again, NWF repeatedly emphasizes the statement in *Sierra Club* that “the risk must be borne by the project, not by the endangered species.” Dkt. 1831 at 4, 10, 14. Although they claim otherwise, Plaintiffs employ that inarguable statement in a manner clearly not intended by the *Sierra Club* Court, and to seek precisely what they could not provide under their own “model it all now” approach – guaranteed success upon issuance of the BiOp. Moreover, NWF’s habitat arguments are written as if no improvements have ever been made to habitat or FCRPS operations before, and the 2008 and 2010 BiOps are starting from scratch. This tactic seeks to so narrowly focus the Court’s attention that the broader – and more legally accurate – view of what has been accomplished under the Court’s watchful eye, and what the future holds for habitat improvement as expressed in the most recent BiOps, are completely obscured. The impression that Plaintiffs strive to leave with the Court is that the 2008 and 2010 BiOps’ reliance upon tributary or estuary habitat as an RPA to avoid jeopardy is a novel and highly dubious enterprise. Dkt. 1831 at 16 (describing habitat portion of RPA as merely something “that optimistically may work,” and “precisely the history of FCRPS BiOps for over fifteen years.”)

Accordingly, Plaintiffs would probably prefer that the Court not be reminded of what has actually occurred in roughly the last decade in the area of habitat improvement. That is, the record established between 2001 and 2009 reflects that the Action Agencies provided funding and technical assistance to protect and improve tributary habitat based on biological needs and

prioritized actions. The actions were targeted to increase streamflows, address entrainment through screening water diversions, provide fish passage and access to suitable spawning and rearing habitat, improve mainstem and side-channel habitat conditions, and protect or enhance riparian conditions generally. These tributary habitat actions resulted in:

- 2,057 miles of improved access to spawning and rearing habitat
- 1,565 cubic feet per second (236,925 acre-feet) of streamflow protected under State law
- 263 water diversions screened to prevent fish entrainment from rivers and streams
- 103 miles of stream channel complexity improvement
- 27,761 acres of riparian habitat improvement

See FCRPS 2003 Check-In Report, 2005 and 2009 Annual Progress Reports (*available at* <http://www.salmonrecovery.gov/homepage.aspx>).

Oregon also incorrectly fosters the notion that all actions heretofore have failed, thereby suggesting the Court must assume that the RPA in the latest BiOp will fail. Dkt. 1834 at 1. (“[T]he new BiOp not only fails to correct the deficiencies of its predecessors, but it also demonstrates NOAA’s unwavering and uncritical allegiance to the no-jeopardy conclusions it reached long ago.”) Given Oregon’s insistence that NOAA is fixated on habitat improvements to the exclusion of changes to the operation of the hydro system, and that nothing meaningful has changed within the FCRPS operations, it seems appropriate to point out the reality over the last ten years, habitat aside:

All eight lower Snake and Columbia River mainstem dams have had surface collection systems installed or upgraded to improve juvenile survival and reduce travel time through the lower Snake and Columbia River facilities:

- Lower Granite RSW – 2001
- Bonneville 2 Corner Collector – 2004
- The Dalles sluiceway operational improvements – 2004
- Ice Harbor RSW – 2005

See 2007 FCRPS BA.

- McNary two spillway weirs – 2007
- Lower Monumental RSW – 2008

- John Day two spillway weirs – 2008
- Little Goose spillway weir – 2009

See 2006 - 2009 Progress Reports to Court.

- Bonneville sluiceway improvements – 2010.

See FCRPS Implementation Plan 2010-2013.

Since 2000, the federal government that Oregon characterizes as habitat-fixated, with no meaningful emphasis on operational improvements, has also produced these spillway improvements:

- Spillway operational improvements at all eight mainstem dams (spill patterns). *See* 2007 FCRPS BA.
- Downstream spillwall at The Dalles Dam – 2010. 2010 Federal Statement of Facts
- Additional spillway deflectors have been installed since 2000 (five at Bonneville; one at John Day; four at McNary; two at Lower Monumental and two at Little Goose.) The Action Agencies also completed installation of flow deflectors on 19 spillways at Chief Joseph Dam. *See* 2007 FCRPS BA; 2008 and 2009 Progress Reports; FCRPS Implementation Plan 2010-2013 (John Day).

Oregon alleges that the 2008 and 2010 BiOps amount to nothing more than “promises that adequate solutions will be found, and the commitment of the government and their sovereign collaborators to work together towards that end.” Dkt. 1834 at 19. Yet somehow, also in roughly the last decade, besides the improvements listed above, seven of eight mainstem dams have seen the installation of juvenile bypass systems that are continually upgraded:

- Bonneville second powerhouse (B2) outfall relocation – 1999.
- Bonneville first powerhouse (B1) bypass system closed – 2002.
- Added full flow system at B2, McNary, Ice Harbor, Lower Monumental, and Little Goose dams to reduce stress and improve PIT tag monitoring capability. *See* 2007 FCRPS BA; 2006 and 2007 Progress Reports; 2009 Progress Report.
- Bypass outfall relocation at Little Goose Dam. *See* FCRPS Implementation Plan 2010 – 2013.

NWF’s disdain for affording NOAA or the Action Agencies any deference in designing the 2008 and 2010 BiOp’s approach to habitat measures in the RPA belies the platitudes it otherwise expresses about the value of habitat improvement generally. At least Oregon candidly

admits (without legal support) that habitat actions should not be placed on the same level with the other “Hs” when assessing the survival benefits of a particular measure. Dkt. 1834 at 10. (“It is true that Oregon has consistently advocated for ample spill as the default operation against with all other actions should be measured.”)³ Plaintiffs’ criticisms of the habitat measures clearly reflect this spill-oriented bias. Unlike spill, habitat programs are not turned on and off with the flip of a switch. They require careful planning and robust research, monitoring and evaluation. Thus, the methods of creating them and measuring their benefits are easy targets for skeptics. The uncertainty and complexity embodied in that fact is exactly why the Court should leave it to NOAA, together with the vast group of knowledgeable biologists employed by the Action Agencies and the cooperating sovereigns, to implement the 2008 and 2010 BiOp’s habitat programs. The BiOps themselves contain many provisions mandating success, for the very reason that the listed species may not withstand failure. On the other hand, if success not only means survival and conservation of the species, but freedom from litigation so the region can remain focused on what the collaboration has produced, there is everything to be gained by giving these BiOps an opportunity to succeed on their own.

CONCLUSION

For the reasons described herein, as well as in their previous summary judgment briefs, the Three States urge the Court to grant their motion for summary judgment.

DATED: February 11, 2010

STATE OF WASHINGTON, OFFICE OF THE
ATTORNEY GENERAL

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³ As context to consider Oregon’s valuation of emphasis on spill over all other actions (including habitat improvement), attached hereto as Exhibit “A” is a table comparing spill operations in the 2000, 2004, and 2010 BiOps.

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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 February 11, 2011, 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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