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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civil No. 01-CV-640-RE

**REPLY IN SUPPORT OF FEDERAL
DEFENDANTS' SUPPLEMENTAL
CROSS MOTION FOR SUMMARY
JUDGMENT AND COMBINED
OPPOSITION TO PLAINTIFFS'
SUPPLEMENTAL MOTIONS FOR
SUMMARY JUDGMENT**

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INTRODUCTION

In the 1990s, Judge Marsh reviewed a system that had very little spill, almost no surface by-pass, unfocused habitat mitigation, and, not surprisingly, very little agreement among the sovereigns in the region. While dissension and lack of mitigation marked that time period, it was underscored by 240 returning wild Snake River fall Chinook and one returning Snake River sockeye. Today, the preliminary estimate for returning 2010 wild Snake River fall Chinook is over 4000, and the count for returning Snake River sockeye was 1316.¹ The Nez Perce Tribe and other agencies recently completed their annual productivity survey of Snake River fall Chinook redds. They found 5,626 redds, exceeding the previous record by 1,910 (notably set in 2009). Other recent data suggest that for steelhead, juvenile hydrosystem survival is higher than ever before and the average travel time from Lower Granite to Bonneville Dam of approximately 18.4 days has been reduced by approximately 5.4 days as a result of structural and operational changes.² This Administration will continue to build on these successes, and our work is far from done, but Plaintiffs' arguments cannot change these numbers, what they represent, and how far the agencies have come from the system Judge Marsh once reviewed.

At each turn throughout this litigation we have welcomed the Court's review on all of the critical issues, opened up the technical aspects to independent science, and where there were recommendations grounded in data, the agencies created and implemented new measures. With this Administration's full support, the agencies have charted a course that is protective and that complies with the law. Operational advancements and habitat mitigation are working. Indeed, Plaintiffs have clarified that they do not seek a change in the extensive habitat projects that are being implemented over the next seven years; to the contrary, they would seek an injunction forcing the agencies to implement the very Reasonable and Prudent Alternative ("RPA") that we

¹ Although the final 2010 estimate is not complete, 42,700 Snake River fall Chinook (excluding jacks) returned to Lower Granite Dam and, historically, 10-20% of the run has been wild fish. See <http://www.cbr.washington.edu/dart/adult.html> (adult returns for 2010 to Lower Granite Dam) (last visited Feb., 8, 2011).

² See NOAA 2008 B.0538 at 87 (pre-RSW, TSW average); *compare*, <http://www.nwcouncil.org/news/2010/10/9.pdf> (last visited Feb., 8, 2011).

now debate. The science has been exhaustively reviewed by some of the best minds this country has to offer, and the RPA has been judged to be sound. It is time to re-focus on the salmon and steelhead, end the litigation, and move forward with implementation.

STANDARD OF REVIEW

Plaintiffs' arguments rest on the premise that this Court's review should only focus on the agencies' recent efforts, primarily the development of the Adaptive Management Implementation Plan ("AMIP") and 2010 BiOp. In seeking to narrow the standard and scope of review, Plaintiffs make repeated and definitive assertions that NOAA's analysis -- a process guided by NOAA's Administrator, Dr. Jane Lubchenco -- was "barely relevant," an "outcome-driven, outcome determinative decision making," which is not due "any deference." NWF Reply at 5 n.7; OR Reply at 2, 4. This is not the proper scope of review and minimizes the agencies' careful analysis and application of the law. What is now before the Court for review, in its entirety, is the result of several years of agency process -- a program developed through collaboration, embodied in the RPA, and strengthened by the AMIP and 2010 BiOp.

Since our last filing, the Ninth Circuit reiterated that in technical, scientific disputes the Court must be at its most deferential. *Lands Council v. McNair*, ___F.3d ___, 2010 WL 5300804, *9 (9th Cir. Dec. 28, 2010). It also re-emphasized that, where the statute or regulation do not "specify precisely" how an analysis must be done, the Court must defer to the agency. *Id.* These reaffirmed axioms are not new, but Plaintiffs' bold assertions that the Obama Administration's efforts are not worthy of consideration and that they should not be afforded "any deference" cannot be squared with the Ninth Circuit's recurrent and now pervasive case law.

Plaintiffs dismiss the fact that nine different sovereigns are in agreement on the technical aspects of the RPA, suggesting that Federal Defendants and the other sovereigns equate ESA compliance with a simple democratic majority. Rather, this convergence, perhaps the greatest alignment of sovereigns ever on the Columbia River, is *evidence* that NOAA's conclusions are reasonable and entitled to deference in accordance with Ninth Circuit case law.

ARGUMENT

Through all the charged assertions, we must be mindful that the State of Oregon and Nez Perce Tribe, in *United States v. Oregon*, are committed to the same exact jeopardy analysis and conclusions they excoriate here. This is the same jeopardy analysis that provides ESA coverage for the Nez Perce Tribe's harvest levels and the State of Oregon's recreational fishing for Snake River fall Chinook in Hells Canyon.³ *See, e.g.*, Second Redman Decl. ¶¶ 4-5 (Doc. 1798) (expressing a desire to take fish on the Snake River). Despite the passing years, with continual tribal, commercial, and recreational harvest, not once have Plaintiffs adequately explained this glaring contradiction. Just as in 2008, the steadfast silence speaks volumes.

I. NOAA'S JEOPARDY ANALYSIS

A. NOAA's Jeopardy Standard is Consistent with the Statute and Regulations.

While professing that their preferred jeopardy standard does not require target "population numbers" or development of a recovery "timeframe," Plaintiffs' briefing clearly states: "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*." NWF Reply at 5 (emphasis added).⁴ This contradiction is irreconcilable. The fact that Plaintiffs couch their claims in terms of "likelihood" does not change the reality that NOAA would first need to

³ In order to diminish the reality that Oregon opened the Snake River fall Chinook fishery in Hells Canyon because the ESU is exceeding all expectations, the state seems to draw a distinction between hatchery and wild fish for this ESU. OR Reply at 4 n. 2. Yet, Oregon must know that *all* Snake River fall Chinook (whether they are hatchery or wild) are listed as threatened under the ESA. 70 Fed. Reg. 37160, 37175-76 (June 28, 2005) ("We have determined that these artificially propagated stocks are no more divergent relative to the local natural population(s) than what would be expected between closely related natural populations within the ESU"). Moreover, as Oregon concedes, incidental "take" of listed wild fish regularly occurred as a result of this fishery opening. OR Reply at 4 n.2 (noting incidental harm). That "take" of Snake River fall Chinook is exempt from ESA § 9 by NOAA in the *United States v. Oregon* biological opinion, which uses the same jeopardy analysis Oregon challenges here. 2008 NOAA B.377 at 13-7 (*U.S. v. OR. BiOp*).

⁴ The Nez Perce Tribe forthrightly insists that NOAA's inquiry here must "bring each listed species to the point where the protections of the ESA 'are no longer necessary.'" NPT Reply at 6. The point at which protections are no longer necessary is, of course, recovery. 50 C.F.R § 402.02 (defining "recovery").

determine recovery levels and a timeframe before engaging in their preferred inquiry -- the former presupposes the latter. But this is precisely what they disavow.

The formulation of recovery levels and timeframes are only necessary to Section 4 recovery planning and, more importantly, no such requirement exists in the regulation or under Section 7 of the statute. This was the same argument rejected in *Home Builders v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (“[T]here is no reason why FWS cannot determine what elements are necessary for [recovery] without determining exactly when [recovery] will be complete.”); *see also* 2008 Dr. Toole Decl. ¶ 24 (Doc. 1566) (“one can determine *whether* a condition can be attained independently from calculating *when* that condition will be attained ...”). Even if Plaintiffs’ position was not viewed as a contradiction, it is wrong as a matter of law.

In fact, Plaintiffs’ arguments are so misplaced that it is worth returning to the actual regulatory definition of “jeopardize.” 50 C.F.R. § 402.02. The remainder of the regulation provides: “Jeopardize ... means ... to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild *by reducing the reproduction, numbers, or distribution of that species.*” *Id.* (emphasis added). These are the regulatory factors that inform a “full analysis,” not a litigation position. *See, e.g.*, NPT Reply at 6-8. By considering these regulatory factors, NOAA can determine the likelihood of *whether* a species will recover, independently from *when* it will recover. The regulation says nothing of recovery levels or timeframes, but it does specify, explicitly, that NOAA must consider whether the action reduces reproduction, numbers, or distribution – all of which Plaintiffs acknowledge were thoroughly evaluated through the quantitative and qualitative analyses in the 2008 and 2010 BiOps. 2008 BiOp at 7-35 through 7-37 (“The qualitative factors relevant to evaluation of the potential for recovery prong of the jeopardy standard are the VSP factors: abundance, productivity spatial structure and diversity.”); *see, e.g., id.*, at 8.3-47 through 48 (Tables 8.3.2-1; 8.3.2-2); 2010 BiOp, § 2 at 29-33.

There is no question that NOAA evaluated whether the RPA appreciably reduces the likelihood of recovery and reasonably concluded that there is an adequate potential for each ESU

and DPS. The analysis is robust and consistent with the standard endorsed by Judge Marsh in 1995 and the Ninth Circuit in 2008. *American Rivers v. NMFS*, 96-384-MA, 1997 WL 33797790, at *6 (D. Or. Apr. 3, 1997); *NWF v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). The fact that Plaintiffs would have employed a different standard is legally irrelevant. *Lands Council v. McNair*, 537 F.3d 981, 991 (9th Cir. 2008); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 524 (9th Cir. 2010).

B. NOAA Thoroughly Evaluated and Cogently Explained the Significance of New Data.

Both NWF and Oregon contend that NOAA failed to evaluate new data and explain the significance to the prospective ESU and DPS conclusions. This position ignores the 2010 BiOp and fails to address the scientific substance of NOAA's conclusions.

The 2010 BiOp closely examined the revised and extended base period estimates and cogently explained their significance to NOAA's prospective analysis as well as the overall ESU and DPS conclusions. Taking all of the metrics into account, NOAA found that, during the base period in general, abundance went up,⁵ recruits to spawners ("R/S") went down, and lambda,⁶ BRT trend, and extinction risk were mixed. 2010 BiOp, § 2 at 5. During this process, NOAA examined the relative change of the new estimates by creating a ratio between the "extended base period vs. the 2008 BiOp base period" *Id.*, § 2 at 5. It then detailed which populations these data affected most and explained the significance of this change with respect to the

⁵ NWF acknowledges that abundance for species and populations increased significantly during the base period, but it does not address the substance of what this actually means in terms of prospective estimates, how it relates to productivity, and the overall ESU and DPS conclusions. NWF Reply at 8. Instead, NWF reverts back to their initial argument that NOAA has switched standards, but here again NWF refuses to address the fact that NOAA considered abundance in the same manner it considered abundance in the 2008 BiOp. Fed. Def. Br. at 22.

⁶ NWF contends that there were "broad-based declines" for the median population growth rate (also known as lambda). NWF Reply at 9 n.16. This is simply not correct. For the assumption that hatchery-origin spawners are equally successful (HF=1), lambda estimates dramatically increased for almost all populations. For the assumption that hatchery-origin spawners are completely unsuccessful, lambda estimates decreased. 2010 BiOp, § 2 at 3-33. NWF's error further underscores the necessity of evaluating all of the metrics to reach an informed conclusion – seizing on one metric (some of which are predicated on conservative assumptions), which NWF does here – is not scientifically justified.

corresponding ESU or DPS.⁷ *Id.*, § 2 at 29-33. For example, with respect to extinction risk, the new data were significant “for only two of the populations” because all of the other estimates for populations are likely to remain relatively unchanged with respect to the 5% risk level when prospective metrics are estimated. *Id.* § 2, at 29-30 (explaining that Tucannon is likely to shift under the conservative assumption that none of the RPA actions would take effect during the next 24 years; and how the East Fork population is likely to shift, but the other two populations in the South Fork Salmon MPG remained strong). That is, out of the 20 different populations for which extinction risk could be calculated, the new data is only likely to significantly affect two populations. *Id.* at (Table 4 p. 17).

Based on a reasoned and comprehensive analysis, NOAA concluded that these changes were not significant enough to alter the conclusions for the ESUs and DPSs when considered in the context of all the other metrics, data, and relevant factors detailed throughout the 2010 BiOp. 2010 BiOp, § 4 at 8. These are extremely detailed, metric-specific explanations delving down to considerations for individual populations and rolling up to the ESU and DPS level; yet Plaintiffs never contest, or even acknowledge, these discussions. The burden to demonstrate that a conclusion is so “implausible” under the APA, so as to render it arbitrary, cannot be carried by ignoring it.⁸ *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1068-70 (9th Cir. 2010) (a plaintiff must satisfy a “high threshold” to set aside agency action under the APA).

⁷ Plaintiffs make much of the fact that the point estimates have changed among the various metrics. What they fail to recognize is that adding new data is supposed to change the point estimate – that is the whole point of revising and extending the base period estimates. Moreover, because data was not available to recalculate the “prospective estimates,” NOAA examined the ratios to qualitatively assess the likely changes as to the effect of the RPA. 2010 BiOp, § 2 at 11.

⁸ Oregon seems to acknowledge this discussion, but contends that “federal defendants cite only a solitary example in which NOAA discussed some populations of Upper Columbia spring Chinook . . .” OR Reply at 6. It is the 2010 BiOp, not our brief, that contains the explanations. *See* 2010 BiOp, § 2 at 29-33 (discussing all of the populations). Moreover, had Oregon thoroughly examined the BiOp, it would have found that the new data altered the prospective assessment for this particular ESU significantly enough to warrant further explanation, and for that ESU, NOAA was confident that hatchery supplementation (which mathematically was assumed to cease) would be sufficiently protective. *Id.*, § 4 at 8 (“The extinction risk estimates for UCR steelhead and UCR spring-Chinook assume that all hatchery production ceases immediately. This overstates the actual short-term extinction risk, as shown by modeling of

NWF and Oregon also contest the minutia of the “base-to-current multiplier,” arguing that although they readily acknowledge the benefit of various improvements and that abundance increased during the same timeframe, they would have assigned different (albeit un-provided) multipliers. *See, e.g.*, OR Reply at 8-11. Again, using Oregon’s hydrosystem multiplier example, the increase in survival from the early 1980s to 2008 has been significant, and there is no dispute that empirical data reflect the increase between base period hydrosystem survival and current hydrosystem survival. *See* 2008 BiOp at 7-10 (Figure 7.1-2). This means a multiplier is appropriate. But Oregon offers no evidence in favor of an alternative base-to-current hydro multiplier and cannot, given the empirical information available to NOAA. Moreover, Federal Defendants cannot help but note that while Oregon vigorously believes spill is beneficial and has “consistently advocated for ample spill,” *see* OR Reply at 9, it does not believe it is as effective as the Federal Defendants’ data and multiplier suggest. OR Reply at 9 (“[D]efendants' argument appears to be that current hydrosystem operations are much better for migrating species than they once were.”).⁹ This is precisely the kind of technical debate that should be deferred to the agency. *Lands Council v. McNair*, 2010 WL 5300804, at *9.

More broadly, Plaintiffs’ refusal to recognize the natural relationship between increased abundance followed by decreasing productivity estimates is not scientifically sound. As a statistical matter, in order for productivity estimates to exceed 1.0 in perpetuity, each brood-

continued hatchery supplementation in the 2008 BiOp (chapters 7.1, 8.6, 8.7 and the 2008 SCA Appendix B).”).

⁹ Oregon also claims that, because NOAA predicted base-to-current changes of 25-43% but average R/S declined with the inclusion of new data, the multipliers must have been over-estimated. OR Reply at 8. This ignores the definition and nature of the multipliers, which were explained in the BiOp. 2008 BiOp at 7-11 (“[I]f the current management practices continue into the future, the projected biological performance will be different from that predicted from base period patterns alone.”). NOAA never claimed that the expected survival changes will be immediate and recognized the influence of other factors, such as environmental variability, on all of the metric estimates, including natural fluctuations. More specifically, NOAA’s prospective R/S estimates are based on an average condition that will be expressed over a period of years and the check-in periods contemplated in the 2008 BiOp (RPA 1) were chosen as reasonable points at which to evaluate progress. Until a sufficient number of new R/S estimates are available to calculate meaningful average conditions, NOAA rationally found that conclusions regarding the accuracy of multipliers are best inferred from empirical information specific to the multiplier.

generation would need to be larger than the last, which is unrealistic. *See* 2010 BiOp, § 2 at 32. We know that salmon runs fluctuate and that variations are “expected to continue in the future and to fluctuate both positively and negatively.” *Id.* § 2, at 32. That is one reason why when NOAA adds new data, the revised and extended base period shows increased abundance, while productivity estimates decreased.¹⁰

Similarly, density dependence is a recognized biological fact that NOAA appropriately considered and explained in both the 2008 and 2010 BiOps. Using Plaintiffs’ example of Marsh Creek, *see, e.g.*, OR Reply at 14, the 2008 BiOp models the likely point at which this population would experience density dependence. 2008 BiOp at 7-29 (Figure 7.1-7). At roughly 100 adults (the black lower line), the population experiences a decline in R/S productivity (red upper line). *Id.* What this means is that when there are more than 100 returning adults to this drainage (which has been the average condition during the past 10 years), the population will start to experience declining productivity as a result of density dependence. *Id.* This is why the 2008 and 2010 BiOps anticipated density dependence. 2010 BiOp, § 4 at 8. To be sure, other populations have higher thresholds, but Plaintiffs’ blanket contention that density dependence does not occur and that “[n]o scientists would argue” to the contrary is biologically misleading and ignores NOAA’s modeling and findings. NWF Reply at 9 n.15.

Finally, Plaintiffs seem to suggest that the record returns experienced over the last three years should be discounted, or perhaps ignored, because some of the returning fish are hatchery origin and therefore not subject to ESA considerations. OR Reply at 3. As noted previously, all Snake River fall Chinook (whether hatchery or wild) are listed as threatened under the ESA. 70 Fed. Reg. at 37175. Many, if not most, of the remaining ESUs and DPSs also include hatchery fish. *Id.* To the extent these Plaintiffs are challenging the inclusion or consideration of hatchery fish within an ESU, their citation to case law does not support this position. *Trout Unlimited v.*

¹⁰ As NOAA explained, the converse is also true, *i.e.*, years of low abundance will be followed by high productivity estimates. 2010 BiOp, § 2 at 32 (“These anticipated higher returns represent progeny from the mid-2000 spawning years, which had lower abundance, so they will likely result in increasing productivity estimates for one or more of the mid-2000 brood cycles.”).

Lohn, 559 F.3d 946, 956 (9th Cir. 2009) (“[T]here is no scientific consensus concerning the relationship between hatchery and natural fish. In such situations, we stay our hand.”). More importantly, the abundance data Plaintiffs seek to ignore is based exclusively on wild fish. 2010 BiOp, § 2 at 6-7, 13 (Table 3). And NOAA has determined that, with respect to wild fish, “the actions in the RPA, which are expected to improve survival in various life-history stages, should continue to improve the species’ status such that they will generally trend upwards when the RPA is implemented, as anticipated in the 2008 BiOp.” 2010 BiOp, § 2 at 28-29.¹¹ Ignoring the record returns (hatchery and wild) or claiming that increased system survival only affects hatchery fish is unrealistic and unfounded.

II. THE RPA HABITAT ACTIONS WILL IMPROVE SALMONID SURVIVAL.

There is no dispute that habitat restoration is beneficial for salmon and steelhead. Particularly with the advent of climate change, the extent to which the various projects in the tributaries and estuary will aid these species is profoundly important and should not be underestimated. That is why all of the sovereigns -- including Oregon and the Nez Perce Tribe -- have made watershed habitat restoration a centerpiece of their salmon conservation programs.¹² Plaintiffs’ litigation construct – immediate implementation, with simultaneously verified survival improvements, without any consideration to ISRP review or adaptive management – does not find any support in the statute, regulation, or case law. NWF Reply at 10-16; OR Reply at 16-17. Suggesting that we must precisely quantify all the beneficial aspects of habitat restoration while

¹¹ This evaluation is based on methods identical to those applied in the 2008 BiOp, which consider only natural productivity (R/S and lambda), the trend of natural abundance (BRT trend), and extinction risk under “an assumption that all hatchery production ceases immediately.” 2010 BiOp § 2, at 14.

¹² As we previously explained, Oregon employs the same conceptual framework to habitat restoration, *see* 2009-2011 Biennial Report Exec. Summary at 4 (elements of the Oregon Plan), available at www.oregon.gov/OWEB/BiennialReport_0911/OPBiennial_2009_2011.pdf (last visited Feb. 8, 2011), albeit with a much reduced degree of specificity and certainty of implementation, *see* www.oregon.gov/OWEB/BiennialReport_0911/monitoring.shtml (“Budgetary constraints continued to influence the available resources to conduct Oregon Plan monitoring.”). Plaintiffs do not, and cannot, reconcile their support of these restoration strategies in other forums with their attack of the RPA habitat actions at issue here.

demanding perfection at year two, of ten, is a roadblock to actions that are critical and undisputedly beneficial.

In the ESA, Congress established a straightforward test governing the nature of an RPA: it must be an action that “can be taken by the Federal agency” and one that NOAA “believes would not violate” Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). *See* 16 U.S.C. § 1536(b)(3)(1); 50 C.F.R. § 402.02 (defining RPA). The Ninth Circuit has expressly confirmed that these are the applicable standards, not Plaintiffs’ gloss upon the case law. *Southwest Ctr. for Biological Diversity v. Bureau of Reclamation (Lake Mead)*, 143 F.3d 515, 523 (9th Cir. 1998) (upholding an RPA that “could be implemented,” where FWS “rationally” concluded that the RPA would comply with the ESA).¹³ Indeed, contrary to their claims, *Wild Fish Conservancy*, 628 F.3d 513, runs directly counter to their current demand for mathematical hyper-precision.

In *Wild Fish*, the court found that FWS had an obligation to consider the effects of “planned subsequent modifications,” even where there was only a “preferred” design and the project was “delayed as a result of engineering difficulties.” 628 F.3d at 519 & n.2, 524 & n.9. ESA regulations do not differentiate between beneficial and adverse effects – they are all held to the same standard – and clearly the Ninth Circuit did not require “verified” results, free from uncertainty, before insisting that these effects be considered and relied upon by FWS in an ESA consultation. *Id.* at 525 (finding instead that the effects should be considered because there was enough information to “include a meaningful analysis”). Plaintiffs’ failure to reconcile the clear import of this case, as well as the fact that the entire RPA is within the control of the agencies, only serves to highlight the contradictions in their legal positions. *See* Fed. Defs. Br. at 32-33.

Plaintiffs’ reliance on *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), likewise misses the mark. NWF Reply at 14. There, the acquisition of replacement habitat deemed

¹³ Notably, the Ninth Circuit has confirmed that the appropriate standard for review of an RPA is not the standard Plaintiffs’ proffer, but the standard set forth in the ESA, its regulations, and *Lake Mead*. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (“The ‘reasonably certain to occur’ standard applies to ‘[i]ndirect effects ... Acquiring and preserving the mitigation lands is not an indirect effect ... but one of several ‘reasonable and prudent alternatives’ that the FWS found necessary to minimize the project’s effects. 16 U.S.C. § 1536(b)(3)(A).”).

“absolutely necessary” to avoid jeopardy should have been acquired more than a year previously, the mitigation lands were in private hands, transfer of the lands was subject to conditions all agreed “would diminish or eliminate its value as a preserve,” and the dispute over the transfer of the lands was in litigation. *Marsh*, 816 F.2d at 1389-90. Thus, “the anticipated mitigation ... may not take place at all.” *Id.* at 1388. Here, in stark contrast, there is no question that the agencies and the region are, as the Lower River Treaty Tribes aptly put it, “in the midst of a good-faith, well-executed launch of the most aggressive salmon restoration plan in the history of the species.” Lower River Treaty Tribe’s Br. at 6 (Doc. 1814). More importantly, Plaintiffs’ case is built upon dire predictions that the habitat program will fail *before* it even has a chance to be fully implemented; predictions that run directly contrary to the collective expertise of NOAA, the Action Agencies, three States, and six tribes. This case bears no relationship to the facts present in *Sierra Club v. Marsh*, and Plaintiffs’ reliance on the opinion confirms the flaws permeating their challenge to the RPA habitat actions, as further demonstrated below.

A. The Science Supporting the RPA Habitat Actions is Sound.

Although Plaintiffs continue to diminish this RPA habitat program, they at the same time concede the RPA’s real and significant benefits to salmon and steelhead. *See* NWF Reply at 12 n.19 (arguing the RPA habitat actions are so beneficial the Court should enjoin the agencies to continue implementing the measures); *id.* at 15 (arguing that the issue is not whether “habitat restoration is generally important or beneficial”). With these admissions, Plaintiffs have now confirmed the scientific merit and foundation of the RPA habitat program – that habitat restoration and rehabilitation actions *will* increase the survival of and benefit salmon and steelhead populations throughout the region. *See* Fed. Defs. Br. at 38-39 (citing scientific literature establishing the correlation between habitat restoration and increased salmonid survival).¹⁴ That is, Plaintiffs, at least here, confirm that their dispute lies not with the fact that benefits will accrue, but rather the extent to which the RPA actions will benefit the species.

¹⁴ Plaintiffs’ arguments that certain scientific papers did not involve numeric predictions of survival improvements associated with habitat restoration actions miss the mark. NWF Reply at 15. The science clearly demonstrates that survival improvements are associated with habitat

On this latter issue, Plaintiffs' reply is notably lacking in substance. They opine that the RPA survival improvements are speculative and not measurable, NWF Reply at 15-16; OR Reply at 16-17, yet they do not dispute the RPA's reliance on expert judgment by local experts most knowledgeable of local habitat conditions as part of the methodologies employed to translate amelioration of limiting factors of habitat conditions into survival benefits to salmonid populations. *See* AMIP, App. 1, at 7-14; *see, e.g.*, CA C-1-17 to C-1-28 (scientific justification and rationale for identifying benefits associated with tributary habitat actions); *id.* at C-1-8 to C-1-16, C-1-31 to C-1-38 (same). Although the benefits associated with habitat actions cannot be proved with statistical precision, Plaintiffs cannot show that NOAA's reliance on habitat methodologies to identify benefits known to occur is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); Fed. Defs. Br. at 30-32.

Plaintiffs also argue that the RPA actions do not specify habitat performance standards, NWF Reply at 2, when the record unequivocally refutes this assertion: the RPA habitat actions employ an adaptive management framework specifically designed to meet habitat quality improvement performance standards by 2018. *See* BRS002212 at 2231; 2008 BiOp, RPA 35, 51.¹⁵ That RM&E is used to further *improve* the assessment of whether the performance standards are achieved, and more broadly to refine the ongoing implementation of the RPA

restoration actions, and the agencies employed a reasonable scientific method for identifying those benefits, *see* AMIP, App. 1, at 7-14. That Plaintiffs can provide no superior scientific basis by which NOAA should have identified the benefits associated with restoration actions – benefits they concede will occur – is dispositive. *See Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir. 2006) ("Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the 'best scientific evidence available' fails.").

¹⁵ In other words, the RPA 35 and 37 habitat quality survival improvements, in the form of changes in habitat quality linked to limiting factors, are the habitat "performance standards," *see* AMIP, App. 1 at 13-14, App. 2&3 at 8-9; BA at B.2.6-10 to B.2.6-12, and achievement of these performance standards is based on the evaluation of the RPA expert panels identifying limiting factors and changes to habitat conditions associated with projects, *see* AMIP, App. 2&3 at 8-9; 2010 RTC at 14. Far from being immaterial, NWF Reply at 12, the reported performance metrics like in stream flow improvements, miles of spawning and rearing habitat restored, diversions screened, and riparian acres protected and restored are used to evaluate achievement of the habitat performance standards, *see* AMIP, App. 2&3 at 8-10; 2010 RTC at 14.

habitat program, *see* AMIP, App. 2&3 at 8-10, 11 (Table 2-2), does not render the existing habitat RPA actions without scientific merit. NWF Reply at 14. Rather, it is these components, structured in a rigorous adaptive management framework, that make the RPA actions “on the cutting edge of science” and increase the certainty that the specified survival improvements will occur. 2010 RTC at 9; *see People of California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 2008 WL 3863479, at *27 (E.D. Cal. Sept. 3, 2008) (“While Plaintiff objects to the scientific utility of adaptive management under the circumstances of this case, the Ninth Circuit’s recent *McNair* decision makes it clear that choosing between and validating scientific methodologies is ‘not a proper role’ for a federal court.” (quoting *Lands Council*, 537 F.3d at 988)).

Finally, Plaintiffs complain of a lack of “independent science review” of the habitat actions. NWF Reply at 3 n.5.¹⁶ Plaintiffs, however, disregard the fact that NOAA, the Action Agencies, the States, the Tribes, and even Plaintiffs themselves have engaged in independent review of all of the RPA actions, including the habitat actions. *See, e.g.*, BRS021964 at 21965-69 (NWF’s comments); 2008 NOAA C.1155 (response to comments); NOAA CC.200 (2010 response to comments). This review, including the extensive opportunities for comment, has enabled the current Administration to become fully versed in the scientific data and the many, often competing, viewpoints concerning effects of the FCRPS system on salmon and steelhead. *Id.* In view of these proceedings, it is no longer supportable to argue that any issue or scientific data has gone unaddressed. Moreover, the majority of the region’s experts, including NOAA’s experts, have firmly concluded that the RPA habitat program is supported by the science. *See* Fed. Defs.’ Br. at 39 & n. 33. This soundly refutes Plaintiffs’ strained claims that the RPA habitat actions are unsupported by the record, and their bare disagreement with scientifically supported methodologies and RPA actions they admit will benefit salmon and steelhead falls well short of the showing required at this stage of the proceedings. *See Sierra Club v. Dombeck*,

¹⁶ NWF also continues to argue that “NOAA’s own scientists” have criticized the estuary habitat methodology. NWF Reply at 13 n. 22. This argument was addressed in Federal Defendants’ supplemental response, *see* Fed. Defs. Br. at 34 n. 26, and it is telling that Plaintiffs continue to ignore the Science Center’s clear findings that the estuary methodology and RPA actions are “based on ecosystem principles and the best available science,” FER 8 at 2 (Ferguson 5/19/09).

161 F. Supp. 2d 1052, 1070-71 (D. Ariz. 2001) (“Mere disagreement with an agency's policies, methodologies, and conclusions does not render the decision arbitrary and capricious.”).

B. The Agencies' Implementation of the RPA Habitat Actions is Occurring in Accordance with the RPA.

In challenging the agencies' implementation of the RPA habitat actions, Plaintiffs fail to appreciate two critical points. First, the record shows that, under this RPA, the agencies and the region are actively devoting their resources, expending funds, and implementing tributary and estuary projects *in partnership* for the singular purpose of improving the survival of salmon and steelhead. Fed. Defs. SOF at ¶¶ 1-6; Lower River Treaty Tribes Br. at 6, 14-21 (noting and demonstrating implementation of “the most aggressive salmon restoration plan in the history of the species”). The habitat tour provided by the Warm Springs Tribe on the John Day River gave the Court an opportunity to see, firsthand, the extensive, ongoing work taking place under this RPA. Indeed, the extraordinary increase in identified projects and associated agency funding for the 2010-2012 period alone demonstrates the extent to which the RPA habitat actions are no longer just reasonably certain to occur – they *are* occurring. *See* Corps 005 at 552-568 (identifying over 100 estuary and tributary projects, comprised of hundreds upon hundreds of associated habitat actions that are funded and contracted for during the 2010-2012 period). Plaintiffs' suggestion (NWF Reply at 14) that the agencies are merely devising “plans” and “strategies” to improve salmonid habitat, or that the RPA actions are not reasonably certain to occur, cannot be sustained. *See* Fed. Defs. Br. at 44-50.

Second, the agencies' and their partners' implementation of on-the-ground actions and projects in the estuary and tributary habitats, as well as the extensive independent scientific review of habitat projects, has allowed the agencies to gain valuable insight and data on habitat restoration actions. This information, in turn, has allowed the agencies to discern with sophistication what additional actions and efforts are needed to successfully restore the tributary and estuary habitats and meet the RPA's performance standards. *See, e.g.*, Corps 1654; BRS025300. While Plaintiffs speculate that the agencies' plans for future implementation may

not work, *see* NWF Reply at 12-14, they completely gloss over the fact that these plans and strategies were not developed in a vacuum. Through invaluable experience gathered *in the field*, the agencies have data and information on what works and what additional actions are needed, and this information is being brought to bear on the habitat restoration program through the RPA's RM&E and adaptive management provisions. Fed. Defs. Br. at 44-50. It is not enough to suggest that the agencies' plans and efforts are insufficient without even addressing the collective RPA actions, the basis for the agencies' plans, and the years of knowledge and information gained in implementing this RPA.

Plaintiffs' technical claims to implementation of the RPA also fail. Plaintiffs opine that the habitat actions are undefined, NWF Reply at 2-3, 10; NPT Reply at 12, 14, without addressing numerous actions that collectively comprise the RPA habitat program and that, taken together, represent a reasonable, transparent, science-based, and critical effort to improve ESA-listed salmonid steelhead habitat in the Columbia and Snake River Basins. *See* Fed. Defs. Br. at 34-35. Plaintiffs' critique of adequate funding is even more misguided; while they disparage the amount of secure funding, they cannot identify a single restoration project that has been delayed or unimplemented due to insufficient funding. NWF Reply at 2 & n. 4, 12; NPT Reply at 12. Nor do Plaintiffs even acknowledge the funding commitments in the Fish Accords or the funding secured specifically to increase the pace of project implementation and the certainty of achieving the survival benefits in the estuary. *See* Corps 1425 at 27468 ("in response to the Court's concerns," the agencies made "available \$40.5 million over the course of 9 years for on-the-ground habitat actions," in addition to the habitat funding under the 2008 BiOp).

Plaintiffs even choose to highlight the application of independent science as a reason to overturn NOAA's analysis, complaining that the agencies have delayed certain projects to address the findings of independent science review. NWF Reply at 13 n. 23.¹⁷ Rather than

¹⁷ Plaintiffs also complain that the Fish Accord projects and associated benefits have not undergone scientific review. NWF Reply at 14 n. 24. The record, however, soundly refutes this claim: the benefits of Accord projects were reviewed using the exact same methodology employed in the RPA, NOAA CC.004, Att. G; NOAA explicitly evaluated the Accords, 2010 BiOp, App. G; and the Accord projects will undergo additional review as part of the RPA expert

support their claims, Plaintiffs' argument shows that the best available scientific data is being applied and that the question is not whether the RPA habitat actions will be implemented, but what type and how many habitat projects will be implemented in light of the extensive and continuous independent and scientific review. See BRS02300 at 25307-308; FER 8 at 3 (Ferguson 5/19/09) (Science Center) (methodology provides "greater ecological benefits" to species by "[p]lacing potential projects through a scientifically rigorous framework"); 2010 RTC at 15 ("Some projects have been temporarily delayed in order to address independent scientific critiques and *to ensure quality projects on the ground.*" (emphasis added)).

Finally, Plaintiffs repeatedly argue that this unrivaled habitat program must result in the instantaneous completion of massive restoration projects and result in "verified" benefits a mere two years into a ten-year restoration program. NWF Reply at 13; OR Reply 16-17. As Plaintiffs well know, habitat restoration takes time, and the record proves a demonstrable increase in projects and associated benefits in, for instance, the estuary. In three years (2007-2009), the agencies accomplished similar habitat quality survival benefits for salmon and steelhead as were accomplished over the past seven years (2000-2006). See Corps 1654 at 30751-52 (Table 1 & 2). The agencies have substantially increased the identified and contracted for actions in the estuary through, *inter alia*, the Estuary MOA, as well as dramatically increased agency funding and the partners necessary to successfully restore estuary habitats. See Corps 728 at 15165 (providing a 90% increase in already significant estuary habitat funding under the 2008 BiOp); Corps 005 at 570-73 (identifying over 20 broad-scale estuary projects that are contracted for and scheduled for implementation); AMIP, App. 3 at 23-25. And NOAA has explicitly contemplated and accounted for the implementation contingencies that have arisen, and these mechanisms are being utilized to ensure that the estuary habitat program is successful. Fed. Defs.' Br. at 33-35, 44-50.¹⁸

panel process, AMIP, App. 1 at 12; FER 65 at 16. This multi-layered review renders Plaintiffs' "spend-first-evaluate-later" assertion wholly unsubstantiated and without any merit.

¹⁸ Plaintiffs' criticisms of the strategies developed by the agencies fail on numerous additional grounds. They incorrectly state that the agencies are not on pace to achieve the requisite survival

All of these factors demonstrate that the agencies are ramping up implementation of one of the most extensive habitat restoration programs ever conducted and, as demonstrated with the overhaul of the hydrosystem to improve salmonid survival, the record demonstrates that these agencies can achieve the survival improvements prescribed in the RPA. Plaintiffs' speculation regarding the success of the RPA -- while at the same time conceding these actions will benefit the species -- does not cast doubt on NOAA's analysis or the ability of the agencies to perform the requisite habitat mitigation under the RPA. *See, e.g., American Rivers v. NMFS*, 1997 WL 33797790, *10 (“[G]iven the present number of uncertainties facing the action agencies relative to the question of the best overall mitigation strategy ... I see no way I could find that NMFS' failure to select a single strategy to pursue at this time is arbitrary and capricious.”).

C. NOAA Thoroughly Considered Climate Change.

NWF's argument on climate change is entirely at odds with a plain reading of the 2008 BiOp, AMIP, 2010 BiOp, and their supporting records. The 2008 BiOp recognized increased warming over the last century and assumed warming will continue to rise 0.1-0.6°C per decade over the next century. 2008 BiOp at 7-12. NOAA's analysis modeled extinction risk over the next 24 years utilizing three different climate assumptions and used a qualitative approach to evaluate climate change affecting freshwater life stages. *Id.* at 7-12, 7-13, 7-32, 7-34. Based on this and a number of other considerations, NOAA formulated actions, in accordance with ISAB recommendations, paying specific attention to areas of concern with climate change. 2008 BiOp at 8-17. The 2010 BiOp evaluated all the new information and found more detail and that the “adult life stage may need particular attention through monitoring and proactive actions

improvements for “a large majority of major population groups,” NWF Reply at 13, as the cited record documents refer to single populations, *not* major population groups, BRS025300 (identifying individual populations associated with four of the 17 major population groups). Plaintiffs misconstrue the habitat strategy (Corps 1654) to argue that the agencies have not identified larger parcels with willing partners, when the strategy actually demonstrates that the “[a]ctions listed above by both agencies address this resource need.” Corps 1654 at 30761. Plaintiffs argue the habitat program is flawed because of events that “could” happen, NWF Reply at 13 (citing contractor pool and other actions that “may be needed”), without explaining why the agencies' identification of future contingencies or *potential* problems is anything but reasonable and responsible. These and other mischaracterizations do not support their claims.

envisioned in the AMIP.” 2010 BiOp, § 2 at 62; *id.* at 50. With the incorporation of the AMIP and this new information, NOAA was confident that the RPA avoided jeopardy “in the present and future human and natural contexts,” and dealt adequately with the new information through new monitoring measures for adults. *See PCFFA v. BOR*, 426 F.3d 1082, 1093 (9th Cir. 2005).

NWF obviously disagrees with this conclusion. It seems to believe that avoiding jeopardy is not enough and that a system that contributes nearly 40% of the Pacific Northwest’s power in a carbon neutral form and constantly integrates renewable wind power must provide additional mitigation.¹⁹ But it never provides the justification, legal or scientific, for its demand. Nor have Federal Defendants conceded that NOAA did not analyze anything beyond 2018. 2008 BiOp 7-17, 18 (explaining a 24-year time frame and that precision decreases with additional years). In fact, while NWF vigorously argues that the effects from habitat projects must be verified with mathematical precision, the same demand is notably lacking when it comes to climate change. Analogizing to a case that clearly supports NOAA’s methodology does not advance NWF’s cause, and *Wild Fish* certainly does not stand for this dual standard proposition. Indeed, on its sole substantive response, NWF again reverts to its contradictory refrain that habitat actions will not have any benefit and that consideration, “whether quantitatively or qualitatively . . . is irrelevant.” NWF Reply at 18. If NWF truly believes that over one billion dollars of habitat mitigation is “irrelevant,” when the majority of those projects will be directed at the locations that will feel the impact of climate change first and benefit salmon in ways we cannot even conceive, this debate has strayed from any reasonable interpretation of the law and facts of this case.²⁰

¹⁹ NWF wrongly asserts that “lost hydropower due to salmon protection need not be replaced by fossil-fuel generation.” NWF Resp. SOF ¶ 12 (citing Council’s Sixth Power Plan, Chap. 6 at 6-11 to 6-12). It is clear that “actions taken to enhance salmon restoration that reduce federal hydro system output will lead to increases in greenhouse gas emissions” and “[a]ny non-hydro resources developed to replace the flexibility of the hydro system to integrate wind resources are likely to be fossil fuel fired, leading to further greenhouse gas emissions.” Corps 1425 at 27475-77; Council’s Sixth Power Plan, Chap. 10 at 10-2, 10-27, available at: www.nwcouncil.org/energy/powerplan/6/final/SixthPowerPlan_Ch10.pdf.

²⁰ Plaintiffs’ challenges to NOAA’s analysis of orcas, kelts, critical habitat, and dam breaching reveal nothing new. Plaintiffs continue to opine on the impacts of current Chinook abundance on

CONCLUSION

The collective body of work compiled over the last five years, including the Biological Assessment, Comprehensive Assessment, Supplemental Comprehensive Assessment, three Biological Opinions for FCRPS, Upper Snake, and *United States v. Oregon*, the Fish Accords and Estuary MOA, Adaptive Management Implementation Plan, 2010 Biological Opinion, and the extensive public comment and collaboration throughout comply with this Court's remand orders and exceed what is required under Section 7 of the ESA. There is now a historic opportunity for the region – federal agencies in partnership with all of the other sovereigns in the region, informed by completed litigation – to move forward and turn their full attentions to implementing this RPA *and* to Section 4 of the ESA, so that the region can collectively achieve the recovery of Columbia and Snake River salmon and steelhead. We respectfully request the opportunity to do so and ask that the Court grant Federal Defendants' cross-motions for summary judgment.

Respectfully submitted: February 11, 2011.

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orcas, NWF Reply at 20-21, but they cannot rationally demonstrate that this RPA is not likely to alter the prey available to the whales, Fed. Defs. Br. at 66-67. Plaintiffs (NWF Reply at 12 n. 21) likewise do not address *the evidence* in the record demonstrating that NOAA fully considered the effects of kelt reconditioning, including the many viable actions to improve the productivity of kelts, Fed. Defs. Br. at 62 & n. 52, and expressing a bare opinion to challenge NOAA's critical habitat analysis is equally flawed, NWF Reply at 20. On dam breaching, this Administration required the development of updated life-cycle models, a module to assess the biological effects of breaching one or more dams, a breaching study plan (which has been developed, *see* Corps 297), and initiation of dam breaching studies as a contingency of last resort. *See* Fed. Defs. Br. at 68-69. The Tribe disregards these actions and claims that dam breaching "is treated one way or another, by most, as a matter of politics." NPT Reply at 18. To the contrary, the Administration's efforts to complete the requisite studies, when needed, ensures that any debate on the authorization of dam breaching is rightly focused on the biology, not politics.

/s/ Coby Howell

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CERTIFICATE OF SERVICE

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