

David J. Cummings, OSB #922695  
[djc@nezperce.org](mailto:djc@nezperce.org)  
Geoffrey Whiting, OSB #954547  
[gwhiting@gmwnnezperce.com](mailto:gwhiting@gmwnnezperce.com)  
NEZ PERCE TRIBE  
OFFICE OF LEGAL COUNSEL  
P.O. Box 305  
Lapwai, ID 83540  
(208) 843-7355 | Phone  
(208) 843-7377 | Fax

*Attorneys for the Nez Perce Tribe*

THE HONORABLE MICHAEL H. SIMON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,  
Plaintiffs,

Civ. No. 3:01-cv-00640-SI

and

STATE OF OREGON,  
Intervenor-Plaintiff,

v.

NEZ PERCE TRIBE'S  
MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTIONS FOR  
SUMMARY JUDGMENT

NATIONAL MARINE FISHERIES SERVICE,  
U.S. ARMY CORPS OF ENGINEERS, and  
U.S. BUREAU OF RECLAMATION,

Defendants.

---

NEZ PERCE TRIBE'S MEMO IN SUPPORT OF PLAINTIFFS' MOTIONS FOR  
SUMMARY JUDGMENT

## TABLE OF CONTENTS

INTRODUCTION.....	1
STANDARD OF REVIEW.....	2
ARGUMENT.....	4
I. THE 2014 SUPPLEMENTAL BIOP'S JEOPARDY AND ADVERSE MODIFICATION CONCLUSIONS CONTINUE TO RELY ON THE INCORRECT STANDARDS AND INCOMPLETE ANALYSES OF THE 2008 BIOP AND SUCCESSOR PRODUCTS.....	4
II. THE 2014 SUPPLEMENTAL BIOP FAILS TO RATIONALLY ANALYZE CLIMATE CHANGE RISKS AND USE THE BEST AVAILABLE SCIENCE, AND EXACERBATES THE FLAWS OF THE 2008 BIOP AND SUCCESSOR PRODUCTS.....	10
III. THE 2014 SUPPLEMENTAL BIOP CONTINUES TO RELY ON SPECULATIVE TRIBUTARY AND ESTUARY HABITAT ACTIONS TO PRODUCE SUBSTANTIAL SURVIVAL IMPROVEMENTS.....	20
IV. THE 2014 SUPPLEMENTAL BIOP CONTINUES TO ACCEPT A DAM BREACHING CONTINGENCY PLAN THAT WOULD BE USELESS PRECISELY WHEN NEEDED.....	25
V. THE ACTION AGENCIES HAVE FAILED ENTIRELY TO COMPLY WITH NEPA IN ADOPTING THE 2014 FCRPS RPA.....	27
CONCLUSION.....	29

## TABLE OF AUTHORITIES

CASES

<u>Bennett v. Spear</u> , 520 U.S. 154 (1997).....	2
<u>Bureau of Alcohol, Tobacco &amp; Firearms v. Federal Labor Relations Auth.</u> , 464 U.S. 89 (1983).....	2
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971).....	2
<u>Ethyl Corp. v. EPA</u> , 541 F.2d 1 (D.C. Cir. 1976).....	3
<u>Intertribal Sinkyone Wilderness Council v. National Marine Fisheries Serv.</u> , 970 F. Supp. 2d 988, 1007 (N.D. Cal. 2013).....	14
<u>Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.</u> , 463 U.S. 29 (1983).....	2
<u>National Wildlife Federation v. National Marine Fisheries Service</u> , 2005 WL 1278878 (D. Or. 2005), <u>aff'd</u> , 524 F.3d 917.....	3
<u>National Wildlife Federation v. National Marine Fisheries Service</u> , 524 F.3d 917 (9 <sup>th</sup> Cir. 2008).....	<u>passim</u>
<u>Pacific Coast Fed'n of Fisherman's Ass'ns v. NMFS</u> , 265 F.3d 1028 (9 <sup>th</sup> Cir. 2001).....	2
<u>San Luis &amp; Delta-Mendota Water Auth. v. Jewell</u> , 747 F.3d 581 (9th Cir. 2014).....	28
<u>Sierra Club v. Marsh</u> , 816 F.2d 1376 (9 <sup>th</sup> Cir. 1987).....	4
<u>TVA v. Hill</u> , 437 U.S. 153 (1978).....	<u>passim</u>
<u>Wild Fish Conservancy v. Salazar</u> , 628 F.3d 513, 524 (9 <sup>th</sup> Cir. 2010).....	13

## STATUTES

5 U.S.C. § 706(2)(a).....2

16 U.S.C. § 1536.....	<u>passim</u>
42 U.S.C. § 4332.....	28

REGULATIONS

50 C.F.R. § 402.02.....	<u>passim</u>
40 C.F.R. §1502.14.....	29

MISCELLANEOUS

<u>Endangered Species Consultation Handbook,</u> U.S. Fish and Wildlife Service and NMFS, 1998.....	<u>passim</u>
--	---------------

## INTRODUCTION

Ki hiwes nunim howtin waqiswiitine oykala hiwes ke kuus wetes hiwcetetu pel'leyhype. Oykala ke hipimtetu pike weteskiniñ ka pen'neñsep waqiswit hiwsiiñ nunim mickuynekt. Kus wecen hiwes toosñ nunim kuus ka hiwciñ lepitipñ tukewtelikin eetqo kuuspelu etke kuuspeme hiwsiiñ. Kalo'.

[According to our spiritual way of life, everything is based on nature.  
Anything that grows or lives is part of our spiritual life.  
The most important element we have in our way of life is water.  
The next most important element is the fish because the fish comes from water.]

Isluumc, Horace Axtell, Nez Perce elder, September 2008

The Nez Perce Tribe respectfully submits this memorandum in support of the claims and summary judgment arguments of National Wildlife Federation (NWF) Plaintiffs and the State of Oregon in this case.

This case unavoidably requires the restatement of interests, intentions and positions. The Nez Perce Tribe is deeply committed to rebuilding the Columbia and Snake River salmon runs to healthy, harvestable levels and fairly sharing the conservation burden. Of the Snake River runs, sockeye are listed as endangered under the Endangered Species Act (ESA), and spring/summer Chinook, fall Chinook, and steelhead are all listed as threatened under the ESA. The dams on the lower Snake River and the mainstem Columbia have had – and continue to have – an enormous impact on salmon and steelhead, and, in turn, on the Nez Perce Tribe and its people. The Tribe's Reservation, and many of the Tribe's usual and accustomed fishing places, in addition to those on the mainstem Columbia, lie above the eight dams on the lower Snake and Columbia rivers.

The Tribe continues to participate in this case for the fundamental reason that the federal action agencies' hydropower operations remain essentially unchanged, and NOAA continues to produce Federal Columbia River Power System (FCRPS) biological

opinions (BiOps) in which the demands of river users come first and the survival and recovery needs of endangered and threatened salmon and steelhead come last. This is unlawful. Both Congress and the U.S. Supreme Court have made it clear that the required priority when federal agencies interact with ESA listed species is that the needs of listed species must come first. TVA v. Hill, 437 U.S. 153, 180 (1978).

### **STANDARD OF REVIEW**

An ESA BiOp is an agency action reviewable under the Administrative Procedure Act (APA). Bennett v. Spear, 520 U.S. 154, 175 (1997). A court may “hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .” 5 U.S.C. § 706(2)(A). A court must perform a “thorough, probing, in-depth review” of agency action. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Review may not “rubber stamp . . . decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 97 (1983). A court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983). “Essentially, [a court] must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Pacific Coast Fed’n of Fisherman’s Ass’ns v. NMFS, 265 F.3d 1028, 1034 (9<sup>th</sup> Cir. 2001) (quotations and citations omitted).

Especially pertinent in this case, this Court has recognized that “the presumption of agency expertise may be rebutted if the decisions, even though based on scientific

expertise, are not reasoned.” NWF v. NMFS, 2005 WL 1278878, at \*4 (D. Or. 2005), aff’d, 524 F.3d 917 (9<sup>th</sup> Cir. 2008) (internal quotation and citation omitted).

A thoughtful summary of the relationship under the APA between agency deference and thorough judicial scrutiny of agency evidence and reasoning:

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court’s effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function.

Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc).

## **ARGUMENT**

I. THE 2014 SUPPLEMENTAL BIOP’S JEOPARDY AND ADVERSE MODIFICATION CONCLUSIONS CONTINUE TO RELY ON THE INCORRECT STANDARDS AND INCOMPLETE ANALYSES OF THE 2008 BIOP AND SUCCESSOR PRODUCTS.

The Tribe supports the claims and arguments made by NWF Plaintiffs and Oregon regarding both standard/framework and analytical flaws in the 2014 BiOp with respect to its jeopardy (species) and adverse modification (critical habitat) conclusions under Section 7(a)(2) of the ESA.

Nothing of consequence in NOAA’s ESA Section 7 methodology has changed since the 2008 BiOp. The 2014 Supplemental BiOp reasserts jeopardy and adverse modification conclusions that start from incorrect standards and then rest on incomplete analyses done to meet those misdirected standards – all of which fails to comply with the

ESA and APA. The 2014 BiOp’s “good to go” Section 7 conclusions as a result place the risk of error on the listed species rather than the FCRPS hydropower system action at the center of this case. This is precisely the reverse of the burden of risk required by law.

Federal agencies must “give the benefit of the doubt” to ESA listed species. Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9<sup>th</sup> Cir. 1987) (citations omitted).

#### A. The 2014 BiOp’s jeopardy and adverse modification standards remain wrong.

Words matter. Improperly worded standards have analytical consequences. The 2008 BiOp set a self-limited standard of inquiry that continues through the 2014 BiOp. NOAA defined the jeopardy standard as “whether the species can be expected to survive with an adequate *potential for recovery* (e.g. *trending toward recovery*) . . .” 2008 BiOp at 1-10 (emphasis added).<sup>1</sup> That standard dictates and limits the extent of NOAA’s

---

<sup>1</sup> NOAA’s standard for determining adverse modification of critical habitat, and the incomplete analysis it then conducts to meet that standard, is a mirror image of the errors of its jeopardy inquiry. The Tribe supports the detailed arguments made by Oregon and NWF regarding the treatment of critical habitat in the 2014 BiOp, and here only summarizes its assessment of those parallel errors.

The 2008 BiOp established a critical habitat standard based on the question “whether affected designated critical habitat is likely to remain functional (*or retain the ability to become functional*) to serve the intended conservation role for the species in the near and long term under the effects of the action, environmental baseline and any cumulative effects.” 2008 BiOp at 1-10 (emphasis added). As with the concept of “potential for recovery,” which because it is already implicit in the definition of survival is meaningless as a distinct inquiry, “retain the ability to become functional” is a meaningless standard when used to inquire into Section 7(a)(2)’s mandate that NOAA ensure that the action is “not likely” “to result in the destruction or adverse modification of [designated critical] habitat.”

The standard is then employed in a conclusory manner that could have supported any desired outcome: e.g., “critical habitat will retain at least its current ability for PCEs to become functionally established. . . .” (2014 BiOp at 477, RPA Effects Determination); and, e.g., 2008 BiOp at 8.3-46 (Snake River Spring/Summer Chinook). Wherever employed, the BiOp adverse modification conclusion follows an iteration of mitigation actions with little or no discussion of the adverse effects of “the elephant in the room:” the effects of FCRPS dam operations on the species’ mainstem river migratory critical habitat. This is precisely the point where the consequences of the adverse modification

analysis: the 2008 BiOp states that “[t]he purpose of both the quantitative and the qualitative analyses is to evaluate whether: - Short-term extinction risk is sufficiently low to meet the *survival prong* of the jeopardy standard; and whether - The populations within a species are expected to be on a trend towards recovery, the *potential for recovery prong* of the jeopardy standard.” BiOp at 7-4 to 7-5 (emphasis in original).

This is the wrong standard. “Survival” by regulatory definition already includes “the potential for recovery.” ESA Consultation Handbook at 4-35. “Recovery,” as a separate action-effects inquiry, has a separate meaning that must be employed. The jeopardy inquiry otherwise functionally collapses into the same “survival only” inquiry rejected by the Ninth Circuit as to the 2004 BiOp. NWF v. NMFS, 524 F.3d 917, 932 (9<sup>th</sup> Cir. 2008). As the Ninth Circuit held there, statutory and regulatory interpretations “that give no significance to portions of the text are disfavored.” Id. (citation omitted). Here NOAA’s “potential for recovery” standard, by redundancy with the regulatory definition of “survival,” gives no significance to the distinct regulatory definition of “recovery.”

ESA regulations provide the necessary definitions:

“Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, *to reduce appreciably the likelihood of both the survival and recovery of a listed species* in the wild by reducing the reproduction, numbers, or distribution of that species.

---

standard chosen become most apparent. When the inquiry boils down to whether critical habitat is “likely to *retain the ability to become functional*,” an FCRPS action which is to any extent incrementally better than prior FCRPS operations will be allowed to pass muster. This is not consistent with the language and purpose of the ESA, nor with ESA critical habitat case law, as discussed by NWF and Oregon.

“Recovery” means improvement in the status of listed species *to the point at which listing is no longer appropriate* under the criteria set out in section 4(a)(1) of the Act.

50 C.F.R. § 402.02 (emphasis added).

NOAA’s ESA Consultation Handbook defines “survival” as:

[T]he species’ persistence, as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future *while retaining the potential for recovery*.

Endangered Species Consultation Handbook at 4-35 (emphasis added).

The ESA Consultation Handbook defines “recovery” with the § 402.02 definition above, and the additional statement that “recovery is the process by which species’ ecosystems are restored and/or threats to the species are removed so self-sustaining and self-regulating populations of listed species can be supported as persistent members of native biotic communities.” Id.

A standard merges with an analysis, and a flawed standard will misdirect an analysis, at just this point. In affirming this Court’s invalidation of the 2004 BiOp, the Ninth Circuit summarized the requirement of a recovery prong analysis:

The question before us is not whether, on the merits, recovery risks in fact require a jeopardy finding here, but whether, as part of the consultation process, NMFS *must conduct a full analysis of those risks* and their impacts on the listed species’ continued existence. Although recovery impacts alone may not *often* prompt a jeopardy finding, NMFS’s analytical omission here may not be dismissed as harmless: the highly precarious status of the listed fishes at issue raises a substantial possibility that considering recovery impacts could change the jeopardy analysis.

524 F.3d at 933 (emphasis added in part) (footnote regarding Snake River sockeye recovery risks omitted).

The Ninth Circuit thereby rejected a jeopardy standard in which the inquiry was “survival only,” with only implicit consideration of recovery. The court clearly intended that

NOAA's analysis on remand would consider the risks of a consulted agency action to the species' actual recovery. That has not occurred. The "potential for recovery" standard employed in the 2008/14 BiOps as a matter of plain language and regulatory definition is no different in its analytical consequences than the "survival only" inquiry rejected by the Ninth Circuit six years ago.

B. The BiOp's jeopardy and adverse modification analyses are as a result incomplete and arbitrary.

The consequences of setting vague-to-the-point-of-meaningless standards for the recovery component of jeopardy – "*potential for recovery*" – and for adverse modification of critical habitat<sup>2</sup> – "*retain the ability to become functional*" – are revealed in the misdirected analyses that the 2008/14 BiOps then conduct.<sup>3</sup>

Again the Ninth Circuit's 2008 instructions are avoided. The court held that NOAA in the 2004 BiOp had "inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery. It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from 'significant' impairments to habitat that is already severely degraded." 524 F.3d at 936.

Yet employment of the "potential for/trending toward recovery"<sup>4</sup> standard has allowed the 2008 BiOp, and the present 2014 Supplemental BiOp, to employ a methodology that looks at only one, analytically inconclusive aspect of the problem:

---

<sup>2</sup> See Footnote 1.

<sup>3</sup> The Tribe supports the detailed explanation by NWF Plaintiffs and Oregon of multiple aspects of arbitrary and irrational analysis occurring in the 2008 and 2014 BiOps, that are indeed compounded in the supplemental analysis of the 2014 BiOp.

<sup>4</sup> The immediate translation of "potential for recovery" into "e.g., trending toward recovery" facilitated the incomplete, inconclusive analysis to come. 2008 BiOp at 1-10.

productivity “trends” divorced from real world abundance/population size. With respect to recovery risk analysis, the 2008/14 BiOps rest on the use of three “metrics” possessing the same flaw. Average adult returns or recruits per spawner (R/S) measures population productivity, regardless actual population numbers; lambda ( $\lambda$ ), measures population growth rates in four-year sums, regardless actual population numbers; and Biological Review Team (BRT) trend measures the trend of population abundance, also regardless actual population numbers. For R/S and lambda, NOAA states that its recovery-analysis “goal” is any number greater than 1.0. 2008 BiOp at 7-24 to 7-25. For the BRT trend, it was less clear whether the goal was a number greater or merely equal to 1.0. Id. at 7-26. All three metrics possess the same flaw and fail to reveal a critical aspect of the jeopardy issue. They each only indicate a “trend” in growth, with no mathematical connection to actual population size/abundance, much less to an analytically usable recovery abundance target.<sup>5</sup>

---

<sup>5</sup> This Court, in its February 18, 2009, letter to the parties, in Question # 5 (Dkt. 1682 at 3-4), asked a crucial question that has still never been adequately answered. The question suggested precisely the point made by the Tribe above, and made by NWF and Oregon as well in more detail: productivity metrics disconnected from any real world population size are mathematically, analytically inconclusive:

Federal Defendants urge that if there is any positive growth in abundance or productivity (*i. e.*, a greater than 1 to 1 ratio of adult returns per spawner), a species is "trending toward recovery" and thus, not likely to be "jeopardized." Does this mean that an incremental survival improvement is sufficient to avoid jeopardy regardless of the already vulnerable status of the species? Stated differently, if Federal Defendants anticipate that 100 listed adult sockeye will return to the river in 2018 and approximately 90 returned in 2008, does Federal Defendants' approach mandate a "no jeopardy" conclusion even though 90 returning Sockeye is still so low as to be considered a continued threat to the species' extinction? Does the best available science support such a conclusion?

NOAA never explains, in any of the intertwined FCRPS BiOps of this case, how any productivity metric, disconnected from actual population size/abundance, can be a rational way of conducting a “full analysis,” 524 F.3d at 933, of risks to recovery for a listed species from the effects of the FCRPS action. In the 2008 BiOp, it paid lip service, in its recovery overview, to the concept of recovery population abundance levels, 2008 BiOp at 7-22, and then listed for some populations— but never used/employed – recovery abundance levels. E.g., 2008 BiOp at 8.3-47, Table 8.3.2-1. The 2014 BiOp states that population abundance levels have been “considered,” 2014 BiOp at 47, but not used as an indicator metric, and the 2008 BiOp is described as having included average abundance as a “descriptor,” but one where no “goals” were established for analytical use, as with the three productivity metrics. Id. at 55. NOAA seems to have concluded that it now needs to *say* that it “considered” population abundance levels, id. at 47, but all this amounts to is ex post facto rationalizing. That logical aspect of a “full analysis” is simply missing and there is no rational connection made between facts that are simply recited – never employed analytically – and the BiOp’s ultimate Section 7 conclusions. See 265 F.3d at 1034.

Without an analytical connection to actual population abundance levels, the 2008 BiOp productivity metrics that remain the underpinning of the 2014 BiOp are analytically inconclusive tools, insufficient to answer the required ESA jeopardy question whether the action “appreciably reduces the likelihood of both the survival and *recovery* of a listed species.” 50 C.F.R. § 402.02 (emphasis added).

The Tribe remains in this case because these analytical points matter – they have consequences. Asking the correct recovery-risks question is centrally significant to this

case and has been consistently avoided by the agencies. The purpose of the ESA is not to allow listed species to “survive” in spite of harmful federal actions, or to devise “mitigation measures” that will allow listed species to experience slightly less harm and continue to “survive.” The risks posed by a federal action to the (definitional) recovery of listed species must be evaluated and can in fact alter the ultimate jeopardy conclusion.

NWF v. NMFS, 524 F.3d at 933.

## II. THE 2014 SUPPLEMENTAL BIOP FAILS TO RATIONALLY ANALYZE CLIMATE CHANGE RISKS AND USE THE BEST AVAILABLE SCIENCE, AND EXACERBATES THE FLAWS OF THE 2008 BIOP AND SUCCESSOR PRODUCTS.

The Nez Perce Tribe is intimately connected with its homeland, all of its usual and accustomed fishing places, and the fish by law and culture. The Nez Perce Tribe reserved, and the United States secured to the Tribe, the right to take fish at all of the Tribe’s usual and accustomed places, and the right to hunt, gather, and pasture on open and unclaimed lands. Treaty with the Nez Perces, 12 Stat. 957 (June 11, 1855). Climate change, by affecting these traditional and treaty-reserved resources throughout their life-cycles, and the habitat on which these fish, wildlife and plants depend, as well as by affecting the geographic distribution of these species, can affect Treaty-reserved rights.

The Tribe has been concerned about the risks of climate change on salmon and steelhead (and Pacific lamprey) throughout their life cycles, including the impacts of climate change on freshwater habitat and freshwater life-stages, because much of the freshwater habitat for ESA listed Snake River salmon and steelhead is above the eight federal dams on the mainstem Columbia and lower Snake River, where the Nez Perce Tribe’s Reservation and many of its usual and accustomed fishing places (in addition to those on the mainstem Columbia) are located. The Tribe’s concerns are informed by

leading scientific opinion indicating that climate change will be among the most fundamental influences on the future survival and recovery of Pacific Northwest salmon and steelhead. The Tribe is extremely familiar with the Action and RPAs NOAA has set forth in its BiOps for the FCRPS dams to try to mitigate for the effects of those dams: from Nez Perce implementation of the lion's share of the habitat restoration actions that are occurring in the Snake River Basin to Nez Perce involvement in the long-standing releases of cold water from Dworshak Dam – located on the Nez Perce Reservation – to assist in cooling temperatures in the Lower Snake River and being responsive to fall Chinook in the Clearwater.

Consequently, the Tribe is extremely concerned that NOAA's 2014 BiOp:

- fails to actually analyze the risks and impacts of climate change on freshwater habitat and freshwater life stages;
- ignores a significant aspect of the problem by asking whether Action/RPA actions taken to mitigate for the current impacts of the FCRPS dams are consistent with the *types* of actions the ISAB recommended as responsive to climate change, and failing to assess the *magnitude and extent* to which the Action/RPA actions are – or even can be – responsive to the risks associated with climate change while serving as mitigation for the impacts of the FCRPS dams;
- fails to analytically use – rather than recite – the best available science regarding the risks and impacts of climate change.

All of the Tribe's concerns involve critically important aspects of the problem that the law does allow to be ignored. Agency action is unlawful "if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs., 463 U.S. at 43. A BiOp is also invalid if it "fails to use the best available science as required by 16

U.S.C. § 1536(a)(2).” Pacific Coast Fed’n, 265 F.3d at 1034. “Essentially, a court must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Id. (quotations and citations omitted).

- A. The 2014 BiOp does not actually analyze the impacts of climate change on freshwater habitat and the freshwater portion of the salmon lifecycle and does not use the Best Available Science.

NOAA’s consideration of climate change on freshwater habitat and the freshwater portion of the salmon lifecycle in the 2008 BiOp consisted only of observing whether the actions in the RPA intended to mitigate adverse hydrosystem impacts were consistent with the types of action the Independent Scientific Advisory Board (ISAB) recommended to address climate impacts to anadromous fish, and concluding that they were. The 2014 BiOp does not alter this construct, reciting the 2008 BiOp’s description of NOAA’s approach to climate change affecting freshwater habitat and life stages as “a method of qualitative evaluation, based on ISAB recommendations for pro-active actions” where the “primary qualitative method NOAA uses to evaluate the Prospective Actions is to determine the degree to which the Prospective Actions implement recommendations by the ISAB (2007c) to reduce impacts of climate change on anadromous salmonids.” 2014 BiOp at 435, citing 2008 BiOp at 7-14, 7-32. At first glance, this description, and a shorthand reference in the BiOp<sup>6</sup>, might give the reader the impression that NOAA qualitatively analyzed the impact of climate change risks on freshwater habitat and freshwater life stages. What NOAA actually did, evident from a closer reading of this

---

<sup>6</sup> The 2014 BiOp’s statement that “future freshwater climate change was considered qualitatively” in the 2008 BiOp (2014 BiOp at 180) is mere shorthand and does not describe what NOAA actually did as set forth in the text.

language, is (1) jump over any attempt to analyze the extent and severity of climate change risks to freshwater habitat and freshwater life stages – using all available information, whether qualitative or quantitative, and (2) instead ask a qualitative question about whether the Action/RPA implements the types of actions the ISAB recommended to address climate change. The question that NOAA asks, however, tells one nothing meaningful about the extent and severity of the climate change risks to freshwater habitat and life stages. In this way, NOAA avoids analyzing a significant aspect of the problem.

NOAA's 2008 BiOp mustered an explanation for not conducting a quantitative analysis at that time (stating that “the primary reason for not attempting quantitative modeling is lack of available information regarding effects of climate change on survival of anadromous salmonids in the Columbia Basin” yet acknowledging that there was at least one quantitative study they were aware of) (2008 BiOp at 7-14)) that the 2014 BiOp continues to rely upon. 2014 BiOp at 435, referring to the 2008 BiOp at 7-14. Neither the 2008 BiOp nor the 2014 BiOp offers an explanation for not doing any analysis on the extent and severity of climate change impacts and risks on freshwater habitat and life stages using the best available information and science. To the extent that NOAA's explanation is that “[t]he full breadth of long-term climate change (ISAB 2007c) is unlikely to be realized in the ten year term of this Opinion” (2008 BiOp at 7-14, referenced in 2014 BiOp at 435), this runs afoul of the ESA and APA. NOAA cannot rationally limit the scope of its analysis to just the period of the BiOp. Wild Fish Conservancy v. Salazar, 628 F.3d 513, 524 (9<sup>th</sup> Cir. 2010) (the term of the analysis “must be long enough for the Service to make a meaningful determination as to whether the ongoing” action would jeopardize ESA-listed species). See also Intertribal Sinkyone

Wilderness Council v. National Marine Fisheries Serv., 970 F. Supp. 2d 988, 1007 (N.D. Cal. 2013) (rejecting NOAA’s similar attempt to limit analysis to a five-year period for action that would continue indefinitely). And as NWF has explained, NOAA is simultaneously relying on the benefits of tributary habitat improvements in the 2014 BiOp that it admits may not accrue for decades while refusing to consider any adverse effects on those assumed benefits.

- B. NOAA’s ignores a significant aspect of the problem by asking whether Action/RPA actions taken to mitigate for the current impacts of the FCRPS dams are consistent with the *types* of actions the ISAB recommended as responsive to climate change, and failing to assess the *magnitude and extent* to which the Action/RPA actions are – or even can be – responsive to the risks associated with climate change while serving as mitigation for the impacts of the FCRPS dams.

NOAA’s approach to analyzing the FCRPS Action/RPA with respect to the effects of climate change is set forth in Section 3.9 of the 2014 BiOp. As in the 2008 BiOp, NOAA’s approach consists of asking whether the Action/RPA actions taken to mitigate for the current effects of the FCRPS dams are consistent with the types of actions the ISAB recommended to address climate impacts to anadromous fish, and concluding that they are. 2014 BiOp at 442 (“NOAA Fisheries continues to conclude that sufficient actions consistent with the ISAB’s (2007b) recommendations for responses to climate change have been included in the RPA and are being implemented by the Action Agencies as planned.”) NOAA’s approach is arbitrary, irrational and overlooks important aspects of the problem because it doesn’t tell one anything about the *extent and magnitude* to which existing actions in the FCPRS Action/RPA provide any additional response to climate change above and beyond intended mitigation for existing hydrosystem effects.

Simply reading Section 3.9 “RPA Implementation to Address Effects of Climate Change” reveals that NOAA offers no analysis of the extent and magnitude to which the FCRPS Action/RPA actions address climate change beyond an intention to mitigate for the existing hydrosystem effects. Any of the actions in Section 3.9 illustrate this point, but two examples from Nez Perce country are revealing:

- Section 3.9.4, “Mainstem Hydropower Mitigation to Address Climate Change,” (2014 BiOp at 440-41) states:

The ISAB (2007b) recommended actions in the mainstem hydropower system that could help to mitigate for impending effects of climate change, such as addressing outflow temperatures, development and implementation of fish passage strategies, transportation, and predation management. Many RPA actions address these factors including the following examples.

...  
The Action Agencies continue to conduct cold-water releases from Dworshak Dam, which is temperature stratified, to maintain temperatures in Lower Granite reservoir below 20°C in late summer. Recent research confirms the importance of this management practice for enhancing survival of fall-run Chinook from the Clearwater River, which may over-winter in reservoirs and then migrate the following spring as yearlings (see 2013 CE, Section 2, RPA 55.4).

- Section 3.9.2, “Tributary Habitat Mitigation to Address Climate Change,” (2014 BiOp at 437-38) states:

The ISAB (2007b) details a list of actions that can directly moderate impacts of climate change in tributary streams. Among actions to improve tributary habitat in a manner that will help salmon and steelhead adapt to the effects of climate change, the 2008 BiOp highlighted water rights acquisition, riparian protection, barrier removal, and restoration of habitat connectivity to wetlands and floodplains that enhance flows and improve access to thermal refugia.

\*\*\*

The Lolo Creek watershed provides another example of actions to mitigate for the effects of climate change through passage improvement, riparian enhancement, and restoration of floodplain connectivity. Restoration efforts proposed for Lolo Creek that can buffer the effects of climate change on this drainage include culvert and bridge replacement to specifications that will accommodate a 100-year flow event and removing barriers in areas with suitable habitat that will allow for more diversity and the potential for fish to

move to higher, cooler systems. Because heat budgets in streams are typically dominated by incoming solar radiation, shading from riparian vegetation plays an important role in buffering stream temperatures on small to medium-sized streams (Isaak 2012). Riparian plantings and floodplain restoration share many of the same benefits. Riparian plantings have the obvious effect of shading streams to reduce water temperatures. Floodplain restoration can help attenuate peak flows.

These two examples are illustrative. Dworshak Dam and Reservoir is currently being operated to release cold water to address high temperatures in the lower Snake River. Thus the answer to the question whether Dworshak's releases of cold water are consistent with the *types* of actions that the ISAB recommended are consistent with climate change is yes. However, this tells one nothing about the magnitude and extent to which Dworshak cold water releases are – or can be – responsive to climate change in addition to serving to mitigate for the existing operations of the FCRPS dams. The *existing* operation of Dworshak Dam to provide cold water releases has been occurring as described since at least 1995 when it was included in the 1995 FCRPS BiOp's Incidental Take Statement to address the impacts of the FCRPS dams.<sup>7</sup> In the 2014 BiOp, NOAA provides no explanation or analysis of the magnitude and extent to which this existing operation responds – or can respond – to climate change *in addition* to serving to

---

<sup>7</sup> NMFS 1995 FCRPS BiOp (NMFS 023714) provides as follows in its Incidental Take Statement (NMFS 023884):

17. The COE shall monitor river water temperatures and implement, when possible, temperature control measures in the lower Snake River, such as releasing cool water from both Dworshak Dam and the Hells Canyon complex (Hells Canyon, Oxbow and Brownlee dams) during August and September. High water temperatures negatively affect the life history of salmonids, including growth, disease resistance, migration, and spawning. Although higher temperatures are frequently encountered during migrations (depending on species and location), maximum optimum temperatures for chinook and sockeye salmon are approximately 58F (Bell 1991). Measures to decrease water temperatures may reduce stress and contribute to greater passage and spawning success for chinook salmon, sockeye salmon, and other anadromous species.

mitigate for the existing impact of the FCRPS dams. NOAA does not acknowledge the limited ability of Dworshak to release cold water to address existing hydrosystem effects, which an actual, full analysis would disclose. (Cold water releases from Dworshak do not always “maintain” temperatures in Lower Granite reservoir below 20°C in late summer as the 2014 BiOp states, nor could they, as there are limits to the ability to release cold water from Dworshak). Similarly, explaining that tributary habitat actions in Lolo Creek developed in response to mitigate the impacts of the FCRPS dams (with the assistance of the Nez Perce Tribe) are the types of actions that may also be responsive to climate change effects provides no explanation or analysis of the magnitude and extent to which these actions serve that purpose in addition to serving to mitigate for the present impacts of the FCRPS dams.

C. NOAA’s 2014 BiOp fails to actually use – rather than recite – the best available science regarding the risks and impacts of climate change.

As NOAA acknowledges in its literature review and in the 2014 BiOp, a considerable amount of additional information about climate change exists since the 2008 BiOp. NOAA is required by the ESA to do more than merely assemble updated information, as it did in the 2010 BiOp and does again in the 2014 BiOp. Under Section 7(a)(2), it must use that information. A BiOp is invalid if it “fails to use the best available science as required by 16 U.S.C. § 1536(a)(2).” Pacific Coast Fed’n, 265 F.3d at 1034.

Two examples are illustrative of areas where NOAA does not use the best available science. First, the 2014 BiOp references a study showing “dramatic []” contractions of the ocean range for all species of salmon by 2080.” 2014 BiOp at 178 (contraction of Chinook ocean summer range up to 88% by 2080, contractions for other

species of up to 50%). What NOAA fails to reveal in the BiOp, but is evident from the literature review, is that the study identifies a 24% reduction in ocean Chinook habitat by the 2020s (2014 BiOp, Appendix D at D-132). And the study itself identifies that habitat contractions are already occurring. NOAA admits that this study is “an example of an effect generally considered in the BiOp, but which new information indicates may be greater than previously anticipated” and that “updated climate projections and the multi-species perspective make this a particularly relevant study”. 2014 BiOp at 178-79. But NOAA does nothing further with this study, and offers no explanation for not using this study in an analysis. And to the extent that NOAA concludes that this new information is “within the range of expectations of the 2008 BiOp” this explanation is implausible since the 2008 BiOp did not mention such dramatic contractions in the marine range. Second, NOAA does update information in some areas: in its “updated” discussion of marine climate change, it highlights that the past few years of ocean conditions have been better for salmon than either its “current ocean” or “warm ocean” case scenarios in the 2008 BiOp. However, in updating that information about the extent to which ocean conditions have warmed to date, NOAA still avoids confronting an important aspect of the problem and the best available science indicating marine and other impacts will be greater and more rapid *in the future* and the ISAB criticism that NOAA’s worst-case, warm ocean scenario assumption about the future is *not pessimistic enough*.

D. NOAA has demonstrated its ability to do a meaningful analysis of climate change risks in other BiOps.

The Tribe joins with Oregon and NWF in respectfully requesting that this Court reject the 2014 FCRPS BiOp’s summary approach to climate change effects. Only this will ensure that NOAA actually provides the full analysis the ESA and APA require of

capturing the full extent of climate change risks and impacts throughout the salmon's life-cycle, including the impacts on freshwater habitat and freshwater life stages, as it analyzes the full effects of the FCRPS Action/RPA. It is instructive to note that NOAA *has* provided a meaningful analysis of the impacts of climate change in other BiOps, such as its 2009 BiOp on the Central Valley Project<sup>8</sup> – including assessing “climate change as part of the future [environmental] baseline”, assessing climate change risks to the species, and analyzing the ability (and limitations) of the proposed action and RPA to respond to climate change.

---

<sup>8</sup> NOAA’s June 4, 2009, biological opinion on “Long-Term Operations of the Central Valley Project and State Water Project” (“CVP/SWP BiOp) is available at: [http://www.westcoast.fisheries.noaa.gov/publications/Central\\_Valley/Water%20Operations/Operations.%20Criteria%20and%20Plan/nmfs\\_biological\\_and\\_conference\\_opinion\\_on\\_the\\_long-term\\_operations\\_of\\_the\\_cvp\\_and\\_swp.pdf](http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations.%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf) (visited December 16, 2014). The CVP/SWP BiOp may also be found in the administrative record of this case at 2010 AR Doc. BB281.

NOAA’s 2010 FCRPS BiOp (NMFS 030313) identified the CVP/SWP BiOp as “new information relevant to the 2008 FCRPS BiOp and AMIP” and described that it “developed a reasonable and prudent alternative that includes a number of measures to reduce impacts of the projects in the face of climate change” and noted that “The CVP/SWP BiOp concludes that these measures may not be sufficient to reduce temperature-related mortality of fish and eggs below the projects in light of climate change through 2030 action duration, so studies and pilot programs to evaluate and implement reintroduction above impassible dams are required.” NMFS 030386-87. The 2010 FCRPS BiOp states that “The 2008 [FCRPS] BiOp contains similar measures to manage water temperature such as flow provisions as described below” (NMFS 030387) but omits the fact that the FCRPS BiOp flow provisions to manage water temperatures are in response to the current impacts of the FCRPS dams, not additional climate change risks and impacts. What is evident from reading the CVP/SWP BiOp, and reviewing what NOAA actually did there, is that climate change is critically important at each step of that BiOp’s analysis: from climate change as part of the “future environmental baseline,” to assessing climate change risk to the species and critical habitat, to analyzing the ability (and limitations) of the proposed action and RPA to respond to climate change. As such, the meaningful climate change analysis NOAA conducted in the CVP/SWP BiOp stands in stark contrast to the 2008/2010/2014 FCRPS BiOps.

**III. THE 2014 SUPPLEMENTAL BIOP CONTINUES TO RELY ON SPECULATIVE TRIBUTARY AND ESTUARY HABITAT ACTIONS TO PRODUCE SUBSTANTIAL SURVIVAL IMPROVEMENTS.**

NOAA Fisheries' 2014 BiOp continues to place enormous reliance on prospective tributary and estuary habitat improvement to support its no-jeopardy and no-adverse modification conclusions for the FCRPS dams, and significant actions continue to be neither reasonably specific nor reasonably certain to occur as required by the ESA and APA.

The Nez Perce Tribe, throughout this litigation, has emphasized the importance of implementing habitat restoration actions in addition to – not in lieu of – making necessary improvements at the mainstem Columbia and Lower Snake River dams. As the Tribe has noted, this reflects the reality that the United States has obligations under the Northwest Power Act to protect, mitigate and enhance fish and wildlife affected by the FCRPS dams in addition to its legal obligations under the ESA, and the fact that in the Snake River basin above the four lower Snake River dams there are areas where habitat has been degraded and needs to be restored, and other areas where habitat is in near-pristine condition (such as in wilderness areas in Idaho). During the development of the 2008 BiOp, the Tribe recognized that it might or might not ultimately agree with NOAA's or the Action Agencies' interpretations of the ESA's requirements with respect to the FCRPS dams, these agencies' calculations of the "survival gaps" for these fish, or the actions that should be taken at the FCRPS dams, and consequently the Tribe took the approach of identifying tributary habitat projects in the Snake Basin above the four lower Snake River dams in which it works that could be implemented during a 10-year time frame; describing the existing projects and work, expanded projects and work, and new

projects and work; estimating the associated benefits with this effort; and, estimating the associated budgets.

Throughout this litigation the Tribe has emphasized the importance of NOAA “showing its work” in relying upon these habitat actions in the tributaries and in the estuary, as the ESA and APA require. The Tribe has insisted on NOAA showing its work both in the tributaries where the Tribe is carrying out this work, as well as in the estuary, where, for Snake River salmon and steelhead returning to Nez Perce country, NOAA’s 2008 BiOp relied on estuary habitat actions to provide a 6% survival improvement for Snake River steelhead and Snake River spring/summer Chinook and a 9% survival improvement for Snake River fall Chinook.

Yet NOAA’s 2014 BiOp continues to advance conclusions without showing its work. Two examples stand out to the Nez Perce Tribe: NOAA concludes that habitat quality improvements will be met where supplemental projects are needed in the Lochsa and South Fork Clearwater without revealing key information about the status of when such supplemental projects would be implemented and when benefits would be expected to accrue (2014 BiOp at 304-11); and, in the estuary, NOAA acknowledges significant delays in implementation but concludes that “the Action Agencies will ensure that the total sum of projects...will collectively reach the BiOp estuary habitat survival benefit performance standards” while continuing to assert that “if this project provides unfeasible, they [the action agencies] will implement others” without identifying any specific backup actions. 2014 BiOp at 336, 338.

This Court set forth the applicable legal standard related to NOAA's reliance on mitigation measures in its August 2, 2011 Opinion and Order invalidating the 2008/2010 BiOp:

The ESA prohibits NOAA Fisheries from relying on the effects of uncertain and speculative actions that are not "reasonably certain to occur." 50 C.F.R. § 402.02; Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF v. NMFS I"), 254 F. Supp. 2d 1196, 1207-09 (D. Or. 2003). Mitigation measures may be relied upon only where they involve "specific and binding plans" and "a clear, definite commitment of resources to implement those measures." Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF v. NMFS II"), 524 F.3d 917, 935-36 (9th Cir. 2008) (finding agency's "sincere general commitment to future improvements" inadequate to support no jeopardy conclusion). Mitigation measures supporting a biological opinion's no jeopardy conclusion [and adverse modification conclusion] must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)).

Dkt. 1855 at 11.

And, in finding that the 2008/2010 BiOp's estuary habitat mitigation program was "plagued with uncertainty," id. at 13, at that time based on the lack of specific projects for the 2013-2018 time frame, this Court also found that a process alone for identifying replacement estuary projects is inadequate: "Apart from a vague process for identifying replacement estuary projects if a particular action proves infeasible, there is no mechanism in the 2008 BiOp to ensure that the action agencies will implement specific projects in the 2013-2018 time frame *or that 'equally effective' actions even exist.* NOAA Fisheries' reliance on a 'commitment' to achieve a certain percent increase in salmon survival does not relieve NOAA Fisheries of the requirement to rely only on those actions that are reasonably certain to occur." Id. at 14 (emphasis added).

Against this backdrop, in its comments on the Draft 2014 FCRPS BiOp, the Tribe expressed concerns with respect to the tributary habitat “supplemental projects” identified as needed for the Lochsa and South Fork Clearwater. The Tribe stated that it “is committed to, and capable of, implementing on-the-ground habitat work that is funded and working in partnership with the Forest Service and the Action Agencies to carry out this work” but expressed concern that “no additional funding has been identified or allocated to these [supplemental] projects” and emphasized that “NOAA must be transparent and candid [in its BiOp] with respect to describing the status of identified and allocated funding, when implementation would occur, and when benefits are expected to begin accruing.” Nez Perce Tribe’s Comments on Draft 2014 BiOp, NMFS 266448, 266451-53.

The Tribe’s concerns still hold true. A review of the 2014 BiOp’s treatment of these supplemental projects for the Lochsa and South Fork Clearwater populations in Section 3.1.2.5 leads the Tribe to question whether NOAA can count on the entirety of the supplemental projects in the Lochsa and South Fork Clearwater being initiated, much less completed, by 2018. The 2014 BiOp fails to reveal that under existing processes (that is, in the absence of a decision to expedite these projects –something which has not occurred) the host of activities identified in the supplemental projects would be evaluated by the expert panel process in 2015, and if typical, funding would then be available in 2016, meaning that the earliest that projects could begin to be implemented on-the-ground would be in the summer of 2017. (It is important to understand that the amount of supplemental projects identified is substantial, and these projects would be in addition to the projects already scheduled to occur during this 2017 time period.) Thus, while the

Tribe recognizes the importance of these projects and the benefits they provide, and remains committed to getting these projects done, it does not appear that these supplemental projects can be completely implemented by 2018. And, even if one were to assume that the project benefits begin to accrue as soon as the project is underway, the logistics of project implementation would make it unreasonable to count on the benefits beginning to accrue prior to 2018.

With respect to the estuary habitat program, the Tribe shares the concerns that are set forth in Mr. Olney's Declaration. Most basically, it seems particularly hard to square the facts found – NOAA's acknowledgement of both the delay in estuary projects being implemented as well as the substantial shortfall in benefits as calculated by NOAA from the estuary projects that have been implemented to date – with the NOAA's conclusion that "the Action Agencies will ensure that the total sum of projects . . . will collectively reach the BiOp estuary habitat survival benefit performance standards" (2014 BiOp at 338) based on the information set forth in the BiOp. In addition, NOAA's explanation that "if this project proves unfeasible, they [the action agencies] will implement others" (2014 BiOp at 336) without identifying any backup actions that would allow one to assess whether such backup actions actually exist, continues to run afoul of the reasonable certainty the law requires as set forth in Judge Redden's May, 2011 Order.

The 2014 BiOp's reliance on tributary and estuary habitat mitigation to support its jeopardy and adverse modification conclusions as to the entire FCRPS RPA rests on numerous uncertainties, which could be categorized by project or by habitat area or by inconsistency with ESA legal principles. Perhaps the most obvious uncertainty is the overarching one, that NOAA's conclusions regarding the effects of the RPA on the

species and their critical habitat – conclusions bolstered largely by assumptions about the effects of habitat mitigation actions – are additionally wrong because they repeatedly place the risk of analytical error on each listed species. Above all else, NOAA has failed to “give the benefit of the doubt” to the ESA-listed species. See Sierra Club v. Marsh, 816 F.2d at 1386.

**IV. THE 2014 SUPPLEMENTAL BIOP CONTINUES TO ACCEPT A DAM BREACHING CONTINGENCY PLAN THAT WOULD BE USELESS PRECISELY WHEN NEEDED.**

Given the location of the Nez Perce Reservation and many of the treaty-reserved usual and accustomed fishing places of the Nez Perce people above eight of the FCRPS dams, the Tribe remains a uniquely affected advocate for breaching the four lower Snake River dams. Federal Defendants, since the 2004 BiOp, have been resistant to any serious consideration of the issue. The Tribe’s dam breaching comments regarding the 2008 BiOp were subjected to a federal motion to strike, which was rejected by this Court largely on the basis that the dam breaching issue has been a persistent element both of past NOAA BiOps, e.g. 1995, 2000, and of this Court’s own remand rulings regarding both the 2000 and 2004 BiOps. See Dkt. 1619 at 5-7. The Court’s August 2, 2011 decision overturning the 2008/10 BiOp continued the integration of the issue within this case and the prospective FCRPS action:

No later than January 1, 2014, NOAA Fisheries shall produce a new biological opinion that reevaluates the efficacy of the RPAs in avoiding jeopardy, identifies reasonably specific mitigation plans for the life of the biological opinion, and considers whether more aggressive action, *such as dam removal* and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy. As a practical matter, it may be difficult for Federal Defendants to develop a long-term biological opinion that relies only on mitigation measures that are reasonably certain to occur.

Dkt. 1855 at 20 (emphasis added).

In its opening brief on the 2008 BiOp, the Tribe discussed at length its view that the Section 7 jeopardy and adverse modification errors of that BiOp were not inadvertent or careless: the BiOp was *crafted* in order not to have to ask certain questions and not to have to face certain answers. See Tribe's Opening Mem., Dkt. 1505, at 34-40.

The unchanged jeopardy and adverse modification errors – both in standards set and analyses conducted – of the 2008/14 BiOps are not a separate issue from the Tribe's advocacy for dam breaching. They are in large part *the reason* that full agency consideration of dam breaching, as an alternative action or as a seriously prepared-for contingency, has been repeatedly avoided in the 2008/14 BiOps.

The 2014 Supplemental BiOp, with its incorporation of 2009 Adaptive Management Implementation Plan (AMIP) contingency planning (2014 BiOp at 419-26), continues the disingenuous placement of lower Snake River dam breaching as an AMIP “contingency of last resort,” as criticized by the Tribe in prior briefing. Tribe’s AMIP Resp. Br., Dkt. 1724, at 24-28. The question-begging premise remains: because the RPA is adequate, real world preparation for a fully and timely deployable dam breaching contingency is not necessary. “It is reasonable to study breaching of lower Snake River dam(s) as a contingency of last resort because the status of the Snake River species is improving and the 2008 BiOp analysis concluded that breaching is not necessary to avoid jeopardy.” AMIP, Dkt. 1712-2, at 37.

The Tribe and its people care about this question because they live where the adverse effects of *eight dams* are fully realized. The Tribe’s position throughout this case has remained consistent: lower Snake River dam breaching is a rational, feasible biological option that should be prepared for now and, at a minimum, be developed and

put “on the shelf” for *timely* implementation when needed. This Court in a May 18, 2009, letter seemed to agree, urging Federal Defendants to consider “what it will take to breach the lower Snake River dams if all other measures fail (i.e., independent scientific evaluation, permitting, funding, and congressional approval).” Dkt. 1699 at 3.

For the Tribe, the problem goes deeper. “Contingency of last resort” in fact appears to be a means of ensuring that dam breaching will remain a political – and inevitably politically paralyzed – issue that is functionally no different than the 2008 BiOp’s failure to consider a dam-breaching contingency at all. It remains unexplained why the question of congressional authority for the Corps, assuming for the moment the Corps’ position that it lacks authority, could not be resolved as a preliminary, contingent step: i.e., seeking congressional authority that the Corps would be able to execute in the future under biologically triggered circumstances. The contingency instead ensures that the question of congressional authority would become a final, drawn-out political fight in which biological considerations would inevitably be ignored. Dam breaching has not been treated as a serious contingency plan, one that could be implemented as and *when* needed. It is treated as a “process” in which breaching will be a political question in which the needs of fish and those who rely on them can be outvoted by all other social or economic factors no matter what the biological reality or urgency at that precise point in time.

The Nez Perce Tribe remains and will remain a leading advocate for breaching the four lower Snake River dams and investing in affected local communities as the best biological alternative for rebuilding Snake River salmon and steelhead runs.

V. THE ACTION AGENCIES HAVE FAILED ENTIRELY TO COMPLY WITH NEPA IN ADOPTING THE 2014 FCRPS RPA.

The Nez Perce Tribe supports the claims and arguments made by NWF Plaintiffs and Oregon regarding the action agencies' failure to comply with NEPA in this case. This issue is particularly significant to the Tribe because NEPA will require the agencies to consider hydrosystem alternatives, something the Tribe has consistently requested in the ESA context.

The NEPA flaw is simple. NEPA requires all federal agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Agency adoption of an RPA from an ESA BiOp requires compliance with NEPA. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581 (9th Cir. 2014) (holding that BOR decision to adopt an RPA from a biological opinion for operation of a water management system required preparation of an EIS).

The Corps and Reclamation have failed to comply with NEPA in making their decisions to adopt the 2014 RPA. The records of decision (RODs) for the agencies reference no NEPA decision documents – environmental impact statement or environmental assessment – that were prepared in support of the 2014 FCRPS RPA adoption decisions. 2014 Reclamation AR 00000001; 2014 Corps AR 0000001.<sup>9</sup>

The Tribe in this memorandum has repeatedly noted an agency pattern of failing to ask certain questions – legally required questions – with the fair implication that Federal Defendants do not want to have to answer those questions and/or deal with what

---

<sup>9</sup> The Tribe supports the detailed explanation NWF Plaintiffs make regarding those prior, older NEPA documents that are referenced in these RODs, none of which supports the actual 2014 RPA adoption decisions.

answers might result. The absence of required NEPA decision documents supporting the agencies' adoption of the 2014 RPA fits this pattern. NEPA compliance *will* require that alternative courses of action be disclosed, described and fully considered utilizing current information, something the Tribe has hoped for over a decade. 40 C.F.R. §1502.14 (comparing alternatives "is the heart of the environmental impact statement . . . sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."). And as the Tribe described above with respect to its advocacy for lower Snake River dam breaching, the Tribe finds the requirements of NEPA compliance additionally significant in that Federal Defendants will have to consider alternatives without being limited to what they believe they have present authority to implement. 40 C.F.R. § 1502.14(c) (EIS "shall" "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.").

## CONCLUSION

The Nez Perce Tribe respectfully urges the Court to grant NWF Plaintiffs' and the State of Oregon's motions for summary judgment.

Dated: December 16, 2014.

Respectfully submitted,

s/ David J. Cummings  
s/ Geoffrey M. Whiting  
 David J. Cummings (OSB #922695)  
 Geoffrey M. Whiting (OSB#954544)  
 NEZ PERCE TRIBE  
 OFFICE OF LEGAL COUNSEL  
 P.O. Box 305  
 Lapwai, ID 83540  
 (208) 843-7355 | Phone  
 (208) 843-7377 | Fax  
[djc@nezperce.org](mailto:djc@nezperce.org)  
[gwhiting@gmwnezperce.com](mailto:gwhiting@gmwnezperce.com)  
*Attorneys for the Nez Perce Tribe*

**CERTIFICATE OF SERVICE**

Pursuant to Local Rule 5-2, and F.R. Civ. P. 5(d), I certify that on December 16, 2014, the foregoing document 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:

Dr. Howard F. Horton, Ph.D.  
U. S. Court Technical Advisor  
Professor Emeritus of Fisheries  
Department of Fisheries & Wildlife  
104 Nash Hall  
Corvallis, OR 97331-3803  
hortonho@onid.orst.edu

Franklin County Farm Bureau Federation  
975 Carpenter Road NE Suite 301  
Lacey, WA 98516

Grant County Farm Bureau Federation  
975 Carpenter Road NE Suite 301  
Lacey, WA 98516

Washington Farm Bureau Federation  
975 Carpenter Road NE Suite 301  
Lacey, WA 98516

s/ Lori F. Picard

Lori F. Picard