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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants,

and

NORTHWEST RIVERPARTNERS, INLAND PORTS AND NAVIGATION GROUP, STATE OF IDAHO, STATE OF MONTANA, STATE OF WASHINGTON, KOOTENAI TRIBE OF IDAHO, CONFEDERATED SALISH AND KOOTENAI TRIBES, and NORTHWEST POWER AND CONSERVATION COUNCIL,

Intervenor-Defendants.

Case No. 3:01-cv-0640-SI

NORTHWEST RIVERPARTNERS' CROSS MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM

ORAL ARGUMENT SCHEDULED
JUNE 23, 2015

NORTHWEST RIVERPARTNERS' CROSS MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM

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CROSS MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Northwest RiverPartners ("RiverPartners") respectfully moves the Court pursuant to the Court's Amended Schedule Order of December 4, 2014, and Fed. R. Civ. P. 56(a) for summary judgment on the claims filed by the plaintiffs, the National Wildlife Federation, et al. ("NWF") and the State of Oregon (collectively "Plaintiffs") against the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the Bureau of Reclamation under the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act.

This motion is based on RiverPartners' memorandum set out below, the agency administrative records, pleadings and papers previously filed with the Court, and such other evidence as the Court deems appropriate.

Respectfully submitted this 6th day of March, 2015.

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I. INTRODUCTION

The Court here has the unenviable task of wading into the middle of litigation that has been waged for 15 years, or longer, if you include the earlier cases presided over by Judge Marsh. Plaintiffs' briefing is mind-numbingly arcane and technically very dense, and ultimately makes the Court's task even more difficult by repeatedly cross-referencing to arguments that they made in earlier rounds of this case (and to the declarations previously filed in support of those arguments as well).

But the Court need not dig and delve into the archives of this case or the morass of uber-technical arguments produced by Plaintiffs for two basic reasons. First, Plaintiffs apply the wrong legal standard by demanding a level of scientific certainty and exactness that Congress rejected. In amending the Endangered Species Act ("ESA") in 1978 and 1979, Congress effectively eliminated the kinds of arguments now advanced by Plaintiffs. As detailed below, Congress made clear that a biological opinion is essentially a "judgment" call that would often be based on imperfect information, and was not an absolute "guarantee." Plaintiffs' repeated demands for more and more certainty, riddled throughout their latest round of summary judgment briefs, have no basis in the law and therefore must fail.

Second, although obscured by Plaintiffs' briefing, this case presents a simple and straightforward question of administrative law. Section 7(a)(2) of the ESA instructs federal agencies to consult with the Secretary (here delegated to the National Marine Fisheries Service ("NMFS")) to ensure that a proposed federal action "is not likely to jeopardize the continued existence" of threatened or endangered salmon, or "result in the destruction or adverse modification of habitat" essential to those species. 16 U.S.C. § 1536(a)(2). As part of that consultation NMFS must produce a "written statement setting forth [NMFS'] opinion, and a

summary of the information on which the opinion is based." *Id*. at § 1536(b)(3)(A). If NMFS concludes that the action will "jeopardize the species" or destroy critical habitat, it must offer reasonable and prudent alternatives ("RPAs") that it "believes" would avoid that result. *Id*.

Plaintiffs do not dispute that NMFS complied with the statutory *process* set forth in the ESA, as it is beyond dispute that NMFS has produced the requisite "opinion," provided that opinion in a "written statement," produced a "summary of the information on which the opinion is based," and provided RPAs that it "believes" will avoid jeopardy to species or destruction of their habitat.

Instead, Plaintiffs' arguments fall into two broad categories of claims that may be readily disposed of under well-settled principles of administrative law. First, Plaintiffs disagree with NMFS' interpretation of the statutes it was entrusted to implement and/or NMFS' interpretation of the regulations that it has authored. So, for example, Plaintiffs offer their own interpretation of what "jeopardize" means, provide factors that they believe should go into that jeopardy analysis, and then lament that NMFS did not adequately address Plaintiffs' manufactured standard. *See, e.g.*, NWF Br. at 5-11. This kind of claim is readily disposed of under the deferential standards applicable to an agency's interpretation of its governing statutes (*Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984)) and regulations (*Auer v. Robbins,* 519 U.S. 452, 462 (1997)). If NMFS' interpretations of the statute or its regulations are plausible (and indeed, they are), that is the end of the inquiry.

The second category of arguments reflects Plaintiffs' efforts to second-guess the substance of NMFS' opinion in various ways. So, for example, Plaintiffs provide the Court with what they think would make a "rational and cautious" analysis, how they believe that uncertainty should be addressed, or how they would allocate risk, all in an effort to undermine NMFS'

opinion. These kinds of arguments are equally ill-fated under the deferential standard applicable to agency scientific determinations. *The Lands Council v. McNair*, 537 F.3d 981, 991 (9th Cir. 2008). As long as NMFS' opinion is based on facts found in the record (and indeed it is), that is the end of the inquiry.

RiverPartners endorses the federal government's explanation of NMFS' interpretation of the ESA and its regulations, and how NMFS' opinion is supported by the facts in the agency record. Without repeating those arguments, RiverPartners writes separately to add additional emphasis to the following specific points.

First, RiverPartners addresses Plaintiffs' collective efforts to contort the plain language of the ESA and infuse an affirmative obligation to recover species into the biological opinion process. As detailed below, Section 4(f) of the ESA places the affirmative duty "to develop and implement . . . recovery plans" directly on NMFS. 16 U.S.C. § 1533(f)(1). NMFS carries out that obligation with the aid and assistance of federal agencies, states, tribes, and local governments. The biological opinion under Section 7(b) is not part of the recovery process. Instead, the opinion evaluates the prohibitory mandate under Section 7(a)(2) that precludes actions that are likely to jeopardize the species or destroy critical habitat. To be sure, an action that precludes a species from ever recovering could fall short of that mandate. But that does not mean that the biological opinion must affirmatively ensure recovery of the species. To do so would make nonsense of the statutory scheme. As detailed below in Section IV.A., Plaintiffs' jeopardy and critical habitat arguments quickly unravel in light of the statutory standard.

Second, RiverPartners addresses Plaintiffs' arguments related to climate change (Section IV.B. below), spill (Section IV.C. below), and contingency planning (Section IV.D. below). As discussed in those sections, Plaintiffs' arguments ask more of the agency than the statute

requires, overlook the careful analysis in the record, or both. Accordingly, these arguments fail to demonstrate that NMFS was arbitrary and capricious and should be accordingly rejected.

Finally, RiverPartners addresses one additional ground for dismissing claims against Oregon, based on Oregon's contradictory attacks on the biological opinion. Since 2008, Oregon has been asserting opportunistic litigation positions, unconstrained by any effort or desire to maintain consistency. Oregon previously told Judge King in *U.S. v. Oregon* that the underlying biological opinion is consistent with applicable law, but now tells this Court that the very same analysis is arbitrary and capricious. Similarly, Oregon maintains in this forum that Columbia salmon and steelhead are in dire straits but assures its residents that the Columbia River is experiencing record returns – allowing it to extend fishing seasons and collect additional revenues. In other words, while this case proceeds, these "record returns" have allowed Oregon to authorize and indeed encourage additional (and unmitigated) take, which ironically serves only to add to the problems it asks this Court to now resolve. As discussed below in Section IV.E, Oregon's inconsistent representations provide ample grounds for this Court to dismiss its motion for summary judgment under the doctrine of judicial estoppel.

For all of these reasons, and those discussed more fully below, the Court should deny Plaintiffs' motions for summary judgment, and grant the cross motions for summary judgment filed by the federal defendants and allied parties.

II. BACKGROUND

A. The FCRPS Is Essential To The Northwest

The Federal Columbia River Power System ("FCRPS") is the crown jewel of the Pacific Northwest's clean, reliable, and renewable energy system. It provides more electricity than any other North American river. Hydropower is more efficient than any other form of electricity

generation and is capable of converting 90 percent of the available energy into electricity. By comparison, coal or natural gas plants are only capable of converting approximately 50 percent of the available energy from that resource extraction. Clean Hydro, www.cleanhydro.com (last visited Mar. 4, 2015).

The eight federal dams on the lower mainstem Columbia and Snake rivers alone provide the region with about 4,300 megawatts of consistently available energy – enough to power almost four cities the size of Seattle. And, in a region where meeting energy capacity needs is a increasing concern – i.e., the ability to meet peak or unexpectedly high energy demand on short notice – the dams provide the unique ability to meet fluctuations in regional energy needs. The four federal dams on the Snake River supply 12 percent of the capacity and five percent of energy produced on average by the entire federal hydro system. *Id.*

Hydropower produces no carbon emissions. Given the many environmental challenges posed by climate change, the FCRPS is a critical component of the Northwest's ability to reduce greenhouse gas emissions. NMFS015450. The existence and operation of the FCRPS alone is responsible for *ninety* percent of the region's renewable energy resources and reduces the Northwest's energy carbon footprint to nearly half that of other parts of the country.

B. Northwest RiverPartners' Interest In This Litigation

RiverPartners first intervened in this lawsuit more than a decade ago to ensure that the important attributes provided by the FCRPS continue to be fostered alongside healthy, thriving salmon populations. *See* ECF No. 1450. RiverPartners represents public, private, municipal, and cooperative utilities as well as ports, farmers, and businesses throughout the Northwest. NMFS265063. RiverPartners' constituents include more than 40,000 farmers and four million electric utility customers – all of whom pay for the high costs of the fish and wildlife programs

implemented through the 2014 biological opinion ("BiOp") BiOp through their electricity rates, and all of whom rely upon the affordable, clean, and reliable power that comes from the FCRPS. *Id*.

As explained by the federal government, this BiOp is like none other. 2014 BiOp at 32. It is the product of an extraordinary regional collaboration between federal, state, and tribal sovereigns over a number of years and is backed by an additional financial investment of more than a billion dollars paid for by RiverPartners' members and their constituents. *Id*. The BiOp has been vetted by the Independent Science Advisory Board, the Obama administration's top scientists, expert panel peer review, and the best scientific minds and fishery institutes in the nation. No other BiOp in the country has been vetted as thoroughly as this one and no other BiOp rivals the investment reflected by the human capital that generated the FCRPS BiOp.

III. STANDARD OF REVIEW

RiverPartners adopts and incorporates the federal defendants' standard of review.

IV. ARGUMENT

A. Plaintiffs' Arguments Are Premised On Misreading The ESA

Much of Plaintiffs' arguments are based on conflating a single section of the ESA – Section 7(a)(2) – with other sections of the Act, in an effort to create a standard that is effectively impossible to meet. The text of Section 7(a)(2) is narrow and prohibitory in nature:

> Each federal agency shall, in consultation with and with the assistance of the [Services], insure that any action authorized . . . or carried out by such agency . . . is <u>not likely</u> to jeopardize the continued existence of endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].

16 U.S.C. § 1536(a)(2) (emphasis added). The question posed by Section 7(a)(2) – whether the action is "likely" to jeopardize species or destroy habitat – is answered with an "opinion" by the

NMFS or the U.S. Fish and Wildlife Service Services (collectively the "Services") under Section 7(b). 16 U.S.C. § 1536(b). That opinion is issued under prescribed timelines and based on the best scientific and commercial data available.

Plaintiffs repeatedly ask more of the Section 7(a)(2) prohibition, claiming that the Services were required to do more to address the "recovery" of the species and more to account for uncertainty. But as detailed below, Plaintiffs are simply conflating separate obligations under the Act and otherwise imposing a standard that does not exist. The goal Plaintiffs seek to achieve (species recovery) is implemented through other provisions of the ESA (and under different timeframes). Section 4 of the ESA places separate duties on the Services to plan for recovery of a species and then carry out those plans. 16 U.S.C. § 1533(f). Section 7(a)(1) also places separate duties on both the Services and the action agencies to "utilize their authorities in the furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered . . . and threatened species." 16 U.S.C. § 1536(a)(1). These are the provisions of the ESA that will ultimately produce and achieve the recovery of species, not the prohibition at issue in this case established under Section 7(a)(2).

A review of the legislative and regulatory history (below) shows that Congress intended that the prohibitory obligation under Section 7(a)(2) remain distinct and apart from the affirmative obligation to recover species under Section 4(f) or 7(a)(1). Moreover, this history shows that the Section 7(a)(2) analysis was intended to be premised on a judgment call by the expert agency, and not present some kind of guarantee against all uncertainty. When placed in the proper statutory and regulatory context, Plaintiffs' arguments quickly unravel.

1. The ESA's History Demonstrates That The Section 7(a)(2) Process Is Limited To The Narrow Issue Of Whether Jeopardy Or Adverse Modification Are The Likely Result Of A Proposed Action

Congress originally enacted the ESA in 1973, in response to the rise in the number and severity of threats to the world's wildlife. *See Tenn. Valley Auth. v. Hill (TVA)*, 437 U.S. 153, 177 (1978). As originally enacted, the policy of the ESA was to "halt and reverse the trend towards extinction." *Id*. at 184. The original version of the Act was quite narrow and strict in this focus on halting extinctions. The original Act was narrow in the sense that while "conservation" was a stated goal of the ESA, the Act did not mention "recovery" and did not place an express obligation on any entity to plan for or carry out recovery activities. Endangered Species Act of 1973, Pub. L. No. 93-205, §§ 2, 4, 87 Stat. 884. The original Act was draconian in that Section 7 categorically required agencies "to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of listed species "or result in the destruction or modification" of critical habitat. *Id*. at § 7 (emphasis added).

The ESA's mandate quickly became a matter of controversy when the Supreme Court in *TVA* enjoined the construction of the Tellico Dam on the Little Tennessee River to protect the endangered snail darter, a small fish living in the vicinity of the dam. *TVA*, 437 U.S. at 172. Although construction on the dam was "virtually complete[]," with nearly $100 million already expended on the major infrastructure project, the Supreme Court halted construction, finding that the ESA mandated reversing the trend towards extinction, "whatever the cost." *Id*. at 184.

Congress immediately responded to this pronouncement by amending the ESA in November 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978). As one member of Congress explained, "[t]he Supreme Court decision may be good law, but it is very bad public policy." Staff of S. Comm. on Environment and Public Works, 97th Cong., a Legislative History of the

Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980 (Comm. Print 1982) ("Legislative History") at 822 (reprinting House Consideration and Passage of H.R. 14104, with Amendments). Legislators expressed serious concerns that the ESA would "serve[] to delay and, in many instances, completely halt important public works projects with unimpeachable cost/benefit ratios." *Id*. at 796 (reprinting House Consideration and Adoption of House Resolution 1423). In short, Congress recognized that the decision in *TVA* left the ESA "totally inflexible" (*id*. at 799) and that changes were needed to inject "common sense" into the statute.

To reflect these sensibilities, Congress comprehensively rewrote Section 7, expanding it from one paragraph to 16 subsections. Pub. L. No. 95-632. Relevant here, subsection (b) was added to provide a procedure for the consultation process outlined in Section 7. Congress instructed the Services as part of the consultation process to provide a "written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based." *Id*. Moreover, if the action was deemed to violate the prohibition on jeopardy or destruction of critical habitat, the amendment further directed the Secretary to propose a "reasonable and prudent alternative" that the Service "believes" will avoid jeopardy or adverse modification. *Id*. (the current version is now at 16 U.S.C. § 1536(b)(3)(A)).

At the same time, Congress recognized that the prohibition against jeopardy in Section 7 was not going to recover a species. So, in 1978, Congress also added a separate requirement in Section 4 of the ESA for the Services to engage in "recovery planning." Section 4(g) now requires the Secretary to "develop and implement plans (hereinafter in the subsection referred to as 'recovery plans') for the conservation and survival of" listed species and authorized the Secretary to "procure the services of appropriate public and private . . . institutions, and other

qualified persons." Pub. L. 95-632. As members of Congress explained, "[s]uch plans would be designed to ensure the conservation or survival of each listed species." Legislative History at 743 (reprinting House Report 95-1625). These plans "shall be as long and as detailed as is necessary and consonant with their purpose of providing a framework for actions directed at conserving or, at least, insuring the survival of the subject species." *Id*. This obligation was placed on the Services, not the action agencies, and is entirely distinct from the consultation process.

Congress followed up with more changes in 1979. Pub. L. No. 96-159. First, Congress separated the *affirmative* obligation placed on federal agencies to carry out "programs" for the benefit of endangered species (now Section 7(a)(1)) from the *prohibitory* obligation to avoid authorizing, funding, or carrying out actions that jeopardize listed species or destroy their critical habitat (now Section 7(a)(2)). *Id*. In so doing, Congress expressly tied the biological opinion process in subsection (b) to the prohibitory mandate under Section 7(a)(2), not the general obligation to develop programs for the benefit of species. *Id*. at § 4 ("amending each of subsections (b), (c), (d), (e)(2), (f), (g)(1) . . . by striking out 'subsection (a)' wherever it appears and inserting in lieu thereof 'subsection (a)(2)'").

Second, the 1979 amendments changed the jeopardy standard. Specifically, Congress replaced the strict obligation in the 1973 version ("do not jeopardize the continued existence" of listed species), with the more pragmatic obligation to insure that such actions are "not likely" to jeopardize listed species. Pub. L. No. 96-159. As the sponsor of the amendment explained, the "does not" language was an "unrealistic and unachievable standard." Legislative History at 1373 (reprinting Oct. 24, 1979 Congressional Record coverage of House Consideration and Passage of H.R. 2218) (statement of Rep. Forsythe). Indeed, "no agency can or should be expected to give a

100-percent guarantee of no adverse impact." *Id*. at 1368 (statement of Rep. Breaux). Congress' decision to use the "not likely" language reflected a "commonsense" approach to consultations to ensure that "agencies consider the probability or likelihood of jeopardizing a listed species in deciding whether to go ahead with a particular action." *Id.* at 1367. The jeopardy and adverse modification determinations are a simply a judgment call, and "[t]o require more, would . . . be asking the impossible." *Id.* at 1368.

And third, Congress in 1978 coupled the changes to the jeopardy standard with additional pragmatic concerns, expressly providing that "each agency shall use the best scientific and commercial data available" in making the determination under Section 7(a)(2). Pub. L. No. 96-159. The requirement reflected Congress' understanding "that data concerning a potential jeopardy situation may not be as complete in some situations as it is in others," and that Congress "expects the [Services] to make a judgment concerning jeopardy on the basis of the best scientific and commercial data available to [them] at the conclusion of the consultation period." Legislative History at 1394 (reprinting Senate Report 96-151) (emphasis added).

In sum, the history of the ESA shows that the Section 7(a)(2) obligation is prohibitory in nature and distinct from any affirmative obligation to recover listed species, while the Services' biological opinion is essentially a judgment call, entrusted to the Services, and based on the best information available at the time.

2. The Services' Regulations Confirm The Plain Reading Of The ESA

In 1986, the Services promulgated joint regulations closely adhering to the ESA amendments, and clarifying and confirming that the Section 7(a)(2) obligation is prohibitory in nature and distinct from other obligations under the ESA. Specifically, the Services defined "jeopardize the continued existence of" as engaging 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." 50 C.F.R. § 402.02 (emphasis added). As interpreted by the Ninth Circuit in this case, the Section 7(a)(2) obligation is a negative mandate that allows an agency to take an action that either does not deepen the jeopardy by causing additional harm or that lessens the degree of jeopardy. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF")*, 524 F.3d 917, 930 (9th Cir. 2008).[1] As the Ninth Circuit explained, an "[a]gency action can only 'jeopardize' a species' existence, if that agency action causes some deterioration in the species' pre-action condition." *Id.* at 930.

In promulgating the joint consultation regulations, the Services understood that the Sections 7(a)(1) and 7(a)(2) obligations were both separate and distinct and that the consultation obligations imposed under Section 7(a)(2) are not to be used to prohibit an action that fails to conserve a species. *See* 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (preamble to joint consultation rules).

Indeed, the preamble to the regulations clarifies that the affirmative obligation to conserve is an entirely separate obligation that is not imported into the more limited obligation to not jeopardize, established in Section 7(a)(2). *Id*. (further distinguishing between affirmative obligations set forth in Section 7(a)(1) and the prohibitory mandate established by Section 7(a)(2) consultation obligations). Courts have routinely recognized this distinction. *See generally Pyramid Lake v. U.S. Dep't of the Navy*, 898 F.2d 1410 (9th Cir. 1990) (construing differing obligations of Sections 7(a)(1) and 7(a)(2)); *Carson-Truckee Water Conservancy*

[1] *See also* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 Envtl. Law 1101, 1161-62 n.263 (1995) ("[T]he jeopardy prohibition in section 7(a)(2) is stated as a negative duty. . . and thus cannot be understood as embodying the complete universe of affirmative duties federal agencies bear under the ESA.").

Dist. v. Clark, 741 F.2d 257, 261-62 (9th Cir. 1984) (contrasting negative obligation under Section 7(a)(2) with affirmative obligation under Section 7(a)(1)); *see also Envtl. Prot. Info. Ctr. Inc. v. Pac. Lumber Co.*, 67 F. Supp. 2d 1113, 1121 (N.D. Cal. 1999) (same), *vacated in part*, 257 F.3d 1071 (9th Cir. 2001); *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1125 (S.D. Cal. 2006) (same).

The preamble also explains why it used the phrase "reduce appreciably the likelihood of both the survival and recovery." 51 Fed. Reg. at 19,958. The Services explain that the standard referred to a "*joint* survival and recovery concept." *Id*. at 19,934. The Services included the word "both" "to emphasize that, except in exceptional circumstances, injury to recovery alone would not warrant [a jeopardy finding]." *Id*. Thus, as the Ninth Circuit has explained in prior iterations of this lawsuit, this passage confirms that "recovery impacts alone may not <u>often</u> prompt a jeopardy finding." *NWF*, 524 F.3d at 933. Therefore, the Service's task in issuing a biological opinion is to decide whether a proposed action meets one of the <u>exceptional</u> circumstances identified in the joint regulations, and not to affirmatively ensure that the proposed action enhances recovery.

Equally important, just because an action does, in fact, negatively impact survival and recovery, it does not follow that the impact rises to the level of jeopardy. As a district court recently explained in *Oceana, Inc. v. Pritzker*, No. 08-1881, 2014 WL 7174875 (D.D.C. Dec. 17, 2014), the jeopardy regulations explain that the reduction must be "appreciable." This requires something more than a "perceptible" impact, or a "bare reduction in the likelihood" of survival and recovery. *Id*. at *9-10. Rather, the regulation (like the statute itself) provides the Services "the discretion to determine whether a given reduction in those likelihoods is 'meaningful from a biological perspective.'" *Id*. at *9.

3. NMFS' Jeopardy Analysis Far Exceeds The Requirements Of Section 7(a)(2) And Is Entitled To Deference

NMFS' Supplemental Biological Opinion and jeopardy analysis more than meet the basic prohibitory requirements of Section 7(a)(2). As thoroughly explained by the federal defendants, NMFS reviewed the best scientific data available, including the prior biological opinions and all new information developed since that time (including all data and comments offered by Plaintiffs). The Services extensively discussed impacts to both survival and recovery of the RPA on each listed species. Based on that available information, the Services reasonably concluded that the RPA would not jeopardize the continued existence of listed salmon and steelhead. Because NMFS has provided a "rational connection between the facts found and the conclusion made," that is the end of the Court's inquiry. *San Luis & Delta Mendota Water Auth. v. Locke*, 776 F.3d 971, No. 12-15144 et al., 2014 WL 7240003, at *10 (9th Cir. Dec. 22, 2014) (quotations and citation omitted).

Plaintiffs' arguments to the contrary are misguided. NWF's primary argument maintains that NMFS has failed to follow the regulations in conducting its jeopardy analysis. In presenting this argument, NWF selectively plucks words from the definition of "jeopardize the continued existence of" at 50 C.F.R. § 402.02, claiming that "[t]he ESA regulations define jeopardy to a species' recovery," and that NMFS had an obligation to "avoid jeopardy to recovery." NWF Br. at 6. NWF's clever legal rewrite is both misleading and incorrect, as neither the statute nor the regulations reflect NWF's trumped-up phrase "jeopardy to recovery." Because the Services are not required to evaluate "jeopardy to a species' recovery" (whatever that means), arguments directed at NMFS' supposed failure to comply with Plaintiffs' invented standard must fail. *McNair*, 537 F.3d at 993 (court may not "impose procedural requirements [not] explicitly enumerated in the pertinent statutes" (quotations and citation omitted)).

Instead, the jeopardy analysis is directed toward the species. As detailed above, in an "exceptional circumstance" impacts to recovery alone could result in jeopardy to that species. Plaintiffs provide no evidence that this case presents such exceptional circumstances (and, not surprisingly, there simply is none). As such, their arguments also must fail.

Likewise, Plaintiffs are way off base in complaining about NMFS' use of the "trending towards recovery" methodology. NWF Br. at 9-11. As detailed above, NMFS' obligation under the regulations is to ensure that the proposed action (here, the ongoing operation of the dams, not their continued existence) is not likely to appreciably reduce the likelihood of both survival and recovery. This regulatory obligation gives NMFS the "discretion to determine whether a given reduction in those likelihoods is 'meaningful from a biological perspective.'" *Oceana*, 2014 WL 7174875, at *9. In the 2014 biological opinion, NMFS reviewed "new information regarding recovery goals and the status of listed species relative to those recovery goals" and "determine[d] whether recovery goals or the qualitative risk categories indicative of recovery have changed since the 2008 BiOp." 2014 BiOp at 46. Among other factors, NMFS considered whether the population was growing, and would continue to grow in light of the RPA (*id*. at 48), identified "recovery abundance" levels (*see, e.g.*, *id*. at 55), discussed the status and objectives of interior Columbia recovery plans for all listed species (*id*. at 58), and explained recovery viability metrics for all species. *Id*. at 71. Based on that detailed analysis, NMFS reasonably concluded that the RPA "is not likely to jeopardize the continued existence of ESA listed SR spring/summer Chinook, SR fall Chinook, SR steelhead, SR sockeye, MCR steelhead, UCR spring Chinook, or UCR steelhead." 2014 BiOp at 472. Nothing more was required under the ESA.

Indeed, this Court recently rejected similar efforts to elevate form over substance in

Northwest Environmental Defense Center v. U.S. Army Corps of Engineers, No. 3:10-cv-01129-AC, 2013 WL 1294647, at *22 (D. Or. Mar. 27, 2013). In that case, NMFS concluded that the RPA would improve river conditions and thereby "ensure that the population will continue to trend toward recovering viability objectives." *Id.* The plaintiffs in that case, much like here, complained that NMFS did not do more with the recovery standard, and that NMFS was required to "identify when SONCC coho will have recovered, and how long it will take to reach recovery." *Id*. The court rejected those arguments, finding that the plaintiff "places too much import on NMFS' choice of words" rather than its reasoned conclusion that the proposed action "would not be an 'appreciable reduction in the likelihood of survival and recovery.'" *Id*. It was sufficient for the biological opinion to identify habitat features necessary for the recovery of the species and analyze the impact of the proposed action on those features. "To require more," the Court reasoned, "would 'improperly import ESA's separate recovery planning provisions into the section 7 consultation process.'" *Id*. (quoting *NWF*, 524 F.3d at 936).

NWF's arguments here fail for the same reasons. NWF places "too much emphasis on NMFS's choice of words" in calling its methodology "trending towards recovery" in 2008. As detailed above, NMFS performed the required analysis and evaluated impacts to both survival and recovery of the RPA. Although Plaintiffs might prefer a different articulation of the standard, or a stronger demonstration that these species are affirmatively moving towards recovery, nothing in the ESA requires that result.

NWF's arguments related to uncertainty also lack merit. NWF invites this Court to follow it down the rabbit hole consisting of nine pages of nearly impenetrable discussion of "uncertainty." NWF Br. at 11-20. Apparently, Plaintiffs' experts would have used different confidence intervals (NWF Br. at 13 (citing Bowles and Olney)), would have a different view on

how to conduct a statistical analysis (*id*. (citing Onley)), would ascribe different theories to explain uncertain results (*id*. at 16 (citing Conners)), or would otherwise have a different view of what a "rational and cautious" analysis would look like (*id*. at 18 (citing Bowles)). In so doing, Plaintiffs contend NMFS "impermissibly places on the listed species the burden of uncertainty these confidence intervals indicate." *Id*.

The Court need not wade into the thicket of these arguments because this kind of scientific second-guessing is precluded under the ESA. As discussed above, in amending the ESA in 1979, Congress insulated NMFS from precisely this kind of argument. Congress recognized that the jeopardy determination often has to be made on the basis of "imperfect" information, and that it was not reasonable to expect a "guarantee" against jeopardy. Legislative History at 1368. For this reason, Congress changed the standard from "do not" jeopardize to "not likely" to jeopardize, and asked the Services "to make a judgment concerning jeopardy on the basis of the best scientific and commercial data available to [them]." *Id*. at 1394. Putting that judgment in the hands of the Services "continue[s] to give the benefit of the doubt to the species." *Id*. at 1442. Although Plaintiffs' experts might like to strike a different balance or require greater certainty, the ESA does not require it. *See* Legislative History at 1368 (ESA requires an informed judgment; to require more would be asking the "impossible"). NMFS has provided its expert judgment and supported that judgment with evidence in the record; nothing more is required.

Indeed, the Ninth Circuit recently rejected similar efforts to invite the court into a statistical debate in *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 613 (9th Cir. 2014). In that case, NMFS decided to use two different models together (DAYFLOW and CALSIM II) to measure impacts of a project in a biological opinion, even though it recognized

that both models were "imperfect" and resulted in "bias." *San Luis*, 747 F.3d at 619. The district court found that the decision to use these two models was arbitrary and capricious because the plaintiffs' experts showed that "best available science" demonstrated "that a bias was present" and not fully explained by NMFS. *Id*. (quotations and citation omitted).

The Ninth Circuit reversed, explaining that "[w]e do not require agencies to analyze every potential consequence of every choice they make; to do so would put an impossible burden on agencies." *Id*. at 621. Instead, the Court reviews "choices with respect to models, methodologies and weighing scientific evidence to ensure that the agency's choices are supported by reasoned analysis." *Id*. (quotations, citations, and alterations omitted). The Court explained that this caution was particularly appropriate in areas that are "unwieldy and science-driven" such as NMFS' "statistical modeling" and that the Court should not wander into the "technical wilderness." *Id*. (citations and quotations omitted). Moreover, the fact that "some or many [experts] would disapprove" of NMFS' approach "does not answer the question presented to us." *Id.* (quotations and citation omitted). Rather, the only question is whether NMFS "provided a reasoned analysis" of why it chose a particular methodology. *Id*.

Here too, the Court should not wade into the "technical wilderness" presented by NWF and its experts. As detailed in the federal defendants' brief, NMFS has provided a full explanation of its decision to use metrics based on 24-year extinction risk, average returns-per-spawner, median population growth rate, abundance levels, and qualitative factors, and has discussed the uncertainty associated with those metrics. NMFS has therefore provided the reasoned analysis required by the ESA, and for these reasons, NWF's arguments must fail.

4. Plaintiffs' Critical Habitat Arguments Are Misguided

Plaintiffs' critical habitat arguments fare no better. Both NWF and Oregon contort the statutory scheme (and the record) in efforts to advance obligations that simply are not imposed on either the action agencies or the Services. Plaintiffs claim that NMFS neglected to address whether the RPA will "appreciably reduce" the capability of mainstem critical habitat to support survival and recovery. Oregon Br. at 27. Plaintiffs further maintain that one of the core features of critical habitat for all salmon species is "safe passage," that the construction of the dams has destroyed that safe passage, and that the RPA does not do enough to restore that safe passage. Oregon Br. at 24-29; NWF Br. at 46-50.

Plaintiffs' arguments should be rejected for three reasons. First, Plaintiffs have again misread the statute. As with the jeopardy analysis, Section 7(a)(2) imposes a prohibition: the agency must ensure that its actions are "not likely" to "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). Maximizing critical habitat is not a goal or a requirement imposed under Section 7(a)(2). *See San Luis & Delta Mendota Water Auth.*, 2014 WL 7240003, at *16 n.15. NMFS has no obligation to restore safe passage under Section 7(a)(2). Rather, its obligation is limited to ensuring that the RPA for the continued operation of the FCRPS through 2018 does not destroy safe passage. In arguing that NMFS must do more to restore the conservation value of the Columbia River mainstem, Plaintiffs have turned the statute on its head, and try to impose recovery obligations not found in Section 7(a)(2).

Second, and equally fundamental, Plaintiffs confuse the effects that the existence of the dams have on critical habitat with the effects of hydro operations proposed in the RPA through 2018. Plaintiffs' adverse modification argument is, at its core, directed squarely at the dams

themselves. Arguing that their construction has resulted in elevated water temperatures, reduced flows, and other negative attributes that allegedly compromise safe passage, Plaintiffs are essentially making a baseline adverse modification argument. But the existence of the dams by themselves cannot cause adverse modification; rather, adverse modification can only be caused by a particular set of dam operations (here the RPA) that must be evaluated in the context of the baseline. *NWF*, 524 F.3d at 930 (Section 7(a)(2) findings require some new risk of harm, and an active change in status, *i.e.*, a deterioration in the baseline's pre-action condition). Because Plaintiffs' argument rests on an inverted application of the adverse modification standard, its critical habitat arguments should be rejected for this reason as well.

And third, Plaintiffs' arguments that NMFS somehow did not even evaluate whether the continued operation of the FCRPS would "appreciably reduce" the functioning of critical habitat are belied by the record. NMFS fully explained the statutory basis for its Section 7(a)(2) analysis in a memorandum in the record and in the biological opinion.[2] As NMFS explained, Section 7(a)(2) requires it to ensure that the critical habitat retain its current (albeit reduced) ability to facilitate spawning, rearing migration, and foraging, so that it may ultimately serve its conservation role for the species in the near and long term. 2014 BiOp at 477; 2008 NMFS AR

[2] In promulgating the 1986 joint regulations (discussed above) the Services also defined "destruction or adverse modification" as a "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. But the Ninth Circuit invalidated that definition in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), because the regulation, as written, did not require consideration of impacts to the ability of critical habitat to support recovery (the court basically thought the regulation needed to say "survival or recovery" rather than "survival and recovery"). Accordingly, NMFS did not rely on the implementing regulations (and indeed, no biological opinion has relied on the regulation in this circuit since 2004). Instead it relied on the statutory standard as set forth in the record. 2008 NMFS AR B033.

B033. This standard ensures that the continued operation of the FCRPS through 2018 will not appreciably reduce the value of critical habitat for survival and recovery.

This Court has previously upheld NMFS' use of this exact interpretation of its critical habitat mandate under Section 7(a)(2) in *Northwest Environmental Defense Center v. National Marine Fisheries Service*, 647 F. Supp. 2d 1221 (D. Or. 2009) (upholding NMFS' Section 7(a)(2) analysis in the context of a Corps permit to construct a dock). In evaluating NMFS' statutory obligations, the Court in *Northwest Environmental Defense Center* relied heavily on the Services' Section 7 Handbook, which emphasizes that

> [a]dverse effects on . . . constituent elements or segments of critical habitat generally do not result in . . . adverse modification determinations unless that loss, when added to the environmental baseline, is likely to . . . appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.

U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook,* at 4-36. This interpretation is fully consistent with controlling case law holding that "adverse modification" occurs only when there is "a direct or indirect alteration that appreciably diminishes the value of critical habitat." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (internal quotation marks and citation omitted). These cases make clear that an adverse modification cannot occur unless and until an action negatively and materially alters the value of critical habitat to serve its conservation function. *Id.* (holding that the construction of a business park would not result in adverse modification despite the fact that it would destroy hundreds of acres of critical habitat, because only a small percentage of critical habitat as a whole would be lost).

NMFS not only correctly interpreted its legal mandate, but it conservatively ensured that the RPA went <u>far beyond</u> simply avoiding "diminishment." Rather than merely ensuring that the

proposed hydro operations would not materially impair the ability of the habitat to serve its conservation functions (the prohibitory requirement under Section 7(a)(2)), the BiOp ensures that the RPA will actually improve its functioning. 2014 BiOp at 456. Indeed, the BiOp demonstrates that the RPA is improving the functioning of designated critical habitat by improving mainstem passage conditions, reducing limiting factors in tributary and estuary habitat, and reducing the number of aquatic and terrestrial predators. 2014 BiOp at 45, 477. In fact, the RPA has improved baseline passage conditions and juvenile survival rates to the point at which they are approaching "those estimated in several free-flowing river systems." 2014 BiOp. at 381. Thus, while the statute imposes a negative mandate, NMFS went so far as to ensure that the RPA actually leaves the system better off than the pre-action condition. Accordingly, Plaintiffs' arguments that the RPA has somehow appreciably diminished the value of critical habitat are entirely baseless.

B. NMFS Adequately Considered Climate Change Impacts

NMFS devotes significant portions of its biological opinion to the potential impacts of climate change on listed salmon and steelhead species. 2014 BiOP at 152-82. NMFS reviewed the changes in scientific understanding since the 2010 biological opinion, and concluded that its best course was to continue to follow the recommendations of the Independent Scientific Advisory Board ("ISAB") to include measures in the RPA that mitigate extinction risk and improve opportunities for species to adapt to changing conditions. 2014 BiOP at 181-82, 435-42 (RPA implementation to address climate change). Based on that review, NMFS "conclude[s] that sufficient actions consistent with the ISAB's (2007b) recommendations for responses to climate change have been included in the RPA and that these are being implemented by the Action Agencies as planned." 2014 BiOp at 446.

NWF's efforts to impugn this analysis are fatally flawed. NWF reviews the exact same studies discussed by NMFS and concludes (in its view) that more needs to be done with respect to climate change. But Plaintiffs' disagreement with NMFS' conclusions is no basis for setting aside an agency action. Congress entrusted NMFS, not NWF, with the deference to make judgment calls about whether it "believes" an RPA will avoid jeopardy. 16 U.S.C. § 1536(b). NMFS has explained its reasoning and supported that reasoning in the record, and nothing further is required.

Similarly, NWF points out that some of the studies reviewed by NMFS foreshadow significant impacts from climate change in 2040, or 2080, and complain that NMFS should be requiring RPAs that address those concerns. Thus, NWF contends, the Services failed to use the best available science.

This argument makes little sense. The Services' obligation is to ensure that an RPA is not likely to jeopardize the species or adversely modify or destroy critical habitat. The RPA at issue in this case lasts only for the next three years, through 2018. There is nothing in the ESA (or the bounds of reason) that would require NMFS to change the course of global climate change and its impact on listed species in the course of the next three years. The ESA's task is much more commonsense: ensure that the operation of the FCRPS for the next three years under the RPA is "not likely" to result in species extinction or the destruction of its critical habitat. NMFS reasonably accomplished that goal by focusing on the concrete and implementable recommendations of the ISAB, not by speculating about the distant future. *See Oceana*, 2014 WL 7174875, at *16 (upholding NMFS' decision to focus on climate impacts during near term of the biological opinion, rather than the speculative long term impact of climate change).

Lastly, NWF's climate change arguments are decisively out of place, levied as they are

against the largest carbon-free power source in the Northwest. As the ISAB explains, "[t]he efficient production, distribution, and consumption of power, especially power generated without the release of greenhouse gases, can contribute to global efforts to reduce human impact on the greenhouse effects." NMFS015450. Plaintiffs' efforts to enjoin the productive operation of this clean hydro system on the back of a climate change argument strains credulity and would ultimately lead to self-defeating results.

C. Oregon's Spill Arguments Are Misguided

Oregon alone criticizes NMFS' spill plan on grounds that it is not "adequately explained." Oregon maintains that the 2014 BiOp reduces spill levels and changes spring and summer spill timing from prior BiOps. Oregon Br. at 40. Oregon insists that NMFS was somehow remiss in allegedly not explaining the impacts of these changes on juvenile migrating fish, and further remiss in not increasing spill to greater levels.

These arguments are factually baseless. The record shows that NMFS fully addressed issues related to spill, including each and every concern raised by Oregon (or anyone else) during the administrative process. NMFS fully explained its decision for the dates marking the transition from spring to summer spill, and the biological basis it derived for the cessation of summer spill. 2014 BiOP at 346-49. NMFS fully responded to Oregon's concerns, both in a response to comments that it voluntarily provided to Oregon and the general public, and in the Supplemental BiOp itself. *See* NOAA Response to Comments at 52-53; 2014 BiOp § 3.3.1.1 at 346-49; 2014 BiOp (RPA Implementation) § 3.3 at 379-82.

NMFS explained that the spring to summer spill transition will be based on a 95 percent passage rate, and that the end date for summer spill will be based on juvenile abundance triggers. NMFS further explained that the survival rates, transport rates, and smolt to adult returns from

these modifications are not expected to differ substantially for any evolutionary significant unit compared ("ESU") with data observed since 2008, because the changes are actually quite small. 2014 BiOp at 347. With respect to August spill in particular, NMFS explained that recent court-ordered spill operations will be continued throughout the spring and summer periods, but will be curtailed if subyearling collection counts fall below 300 fish per day for three consecutive days.[3]

NMFS also responded to Oregon's concern that the very small portion of the ESU passing the Snake River projects during August (if spill is curtailed) will likely experience slightly lower survival rates. NMFS explained that any such effects to that small single subpopulation will not affect the ESU for a number of reasons including, but not limited to, the fact that the overall abundance of Snake River fall Chinook continues to increase substantially. In fact, 55,000 adults passed Lower Granite Dam in 2013. *Id*. at 349. Because spill cessation is linked to very low juvenile fish passage numbers, NMFS emphasized that

> it is not reasonable to expect that a significant change to the composition of this ESU will occur, especially given its current size and the substantial influence that hatcheries, harvest, and limited habitat currently have on this population. . . .
>
> Because of the small difference in survival afforded by the various passage routes: i.e. spillways, transport, or return to the river by way of the juvenile bypass system, cessation of spill will not have a significant effect on the number of returning adults.

Id.

NMFS also responded to arguments that it should require more spill at the Snake River dams. NMFS explained that the spill studies conducted to date are not adequate to justify any upward departure because the results observed (either greater or fewer adult returns) could be equally explained by other factors (*i.e*., ocean conditions) not accounted for. *Id.* at 381;

[3] 300 subyearlings represent, at most, a handful of returning adults.

NMFS038368. More specifically, the "study" used by spill advocates to argue for more spill was recently critiqued by scientists at the University of Washington's School of Aquatic and Fishery Sciences. That analysis found that the statistical analysis used in the pro-spill study would also predict that transported salmon and steelhead also benefitted from increased spill – a result that obviously makes no sense because fish transported to below Bonneville Dam are taken by barge through the dams and experience no spill. *Id.* In other words, this analysis concludes that spill studies produced to date cannot be used to prove a causal relationship between spill and salmon returns. Because these spill studies have not adequately accounted for co-variants that could equally explain the study results, the studies are not "evidence" of the beneficial aspects of spill, and cannot be used as a basis to undermine NMFS' expert judgment.

NMFS also explained that the "pro-spill" studies that Oregon uses to advocate for more spill fail to address the increase in total dissolved gas that would be caused by increased spill and how that adversely affects the survival of migrating salmon and other aquatic biota. *Id.* Finally, NMFS emphasized that evidence now suggests that a greater proportion of fish are passed using conventional and surface spill when the river is at lower flow levels. Therefore, high spill percentages may not be needed to pass the same proportion of fish in lower flow years. *Id.*

Given NMFS' thorough explanations for its spill decisions, Oregon's claims are baseless. Substantial progress has been made toward improving survival of juvenile anadromous fish in the hydro system. In fact, "survival rates are approaching those estimated in several free-flowing river systems." *Id.* at 362. Higher spill levels are simply not necessary and not borne out by recent data.

At bottom, Oregon's real concern is not that NMFS has somehow failed to explain its spill decisions, but that Oregon disagrees with NMFS' conclusions. As with Plaintiffs' other

arguments, this argument fails because Oregon's scientific disagreement provides no basis for overturning NMFS' conclusions. *Humane Soc'y of the U.S. v. Bryson*, 924 F. Supp. 2d 1228, 1243 n.15 (D. Or. 2013) ("The Court must defer to the agency's reasonable interpretation of equivocal evidence."); *Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1222 (W.D. Wash. 2003) ("[I]t is not the role of this court to resolve scientific disagreements between [plaintiff's] expert and the Corps' experts."). While this principle is decisive in every case involving a legitimate scientific dispute, it is even more compelling when, as here, the federal defendants have demonstrated that Oregon's arguments are premised on a declaration with numerous, fundamental problems. Accordingly, for all these reasons, Oregon's spill arguments must fail.

D. NMFS' Contingency Planning Was More Than Sufficient

Oregon also argues that the BiOp's contingency planning is insufficient. Oregon Br. at 42-44. According to Oregon, salmon and steelhead are in dire straits and require much more assistance than the BiOp provides. As discussed above, Oregon's histrionic rhetoric is belied by the record returns Oregon otherwise presents to its residents in an effort to sell more fishing permits. *See* discussion at page 35 below. In fact, as the BiOp demonstrates, Oregon's bullish rhetoric is accurate; many stocks in the Columbia are currently experiencing record returns (including an estimated 2.5 million salmon passing Bonneville Dam for 2014).[4] *See also* 2014 BiOP at 349 (55,000 adults passed Lower Granite Dam in 2013). All of the listed salmon and steelhead species in the basin are currently either improving or stable. *Id*. at 73.

The question for the Court is not whether Oregon's proposed contingency trigger makes for a better RPA than the one approved by NMFS. *San Luis*, 747 F.3d at 638 n.44 ("We also

[4] Public Power Council, Regional Fish Status and BiOp Facts (July 2014), http://www.ppcpdx.org/documents/FishStatusandBiOpFacts2014.pdf.

hold that the FWS need not explain why it chose the RPA measures over 'less harmful alternatives.'"); *McNair*, 537 F.3d at 993 (court may not "impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good" (internal quotation marks and citation omitted)). Rather, the issue is whether NMFS properly supported its conclusion that the RPA will avoid jeopardy. Nothing in the record or in Oregon's brief demonstrates that the biological triggers for contingency planning are not based on sound science, especially given that "survival rates are approaching those estimated in several free-flowing river systems." 2014 BiOp at 362. Under these circumstances, the current contingency plans are more than sufficient to thwart any unexpected turn for the worse.

Likewise, the arguments by the Nez Perce Tribe that more contingency planning must be done to prepare for breaching the lower Snake River dams are entirely misplaced. At the outset, the Court need not even address these arguments because they are raised solely by the Nez Perce in an amicus curiae brief. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008) ("We need not consider arguments raised solely by an amicus."). In any event, this argument is similarly devoid of merit. There is no dispute that dam breaching of any kind is not and cannot be an RPA because RPAs, by definition, must be actions:

> [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02. Dam breaching fails every part of that definition. Dam breaching is obviously not consistent with the intended purpose of <u>operating the dams</u>. Pub. L. No. 79-14, 59 Stat. 10. Moreover, the action agencies lack legal

authority to remove the dams (only Congress has that authority), and in fact would be in direct violation of a Congressional mandate in pursuing that objective. *See* 2008 NOAA AR S77 at 37, 40-41 (*NOAA's Issue Summaries* explaining that dam breaching is outside action agencies' legal authority). NMFS has already completed a study showing that dam removal is not economically feasible, as it would have the practical effect of "eliminating the generation of 1,022 average megawatts of emissions-free electricity per year, enough to power the City of Seattle." *Id.* at 40.[5] And finally, even if the species were facing imminent threat of extinction, there is no credible reason to believe that dam removal (a process that has in practice taken decades to achieve for even much smaller dams), if needed, could be implemented in a timeframe that could prevent jeopardy. And even if it could, the habitat and sediment disturbance would probably do more harm than good in an emergency situation. *Id.* at 40-41 (breaching would lead to negative impacts on water quality).

Because dam removal is not an RPA, planning for dam removal as an RPA is an exercise in futility. NMFS has already gone well beyond its legal mandate by including an emergency trigger that would allow for dam removal planning if the species start to decline to certain threshold levels reflecting biological peril. Although the Nez Perce might desire to have a dam removal plan that can be immediately implemented if those thresholds are met, such a plan would serve no purpose because dam breaching is itself not an RPA. The only purpose the Nez

[5] Removal of the Snake River dams would also result in increased CO_2 emissions of 3.6 million tons per year from fossil fuel replacements. *See* Northwest Power and Conservation Council, Carbon Dioxide Footprint of the Northwest Power System, at 11 (2007).

Perce's RPA would serve is to waste limited resources that could be better put to immediate use elsewhere in the system. NMFS was not arbitrary and capricious in rejecting that invitation.

E. The Doctrine Of Judicial Estoppel Bars Oregon From Attacking The FCRPS BiOp's Legal Framework

For all the reasons discussed above, Plaintiffs' attacks on the biological opinion are without merit. That said, there is one additional, and equally important, reason for denying claims made by Oregon: its attacks on the biological opinion are precluded under the doctrine of judicial estoppel.

The doctrine of judicial estoppel prevents parties from assuming a position in one forum and, simply because their interests are different, assuming a contrary position in another. *New Hampshire v. Maine,* 532 U.S. 742 (2001). The purpose of the judicial estoppel doctrine is to "protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id*. at 743 (citations omitted). The doctrine prevents parties from playing "fast and loose with the courts" and from "intentional self-contradiction . . . as a means of obtaining unfair advantage." *Id*. at 751 (internal quotation marks and citations omitted). In determining whether to apply the doctrine, courts must assess

> whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled."

Id. at 749-50 (citation omitted). Judicial estoppel applies with equal force to the positions taken by state governments. *See, e.g., Whaley v. Belleque,* 520 F.3d 997, 1002 (9th Cir. 2008) (applying the doctrine of judicial estoppel against Oregon, refusing to consider Oregon's "self-serving" statements contrary to a position it explicitly took in state court).

Oregon's behavior with respect to salmon in this case clearly qualifies as "playing fast and loose with the courts" for any number of reasons. First and foremost, Oregon's claims here that the biological opinion is arbitrary and capricious, ignores relevant factors, or is otherwise contrary to law, are flatly contradictory to the positions that Oregon advanced before Judge King in *U.S. v. Oregon*, Case No. 68-513-KI. That case involves the harvest allocation between the states, including Oregon, and the Columbia River Treaty Tribes, for salmon and steelhead in the Columbia River. The *U.S. v. Oregon* parties negotiated a 10-year Management Agreement supported by the exact same Supplemental Comprehensive Analysis ("SCA") that now supports the FCRPS biological opinion at issue in this case. 2008 BiOp at 7-3; NMFS027541-42 (explaining how SCA links FCRPS and *U.S. v. Oregon* biological opinions).

But whereas Oregon now argues in this case that the analysis is arbitrary and contrary to law, Oregon told Judge King just the opposite, when Oregon (along with the Nez Perce Tribe and others) asked Judge King to approve and enter the 2008 Management Agreement.[6] Oregon's Motion and Consent Order supporting the Management Agreement explicitly represented that the 2008 Harvest Management Agreement should be entered by the Court because, *inter alia,*

> NOAA Fisheries issued a biological opinion on the proposal . . . [and] [i]n that biological opinion, NOAA Fisheries determined that the agreement would not cause jeopardy to any listed species.

[6] Oregon and the Nez Perce stand alone in this sleight of hand, as the other signatories – including the federal government, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes of the Umatilla Reservation, the Nez Perce Tribe, the Yakima Nation, the State of Washington, the State of Idaho, and the Shoshone-Bannock Tribe – have either endorsed the biological opinion for the FCRPS since 2008, or otherwise remained silent on the issue.

See Joint Motion and Stipulated Order Approving 2008-2017 *U.S. v. Oregon* Management Agreement, Case No. 68-513-KI, attached hereto as Ex. A, at page 3.[7] The parties (including Oregon) further represented that the Agreement was thus "fundamentally fair, adequate, and reasonable, both procedurally and substantively, in the public interest, and consistent with applicable law. . . ." *Id*. at A-6 (emphasis added). Thus Oregon clearly represented to Judge King that the Harvest Management Agreement – backed by the very same legal framework and technical analysis at issue in this case – complied with the ESA in order to facilitate its interest in state-authorized sport and commercial fishery harvest.

Oregon's opportunistic about-face in this case is precisely the kind of inconsistent position that judicial estoppel is designed to prevent. In *New Hampshire*, the Supreme Court held that the state was estopped from assuming a position contrary to what it had previously advocated in successfully persuading the Court to enter a consent decree based on the state's explicit representations of fairness and associated legal arguments. 532 U.S. at 749-50. In dismissing New Hampshire's complaint, the Court was particularly troubled by the fact that the state had previously represented that its prior legal position concerning an interstate river boundary was in the "best interest of each State." *Id*. at 752 (internal quotation marks and citation omitted).

Like New Hampshire, Oregon should be estopped from now attacking a BiOp that adopts a legal and scientific framework identical to that used in the BiOp supporting the Harvest Management Agreement in *U.S. v. Oregon*. The holding in *New Hampshire* is directly applicable here, as Oregon persuaded Judge King to enter the 2008 Harvest Management

[7] This document is attached for the Court's convenience here, but can also be found in the docket in this case at ECF No. 1644-2.

Agreement on its express representations that the Agreement was fundamentally fair, in the public interest, and consistent with applicable law. *See* Ex. A; *see also Russell v. Rolfs,* 893 F.2d 1033, 1038 (9th Cir. 1990) ("A state under these circumstances misleads a district court by mentioning only that portion of its views that favors the immediate result it seeks."). The representations made by Oregon in this case and in *U.S. v. Oregon* cannot both be true, and for this reason alone, Oregon's claims should be dismissed.[8]

Oregon's selective opportunism hardly ends with its inconsistent endorsement and attack of the same biological opinion. First, Oregon tells only half the story when it claims that the hydropower system is responsible for significant percentages of the human-caused mortality of Snake River salmon and steelhead, and then demands that the FCRPS fully offset that mortality (and more). Oregon Br. at 29, 37; Nigro Decl. ¶ 7. Oregon neglects to mention that non-tribal harvest (including harvest that is authorized by the State of Oregon for its commercial and sport fishermen) accounts for up to 35 percent of the human-caused mortality of these same stocks. 2008 NMFS AR B0143, Table 13. But Oregon offers no offset for those mortalities as part of the *U.S. v. Oregon* Management Agreement (or anywhere else). Oregon advances a double standard here, demanding that the FCRPS mitigate for the impact of mortalities while ignoring its responsibility to mitigate for state-authorized take. Put simply, Oregon wants "to have their fish, and eat them too."

Second, Oregon paints a cataclysmic picture in this case for salmon, claiming that there are "39 of 47 populations that fail to meet the minimum viable abundances and six of those populations have fewer than 100 fish per year." Oregon Br. at 11. But Oregon illustrates a

[8] The Nez Perce are *amicus curiae* in this case, but the reasoning here applies with equal force to their inconsistent arguments.

radically different picture and puts on an entirely different regulatory hat when communicating with its sport and commercial fishermen by (1) reopening fisheries in the Columbia and Snake Rivers because "fall Chinook returns to the Snake River have rebounded in recent years to the point that fishing can now be allowed"; (2) "predicting [that] tremendous runs of Chinook are forecast to return to the Columbia," including a "record return" in 2014; and (3) authorizing extension after extension on fishing seasons in the Columbia.[9]

As the above demonstrates, Oregon's professed concerns about the dire status of species are belied by their own words and deeds; the Oregon Department of Fish and Wildlife continues to authorize harvest of Columbia River salmon (no doubt in an effort to close the $32 million budget deficit it has encountered from declining license revenues),[10] including take, while providing no offsetting mitigation whatsoever.

Indeed, Oregon does not even attempt to maintain a consistent position in this case. For the 2000 biological opinion, Oregon stated that it "specifically endorses the NMFS comprehensive water-shed based approach," and on this basis, asked the court to "endorse this approach" including habitat mitigation outside of the mainstem. ECF No. 311 at 9 (State of Oregon's *Amicus* Brief). Oregon's only concern then was that the 2000 biological opinion did not sufficiently ensure that the future mitigation measures "will, in fact, occur." *Id*. But now

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[9] *See* press releases posted by the Oregon Department of Fish and Game:

http://www.dfw.state.or.us/news/2014/august/081414b.asp (Aug. 14, 2014)
http://dfw.state.or.us/news/2014/april/041014c.asp (Apr. 10, 2014)
http://www.dfw.state.or.us/news/2014/july/072914.asp (July 29, 2014)
http://www.dfw.state.or.us/news/2014/july/070914e.asp (July 9, 2014)

[10] *See* OPB, Oregon Fish and Wildlife Faces $32 Million Budget Shortfall (June 6, 2014), http://www.opb.org/news/article/oregon-fish-and-wildlife-face-32-million-budget-shortfall/.

that the federal defendants have made those future mitigation measures certain to occur through the state and tribal fish accords, thereby foreclosing the arguments Oregon made in 2000, Oregon has changed its tune. Now that "the exigencies of the moment" are different, Oregon argues that a comprehensive watershed approach is not the correct approach, and further insists that it is arbitrary and capricious for defendants to rely on mitigation actions outside of the mainstem and in the estuary and tributary. Oregon Br. at 33-38.

In short, while Oregon appears willing to offer any argument to make its case (including, as demonstrated in the federal defendants' brief, arguments premised on a declaration riddled with basic errors), Oregon's self-serving arguments *du jour* are not credible, and the Court is not required to consider these inconsistent positions under the doctrine of judicial estoppel.

V. CONCLUSION

More than 20 years ago, Judge Marsh admonished that the FCRPS "literally cries out for a major overhaul." *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 850 F. Supp. 886, 900 (D. Or. 1994). As the brief submitted by the federal government amply demonstrates, that overhaul has occurred. Backed by an additional investment of more than a billion dollars, this BiOp requires more of the action agencies than any other BiOp in the country. Survival rates through the hydro system are now approaching levels seen in rivers without dams, and Oregon has opportunistically used the record returns to justify an expansion of sport and commercial fishing opportunities for its residents.

The more than 20 years of litigation over this BiOp have left Plaintiffs with little to fight about, which perhaps explains why Plaintiffs now advance arguments that the Ninth Circuit admonitions fall in the prohibitive zone of the "technical wilderness." Because NMFS and the action agencies have more than satisfied the narrow objectives set forth in Judge Redden's

remand and have gone above and beyond what the statute commands, the 2014 BiOp should be upheld in its entirety.

For all these reasons, Plaintiffs' Motion for Summary Judgment should be denied, and the Court should grant the federal defendants and allied parties' Cross Motions for Summary Judgment.

Dated: March 6, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 10,996 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed. R. Civ. P. 5(d), I certify that on March 6, 2015, the foregoing *NORTHWEST RIVERPARTNERS' CROSS-MOTION FOR SUMMARY JUDGMENT* will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first class U.S. mail:

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EXHIBIT A

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA, et al. Plaintiffs, v. STATE OF OREGON, et al. Defendants	Civil No. 68-513-KI ALL PARTIES' JOINT MOTION AND STIPULATED ORDER APPROVING 2008-2017 *UNITED STATES v. OREGON* MANAGEMENT AGREEMENT

All parties to this case,[1] listed below, are pleased to move this Court for an order approving the 2008-2017 *United States v. Oregon* Management Agreement, attached hereto as Exhibit 1:

- The United States of America, which initiated this lawsuit against the State of Oregon in a Complaint filed on September 13, 1968;

[1] The Confederated Tribes of the Colville Reservation is currently involved in proceedings relating to injunctive motions brought by the Yakama Nation under the *United States v. Oregon* caption. The Colville Tribes has not been granted intervention as a party, however.

- The Confederated Tribes of the Warm Springs Reservation of Oregon, which was granted intervention as a plaintiff on December 13, 1968;
- The Confederated Tribes of the Umatilla Indian Reservation, which was granted intervention as a plaintiff on December 18, 1968;
- The Nez Perce Tribe, which was granted intervention as a plaintiff on January 8, 1969;
- The Yakama Nation, which was granted intervention as a plaintiff on December 5, 1968;
- The State of Washington, which was granted intervention as a defendant orally on April 29, 1974, and by written order on May 20, 1974;
- The State of Oregon, defendant;
- The State of Idaho, which was granted intervention on May 20, 1985 (Doc. No. 1281); and
- The Shoshone-Bannock Tribes, which was granted intervention orally on July 25, 1986 (Doc. No. 1380), and whose intervenor status the Court reaffirmed on December 5, 2002 (Doc. No. 2322).

BACKGROUND

The United States filed this case in 1968 to seek relief concerning the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory," that is secured to the Warm Springs, Umatilla, Nez Perce, and Yakama Tribes in treaties that the United States executed with those Tribes in 1855. On July 8, 1969, this Court issued a memorandum opinion declaring the rights of the parties. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).[2] On October 10, 1969, the Court entered a Judgment in accordance with that opinion. On May 10, 1974, the Court issued an Order Amending Judgment, which was affirmed by the Ninth Circuit. *Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

[2] *Sohappy v. Smith*, Civil No. 68-409, was a companion case to *United States v. Oregon*. The two were consolidated on November 18, 1968. The court terminated continuing jurisdiction over *Sohappy v. Smith* on June 27, 1978. Since then, all pleadings have borne the caption *United States v. Oregon*.

To this day, the Court has retained continuing jurisdiction to implement the 1969 Judgment. 302 F. Supp. at 911; Judgment ¶ 4. The Court has encouraged the parties to work out for themselves the details of how its Judgment should be implemented. *E.g.*, 302 F. Supp. at 912. On February 28, 1977, the Court approved a five-year Plan for Managing Fisheries on Stocks Originating From the Columbia River and its Tributaries Above Bonneville Dam. On October 7, 1988, the Court approved a ten-year Columbia River Fish Management Plan (1988 CRFMP) (Doc. No. 1594). *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990). The Court has also approved many other interim agreements of shorter duration, most recently in May 2005 (Doc. No. 2407).

In 1997, as the expiration date of the 1988 CRFMP neared, the parties began an effort to negotiate a new or renewed long-term agreement. The 2008-2017 *United States v. Oregon* Management Agreement is the result of more than ten years of negotiation.

In April 2008, the parties' Technical Advisory Committee completed a biological assessment on the joint fishery proposal described in the 2008-2017 *United States v. Oregon* Management Agreement under 16 U.S.C. § 1536(c), and submitted it to the National Marine Fisheries Service (NOAA Fisheries). On May 5, 2008, NOAA Fisheries issued a biological opinion on the proposal under 16 U.S.C. § 1536(b). In that biological opinion, NOAA Fisheries determined that the agreement would not cause jeopardy to any listed species.

The parties are pleased to present the 2008-2017 *United States v. Oregon* Management Agreement for approval and adoption as an order of the Court.[3]

[3] The parties would like to recognize the substantial contributions of Laurie Jordan, Policy Analyst II, Columbia River Intertribal Fish Commission. Ms. Jordan kept the parties organized and focused, and provided intellectual and material assistance in many ways over a long time.

STIPULATION

All parties stipulate that the 2008-2017 *United States v. Oregon* Management Agreement should be approved and adopted as an Order of the Court.

RESPECTFULLY SUBMITTED this 11th day of August, 2008.

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ORDER

1. The Court has examined the 2008-2017 *United States v. Oregon* Management Agreement in light of the Court's Judgment of October 10, 1969, as amended May 10, 1974, and other materials in the case files. The Court concludes that the 2008-2017 *United States v. Oregon* Management Agreement is fundamentally fair, adequate, and reasonable, both procedurally and substantively, in the public interest, and consistent with applicable law, and that is has been negotiated by the parties in good faith. *See Firefighters v. Cleveland*, 478 U.S. 501 (1986); *United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990).

2. The parties' joint motion to approve the 2008-2017 *United States v. Oregon* Management Agreement is GRANTED. The 2008-2017 *United States v. Oregon* Management Agreement is hereby approved and adopted as an Order of the Court.

3. This Court retains jurisdiction to resolve disputes concerning the 2008-2017 *United States v. Oregon* Management Agreement as described therein.

IT IS SO ORDERED.

DONE this _____ day of _____, 2008.

_____
HON. GARR M. KING
UNITED STATES DISTRICT JUDGE