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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

**NATIONAL WILDLIFE FEDERATION,**  
*et al.,*

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

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES  
SERVICE, et al.,**

**BRIEF OF *AMICUS CURIAE*  
CONFEDERATED TRIBES OF THE  
COLVILLE RESERVATION IN  
SUPPORT OF DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

Defendants.

BRIEF OF *AMICUS CURIAE* CONFEDERATED  
TRIBES OF THE COLVILLE RESERVATION  
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

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## INTRODUCTION

*Amicus curiae* Confederated Tribes of the Colville Reservation (“Colville” or “Tribes”) submits this brief in support of the Federal Defendants’ cross-motion for summary judgment and in opposition to Plaintiffs’ motions for summary judgment (Dkt. 1976 and Dkt. 1985).

Colville has a unique perspective on the Federal Columbia River Power System (FCRPS) and this litigation, which Colville joined in November 2005 as part of the Court’s remand process. Colville has witnessed firsthand the devastation wrought by the FCRPS, which eliminated once abundant salmon runs from large portions of the Colville Reservation through the construction of Grand Coulee Dam in the early 1940s and later Chief Joseph Dam. Colville has also witnessed record returns of summer/fall Chinook and sockeye to the Okanogan River basin in recent years, confirming the Tribes’ view that the future of salmon and steelhead in the Columbia is bright – even for those that must pass nine dams twice in their lifetime.

From this vantage point, Colville has actively engaged in the historic regional collaboration ordered by this Court and has committed to doing its part for the massive basin-wide effort to mitigate the effects of the FCRPS on species of salmon and steelhead listed under the Endangered Species Act (ESA). This effort must – and Colville believes it will – succeed. Although some salmon populations are returning to the Colville Reservation in large numbers, others are still at risk. Through the remand process, the action agencies responded to Colville’s criticism of the historic imbalance between the Snake and Lower Columbia salmon populations and the comparably imperiled Upper Columbia ESUs with increased attention to the Upper Columbia. With this support in the current BiOp and reinforced by the Fish Accords, Colville

has made significant progress toward fulfilling its objectives for steelhead and spring Chinook in the Okanogan River basin.

In addition to Colville's vital interest in the survival and recovery of Upper Columbia River ("UCR") salmon and steelhead populations under the BiOp, Colville was concerned that Plaintiffs would seek greater spill and/or flow augmentation in the mainstem Columbia from a drawdown of Lake Roosevelt. The integrated management of Grand Coulee Dam within the FCRPS affects core Colville interests, and previous requests by Plaintiffs for injunctive relief would have dramatically impacted those interests. The potential for Plaintiffs to request similar relief in this round of litigation is clear and present based on the extensive discussion initiated by Oregon's proposal for a 10-year experiment involving spill levels higher than those ordered by this Court.

We are now through nearly seven years of this 10-year BiOp, including both the 2010 and 2014 supplemental BiOps, and the perpetual cycle of litigation and remand appears to have no end. Plaintiffs' briefs focus almost exclusively on Snake River populations and the effects of the mainstem hydroelectric projects, ignoring the scope of on-the-ground advances made throughout the basin by the broad collaboration of the federal agencies, three of the four Pacific Northwest states and all but one of the Columbia Basin tribes participating in the case. Plaintiffs would have this Court turn away from the comprehensive mitigation solution preferred by the vast majority of the region's sovereigns without giving this BiOp and its unprecedented suite of actions the opportunity to work for the benefit of the fish.

## **BACKGROUND**

### **I. THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION.**

BRIEF OF *AMICUS CURIAE* CONFEDERATED  
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The Colville Reservation is located in north-central Washington and presently consists of approximately 1.4 million acres bounded by the Okanogan and Columbia Rivers. The Reservation includes two major components of the FCRPS, Chief Joseph and Grand Coulee Dams, both of which completely block anadromous fish passage. Their associated reservoirs, Lake Rufus Woods and Lake Roosevelt, have inundated thousands of acres of the most economically important and culturally significant tribal lands.<sup>1</sup>

Colville culture and subsistence were intricately linked with anadromous fish runs in the upper Columbia River and the fisheries they provided. The development of the FCRPS has had devastating impacts on these fish runs and the Tribes' fisheries and way of life. In addition to the complete blockage of anadromous fish passage upstream of Chief Joseph Dam, which eliminated access to hundreds of miles of productive spawning and rearing habitat, out-migrating juveniles and returning adults must navigate four federal and five non-federal dams downstream of the Reservation. The effects of these nine mainstem dams, compounded by local habitat degradation and other adverse impacts, have led to the extirpation of spring Chinook salmon and continue to pose a serious threat to steelhead in the Okanogan River basin, the only Reservation watershed not blocked by federal dams. Peone Decl. ¶¶ 5-6; *see also* Colville MOA at 2.

## II. COLVILLE PARTICIPATION IN THE REMAND PROCESS AND ROLE IN IMPLEMENTING THE 2008-2014 BIOPS.

When Colville entered into the Court-ordered collaboration process in 2005, little progress had been made towards the recovery of endangered UCR spring Chinook salmon and threatened UCR steelhead relative to listed salmon and steelhead elsewhere in the Columbia

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<sup>1</sup> *See* Declaration of Joe Peone, Dkt. 1561 ("Peone Decl.") ¶ 3; *see also* Colville MOA (Corps 2008 Administrative Record (AR) A.394) at 1-2.

Basin. Available federal mitigation funding, federal dam improvements, and recovery strategies were focused on the watersheds of the lower Columbia and Snake Rivers. In addition, federal research to improve passage survival was targeted on Snake River species. Peone Decl. ¶ 9. Colville's main objectives in the collaboration process were to ensure that the BiOp would adequately address the survival and recovery of UCR spring Chinook salmon and steelhead, and direct needed attention to restoring steelhead and spring Chinook salmon in the Okanogan River basin. The Tribes also hoped to assure that changes to FCRPS operations intended to aid salmon and steelhead survival throughout the Columbia Basin would not unnecessarily affect Lake Roosevelt, a critical part of the Colville Reservation. *Id.* ¶ 10.

These two fundamental objectives led Colville to join this litigation as *amicus* in November 2005 concurrent with Plaintiffs' request for further injunctive relief. Dkt. 1105, 1106. In its motion requesting leave to participate as *amicus*, Colville explained its significant rights and interests that would be affected by the remand process, including fishing rights, anadromous and resident fish species, cultural resources, revenue from the 1994 Grand Coulee Dam settlement agreement, recreation resources, and the risk of exposure to contaminated sediments in Lake Roosevelt. *See* Dkt. 1126, 1127.<sup>2</sup> Colville joined the Regional Coalition brief responding to the Plaintiffs' motion for further injunctive relief and submitted five declarations describing the adverse impacts that the requested injunction would have on Colville, particularly

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<sup>2</sup> Colville previously participated as *amicus* in the litigation over the 1995 BiOp, raising many of the same concerns about further drawdowns of Lake Roosevelt. *American Rivers v. NMFS*, No. Civ. 96-384-MA, 1997 WL 33797790, \*2, \*12 (D. Or. Apr. 3, 1997).

the proposal to augment summer flows by drawing down Lake Roosevelt in August.<sup>3</sup> The Court granted Plaintiffs' motion in part, but denied the request for flow augmentation. Dkt. 1221 at 11-16.<sup>4</sup>

Colville was an active participant in the collaboration process and made important contributions to the Policy Working Group and various technical committees and ad hoc workgroups. The Tribes provided numerous and substantial comments to the federal agencies throughout the collaboration process, seeking to awaken the federal government to the recovery needs of the endangered UCR spring Chinook and threatened steelhead ESUs, particularly the largely extirpated Okanogan populations of these species. *See, e.g.*, Corps 2008 AR C.15599; NOAA 2008 AR C.915 (letters on early drafts of proposed action and RPA identifying deficiencies and urging changes to meet the needs of UCR spring Chinook and steelhead).

As NOAA Fisheries finalized the 2008 BiOp, the Colville Tribes entered into negotiations with the BPA, the Corps and the Bureau of Reclamation (the "Action Agencies") to seek agreement on additional measures that would address the Tribes' concerns regarding the UCR spring Chinook and steelhead ESUs. The negotiations focused on implementation of the Tribes' Okanogan Initiative (Reclamation 2008 AR 74565-74629), which provided the Action Agencies with extensive and concrete opportunities for habitat improvements, safety-net propagation programs, hatchery reforms, and spring Chinook salmon reintroductions that would help achieve the survival and eventual recovery of these two endangered ESUs. The outcome of

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<sup>3</sup> *See* The Regional Coalition's Joint Response to Motion for Further Injunctive Relief (Dkt. 1162); Decl. of Whitfield A. Russell (Dkt. 1149); Decl. of Thomas M. Watson (Dkt. 1150); Decl. of Gerald Marco (Dkt. 1152); Decl. of Guy Moura (Dkt. 1154); Decl. of Gene Joseph (Dkt. 1173).

<sup>4</sup> *Nat'l Wildlife Fed'n v. NMFS*, 2005 WL 3576843, \*5-\*8. (D. Or. Dec. 29, 2005).

this negotiation process was a Memorandum of Agreement (MOA), one of several which make up what are now called the Columbia Basin Fish Accords (“Colville MOA”).<sup>5</sup>

The Colville MOA provides greater certainty that habitat and hatchery measures provided for in the 2008 BiOp would actually be implemented and provide real, measurable benefits to the listed species, linked to the RPA’s target of 14% Habitat Quality Improvement for UCR steelhead in the Okanogan River basin. For the purposes of the BiOp, the MOA’s core provisions provide upward of \$141 million for ESA-listed anadromous species over its ten-year term focused on specific habitat and hatchery actions that will lead to restoration and the eventual recovery of the Okanogan populations of UCR steelhead and spring Chinook salmon.<sup>6</sup> The MOA provides a quantum leap in the amount of annual funding for habitat, safety-net hatchery and monitoring and evaluation actions in the Okanogan watershed. The changes brought about by collaborative efforts during the remand process led Colville to support the 2008 BiOp. With the added certainty provided by the MOA, Colville determined that the final 2008 BiOp satisfied the Tribes’ concerns.

In the seven years during which the 2008 BiOp and the 2010 and 2014 supplements have been implemented, Colville – and the region – have made tremendous progress toward fulfilling the objectives in the RPA. Together, Colville and many other tribes, three states and the federal agencies have demonstrated that the BiOp’s ambitious mitigation program to protect and recover listed salmonids in the Columbia River basin – which is quite possibly the largest mitigation project ever undertaken in the region, and perhaps the country – was reasonably certain to occur,

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<sup>5</sup> Peone Decl. ¶¶ 18, 22, 23; Colville MOA at B-1 – B-2.

<sup>6</sup> Declaration of William T. Towey ¶ 5 (“2015 Towey Declaration”).

and has in fact led to on-the-ground change and immediate benefits for fish throughout the basin. Colville is but one part of this immense effort, and our brief and supporting declarations address those parts of the BiOp and the Plaintiffs' briefs most directly relevant to our role in the larger effort.

With the funding support of the Colville MOA, Colville has built upon the early accomplishments we described in our 2010 *amicus* brief.<sup>7</sup> Since 2010, Colville has also completed Chief Joseph Hatchery, the safety net hatchery that was a key part of the Colville MOA. *See* 2010 Colville Amicus Br. at 9-10 (describing hatchery design and objectives). The hatchery is now carrying out its key role relative to the BiOp in the reintroduction of spring Chinook to the Okanogan River basin. 2015 Towey Decl. ¶ 5 n.1, ¶ 9. Also since 2010, Colville has planned, designed, and implemented numerous habitat restoration projects in the Okanogan River basin, opening tributary reaches inaccessible for decades, providing additional flows, and protecting riparian habitat. *See id.* ¶¶ 10-14. Completed projects have already demonstrated immediate benefits to UCR steelhead, now that they are able to access some of the most important habitat in the basin. *Id.* ¶¶ 10-15. This habitat work continues to the present day notwithstanding the new supplemental BiOp and the new round of litigation. Colville believes the Court would benefit from information about the Tribes' continued work on habitat restoration and other RPA actions even though they post-date the administrative record.

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<sup>7</sup> *See Amicus Brief of Colville Tribes in Support of Defendants' Supplemental Cross Motion for Summary Judgment* (Dkt. 1816) ("2010 Colville Amicus Brief"); *Declaration of William T. Towey* (Dkt. 1817) ("2010 Towey Decl.").

Providing information that is beneficial as context for the Court’s consideration of the pending summary judgment motions is a well-established role for non-party *amici*.<sup>8</sup>

### STANDARD OF REVIEW

It is well-established that claims under the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (“*Jewell*”) (agency action “must be upheld on review unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”) (internal quotations omitted), *cert denied*, 83 USLW 3247 (Jan. 12, 2015). The APA requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation and citation omitted); *accord Pac. Coast Fed’n of Fishermen’s Ass’ns. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). Although the court conducts a thorough evaluation of the challenged action, this review “is narrow and [the court does] not substitute [its] judgment for that of the agency.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (internal quotation omitted); *Jewell*, 747 F.3d at 601. Rather, the APA requires courts to focus on whether the agency “relied on factors which Congress has not intended it to

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<sup>8</sup> See, e.g., *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir.1997) (“An amicus brief should normally be allowed when ... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”); *Miller-Wohl Co. v. Comm’r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (classic role of amicus curiae is to assist in case of general public interest and supplement the efforts of counsel).

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.” *San Luis & Delta-Mendota Water Authority v. Locke*, \_\_\_F.3d\_\_\_, 2014 WL 7240003 at \*11 (9th Cir. Dec. 22, 2014) (“*Locke*”) (quoting *State Farm*, 463 U.S. at 43).

The deferential standard of review under the APA carries additional weight when the challenged agency action involves complex scientific and technical issues, a choice of methodologies, or matters that fall within the agency’s expertise. The Ninth Circuit requires courts “to defer to an agency’s determination in an area involving a ‘high level of technical expertise,’” particularly where the agency is “making predictions, within its area of special expertise, at the frontiers of science.” *McNair*, 537 F.3d at 993 (internal quotations omitted). “Where scientific and technical expertise is necessarily involved in agency decision-making, . . . a reviewing court must be highly deferential to the judgment of the agency.” *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009) (quoting *Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 384 F.3d 1163, 1174 (9th Cir. 2004)). Finally, “deference to agency determinations is at its greatest when that agency is choosing between various scientific models.” *Jewell*, 747 F.3d at 610.

These requirements guide the role of courts even in cases involving the ESA, where the statute requires “an agency to use ‘the best scientific and commercial data available’ when formulating a BiOp.” *Locke*, 2014 WL 7240003 at \*12 (citing 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8)). For example, “[a]ssessing a species’ likelihood of extinction involves a great deal of predictive judgment [and s]uch judgments are entitled to particularly deferential review.”

*Trout Unlimited*, 559 F.3d at 959 (citing *McNair*, 537 F.3d at 993). However, the agency is not required “to conduct new tests or make decisions on data that does not yet exist,” nor is it prohibited from relying on weak and not dispositive data if that is the only data available. *Locke*, 2014 WL 7240003 at \*12. The agency’s actions are not arbitrary as long as it “does not ignore available studies, even if it disagrees with or discredits them.” *Id.* The existence of evidence for and against the agency decision does not render a decision arbitrary and capricious under the “best available science” standard where the agency resolves conflicting evidence in a reasoned manner, entitling it to deference. *See id.* Indeed, the very determination of “what constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference.” *Locke*, 2014 WL 7240003 at \*12; *accord Jewell*, 747 F.3d at 602. Uncertainty about the effectiveness of specific management measures is not necessarily fatal to an agency decision, especially where the agency’s decision is premised on a reasonable evaluation of all available data. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir.1992).

### ARGUMENT

Colville’s *amicus* brief addresses the following issues: (1) whether the “trending toward recovery” jeopardy standard used in the BiOp is consistent with the ESA and its implementing regulations; (2) whether the BiOp’s analysis of “adverse modification of critical habitat” is consistent with the ESA and valid under the APA; (3) whether the mitigation actions in the RPA are “reasonably certain to occur”; (4) whether NOAA Fisheries considered all relevant factors associated with its consideration of density dependence; and (5) whether the Action Agencies failed to comply with NEPA when they did not prepare an environmental impact statement.

I. NOAA’S ANALYSIS IS CONSISTENT WITH THE SECTION 7 JEOPARDY STANDARD.

Plaintiffs’ first claim is that NOAA applied the wrong standard when assessing whether FCRPS operations will “jeopardize the continued existence” of the listed species. NWF Br. at 5-11 (Dkt. 1976). Plaintiffs principally maintain that the “trending toward recovery” standard that NOAA applied in the 2008 BiOp<sup>9</sup> fails to “address or include the key elements of the jeopardy regulations or explain why they are unnecessary.” *Id.* at 9. Plaintiffs’ position lacks legal support, and they propose no workable alternative to the “trending toward recovery” standard employed in the BiOp.

A. The Recovery Analysis in the 2008 BiOp Meets the Requirements of Section 7 and Its Implementing Regulations.

The Court’s analysis of Plaintiffs’ recovery claim must start with the language of Section 7 of the ESA and its implementing regulations. Section 7 of the ESA prohibits agency action that is “likely to jeopardize the continued existence of” any listed species. 16 U.S.C. § 1536(a)(2). The ESA regulations interpret this to prohibit any agency 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).

This statutory and regulatory language “requires [NOAA Fisheries] to consider both recovery and survival impacts.” *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2008). Contrary to Plaintiffs’ suggestions, however, consideration of recovery effects under

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<sup>9</sup> NOAA applied the same jeopardy standard in the 2008, 2010 and 2014 BiOps. Thus, Plaintiffs’ challenge is essentially unchanged from the 2008 summary judgment briefing in this case, as the Court never issued a ruling on this issue. NWF Br. at 5-6 (citing 2008 and 2010 briefs and summarizing arguments).

Section 7 does not stand alone, but is intended to inform NOAA's ultimate determination concerning whether the proposed action is "likely to jeopardize the continued existence" of the listed species. 16 U.S.C. § 1536(a)(2). As the Ninth Circuit has emphasized, jeopardy is a "joint survival and recovery concept" and the recovery effects warrant a jeopardy finding only in the "exceptional circumstances" that they "rise to the level of 'jeopardizing' the 'continued existence' of a listed species." *NWF v. NMFS*, 524 F.3d at 932 (citing 51 Fed. Reg. 19,934).

Also contrary to Plaintiffs' suggestions, the jeopardy standard is not a broad mandate requiring federal agencies to ensure the recovery of listed species that may be affected by their proposed actions. Rather, Section 7 is focused on ensuring that new federal actions will not jeopardize the existence of listed species. As the Ninth Circuit has explained, "[a]gency action can only 'jeopardize' a species' existence if that agency action *causes some deterioration in the species' pre-action condition.*" *NWF*, 524 F.3d at 930 (emphasis added). Thus, "an agency only 'jeopardize[s]' a species if it causes some *new* jeopardy." *Id.* (emphasis added). Where baseline conditions already jeopardize a species, Section 7 prohibits only those new actions that "deepen[] the jeopardy by causing additional harm." *Id.*

In contrast to the litigation regarding the 2004 BiOp, Plaintiffs no longer can credibly argue that NOAA failed to "consider" recovery impacts. *NWF*, 524 F.3d at 931. Instead, they now take issue with the procedures and methods NOAA used to evaluate these impacts. Plaintiffs maintain that instead of analyzing whether the relevant ESUs would be "trending toward recovery," NOAA should have applied the standard from the 2000 BiOp: "(a) the probability of achieving recovery that NOAA believed was necessary to avoid appreciably reducing the likelihood of recovery, (b) broad time frames for reaching recovery, and (c) a

working definition of what would constitute a recovered species.” NWF Br. at 7 (citing 2000 BiOp at 1-9, 1-14); *see also* 2008 NWF SJ Br. at 9-10 (Dkt. 1499).

This Court, however, may not impose on NOAA “procedural requirements” that are not “explicitly enumerated” in the ESA or its implementing regulations. *McNair*, 537 F.3d at 993 (quoting *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 818 (9th Cir.1990); *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir.2001)). Plaintiffs’ proposed three-step analysis cannot be found anywhere in the relevant statutes or regulations. In this situation, this Court must give deference to the methods NOAA used to evaluate recovery impacts as long as they are reasonable. *See McNair*, 537 F.3d at 993.

The methods NOAA used in its jeopardy analysis were reasonable. First, NOAA analyzed whether the “[s]hort term extinction risk is sufficiently low to meet the survival prong of the jeopardy standard.” 2008 BiOp at 7-5 (NMFS 2014 AR at B281). Next, NOAA considered whether there was an adequate potential for recovery, *i.e.* “[t]he populations within a species are expected to be on a trend toward recovery.” *Id.* Only if the short-term risk of extinction was sufficiently small *and* there was an adequate potential for recovery did NOAA conclude that the proposed action was not likely to “jeopardize the continued existence” of the ESU in question. *Id.*

While plaintiffs take issue with the second prong of NOAA’s analysis, the “trending toward recovery” metric for analyzing recovery potential is a reasonable method for determining whether a proposed federal action will appreciably reduce the likelihood of recovery of listed salmon or steelhead ESUs. The “trending toward recovery” metric essentially asks whether, given the effects of the proposed action, the environmental baseline, and any cumulative effects

that are “reasonably certain to occur,” the number of returning spawners in the future is likely to be greater than the levels prevalent under current conditions. *See* 2008 BiOp at 7-22 through 7-26. Where the number of returning fish in an ESU is currently declining, a “trending toward recovery” analysis requires the Action Agencies to “reverse the trend toward species extinction” and put the ESU back on a positive trend toward recovery. *American Rivers v. NOAA Fisheries*, 2006 WL 1455629 \*10 (D. Or. 2006) (quoting *TVA v. Hill*, 437 U.S. 153, 184-85 (1978)). By tying a “no jeopardy” determination to a finding that the number of returning fish in an ESU is likely to increase over base and current conditions, the “trending toward recovery” analysis ensures that the proposed action will neither “cause[] some new jeopardy” nor “deepen[] the jeopardy by causing additional harm.” *NWF*, 524 F.3d at 930. That is exactly what the law requires.

B. No Legal Authority Supports Plaintiffs’ Attack on the Trending Toward Recovery Analysis.

No legal authority supports plaintiffs’ claim that the “trending toward recovery” analysis is arbitrary and unlawful. In support of their claim, Plaintiffs mistakenly rely on the portion of the Ninth Circuit’s opinion holding that the 2004 BiOp “inappropriately evaluated recovery impacts without knowing the in-river survival levels necessary to support recovery.” *NWF*, 524 F.3d at 936. The Ninth Circuit reasoned that it was “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.” *Id.* Importantly, however, the court emphasized that its holding did not import the ESA’s separate recovery planning provisions into the Section 7 consultation process, but was intended only to

provide “some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.” *Id.*; *see also Home Builders Ass’n v. FWS*, 616 F.3d 983, 990 (9th Cir. 2010) (recovery planning requirements cannot be inserted into other parts of the ESA).

The “trending toward recovery” metric in the 2008 BiOp meets these requirements. Under this standard, survival and recovery logically are “put at risk” when the number of returning adult spawners is consistently less than that of the preceding generation, *i.e.* the species is on downward trend toward extinction. *See* 2008 BiOp at 7-22 through 7-26. The BiOp also includes, as an RPA, “performance standards” for both adult and juvenile survival that, if met, would allow sufficient numbers of populations of each ESU to increase over time. By requiring that there will be more listed fish in future generations than in the present generation, the “trending toward recovery” standard provides “reasonable assurance” that FCRPS operations over the next ten years will not “appreciably reduce the odds of success of future recovery planning by tipping a listed species too far into danger.” *NWF*, 524 F.3d at 936.

The Nez Perce Tribe maintains that the “trending toward recovery” analysis is inconsistent with the definitions of “survival” and “recovery” in NOAA’s ESA Consultation Handbook. *See* Nez Perce Br. at 5-6 (Dkt. 1984) (citing ESA Handbook at 4-35); *see also* 2008 *NWF* Br. at 12-13 (same).<sup>10</sup> This definitional argument, however, ignores the most important definition – the definition of “jeopardy” in the ESA regulations. Under the consultation regulations, the jeopardy standard is intended to serve as a “*joint* survival and recovery concept.”

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<sup>10</sup> FWS and NMFS, Endangered Species Consultation Handbook (March 1998 Final Version) (“ESA Handbook”), *available at* [https://www.fws.gov/ENDANGERED/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf) (last accessed Feb. 26, 2015).

*NWF*, 524 F.3d at 932 (citing 51 Fed. Reg. 19,934). Thus, while the regulations require NOAA to consider recovery impacts, they require a jeopardy finding only in the “exceptional circumstances” that recovery effects “rise to the level of ‘jeopardizing’ the ‘continued existence’ of a listed species.” *Id.* Since recovery effects are dispositive in the jeopardy analysis only where the “continued existence” of the species is jeopardized, it was entirely appropriate for NOAA to analyze recovery effects based on the “potential for recovery” concept found in the ESA Handbook’s definition of “survival.”

C. Plaintiffs’ Alternative to NOAA’s Analysis Is Contrary to Law and Unworkable.

While Plaintiffs vigorously attack the recovery prong of the analysis in the 2008 and 2014 BiOps, their proposed three-step analysis is not a workable alternative. Although recovery targets certainly can be and have been set for different populations and ESUs, there is no statutory or regulatory guidance for determining either the appropriate *time* for recovery or what constitutes an “appreciable reduction” in that time period. Plaintiffs’ proposed three-step method would only inject additional uncertainty and subjectivity into the recovery analysis.<sup>11</sup>

Plaintiffs suggest that an action “appreciably reduces” the likelihood of recovery if it would result in a population growth rate that is less than required to attain a viable population within some desired time frame for recovery. Under Plaintiffs’ theory, an “appreciable reduction” in the likelihood of recovery would be measured against an ideal situation where all federal and non-federal actors take unspecified actions that lead to recovery within that desired

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<sup>11</sup> Plaintiffs fail to state what the appropriate timeframe for recovery should be. *See NWF Br.* at 7-8 (mentioning both a 48- and 100-year period).

time frame. Even assuming that there were some recognized standard on the appropriate time for recovery or what constitutes an “appreciable reduction,” this standard is contrary to law.

In most cases, full recovery of a listed species will require voluntary actions by many federal and non-federal actors that go far beyond the scope of the proposed federal action subject to Section 7 consultation. In this common situation, Plaintiffs’ standard would make a “no jeopardy” determination unattainable unless the action agency secures affirmative commitments from other federal and non-federal actors to undertake positive actions needed to ensure species recovery. The analysis demanded by Plaintiffs would thus shift the focus of Section 7 consultations away from ensuring that the proposed federal action subject to consultation does not “jeopardize the continued existence” of (*i.e.* cause additional harm to) the listed species. Instead, the Section 7 consultation process would require the action agency to secure actions and commitments from third parties that are sufficient to ensure full recovery of the listed species, or at least recover the species to an arbitrary point where a Court could determine that the likelihood of recovery has not been “appreciably reduced.” This goes far beyond what Congress intended when it adopted Section 7, which requires only that a federal agency insure that its *proposed action* will not jeopardize the “continued existence” of a listed species.

It is true that NOAA attempted to employ something akin to Plaintiffs’ proposed methodology in the 2000 BiOp. *See* NWF Br. at 7-8. However, NOAA adequately explained why it employed the “trending toward recovery” analysis in lieu of the unworkable analysis employed previously. The earlier analytical framework for evaluating recovery impacts was not appropriate for use in this case because full recovery will: (1) take more than the ten-year period of the proposed action, (2) depend on additional federal and non-federal actions that are beyond

the control of the action agencies and are not “reasonably certain to occur,” and (3) depend on future, yet-to-be-determined federal actions that have yet to undergo Section 7 consultations. *See* July 12, 2006, Memo (NOAA 2008 AR B.343) at 3; 2008 BiOp at 1-6. This far-reaching standard was the primary reason this Court overturned the 2000 BiOp, holding that a jeopardy determination must be based *solely* on actions that are “reasonably certain to occur.” *Nat’l Wildlife Fed’n v. NMFS*, 254 F.Supp.2d 1196, 1213 (D. Or. 2003). Given the direction from the Court, NOAA properly chose to focus its jeopardy analysis on whether the “reasonably certain” effects of future federal and non-federal actions over the next ten years are likely to put ESUs on a trend toward recovery.

NOAA’s 2008 and 2014 analysis, while perhaps less ambitious, is better grounded in reality and more likely to generate useful information for the agency’s jeopardy determinations. In light of the long time frame needed for recovery, the speculative nature of future actions that will be needed to attain recovery, and the lack of any ascertainable standards for determining the appropriate time for recovery or what constitutes an “appreciable reduction” in the likelihood of recovery, NOAA’s decision to modify the jeopardy standard and use the “trend toward recovery” framework for its recovery analysis in the current BiOp was both reasonable and adequately explained by the record.

## II. NOAA’S ADVERSE MODIFICATION ANALYSIS IS CONSISTENT WITH SECTION 7 OF THE ESA AND IS NOT ARBITRARY OR CAPRICIOUS.

Plaintiffs challenge NOAA’s analysis of the effects of the proposed action on critical habitat. NWF Br. at 46-51; Oregon Br. at 21-41. It is important to consider the scale of the critical habitat at issue when passing judgment on the adequacy of NOAA’s analysis. The

critical habitat designation for nine of the FCRPS-impacted salmon and steelhead ESUs included approximately 20,630 miles of lake, river, and estuary habitat spread across three states. NMFS, *Final Rule: Critical Habitat Designation for 12 West Coast Salmon and Steelhead ESUs*, 70 Fed. Reg. 52,630 (Sept. 2, 2005). The FCRPS BiOp action area includes the entire designated critical habitat area for many of these ESUs. The life cycle of the affected salmonid ESUs “gives rise to complex habitat needs, especially during the freshwater phase.” *Id.* at 52,662. Thus, the “principal biological or physical constituent elements [of habitat] that are essential to the conservation,” or PCEs, of these salmonid species differ depending on life stage. *Id.* at 52,664 (citing 50 C.F.R. § 424.12(b)). Furthermore, the diverse characteristics of the habitat areas, and the PCEs of those areas, add further complexity to the picture. Multiple life history types, such as the bimodal migration of inland steelhead, add other complicating factors. Reducing this naturally occurring complexity to a manageable set of variables and observations susceptible to quantitative and qualitative habitat analysis is no mean feat.

Plaintiffs’ arguments that NOAA’s analysis is deficient because it did not focus specifically on mainstem critical habitat PCEs necessary to migratory life stages, Oregon Br. at 27-30, or because NOAA failed to tie its analysis to specific in-river mortality or survival metrics, NWF Br. at 47-48; Oregon Br. at 33-36, fail because they do not consider the state of the best available science or NOAA’s duties under the ESA. Plaintiffs’ contentions impermissibly convert the ESA’s obligation to avoid “destruction or adverse modification” of critical habitat to an affirmative recovery obligation placed on NOAA and the Action Agencies. Plaintiffs’ position finds no support in the statute or regulations. Under Section 7(a)(2), an 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) (emphasis added). The ESA regulations define “destruction or adverse modification” as “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 (emphasis added). Just as “[a]gency action can only ‘jeopardize’ a species’ existence if that agency action causes some deterioration in the species’ pre-action condition,” an action “appreciably diminishes the value of critical habitat” only when it would result in some *additional or new* harm to the function of that habitat. *NWF*, 524 F.3d at 930.

To be sure, NOAA must consider whether an agency action affects critical habitat needed for recovery of the listed species. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 384 F.3d 1059, 1069-71 (9th Cir. 2004).<sup>12</sup> But as the Ninth Circuit has made clear, applied to continuing operations, this requirement “simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, *by tipping a listed species too far into danger.*” *NWF*, 524 F.3d at 936 (emphasis added). Thus, an agency may not continue actions that adversely affect critical habitat if maintaining the status quo would cause *further harm* to the species, for example, by continuing the species on a downward spiral toward extinction. *See Nez Perce Tribe v. NOAA Fisheries*, 2008 WL 938430 at \*8 (D. Idaho Apr. 7, 2008) (status quo operation of a federal irrigation project would result in destruction of critical habitat because it would maintain the creeks as “population sinks, where mortality exceeds reproduction”).

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<sup>12</sup> Unlike the FCRPS, where the primary action is continuing, in *Gifford Pinchot Task Force*, there was no question that logging would result in *new* destruction of designated critical habitat. *See* 384 F.3d at 1074. The only issue was whether that critical habitat was necessary for the recovery of the spotted owl.

Plaintiffs acknowledge that, in contrast to the situation in *Nez Perce*, the 2014 BiOp requires that critical habitat must be maintained in a condition that allows an ESU to “be stable or growing at some rate . . . .” NWF Br. at 9. Plaintiffs, however, insist on more – they demand that the Section 7 consultation process lead to *restoration* of sufficient critical habitat to support *full recovery*. Plaintiffs’ contention should be rejected because it would put recovery planning at the forefront of Section 7 consultation process, contrary to the Ninth Circuit’s express directive that importing “ESA’s separate recovery planning provisions into the Section 7 consultation process” would be “improper.” *NWF*, 524 F.3d at 936; *accord Cascadia Wildlands v. Thrailkill*, \_\_\_F. Supp. 3d \_\_\_, 2014 WL 4724855 at \*13 (D. Or. Sept. 23, 2014) (jeopardy analysis “is concerned with whether a given federal action at the species level would appreciably reduce the likelihood of recovery, not whether that federal action would itself implement or bring about recovery.”).

The remainder of Plaintiffs’ critical habitat arguments are disagreements with NOAA’s scientific determinations, which are entitled to substantial deference. Although NOAA must employ the best scientific data available, it is not required to support its finding that the RPA will avoid adverse modification of critical habitat with anything approaching scientific certainty. *See Jewell*, 747 F.3d at 592-93. Plaintiffs attempt to paint the picture that NOAA totally ignores the RPA’s impacts to migratory life stage PCEs because NOAA fails to consider survival through the mainstem migratory corridor in its adverse modification analysis. Oregon Br. at 26-36. However, the RPA includes specific adult and juvenile dam passage rates and is thus part of the proposed action considered by NOAA. *See* BiOp at 351 and 358 (adult and juvenile performance standards); 2013 Comprehensive Evaluation § 2 at 4 (2014 NMFS AR at B47)

(RPA Actions 18 through 25, 28 through 32); *id.* § 1 at 37 (describing metric to estimate in-river survival performance); *see also id.* at 94-97 (describing extensive hydrosystem research and monitoring efforts and resulting changes to system operations through adaptive management), *id.* § 2 at 271-285 (discussing RPA 52's requirement to monitor and evaluate fish performance through the FCRPS and implementation of this action). Considered as a whole, the RPA, AMIP and RM&E plans implemented by NOAA and the Action Agencies evidence a thorough and reasoned consideration of in-river survival and dam passage. NOAA considered how the RPA's hydropower actions affected critical habitat, and concluded that, based on the specific hydropower system survival metrics discussed above, the RPA reduces factors that have limited the functioning of PCEs in juvenile and adult migration corridors. 2014 BiOp at 388. NOAA's conclusion is reasonable, supported by the record and therefore entitled to substantial deference. *See NW Env'tl. Def. Council v. U.S. Army Corps of Engineers*, No. 3:10-cv-01129-AC, 2013 WL 1294647 at \*22 (D. Or. March 27, 2013).

Oregon also argues that the action agencies cannot rely on tributary and other mitigation action outside of the mainstem to account for adverse modification of mainstem PCEs. Oregon Br. at 28 n. 15, 28-29. Oregon cites no authority for its assertion because there is none. There is nothing impermissible with the approach followed by NOAA and the action agencies in evaluating the entire RPA's impacts on critical habitat as a whole. In fact, the ESA Consultation Handbook directs NOAA during consultation to "focus[] on the entire critical habitat area designated unless the critical habitat rule identifies another basis for analysis . . . ." ESA Handbook at 4-41. Furthermore, the 2005 critical habitat rule makes it clear that because the FCRPS is operated as an integrated system that spans multiple watersheds, impacts of the system

“are best considered as a spatial scale considerably *greater* than an individual watershed.” 70 Fed. Reg. at 52,643 (emphasis added). As the rule makes clear, it is not segments of PCEs associated with particular life stages but “the quality, quantity and distribution of PCEs within a watershed,” *id.* at 52,638, that is important to assessing salmonid critical habitat. This is, in part, because “protecting upstream areas accrues benefits to downstream areas.” *Id.* at 52,638. In light of the parameters established by the 2005 critical habitat designation, it is reasonable for NOAA to focus on the combined effects of habitat impacts, rather than impacts to PCE segments, in finding no adverse modification by the RPA.

### III. NOAA’S JEOPARDY ANALYSIS IS BASED ON TRIBUTARY HABITAT RESTORATION AND HATCHERY PROJECTS THAT ARE REASONABLY CERTAIN TO OCCUR.

Plaintiffs’ claims regarding tributary habitat and estuary habitat are indicative of a central theme in this litigation – hostility toward any effort to mitigate the FCRPS impacts to listed salmonids that does not involve major changes to the projects themselves.<sup>13</sup> This philosophy is inconsistent with the “All-H” approach that has long guided the region’s efforts to address the significant impacts of the FCRPS. It also fails to acknowledge the significant changes that have occurred in how the Action Agencies developed the 2008 BiOp through a regional sovereign process with unprecedented opportunities for public and stakeholder input. This has continued through the 2010 and 2014 BiOps and in the coordination and adaptive management processes established since the Court’s remand of the 2004 BiOp. The BiOp’s emphasis on habitat

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<sup>13</sup> *See, e.g.* Oregon Br. at 33 (“Oregon supports freshwater habitat restoration, but not in lieu of addressing significant mortality associated with passage through the FCRPS.”); Nez Perce Br. at 20 (“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.”).

restoration truly makes the effort a collective one, as no agency has the local expertise or capability to plan and implement the hundreds of projects that were prescribed by the RPA and have been undertaken over the past seven years.

One method Plaintiffs use to attack the sweeping habitat mitigation called for in the BiOp is to pick at projects or areas where progress has been sub-par. It is hardly surprising, even this far into the BiOp, that some areas – the estuary in particular – have experienced greater challenges in implementing restoration projects. But to argue that a few lagging projects calls the entire approach into question, and requires the Court to throw out the BiOp *in toto*, is unwarranted. Unlike the 2000 BiOp, strong progress has been demonstrated in a number of areas, and there is ample evidence that the habitat restoration improvements on which NOAA’s jeopardy analysis rests – in part – are reasonably certain to occur. *See NWF v. NMFS*, 254 F. Supp. 2d at 1213-15 (discussing “reasonably certain to occur” requirement and holding 2000 BiOp impermissibly relied on off-site non-federal mitigation actions that did not meet this standard).

Situated in the upper Columbia basin, above all of the dams where fish passage occurs, Colville has taken responsibility for restoring habitat in the highly degraded Okanogan River basin and in establishing a major new safety net hatchery, which is being utilized in part to reintroduce a locally adapted spring Chinook population to the Okanogan. While the Tribes had been committed to habitat restoration long before the 2008 BiOp, they have substantially developed their capacity and expertise over the past seven years and now have a comprehensive habitat restoration program that has designed, planned and implemented numerous projects with documented benefits to UCR steelhead. Towey Decl. ¶¶ 9, 22; NMFS 2014 AR C031634 at 2

(Colville Cmts. on Draft BiOp). This growth has been possible in large part from the stable, significant funding under the 2008 Colville MOA. Towey Decl. ¶¶ 5-6. The MOA is a ten-year commitment by the Action Agencies to work in partnership with Colville and fund projects benefiting salmon and steelhead in the upper Columbia. The Colville MOA and other “Fish Accords” established the certainty and binding federal commitment,<sup>14</sup> as well as the measurable goals and implementation schedule that were lacking in the 2000 BiOp’s RPA. For purposes of the BiOp, the key MOA projects are habitat restoration, protection and monitoring and evaluation in the Okanogan River basin, and Chief Joseph Hatchery. Early in the BiOp’s term in 2010, Colville was upholding its part of the bargain, *see* 2010 *Amicus* Br. at 7-17, and since then, has continued to solidify those gains and implement numerous other projects, including the 2013 completion of Chief Joseph Hatchery.

A. Okanogan Basin Tributary Habitat Projects and Monitoring and Evaluation.

The Colville MOA infuses on average from \$4 to \$7 million annually to habitat, monitoring and related work in the Okanogan Basin. Towey Decl. ¶ 6. This compares to pre-MOA funding of \$3 million per year for the entire upper Columbia. *Id.* Additional benefits have flowed from the MOA’s overall commitment of more than \$200 million over ten years, including freeing staff to work on projects rather than seeking funding on a project-by-project basis and leveraging MOA funds to develop cost-share agreements with regional partners. *Id.*

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<sup>14</sup> The Colville MOA would remain in effect even if the Court invalidates the BiOp. However, the Action Agencies may withdraw from the MOA if the Court orders changes to FCRPS operations that have a materially financial effect on the Action Agencies or materially constrain the Action Agencies from meeting FCRPS purposes. *See* Colville MOA at 18 (¶ F.2).

Colville habitat work in the Okanogan implements projects designed to restore healthy, sustainable steelhead populations. These projects are tied to the 2007 Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, which in turn is based on addressing limiting factors for each species. In the past four years, Colville has built on progress from the first three years of the BiOp. The 2012 expert panel assessment of habitat work in the Okanogan determined that Colville projects were on track, achieving 50% of the RPA's target of 14% habitat quality improvement (HQI), and in fact were anticipated to achieve 120% HQI by 2018. Towey Decl. ¶ 15; Colville Cmts. on Draft BiOp at 2.

From 2010 to the present, Colville projects have focused on restoring access, improving flows and protecting riparian habitat in key Okanogan River tributaries. In Omak Creek, Colville completed a project to remove over 10,000 cubic yards of rock and boulder in the 200-foot deep Mission Falls gorge. Towey Decl. ¶ 10. Overcoming significant logistical challenges cleared access to over 15 miles of spawning and rearing habitat. Similar to many other Colville projects, it was met with immediate and positive results, as 10 adult steelhead were detected above Mission Falls for the first time in nearly a century (despite poor flow conditions). *Id.* ¶¶ 10-12 (demonstrating immediate benefits in Omak, Salmon and Loup Loup Creeks). On Salmon Creek, Colville made two opportunistic land purchases after being approached by the owners. *Id.* ¶ 11. Such purchases are an important part of Colville's strategy to protect habitat as nearly 40% of the Okanogan watershed is in private ownership, a much higher share than other UCR sub-basins. *Id.* These projects protected 0.85 miles of riparian habitat and led to other habitat restoration work. *Id.* In Loup Loup Creek, Colville funded a 20-year lease which resulted in perennial flow in a 2.2-mile stretch of spawning and rearing habitat and spearheaded efforts with

regional partners to remove two fish passage barriers. *Id.* ¶ 9. In Antoine Creek, tribal biologists and engineers designed a rock chute that will be constructed in 2015, ensuring access to the entire creek in advance of other planned work. *Id.* ¶ 13. In Ninemile Creek, Colville funded a large instream water rights transfer resulting in permanent protection of over 2 cubic feet per second of instream flow. *Id.* ¶ 14.

Along with the habitat restoration work described above, Colville is carrying out an ambitious monitoring and evaluation (M&E) program in the Okanogan. *Id.* ¶ 17. Under the Okanogan Basin Monitoring and Evaluation Program (OBMEP), Colville biologists gather key ecosystem data relating to salmonids and their habitat to establish a long-term status and trend data set. *Id.* As compared to M&E efforts in other watersheds, OBMEP collects, analyzes and reports data on a very fine scale – at the stream reach level where habitat degradation, improvement projects and observable fish response occur. *Id.* ¶ 18. Colville then analyzes this data utilizing the Ecosystem Diagnosis and Treatment (EDT) modeling tool, which assists the Tribes in evaluating fish response to the projects, prioritizing future projects and, in time, evaluating and considering the impacts of climate change in Colville’s work in the Okanogan River basin. *Id.* ¶¶ 19-21.

B. Chief Joseph Hatchery and the Reintroduction of Spring Chinook to the Okanogan River.

On June 20, 2013, the Colville Tribes held a first salmon ceremony and dedicated the Chief Joseph Hatchery. Colville Cmts. on Draft BiOp at 2. This event celebrated the culmination of a long planning process, and more than three years of constructing the major hatchery infrastructure. *Id.* at 2-3. The dedication event also coincided with the first fish on

station and formal initiation of hatchery operations that will ultimately produce up to 2.9 million Chinook salmon annually at this state-of-the-art facility. *Id.* at 3; 2010 Colville *Amicus* Br. at 7-11 (describing application of best available science in hatchery operations).<sup>15</sup> Chief Joseph Hatchery was the largest single project funded under the Colville MOA, representing over \$40 million in construction costs and almost \$20 million for operations and M&E costs over the first decade. Colville Cmts. on Draft BiOp at 3; Colville MOA at A-1 (Attach. A).<sup>16</sup>

The completed hatchery is now ready to play a role under the BiOp in enhancing UCR spring Chinook genetic resources and recovery efforts (RPA 42, Hatchery strategy 2 at Table 8). Colville Cmts. on Draft BiOp at 3. The BiOp supports implementation of the 2007 UCR Spring Chinook Salmon and Steelhead Recovery Plan's strategy for reintroducing spring Chinook into the Okanogan Basin. To accomplish this, in November 2010 Colville submitted to NOAA Fisheries a request to designate an experimental, non-essential population pursuant to Section 10(j) of the ESA. *See id.* & Colville MOA at B-6 to B-7. NOAA issued a final rule designating the experimental, non-essential population on July 11, 2014. 79 Fed. Reg. 40,004 (July 11, 2014); *see also* 50 C.F.R. § 223.301(c). In addition, several regulatory processes were completed in 2013 and 2014 along with NOAA Fisheries' consideration of the proposed rule. In May 2013, Colville submitted an updated Hatchery and Genetic Management Plan (HGMP)

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<sup>15</sup> More details about the hatchery can be found at BPA's project website, including the 2009 Final EIS. *See* [http://efw.bpa.gov/environmental\\_services/Document\\_Library/Chief\\_Joseph/](http://efw.bpa.gov/environmental_services/Document_Library/Chief_Joseph/); *see also* Colville MOA at B-6 to B-7.

<sup>16</sup> In addition to funding under the MOA, Colville was able to secure cost share agreements for substantial portions of the operation and maintenance and M&E costs with three public utility districts, and a contribution of \$10 million of the construction costs from one of the PUDs. Towey Decl. ¶ 6 & n.3.

specific to the spring Chinook reintroduction program at Chief Joseph Hatchery.<sup>17</sup> NOAA also completed an environmental assessment and issued a Finding of No Significant Impact when it issued the final rule. 79 Fed. Reg. 40,004.<sup>18</sup> On October 27, 2014, NOAA issued a Section 10(a)(1)(A) permit under the ESA, authorizing Colville and the U.S. Fish and Wildlife Service to take spring Chinook associated with hatchery and monitoring and evaluation activities of the reintroduction program.<sup>19</sup> With these substantial regulatory approvals and environmental reviews in place, Colville is now fully prepared to accept juvenile Methow Composite UCR spring Chinook from the Winthrop National Fish Hatchery for rearing and eventual release in the Okanogan River. *See* HGMP at 2-3 (describing fish transfer and reintroduction plans). This process has already begun.

In sum, NOAA's jeopardy analysis, when considering the efforts of Colville and the other regional partners, was rational, justifiably optimistic, and should be upheld.

IV. NOAA'S DISCUSSION OF DENSITY DEPENDENCE IS BASED ON THE BEST AVAILABLE SCIENCE AND RATIONALLY SUPPORTS NOAA'S CONCLUSIONS ABOUT PRODUCTIVITY AND TRIBUTARY HABITAT.

NWF criticizes NOAA's jeopardy analysis because it relies on increased point estimates in "geometric mean abundance" as evidence that populations have remained stable or improved, while "disregard[ing]" updated point estimates for R/S, which "show consistent declines in the

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<sup>17</sup> The HGMP is available at:

[http://www.westcoast.fisheries.noaa.gov/publications/hatchery/document%20for%20public%20review/springchinookhgmp\\_okan10j\\_13may2013\\_final.pdf](http://www.westcoast.fisheries.noaa.gov/publications/hatchery/document%20for%20public%20review/springchinookhgmp_okan10j_13may2013_final.pdf) ("HGMP").

<sup>18</sup> The environmental assessment is available at:

[http://www.westcoast.fisheries.noaa.gov/publications/recovery\\_planning/salmon\\_steelhead/domains/interior\\_columbia/upper\\_columbia/okanogan\\_10j\\_final\\_environmental\\_assessment\\_062614.pdf](http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/interior_columbia/upper_columbia/okanogan_10j_final_environmental_assessment_062614.pdf)

<sup>19</sup> The biological opinion for the Section 10(a)(1)(A) permit is not yet available online, but NOAA has informed the Tribes that the process for doing so has been initiated.

updated analysis.” NWF Br. at 15. One aspect of this argument relates to the observation in recent years that higher adult returns are correlated with lower R/S values for many populations. NMFS thoroughly analyzed the data and determined that the reduced R/S reflected not a decrease in productivity, but rather statistical support for density dependent effects. *See* Appendix C to the 2014 BiOp (BOR 2014 AR at BR00000272). Relying heavily on the extra-record declaration of Dr. Brendan Connors (Dkt. 1981), NWF criticizes NOAA for failing to “look beyond” density dependence to locate other relevant factors that could be accounting for the observed relationship between abundance and productivity levels. NWF Br. at 16-17. But NWF does not show that NOAA failed to rely on a relevant factor or utilize the best available science in its analysis.

According to Dr. Connors, the “other factor” that could account for the observed relationship between R/S and abundance is that “spatial contraction of tributary habitat use and depressed smolt to adult survival,” Dkt. 1981 at ¶ 16, combine to create a “false positive” for a density dependent response due to a lower “apparent carrying capacity” for the population. *See* Declaration of Casey M. Baldwin at ¶ 5 (“Baldwin Decl.”). This is apparently a novel theory, and Dr. Connors provides no data or relevant studies that support it. *Id.* ¶¶ 5-11. NOAA is charged with relying on the best *available* science; the agency is not required to chase down and analyze unsupported theories, much less those offered in litigation to raise questions regarding the wisdom of the agency’s decision. *Jewell*, 747 F.3d at 633 (“It is not our job to task the FWS with filling the gaps in the scientific evidence. We must respect the agency’s judgment even ‘in the face of uncertainty.’”); *cf. Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 964 (D. Or. 2007) (agency review of scientific evidence not rendered arbitrary by failure to adhere to contrary view

contained in unpublished reports) (describing holding of *Alabama–Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)).

Dr. Connors’ conclusion that many populations of UCR and Snake River steelhead and spring Chinook have access to “pristine wilderness” for spawning and rearing is an extremely broad generalization and simply not true with respect to the majority of watersheds in the Interior Columbia Basin. Baldwin Decl. ¶ 9. Indeed, human activities over the past century have severely degraded the Okanogan River basin, including water diversions, logging, road infrastructure, and livestock grazing, rendering steelhead productivity in the basin likely subject to density dependent processes. *Id.* ¶¶ 9-13. As a result, it remains vitally important to restore such degraded habitats to achieve salmon and steelhead recovery. *Id.* ¶¶ 13, 15-16. Even watersheds that appear “pristine” may be degraded, such as through the limited occurrence of salmon carcasses. *Id.* ¶ 9.<sup>20</sup>

The fact that science must advance further before we can fully understand how tributary habitat improvements will measurably increase salmonid survival does not mean that NOAA failed to rely on the best available science, or that it irrationally and arbitrarily concluded that there was a reasonable certainty that tributary habitat improvements will improve productivity. *See Jewell*, 747 F.3d at 630. NOAA may simultaneously recognize that effects of certain actions are not well understood or highly uncertain, and that it is reasonably certain that the effects will result from the actions at issue. *See id.* Here, NOAA has drawn rational conclusions from the

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<sup>20</sup> A recently completed ISAB review of density dependence and its implications for salmonid restoration in the Columbia River Basin is consistent with this and other opinions expressed by Mr. Baldwin. *See ISAB, Density Dependence and its Implications for Fish Management and Restoration Programs in the Columbia River Basin* at 135-36. Feb. 25, 2015, available at <http://www.nwcouncil.org/media/7148891/isab2015-1.pdf>.

best available science in concluding that density dependence is suppressing productivity metrics for a number of ESUs, and that tributary habitat improvement is likely to relieve density dependence and result in measurable population growth.

V. A SINGLE EIS FOR THE ENTIRE RPA IS IMPRACTICAL.

Plaintiffs and the Nez Perce Tribe allege that the Action Agencies are in violation of the National Environmental Policy Act (NEPA). NWF Br. at 56-60; Oregon Br. at 44-47; Nez Perce Br. at 28-29. Colville adopts the federal defendants' arguments regarding waiver and distinguishing *Jewell*, Fed. Def. Br. at 62-64, 66-67 (Dkt. 2001), but provides additional observations regarding the potential complexities of the NEPA issue as it relates to one aspect of this BiOp's RPA.<sup>21</sup>

An environmental impact statement (EIS) for this BiOp's RPA would without a doubt be the most impractical and unwieldy environmental review in the 45-year history of NEPA. This Sisyphean task would further bog down the already challenging multi-year interagency ESA consultation and perhaps strain it to the breaking point. This may be Plaintiffs' objective in bringing the NEPA claim, but in making its decision the Court should consider whether such a result makes sense or would achieve any additional benefits for listed salmon and steelhead.

Colville's experience with the avian predation issue illustrates the complexities that would result from a single EIS mandate for the RPA. For the past three years, Colville has been

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<sup>21</sup> The Corps' NEPA processes for avian predation in the Columbia River basin are ongoing. For example, the Corps' final environmental impact statement for the Double-Crested Cormorant Management Plan to Reduce Predation of Juvenile Salmonids in the Columbia River Estuary ("Cormorant Plan") is available for its final comment period through March 16. *See* <http://www.nwp.usace.army.mil/Missions/Current/CormorantEIS.aspx>. Colville believes the Court will find the background information regarding the Corps' avian predation NEPA processes useful in considering Plaintiffs' NEPA claims.

advocating for an aggressive approach to avian predation management by the Action Agencies and other agencies with management responsibilities for these migratory species, primarily the Corps and U.S. Fish and Wildlife Service (FWS). *See* Corps 2014 AR at 01775: 0093057-0093062 (Cormorant Plan EIS scoping comments); Corps 2014 AR at 20169:0308116-0308123 (Inland Plan Draft EA comments); Colville Cmts. on Draft BiOp at 3-4. In particular, Colville has expressed concerns that the agencies are addressing the issue as a bird problem, when the Tribes see it as a fish problem. There are currently three RPA actions addressing avian predation other than at the dams themselves. RPA 45 seeks to implement the Caspian Tern Management Plan for East Sand Island (“Tern Plan”). RPA 46, which was modified to specify a management target in the current BiOp, 2014 BiOp at 410, calls for the development and implementation of warranted actions related to cormorants at East Sand Island, *i.e.* the Cormorant Plan. RPA 47 calls for development of an Inland Avian Predation Management Plan (“Inland Plan”) to address avian predation inland in the basin of Bonneville Dam. 2014 BiOp at 412.

There has been a separate NEPA process for each of the three plans. The Tern Plan arose from litigation by avian advocacy groups challenging previous management actions by the Corps and FWS, and several of its key terms were dictated by the settlement of that litigation. *See Nat’l Audubon Soc’y v. Butler*, 160 F. Supp. 2d 1180 (W.D. Wash. 2001). In order to restrict tern nesting habitat on East Sand Island under the Tern Plan, the Corps was required to develop alternative habitat at a 2:1 ratio. The habitat sites that have been developed range into southern Oregon and northern California. *See* Tern Management Plan EIS at ES-2 to ES-3.<sup>22</sup> In 2014,

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<sup>22</sup> The 2005 Final EIS is available at 2014 Corp AR at ACE\_00576 and ACE\_00577.

and again this year, the Corps has sought to further reduce East Sand Island nesting habitat. That proposal has involved yet another NEPA process.<sup>23</sup>

The Inland Plan was finalized in January 2014. *See* 2014 Corps AR ACE\_00806. The action focused on a 2-phase approach to deterring Caspian terns from two inland islands – Goose Island in the Potholes Reservoir and Crescent Island in the Columbia River near its confluence with Snake River. A major issue in the plan was the issue of dispersal of the dissuaded terns, as it was unknown whether they would move to other nesting sites within or outside of the basin. *See, e.g.*, Inland Plan at 4 (2014 Corps AR ACE\_00806: 0079650).

The Cormorant Plan is not yet finalized, but the Corps anticipates a final EIS and record of decision this spring, over two years after it began scoping for the NEPA process.<sup>24</sup> This plan includes a preferred alternative in which upwards of 10,000 adult cormorants would be killed and more than 20,000 eggs would be oiled over a four-year period. The EIS examines the impacts of the action on the western population of cormorants, which migrates along the west coast of the United States. The EIS also considers dispersal issues.

Each of these plans involve complex considerations of resource impacts, science, and applicable law. Because the managed species are migratory birds, they are protected under the Migratory Bird Treaty Act, which requires a permit from FWS before any action constituting a “take” may occur. *See* 50 C.F.R. § 21.41. As a result, FWS, an agency with no formal role in

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<sup>23</sup> *See* 2014 Corps AR at ACE\_00646 (2014 Final EA for Tern Plan Actions on East Sand Island); the Draft Environmental Assessment (March 3, 2015) is available at <http://www.nwp.usace.army.mil/Media/Announcements/tabid/1887/Article/572428/draft-ea-caspian-tern-nesting-habitat-reduction.aspx>.

<sup>24</sup> Information about the Cormorant Plan, including the Final EIS can be found at <http://www.nwp.usace.army.mil/Missions/Current/CormorantEIS.aspx>.

the FCRPS BiOp and which has emphasized its statutory mandate to protect migratory birds rather than listed salmonids, has been involved in each of the NEPA processes. The broad geographic scope of the plans is inherent in the migratory nature of the affected species, and literally encompasses the entire west coast of the United States. A no less diverse set of interested parties – many of whom have never participated in this litigation – would now claim harm or benefit from the proposed action and the resulting NEPA analysis. *See, e.g., Humane Soc’y of U.S. v. Bryson*, 924 F.Supp.2d 1228 (D. Or 2013) (Bonneville Dam sea lion litigation).

Given the complexity of just these three avian management plans under the RPA, it is hard to imagine what an EIS addressing all of them would look like – or whether it could even be written. Indeed, there are serious questions about how the agencies would evaluate a reasonable range of alternatives considering the possible matrix of alternatives for over 70 individual RPA actions. The complexities of a single RPA EIS that come to mind immediately will almost certainly expand upon detailed scrutiny by the agencies and, inevitably, by a court as lawsuits that seeking to protect various resources of interest merge into a mega-challenge to a single agency action.

### CONCLUSION

For all of the foregoing reasons, Plaintiffs’ motions for summary judgment should be denied, and Defendants’ cross-motion for summary judgment should be granted.

Respectfully submitted this 6th day of March, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

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