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THE HONORABLE MICHAEL H. SIMON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs,

and

STATE OF OREGON,
Intervenor-Plaintiff,

v.

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

Defendants.

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

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

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INTRODUCTION

The Nez Perce Tribe (Tribe) appreciates the opportunity to provide the Court with this reply memorandum in support of NWF Plaintiffs' and the State of Oregon's motions for summary judgment on the 2014 FCRPS Supplemental Biological Opinion (2014 BiOp).

Unique though it is, this case is categorically like many others when viewed at a distance. It is composed first of a set of facts, here contained within an administrative record and most fundamentally involving the status of thirteen ESA-listed salmon and steelhead species. The facts reveal the legal issues of the case, predominantly questions whether certain applicable laws are being violated. But for the Tribe, the real world consequences are personal and significant. The FCRPS dams on the lower Snake River and the mainstem Columbia have an enormous impact on salmon and steelhead, and, in turn, on the Tribe and its people. The Tribe's Reservation, and many of the Tribe's usual and accustomed fishing places, in addition to those on the mainstem Columbia, are located above eight dams on the lower Snake and Columbia rivers.

One of the defendant-intervenor response briefs complains that the Plaintiffs' arguments in this case are excessively technical and "dense". This is ironic: while the Federal Defendants' mass of effort in producing FCRPS BiOps that have been repeatedly rejected by the Court since 2000, and in now producing the 2014 BiOp, appears unusually complex and intricate, Plaintiffs' demands are by contrast fundamentally clear and focused. They are grounded in demands that the FCRPS BiOp not misstate the facts of the status of the listed species; that the BiOp not rest on incomplete, analytically ambiguous statistics regarding the status of the species; and that the BiOp not in the end

provide disconnected, unreasoned conclusions regarding the adverse impacts of the FCRPS on the listed species and their critical habitat: conclusions that appear reverse-engineered so as to require minimal changes to a system that – externally to the ESA, but in a very real way – is inextricably tied to the lowest common political denominator of the region.

Yet that is why we are here. This Court, like all Article III courts, is uniquely constituted, therefore uniquely capable, of ignoring politics and political majorities, of rejecting executive agency conclusions deferential to political considerations rather than disinterested compliance with law, and of requiring of executive agencies explicit, reasoned compliance with the law regardless the inconvenience. Congress understood the implications of full, disinterested compliance with the ESA, and included a cabinet-level Endangered Species Committee, the so-called "God Squad," within Section 7 to address exemption issues where necessary.

Because the term of the 2008 BiOp now expires in less than three years, and because NOAA must begin to reinitiate consultation on the FCRPS so soon, the present moment is in fact an ideal time to overturn this BiOp and require full analytical compliance with the ESA – and NEPA – from the Federal Defendants in this case.

While unrelated, one of the Intervenor-Defendants (Northwest RiverPartners) accuses the Tribe (and Oregon) of hypocrisy for having entered into the 2008-2017 U.S. v. Oregon Management Agreement regarding treaty and non-treaty fisheries in the Columbia River Basin, because NOAA then produced a BiOp on that Agreement that is asserted to be analytically identical to the present FCRPS BiOp. This accusation has no merit. In answer, it is worth noting that the Tribe was similarly accused years ago of not

challenging NOAA's BiOp on Upper Snake River federal operations, and stated the following to this Court:

> As the Tribe indicated in its opening brief, it has supported and continues to support the Upper Snake River operational regime encompassed by the Snake River Basin Adjudication (SRBA) Agreement approved by Congress, in all forums. Tribe's S.J. Mem. at 2. The Tribe also has a long history of managing its Treaty fisheries consistent with the Treaty of 1855 and the Treaty case law, including U.S. v. Oregon and orders issued in that case. There is certainly nothing inconsistent with the Tribe supporting these underlying actions as it continues to address the reality that, as this Court acknowledged in the American Rivers v. NOAA litigation, "rebuilding salmon to healthy, harvestable levels will come in large part from addressing the impacts of the down-river dam operations that do the most harm to salmon." American Rivers v. NOAA, Opinion and Order, Docket #263 (May 23, 2006).

Tribe's 2008 BiOp Reply Mem. at 3 n. 1.

As there, with respect to a federal *action* involving operation of the Upper Snake River dams, the Tribe supported and supports the federal *action* represented by the 2008-2017 U.S. v. Oregon (Fisheries) Management Agreement which was subject to a subsequent NOAA BiOp. Whereas here, the Tribe supports the NWF Plaintiffs and Oregon in this case because the *FCRPS action* is so destructive of ESA-listed fish species to which the Nez Perce people are so critically connected. The Tribe of necessity challenges NOAA's BiOp on the FCRPS action because it *conceals* the destructiveness of that action. The Tribe has no fear of the theoretical consequence – plainly being threatened by the Intervenor-Defendant, and the Federal Defendants in this case – of NOAA being required to engage in a lawful Section 7 analysis of the 2008-2017 (Fisheries) Management Agreement, because the differences between the adverse *impacts* of that action and this FCRPS action are so enormous.

ARGUMENT

I. THE 2014 SUPPLEMENTAL BIOP'S NO-JEOPARDY CONCLUSIONS CONTINUE TO RELY ON INCORRECT STANDARDS AND INCOMPLETE ANALYSES.

The 2014 Supplemental FCRPS BiOp carries forward the flawed jeopardy standard and analytical incompleteness of the 2008/10 BiOps with particular respect to recovery risks. These flaws are revealed in the BiOp itself and must be evaluated based on that record. "When reviewing a biological opinion, we rely only on 'what the agency *actually said*' in the BiOp to determine whether the agency considered the appropriate factors." Pacific Coast Fed'n of Fisherman's Ass'ns v. BOR, 426 F.3d 1082, 1091 (9th Cir. 2005) (emphasis in original) (citing and quoting Gifford Pinchot Task Force v. USFS, 378 F.3d 1059, 1072 & n. 9 (9th Cir. 2004)).

The Tribe has summarized these flaws as, first, a merging of analytical standards for risk assessment of "survival" and "recovery" that results in the distinct concept of recovery (for purposes of jeopardy/risk assessment, not for *achievement* of recovery via the distinct mechanism of Section 4, a repeated Defendant straw man in this case) being submerged into the concept of survival, since that concept by regulatory definition already includes "the potential for recovery." The Tribe's "standard" point is therefore that the plain language and plain meaning of the regulatory terms "survival" and "recovery" are being misused, with the result that the latter term is not given independent significance, an outcome that is routinely rejected by the courts with respect to both statutory and regulatory implementation. E.g., NWF v. NMFS, 524 F.3d 917, 932 (9th Cir. 2008) (citation omitted).

The second flaw is connected to the first and is its analytical consequence. The BiOp's use of three productivity metrics that are mathematically, analytically ambiguous, results in an incomplete, inconclusive analysis of the *risks* of the action to the species' actual recovery in the future.[1] Perhaps even more than the jeopardy standard flaw, this is directly contrary to the law of this case, the Ninth Circuit's instruction to Federal Defendants in its decision affirming this Court's invalidation of the 2004 BiOp. The Ninth Circuit stated:

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

NWF v. NMFS, 524 F.3d at 933 (latter emphasis in original) (footnote omitted).

This issue must turn in part on the question whether the 2014 BiOp includes a "full analysis" of the risks of the FCRPS RPA to the recovery of the listed species. And the answer to that question must come from what is "said" in the BiOp itself, 426 F.3d at 1091, not the litigation rationalizations of the agencies or their lawyers. The 2008 BiOp

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[1] Federal Defendants' citation to Home Builders v. FWS, 616 F.3d 983 (9th Cir. 2010), holding, inter alia, that the process of critical habitat designation does not require a determination of when a species would *actually* be conserved, that properly belonging to Section 4 planning, is not on point with respect to the present challenge to NOAA's disconnected, *analytically* incomplete Section 7 jeopardy analysis. (Interestingly, critical habitat cases, though distinct, and whether or not the Tribe agrees with particular decisions, by comparison often support by analogy Plaintiffs' jeopardy argument before this Court. In other words, by their nature, many of those cases necessarily involve analyses under which at least the most basic, broad analytical/mathematical parameters have been determined with some rationality: e.g., total designated critical habitat and affected/impacted critical habitat. NOAA's refusal in this case to *use* – at least analytically –recovery abundance levels in its jeopardy analysis by contrast is disconnected and unreasoned.)

did no more than refer to the concept of recovery population abundance levels and list such levels for some populations. 2008 BiOp at 7-22 and, e.g., 2008 BiOp at 8.3-47, Table 8.3.2-1. The 2008 BiOp never *used* recovery abundance levels as an analytical tool in order to make its otherwise free-floating productivity metrics meaningful. The three productivity metrics were/are instead the explicit analytical tools with respect to recovery risks. The 2014 BiOp states that population abundance levels have been "considered," 2014 BiOp at 47, but again there is no use of any form of recovery abundance levels to make such considerations analytically meaningful. [2]

An Intervenor-Defendant brief (RiverPartners) makes a revealing observation on the posture of the recovery risk issue in this case. Accepting the Ninth Circuit's instruction that a "full analysis" of recovery risks is required to ensure that impacts to recovery are not independently causing jeopardy to the species, the brief states, "As

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[2] Federal Defendants cite to the recent case of Oceana, Inc. v. Pritzker, 2014 WL 714875 (D.D.C. Dec. 14, 2014) in support of their analysis. That decision, when distinguished, does nothing to support the incomplete, inconclusive recovery prong analysis of the 2008/14 BiOps. There the court stated as follows in finding an adequate BiOp recovery risk analysis:

> The BiOp includes a fairly extensive discussion of recovery impacts, centered on the recovery criteria established in the 2008 Recovery Plan for the Northwest Atlantic Population of the Loggerhead Sea Turtle. *See* SAR 13148–49, 13265–68. NMFS specifically finds in the BiOp that interactions between loggerheads and the Fishery will not lessen the species' genetic heterogeneity, *see* SAR 13268, and it further determines that the continued operation of the Fishery will not affect two of the loggerheads' recovery criteria—the number of nests and nesting females, and trends in abundance on foraging grounds—to such an extent that there would be an appreciable reduction in their likelihood of recovery. SAR 13270. NMFS concludes that the "proposed action would not impede progress on carrying out any aspect of the recovery program or achieving the overall recovery strategy." *Id.* Thus, NMFS has identified the reasons underlying its conclusion that the likelihood of loggerheads' recovery would not be appreciably reduced by the operation of the Fishery, and it has articulated a rational connection between these reasons and that conclusion.

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." RiverPartners Br. at 16. For the Tribe, this observation brings us back to very reason the Tribe is here, and why it supports the claims and arguments of the NWF Plaintiffs and the State of Oregon in this case. For the Tribe, the heart of the matter in this case is a biologically destructive FCRPS action. And for the Tribe, the FCRPS BiOps on that action consistently "hide the ball," failing to take the analytical steps necessary to expose the full impacts of the system on the listed species. It is not the job of the *Plaintiffs* to prove or "provide evidence" that there is jeopardy to the species. It is the Federal Defendants' obligation under Section 7 to ensure that there is not. And it precisely the analytical ambiguity and incompleteness of the 2014 FCRPS BiOp – its precise failure to conduct the Ninth Circuit's "full analysis" of recovery risks – that makes it impossible for anyone to conclude that that legal requirement has been met. The ESA and APA do not allow this result.

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

The 2014 BiOp, while compiling new information on climate change, did not revise a single previous finding about the effects of climate change, and did not include a single additional action to address climate change risks. Actual analysis, *using* the best available science, is the foundation of ESA Section 7 consultations. The ESA Consultation Handbook stresses the "Use of Sound Science":

> An overriding factor in carrying out consultations should always be *the use of* the best available scientific and commercial data to make findings regarding the status of a listed species, the effects of a proposed action on the species or critical habitat, and the determination of jeopardy/no jeopardy to listed species or destruction or modification/no destruction or adverse modification to designated critical habitats.

ESA Consultation Handbook, at xxi (emphasis added).

An actual analysis that uses the best available science is necessary to satisfy judicial review pursuant to the ESA. A BiOp is invalid if it "fails to *use* the best available science as required by 16 U.S.C §1536(a)(2)." Pacific Coast Fed'n of Fisherman's Ass'ns v. NMFS, 265 F.3d 1028, 1034 (9th Cir. 2001) (emphasis added). And, an actual and rational analysis is necessary to satisfy judicial review pursuant to the APA. "Essentially, a court must ask whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." Id. (quotations and citations omitted).

As the Tribe explained in its opening brief, the 2014 BiOp fails to *use* the best available science about climate change risks and impacts on future ocean conditions and freshwater habitat and on freshwater life stages of salmon and steelhead, and does not actually analyze the severity and extent of these climate change risks and impacts. And as the Tribe explained, NOAA's "consideration" of climate change on freshwater habitat and freshwater life stages in the 2014 BiOp is unreasoned and overlooks significant aspects of the problem because it tells one nothing about the *extent* to which the existing actions in the FCRPS action/RPA provide any additional response to climate change beyond mitigating for existing hydrosystem effects, the *magnitude* of any such additional response to climate change, and the limitations of these existing actions to mitigate for the existing hydrosystem effects let alone provide an additional response to climate

change. As the Tribe concluded, the 2014 BiOp stands in stark contrast to the NOAA BiOp for the Central Valley Project (CA) where the agency demonstrated its ability to do a meaningful analysis of climate change.

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

In its response brief, NOAA does not directly confront the 2014 BiOp's failure to analyze the severity and extent of climate change risks to freshwater habitat and freshwater life stages using the best available science. Instead, NOAA's response brief states that the agency "assumed that freshwater conditions would be affected by climate change and addressed the degree to which the RPA actions address those possible future effects." Feds' SJ Mem., Dkt. 2001, at 21. What NMFS actually did, as is evident from reading the BiOp itself[3], was jump over any attempt to analyze the extent and severity of climate change risks to freshwater habitat and life stages using all available information, whether qualitative or quantitative. As NOAA never analyzed the extent and severity of these freshwater climate impacts, it could not possibly analyze the "degree to which"[4] the Action/RPA actions intended to mitigate the impacts of the FCRPS also mitigate for the impacts of climate change.

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[3] All parties are in agreement that the relevant sections of the 2014 BiOp are Section 2.1.4 "Recent Climate Observations and New Climate Change Information", Section 3.9 "RPA Implementation to Address Effects of Climate Change", and Appendix D, "Literature Reviews for Impacts of Climate Change".

[4] The 2014 BiOp notes that the question of "degree" that the BiOp asked was the "degree to which the Prospective Actions implement recommendations by the ISAB (2007c) to reduce impacts of climate change on anadromous salmonids." 2014 BiOp at 435, citing 2008 BiOp at 7-14, 7-32. The flaws in this inquiry are addressed in Section II. B. of this brief.

The 2014 BiOp contains no explanation for cataloging the scientific literature but never using that information to analyze the extent and severity of climate change risks to freshwater habitat and life stages. In its response brief, NOAA highlights that the 2014 BiOp – in what is actually the 2014 BiOp's description of the climate change effects the agency considered in the 2008 BiOp – notes that the magnitude and timing of freshwater habitat changes and impacts involve a level of uncertainty, before arguing that NOAA "analyzed potential climate change effects." Feds' SJ Mem. at 20. As a matter of fact, the 2014 BiOp does not state that uncertainty precluded it from doing any analysis of the extent and severity of climate change risks to freshwater habitat and life stages. And as a matter of law, such an explanation would not withstand judicial scrutiny: NOAA cannot await "the best conceivable scientific information" before it acts. Cabinet Res. Group v. U.S. Fish and Wildlife Service, 465 F. Supp. 2d 1067, 1088 (D. Mont. 2006).

And with respect to climate change effects on ocean conditions, NOAA, having highlighted in the 2014 BiOp a 2011 study presenting information of dramatic contractions in marine salmon habitat (as soon as the 2020s) as "new information" and as an example of an effect that "may be greater than previously indicated", now in its response brief argues that because the authors of the 2011 study described their results as largely agreeing with the results of their previous studies from 1998, 2007, and 2008, the study did not identify "new effects" from climate change. The problem is that NOAA did not cite or use these earlier studies in the 2008 BiOp. 2014 NOAA AR B282 at 28327-28380 (2008 BiOp reference list). And, substantively, a full reading of the 2011 study makes it clear that "in contrast [to the smaller changes modeled in these previous studies], our analysis showed substantial reduction in summer as well as winter habitats

for sockeye and only summer habitats for the other five species." 2014 NOAA AR B1 at 643.

B. The 2014 BiOp is unreasoned and ignores a significant aspect of the problem in asking only whether the RPA actions taken to mitigate for the current impacts of the FCRPS dams are consistent with the *types* of actions the ISAB recommended as responsive to climate change, an inquiry that provides no information about the *extent and magnitude* to which the Action/RPA actions are – or even could be – responsive to risks associated with climate change while serving as mitigation for the impacts of the FCRPS dams.

In its opening brief, the Tribe explained that NOAA's incomplete consideration of climate change effects on freshwater habitat and life stages in the 2014 BiOp[5] consists only of observing whether the RPA actions taken to mitigate for the current impacts of the FCRPS dams are consistent with the *types* of actions the ISAB recommended to mitigate for the separate impacts of climate change[6] and concluding that they were[7], and

[5] NOAA took this approach in its 2008 BiOp and again in 2010 – even with evidence (quantitative and qualitative) about climate change risks and effects – accompanying it with a rationalization that "the full effects of climate change are unlikely to be realized during the time period covered by this BiOp,"2010 BiOp, App. F. at 3; 2008 BiOp at 7-13 (refusing to consider future ocean conditions outside "the period of … this opinion". NOAA's argument that it "did not limit [its climate] analysis to the 10-year term of the BiOp", Feds' SJ Mem. at 22 and n.20 cannot be squared with what NOAA actually did in the BiOps.

[6] The 2014 BiOp repeats the 2008 BiOp's description of NOAA's approach to climate change affecting freshwater habitat and life stages as "a method of qualitative evaluation, based on ISAB recommendations for pro-active actions" where the "primary qualitative method NOAA uses to evaluate the Prospective Actions is to determine the degree to which the Prospective Actions implement recommendations by the ISAB (2007c) to reduce impacts of climate change on anadromous salmonids." 2014 BiOp at 435, citing 2008 BiOp at 7-14, 7-32.

[7] The 2014 BiOp states, "NOAA Fisheries continues to conclude that sufficient actions consistent with the ISAB's (2007b) recommendations for responses to climate change have been included in the RPA and are being implemented by the Action Agencies as planned." 2014 BiOp at 442.

in doing so fails to analyze the magnitude and extent to which the RPA actions are – or even could be – responsive to the risks associated with climate change while also serving as mitigation for impacts of the FCRPS dams.

In its response brief, NOAA argues that "[t]he RPA was developed to improve salmonid survival and recovery prospects considering *all aggregate effects* to the species, including future climate change impacts". Feds' SJ Mem. at 22 (emphasis in original). The flaw in this argument is that it implies an analysis of the magnitude and severity of climate impacts that, as set forth above, NOAA has not done. Nor do the sections of the BiOp NOAA references (2008 BiOp at 7-13 – 7-14 and the 2014 BiOp at 176-182) support this argument. NOAA's related argument is that the BiOp contains "numerous actions" that "will improve the resiliency and ability of the salmonid populations to climate change". Feds' SJ Mem. at 22-23. This argument suffers from the same flaw, as the BiOp itself, that is, NOAA provides no reasoned analysis showing the magnitude and extent to which the RPA actions are – or even could be – responsive to the risks associated with climate change while also serving as mitigation for impacts of the FCRPS dams. "When reviewing a biological opinion, we rely only on 'what the agency *actually said*' in the BiOp to determine whether the agency considered the appropriate factors." Pac. Coast Fed'n v. BOR, 426 F.3d at 1091 (emphasis in original) (citation/quotation omitted). Agency action cannot be evaluated based on post-decisional explanations. As the U.S. Supreme Court has stated, "post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." Am. Textile Manuf. Inst. v. Donovan, 452 U.S. 490, 539 (1981) (citations omitted).

Tellingly, NOAA's response brief offers no response to the Tribe's illustration –

using two of NOAA's own examples from RPA Section 3.9 "RPA Implementation to Address Effects of Climate Change" – that answering the question of whether these actions are consistent with the *types* of action the ISAB recommended in response to climate change tells one nothing about the *extent* and *magnitude* to which these actions are – or could be – responsive to climate change in addition to serving to mitigate for the existing operations of the FCRPS dams. Tribe's Mem., Dkt. 1984, at 15-17.

That is, the answer to the question whether releasing cold water from Dworshak Dam (located on the Nez Perce Reservation) or whether tributary habitat actions in Lolo Creek (developed with the assistance of the Nez Perce Tribe) are the consistent with the types of actions the ISAB recommended as consistent with climate change is "yes". But this tells one nothing about the magnitude and extent to which these actions respond – or could respond – to climate change in addition to serving to mitigate for the existing impacts of the FCPRS dams. The existing operation of Dworshak Dam to provide cold water releases has been occurring as described since at least 1995, when it was included in the 1995 BiOp's Incidental Take Statement to address the impacts of the FCRPS dams. Indeed, Dworshak Dam has a limited ability to release cold water to address existing hydrosystem effects: cold water releases do not always "maintain" temperatures in Lower Granite reservoir below 20°C in late summer as the 2014 BiOp states, nor could they, as there are limits to the ability to release cold water from Dworshak. A reasoned analysis would disclose the extent to which these existing operations respond to climate change in addition to mitigating for the existing impacts of the FCRPS dams, the magnitude of the response to climate change these operations provide in addition to mitigating for the existing impacts of the FCRPS dams, and the limitations of these existing operations.

The Nez Perce Tribe – whose Reservation and many of its usual and accustomed fishing places (in addition to those on the mainstem Columbia) are located above the eight dams on the mainstem Columbia and lower Snake River – is uniquely concerned about the risks of climate change on salmon and steelhead (and Pacific lamprey) throughout their life cycles, given that leading scientific opinion indicates that climate change will be among the most significant influences on the survival and recovery of Pacific Northwest salmon and steelhead. NOAA has demonstrated its ability to do a reasoned, meaningful analysis of the impacts of climate change in other BiOps, such as its 2009 BiOp on the (CA) Central Valley Project, where it analyzed the magnitude and severity of climate change impacts, and analyzed the ability (and limitations) of the proposed action and RPA to respond to the additive impacts of climate change. Tribe's Mem., Dkt. 1984, at 18-19.

The Tribe joins with Oregon and NWF in respectfully requesting this Court to reject the 2014 FCRPS BiOp's unreasoned approach to climate change effects, and order NOAA to use the best available science to conduct a full and rational analysis of climate change risks and impacts throughout the salmon's life cycle as it analyzes the full effects of the FCRPS Action/RPA as required by the ESA and APA.

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

In its opening brief, the Tribe emphasized that the 2014 BiOp continues to place enormous reliance on prospective tributary and estuary habitat improvement to support its no-jeopardy and no-adverse modification conclusions for the FCRPS dams, and highlighted that throughout this litigation the Tribe has emphasized the importance of

NOAA "showing its work" in relying upon these habitat actions in the tributaries and in the estuary, as the ESA and APA require. Tribe's Mem. at 20-25.

In its response brief, NOAA incorrectly portrays the Tribe's concerns as being solely about funding, and then argues that such concerns are "more of a policy concern rather than a challenge to NMFS's reliance on tributary habitat measures or actions being completed" and "do not represent a legal challenge to the BiOp." Feds' SJ Mem. at 38 n. 33. The Tribe's argument, set forth in its opening brief, is rather that NOAA in the 2014 BiOp relies on benefits from "supplemental projects" –such as those in the South Fork Clearwater and Lochsa – but fails to provide the most fundamental information regarding when such projects will be initiated, when such projects will be completed, and most significantly, when it expects the anticipated benefits to accrue, all of which are affected by the reality that there has been no decision to expedite these supplemental projects and no additional funding identified and allocated to these supplemental projects. Consequently, the Tribe asserts that NOAA's reliance on these benefits fails to satisfy the law's requirements that the agency may only rely on actions that are "reasonably specific, certain to occur, and capable of implementation; . . . subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." NWF v. NMFS, August 2, 2011 Opinion and Order (invalidating the 2008/2010 BiOp), Dkt. 1855 at 11.

NOAA's response also references the declaration submitted by Mr. Tehan of NOAA who asserts that the Tribe's Lower South Fork Clearwater River Watershed Restoration Proposal "demonstrates that funding has been sufficient to implement tributary habitat improvement actions *to date*." Tehan Dec., Dkt. 2006, ¶ 60 (emphasis

added). In fact, the Tribe's proposal (attached to Mr. Tehan's declaration) supports the Tribe's concerns about NOAA's reliance on "supplemental projects" to produce habitat quality improvements. The Tribe's proposal was submitted to the Council prior to the identified need for supplemental projects and *does not* include the "supplemental projects" for the South Fork Clearwater. The Tribe's concern is that NOAA in the 2014 BiOp relied on "supplemental projects" to produce habitat quality improvements without providing any information identifying the projects being relied upon, when they would be implemented, and when the benefits are expected to accrue. And, NOAA relies on these benefits without acknowledging the logistics of project implementation and the realities that there has been no decision to expedite these "supplemental projects" and no additional funding identified and allocated for implementing these supplemental projects.

IV. CONTINGENCY PLANNING FOR LOWER SNAKE RIVER DAM BREACHING IS A RATIONAL, NECESSARY PART OF ESA COMPLIANCE IN THIS CASE.

The Nez Perce Tribe has probably been the most persistent voice[8], as amicus curiae, in stating that an overturned BiOp would require careful development of a lower Snake River dam breaching RPA. And the Tribe has stated that the FCRPS BiOp as written is additionally flawed in containing a dam breaching contingency plan so buried in layers of delay and sub-contingency as a so-called "contingency of last resort" as to be useless in precisely the sense that a contingency plan should be required to be *useful*.

Intervenor-Defendant RiverPartners asserts that the Tribe wastes its words because dam breaching could not be an RPA action, and "[b]ecause dam removal is not

[8] Though not the sole: NWF Plaintiffs have made similar points throughout the case and in this iteration have adopted the Tribe's arguments by reference. NWF Opening Br. at 11 n. 7.

an RPA, planning for dam removal as an RPA is an exercise in futility." RiverPartners's Br. at 29-30. The Tribe responds simply to point out that careful, meaningful contingency planning for lower Snake River dam breaching has been a legitimate issue with a consistent place in the statements and considerations of this Court, multiple party experts and the Federal Defendants themselves in the past, and, if perhaps through lip service, even now.

NOAA's 2000 BiOp concluded that "breaching the four lower Snake River dams would provide more certainty of long-term survival and recovery than would other measures." 2000 BiOp at 9-5 (finding that removing the four lower Snake River dams would, under all assumptions, provide significantly higher proportional changes in juvenile survival as compared to the action and the RPA. Id., Appendix A, Table A-9). The 2000 BiOp included an RPA that, when triggered, would require the Corps to "reevaluate more intensive hydropower-related actions (including breaching) for the four lower Snake River dams" and produce a report to be used to seek "authorization and/or appropriations to implement" recommended actions including dam breaching if needed. Id., RPA Action #147, at 9-130. An RPA covering detailed engineering and design work was included. Id., RPA Action #148. NOAA stated that "the RPA requires that the Action Agencies prepare for the possibility that breaching or other hydropower actions could become necessary. These actions will reduce the time needed for possible implementation." Id., RPA Action #148, at 9-130 to 9-131.

In remanding the 2000 BiOp, this Court emphasized that "the consequences of insufficient implementation include hydropower mitigation actions, up to and including [obtaining authority for] the breaching of Snake River dams." Supplemental Order, Dkt.

444 (July 3, 2003) at 2-3. In remanding the 2004 BiOp, this Court again emphasized that, "Indeed, in the 2000 BiOp, NOAA expressly recognized that, if all else failed, the Action Agencies would need to give serious consideration to breaching the dams on the lower Snake River." Opinion and Order of Remand, Dkt. 1087 (October 7, 2005). The Court's May 18, 2009, letter similarly encouraged the agencies to develop a serious contingency plan, "(i.e., independent scientific evaluation, permitting, funding, and congressional approval)." Dkt. 1699 at 3.

The Tribe has repeatedly pointed out that the Federal Defendants could commit to seek any authority they believe they lack, to be exercised under biologically justified circumstances, at an *early stage* in a meaningful contingency plan, rather than leaving that precise issue to become a final political "football."

One of the clearest statements on the question of a dam breaching plan came from the Oregon Chapter of the American Fisheries Society in response to the 2009 FCRPS Adaptive Management Implementation Plan (AMIP):

> Rather than treating dam breaching as an action worth at least equal consideration to other salmonid management alternatives, the AMIP relegates even the study of it to merely a potential action [citations omitted] occurring on a delayed schedule relative to other actions, none of which differ fundamentally from past failed actions. It is the opinion of the ORAFS that a science-driven, comprehensive study of dam breaching, including resource and economic effects, with independent scientific review, be included as a primary and immediate step such that breaching actions could be implemented much sooner than currently contemplated.
>
> Dkt. 1726-2 (NPT Excerpts of Record E).

The Tribe has captured previously the recent federal zig-zags on this issue: for example, the silence of the 2008 BiOp followed by the buried-alive "contingency of last resort" of the 2009 AMIP:

> In the Tribe's opening brief, it criticized the 2008 BiOp's treatment of the biological question of lower Snake River dam breaching as "disingenuous, unreasoned and littered with improper considerations that have the feel of a preemptive strike on any future consideration under a court-ordered, proper jeopardy analysis." Opening Br. at 35. With their September 15 submission to this Court, Federal Defendants constructed a "contingency of last resort" that allowed them, as a public relations matter, to tell the world that they had "heard" this Court on that issue. But when one examines the actual labyrinth of the lower Snake dam breaching contingency, in reality nothing has changed. Federal Defendants have created a contingency that can never be evaluated on a purely biological basis, that will remain politically paralyzed, and that will never be deployable in time to be of value to any species. It is frankly as cynical a response as the 2008 BiOp's failure to even consider dam breaching.

Tribe's AMIP Resp. Br., Dkt. 1724, at 28.

And the Tribe in final response to the claim that this critical planning issue is "futile," noted that there are the legal requirements of NEPA, discussed in the Tribe's prior brief, and discussed briefly below.

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

The NEPA claims of NWF Plaintiffs and Oregon in this case are correct and unavoidable. Under the reasoning and conclusions of the Ninth Circuit's Jewell decision, the Army Corps and Reclamation must complete environmental impact statements for their respective decisions to adopt the 2014 FCRPS Supplemental BiOp RPA. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 646-55 (9th Cir. 2014). The Tribe's particular perspective on this requirement relates to its discussion above, and in prior amicus submissions to this Court, with respect to the potential requirement of an Army Corps of Engineers' EIS alternative that would include meaningful consideration of Lower Snake River dam breaching.

NEPA regulations plainly require the inclusion of action alternatives in an EIS irrespective of an agency's jurisdiction or opinion of its jurisdiction. 40 C.F.R. §

1502.14(c) (an EIS "shall" "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency."). Early in NEPA history, the question whether this regulation means what it appears to say became a "frequently asked question," answered by the President's Council on Environmental Quality (CEQ) via Federal Register publication in 1981.

> 2b. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?
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> A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). *Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies.* Section 1500.1(a).

Council on Environmental Quality, Executive Office of the President, Memorandum to Agencies, Forty Most Asked Questions [concerning NEPA regulations], 46 Fed. Reg. 18026 (March 23, 1981), as amended (emphasis added).

This regulatory approach, essentially putting environmental policy and benefits first, and necessary/technical authorization or approval second, is precisely the philosophy the Tribe believes is required for meaningful consideration of alternatives to address the impacts of the FCRPS. Whether such a process would in fact result in the development of a dam breaching alternative, and if so whether that alternative would become the preferred alternative, the Tribe frankly views NEPA compliance in this case as means of setting aside the no-authority "crutch" the Tribe has repeatedly seen the action agencies take up over the years when faced with serious consideration of the environmental benefits of lower Snake River dam breaching.

And also frankly, the timing is right for a transparent consideration of the matter as a distinct action alternative. Opponents claim that dam breaching would be in fact

counterproductive because of climate change/carbon concerns; supporters believe that argument is a red herring and an inversion of reality, given the present day transitions and new energy inputs to the Northwest power grid, as well as obvious climate change concerns with increasing mainstem river water temperatures.

The Nez Perce Tribe, for a long time, has been a leading advocate for breaching the four lower Snake River dams as the best biological alternative for rebuilding the Snake River salmon and steelhead runs, and for investing in affected local communities as an integral part of that approach. The Tribe believes the present time is ideal for a truly comprehensive understanding and evaluation of the consequences and opportunities that would coincide with lower Snake River dam breaching. The Tribe urges this Court to rule in favor of the NWF Plaintiffs and the State of Oregon on their NEPA compliance claim.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5-2, and F.R. Civ. P. 5(d), I certify that on April 6, 2015, the foregoing document will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all parties enrolled to receive such notice.

The following will be manually served by first class U. S. Mail:

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