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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*,

Defendants.

HON. MICHAEL H. SIMON

Case No. CV 01-00640-RE

THREE STATES' REPLY TO RESPONSES TO CROSS-MOTION FOR SUMMARY JUDGMENT

Oral Argument Scheduled June 23, 2015

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INTRODUCTION

Plaintiffs National Wildlife Federation *et al.* ("NWF") and Intervenor-Plaintiff Oregon bring nothing new to the table in their responses to Federal Defendants' and their allied parties' motions for summary judgment. This comes as no surprise because most issues here have been subject to three sets of summary judgment motions. Indeed, there are two threads that bind those issues together and control the outcome.

The first common thread is the deference due Defendant National Marine Fisheries Service ("NOAA") in making the jeopardy determination required under Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). The required deference derives as a matter of law from the judicial review standard imposed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, but it derives as a matter of practical fact from NOAA's technical expertise. The second common thread is NWF's and Oregon's persistent failure to recognize the scope of the duty imposed under Section 7(a)(2). They ask this Court to hold that the agency action—operation of the Federal Columbia River Power System ("FCRPS")—must be accompanied by a reasonable and prudent alternative ("RPA") that materially *increases* the likelihood of the listed species' survival and recovery and *improves* critical habitat status. The RPA actually does satisfy their proposed standard, but Section 7(a)(2) requires only that the action not appreciably *lessen* the likelihood of survival and recovery or *adversely* modify critical habitat.

Proper application of the governing deference and Section 7(a)(2) standards transforms this case from an almost impenetrable web of extra-record-based science argument into a relatively straightforward APA-controlled judicial review proceeding. The several biological opinions set out NOAA's analysis as to the current status of the listed species, metrics for

determining whether the RPA will avoid further deterioration in that status, the RPA itself, and how the RPA will benefit the species. Neither the ESA nor APA § 706 demands more. Federal Defendants' and their allied parties' summary judgment motions should be granted.

ARGUMENT

I. NOAA'S JEOPARDY STANDARD COMPLIES WITH SECTION 7(a)(2), AND DEFERENCE IS DUE TO ITS APPLICATION OF THAT STANDARD

NWF and Oregon largely reprise their earlier criticisms of NOAA's trending-toward-recovery standard. NWF argues that the standard fails because "[a]n RPA must walk the species back from *beyond* the jeopardy precipice—actually *improve* its chances of survival and recovery, not just by some detectable amount but by *enough* so that FCRPS operations will no longer 'reduce appreciably the likelihood of both the survival and recovery.'" Dkt. 2016 at 8. NOAA, in NWF's view, does not carry that burden as to the recovery prong of Section 7(a)(2) because the standard applied by the agency requires "only some detectable positive growth" and lacks the "end points embedded in [50 C.F.R. § 402.02]: some approximation of what would constitute recovery and when NOAA expects the species [to] achieve this." Dkt. 2016 at 5. NWF faults NOAA's analysis as to the survival prong because the agency "does not rationally account for the very large uncertainty in its quantitative predictions about the effects of the RPA." *Id.* at 8; *see also id.* at 10 (NOAA "irrationally focused on attempting to re-purpose the wide confidence intervals for the population performance metrics from the 2008 BiOp (that it failed to address rationally in 2008) into a basis for staying the course in 2014 even though, by its own account, this is jeopardy")).

Oregon believes the 2014 BiOp shows that the reasonable and prudent alternative adopted in the 2008 BiOp and strengthened in the 2010 BiOp has not improved the listed species' status and points to data that show many populations do not equal minimum abundance

thresholds identified by the Interior Columbia River Technical Recovery Team. Dkt. 2020 at 12, 13. It further devotes almost ten pages to reiterating its position that NOAA improperly failed to consider smolts-to-returners ("SAR") ratios in making its jeopardy determination. *Id.* at 16-21.

None of these arguments, again, is new. Nor do they become more persuasive through repetition. The Three States address them in order.

A. NOAA's Section 7(a)(2) Recovery Prong Analysis

NWF's insistence that Section 7(a)(2) requires NOAA to quantify both a recovery goal and the period of time within which to achieve that goal has at least one virtue: It does not ask this Court to second-guess the agency's technical determinations but, instead, presents a pure question of law. The Court of Appeals' decision in *NWF III*—which NWF mostly ignores—answers that question. *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917 (9th Cir. 2008).

NWF III sets out a straightforward Section 7(a)(2) analytical path. *First*, NOAA must "consider the proposed FCRPS operations in their actual context" as opposed to a hypothesized reference operation. 524 F.3d at 930. Although that context includes "all independent and baseline harms," the jeopardy analysis focus remains on the agency action—*i.e.*, "whether the action effects, when added to the underlying baseline conditions, would tip the species into jeopardy." *Id.* at 929. *Second*, where a species has *already* been placed in jeopardy, the question becomes whether the agency action carries with it "some *new* risk of harm." *Id.* at 930 (emphasis added). "Agency action," in other words, "can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition" through "tak[ing] action that deepens the jeopardy by causing additional harm." *Id.* *Third*, the agency action here is the "operation" of the FCRPS hydroelectric facilities, with the effect of the dams' existence part of the environmental baseline. *Id.* at 931. The RPA can only violate Section

7(a)(2) if it results in "additional" harm. By parity of logic, that harm does not exist when the RPA actually makes the FCRPS's operations *less* detrimental to the species than it would be absent the RPA's implementation.

NWF III further teaches that this analytical paradigm applies equally to both the survival and the recovery prongs of Section 7(a)(2). Extending *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059 (9th Cir. 2004), from its adverse modification context, the Court rejected the contention that 50 C.F.R. § 402.02 should be construed as authorizing an agency action if either prong was found satisfied (524 F.3d at 931) and pointed for support to the preamble and comments attendant to § 402.02's promulgation in 1986:

> The comments noted that there was some controversy over the reference to "both the survival and recovery," but explained that the standard referred to a "*joint* survival and recovery concept." . . . The 1986 revisions added the word "both" "to emphasize that, *except in exceptional circumstances*, injury to recovery alone would not warrant [a jeopardy finding]." . . . Thus, "in exceptional circumstances," injury to recovery prospects alone could result in a jeopardy finding. The comments expressly acknowledged that "significant impairment of recovery efforts or other adverse effects [besides survival impacts] which rise to the level of 'jeopardizing' the 'continued existence' of a listed species can also be the basis for issuing a 'jeopardy' opinion." . . . In order to recognize such effects, and to apply the proper "joint survival and recovery concept," NMFS must analyze effects on recovery as well as effects on survival.

524 F.3d at 932 (citations omitted; emphasis added by Court) (quoting 51 Fed. Reg. 19,926, 19,934 (June 3, 1986)). The *NWF III* Court added that it "recognize[d] that 'these concepts [survival and recovery] are generally considered together in analyzing effects, and it is difficult to draw clear-cut distinctions'" but counseled that "the agency may not resolve this difficulty by ignoring recovery needs and focusing entirely on survival." *Id.* at 932 n.11. Simply put, while the action's impact on recovery must be considered in making the Section 7(a)(2) jeopardy assessment, that assessment is tied closely to the survival analysis. That is why the jeopardy findings will differ for the two prongs only in "exceptional circumstances."

Against this backdrop, NWF's contention that NOAA *must* specify a "recovery abundance" and "time to recovery" to pass muster under Section 7(a)(2)'s jeopardy assessment requirements amounts to adversarial *ipse dixit*. The statute merely asks whether the proposed action will "likely jeopardize the continued existence of" the involved species, and the regulation (50 C.F.R. § 402.02) construes that phrase to mean "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Nothing in the statute, the regulation or *NWF III* prescribes a particular analytical regime to make the jeopardy determination.

Choice of that regime instead is left to the expertise of NOAA. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) ("we afford the agency discretion to choose among scientific models; we reject an agency's choice of a scientific model only when the model bears no rational relationship to the characteristics of the data to which it is applied") (internal quotation marks omitted); *Gifford Pinchot Task Force*, 376 F.3d at 1066 ("[a]n agency's scientific methodology is owed substantial deference"); *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1163 (E.D. Cal. 2010) ("Although the analysis in the BiOp may have benefited from the application of quantitative VSP methodologies, it is disputed whether the failure to do so represents a breach of accepted scientific practice. A court must defer to the agency in such scientific disputes."). This is especially true where, as is the situation here, an agency is "at the frontiers of science"—*i.e.*, where multiple data, scientific and technical challenges exist. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983); *see Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) ("[a] number of our sister circuits agree that we are to conduct a 'particularly deferential review' of an 'agency's

predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable'").

NOAA chose to conduct an interrelated survival and recovery jeopardy analysis that it encapsulated under the trending-toward-recovery rubric. *See* Dkt. 1998 at 19-20. In applying that standard, the agency examined three quantitative metrics for the six Interior Columbia River species—returns per spawner rates, median population growth rates ("lambda"), and the West Coast biological review team population trend methodology for both survival and recovery purposes. 2008 BiOp at 7-22 – 7-26. It added a "survival gap" metric to its survival prong analysis to assess the possibility of extinction over the next 24 years. *Id.* at 7-14 – 7-20. NOAA selected the "24-year time horizon . . . because the main purpose of the metric is to inform our judgment regarding the ability of the species to survive while actions to promote recovery are implemented under the Prospective Actions and through other processes." *Id.* at 7-18. Together, these quantitative analyses constitute the biological opinions' population-level jeopardy indicator metrics. 2014 BiOp at 47. NOAA augmented these quantitative metrics with an assessment of certain qualitative considerations for all 13 evolutionarily significant units ("ESUs") and dependent population segments ("DPSs") subject to the jeopardy analysis. 2008 BiOp at 7-32 – 7-34 (climate change consideration applicable to both survival and recovery); 7-34 – 7-35 (survival considerations); 7-35 – 7-37 (recovery considerations). As with quantitative metrics, the qualitative considerations overlap in part. No dispute exists, therefore, that NOAA discretely examined both survival and recovery through a complex combination of quantitative and qualitative analyses.[1]

[1] Oregon's related assertion that "NOAA must know the in-river survival levels necessary to support recovery before it can insure that operation of the FCRPS, with any improvements made by the RPA, does not jeopardize protected species or appreciably diminish the value of critical

None of this departs from either Section 7(a) or the consultation regulations. To requote from *NWF III*, Section 7(a)(2) directs use of a "'joint survival and recovery concept'" and thereby makes it "difficult to draw clear-cut distinctions" between the two jeopardy prongs. 524 F.3d at 932 & n.11. NWF, however, seeks to substitute *as a matter of law* its preferred methodological approach to assessing the recovery prong. In so doing, NWF obscures the fact that this choice is committed by Congress to NOAA; it is a quintessential illustration of NOAA's applying its unique expertise to develop a highly complex scientific and technical methodology to resolve an equally complex Section 7(a)(2) inquiry.

B. Confidence Intervals And Uncertainty

NWF attacks NOAA's quantitative analysis because of what it characterizes as "wide confidence intervals for the population performance metrics from the 2008 BiOp." Dkt. 2016 at 10. These intervals, according to NWF, have been "re-purpose[d]" to serve the objective of "staying [a] course" that, "by [NOAA's] own account, . . . is jeopardy." *Id.* This contention misapprehends the significance of the updated point estimates and, like other NWF arguments, reflects nothing more than disagreement with NOAA's overall statistical methodology.

The 2014 BiOp incorporated four to nine years of new data, together with some corrections based on new research, into the 2008 BiOp's Base Period estimates to produce extended Base Period estimates. 2014 BiOp at 73. The data varied as to the calendar years covered depending upon whether they were for adult return years or completed brood cycle

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habitat" (Dkt. 2020 at 20 n.13) is comparably flawed. NOAA carefully considered survival and recovery metrics for each "H" including hydro in the 2008 and later BiOps. The unique life cycle of Chinook salmon and steelhead imposes significant scientific and technical challenges to analysts, and NOAA adopted a suite of measures to assess jeopardy that, in its professional judgment, was best suited to the task. Hydro sector survival is encompassed within that suite even if not in the particular way Oregon prefers. *See, e.g.*, 2008 BiOp at 8.3-52 (Table 8.3.3-1) (base-to-current adjustment (survival multiplier) for Snake River spring/summer Chinook salmon).

years. *Id.* at 77 (Table 2.1-3), and 78 (Table 2.1-4). As to the former, the last year ranged from 2010 to 2012; as to the latter, the last year ranged from 2005 to 2007. *Id.* The estimates "nearly all" fell within the Base Period's statistical confidence interval for the three metrics. *Id.* at 109. As indicated by the term "extended Base Period," the update's purpose was not to assess the impact of the RPA contained in the 2008 and 2010 BiOps. The objective instead was to determine after consideration of the new data (1) "whether the recovery goals or the qualitative risk categories indicative of recovery have changed since the 2008 BiOp" and (2) whether "the starting point for the qualitative analyses conducted for six interior Columbia Basin species in the 2008 BiOp . . . has changed in a manner that would affect other parts of the 2008 BiOp's jeopardy analysis." *Id.* at 46; *see id.* at 73-119. NOAA also discussed 2013 dam counts and SARs—information outside the four population-level jeopardy indicator metrics. *Id.* at 46; *see id.* at 120-27. NOAA concluded that the extended Base Period did not contain statistically significant different indicator metrics from those in the Base Period. *Id.* at 109. It concluded further, however, that the statistical point estimates did change, with abundance and BRT abundance trend estimates generally higher, extinction risks estimates generally lower, and productivity (*i.e.*, lambda and R/S) generally lower. *Id.* The agency found this "pattern of decreasing productivity with increasing abundance over a range of environmental conditions" consistent with the presence of density dependence. *Id.* at 115; *id.*, App. C-10.

Consequently, if by the phrase "staying the course" NWF means that NOAA concluded from the updated indicator metrics that the RPA remains valid under 16 U.S.C. § 1536(b)(3)(A), it is correct.[2] However, to the extent it suggests that the confidence intervals have been "re-

[2] NWF's suggestion that "staying the course" constitutes jeopardy by NOAA's "own account" is difficult to understand given the purpose of the extended Base Period calculations. That purpose, as explained above, had nothing to do with measuring the RPA's effectiveness to date; it was to

purpose[d]" to cloak a less favorable Base Period (and hence the need for a modified RPA), NWF is wrong. NOAA explained why estimates used in the several biological opinions have "fairly wide statistical confidence intervals," including high variability in spawner numbers, "natural variability in freshwater and marine environments that influence salmon survival," and measurement error. 2014 BiOp at 66. The agency additionally explained that "high variability and relatively few observations make it difficult to statistically 'prove' whether a new indicator metric represents a change from the previous estimate or not" and that, given these statistical limitations, it "rel[ies] on a combination of all of the information" discussed in Section 2. *Id.* at 67. NOAA plainly did not "re-purpose" the confidence intervals. It used them no differently now than in calculating the Base Period *and* considered other information in making the ultimate determination as to whether the extended Base Period estimates reflected a substantial change in the baseline to which the RPA responds.

NWF's "re-purpos[ing]" contention is simply another attack on NOAA's choice of an appropriate methodology to determine the pre-2008 BiOp status of the listed species and whether the original estimate of that status should be modified in light of newly available data. NWF may think that it has a better statistical mousetrap or, at the least, that NOAA should have dealt with the difficulty of estimating abundance and productivity in some other manner. Nevertheless, the governing judicial review standard under APA § 706, leaves no room for judicial override of the agency's exercise of its best judgment as to dealing with the dauntingly complex task of determining Columbia Basin salmon and steelhead status. As the Supreme

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assess whether the RPA required modification because of a materially different set of Base Period calculations. Put otherwise, the fact that NOAA found no significant change in the Base Period indicator metrics does not mean that it found no change in the various populations' status through the RPA's implementation by reference to the *indicator metrics*. It did not, and could not, address the issue. *See* 2014 BiOp at 68-69.

Court observed with respect to a challenge to an environmental impact statement, "[t]he question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989). Here, as there, the answer is straightforward: "Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" *Id.* at 377.

C. Lack Of Reported Improvement

Oregon argues that the new data should have shown an increase in the extended Base Period metrics given the assumption of improved survival productivity and extinction risk reflected in the 2008 BiOp's base-to-current and current-to-future adjustments. Dkt. 2020 at 11; *see* 2008 BiOp at 7-11 – 7-12 (explaining adjustments). NOAA responded directly to this issue. 2014 BiOp at 68-69. As the agency stated, "detection of Base-to-Current changes in the indicator metrics is very uncertain at this time" because (1) the effect of particular improvements "may take years to be fully achieved[;]" (2) a lag up to three or four years exists with respect to measuring life-stage changes for brood year—the last of which ranges from 2005 to 2007 in the new data; (3) insufficient data in the form of new observations were available to materially affect calculation of the indicator metrics in view of the large number of Base Period observations; and (4) other naturally occurring "background variations"—*e.g.*, ocean conditions—"may mask or artificially enhance the effects of the current and prospective management actions." *Id.* at 68; *see also id.* at 53 (discussing differing points at which RPA actions' impacts affect indicator metrics); *id.* at 113 (Table 2.1-17) (qualitative summary of factors affecting 1994-2012 brood year survival).

Oregon thus criticizes the 2014 BiOp for not reporting statistical conclusions without

even acknowledging, much less addressing substantively, NOAA's explanation why those conclusions could not be drawn. The agency's determination was indisputably driven by absence of any available, reliable scientific and commercial data—a determination committed to its discretion by 16 U.S.C. § 1536(a)(2). *See, e.g.*, *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 1992) (§ 1536(a)(2) "means that agencies must support their conclusions with accurate and reliable data").[3]

Where reliable data existed that allowed base-to-current or current-to-future estimates to be made, NOAA used it. An example is the juvenile inriver estimates for the Lower Granite to Bonneville and the McNary to Bonneville dam reaches for several ESUs and DPSs. 2014 BiOp at 360-66. The estimates showed that "for subyearling SR fall Chinook salmon and yearling spring/summer Chinook salmon, sockeye salmon, steelhead, and UCR spring Chinook salmon

[3] Oregon devotes three pages to arguing that many FCRPS-affected populations have low numbers and are at risk of extinction. Dkt. 2020 at 12-15. It observes that "[t]he productivity metrics do not show any statistical change and the majority of the ESA-listed salmonids . . . remain at very low population numbers." *Id.* at 13. This argument, like the contention concerning the absence in improvement in the extended Base Period indicator metrics, says nothing relevant about the RPA's adequacy. To repeat, NOAA's principal purpose in updating the Base Period data lay not in measuring the efficacy of the RPA but in determining whether the baseline to which the RPA responded was altered to a statistically significant degree by the new data, not whether the RPA was having its intended effect. The agency did report the ten-year mean spawner abundance estimates, although not an indicator metric, using the new data "because average abundance is important to track as an element of species status because it indicates current status relative to recovery abundance goals and because we can determine if a population is getting closer to the recovery goals over time." 2014 BiOp at 55. The 2014 BiOp measured ten-year means for the period ending in the last year for which data were available (which ranged from 2008 to 2012), in contrast to the 2008 BiOp which measured ten-year means for periods ending in years ranging from 2003 to 2009. *Id.* at 80 (Table 2.1-5), 82 (Table 2.1-6). The updated species counts included all spawners, with the percentage of hatchery-origin fish indicated. These data led NOAA to conclude that the "[u]pdated geometric mean abundance point estimates are higher than those presented in the 2008 BiOp are for all Chinook populations and for 17 out of 20 steelhead populations." *Id.* at 79. In short, even though NOAA could not recalculate the productivity-related indicator metrics, the agency cannot be accused of not considering the new data where it provided insight into whether progress toward recovery was being made.

and steelhead all appear to be meeting or, in the case of fall Chinook salmon, sockeye, and steelhead, substantially exceeding both Current and Prospective 2008 BiOp expectations for migrating smolts." *Id.* at 362. Oregon not only ignored these data in its arguments but also actually pointed to expected hydro improvements for Snake River spring/summer Chinook population as illustrating NOAA's failure to "estimate[] whether either the base to current or current to prospective multipliers have ever been recognized." Dkt. 2020 at 11; *see also id.* at 32 ("the Agencies relied upon substantial survival improvements from Hydro (25% for Snake River spring/summer Chinook), but they have never attempted to determine whether they achieved that amount"). Oregon's criticisms are thus strikingly at odds with NOAA's detailed dam reach survival analysis.

D. Failure To Use SARs As Indicator Metric

Oregon iterates its position that NOAA acted unreasonably in not including smolts-per-adult return ("SAR") ratios as an indicator metric. Dkt. 2020 at 15-25. Responding to the Three States' argument in the memorandum supporting their summary judgment motion (Dkt. 1998 at 27-28), it contends that the 2014 BiOp's "*isolated* references to SARs . . . do not show that NOAA considered the important factor of SAR survival to evaluate whether the effects of the operation of the FCRPS will appreciably impact survival or recovery to satisfy the ESA Section 7 analysis." Dkt. 2020 at 21 (emphasis added). Oregon, however, cannot dismiss so casually NOAA's recognition of that State's strongly held position and the discussion of why the agency elected not to use SARs as an indicator metric. 2014 BiOp at 124-25.

Sensitive to Oregon's recommendation, NOAA reproduced charts from a 2013 study that estimated SARs for years between the mid-1960 and 2010. It observed that the estimates in general tracked closely "the pattern of survival and oceans conditions" described qualitatively

earlier in the 2014 BiOp. *Id.* at 127 (referencing Table 2.1-17 on p. 113). The agency later considered SARs at myriad points of its analysis, and particularly with regard to hydro sector effects.[4] Two inescapable conclusions flow from a review of the 2014 BiOp: NOAA carefully considered and responded to Oregon's recommendation that SARs be used as an indicator metric; and NOAA, while declining to adopt the State's recommendation, used SAR data as part

[4] *See* 2014 BiOp at 133 ("SARs for SR spring/summer Chinook and SR steelhead exhibit a similar pattern to the survival and ocean entry conditions inferred from other observations"); *id.* at 187 ("[o]bserved Lower Granite Dam SARs for SR spring/summer Chinook and SR steelhead are also within the range estimated in the 2008 BiOp, further supporting the Base-to-Current estimates"); *id.* at 347 (SARs "not expected to differ substantially for any ESU compared with those observed since 2008" under the spill regime in RPA Action 29); *id.* at 371 (Table 3.3-5) (reproducing table from 2013 study that reported the estimated ratio of SARs for transported fish to SARs for inriver fish for 2006 to 2013); *id.* at 375 (concluding that modifications to RPA Action 30, which altered the amount of fish transportation, "should slightly increase SARs for SR steelhead smolts and slightly decrease SARs for transported SR spring-summer Chinook salmon"); *id.* at 376 ("NOAA Fisheries continues to provide updates of juvenile survival estimates, transport rates, and seasonal patterns of SARs for both transported and inriver migrating smolts to the Action Agencies and RIO members as part of the decision-making process for developing the annual Fish Operations"); *id.* at 377 (reporting that "the post-hydrosystem survival (SAR rate) of barged fish is often lower than that of inriver migrants, and is sometimes low enough to offset the survival benefit of barging through the hydrosystem[,]" and stating that delayed mortality is a "useful metric" to assess the effectiveness of the transportation program); *id.* at 379 (Table 3.3-8) (SARs for wild spring Chinook and steelhead for 2006 to 2010); *id.* at 380 ("[T]he available SAR estimates do not indicate that substantial impacts have occurred to either SR steelhead or spring/summer Chinook salmon since 2008. The available information does not warrant an adjustment to the multipliers used in the 2008 BiOp."); *id.* at 382 (recommended spill test should consider, *inter alia*, "the effect of further reduced transport rates on SARs [particularly SR steelhead], etc.)" and the "comparison of adult returns, SARs, TIRs, etc., starting with the 2010 outmigration (following installation of surface passage routes and other major structural improvements to the mainstem FCRPS dams), with past performance under previous configurations"); *id.* at 429 (using SAR as multiplier to calculate total effects of mortality on ESUs/DPSs from research and monitoring between 2014 and 2018); *id.* at 452 ("[T]he available SAR estimates do not indicate that survival has declined substantially for either SR steelhead or spring/summer Chinook salmon since 2008. Therefore, at this time, the available information does not indicate that the survival estimates in the 2008 BiOp are not being met.").

of the BiOp's analysis of issues such as the impact of seasonal spill and transportation. Characterizing the agency's analysis as failing to "consider" SARs simply cannot be squared with the 2014 BiOp's text.

NOAA's use of particular methodologies within a biological opinion is, to return to the core defect in both NWF's and Oregon's challenges, a matter committed to its expert judgment. *See, e.g.*, *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) ("[w]e defer to agency expertise on methodology issues, 'unless the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision'"). Whatever else Oregon may say about the treatment of its recommendation or SARs more generally in the 2014 BiOp, it cannot reasonably contend that NOAA "completely" failed either to address that recommendation or to use SARs in its analysis when deemed appropriate.[5]

II. THE BIOLOGICAL OPINION MEETS OR EXCEEDS THE ESA'S REQUIREMENT TO AVOID DESTRUCTION OR ADVERSE MODIFICATION OF CRITICAL HABITAT

The ESA itself serves as a useful frame of reference for determining whether the 2008 BiOp, as supplemented by the 2010 and 2014 BiOps, meets the requirements of the Act's provisions in respect to critical habitat—a risk that itself risks getting lost in the fog of argument. Section 7(a)(2) simply requires that the federal action not "destroy or adversely modify" a species' designated critical habitat. However, NWF and Oregon have consistently argued that they must not only meet that relatively straightforward mandate to avoid destruction or adverse modification, it must *improve* the value of critical habitat. In its opening brief, NWF argued that

[5] Oregon discusses at length the use of SARs to examine productivity in "pristine" tributary habitat, "degraded" tributary habitat and the impact of dams. Dkt. 2020 at 21-25. If the object of this discussion were to make the point that SARs may be a useful measure, no dispute would exist. NOAA so states. 2014 BiOp at 124. But that is not the issue. The question is whether the APA requires the agency to walk in lockstep with Oregon on exactly how SARs are utilized in the FCRPS biological opinions. The answer to that question is "no."

the federal action was insufficient under the ESA if it "only maintained" the function of critical habitat. *E.g.*, Dkt. 1976 at 58.

Faced with the weight of authority cited by NOAA and aligned parties, NWF has narrowed its claims – to seeking improvements in the value of critical habitat through the RPA only in cases where critical habitat "is presently *not* capable of meeting a species' conservation needs." Dkt. 2016 at 36. Oregon, on the other hand, remains steadfast in seeking broader benefits from the RPA. *See* Dkt. 2020 at 29 (the RPA must "*contribute to* the conservation and eventual de-listing of the species") (emphasis added). Both wrongly equate the no-jeopardy standard of a Section 7(a)(2) consultation with the process of recovery planning. By making the focus of the argument on the nature and certainty of *improvements* to critical habitat (and other areas), NWF and Oregon set up, then disparage, a standard the ESA does not recognize in the context of avoiding jeopardy.

A. The Controlling Adverse Modification Standard

In response to the Three States' and other parties' summary judgment motions, NWF concedes that an action may have some adverse impacts on critical habitat (but only where critical habitat would remain functional). Dkt. 2016 at 36-37. Of course, NOAA and the Action Agencies have never argued that the federal action may permissibly do worse than appreciably diminish critical habitat, so NWF concedes a standard no one is asking the Court to endorse. Nevertheless, because NWF is now more sharply focused on seeking improvements to critical habitat "only where it is presently not capable of meeting a species' conservation needs," the Court at least need not concern itself with NOAA's approach to the adverse modification standard where the Primary Constituent Elements ("PCEs") are either functioning adequately or

where the RPA will improve the PCEs' function, as is the case with many PCEs.[6] *See* Dkt. 1998 at 30-31 (partial list in Three States' opening brief). However, NWF wrongly creates a different, higher standard for areas or PCEs that are not presently functioning adequately. In that regard its argument is no different than Oregon's.

By ensuring that the agency action does not appreciably diminish the value of critical habitat, regardless of how well it is functioning, NOAA has imposed a consistent standard equally applicable to all critical habitat, and which by definition meets the ESA's prohibition against adverse modification. In the context of the facts of each case, courts have critiqued whether biological opinions are vigorous enough to avoid adverse modification of critical habitat, but they do not (as NWF suggests) create a double *legal* standard dependent on an assessment of the functional value of critical habitat. NWF cites nothing significantly new by way of legal authority in its reply, and again relies primarily on *Nez Perce Tribe v. NOAA Fisheries*, No. 3:07-cv-00247-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008). That case, which was distinguished by Three States (Dkt. 1998 at 29-30), involved invalidating a biological opinion for failure to analyze each PCE on a range-wide basis, where extinction was a foregone conclusion without improvement in habitat conditions. NWF has failed to identify specifically how that applies to the facts of this case, except to inaccurately categorize both the irrigation project at issue in *Nez Perce* and the FCRPS RPA as containing "some improvements." Dkt. 1998 at 37. Moreover, in overturning the biological opinion in the *Nez Perce* case, the Idaho district court did *not* categorically mandate that avoiding adverse modification to critical

[6] In actuality, NWF makes no attempt to distinguish the PCEs that will experience improvement under the RPA from more marginal PCEs for which the possibility of improvement is preserved in the RPA, and relegates the entire FCRPS to a latter category. Dkt. 2016 at 36 ("where critical habitat is presently *not* capable of meeting a species' conservation needs (as is the case here)") (emphasis original).

habitat means that critical habitat must be improved, which is the outcome sought by NWF here. Instead, the *Nez Perce* court employed a straightforward rationale of the role of recovery in the critical habitat context:

> Recovery and survival are distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both: "Congress said that 'destruction or adverse modification' [of designated critical habitat] could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival."

2008 WL 938430, at *2. Thus, unless NWF can show—heretofore it has not—that the RPA *diminishes* critical habitat so as to threaten recovery, even *Nez Perce* does not support its position. In fact there is no meaningful distinction between a line drawn at "failure to preserve" critical habitat (the *Nez Perce* phrase) and "retain[ing] at least its current ability" to serve its conservation and recovery functions. 2008 BiOp at 8.2 *et seq*. This especially makes sense against the background of the broader concept of jeopardy expressed in the *Nez Perce* case:

> Agency action can only "jeopardize" a species' existence "if that agency action causes some deterioration in the species' pre-action condition." . . . An agency may still take action that removes a species from jeopardy entirely, or that lessens the degree of jeopardy. . . . "However, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm."

2008 WL 938430, at *2 (citations omitted). That standard, of course, is taken directly from *NWF III* and, as discussed above, precludes agency action to degrade (*i.e.*, *adversely* modify) critical habitat. Where the action serves to maintain the critical habitat or, as here, to improve that habitat, the prohibited destruction or adverse modification does not exist.

B. NWF's And Oregon's Departure From Controlling Adverse Modification Standard

In furtherance of a heightened adverse modification standard that goes far beyond non-adverse modification, NWF inserts its own twist on how the standard applies. It states: "Will

critical habitat PCEs improve under the RPA to the extent that critical habitat is *no longer being adversely modified* by continued FCRPS operations." Dkt. 2016 at 40 (emphasis in original). "No longer adversely modifying" critical habitat is not the functional equivalent of "avoiding adverse modification" of critical habitat, because the former requires accepting the premise that consultation must occur on something other than the agency action under consideration. Moreover, the cases cited by NWF in support of this approach (including previous FCRPS litigation) do not impose on NOAA the obligation to ensure the RPA makes up for all past alleged impacts on critical habitat. Rather, they criticized the agency for failing to adequately *address* recovery in evaluating the effects of the action. *NWF III*, 524 F.3d at 933-36; *NWF v. NMFS*, Nos. CV 01-640-RE & CV 05-23-RE, 2005 WL 1278878, at *17 (D. Or. May 26, 2005).

The standard that NOAA and the action agencies must meet is strict enough but does not require transforming a biological opinion into a recovery plan. What is required is to confirm that the RPA does not appreciably diminish the value of critical habitat. *Butte Envtl. Council v. USACE*, 620 F.3d 936, 948 (9th Cir. 2010). NOAA did just that. It evaluated the requirements for recovery and the risks that each ESU faces. 2008 BiOp at 7-5; 2014 BiOp at 47-48, 64-66.

Oregon's arguments for a heightened recovery standard applicable to adverse modification determinations is far less nuanced than NWF's—Oregon flatly claims that the BiOp "is devoid" of any analysis that FCRPS operations will not appreciably reduce the value of mainstem critical habitat for "migratory life-stage requirements that are essential to the species' recovery." Dkt. 2020 at 27. Oregon does concede "that the BiOp sets forth and *describes* the PCEs, the impacts of the dams on the migratory life stages and efforts to reduce such impacts." *Id*. Oregon does not identify why this, together with NOAA's conclusions on those points, is not "analysis."

Oregon also argues that NOAA masked the harm to mainstem critical habitat by "viewing adverse modification within the context of the critical habitat as a whole." Dkt. 2020 at 28. Although Oregon may prefer otherwise, evaluating critical habitat as a whole is precisely what the law requires. "Adverse modification determinations are made in the context of the critical habitat as a whole." *Nw. Envtl. Def. Ctr. v. NMFS*, 647 F. Supp. 2d 1221, 1234 (D. Or. 2009). NOAA did in fact evaluate the effect of the RPA on all PCEs, including estuary habitat (2014 BiOp at 340), mainstem habitat (*id*. at 388, 415), and tributary habitat (*id*. at 314). How that can be construed as impermissibly hiding impacts of a localized nature Oregon does not explain. In sum, Oregon's arguments are the same ones rejected in *Butte Environmental Council*, where the Ninth Circuit found "there is no evidence in the record that 'some localized risk was improperly hidden by use of large scale analysis," and the Court would not "second-guess" the consulting agency. 630 F.3d at 948.

III. NOAA RATIONALLY ADDRESSED THE RISKS AND UNCERTAINTIES ASSOCIATED WITH RPA DEVELOPMENT AND IMPLEMENTATION

Both NWF and Oregon claim to be solidly behind an all-H approach to conserving listed salmon and steelhead in the Columbia River Basin. And both seem to embrace the need to implement habitat restoration measures as a real and effective element of that All-H approach—but just not here. Why? Because when it comes to implementing that strategy, they demand a level of certainty no one else in the region has ever been required to demonstrate, or could ever provide based upon existing science and techniques.

In the Three States' view, the 2014 BiOp RPA that provides for the development and implementation of habitat restoration is the best this region has ever developed. If we throw that out as too uncertain and risky, where does that leave us in terms of incentives to fund and implement these critical conservation and recovery programs?

A. The *Kempthorne* Roadmap For Developing And Implementing Adaptive Mitigation Measures

Everyone understands this Court's remand order was focused on making sure that out-year habitat restoration was more certain and not simply a promise to figure it out going forward. *Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1125-28 (D. Or. 2011) ("*NWF IV*"). But as discussed in the Three States' opening brief, most RPAs in the world of fisheries management do not come with scientifically certain outcomes. There are serious difficulties in predicting fish returns based upon the gamut of environmental factors they face. And there is an admittedly limited ability to fully understand how manipulating the environment in which they exist—including dam passage, or spillway weirs, or reservoir flow—will produce survival challenges or benefits several years hence when out-migrating fish return.[7] But we (*i.e.*, NOAA and the Columbia Basin non-federal sovereigns with fish and wildlife management responsibilities) do the best we can with the best available science at our disposal.

In the case of habitat mitigation, there are challenges. As with hydro manipulation, we need identified objectives along with time to plan and implement measures, and then wait for fish to return. We then need to assess outcomes and implement adjustments as needed to achieve the identified objectives. With a ten-year BiOp horizon, we also need to recognize that specific project identification is impossible, and indeed in some respects irresponsible, because what happens tomorrow builds on what is happening today and the specific results and opportunities that emerge over the course of time. Accordingly, to be consistent with reasonable certainty

[7] We seriously question whether NWF or Oregon would be willing, or capable, of subjecting their preferred strategies, including the so called Spill Experiment that Oregon is advocating, to the same level of scientific scrutiny and certainty they demand here. Indeed, Oregon's preferred option of focusing on additional mainstem hydro manipulations is far less developed. *See Review of the Proposed Spill Study*, available at http://www.nwcouncil.org /fw/isab/isab2014-2 (last visited Mar. 2, 2015).

standards, we make sure out-year projects are capable of sufficient definition in relation to objectives (the menu of options) combined with a systematic approach to adaptive management that works to ensure the underlying mitigation objectives are reasonably attainable.

The Three States described the work undertaken in the remand to enhance this approach in response to this Court's concerns. Dkt. 1998 at 13-18. We also described how this approach is fully consistent with the roadmap courts have suggested for adaptively developing and implementing long-term RPA programs where there is uncertainty in science and the ultimate ability to predict outcomes. In *Natural Resource Defense Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007), that court specifically addressed adaptive management programs in relation to uncertain science and the ESA's *reasonable* certainty requirement. The *Kempthorne* framework bridges these two imperatives by accepting that mitigation plans need not answer all questions, or outline every detail of a rolling development and implementation process, provided there is "some form of measureable goals, action measures, and a certain implementation schedule." *Id.* at 355. We explained how that prescription was followed in the remand. Dkt. 1998 at 15-16.

B. The RPA's Consistency With *Kempthorne* Roadmap

The response briefs of NWF and Oregon fail to address the *Kempthorne* roadmap whatsoever. Their briefs also contain no discussion or critique of the 2014 BiOp's systemized approach to achieving performance objectives through the use of science panels to develop, assess and adjust the RPA habitat restoration programs that the Action Agencies and other regional actors have committed to fund and implement going forward. Nor does their recitation of ESA case law undermine either the *Kempthorne* roadmap or the manner in which it has been

used in the 2014 BiOp to develop and implement reasonably certain habitat restoration mitigation measures.

NWF cites to *Pacific Coast Federation of Fishermen's Associations v. USBOR*, 426 F.3d 1082 (9th Cir. 2005), for the proposition that the utility of an RPA can't be implicitly assumed using "sweeping assertions of agency expertise," but must instead be supported by articulated analysis. Dkt. 2016 at 12. The Three States agree. But NWF confuses the quite correct assertion that NOAA is entitled to deference in its exercise of institutional expertise, with the holding in *Pacific Coast* which mandates more than just assurances from the expert. The notion that NOAA and the 2014 BiOp provide nothing more than bare assurances—that it is somehow bereft of meaningful analysis—is unsupportable as described in the opening briefs filed by Federal Defendants and allied parties. Instead, what NWF and Oregon offer is a debate over NOAA's analysis and conclusions. But that form of objection *does* implicate the deference limitation on second-guessing the federal government's scientists as recognized by the en banc Court in *Lands Council v. McNair*. 537 F.3d at 993 ("[w]e are to be 'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science'"); *accord Soda Mountain Wilderness Council v. USBLM*, 945 F. Supp. 2d 1162, 1186 (D. Or. 2013).

Oregon similarly cites to *Pacific Coast* for the legal premise that predicted future benefits of out-year habitat restoration measures cannot be relied upon as they are here. Dkt. 2020 at 7-8. But the differences between *Pacific Coast* and the approach used in the 2014 BiOp for out-year RPA measures are marked. In *Pacific Coast*, the federal government relied, as here, on a phased-in series of mitigation measures to increase water volumes for instream flows to support continued salmon survival. The difference in *Pacific Coast* is that, unlike here, the biological

opinion simply made conclusory statements that the phased-in flow elements "should improve instream flows," or "could be used to . . . improve downstream smolt survival," without discussing how the RPA measures were expected to actually contribute to jeopardy avoidance. 426 F.3d at 1092-93. Here the 2014 BiOp does far more than recite simple conclusions about how habitat measures will be utilized to produce benefits. Rather, as described in prior briefing by Federal Defendants, desired survival units are established and estimated, and then put into action under the enhanced AMIP process developed during the remand. There is no legitimate comparison between the 2014 BiOp and the deficiency identified in *Pacific Coast.*

NWF cites to *Center for Biological Diversity v. USBLM*, 698 F.3d 1101 (9th Cir. 2012), in support of its argument that NOAA improperly relies upon the Action Agencies' commitment to implement habitat restoration RPAs as a proxy for a hard look at whether the RPAs are reasonably certain to occur. Dkt. 2016 at 13. The Three States certainly agree that a hard look is required. But it is false to say that NOAA substituted abstract commitments to habitat restoration, cloaked with meaningless and rote references to "best available science," as a proxy for any hard look. Once again, as described in Federal Defendants' and allied parties' briefs, the analysis was thorough and searching, even if not to NWF and Oregon's satisfaction.

As an initial matter, we should all take some comfort that implementation of habitat restoration is a committed regional endeavor. Anyone seriously interested in conservation and ultimate recovery of Columbia River Basin salmonids knows that these efforts are critical to both the continued survival of salmon and their recovery and ultimate return to un-listed status.[8]

[8] NWF's reply suggests that the Northwest Power Planning and Conservation Council (on which the Three States along with Oregon are sitting members) has somehow departed from participation in efforts to implement habitat restoration programs based upon their uncertainty. Dkt. 2016 at 15. In reality, the Council is a key element in vetting such programs so they can be implemented in connection with the Council's Fish and Wildlife Program. The Council serves an

More to the point, the habitat restoration commitments laid out in the 2014 BiOp's RPAs are not simply abstraction. As developed during the remand, these RPAs are a programmatic mechanism identifying specific projects, with objective survival benefits tethered to targeted population needs as part of the life cycle analysis conducted through NOAA's jeopardy analysis. Dkt. 1998 at 13-18; Dkt. 1999 (Tweit Decl.) at ¶¶ 8-14, 21-35.

NWF cites to *Center for Biological Diversity* in service to its "time machine" argument which is essentially a claim that habitat restoration is a mythical exercise peddled by science fiction writers wholly untethered to reality. Notwithstanding this glib remark, the Three States actually believe NWF does support habitat restoration, as it has previously claimed. In any event, stripped of its hyperbole, NWF's concern comes back to a question of whether NOAA applied its analytical expertise in examining the 2014 BiOp's habitat restoration RPAs and concluded that the RPAs are likely to produce the conservation measures anticipated. But there is no plausible argument that the RPA habitat restoration projects, and the AMIP process, were not fully assessed and explained in the 2014 BiOp. Instead, what exists is deep skepticism by NWF and Oregon for their part, while other regional participants in salmon conservation—the Three States together with all but one tribal sovereigns—have a different view; that habitat restoration is being implemented in a principled and determined manner designed to produce

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important role in making sure that monies appropriated to these programs are wisely spent and designed to produce well-developed proposals. *See* Dkt. 170. An isolated staff memo expressing skepticism about methodologies is no evidence that NOAA's RPAs as a whole are flawed, or that the region should abandon habitat restoration. It is a preliminary work product for the Council's internal consideration and did not then, and does not now, speak on the Council's behalf. Nor is it evidence the Council no longer considers such programs without significant value. Indeed, the evidence is to the contrary as the Council continues to consider, vet and incorporate restoration projects into the Fish and Wildlife Program. *See e.g.*, http://www.nwcouncil.org/fw/program/2014-12/program/ (last visited Apr. 30, 2015).

meaningful conservation benefits alongside other measures the Action Agencies must employ to avoid jeopardizing listed fish.

To be clear, the Three States do not just expect an empty promise that conservation measures will be implemented without regard to effect. If the RPAs fail to live up to expectations, more will likely be needed. NOAA, in consultation with the Action Agencies, will be called upon shortly to make that assessment when preparing the 2018 biological opinion. But some reasonable time must be allowed for implementation where a rational and well-conceived plan is proposed, funded and adopted as part of the Action Agencies' commitment to incorporate the RPA into its FCRPS operations. The same was true for installation and evaluation of the effects of Removable Spillway Weirs. And the same would be true for any exploration of Oregon's proposed Spill Experiment.

In this regard, *Center for Biological Diversity* cuts against Plaintiffs' present lawsuit. The point of that case was that incorporation of a conservation plan into a proposed federal agency action—either as part of the action or an RPA developed in the course of a Section 7 consultation—produces an enforceable duty to ensure the conservation element is implemented. For example, if the measures are not implemented or fail to produce the intended outcomes, re-initiation of consultation should occur. 698 F.3d at 1114 (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987)). Implicit in this prescription is an opportunity to implement a reasoned and well-developed set of conservation measures with room for appropriate corrective action as needed.

We agree that healthy skepticism is useful. Indeed, it is part of the reason that the AMIP and adaptive management are so important. But skepticism becomes a hindrance where it is employed to stop needed habitat restoration, under the guise of a challenge to the merits of the

2014 BiOp, based upon a preference for other forms of conservation measures.

C. The Insignificance of Dueling Science Declarations Under the APA

Ultimately, NWF and Oregon do not provide any sound basis for this Court to conclude that either habitat restoration as a form of conservation measure, or the ground-breaking process for developing and implementing those conservation measures, is an irrational way for the 2014 BiOp to address conservation of listed salmon and steelhead. Instead, their responses to Federal Defendants and their allied parties' collective defense of these conservation measures return to the theme outlined in their opening briefs: They assert that NOAA and the Action Agencies are overly confident and the progress made to date is not enough to verify the RPAs as viable mitigation. But that claim is, at most, an opinion asserted by assembling the views of their own preferred panel of scientists who dispute NOAA's articulated conclusions. This is not proof NOAA failed to carefully consider and explain its views. It is simply proof that NWF's and Oregon's experts have views that differ with NOAA on matters of substantial debate at the "cutting edge" of fish science. Moreover, the views of NWF's and Oregon's science panel are not shared by other fishery scientists outside the federal government. *See, e.g.*, Dkt. 1999 (Tweit Decl.). That is exactly the sort of dispute where deference to agency judgment reaches its zenith.

NWF unsurprisingly cites no law to the contrary. The most that it can do is to complain that NOAA simply declares itself to be implementing the "best available science" and cites to *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash.1988), for the proposition that it is not enough to declare oneself the entitled expert to whom deference is due. Dkt. 2016 at 16. True enough. But the background in which the holding in *Northern Spotted Owl* emerged is starkly different here. In that case, the court found the "[Fish and Wildlife] Service asserts that it is entitled to make its own decisions, yet it provides *no explanation for its findings.*" *Id*. at 482.

Here, by contrast, the voluminous 2014 BiOp contains detailed explanations of NOAA's views. And if any extra-record consideration of the dueling declarations finds sanction under the *Lands Council* exception, the most one can conclude is that there are strongly held differences in scientific views. That is not a sufficient basis to conclude that NOAA's analysis, or the resulting RPAs, are irrational and must be invalidated as arbitrary and capricious agency action. At the end of the day, it is NOAA's expert judgment that must control under APA § 706—a legal fact of life that the Three States have emphasized throughout this reply and in the earlier submissions directed to the 2008, 2010 and 2014 BiOps' validity.

To conclude, the Three States defer to Federal Defendants' briefs, which we adopt by reference, for a detailed description of the manner in which the value of habitat restoration is being gauged and assessed, together with a review of the progress being made on the implementation of habitat restoration. We emphasize here that the dueling science declarations simply demonstrate the complexity and challenges the region faces in identifying and implementing effective conservation measures. They provide no basis upon which to override NOAA's judgment and the several BiOps before this Court.

CONCLUSION

The Three States' cross-motion for summary judgment should be granted, and NWF's and Oregon's motions for summary judgment should be denied.

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DATED: May 6, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2015, the foregoing 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.

I FURTHER CERTIFY that on May 6, 2015, the foregoing was forwarded to the following person by U.S. Mail, first class postage prepaid:

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