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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants,

and

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

Intervenor-Defendants.

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

NORTHWEST RIVERPARTNERS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT SCHEDULED
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I. INTRODUCTION

Reading Plaintiffs' summary judgment briefs, and if we did not know better, one gets the mistaken impression that the federal government has gone rogue, ignoring Judge Redden's narrow and prescriptive remand order, the best available science, and the needs of the imperiled salmon in favor of the status quo. Plaintiffs would have this Court pretend that four states, 10 tribes, and a suite of federal agencies did not participate in an unprecedented regional collaboration leading to the issuance of this latest 2014 Biological Opinion ("BiOp"); that salmon experts from each of the four states and all the affected tribes did not exchange mountains of analyses, information, studies, models, and mitigation options in a variety of structured fora over the course of a number of years to advance the needs of the species; and that non-governmental organizations like the National Wildlife Federation ("NWF") did not enjoy a full opportunity to present their views on the science, the BiOp's legal framework, and the 74 separate mitigation options comprising the Reasonable and Prudent Alternative ("RPA") set forth therein.

If this were not enough, Plaintiffs would also have the Court ignore the fact that this BiOp underwent unprecedented review by the Obama Administration's top scientists and independent peer review to ensure, *inter alia*, that the BiOp was based on the best available science and that climate change considerations were fully addressed using the latest science. Indeed, the National Academy of Sciences reviewed this Administration's Adaptive Management Implementation Plan calling it "one that could not have been done better."[1] Plaintiffs also create the false impression that NOAA Fisheries ("NOAA") paid no attention to

[1] Office of the Secretary, Jennifer Costanza, Notes from FCRPS Science Review Report Out, July 10, 2009 (NOAA Document p. 00006) (attached to this reply as Exhibit A).

the survival and recovery status of the species, their biological needs, and the status of the critical habitat in which they swim. Plaintiffs would have this Court believe that NOAA has absolutely no idea how to determine whether the salmon are more or less healthy and numerous than they were before the Court ordered the successful and complete overhaul to the hydrosystem; that NOAA has no idea how to measure baseline and cumulative effects; that NOAA totally ignored and does not understand the additional challenges posed by climate change; and that more generally, NOAA has little to no understanding of what is required to issue an opinion on the likelihood of jeopardy and adverse modification.

From this, Plaintiffs seek a sea change. Straying well beyond the narrow concerns articulated by Judge Redden in remanding the Federal Columbia River Power System ("FCRPS") BiOp, Plaintiffs raise a multitude of technical issues and ask this Court to put on its waders and jump into the turbulent waters. Yet, as Northwest RiverPartners' ("RiverPartners"), the federal defendants and allied intervenor, opening briefs collectively demonstrate, the story line and sound bites advanced by Plaintiffs bear little resemblance to the facts of this case and the robust record supporting the 2014 BiOp.

Despite the number of words expended on both sides, the principles governing resolution of this case are both well established and far simpler than Plaintiffs would have this Court believe. Given that the federal government has fully addressed each and every claim and argument raised in Plaintiffs' replies, and in the interests of judicial economy, RiverPartners offers this "high level" reply addressing: (i) the level of deference mandated by the Administrative Procedure Act ("APA") and the amendments to section 7(a)(2) of the Endangered Species Act ("ESA"); (ii) the "do no harm" negative mandate required by the jeopardy and adverse modification standard – particularly warranted in a case involving the ongoing operation

of the hydrosystem – very creation of which caused a "baseline jeopardy" scenario; (iii) the narrow remand order issued by Judge Redden underscoring the unwarranted sea change requested by Plaintiffs; and (iv) the judicial estoppel argument RiverPartners levied against Oregon – conceded by Oregon's silence.

First, with respect to the standard of review and level of technical engagement required of this Court, the case begins and ends under the APA, which places strict limits on what this Court can and cannot decide. While the Court must decide whether the federal government has applied the proper legal framework in issuing the Supplemental BiOp, it cannot decide whether it likes NWF's view of the science animating the BiOp better than the government's. Not only bedrock principles of administrative law but also the statutory amendments to the ESA require the Court to defer to NOAA's expertise under ESA section 7(a)(2).

Congress did not require black or white assurances from NOAA as to its "Opinion" or "beliefs" on how to avoid jeopardy. Nor did Congress require NOAA to guarantee results with a degree of certainty, let alone the degree of mathematical precision Plaintiffs now demand. Instead, Congress well understood that when human beings attempt to alter the course of mother nature, there is a fair amount of scientific judgment involved, and saving endangered species is more an art – requiring application of that expert judgment – than a rigid scientific or mathematical formulation. While the APA requires courts to apply principles of deference in reviewing agency action as a general matter, in a case like this one, where the applicable science is at the frontiers of our understanding, a heightened degree of deference is mandated.

Therefore, the Court should refrain from accepting Plaintiffs' invitation to run the river. It is not the Court's job to decide whether NWF and its allies have better answers than the regions' expert wildlife managers, or to discern which population metric, statistical, or modeling

approach it agrees with most. As well explained by NOAA and the other intervenor defendants, the Court's role is to defer to the expert judgment of NOAA, which Congress entrusted to be the arbiter of these vexing scientific questions.

Second, as RiverPartners and the federal government collectively demonstrated in their opening briefs, ESA section 7(a)(2) is a "do no harm" mandate. NOAA's obligation under this standard is a negative or prohibitive one. This negative mandate is all the more important here where ongoing harm is and has been occurring as a result of the initial construction, and, thus, the very existence of the hydropower system. The question the Court must answer is not whether NOAA has offered enough in the BiOp to ensure recovery of the species, and not whether NOAA has required enough from the action agencies to improve population dynamics and the status of the fish more generally. Instead, NOAA is charged with ensuring that the continued operation of the hydropower system, coupled with its 74 mitigation measures, is *not likely* to jeopardize the continued existence of listed species or result in the destruction or adverse modification of its critical habitat. With the issuance of the 2014 BiOp, the federal government has done far more than it needed to do to achieve this negative mandate because, as thoroughly explained in NOAA's opening brief, the BiOp will affirmatively improve the status of the species, and its measures have put the species on an upward trend toward recovery. Nonetheless, Plaintiffs are not satisfied and, frankly, will never be satisfied unless and until the FCRPS is dismantled or operationally rendered a nullity.

Third, Judge Redden did not require the "sea change" or the 180 degree reversal of approach Plaintiffs now demand in issuing his narrow 2011 remand order. *Nat'l Wildlife Fed'n v. NMFS (NWF)*, 839 F. Supp. 2d 1117 (D. Or. 2011). Seeking a stunning reversal of the "ALL-

H" approach[2], to put the spotlight on additional hydropower measures instead of habitat mitigation, Plaintiffs have amped up their assault on the federal hydropower projects with just about every legal and technical claim conceivable.

But, it was Judge Redden who put the parties on the very path that led to this "habitat-heavy" BiOp with specific directives, articulating specific concerns that he wanted addressed. He refused to entertain wholesale attacks on the BiOp's legal framework, opting instead to issue an order leaving the 2008 BiOp in place, while ensuring that the promised habitat mitigation would actually come to fruition. Judge Redden also directed the federal government to continue to fund the BiOp's habitat mitigation plan – the most comprehensive and expensive restoration plan for a species anywhere in the nation – through the Fish Accords among the states, tribes, and Bonneville to the tune of a billion dollars in public funds. Plaintiffs' scattershot, "soup-to-nuts," "spaghetti against the wall" approach to this litigation should be rejected given Judge Redden's far more limited remand order, which, in leaving the 2008 BiOp in place, did not even criticize, let alone reject, its legal framework.

Fourth, and finally, Oregon's complaints should be dismissed in their entirety given that Oregon opted not even to respond to RiverPartners' estoppel argument. Having chosen to "will" the estoppel argument away by pretending as though the argument was not made, Oregon's silence must be construed as a concession as a matter of law. And, having previously judicially embraced the very legal and technical framework it now challenges, Oregon simply cannot be heard to complain about the approach to consultation taken in this BiOp.

[2] "All H" is the nomenclature commonly used to refer to a comprehensive approach to species improvement through hydro, habitat, hatchery, and harvest mitigation measures.

Because Plaintiffs have failed to meet their heavy burden of persuading this Court that NOAA and the action agencies employed not only the wrong legal standard, but the wrong science, and the wrong technical analysis in determining that the 74 individual measures comprising the RPA, taken together, avoid jeopardizing the 13 species of salmon and ensure against adverse modification of the species' critical habitat, the federal government's and RiverPartners' cross motions for summary judgment should be granted.

II. ARGUMENT

A. Congress Did Not Expect Guarantees or Mathematical Precision in Requiring NOAA to Issue an "Opinion" Containing Its "Beliefs" About How to Operate the FCRPS in a Manner "Not Likely" to Cause Jeopardy or Adverse Modification

NWF and its allies argue that they know more about the status of the species, have a better way to quantify uncertainty, have a sharper grasp of population dynamics and how to address climate change, and can predict more accurately than the agency with the specialized expertise how to determine whether habitat and hydro mitigation actions are delivering their intended results. More specifically, Plaintiffs insist that the uncertainty in NOAA's analysis should have been addressed quantitatively, instead of qualitatively (when it suits them), but reverse themselves where necessary to criticize the quantitative measurements actually presented in the BiOp. Plaintiffs take pot shots at NOAA's preference for "point estimates" for its population metrics, and its reliance on abundance levels, rather than on Plaintiffs' preferred "recruits per spawner" metrics. (NWF Reply at 9-11.) Plaintiffs also take issue with NOAA's quantitative predictions of survival improvements from the tributary and estuary habitat mitigation, offering up lengthy, detailed, and impenetrable exegeses in the form of extra-record declarations that read like PhD dissertations. Through these extra-record opinions, Plaintiffs nitpick NOAA's technical analyses metric by metric and table by table. (*Id.* at 14-21.)

They do not stop there. Plaintiffs insist that they know more about NOAA's Caspian terns and kelt conditioning actions (and their expected benefits or lack thereof) than NOAA, and more generally can predict a future of continued and comprehensive failure to meet BiOp expectations. They tell the Court that they and their experts – not NOAA – are better suited to make decisions about spill and transportation options and contingency planning, given the uncertainties presented and their view of the relative benefits of these measures. They also contend they know more about the environmental baseline and cumulative effects than NOAA and would have addressed those factors differently had they been in charge.

Finally, given their "sky-is falling," "glass half-empty" outlook, Plaintiffs would have placed a heavier emphasis on the potential need for dam removal and reservoir drawdown. Yet what is clear from reading Plaintiffs' collective briefing is that it is Plaintiffs' ideological support for dam removal that is at issue in this case, not what is genuinely needed to ensure the hydrosystem is not jeopardizing the species or adversely modifying its critical habitat.

1. The APA does not contemplate the micromanagement Plaintiffs seek

As demonstrated in RiverPartners' opening brief, the Court should resist the temptation to delve deep into the views expressed by Mr. Conner, Mr. Olney, and Mr. Nigro on the above, including the technical, mathematical, and biological issues ranging from: (1) expected survival benefits derived from tributary and estuary habitat actions; (2) levels of avian predation; (3) the success or lack thereof of kelt reconditioning; (4) the benefits of spill versus transportation; (5) population status dynamics; (6) the pros and cons of relying on smolt to adult returns ("SARs") rather than abundance or productivity metrics; and (7) the best way to deal with uncertainties in survival and recovery predictions – to name only a few. The Court should also refrain from deciding whether more or less mathematical and/or statistical precision was required for NOAA

to have reached the various "beliefs" expressed in its Biological "Opinion." These are all issues that Congress entrusted NOAA to decide.

Because NWF cannot argue that NOAA did not consider and fully address these issues in the BiOp, NWF instead argues that it would have addressed these issues differently and would have placed more or less reliance on data advanced by NOAA in support of its BiOp. But, as we previously explained, the standard set forth under the APA and under section 7 of the ESA does not lend itself to this level of judicial micromanagement and does not require this Court to "make its own judgment about the appropriate outcome" of NOAA's BiOp. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (internal quotation marks and citation omitted) (admonishing against judicial venturing into the technical wilderness). Instead, the APA directs the Court to ensure only that NOAA has "articulated a rational connection between the facts found [in the BiOp] and the conclusions it made." *Id.* (internal quotation marks and citation omitted). Underscoring the fact that NOAA's analysis of a species' survival or potential for recovery "'involves a great deal of predictive judgment,'" the Ninth Circuit has held that such judgments are entitled to "'particularly deferential review.'" *Salmon Spawning & Recovery Alliance v. NOAA's NMFS*, 342 F. App'x 336, 339 (9th Cir. 2009) (citation omitted); *see also The Lands Council v. McNair*, 537 F.3d 981, 991 (9th Cir. 2008) (emphasizing that where an agency is making predictions within its area of particular expertise, a heightened level of deference is warranted under the APA).

As the case law cited above demonstrates, the Court need not engage itself and its technical advisor into this level of technical and biological micromanagement of the science behind NOAA's "Opinion." Instead of actually demonstrating that NOAA failed to consider an important aspect of the problem (as required under the APA) Plaintiffs' reply briefs serve to

convincingly demonstrate the reverse – that NOAA considered each issue, population, survival, or recovery improvement metric, piece of unfavorable data, or study that Plaintiffs either prefer or alternatively quibble with. Indeed, Oregon offered all of the technical arguments and opinions advanced in this lawsuit during the lengthy and involved remand processes, and because the state was convincingly out voted by the other three states, nine tribes, NOAA, and the federal agency fish and wildlife managers, it seeks to inappropriately re-address those issues in this Court. Instead of articulating a viable and cognizable claim upon which relief can be granted in this case, Plaintiffs' replies only show that they disagree with NOAA's technical findings and conclusions and believe they should have been done differently and led to different results.

But under the APA, this sort of technical disagreement does not lend itself to a cognizable claim. The very determination of "what constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference." *Locke*, 776 F.3d at 995. The prior briefing of the federal government and its intervenor supporters showed that NOAA considered all important aspects of the problem, including the theories, metrics, studies, and data that Plaintiffs prefer, and fully articulated the reasoning that it employed and the facts it relied on to reach each and every one of its conclusions. More is simply not required. *Id.* at 996 (emphasizing that the Court's role in a BiOp challenge like this is narrow, ensuring that the agency complied with the procedural requirements of the APA). Because NOAA has more than met its burden, Plaintiffs' hyper-technical arguments, and impenetrable extra-record opinions, should be rejected.

2. The ESA does not call for increasing levels of certainty and guarantees

RiverPartners previously demonstrated that heightened deference is further warranted here, where Congress did not require NOAA to ensure or guarantee against an undesired result.

As explained in our opening brief, Congress amended the ESA to remove the obligation for NOAA to prove that the agency action "*does not*" jeopardize or adversely modify. Congress decided that "no agency can or should be expected to give a 100-percent guarantee of no adverse impact." (*See* River Partners' Op. Br. at 11-12.) Accordingly, Congress moved away from requiring "guarantees" to requiring NOAA to express its "*belie[fs]*" – articulated in an "*opinion*" – about whether an action can be said to be "*not likely*" to cause harm. 16 U.S.C. § 1536(a)(2), (b)(3)(A) (emphases added). And, in requiring use of the "best scientific and commercial data available" (16 U.S.C. § 1533(b)(1)(A)), Congress did not intend for NOAA to issue a "black or white" and definitive decision that could be picked apart by litigants.

Instead, Congress contemplated that NOAA would simply make a "judgment call" – as the nation's designated species expert – concerning jeopardy and adverse modification. By speaking in terms of "beliefs," "opinions," and "likelihoods," Congress precluded the sorts of arguments mounted by Plaintiffs – taking issue with levels and degrees of quantitative proof, nitpicking confidence levels, and other survival, recovery, and population status metric units used throughout the BiOp. Congress's deliberate decision to amend the ESA and to incorporate use of these "softer" statutory terms forcefully demonstrate that Congress never dreamed that the types of technically dense arguments marshaled here against the 2014 BiOp would ever be cognizable.

In response, Plaintiffs have no answer to Congress's decision to amend the statute to make clear that NOAA cannot be held to the rigid proof requirements and mathematical and biological guarantees that Plaintiffs attempt to require of the agency in this litigation. In fact, Plaintiffs do not take issue with RiverPartners' articulation of the statutory standard of review as dictated by the 1979 statutory amendments, presumably because it is far beyond doubt.

Instead of responding to the compelling statutory amendment history set forth in RiverPartners' opening brief, Plaintiffs sweep aside the importance of the amendments, again resorting to the platitude "that the benefit of the doubt must go to the species." But Congress was well aware of that axiom and specifically included in the legislative history of the ESA amendments an explanation ensuring that the statutory amendments would *continue* to ensure that the statute gives the "benefit of the doubt" to the species. H. Conf. Rep. No. 96-697, at 12 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576. There would have been no reason to include that assurance in the Conference Report unless Congress felt the need to ensure that the amendments would both relieve NOAA of a prior statutory duty that was impossible to meet (guaranteeing that the RPA would not lead to jeopardy) while continuing to ensure that the species would be protected.

The Conference Report makes clear that requiring less of NOAA in terms of the level of certainty needed in a BiOp (to satisfy the "not likely" to jeopardize mandate in lieu of the impossible "*does not jeopardize*" standard that it supplanted) would not otherwise undermine NOAA's ability *to continue* to give the benefit of the doubt to the species. *Id.*; *see also Miccosukee v. United States*, 566 F.3d 1257, 1268 (11th Cir. 2009) ("[N]o court decision has ever relied solely on the [1979 Committee Report's] benefit of the doubt language to find that a biological opinion was arbitrary and capricious."). In short, had Congress contemplated the sorts of arguments levied by Plaintiffs, it would not have gone to the bother of amending the ESA to make it crystal clear that Congress was not holding NOAA to the level of certainty demanded by NWF and Oregon in satisfying its ESA consultation obligation.

For all these reasons, coupled with those expressed in our opening brief, the Court should reject the technical arguments found at NWF's Reply at 8-24 and at Oregon's Reply at 5-35, and including the expert testimony of all their collective declarants.

B. The Jeopardy and Adverse Modification Standards Are "Do No Harm" Mandates and Do Not Require NOAA to Improve the Status of the Species

The gravaman of Plaintiffs' arguments are that NOAA has not done enough to benefit the salmon and its critical habitat. Plaintiffs argue that the populations are in decline and distress – and that the tributaries, the estuary, and the mainstem of the Columbia River remain hostile to the species. They argue that the survival benefits from the habitat improvements have not been realized and that, taken together, all this amounts to a perpetuation of jeopardy and adverse modification. On reply, they further insist that even if the government were correct, and the status of the species has not really materially changed since 2008, this then proves that jeopardy is simply being perpetuated.

From this, Plaintiffs insist that the BiOp and its RPA must improve things. These claims – whether directed at the jeopardy standard, or NOAA's construction and articulation of its critical habitat mandate – all fail as a matter of law.

As explained in RiverPartners' opening brief, NOAA's job is not to ensure that agencies take action to improve the status of the species and its critical habitat. Instead, NOAA and the action agencies are subject to a negative mandate to ensure *against* the *likelihood* of jeopardy and adverse modification. As the Ninth Circuit previously emphasized in this case – where the existence of the dams has placed the status of the species in decline – jeopardy is measured by some new risk of harm. *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2007). In this type of ongoing action, the Ninth Circuit has held that the hydrosystem plan of operations must be not likely to cause some active change in the status of the species. *Id*. In other words,

the continued operation of the hydrosystem only jeopardizes a species "if it causes some new jeopardy" or if the agency "take[s] action that deepens the jeopardy by causing additional harm." *Id.* The statute puts the focus on the "new action" – the new plan of operations – the new RPA – not, as the Plaintiffs wish, the existence of the dams themselves.

We also demonstrated (Op. Br. at 11, 13-14) that the consultation requirement under ESA section 7(a)(2) is a negative mandate. (*See generally*, RiverPartners' Op. Br. at 7-18.) Thus, it is not NOAA's job to show that we are closer to recovery than we were before the 2014 BiOp was issued, and it is not NOAA's job to show that it has improved the status of the species through the 2014 BiOp and its RPA.

On reply, Plaintiffs re-assert arguments relating to population trends, insisting that either declining trends or trends that have not materially changed since 2008 show that jeopardy is occurring because the numbers have not gotten *better*. Oregon goes to great lengths to argue that mainstem passage has not materially improved and that SAR levels have not improved, and because the construction and continued existence of dams have created a jeopardized baseline, one must conclude that the BiOp fails to avoid jeopardy and adverse modification because the salmon are not materially better off than they were before 2008.

But that is not the standard. Indeed, this Court recently re-affirmed that the standard in a jeopardy analysis "is concerned with whether a given federal action at the species level would appreciably reduce the likelihood of recovery, not whether that federal action would itself implement or bring about recovery." *Cascadia Wildlands v. Thrailkill*, 49 F. Supp. 3d 774, 776 (D. Or. 2014) (refusing "plaintiffs' invitation to blur the two separate and distinct concepts of jeopardy and recovery," and upholding logging activities as part of fire complex recovery project). Even when the baseline is poor, an ongoing action does not violate the ESA section

7(a)(2) prohibition unless it *deepens the jeopardy or "appreciably diminishes the value of critical habitat*" when it results in some additional or new harm to the function of that habitat. *Nat'l Wildlife Fed'n*, 524 F.3d at 934 (internal quotation marks and citation omitted; emphasis added); *Locke*, 776 F.3d at 999 (upholding NMFS' adverse modification analysis, concluding that NMFS properly directed its analysis on whether the RPA would appreciably reduce habitat).

Here, NOAA has done more than what is required of it under the statute by issuing an RPA that includes major modifications in hydrosystem operations; is directed toward improving estuary, tributary, and mainstem habitat, which increases survival benefits; and ensures that there remains an adequate potential for recovery. (*See* Fed. Defs. Cross-Motion for SJ and Mem. in Supt. at 50-55.) Indeed, NOAA explained in detail that an essential part of the BiOp's commitments include "actions to improve the overall survival of fish passing through the hydro system." (*Id*. at 51 (highlighting the installation of highly effective surface passage systems, including spillway weirs at all lower Snake and Columbia dams, so that nearly all juvenile fish now no longer pass through the dam turbines).)

In improving mainstem passage, NOAA did not stop there. The RPA also required installation of a huge concrete spillwall at the Dalles dam, improving fish passage through the tailrace where predators are known to occur, and directed the action agencies to alter turbine designs, upgrade juvenile bypass systems, modify spill operations to improve egress, and engage in predator control actions – each of which leads to major safe passage improvements. (*Id*.) Since 2004, the Court also directed the Corps to continue spilling up to 40% of these massive rivers during salmon migration season (April to the end of August), even when the best available

science shows that for some species (Upper Columbia River steelhead) barging is seasonally more effective.[3]

Nevertheless, the success of these combined actions is evidenced by the fact that the system is meeting or exceeding the stringent survival "performance standards" at each of the mainstem dams for downstream juvenile survival, and in robust, even record-setting adult salmon returns. While good ocean conditions are likely a key factor driving record-setting returns, the comprehensive overhaul of the hydrosystem is undeniably doing its part too.

NOAA's opening brief and Oregon's agency websites each demonstrate that salmon are returning in record numbers, that salmon and steelhead fishing opportunities now abound, and that biological improvements are undeniably manifest. Oregon cannot claim that the baseline status of the salmon is so dire – essentially "tip[ping] a species from a state of precarious survival into a state of likely extinction"[4] – when it simultaneously boasts of record returns and encourages greater and greater levels of fishing. (*See* River Partners' Op. Br. at 35-36.) Against this record and statutory standard, Plaintiffs' claims must be rejected.[5]

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[3] And, in the case of spill for juvenile Chinook passing the Snake River dams, NOAA's research shows that many fish still in the mainstem in August "are no longer attempting to migrate to the estuary or ocean and instead spend the winter in the FCRPS reservoirs," and that . . . spill in August may simply relocate fish within the Snake River projects rather than aid their migration." (Response to Comments on the 2013 FCRPS Comprehensive Evaluation and 2014-2018 FCRPS Implementation Plan, January 2014, ER ACE_0001661.)

[4] *Nat'l Wildlife Fed'n*, 524 F.3d at 930.

[5] The District of Idaho's decision in *Nez Perce Tribe v. NOAA Fisheries*, No. CV-07-247-N-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008), is inapposite. That case found that the Bureau of Reclamations' irrigation water withdrawals in the Lewiston Orchard Project reduced flows during the spawning season, which dried up creek beds, thus leading to a virtual population sinkhole and adverse modification of steelhead critical habitat. The court found that the loss of this habitat caused steelhead mortality to exceed reproduction in the drainages affected by the Lewiston irrigation project. The court further found that the irrigation project "will likely result in the total extinction" of the subpopulation of species returning to a particular

C. Judge Redden's Limited Remand Is at Odds with Plaintiffs' Request for a Sea Change

The intervenor defendants collectively emphasized in our opening briefs that the sweeping changes sought by Plaintiffs were not contemplated by Judge Redden's 2011 remand order. Judge Redden refused to accept any of Plaintiffs' statutory attacks to the BiOp's articulation of the jeopardy and adverse modification standards, deciding instead to hold the course and to focus on improving the habitat mitigation foundation upon which the BiOp was based. *NWF*, 839 F. Supp. 2d at 1123-30. Deciding to remand the BiOp while leaving in place, and further deciding not to require a wholesale revision to the BiOp's statutory approach to avoiding jeopardy and adverse modification, the 2011 decision and order emphasized the significance of the Fish Accords, which are "the foundation of the Federal Defendant's habitat restoration plan . . . provid[ing] firm commitment to funding much of the BiOp's mitigation plan." *Id.* at 1123.

While cautioning that he continued to have reservations about the habitat mitigation plans for last five years of the BiOp's term and the government's survival predictions, Judge Redden emphasized that "[e]veryone agrees that habitat improvement is vital to recovery and may lead to increased fish survival." *Id.* at 1129. Ordering the federal defendants to continue to fund the Fish Accords and the massive habitat mitigation effort on which the 2014 BiOp is now based, Judge Redden was careful to throw cold water on Plaintiffs' lobbying for ever-increasing certainty and guarantees:

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creek. *Id.* at *8 (internal quotation marks and citation omitted). The facts of this case are not remotely similar. Here, there is no suggestion of a population sinkhole or the species' rapid extinction in the Columbia River Basin. And unlike the BiOp at issue in the District of Idaho case, this BiOp includes among the 74 actions that comprise the RPA additional measures to improve important functions of the critical habitat – including juvenile mainstem passage through the hydrosystem.

> I recognize the inherent uncertainty in making predictions about the effects of future actions. If NOAA Fisheries cannot rely on benefits from habitat improvement simply because they cannot conclusively quantify those benefits, they have no incentive to continue to fund these vital habitat improvements. Moreover, requiring certainty with respect to the effects of a mitigation plan would effectively prohibit NOAA Fisheries from using any novel approach to avoiding jeopardy, including dam removal.

Id. at 1130.

In seeking their "sea change" away from the habitat and the "All H" approach used in the FCRPS BiOp, the BiOps for the Upper Snake water withdrawal decision, and the BiOp for the harvest management decision approved by Judge King, Plaintiffs maintain that Judge Redden's comments and letters to counsel somehow override the narrow focus of the Court's 2011 decision and order. It is axiomatic that a court's informal comments or letters do not have the force and effect of a formal remand order. However, even were that not the case, Judge Redden's February 10, 2010 letter to counsel (attached as Exhibit B to this reply) made abundantly clear that the government "need not 'start over from scratch,' or develop a new jeopardy framework." (*Id*. (granting the government's voluntary request for remand to incorporate its adaptive management and implementation plan).) Judge Redden's opinion and order, taken together with the Court's more informal colloquy, evidence a strong reluctance to require wholesale BiOp revisions, including adoption of Plaintiffs' framework arguments. They instead reflect a measured decision to stay the course while ensuring that promised mitigation actually comes to fruition.

Plaintiffs have shown this Court no reason to depart from the cautionary approach adopted by this Court in prior decisions. Nothing in their collective replies indicates a need to reverse course away from the "All-H" approach, which forms the very foundation of the FCRPS BiOp. As the Umatilla, Yakima, and Warm Springs Tribes cautioned,

> We should take a broader view of the federal government's 10-year action plan that began in 2008 and will not be fully reviewable until at least 2018. The FCRPS and Upper Snake BiOps, though important pieces are just that – pieces of the broader plan. The other components of the broader plan include . . . the Columbia Basin Fish Accords . . . that locked down a decade of funding for habitat, hatcheries, research and monitoring and bolstered the standards for hydrosystem operations. These individual components work consistently together as a much broader, unified 10-year federal Columbia River salmon plan, and enjoyed an unprecedented level of agreement in the Basin when the package was presented in 2008.

(Joint Brief Amicus Tribes at 6-7.) The tribes voiced strong concern that:

> a lack of regard or realization that if one key piece of 10-year salmon plan is crippled, there could be impacts on other key elements of the plan – with the balance upset, piece-by-piece the larger All-H federal plan that represents a decade of challenging collaborative work might be picked apart. Through the 2008 package of agreements, the region addressed the ESA in the BiOps; treaty harvest rights, harvest and hatchery actions in the *US v. Oregon* Management Agreement and Pacific Salmon Treaty; and funding and additional commitments in hydro, habitat, hardest and hatcheries in the Accords *all in a carefully coordinated way.*

(*Id.*) Responding to Plaintiffs' concerns that the promised habitat mitigation has not yet borne fruit, the tribes emphasized patience and prudence with respect to habitat improvements only recently begun:

> We are only a few years away from being able to comprehensively evaluate the larger unified plan, and then craft another comprehensive approach that meets both ESA and Treaty rights obligation of the federal agencies. *Plucking the BiOp piece out of that larger package and setting it on a different path . . . frustrates the ability to continue to address the multiple obligations that the federal government must meet in a coordinated and cohesive manner.*

(*Id*. at 7 (emphasis added).) The advice offered by these treaty tribes – who self-identify as the "wardens" of the unprecedented, billion-dollar mitigation effort – is certainly worthy of this Court's consideration. (*Id.* at 6.) After all, it was not long ago that these tribes sided with

Plaintiffs, claiming that NOAA had not done enough to aid the salmon – the lifeblood of their cultural heritage. For these reasons, coupled with all the others articulated above, the Court should reject the "sea change" requested by Plaintiffs.

D. Oregon's Arguments Are Barred

In our opening brief, RiverPartners demonstrated that Oregon has taken one position in this case, and quite another in the *United States v. Oregon* case concerning the legality of the BiOps' respective approaches to jeopardy and adverse modification *and* the sufficiency of the habitat mitigation upon which both BiOps rest. (RiverPartners' Op. Br. at 31-36.) We demonstrated that Oregon has played "fast and loose" with this Court and that, as a result, it should be estopped from arguing that the BiOps' collective approach is illegal in this case, when it previously told Judge King that the same exact approach to avoiding jeopardy and adverse modification is "*fundamentally fair, adequate, and reasonable both procedurally and substantively, in the public interest, and consistent with applicable law*," as applied to the Harvest Management BiOp. (*See* Joint Motion and Stipulated Order Approving 2008-2017 *U.S. v. Oregon Management Agreement*, Case No. 68-513-KI (emphasis added) (Exhibit A at 3 to RiverPartners' Op. Br.); *New Hampshire v. Maine*, 532 U.S. 742 (2001) (applying the judicial estoppel doctrine to prevent a party from asserting a position in one forum and simply because its interests are different, assuming a contrary position in another).)

RiverPartners is not the only party to express these serious concerns. In fact, the federal government told this Court in 2008 that:

> Oregon neglects to inform the Court that it actually supports the same analysis, albeit in Judge King's courtroom for the harvest BiOp in *United States v. Oregon.* Oregon provides no explanation as to how it affirmatively can support the management agreement [in] *United States v. Oregon*, and yet disparage the exact same analysis in a different courtroom. *It seems Oregon is satisfied with*

> *NOAA's analysis when it comes to fishing, but not when it comes to hydropower* . . . . [T]hese glaring inconsistencies and Oregon and the Nez Perce's inexplicable silence on this issue stand in stark contrast to the strident tone they take criticizing this BiOp.

(Fed. Defs.' Mem. Supp. Mot. Summ. Judg. at 27-28 (2008) (emphasis added).)

In forcefully insisting that "Oregon cannot credibly maintain these conflicting positions," NOAA explained that the Harvest Management BiOp is tiered from and utilizes the "same jeopardy analysis and analytical framework present in this case." (*Id*. at 27-28 & n.18.) NOAA further explained that the huge package of mitigation promoted by the FCRPS BiOp is designed to mitigate for the effects of all three federal actions. "This means that each ESU determination made in the SCA (and reflected in each of the three BiOps) is based on the collective mitigation package." (*Id.* at 27.)

Thus, as we previously explained, Oregon's ability to allow its residents unprecedented opportunities to fish for or "take" these endangered salmon comes out of the hide of the FCRPS mitigation that it now complains is both not enough and improperly analyzed. Yet, it is the billion-dollar habitat and estuary mitigation package that Oregon so easily and stridently now criticizes that has allowed the Oregon Department of Fish and Wildlife to reopen and repeatedly extend fishery seasons "predicting [that] tremendous runs of Chinook are forecast to return to the Columbia," including a "record return" in 2014. (RiverPartners' Op. Br. at 35.)

As NOAA previously explained, Oregon was able to persuade Judge King to approve the 10-year Harvest Management Agreement only because of the huge mitigation package required of the FCRPS, and the extensive analysis contained in the accompanying Supplemental Comprehensive Assessment <u>used in and binding all three BiOps together</u>. (Fed. Defs.' Mem. Supp. Mot. Summ. Judg. at 27-28 (2008).) This is the same admonition elegantly expressed by the treaty tribes, who warn that "if one key piece of the 10-year salmon plan is crippled, there

could be impacts on other key elements of the plan." (Joint Brief Amicus Tribes at 7; *see also* Harvest Management Plan BiOp at 1-4 (explaining close substantive association between the FCRPS BiOp and the Harvest Management BiOp).)

Oregon does not even pretend to respond to RiverPartners' estoppel argument. Its failure to respond to RiverPartners' estoppel argument must be construed as a concession as a matter of law. *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1046 (D. Or. 2008) (failure to respond to claim must be construed as a concession). Instead, Oregon makes only a passing attempt to justify the propriety of attacking the "FCRPS RPA" while enjoying the fruits of the Harvest Management BiOp. (*See* Oregon's Reply Br. at 4.) But Oregon cannot divorce an RPA as fundamental as this one from the underlying BiOp in which it is contained in attempting to distance itself from its prior "in court" assertions.

Nor can Oregon explain away the critical fact that the exact same comprehensive analysis used in and supporting the 10-year Harvest Management Agreement is used in and supports the FCRPS BiOp that it now so vigorously attacks. Oregon cannot tell Judge King that the supplemental comprehensive analysis binding all three BiOps is perfectly fine (that the mitigation in the FCRPS BiOp is enough to mitigate for the harvest it asked Judge King to approve), and then tell this Court that this very same analysis places too much emphasis on habitat improvements outside the mainstem while neglecting to require essential hydropower operational changes. Nor should Oregon be able to tell its citizens that salmon are returning in record numbers – offering state commercial and sport fishermen multiple extended opportunities to harvest – if the sky were truly falling and the status of the species were, in fact, in rapid decline.

Oregon's anemic attempt to dance around its glaring inconsistencies should be seen for what it is and does not justify the opportunistic approach to litigation that the Supreme Court has barred in similar contexts. *New Hampshire*, 532 U.S. at 749-50 (estopping New Hampshire from assuming a position contrary to the one it had previously advocated in persuading the court to enter a consent decree based on the state's explicit representations of fairness and legal consistency). Its arguments should be collectively barred under the judicial estoppel doctrine, and its motion for summary judgment should be decisively denied.

III. CONCLUSION

This Court has the opportunity to bring the region full circle from the major overhaul ordered by Judge Marsh in the mid-1990s, through years and years of protracted litigation, to getting on with implementing what the best minds in the region – using the best science – have adopted in the best interests of the salmon. The federal government has done far more than what Congress envisioned through a single ESA section 7(a)(2) consultation in adopting this comprehensive RPA with 74 individual and robust mitigation measures. For the reasons provided herein and in RiverPartners' opening brief, and as more fully developed in the federal government's memoranda, the 2014 BiOp should be upheld.

Dated: May 6, 2015.

STOEL RIVES LLP

/s/ Beth S. Ginsberg
Beth S. Ginsberg, OSB #070890
Jason T. Morgan, WSBA #38346 (*Pro Hac Vice*)
Attorneys for Intervenor-Defendant Northwest RiverPartners

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b) because it contains 6,960 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Beth S. Ginsberg
Beth S. Ginsberg, OSB #070890

CERTIFICATE OF SERVICE

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

Dr. Howard F. Horton, Ph.D.
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, Oregon 97331

/s/ Beth S. Ginsberg
Beth S. Ginsberg, OSB #070890

EXHIBIT A

C.6

Costanza, Jennifer

From: Costanza, Jennifer
Sent: Friday, July 10, 2009 3:03 PM
To: Toal Eisen, Jean; Gregoire, Courtney; Biery, Nancy; Reich, Jay
Subject: Notes from FCRPS Science Review Report Out

All:

I attended the report out that the independent scientists gave Dr. Lubchenco on Wednesday. I've had a chance to give the two sentence read out to Courtney and Jean, but just typed up my notes and have pasted them below. Please let me know if you have any questions. Also, FYI, we received a FOIA on OCAP. Happy Friday!
Thanks,
Jen

FCRPS Science Review Report Out: The scientists reported that there was great and substantial agreement among them. They believe it was a great **scientific analysis**. They noted that they wanted to stress that point time and again. They said that one could not have done better. They noted their lack of confidence that the RPAs could accomplish what was hoped, but stressed the distinction that the lack of support was due to a dearth of data, not thought. They think that the single species analysis in the BiOp was great, but that the analysis of the interactions between different salmon species and the role of invasive riparian species could be better. They noted that the assumptions regarding the hatchery and habitat effects in the RPAs may not be justified, but the weakness in data prevents them from being sure of that. They spent considerable time mentioning that the connections between the **habitat RPAs** and salmon survival were not clear, again because of a lack of data and monitoring. In addition, they noted that the effectiveness of the RPAs would be heavily influenced by climate change and land use, however that was hard to evaluate given the present data base. They recommended initiation of a coordinated program to assess habitat trends and monitoring at the same scale as that which exists for fish populations. They noted that the BiOp did not fully consider climate, land and water use stress on the system because they were considered as a static baseline rather than as part of the projections. Dr. Lubchenco noted that the RPAs are reasonable and prudent, not a cure all. In regard to how to determine if **ESUs** are in trouble, the group noted that the baseline of any health measure has been changing so deciding the point at which ti is in trouble has to take that into account. They suggested that the following should be monitored and any changes should trigger an appropriate action: abundance of wild fish (a decline for 4 years should trigger action); a decline or change in the number of juveniles leaving the system; a change in adults returning to the system (and compare those two); size and age of juveniles leaving; and, physical events (multi-year drought, pathogen spread, novel illnesses, large disturbance events). They suggested that hatchery operations output should be increased when ocean conditions were predicted to be possible. It was suggested that opportunities to establish now extinct runs should be examined. They strongly noted that **dam breaching** would take a very long time, but would have very positive effects in the long run, however, it would have extremely negative short term effects that could negate the positive long term effects. Their comments stressed that it is an extreme option to consider, and should be the "last among many options" and would be "risky business." In regard to **climate change**, the scientists suggested the following: a rapid response team should be established because of the rapidity with which things can change in a negative way; adaptive management triggers should be set in a precautionary measure so that the thresholds set are lower than they otherwise would be; explicit spatial modeling on population info; and, coordinated monitoring and assessment of thermal flow and fish numbers. Overall: they said it was an excellent analysis that used the best available science that was used in an extremely thoughtful way. The assumptions made were perfectly reasonable and it was done as well as it could have been done.

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EXHIBIT B

United States District Court
District of Oregon
1527 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

FILED 10 FEB 10 13:40 USDC-ORP

Chambers of
JAMES A. REDDEN
United States District Judge

Phone: 503-326-8370
Fax: 503-326-8379

February 10, 2010

To: Counsel of Record, National Wildlife Federation v. NMFS, CV 01-640-RE
Re: Federal Defendants' Request for Voluntary Remand

Dear Counsel,

I gave you my preliminary view on the validity of the 2008 Federal Columbia River Power System Biological Opinion ("2008 BiOp") in my May 18, 2009 letter to counsel. The Adaptive Management Implementation Plan ("AMIP") is a positive development. Federal Defendants deserve credit for developing additional mitigation measures, enhanced research, monitoring and evaluation actions, new biological triggers, and contingency actions to address some of the flaws in the 2008 BiOp.

The AMIP, however, is not part of the Administrative Record, and it does not fall into any exception to the record-review rule. Federal Defendants must formally incorporate the AMIP into a final agency decision before I can consider it in evaluating the 2008 BiOp.

The court has the discretion to allow Federal Defendants to conduct a limited voluntary remand. An order of voluntary remand does not require Federal Defendants to admit fault, reopen the entire decision-making process, or commit to a change in course. Federal Defendants have, in effect, acknowledged that the AMIP is procedurally flawed and no one seriously contends that it is properly before the court.

A voluntary remand provides a mechanism by which Federal Defendants can cure this procedural defect, without starting from scratch and without jeopardizing the progress made through the regional collaborative process. A voluntary remand is the most practical and efficient way to formally incorporate the AMIP into the 2008 BiOp. The court can then review the merits of a single, comprehensive final agency action.

I am not satisfied with Federal Defendants' narrow proposed order of voluntary remand. Federal Defendants have an obligation under the Endangered Species Act ("ESA") to rely on the best available science. They cannot rely exclusively on materials that support one position, while ignoring new or opposing scientific information. Federal Defendants recognize that they must supplement of the Administrative Record with all of the documents that support the AMIP. They must also include new and pertinent scientific information relating to the proposed action (*e.g.*, recent climate change data). If that scientific data requires additional analysis or mitigation to avoid jeopardy, Federal Defendants must adequately address those issues. I will not sign an order of voluntary remand that effectively relieves Federal Defendants of their obligation to use the best available science and consider all important aspects of the problem. This court will not dictate the scope or substance of Federal Defendants' remand, but Federal Defendants must comply with the ESA in preparing any amended/supplemental biological opinion.

There are two options. Pursuant to the attached proposed order, Federal Defendants can conduct a voluntary remand using the best available science and addressing all relevant factors. Alternatively, Federal Defendants can reject the proposed order, and I will issue a ruling on the validity of the 2008 BiOp without consideration of the AMIP.

If Federal Defendants agree to the court's proposed order of voluntary remand, I urge them to seize this opportunity to produce a stronger RPA/AMIP. They need not "start over from scratch," or develop a new jeopardy framework. Federal Defendants should do more. Indeed, they have acknowledged that they can do more. Federal Defendants should re-examine the court's previous concerns regarding the lack of specificity and certainty (*i.e.*, funding) in both the 2008 BiOp/RPA and the AMIP. I also encourage them to consider some of the parties' suggestions for improving the AMIP.

Federal Defendants are free to disregard the court's suggestions and simply insert the AMIP into the 2008 BiOp. Plaintiffs will, of course, have an opportunity to challenge the validity of an amended/supplemental biological opinion. If Federal Defendants conduct a superficial, ten-day remand (as they have proposed), I will view that final agency decision with heightened skepticism.

Federal Defendants should advise the court by letter whether they agree to the attached proposed order of voluntary remand by February 19, 2010.

Very Truly Yours,

James A. Redden
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, WASHINGTON WILDLIFE FEDERATION, SIERRA CLUB, TROUT UNLIMITED, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, IDAHO RIVERS UNITED, IDAHO STEELHEAD AND SALMON UNITED, NORTHWEST SPORT FISHING INDUSTRY ASSOCIATION, SALMON FOR ALL, COLUMBIA RIVERKEEPER, AMERICAN RIVERS, INC., FEDERATION OF FLY FISHERS, and NW ENERGY COALITION,

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,

CV 01-00640-RE
CV 05-0023-RE
(Consolidated Cases)

[PROPOSED] ORDER

and

STATE OF IDAHO, STATE OF MONTANA, KOOTENAI TRIBE OF IDAHO, NORTHWEST IRRIGATION UTILITIES, PUBLIC POWER COUNCIL, WASHINGTON STATE FARM BUREAU FEDERATION, FRANKLIN COUNTY FARM BUREAU FEDERATION, GRANT COUNTY FARM BUREAU FEDERATION, BPA CUSTOMER GROUP, and CLARKSTON GOLF & COUNTRY CLUB,

Intervenor-Defendants.

REDDEN, Judge:

The court has reviewed all of the materials submitted by the parties as well as Federal Defendants' request for a limited, voluntary remand. For the reasons set forth below, I GRANT Federal Defendants' request for a limited, voluntary remand.

The court finds that due to the length of the previous remand, complexity of the existing litigation, and the significant effort by all of the parties throughout this case, there is good cause to allow a limited, voluntary remand. I do not make any formal ruling as to the validity of the 2008 Federal Columbia River Power System Biological Opinion ("2008 BiOp") at this time, and I will review the legal adequacy of the agency actions upon completion of this voluntary remand. Accordingly, I ORDER as follows:

(1) I hereby REMAND the 2008 BiOp and its record to NOAA Fisheries, the Bureau of Reclamation, and the U.S. Army Corps of Engineers ("Agencies") to allow these Agencies to consider, among other actions, integrating the Adaptive Management Implementation Plan and

its administrative record into the 2008 BiOp.

(2) The court will retain jurisdiction over this case while the Agencies comply with this interlocutory remand order.

(3) The Agencies are ordered to complete this voluntary remand within 3 months of entry of this order and will provide notice of completion of remand at that time.

(4) If the Agencies choose to integrate the Adaptive Management Implementation Plan, or any other actions or analyses, into the 2008 BiOp, they will provide the Court and the parties with a supplemental administrative record as soon as practicable.

IT IS SO ORDERED.

DATED this _____ day of February, 2010.

_____

James A. Redden
United States District Judge