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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs,

Civ. No. 01-0640-RE (Lead Case)
CV 05-0023-RE
(Consolidated Cases)

and

STATE OF OREGON,

NWF'S COMMENTS ON 2010
PROGRESS REPORT

Intervenor-Plaintiff,

v.

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

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC
POWER COUNCIL, WASHINGTON STATE FARM
BUREAU FEDERATION, FRANKLIN COUNTY
FARM BUREAU FEDERATION, GRANT COUNTY
FARM BUREAU FEDERATION, STATE OF
IDAHO, INLAND PORTS AND NAVIGATION
GROUP, KOOTENAI TRIBE OF IDAHO, and STATE
OF WASHINGTON,

Intervenor-Defendants.

COLUMBIA SNAKE RIVER IRRIGATORS
ASSOCIATION, and EASTERN OREGON
IRRIGATORS ASSOCIATION,

Plaintiffs,

v.

JOHN BRYSON¹, in his official capacity as Secretary
of Commerce, NOAA FISHERIES, and WILLIAM W.
STELLE, JR.², in his official capacity as Regional
Director of NOAA Fisheries,

Defendants.

¹ Please note that pursuant to Fed. R. Civ. P. 25(d)(1), John Bryson, Secretary of Commerce, is substituted as a defendant for Rebecca Blank.

² Please note that pursuant to Fed. R. Civ. P. 25(d)(1), William W. Stelle, Jr., Regional Director of NOAA Fisheries, is substituted as a defendant for Barry Thom.

INTRODUCTION

In its Opinion and Order of August 2, 2011, finding the 2008 BiOp and 2010 Supplemental BiOp arbitrary and capricious, the Court ordered “NOAA Fisheries [to] file with the court their annual implementation reports detailing the progress of the RPA,” and allowed any party or *amici* “to comment on the reports” within 10 days. Opinion and Order at 23-24. On September 30, 2011, federal defendants filed their 2010 Progress Report. The Court subsequently granted an unopposed joint motion by NWF, the State of Oregon, and the Nez Perce Tribe for additional time to comment on the Report. NWF offers the following comments.

Briefly, the 2010 Progress Report fails to actually provide a meaningful or transparent “report[] detailing the progress of the RPA.” Opinion and Order at 23. Instead it offers broad generalizations and opaque tables that fail to illuminate whether the actions broadly described in the RPA are being specifically implemented as anticipated in the 2008/2010 BiOps, whether the survival improvements from these actions are actually accruing as predicted, and what concrete actions the agencies have taken to compensate for any shortfall in either actions or survival improvements. While the Progress Report asserts at a number of points that “[r]esults indicate the benefits from the RPA actions implemented to date are likely accruing as expected,” see, e.g., 2010 Progress Report, Sec. 1 at 5, the Report provides no clear basis for this conclusion, let alone the kind of information that would allow an independent review and evaluation of the conclusion. Consequently, neither the Court, the parties, nor anyone else can assess the accuracy of the 2010 Progress Report’s confident and rosy assessment.

What NWF can and does provide below is evidence culled from the 2010 Progress Report and other sources that indicate implementation of the 2008/2010 BiOps is not proceeding as predicted for many RPA actions, that the Report obscures these shortcomings, and that evidence which undermines or conflicts with the action agencies’ upbeat assessment has been

ignored. This evidence leaves no alternative but to conclude that, if federal defendants are left to their current RPA and approach to evaluating its implementation, we will never be able to verify, or even know, whether the RPA is achieving the salmon survival improvements the 2008/2010 BiOps indicate are necessary to avoid jeopardy.

This would be a profound enough problem by itself. The action agencies, however, have compounded this fundamental shortcoming by taking the position that the Court found only a minor flaw in the 2008/2010 BiOps that can easily be remedied without any serious reexamination of the opinion or RPA, merely by “tighten[ing] up on the habitat program beginning in 2014.” Federal Joint Statement on Salmon Plan Ruling (Aug. 2, 2011), available at <http://www.piersystem.com/go/doc/1582/1153451>. Apparently, federal defendants attach no significance to the Court’s finding that:

NOAA Fisheries shall produce a new biological opinion that reevaluates the efficacy of the RPA in avoiding jeopardy, identifies reasonably specific mitigation plans for the life of the biological opinion, and considers whether more aggressive actions, such as dam/removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy[.]

Opinion and Order at 20, or the Court’s conclusion that:

Coupled with the significant uncertainty surrounding the reliability of NOAA Fisheries habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, NOAA Fisheries approach to these issues is neither cautious nor rational[.]

Id. at 17.

Consequently, NWF respectfully asks the Court to take two steps, both within the context of the current remand, to bring sufficient accountability to the remand to ensure that it results in a scientifically sound and legally adequate revised biological opinion:

- (1) The Court should appoint a settlement Judge or Magistrate Judge to meet with plaintiffs and federal defendants to work to resolve the scope of, and

issues that NOAA will address in developing, a biological opinion by January 1, 2014; and,

- (2) The Court should appoint a panel of independent scientific experts to review RPA implementation to date and any other information these experts determine is relevant, in order to evaluate (a) whether and to what extent it is possible to objectively and reliably assess RPA implementation in light of the specific predictions in the 2008/2010 BiOps and the lack of specific actions; (b) whether and to what extent the action agencies have provided verifiable and independently reviewable information about RPA implementation; and (c) whether and to what extent RPA implementation is achieving the survival improvements necessary to avoid jeopardy.

These steps are necessary to ensure that the remand is successful. As explained further below, they also can be implemented within the Court's authority to supervise the remand without intruding into NOAA's discretion regarding preparation of a revised biological opinion.

DISCUSSION

I. THE 2010 PROGRESS REPORT FAILS TO REVEAL WHETHER RPA IMPLEMENTATION IS ON TRACK AND ACHIEVING THE IMPROVEMENTS IN SALMON SURVIVAL NECESSARY TO AVOID JEOPARDY.

The 2010 Progress Report is long on unverifiable generalities and short on specifics when it comes to implementation of the RPA actions and the salmon survival increases that are a result of those actions. This impenetrable vagueness is apparent in the discussion of tributary habitat actions, estuary measures, and other RPA actions like predator control and kelt reconditioning for which significant survival improvements are predicted as part of the basis for the no-jeopardy findings in the 2008 and 2010 BiOps.

A. 2010 Progress Report on Tributary Habitat Actions.

For RPA action 34, the suite of tributary habitat actions identified for implementation from 2007 through 2009, the 2010 Progress Report states: "This RPA action has been completed. The final report is found in the 2009 FCRPS Annual Progress Report." 2010 Progress Report, Sec. 2 at 44. The 2009 Progress Report, however, does not include any identifiable "final report"

on RPA action 34 or anything similar to one. Instead, Section 1 of the 2009 Report provides the same kind of generalities about tributary habitat actions as the 2010 Report. Compare 2010 Progress Report, Sec. 1 at 15-18 (describing illustrative actions and providing graphs for total acres, stream miles, passage barriers, and flow restored) with 2009 Progress Report, Sec. 1 at 13-15 (similar descriptions and graphs).

Section 2 of the 2009 Report then states for RPA action 34, “Actions scheduled for completion in 2007-2009 that had implementation delays were carried forward to the 2010-2012 period; the associated benefits are included in the expert panel estimates for the 2010-2012 implementation cycle. . . . [A]ctions implemented in the 2007-2009 implementation cycle with funding and technical assistance from the Action Agencies are listed in Section 4, Attachments 1 through 4.” 2009 Progress Report, Sec. 2 at 29. This statement hardly supports the conclusion in the 2010 Progress Report that RPA action 34 “has been completed.” 2010 Progress Report, Sec. 2 at 44 (emphasis added). It indicates instead that at least some – and possibly many – of the tributary habitat actions identified for implementation from 2007 through 2009 were *not* completed and had to be “carried forward” in some fashion.

Further, examination of Section 4, Attachments 1 through 4 of the 2009 Progress Report, to which the above statement from Section 2 of the 2009 Report refers, sheds no additional light on the claim that the tributary habitat actions in RPA 34 have been completed. Attachment 1 lists numerous habitat and other projects but with *no* accompanying information about their status, let alone the share of the predicted salmon survival improvements for 2007-2009 habitat actions they have provided. Compare 2009 Progress Report, Sec. 4, Att. 1 with 2008 BiOp, RPA 34 at 44-46 (Table 5) (listing specific survival improvements by population for 2007-2009 habitat actions). The 2009 Progress Report, Section 4, Attachment 2 provides a summary of total

miles, acres, barriers, and flow improved by habitat actions from 2007 through 2009 for the various populations and ESUs but again with *no* indication of whether these totals are what the RPA required, what the survival improvements associated with these totals might be, or whether, whatever the results may be, they are what was expected from these projects.

Attachment 3 also lists numerous projects with accomplishments for some, see, e.g., 2009 Progress Report, Sec. 4, Att. 3 at 74 (listing for project 200703500, “5.15 miles riparian fencing installed; 5.8 riparian miles planted”), but with many others listed as “[i]mplementation deferred” or “under consideration to assess fish benefits,” id., or similar statements regarding analysis rather than implementation, see, e.g., id. at 73 (for project 200703400, “[p]roject . . . pending inventory, assessment, and prioritization”). Even for projects that appear to have been implemented, there is no indication of how the results compare to expectations (was project 200703500 always planned for about five miles of fencing and planting?), let alone whether whatever implementation has occurred is producing the anticipated survival improvements. In short, Attachment 3 provides some information about the implementation of particular projects but no context for this information – and certainly no indication that all of the projects identified for implementation from 2007 through 2009 have “been completed.” See 2010 Progress Report, Sec. 2 at 44. In fact, Attachment 3 to the 2009 Progress Report shows just the opposite.³

The statement in the 2010 Progress Report that RPA action 34, implementation of the tributary habitat projects specifically identified for the 2007-2009 period, “has been completed,” appears to be either seriously misleading or fundamentally incomprehensible. This is no small matter: the habitat actions in RPA 34 were the most nearly specific tributary habitat actions

³ Attachment 4 to Section 4 of the 2009 Progress Report lists projects that received technical assistance from the BOR and also provides no basis for the statement in the 2010 Progress Report that even this small subset of actions “has been completed.”

actually identified in the action agency biological assessment that formed the basis for the 2008 BiOp and they were predicted to provide both specific and significant survival improvements for many populations of ESA listed salmon and steelhead. See 2008 BiOp, RPA Action 34, Table 5 at 44-46 (predicting survival improvements from 4% to 12% for a number of priority populations and even higher improvements for a number of other populations). A Progress Report that asserts this RPA action “has been completed” and cites a prior Report which sheds no meaningful light on the results of the action leaves the Court, the parties, and the region in the dark.⁴

Nor is this the only unilluminating aspect of the 2010 Progress Report’s discussion of habitat measures. For tributary habitat actions from 2010 through 2013, the current cycle of implementation for RPA action 35, the Report says, “[t]he status on the progress of these projects for 2010 is presented in Section 3 of this annual progress report and in Section 1, figures 13 to 17 and associated text.” 2010 Progress Report, Sec. 2 at 45. Section 1 of the 2010 Report, figures 13 to 17 and associated text, provide the total number of acre-feet of water, miles of stream complexity, riparian acres, fish screens, and miles of habitat made accessible across the entire 2008/2010 BiOp action area in 2010 through tributary habitat work. As with past progress reports that provide similar summary information, it is not possible to connect this description of “progress” to either specific actions for 2010 to 2013 or, more importantly, to the assumptions

⁴ The 2010 Progress Report does indicate that there has been additional “expert panel” review of limiting factors and tributary habitat actions for *future* implementation, 2010 Progress Report, Sec. 2 at 45-46, and that this expert panel process also “suggest[ed] that habitat quality improvement estimates for 2007-2009 actions were reasonable.” Id., Sec. 2 at 46. While the 2010 Report provides no documentation of this review, and while neither the expert panel process itself nor its results have ever been independently reviewed, it remains fundamentally unclear and uninformative what a “suggestion” that estimates were “reasonable” actually means in terms of either habitat projects implemented or population-specific survival improvements for RPA action 34. Moreover, the ESA does not “suggest” that federal action avoid jeopardy; it requires that they do so.

and predictions of the 2008/2010 BiOps.

Section 3 of the 2010 Progress Report does not solve this problem. It contains attachments broadly similar in form to those in the 2009 and prior Progress Reports; for example, Attachment 2 provides total habitat information similar to that in Attachment 2 of the 2009 Report. Attachment 3 to Section 3 of the 2010 Report describes “Limiting Factors to Be Addressed in 2010-12” by population and ESU through tributary habitat actions and lists “Projects Associated with Planned Metrics,” although it is not clear whether these are some or all of the tributary habitat projects for the 2010-12 period, how these actions correlate with predicted survival improvements, or any indication of the extent to which these projects are carry-overs from the 2007-2009 period or new projects for 2010-12. To its credit, Attachment 3 does include a “Summary of 2010-12 Planned Metrics” that indicates what habitat modifications the “associated” habitat projects are supposed to accomplish, although again it is unclear whether the listed projects are expected to accomplish only some or all of the planned metrics.

Further, the tributary habitat accomplishments for 2010 reported in Attachment 3 in a column labeled “2010 Completed Metrics,” frequently appear to have little to do with the summary of planned metrics in the table. For example, for the Lostine/Wallowa River population of Snake River spring/summer Chinook, Attachment 3 indicates four planned metrics (access to instream habitat, wetland acres, floodplain habitat, and stream channel), none of which include the metrics reported as completed (protected water flow and treated riparian miles). The situation is similar for the Grand Ronde River upper mainstem population of the same ESU where the planned metrics involve treating miles of stream channel, adding structure to the stream and road removal but the completed metrics involve “treating” floodplain habitat, instream habitat, riparian habitat, and roads. In addition, for many populations, the entry for

“2010 Completed Metrics” reads “[n]o habitat metrics completed in 2010.” Whether the apparent disconnect between the language about the planned metrics and the completed ones is due to imprecise descriptions or whether the actions taken differ from those planned (and the consequences if they are) is unclear, as is the expectation for 2011 and beyond for those metrics where nothing has been completed to date. What is clear is that the 2010 Progress Report fails to provide any basis for actually assessing whether implementation of RPA 35 is achieving the tributary habitat and survival improvements the 2008/2010 BiOps’ jeopardy analysis assumed it would.⁵

B. 2010 Progress Report on Estuary Habitat Actions.

The 2010 Progress Report for estuary habitat actions is, if anything, even less informative than the report for tributary actions – or to the extent it is informative, it suggests estuary habitat actions are falling even further behind their already seriously delayed pace. First, the 2010 Report, unlike the 2009 Report, does not even say how many estuary projects were completed or are in planning. Compare 2010 Progress Report, Sec. 10 at 18-20 (general narrative) with 2009 Progress Report, Sec. 1 at 15 (stating that the action agencies completed seven “on-the-ground” estuary projects in 2009 with another nine “in the planning and development phase”). In fact, Section 1 of the 2010 Report only mentions one project, the Haven Island Restoration Project, which apparently alone accounts for two of the four entries in Table 5 summarizing total estuary habitat progress for all of 2010. Compare 2010 Progress Report, Sec. 1 at 19 (narrative description of the Haven Island Project reporting feet of tidal channels reconnected or opened) with id. at Table 5 (reporting same numbers in summary table for reconnecting and opening

⁵ The 2010 Progress Report also contains a discussion of tributary habitat research, monitoring and evaluation, see, e.g., 2010 Progress Report, Sec. 1 at 25, Sec. 2 at 88-99, which describes numerous data collection and research efforts but few – if any – results and none that indicate whether RPA implementation is on track and producing the predicted survival improvements.

channels). Moreover, it appears that no estuary habitat was acquired for protection in 2010 since the graph for this accomplishment that appears in the 2009 Progress Report is omitted from the 2010 Report, compare 2009 Progress Report, Sec. 1 at 16 (Figure 18, Estuary Habitat Acquired 2002-2009) with 2010 Progress Report, Sec. 1 at 19 (no similar figure), and habitat acquisition is not mentioned in the 2010 Report narrative. Attachment 5 to Section 3 of the 2010 Progress Report confirms the very limited nature of estuary habitat action in 2010. See 2010 Progress Report, Sec. 3, Att. 5 (listing 24 estuary habitat projects as “under contract” but only 3 with “2010 completed metrics” and listing 27 projects as “under development” with 20 of these listed with their location “TBD” and 7 with locations identified only by river “reach”).

What the 2010 Progress Report does offer in the place of information about estuary habitat actions are some remarkably opaque statements about planning, development, and further study accompanied by many new acronyms. Thus, the Report states broadly that:

As part of an overall adaptive management strategy that assists the Action Agencies in identifying and responding to new information arising during implementation, the Action Agencies addressed the delays in project implementation in the estuary by significantly increasing project development efforts to increase on-the-ground projects and accelerate the pace of implementation.

2010 Progress Report, Sec. 1 at 19-20. It then goes on to explain:

[T]he Expert Regional Technical Group (ERTG) addressed improvements to the quantitative methodology for scoring ecosystem restoration projects for Survival Benefit Units (SBUs). This enhanced scientific rigor for restoration planning and development in the estuary.

Id. at 20.

The Action Agencies also developed a Program Management Plan (PGMP) for the Estuary Habitat Restoration Action Plan. The PGMP provided definition to how the Action Agencies would enhance restoration project development.

Id.

Projects for future implementation are continuing to be identified using other emerging tools such as the Columbia River Estuary Ecosystem Classification System (CREEC). . . . In 2010, the Action Agencies hosted a scientific workshop to begin applications of sections of the CREEC that have been completed.

Id. There is no attempt to connect these various new planning efforts and study groups to the predicted estuary survival improvements on which the 2008/2010 BiOps rely.

Of course, none of the information about estuary habitat study and planning in the 2010 Progress Report addresses, or even directly acknowledges, the blunt assessment of a major shortfall in estuary habitat actions and survival benefits through 2009 set out in the Action Agencies' FCRPS 2010-2013 Implementation Plan. See Implementation Plan at 61 (included in 2010 AR as BOR AR BRS001333 at 001406) (for 2007-2009 action agencies only achieved 24% of estuary survival benefits for ocean-type fish and 26% for stream type-fish); see also Opinion and Order at 13-14 (noting problems with estuary habitat actions). Nor does it even attempt to explain how all of the new *study* tools will actually improve estuary *habitat* at a rate sufficient to fill the shortfall created by these past failures, meet current improvement requirements, and achieve the dramatically increased progress necessary to catch up to the assumptions of the RPA and avoid jeopardy. See NWF Response to Statement of Facts at ¶ 6 (Docket #1623) (filed Jan. 21, 2011) (explaining that “to make up for this significant shortfall in 2007-2009 and also achieve the predicted survival improvements for 2010-2013, on an annual basis, the agencies will need a 494% increase in actual accomplishment of survival benefit units for ocean-type fish and a 560% increase for stream-type fish over their 2007-2009 actual results.”). The plain fact is that for estuary habitat actions, “Progress” is the name of a neighborhood near Portland, not something that is occurring in the estuary.

C. Other Important RPA Actions Also Appear to Be Off-Track.

A number of other important RPA measures that were supposed to produce specific,

numeric survival improvements in order to avoid jeopardy also appear to be off-track, although the 2010 Progress Report also seeks to obscure this point behind promises of further study and future effort.

For example, the 2008/2010 BiOps rely on predicted survival improvements from control of avian predators, specifically Caspian terns. See Declaration of Frederick E. Olney (“Olney SJ Dec.”) at ¶¶ 75-80 (Docket #1501) (filed Sept. 19, 2008) ; Second Declaration of Frederick E. Olney (“Olney SJ Reply Dec.”) at ¶¶ 22-28 (Docket #1626) (filed Nov. 25, 2008) (both discussing avian predation issues); 2010 BiOp § 2 at 90-91(finding predation was worse than originally predicted in 2008 BiOp). As NWF and others have pointed out, however, double-crested cormorant predation has far outstripped tern predation and continues to grow, yet this mortality is not addressed in the RPA and there are no concrete actions to address it. See Olney SJ Reply Dec. at ¶¶ 23-28; NWF’s Excerpts of Record (Docket #1584) (filed Oct. 27, 2010) at ER 152 (Sanderson 3/24/10), Att. at 6 (information not considered in 2008 BiOp “indicate[s] that ... tern predation rates are constant to increasing, cormorant predation is increasing and pelican populations represent a potential new predator species. ... Cormorant predation on East Sand Island now surpasses predation by Caspian terns”). The 2010 Progress Report confirms this unresolved and problematic pattern. It reports, for example, that “[c]aspian terns and double-crested cormorants consumed an estimated 24.3 million, or about 16 percent, of the [juvenile salmon and steelhead] to reach the estuary during the 2010 outmigration.” 2010 Progress Report, Sec. 1 at 12. It then reports as a positive that the tern colony on East Sand Island was “significantly smaller than in 2009 and the smallest the colony has been since it became established in 2001.” Id.

This apparent “progress,” however, is swamped by two facts: (1) smolt consumption by

East Sand Island terns in 2010, despite the smaller colony, was “not significantly different than the smolt consumption estimates the previous two years” and, in fact, was at the same level as the average for the period from 2000 to 2010, id. (2010 consumption of 5.3 million juveniles versus a 2000 to 2010 average of 5.3 million juveniles); and (2) more importantly, double-crested cormorant predation continues to grow, with the East Sand Island cormorant colony growing by about 10% per year and consuming almost *four times* as many juvenile salmon as Caspian terns, id., Sec. 1 at 12-13 (tern predation of 5.3 million smolts versus cormorant predation of 19.2 million smolts).⁶ The only action to address the growing cormorant predation remains further study, id., Sec. 1 at 13 (“[m]anagement options to reduce or limit smolt losses to the double-crested cormorant colony on East Sand Island are under consideration”); see also 2010 BiOp § 2 at 90-91 (acknowledging that cormorant predation was not reflected in the 2008 BiOp jeopardy analysis); id. at 90, 91 (acknowledging that efforts to reduce this predation “have not been successful” and show “no evidence” of success), and there has not even been any actual progress in reducing tern predation below levels that existed before the 2008 BiOp. Again, this is hardly a picture of progress or increased salmon survival as predicted in the 2008/2010 BiOps.

The story is little different for two other measures, kelt reconditioning and improved hatchery practices. While kelt reconditioning affects only some steelhead populations, it was supposed to provide a survival improvement of 6% for these populations for the overall RPA to avoid jeopardy. See 2008 BiOp at 8.5-56 (Table 8.5.5-1); Olney SJ Dec. at ¶¶ 86-92; Olney SJ Reply Dec. at ¶¶ 26-29. To date, there has been no report of actual survival increases from kelt reconditioning and the 2010 Progress Report indicates that after nearly three years this action is

⁶ Avian predation up-river from the estuary by both terns and cormorants also continues. See 2010 Progress Report, Sec. 1 at 13 (discussing tern and cormorant colonies and predation but without providing any context).

still a matter of planning and study:

BPA and [the] Corps completed the 2010 Kelt Management Plan (KMP) and released it for comment in December. . . . It includes a review and synthesis of previous research on kelt migration studies through the hydrosystem as well as kelt reconditioning efforts. . . . Beginning with the 2011 KMP, . . . the focus will shift from planning to progress and adaptive management actions. . . . BPA continued to fund CRITFC to prepare a Master Plan for kelts, . . . which will apply to Snake River kelts [and] is part of a three-step technical review process required by the Northwest Power and Conservation Council[] for artificial propagation projects

2010 Progress Report, Sec. 1 at 11-12.

Likewise, the 2008 BiOp RPA action 39 required preparation of revised hatchery genetic management plans for dozens of hatcheries in the basin to reduce the harmful effects of these facilities on the survival and recovery of ESA-listed wild salmon and steelhead, including a specific schedule for completing the “HGMPs” and individual consultations on them. See 2008 BiOp, RPA 39 at 53-54 (HGMPs for all hatcheries to be completed by February 2010 and all consultations to be completed by August 2010). The 2010 Progress Report makes no mention of this schedule or the consequences of a failure to meet it. Instead, it reports that “[i]n 2010, the action agencies facilitated HGMP development to assist the [hatchery] operators in completing their ESA compliance,” 2010 Progress Report, Sec. 1 at 20-21, and subsequently confirms that *no* ESA consultations on hatchery HGMPs *anywhere* in the Basin have yet been completed and even some HGMPs are not expected until “late 2011 and 2012,” id., Sec. 2 at 55-56. This important RPA action appears to be well off-track with no apparent consequences. But see NWF v. NMFS, 524 F.3d 917, 933 & n.12, 935 (9th Cir. 2008) (noting in connection with Snake River sockeye that long-term reliance on hatchery program is harmful to wild salmon survival and recovery).

As the Court found, the 2008/2010 BiOp jeopardy analysis relies on unspecified RPA

actions, primarily in tributary and estuary habitat, to offset the harmful effects of dam operations and avoid jeopardy. Opinion and Order at 12-17. Consistent with this insufficiently specific approach, the 2010 Progress Report offers broad generalities and observations about progress with respect to the various RPA actions, coupled with lengthy tables that provide many details but no context or clear connection between the details and the specific predictions of the RPA and jeopardy analysis. Moreover, while the Report consistently seeks to paint a positive picture of progress across the RPA, it is difficult for the action agencies to obscure the fact that implementation of many critical RPAs, from tributary and estuary habitat actions to hatchery reforms, are not actually proceeding as predicted in the 2008 BiOp. Under these circumstances, what is sorely missing is a methodical, step-by-step appraisal, that can be independently evaluated, of what actions were required by the 2008/2010 BiOps, which have been taken, and what they have accomplished in terms of achieving the specific salmon survival increases that the 2008/2010 BiOps concluded are necessary to avoid jeopardy. If this pattern continues, neither the parties, nor the Court, nor the region will be able to determine, at the 2013 check-in or at any point during the remaining term of the 2008/2010 BiOps, whether the RPA achieves even the federal defendants' erroneous prediction that it will avoid jeopardy.

D. The 2010 Progress Report Fails to Address Important and Relevant Information About Salmon Survival.

Much of the remainder of the 2010 Progress Report, outside the actions discussed above, is devoted to summaries of adult and juvenile salmon return data, information about the 2010 water year, and various dam operations. See, e.g., 2010 Progress Report, Sec. 1 at 4-11; id., Sec. 2 at 4-42. This discussion and the supporting materials, however, are selective in the information they present and fail to identify both information and analyses that are at odds with the positive picture the action agencies prefer.

For example, the Report talks about how the 2010 water year was below average although a rain spike in early June increased flows before they again receded. 2010 Progress Report, Sec. 1 at 6. What the Report does not say is that during the majority of the juvenile fish outmigration in April and May, flows were below the 2008 BiOp target flows for the spring juvenile migration. Seasonal juvenile fish migration target flows also were not met during the spring period at Lower Granite or the summer period at either Lower Granite or McNary, although the 2010 Progress Report fails to mention this as well. Further, the Report says little about spring or summer spill, ignoring the fact that, with lower flows in 2010, the proportion of spill was actually greater at those projects that spill to a fixed amount – and that juvenile survival at these low flows in 2010 was much higher than in similar low flow years without spill.⁷ Nor does the Report mention that spill actually can be increased and that studies now indicate it should be increased to improve juvenile survival. The Report also does not mention analyses which show that flow and spill are the key variables, including ocean conditions, that predict smolt-to-adult returns and first-year ocean survival. In fact, the Report disregards data on smolt-to-adult return rates almost entirely and chooses not to address additional information that has become available on delayed mortality and still other analyses regarding the effects of bypass and limits on the use of data from acoustic tag studies. See Fish Passage Center 2010 Annual Report at 49 (explaining that acoustic tag studies “do not assess the impact of various passage structures and passage operations on the other life cycle stages such as smolt to adult returns. Recent final results . . . indicated that acoustic tag results at the project did not reflect the smolt

⁷ The only real mention of spill is a note that “[y]earling Chinook salmon and steelhead migration rates through the hydropower system were near average in 2010 Relatively high spill proportions and the use of surface collectors at most projects likely shortened travel times and helped compensate for the lower water velocities associated with lower flow levels.” 2010 Progress Report, Sec. 1 at 6.

to adult return rate by route of passage.”), available at http://www.fpc.org/documents/annual_FPC_report/FPC%202010%20ANNUAL%20REPORT-FINAL.pdf. See also *id.* at A-207 (FPC Memo to ISAB) (“The disparity between smolt-to-adult returns from route of passage studies and the acoustic tag studies is a critical to future hydrosystem operations management decisions because at the present time managers are relying on acoustic tags to evaluate fish passage performance without considering the evidence that delayed mortality may be associated with specific routes of passage.”).

In addition, while generally claiming that adult fish returns are up nearly across the board, the 2010 Progress Report only notes in passing that “about 80 percent of all returning adult salmon are of hatchery origin....” 2010 Progress Report, Sec. 1 at 4. The Report makes no attempt to separate out the numbers of wild fish returning, compare their status and trends to previous years, or to ICTRT or recovery planning targets, or acknowledge the crucial point that it is these wild fish numbers that truly matter for Endangered Species Act purposes.

All of these problems further highlight that the 2010 Progress Report is a carefully constructed presentation of the action agencies’ preferred views, not an unbiased assessment of scientific concerns or issues – let alone progress – in implementing the RPA and avoiding jeopardy. The agencies avoid or minimize mention of information that would raise doubts about the efficacy of the RPA and they neglect to include analyses or information that might lead to a need to modify either the analysis or the conclusions of the 2008/2010 BiOps. This kind of salesmanship ultimately will serve no one well, least of all the ESA-listed salmon and steelhead that are at the heart of this controversy.

II. FEDERAL DEFENDANTS HAVE EMBARKED ON A VERY NARROW REMAND THAT WILL LEAD TO ANOTHER FAILED BIOP.

In addition to the problems with the 2010 Progress Report described above, the direction

federal defendants have indicated they will take on remand in response to this Court's Opinion and Order regarding the 2008/2010 BiOps is unlikely to produce a revised biological opinion that is scientifically and legally sound. Since the Court's ruling, regional federal agency leaders have been attempting to downplay and limit the scope of the decision, apparently in an unfortunate and misguided attempt to preserve the status quo.

On the day of the Court's decision, for example, the regional offices of NOAA Fisheries, Bonneville Power Administration, the Corps of Engineers, and the Bureau of Reclamation issued a joint statement that they were "encouraged by the Court's basic conclusion that the biological opinion should remain in place through the end of 2013, that it is providing 'adequate protection for listed species' and that we should tighten up on the habitat program beginning in 2014."

Federal Joint Statement on Salmon Plan Ruling (Aug. 2, 2011), [available at](http://www.piersystem.com/go/doc/1582/1153451)

<http://www.piersystem.com/go/doc/1582/1153451>. The Northwest Regional Administrator for NOAA Fisheries subsequently was quoted saying, "I think it is fundamentally encouraging that the heart of his opinion was to find that the (recovery) plan is sound." Judge Rejects Salmon-Protection Plan as Too Vague, [Seattle Times](http://seattletimes.nwsourc.com/html/localnews/2015801139_salmondams03m.html) (Aug. 3, 2011), [available at](http://seattletimes.nwsourc.com/html/localnews/2015801139_salmondams03m.html)

http://seattletimes.nwsourc.com/html/localnews/2015801139_salmondams03m.html. In another story, NOAA Fisheries was portrayed as "noting" that "[Judge] Redden endorsed the plan through 2013 . . . and his conclusions about habitat were 'totally understandable.' 'He ordered us to tighten up on the habitat program after 2013, and that's fine,' Stelle said. 'We were intending to do it anyway.'" Federal Judge Shoots Down Plan for Columbia River Basin Dams and Salmon for Third Time, [The Oregonian](http://www.oregonlive.com/environment/index.ssf/2011/08/judge_james_redden_shoots_down.html) (Aug. 2, 2011), [available at http://www.oregonlive.com/environment/index.ssf/2011/08/judge_james_redden_shoots_down.html](http://www.oregonlive.com/environment/index.ssf/2011/08/judge_james_redden_shoots_down.html).

These statements, and the narrow approach to a remand that they reveal, appear to

disregard much of what the Court had to say about the 2008 and 2010 BiOps. In finding that these BiOps were arbitrary and capricious for their “entire ten-year term,” Opinion and Order at 17 (emphasis in original), the Court made clear that the agencies’ fundamental approach to avoiding jeopardy required re-examination. These structural problems are rooted both in the agencies’ inability to identify and implement mitigation measures, as well as their inability to reliably predict and verify any salmon survival improvements that may accrue. Specifically, the Court found that “NOAA Fisheries’ analysis fails to show that expected habitat improvements – let alone the expected survival increases – are likely to materialize,” id. at 15, and that “[t]hus far, Federal Defendants have not implemented the habitat actions necessary to avoid jeopardy [and] there is no indication that they will be able to identify and implement the actions necessary to catch up,” id. at 16.

The Court also specifically noted that “the lack of scientific support for NOAA Fisheries’ specific survival predictions is troubling,” id. at 19, and further noted that the government’s own scientists, “the independent experts who reviewed [the plan], and the Independent Scientific Advisory Board (“ISAB”) have expressed skepticism about whether those benefits will be realized,” id. at 19-20. Overall, the Court found that “[c]oupled with the significant uncertainty surrounding the reliability of NOAA Fisheries’ habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, NOAA Fisheries’” approach to these issues is “neither cautious nor rational.” Id. at 17.

Indeed, in its Opinion and Order, the Court specifically directed the federal agencies to produce a revised biological opinion “that reevaluates the efficacy of the RPAs in avoiding jeopardy, identifies reasonably specific mitigation plans for the life of the biological opinion, and considers whether more aggressive action, such as dam removal and/or additional flow

augmentation and reservoir modifications are necessary to avoid jeopardy.” Id. at 20.

As the long history of this litigation confirms, the problems with the 2008/2010 BiOps are the same ones that have plagued federal defendants’ approach since at least the 2000 BiOp. NWF v. NMFS, 254 F. Supp. 2d. 1154, 1205, 1207-08 (D. Or. 2003) (rejecting 2000 FCRPS BiOp because it relied on offsite habitat mitigation that was uncertain, speculative, and not reasonably certain to occur). Federal defendants’ narrow characterization of the Court’s most recent decision – and their correspondingly narrow view of the task before them – is all too likely to mean that once again the region will waste another two years tweaking and dabbling at the margins of a flawed strategy that disregards the best available science and cannot comply with the law.

As the Court has previously observed at the outset of a remand:

I should not and will not, however, allow another loss of valuable time as occurred during the remand of the 2000 Biological Opinion (2000BiOp). At the outset of that remand, NOAA and the Action Agencies expressed optimism in accomplishing what I had then ordered and they agreed that one year would be adequate. . . . NOAA then abandoned the 2000BiOp and drafted yet another, the fatally flawed 2004BiOp. The entire remand time was lost and wasted.

NWF v. NMFS, CV-01-640-RE, Opinion and Order of Remand (Docket #1087) (Oct. 7, 2005) at

4. The longer the federal agencies wait to seriously address the core problems with their approach, the more likely it is that the decision due in 2014 will again plunge the region into a very avoidable battle over the same issues the Court has just decided.⁸

NWF, the State of Oregon, and the Nez Perce Tribe have all urged the federal agencies to

⁸ The fact that federal defendants recently also have filed a “protective” appeal of the Court’s Opinion and Order regarding the 2008/2010 BiOps suggests that the agencies may be unwilling to abide by even their very narrow interpretation of the Court’s decision. See Notice of Appeal (Docket #1858) (filed Sept. 30, 2011). While this step heightens NWF’s concern that federal defendants are still unwilling or unable to recognize and address the problems with their approach to developing an RPA for FCRPS operations, NWF is confident that the Ninth Circuit will affirm the Court’s rejection of the 2008/2010 BiOps.

change this approach and address these core issues. Others in the region and across the country similarly have urged federal defendants to change course:

Get all the grievances and hard feelings in one room, and work them out
Better to have informed players reconcile their differences toward a mutually agreeable solution. History says it can happen.

Seattle Times, Opinion (Aug. 3, 2011), available at http://seattletimes.nwsourc.com/html/editorials/2015812400_edit04salmon.html.

It's time now for the stakeholders in this dispute to sit down at the same table, something they have never done. They include the National Marine Fisheries Service and the Bonneville Power Administration, two federal agencies that have offered only incremental steps toward fish recovery. They also include environmental groups, fishing and farming interests, Indian tribes and two state governments with differing views, Oregon favoring more aggressive actions than Washington. . . . Jane Lubchenco, the administrator of the National Oceanic and Atmospheric Administration, which oversees the fisheries service, should convene such a group, with White House backing, to reconcile differences and devise an acceptable plan. Otherwise, it's back to the legal wars, which benefit no one, least of all the fish.

New York Times, Opinion (Aug. 11, 2011), available at http://www.nytimes.com/2011/08/12/opinion/the-salmon-deserve-better.html?_r=1&scp=1&sq=redden&st=Search.

While it is axiomatic that the Court cannot prescribe the content of a revised biological opinion or RPA for NOAA or the action agencies, the Court also need not be a mere bystander as yet another train wreck unfolds. It is well within the Court's authority to require plaintiffs and federal defendants to meet with a settlement Judge or Magistrate Judge to discuss their differing views about the scope of a remand in an effort to narrow or resolve those differences. The sooner this can occur, the less likely it is that federal defendants will become committed to a course of action that ultimately fails to resolve this case. NWF is fully prepared to participate in such an effort.

III. THE COURT SHOULD TAKE STEPS NOW, WITHIN THE CONTEXT OF THE REMAND, TO BETTER ENSURE A SUCCESSFUL OUTCOME.

As the Court noted in its Opinion and Order regarding the 2008/2010 BiOps, it has the authority to retain jurisdiction during a remand, Opinion and Order at 20, and has chosen to exercise that authority in light of past agency actions and their inability – or unwillingness – thus far to produce a scientifically sound and legally adequate biological opinion for FCRPS operations, id. at 21. The Court has also recognized that the parties may seek adjustments to the remand in connection with addressing the action agencies’ annual implementation reports. Id.

Here, NWF seeks two procedural measures, rather than substantive relief, in an effort to work within the context of the remand the Court has prescribed, while also better ensuring a successful outcome. Specifically, in light of the problems with the 2010 Progress Report discussed above and the defendants’ narrow view of the Court’s decision, NWF respectfully asks the Court to:

- (1) Appoint a settlement Judge or Magistrate Judge to meet with plaintiffs and federal defendants to work to resolve the scope of, and issues that NOAA will address in developing, a revised biological opinion by January 1, 2014; and
- (2) Appoint a panel of independent scientific experts to review RPA implementation to date and any other information these experts determine is relevant, in order to evaluate (a) whether and to what extent it is possible to objectively and reliably assess RPA implementation in light of the specific predictions in the 2008/2010 BiOps and the lack of specific actions; (b) whether and to what extent the action agencies have provided verifiable and independently reviewable information about RPA implementation; and (c) whether and to what extent RPA implementation is achieving the survival improvements necessary to avoid jeopardy.

The first measure, appointment of a settlement Judge or Magistrate Judge, is appropriate in the context of this case, the Court’s ruling, and the parties’ responses to it. The purpose of such a step is not to compel a particular outcome, but to provide a setting in which plaintiffs and federal defendants are called on not only to present their views, but also to seek ways of

reconciling them under the authority and guidance of a judicial officer. NWF is confident that neither plaintiffs nor federal defendants are interested in wasting scarce judicial resources. Court supervised discussions regarding the scope of and issues to address in the current remand thus provide both the best inducement and the best opportunity to secure a successful outcome.

The second of these measures is equally important and is aimed at providing additional, independent information about the RPA and its implementation, a critical issue in its own right and in terms of the actions that may need to be considered and taken in preparing a revised biological opinion. An independent, expert review would not, however, require the action agencies or NOAA to take any specific steps in preparing a revised biological opinion or otherwise interfere with their discretion on remand. Rather, it would provide the Court and all parties, as well as the region, with important information and an outside perspective on these issues which NOAA and the action agencies could then consider. Securing such an independent review also is consistent with questions and concerns the Court has previously raised in this case. See Letter to Counsel re: August 21, 2008 Status Conference at 2 (Aug. 7, 2008) (Docket #1261) (“If the court finds that the 2008 FCRPS BiOp is fatally flawed, does the court have the authority to appoint an independent scientific panel to assist the court and the parties during potential settlement negotiations, and/or to propose additional or different mitigation measures to assist listed species? Such a process might assist the court and the parties in reaching a settlement agreement, and may obviate the need to vacate the 2008 FCRPS BiOp in its entirety.”); Letter to Counsel at 3 (Docket #1699) (May 18, 2009) (urging federal defendants to consider “independent scientific oversight” of BiOp actions).⁹ NWF is prepared to share in the costs of

⁹ In the context of a remand, appointment of a panel of experts to review the RPA and its implementation raises none of the concerns about the scope of review of an agency action on the merits that the Court identified when NWF previously asked the Court to appoint experts under

such a panel's work, recommend names of suitable scientists to the Court, and otherwise help develop whatever steps are necessary to ensure a timely and successful review.

CONCLUSION

NWF respectfully suggests that, after allowing other parties an opportunity to respond to these comments about the 2010 Progress Report and NWF's requests for additional steps, the Court set a status conference at the Court's convenience to address the two particular procedural measures NWF seeks.

Respectfully submitted this 25th day of October, 2011.

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Fed. R. Evid. 706. See Letter to Counsel re: August 21, 2008 Status Conference at 1 (filed Aug. 7, 2008) (Docket #1261) (outlining Court's reservations about appointment of Fed. R. Evid. 706 experts in summary judgment proceedings, but noting potential advantages for injunctive relief stage and assisting parties in settlement discussions). Most obviously, the Court is no longer considering the merits of the 2008/2010 BiOps. Nor is NWF asking the Court to require federal defendants to take any particular action – or any action at all – in light of the views of these experts.