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THE HONORABLE JAMES A. REDDEN

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE,

Defendants,

and

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

Intervenor-Defendants.

Civ. No. CV 01-00640-RE

SECOND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Pursuant to this Court's December 6, 2004, Order adopting the Joint Stipulation of Plaintiffs and Federal Defendants Regarding a Schedule for Review of Revised FCRPS Biological Opinion, Fed. R. Civ. P. 15(d), and LR 15.1(b) and (c), plaintiffs National Wildlife Federation, et al. ("NWF") hereby supplement their First Amended Complaint for Declaratory and Injunctive Relief, filed July 2, 2001, and Supplemental Complaint for Declaratory and Injunctive Relief, filed July 9, 2004, in order to address new circumstances and subsequent actions by defendant National Marine Fisheries Service ("NMFS") and other federal agencies. Specifically, on November 30, 2004, NMFS issued its final Endangered Species Act – Section 7 Consultation Biological Opinion for the Consultation on Remand for Operation of the Columbia River Power System and 19 Bureau of Reclamation Projects in the Columbia Basin (the "2004 FCRPS BiOp"). The 2004 FCRPS BiOp replaces and supercedes the 2000 FCPRS BiOp which was the subject of this case and the Court's prior rulings, including its summary judgment order in National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp.2d 1196 (D. Or. 2003). For the reasons set forth more fully below, this second supplemental complaint seeks review of the 2004 FCRPS BiOp for violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq., and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 et seq.

PRELIMINARY STATEMENT

2. This action seeks review of the 2004 FCRPS BiOp which NMFS prepared through a reinitiated consultation with the U.S. Army Corps of Engineers (the "Corps"), the Bonneville Power Administration ("BPA"), and the U.S. Bureau of Reclamation ("BOR") (collectively the "Action Agencies") under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. The 2004 FCRPS BiOp addresses the effects of the Federal Columbia River Power System ("FCRPS") and nineteen BOR projects in the Columbia River basin on ESA-

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listed salmon and steelhead.[1] NMFS provided a courtesy copy of this Opinion to the Court on or about November 30, 2004, and the Opinion and related documents are also available at www.salmonrecovery.gov.

3. In a sharp departure from ESA section 7 consultations on similar proposed FCRPS actions in 1995 and 2000, the 2004 FCRPS BiOp concludes that the Action Agencies' Updated Proposed Action ("UPA") for the FCRPS projects and facilities will not jeopardize the continued existence of any of the twelve ESA-listed populations of salmon and steelhead in the Columbia River basin or destroy or adversely modify their designated critical habitat. This no-jeopardy/no-adverse modification finding rests on a novel and unprecedented re-interpretation of the ESA and its implementing regulations that includes a completely new approach to evaluating the effects of the UPA on listed salmon and steelhead. This new approach and the no-jeopardy/no-adverse modification finding based on it are arbitrary, capricious, and contrary to law for at least the reasons described below.

4. Separately, on December 18, 2004, NWF sent a 60-day notice of intent to sue the Action Agencies for parallel and additional violations of the ESA, both procedural and substantive, arising out of their implementation of the UPA. Upon the expiration of the mandatory 60-day period, and unless the Action Agencies take steps to correct their illegal

[1] The term "FCRPS" is one of convenience, not of art, and is defined differently by the federal agencies at different times and for different purposes. As used in this supplemental complaint, the term usually refers to the dams, reservoirs, and related facilities managed by the Corps, BOR, and BPA in the Columbia River basin that are addressed in the 2004 FCRPS BiOp in order to avoid confusion since that is the way the term is used by NMFS and the Action Agencies in the Opinion. This shorthand, however, does not change the nature of the federal action that should be addressed in the 2004 FCRPS BiOp. That action properly includes all of the dams, reservoirs, and related facilities managed by the Corps, BOR, and BPA in the Columbia River basin, including those in the Snake River basin above the Hells Canyon Complex dams. See infra at ¶ 47 & n.9.

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actions, NWF intends to amend this complaint to add claims for violations of the ESA and the APA against those agencies.

PARTIES

5. The plaintiffs in this action are:

A. National Wildlife Federation ("NWF"), the nation's largest conservation advocacy and education organization. Founded in 1936, NWF is a non-profit organization with its headquarters in Reston, Virginia. NWF has eleven regional offices, including the Northwestern Natural Resource Center in Seattle, Washington. NWF's mission is to educate, inspire, and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the Earth's environment in order to achieve a peaceful, equitable, and sustainable future. As part of this mission, NWF and its over 4.5 million members and supporters are dedicated to protecting and restoring the Northwest's salmon runs, including those in the Columbia and Snake Rivers.

B. Idaho Wildlife Federation, a nonprofit organization with its principle place of business in Boise, Idaho. Idaho Wildlife Federation and its 1,000 members and 24 affiliates (representing an additional 5,000 people) promote citizen support of the conservation of Idaho's wildlife and natural resources for fishing, hunting, and outdoor recreation benefiting future generations.

C. Washington Wildlife Federation, a nonprofit conservation organization based in Olympia, Washington, with members throughout the State. Washington Wildlife Federation and its approximately 400 members are dedicated to the preservation, enhancement, and perpetuation of Washington's wildlife and wildlife habitat through education and conservation.

D. Sierra Club, a national environmental organization founded in 1892 and

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devoted to the study and protection of the earth's scenic and ecological resources – mountains, wetlands, woodlands, wild shores and rivers, deserts, plains, and their wild flora and fauna. Sierra Club has some 60 chapters in the United States and Canada, including chapters in Washington, Oregon, and Idaho, and a principal place of business in San Francisco, California.

E. Trout Unlimited ("TU"), a nonprofit coldwater fisheries conservation organization with national headquarters in Washington, D.C. and a regional office in Portland, Oregon. TU is dedicated to the protection of wild trout, salmon, and steelhead fishery resources. TU has approximately 85,000 members nationwide and 8,000 members in the states of Oregon, Washington, Idaho, and Montana. TU's members live and recreate in the Columbia River basin and TU has long participated in efforts to maintain and restore Snake River and Columbia River basin anadromous fish.

F. Pacific Coast Federation of Fishermen's Associations ("PCFFA"), the largest organization of commercial fishermen on the west coast, with member organizations from San Diego to Alaska representing thousands of men and women in the Pacific fleet. Many of PCFFA's members are salmon fishermen whose livelihoods depend upon salmon as a natural resource and who, until recent fisheries closures, generated hundreds of millions of dollars in personal income within the region. PCFFA has its main office in Sausalito, California, and a Northwest regional office in Eugene, Oregon.

G. Institute for Fisheries Resources ("IFR"), a nonprofit corporation that constitutes the conservation arm of PCFFA and shares PCFFA's offices in Sausalito, California, and Eugene, Oregon.

H. Idaho Rivers United ("IRU"), a nonprofit corporation organized under the laws of the State of Idaho with a principal place of business in Boise, Idaho. IRU and its

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approximately 2,400 members throughout the State of Idaho are dedicated to the protection and restoration of Idaho's rivers and river resources.

I. Idaho Steelhead and Salmon United ("ISSU"), a registered Idaho nonprofit corporation with 2,300 members from 31 states and a board of directors from Idaho, Washington, and Montana. ISSU's members comprise a diverse group of business people, guides, conservationists, sportfishers, and concerned citizens formed to protect, preserve, and restore Idaho's anadromous fish resources.

J. The Northwest Sportfishing Industry Association ("NSIA"), dedicated to restoring and protecting the region's rivers, lakes, and streams, keeping them healthy and full of fish. NSIA is a trade association of several hundred sporting goods manufacturers, wholesalers, retailers, marinas, guides, and charter boat operators. About 60 percent of the member businesses are located in Washington, 30 percent in Oregon, and the remainder are national organizations. NSIA's principal place of business is Oregon City, Oregon.

K. Salmon for All, an organization representing a broad range of Columbia River interests including commercial fishermen and fish processors, consumers and lower river businesses, and salmon recovery advocates who support the viability of the lower Columbia commercial fishery. Based in Astoria Oregon, at the mouth of the Columbia, Salmon for All has been advocating for the responsible management of the salmon industry since 1958. Salmon for All represents about 300 active commercial fishermen, fish processors and salmon-supported businesses. Salmon for All is committed to providing ongoing education concerning the public harvest industry, taking active advocacy roles in legislative and agency fishery deliberations, and ensuring the health of the Columbia River and its responsible use by all user groups.

L. Columbia Riverkeeper, a nonprofit public interest organization, organized

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under the laws of the State of Washington, has a principal place of business in White Salmon, Washington, and an office in Hood River, Oregon. Columbia Riverkeeper, and its approximately 2,400 members and supporters, works to restore and protect the water quality of the Columbia River and all life connected to it from its headwaters to the Pacific Ocean.

M. American Rivers, a national conservation organization with its principal place of business in Washington, D.C. and a Pacific Northwest office in Seattle, Washington. American Rivers and its approximately 32,000 members are devoted to protecting and restoring the nation's outstanding rivers and their landscapes and are active in pursuing environmental safeguards in national hydropower policy.

N. Federation of Fly Fishers ("FFF"), a national organization with approximately 11,000 members, dedicated to promoting fly fishing as a recreational use of aquatic resources and to preserving, protecting, and restoring aquatic resources, including water, fauna, and riparian lands. FFF has its principal place of business in Bozeman, Montana and regional councils or chapters that encompass Washington, Oregon, Idaho, Montana, and British Columbia.

O. NW Energy Coalition ("NWEC"), an alliance of over 95 environmental, civic, and human service organizations, progressive utilities, and businesses from Oregon, Washington, Idaho, Montana, Alaska, and British Columbia. NWEC promotes energy conservation and renewable energy resources, consumer and low-income protection and fish and wildlife restoration on the Columbia and Snake Rivers. NWEC's headquarters are located in Seattle, Washington.

6. Plaintiffs and their members use the Columbia River and its tributaries throughout Idaho, Oregon, and Washington for recreational, scientific, aesthetic, and commercial purposes.

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Plaintiffs and their members derive or, but for the threatened and endangered status of salmon and steelhead in the Columbia River basin, would derive recreational, scientific, aesthetic, and commercial benefits from the existence of these species in the wild through wildlife observation, study and photography, and recreational and commercial fishing within the Columbia River basin and the Pacific Ocean. The past, present, and future enjoyment of these benefits by plaintiffs and their members has been, is being, and will continue to be irreparably harmed by NMFS' disregard of its statutory duties, as described below, and by the unlawful injuries imposed on listed species by these actions.

7. The above-described aesthetic, conservation, recreational, commercial, scientific, and procedural interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by NMFS' failure to comply with the ESA as described below. Plaintiffs have no adequate remedy at law.

8. Defendant National Marine Fisheries Service is an agency of the United States Department of Commerce responsible for administering the provisions of the Endangered Species Act with regard to threatened and endangered marine species, including the species of threatened and endangered salmon and steelhead that inhabit the Columbia River basin.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), and § 2202 (injunctive relief).

10. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because members of the plaintiff organizations reside in this district and these members and organizations

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do business here. In addition, a substantial part of the events or omissions giving rise to the claims in this case occurred in this district, and the defendant maintains offices in the district.

STATUTORY FRAMEWORK

11. The Administrative Procedure Act ("APA") authorizes courts reviewing agency action to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Biological opinions issued pursuant to Section 7 of the ESA are reviewed under this provision of the APA. See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997).

12. Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

> [e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . .

16 U.S.C. § 1536(a)(2).

13. Section 9 of the ESA prohibits "take" of listed species by anyone, including federal agencies. 16 U.S.C. § 1538. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). NMFS has defined "harm" to include "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102. "Take" by federal agencies is permitted only if the agency receives an Incidental Take Statement ("ITS") pursuant to Section 7(b)(4), upon completion of formal consultation. 16 U.S.C. § 1536(b)(4).

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14. Section 7 of the Act also establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. Under this process, a federal agency proposing an action that "may affect" a listed species, including salmon and steelhead, must prepare and provide to the appropriate expert agency, here NMFS, a "biological assessment" of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The action agency's biological assessment must be complete and accurate in order to comply with the ESA and its implementing regulations. Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304-5 (9th Cir. 1993). For those actions that may adversely affect a species, NMFS must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a biological opinion from NMFS. Id.; 16 U.S.C. § 1536(b)(3)(A).

15. In formulating its biological opinion and determining whether an action will jeopardize a species or destroy or adversely modify its critical habitat, NMFS must evaluate the "effects of the action" together with "cumulative effects" on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4). This multi-step analysis requires NMFS to consider:

a. the direct, indirect, interrelated and interdependent effects of the proposed action, 50 C.F.R. § 402.02;

b. the "environmental baseline," to which the proposed action will be added. This baseline includes "all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early

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section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress," 50 C.F.R. § 402.02; and,

c. any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation," 50 C.F.R. § 402.02.

16. If, based upon an analysis of these factors and in light of the current status of the species, NMFS concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, NMFS must identify and describe any reasonable and prudent alternative ("RPA") to the proposed action that it believes would avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(B). An RPA may only consist of measures that are within the scope of the action agency's legal authority and jurisdiction, that can be implemented consistent with the purpose of the proposed action, and that will avoid jeopardizing the continued existence of the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The effects of an RPA must be analyzed under the same section 7 framework (described above) as an action proposed by an action agency. If NMFS believes that there is no reasonable and prudent alternative to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

17. If NMFS reaches a no-jeopardy/no-adverse modification finding for either a proposed action or an RPA, it may also issue an incidental take statement for any take of a listed species that is likely to occur as a consequence of the action. 50 C.F.R. § 402.14(I). Take of listed species that is consistent with an incidental take statement is not subject to the prohibition against take in section 9 of the ESA. 16 U.S.C. § 1536(b)(4).

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18. Once the agencies have initiated consultation, the action agency cannot make any irreversible or irretrievable commitment of resources with respect to the proposed action that may foreclose the formulation or implementation of any RPA measures that could avoid jeopardy. Id. § 1536(d). This prohibition remains in effect until the completion of the consultation process. 50 C.F.R. § 402.09.

19. Separately, section 7(a)(1) of the ESA requires federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed" under the Act. 16 U.S.C. § 1536(a)(1) (emphasis added). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NMFS. Id. A program of "conservation" is one that brings the species to the point of recovery and delisting. Id. § 1532(3).

THE STATUS OF ANADROMOUS FISH IN THE COLUMBIA RIVER BASIN

20. Steelhead and salmon are anadromous fish. They are born and rear in fresh water tributaries of the Columbia River as far east as central Idaho, migrate downstream through the Columbia River to the Pacific Ocean where they grow and live as adults, and return to their natal streams and lakes to spawn and die. The Columbia River, its tributaries, and estuary historically provided habitat for chinook, sockeye, chum, and coho salmon, as well as steelhead. A century ago, between 10 and 16 million salmon returned to the Columbia each year. As of 1991, 67 stocks of Columbia River salmonids were extinct and 76 stocks were at risk of extinction.[2]

[2] In order for an imperiled species to enjoy the ESA's protections, it must first be placed on the Act's "threatened" or "endangered" species lists. 16 U.S.C. § 1533(c). A "species" that may be listed for protection under the ESA includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). When deciding whether to list populations of Pacific salmon for protection as a "distinct population segment" under this definition, NMFS employs the concept of "evolutionarily significant unit" ("ESU"). A population of Pacific salmon is an ESU if it is "(1) . . . reproductively isolated from other population units of the same species, and (2) . . . an

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21. During the course of their juvenile and adult lives, the remaining Columbia River basin salmon and steelhead face numerous artificial obstacles to successful migration, reproduction, and rearing. Chief among these obstacles for many salmon and steelhead stocks are the effects of the multiple federal hydroelectric, irrigation, and navigation dams and their associated reservoirs, facilities, and operations on the Columbia and Snake rivers. All of these facilities, individually and together seriously and adversely affect ESA-listed salmon and steelhead in a variety of ways, including but not limited to the following: (1) operation of these facilities alters the hydrograph of the Snake and Columbia Rivers, reducing and shifting river flows in ways that directly and indirectly kill and injure juvenile and adult salmon; (2) juvenile salmon migrating down the Snake and Columbia Rivers are killed and injured in significant numbers at the dams themselves, regardless of the route they take to pass each dam, although some dam passage routes are more lethal than others; (3) even before juveniles reach each dam, passage through the reservoirs created by the dams and operated as part of the federal facilities on these rivers takes a high toll on survival through mechanisms ranging from increased risks of disease, predation, and mortality, to trapping and stranding, disorientation, and stress; (4) once past these federal facilities, the toll the system imposes on juvenile salmon through reduced fitness and survival is still high even in the estuary and ocean, especially for juvenile fish captured and transported downstream around the federal dams and reservoirs by truck or barge. Returning adult salmon and steelhead also must face upstream passage through these federal facilities risking injury, death, and reduced reproductive success through a variety of system-

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important component in the evolutionary legacy of the biological species." 64 Fed. Reg. 14,308 14,310 (Mar. 24, 1999).

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imposed mechanisms ranging from delays at upstream fishway facilities, to fallback (leading to repeated passage of the same dam), disorientation, trauma, and disease.

22. While some of the Columbia River basin salmon and steelhead listed under the ESA are affected to a lesser extent by the FCRPS, those salmon and steelhead ESUs that must successfully pass the four lower Snake River hydropower projects, as well as the four mainstem Columbia River projects, on their way to and from the ocean are particularly hard hit. These ESUs include Snake River spring/summer chinook, Snake River fall chinook, Snake River sockeye, and Snake River steelhead. The upper Columbia River spring chinook and steelhead also are hard hit by passage through hydropower projects because they must navigate both the four federal mainstem Columbia River projects and as many as six additional federally-licensed projects to reach the ocean or return to their spawning streams. All of the above direct and indirect adverse effects on these ESUs are exacerbated by FCRPS facilities on both the Columbia and Snake Rivers that lie upstream of federal and federally-licensed projects that block salmon and steelhead passage altogether.

23. In addition, Columbia River basin salmon and steelhead face other obstacles to successful migration, reproduction, and rearing including, but not limited to: habitat loss and degradation due to human activities such as development, logging, grazing, farming, and mining; disease and adverse effects to the genetic pool of wild fish caused by hatchery fish, as well as competition from hatchery fish for food and shelter; and commercial and recreational harvest for human consumption.

24. As a consequence of these and other obstacles, populations of salmon and steelhead in the Columbia River basin have declined precipitously since the advent of European settlement. Snake River spring/summer chinook, for example, which once numbered over 1.5

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million returning adult fish per year, averaged only 9,674 wild fish per year from 1980 through 1990. In 1994, only 1,822 wild spring/summer chinook were estimated to have passed Lower Granite Dam, the last federal dam separating these fish from their spawning grounds. Between 1992 and 1996 the mean was only 3,820 naturally produced spawners, constituting less than 0.3% of the estimated historic abundance of wild spring/summer chinook. The populations of these fish are expected to continue their downward spiral towards extinction. The population of Snake River fall chinook, once the most important fall chinook stock in the Columbia River basin with estimated annual returns of 72,000 fish earlier this century, declined to 78 wild fish in 1990 and 742 wild fish in 1993. Between 1992 and 1996, the estimated mean of adult spawners returning to Lower Granite Dam was 1,020 per year. The estimated number reaching Lower Granite Dam was 797 in 1997, 306 in 1998, 905 in 1999, and 567 in 2000. While these numbers have increased to varying degrees since 2000, the numbers of wild adult salmon and steelhead that return to spawn each year are still at levels that have led federal scientists to conclude these species face a serious and imminent risk of extinction.

25. The following graph reflects the returns of wild adult Snake River spring/summer chinook, fall chinook, steelhead, and sockeye from 1962 through 2000.

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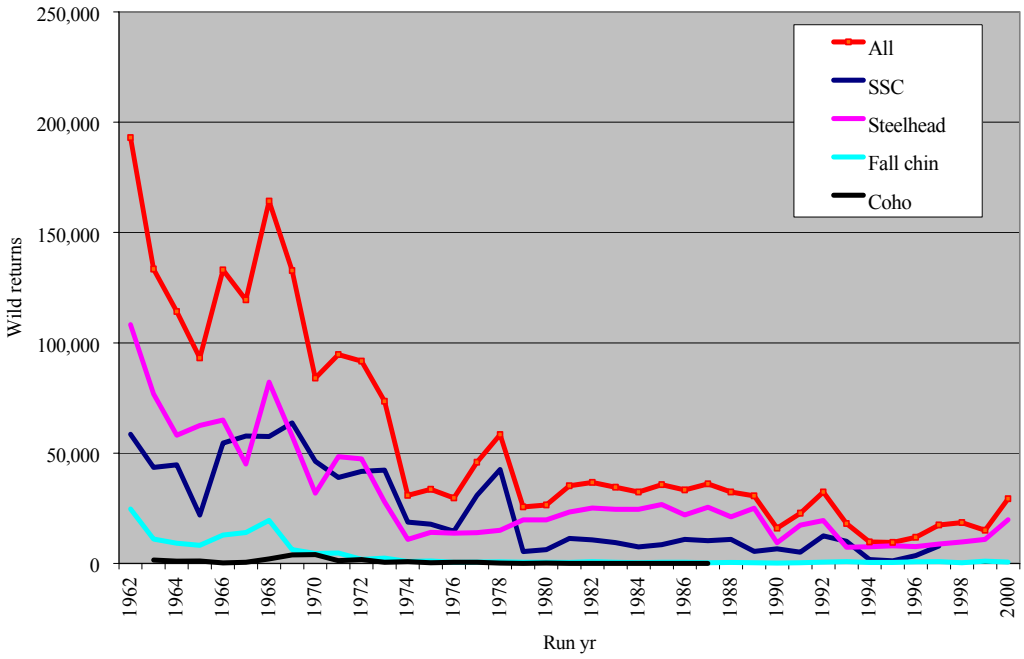

26. As a consequence of these dramatic population declines, NMFS has listed the following salmon and steelhead ESUs in the Columbia River basin as threatened or endangered and designated their migratory, spawning, and rearing habitat in the basin as critical habitat:

- Snake River sockeye, 56 Fed. Reg. 58619 (Nov. 20, 1991) (listed as endangered); 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical habitat);
- Snake River spring/summer chinook, 57 Fed. Reg. 14653 (April 22, 1992) (listed as threatened); 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical habitat);
- Snake River fall chinook, 57 Fed. Reg. 14653 (April 22, 1992) (listed as threatened); 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical habitat);

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- Snake River steelhead, 62 Fed. Reg. 43937 (Aug. 18, 1997) (listed as threatened); 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat)[3];
- Upper Columbia River steelhead, 62 Fed. Reg. 43937 (Aug. 18, 1997) (listed as endangered); 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat);
- Lower Columbia River steelhead, 63 Fed. Reg. 13347 (March 19, 1998) (listed as threatened); 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat);
- Upper Columbia River spring-run chinook, 64 Fed. Reg. 14308 (March 24, 1999) (listed as endangered); 65 Fed. Reg. 7778 (Feb. 16, 2000) (designating critical habitat);
- Lower Columbia River chinook, 64 Fed. Reg. 14308 (March 24, 1999) (listed as threatened); 65 Fed. Reg. 7778 (Feb. 16, 2000) (designating critical habitat).
- Middle Columbia River steelhead, 64 Fed. Reg. 14517 (March 25, 1999) (listed as threatened); 65 Fed. Reg. 7778 (Feb.16, 2000) (designating critical habitat).
- Upper Willamette River steelhead, 64 Fed. Reg. 14517 (Mar. 25, 1999) (listed as threatened); 65 Fed. Reg. 7778 (Feb.16, 2000) (designating critical habitat).
- Upper Willamette River chinook, 64 Fed. Reg. 14308 (March. 24, 1999) (listed as threatened); 65 Fed. Reg. 7778 (Feb.16, 2000) (designating critical habitat).
- Columbia River chum, 64 Fed. Reg. 14507 (March 25, 1999) (listed as threatened); 65 Fed. Reg. 7778 (Feb.16, 2000) (designating critical habitat)

[3] Pursuant to a consent decree approved in National Ass'n of Homebuilders v. Evans, Civ. No. 00-2799 (CKK) (D.D.C. April 30, 2002), NMFS temporarily withdrew its critical habitat designation for many of these ESUs. On December 14, 2004, NMFS proposed to redesignate critical habitat for all ESUs for which habitat had been withdrawn. 69 Fed. Reg. 74,572 (Dec. 14, 2004). The original critical habitat designations remain in place for Snake River fall chinook, Snake River spring/summer chinook, and Snake River sockeye salmon.

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27. Many of these listed stocks face a serious and immediate risk of extinction. For example, only 16 naturally produced Snake River sockeye returned to Redfish Lake between 1991 and 2000. In the 2000 FCRPS BiOp, NMFS estimated that the immediate extinction risk for this ESU is "very high," 2000 FCRPS BiOp at 4-21, and a recent federal study found "extreme risks" to the abundance, productivity, spatial structure and diversity of this ESU. 2004 FCRPS BiOp, at 4-23. Similarly, NMFS scientists have calculated that the probability that Snake River spring/summer chinook salmon populations will decline by a further 90 percent from their present extremely low levels within 24 years is 45 to 99 percent (depending on NMFS' assumptions about the reproductive effectiveness of hatchery fish in the wild). For Snake River fall chinook, the probability of a 90 percent population decline within 24 years is 39 to 96 percent (depending on the hatchery fish assumptions). For Snake River steelhead, the probability of such a decline is 100 percent within 24 years regardless of the assumptions. While these probabilities may have changed somewhat with increased returns over the past 2 to 4 years, these increased returns have not been sustained or shown to be sustainable and are likely the result of cyclical changes in ocean conditions. Most scientists, including those in and outside NMFS, do not view these recent returns as altering significantly the overall decline of the ESA-listed salmon and steelhead ESUs towards extinction.

28. In February 2003, NMFS convened a panel of scientists to form a Biological Review Team ("BRT"), which reviewed all of the most recent data and information on each of these ESUs. In their draft report, these scientists concluded that:

> Overall, although recent increases in escapement were considered a favorable sign by the BRT, the response was uneven across ESUs and, in some cases, across populations within ESUs. Furthermore, in most instances in which recent increases have occurred, they have not yet been sustained for even a full salmon/steelhead generation. The causes for the increases are not well understood, and in many (perhaps most) cases may be due primarily to unusually

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> favorable conditions in the marine environment rather than more permanent alleviations in the factors that led to widespread declines in abundance over the past century. In general, the BRT felt that ESUs and populations would have to maintain themselves for a longer period of time at levels considered viable before it could be concluded that they are not at significant continuing risk.

Draft BRT Report, Executive Summary, at 3 (Feb. 2003). The BRT issued its Final Report in July 2003 affirming its earlier conclusions. See, e.g., Final BRT Report, Vol. A. at 143 ("In spite of the recent increases [of Snake River fall chinook], however, the recent geometric mean number of naturally produced spawners is still less than 1,000, a very low number for an entire ESU."); id. at 144 (conclusion for Snake River spring/summer chinook that "recent abundance in this ESU is still short of the levels that the proposed recovery plan for Snake River salmon indicated should be met over at least an 8-year period."); id. Vol. B. at 133 ("In spite of the recent increases [of Snake River steelhead], however, abundance in most populations for which there are adequate data are well below interim recovery targets."). These and similar population decline projections for species already listed under the ESA have led NMFS' scientists to conclude that: "the probability [that] many [salmon and steelhead] stocks and ESUs will severely decline or go extinct in both the short and long-term [is] substantial." McClure, et al., *A Large-Scale Multi-Species Risk Assessment* at 2 (2001) (emphasis added).[4]

PRIOR PROCEEDINGS REGARDING THE FCRPS AND THE ESA

29. In 1994, this Court concluded that the biological opinion for operation of the FCRPS during 1993, and the process NMFS and the Action Agencies had followed to produce it, was:

[4] In response to requests that Columbia River and other Pacific salmon ESUs be removed from the ESA's protections, NMFS this summer proposed to retain the listings for all ESUs currently listed, but proposed changing the listing of upper Columbia River steelhead from "endangered" to "threatened." In addition, NMFS also proposed listing lower Columbia River coho as threatened. 69 Fed. Reg. 33,102 (June 14, 2004).

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> seriously, 'significantly,' flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation – that is, relatively small steps, minor improvements and adjustments – when the situation literally cries out for a major overhaul.

Idaho Dep't of Fish and Game v. National Marine Fisheries Service, 850 F. Supp. 886, 900 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995) (hereinafter "IDFG").[5] The Court went on to say:

> Instead of looking for what can be done to protect [ESA-listed salmon] from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption.

Id. (emphasis in original). Accordingly, the Court found that the biological opinion was "arbitrary and capricious and otherwise not in accordance with law." Id.

30. Following the Court's ruling in IDFG, and pursuant to a Court supervised schedule, NMFS and the Action Agencies reinitiated consultation under ESA section 7(a)(2) on FCRPS operations. In March of 1995, NMFS released its revised "Biological Opinion on Reinitiation of Consultation on 1994-1998 Operation of the Federal Columbia River Power System and Juvenile Transportation Program in 1995 and Future Years" (the "1995 FCRPS BiOp"). In this Opinion, NMFS found that the Action Agencies' proposed actions would jeopardize listed Snake River salmon[6] and, therefore, set forth an RPA for interim system operations until it could make a long-term decision about how to configure and operate the FCRPS that would both respond to the Court's concerns regarding the need for a "major overhaul" of the system, IDFG, 850 F. Supp. at 900, and be informed by further scientific analysis. 1995 FCRPS BiOp at 91-135. The 1995 FCRPS BiOp thus described certain interim

[5] The Court's opinion in IDFG also provides a summary of the history of litigation over FCRPS operations and ESA-listed salmon prior to 1994. See IDFG, 850 F. Supp. at 888-91.

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FCRPS operations which were intended to provide immediate and near-term improvements in salmon survival while the agencies assessed and chose among several alternative courses of action for long-term configuration and operation of the system. 1995 FCRPS BiOp at 91-94, 94-116 (describing immediate actions), 116-135 (describing plans for study and evaluation of long-term actions).

31. In March 1996, a coalition of conservation and fishermen's organizations, including many of the plaintiffs in this action, sought judicial review under the APA and ESA of the 1995 FCRPS BiOp, as well as certain aspects of its implementation by the Action Agencies. American Rivers v. NMFS, No. 96-384-MA (D. Or.) (complaint filed March 14, 1996). Following a preliminary injunction motion that the parties resolved by stipulation, plaintiffs sought summary judgment on a number of their claims. In April 1997, the Court upheld the 1995 FCRPS BiOp against these challenges stating, "I find that NMFS' selection of an acceptable probable recovery range is largely a question of policy rather than science as it necessarily depends upon the agencies' comfort level for risk tolerance." American Rivers v. NMFS, No. 96-384-MA, Opinion and Order at 25 (D. Or. Apr. 3, 1997). The Court did, however, observe:

> Given the dwindling numbers [of ESA-listed salmon], time is clearly running out. As a long time observer and examiner of this process, I cannot help but question the soundness of the selected level of risk acceptance . . . .

Id. at 26. Plaintiffs and the federal defendants then filed cross-motions for summary judgment on the remaining claims in the case and in October 1997, the Court granted the defendants' motion.

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[6] In 1995, the only Columbia River basin salmon listed under the ESA were the Snake River spring/summer chinook, Snake River fall chinook, and Snake River sockeye. See supra at ¶ 25 (describing history of salmon and steelhead listings).

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32. Plaintiffs appealed the Court's decisions to the U.S. Court of Appeals for the Ninth Circuit. In March 1999, the Court of Appeals affirmed this Court's decision, although it rejected the Court's "immunization [of NMFS' determination of the selected level of risk acceptance] from judicial review under the rubric of a 'policy' decision . . . ." American Rivers v. NMFS, Ninth Cir. No. 97-36159, slip opinion at 8 (9th Cir. 1999) (memorandum disposition).

33. The 1995 FCRPS BiOp indicated that it would be replaced in 1999 by an opinion that made a long-term decision about configuration and operation of the FCRPS that would avoid jeopardy to ESA-listed salmon and steelhead. 1995 FCRPS BiOp at 94-95. However, the promised new opinion was not released until late in 2000.

THE 2000 FCRPS BIOP AND SUBSEQUENT EVENTS

34. On December 21, 2000, NMFS released the 2000 FCRPS BiOp, replacing the prior 1995 opinion. In the 2000 FCRPS BiOp, NMFS acknowledged that, for seven of the twelve listed salmon stocks, including all four of the Snake River stocks, a continuation of the actions required by the 1995 FCRPS BiOp would jeopardize the continued existence of these species and violate the ESA. Accordingly, pursuant to the requirements of ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), and 50 C.F.R. § 402.14(h)(3), NMFS proposed in the 2000 FCRPS BiOp yet another RPA that it concluded would avoid both jeopardy to these species and adverse modification of their critical habitat.

35. The 2000 FCRPS BiOp shared many similarities with its predecessor opinion from 1995. For example, the 2000 FCRPS BiOp "uses the five-step approach for applying ESA section 7(a)(2) [jeopardy] standards developed in the 1995 FCRPS Biological Opinion . . . ." 2000 FCRPS BiOp at 1-8 to 1-15. This five-step jeopardy framework for evaluating whether a proposed action or an RPA would avoid jeopardy includes:

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a. Defining the biological requirements and current status of each listed species through a broad look at the species-level to determine the health, status, and trends of a particular ESU, given all of the actions that affect the fish within the ESU at various life stages. The purpose of the range-wide review is to provide the big picture of how well or how poorly the entire species is faring. NMFS then adds the impacts of the action to this larger context when it makes its jeopardy determination.

b. Evaluating the effects of actions in the environmental baseline on the species' current status.

c. Determining the effects of the proposed or continuing action on listed species.

d. Determining whether the species can be expected to survive with an adequate potential for recovery under the effects of the proposed or continuing action, the effects of the environmental baseline, and any cumulative effects, and considering measures for survival and recovery specific to other life stages. NMFS indicated that its "jeopardy standard" would be met if the mortality attributable to the proposed action was below a level that, when combined with mortality occurring in other life stages, provides a high likelihood of survival and a moderate to high likelihood of recovery. 2000 FCRPS BiOp at 1-9.

e. If the preceding steps indicate that the action will jeopardize the continued existence of the listed species or destroy or adversely modify its critical habitat, NMFS would identify an RPA to the proposed action and analyze it based on the same framework described in the first four steps.

36. Further, like the 1995 FCRPS BiOp, the 2000 FCRPS BiOp concluded that under this framework, the Action Agencies' proposed actions, which were a continuation of the 1995 FCRPS BiOp RPA, 2000 FCRPS BiOp at 3-1, would jeopardize eight ESUs of ESA-listed salmon and steelhead and destroy or adversely modify their critical habitat, 2000 FCRPS BiOp at 6-1 to 6-146.[7] Consequently, the 2000 FCRPS BiOp described an RPA that NMFS believed

[7] Specifically, the 2000 FCRPS BiOp concluded that the proposed actions would jeopardize and adversely modify the critical habitat of Snake River spring/summer chinook, 2000 FCRPS BiOp at 8-3, Snake River fall chinook, id. at 8-5, Snake River sockeye, id. at 8-25, Snake River steelhead, id. at 8-13, upper Columbia River spring chinook, id. at 8-7, upper Columbia River steelhead, id. at 8-15, mid-Columbia River steelhead, id. at 8-17, and Columbia River chum salmon, id. at 8-23.

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would avoid jeopardy and adverse modification of critical habitat. Id. at 9-181 to 9-287. The RPA consisted of 199 separate measures. Many of these measures involved FCRPS operations, the Juvenile Fish Transportation Program, certain BOR projects, and further studies and analyses in these areas. Id. at 9-53 to 9-132. Others described a complex process for planning, monitoring and evaluation, production of reports, and procedural steps NMFS and the Action Agencies would take that would extend well beyond FCRPS operations. Id. at 9-1 to 9-51, 9-161 to 9-180. Still others measures generally described behaviors affecting salmon habitat, hatchery operations, and salmon harvest management for which the Action Agencies have only limited responsibility. Id. at 9-133 to 9-141 (habitat discussion), 9-143 to 9-150 (harvest discussion), 9-151 to 9-160 (hatchery discussion).

37. NMFS recognized in the 2000 FCRPS BiOp that even the measures of the RPA it proposed for the FCRPS would not by themselves avoid jeopardy and adverse modification for the Snake River ESUs and some Columbia River ESUs. This conclusion compelled NMFS to rely on measures unrelated to the FCRPS, such as salmon habitat and hatchery mitigation measures by other federal or state agencies and private parties, in order to reach a no-jeopardy/no-adverse modification finding for the RPA in the 2000 FCRPS BiOp. In fact, the degree to which the no-jeopardy/no-adverse modification finding for this RPA depended on these unrelated and uncertain actions was remarkable. As the pie charts on the following pages show, for all of the Snake River salmon and steelhead ESUs for which NMFS performed an analysis, under all sets of assumptions NMFS applied except one (the optimistic assumptions for Snake River fall chinook), substantially more than one-third, and in many cases two-thirds or more, of the survival improvements needed to avoid jeopardy and adverse modification for the RPA were expected from non-hydrosystem/non-harvest measures, most of which would have

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been carried out by entities other than the Action Agencies. Similarly, for three of the Columbia River ESUs, NMFS' analysis disclosed that as much or more of the survival improvements necessary to avoid jeopardy were predicted to come from such non-hydrosystem/non-harvest measures. Moreover, under all of the assumptions NMFS used in the 2000 FCRPS BiOp analysis, the measures of the RPA that did address the FCRPS and its operations provided only a small faction of the necessary survival improvements beyond the improvements that would be provided by the Action Agencies' proposed actions – a suite of measures for which NMFS reached a jeopardy/adverse modification conclusion.

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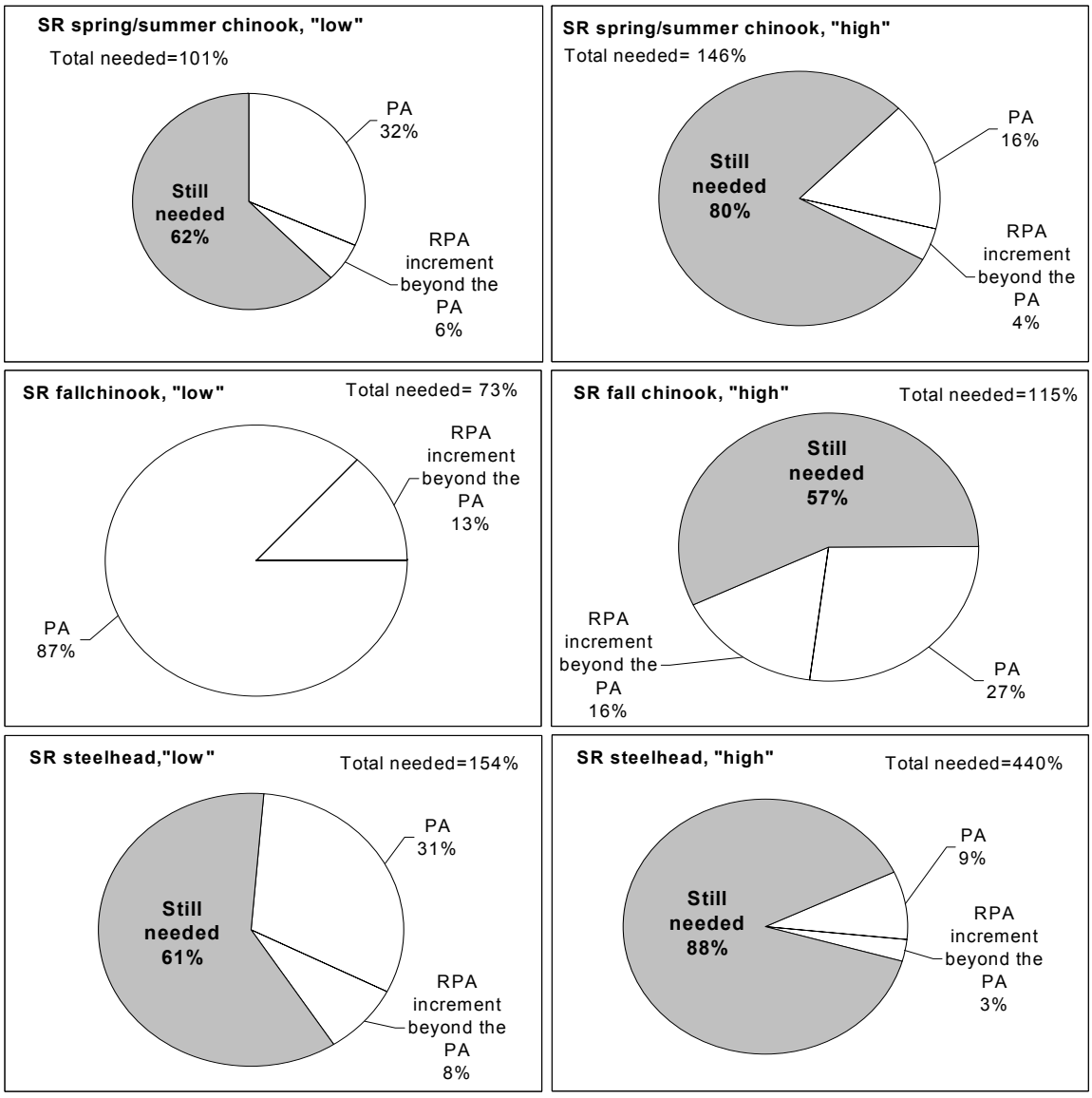

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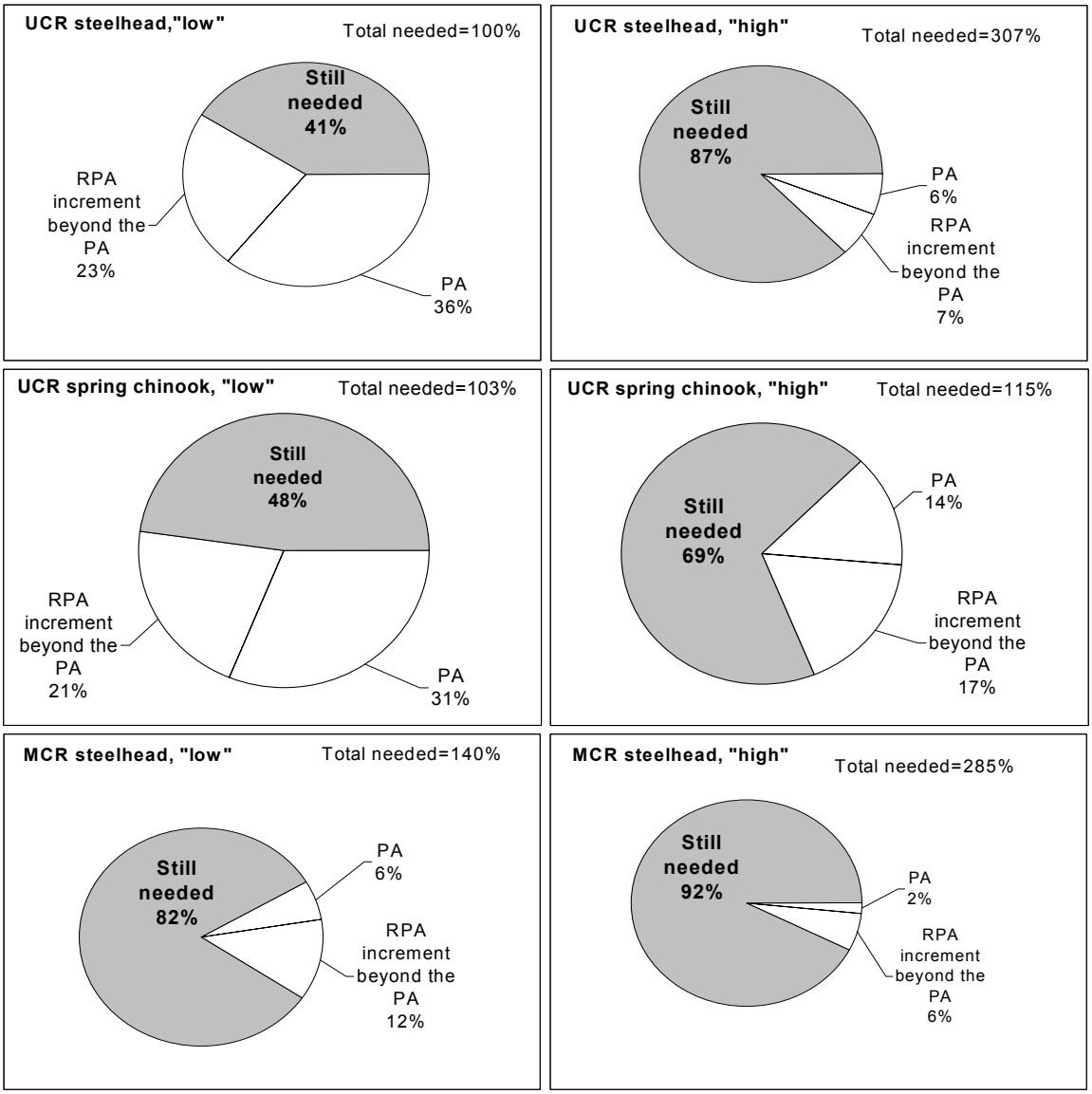

These charts, which are taken from information in tables in the 2000 FCRPS BiOp and its appendices, show for Snake River and upstream Columbia River ESUs the fraction of the survival increase needed to avoid jeopardy that would be provided by the proposed action ("PA") and the RPA. The shaded component in the charts labeled "still needed" is the fraction of the required survival increase that must come from non-hydrosystem/non-harvest measures. For example, the most optimistic analysis for Snake River spring/summer chinook concludes that a total survival increase of 101% is necessary to avoid jeopardy and adverse modification. According to NMFS' analysis, 62% of that improvement must come from some non-hydrosystem/non-harvest actions.

38. In other words, NMFS was not able to articulate an RPA for the FCRPS that avoided jeopardy, as the ESA requires. Instead, it was forced to turn to non-RPA actions that

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would purportedly benefit the listed species to make up for the reductions in the likelihood of survival and recovery caused by the FCRPS. In most cases, those reductions were quite large.

39. On May 5, 2001, NWF filed its first complaint in this action, challenging the scientific and legal validity of the 2000 FCRPS BiOp. Chief among the defects in the 2000 FCRPS BiOp that NWF identified was its reliance on speculative and uncertain future measures to be carried out by Federal, non-federal, and private parties in order to avoid jeopardy. With the encouragement of this Court, plaintiffs, defendants, and various intervenors and *amici* spent the better part of the year following filing of this complaint engaged in mediated negotiations. The parties were not able to resolve their differences through these efforts.

40. In late 2002, NWF filed a motion for summary judgment on its claims against the 2000 FCRPS BiOp and in May of 2003, this Court ruled that the Opinion violated the ESA and its implementing regulations because, in preparing and evaluating the RPA in the opinion, NMFS had misdefined the "action area" and had improperly relied on off-site, range-wide future federal actions that have not undergone section 7 consultation and off-site, range-wide state, private, or tribal actions that were not "reasonably certain to occur" to conclude that the RPA would avoid jeopardy. NWF v. NMFS, 254 F. Supp.2d at 1211-12.

41. Plaintiffs subsequently moved the Court to vacate and set aside the 2000 FCRPS BiOp. On July 1, 2003, the Court denied that motion because, "[i]n the absence of any showing by plaintiffs that an injunction will, at this stage in the proceedings, somehow enhance the survivability or recovery of the affected salmon, the balance of equities favors allowing the 2000 BiOp to remain in place during the remand period." Opinion at 3 (July 1, 2003). The Court permitted the federal agencies to continue operating under the invalid 2000 FCRPS BiOp's requirements during a remand period of one year, while NMFS prepared a revised opinion that

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was to have addressed the specific flaws identified by the Court. Pursuant to an extension of the remand schedule, the Court ordered NMFS to finalize a revised opinion by November 30, 2004.

42. The Court retained oversight of the remand process and required NMFS to submit quarterly status reports on its progress in remedying the legal problems with the 2000 FCRPS BiOp. At the urging of the state and tribal co-managers, NMFS agreed to engage these parties in a "collaborative process" late in the remand period. The parties engaged in a facilitated process for four months, and NMFS promised to consider the input of the co-managers as it completed a final revised biological opinion.

43. Also during the remand period, the Corps and BPA, with approval from NMFS, proposed to eliminate spill as required by the 2000 FCRPS BiOp RPA at The Dalles and Bonneville dams for the month of August 2004, and to eliminate spill at Ice Harbor and John Day dams for the final ten days of August. U.S. Army Corps of Engineers, Bonneville Power Administration, "Amended Proposal for FCRPS Summer Juvenile Bypass Operations" (June 8 2004) at 3. Eliminating spill at these dams for this period would have eliminated some 39% of the entire spill volume for the summer 2004 salmon migration season. The proposal to eliminate spill relied on an "offset" to mitigate the adverse impacts of reducing spill on Snake River fall chinook: an agreement with Idaho Power Corp. ("IPC") to allow 100,000 acre-feet of water above inflow to pass through its Brownlee project at Hells Canyon and into the lower Snake River to augment flows there during July.

44. On July 9, 2004, NWF filed a supplemental complaint for declaratory and injunctive relief alleging violations of the ESA and APA associated with the Corps' decision to eliminate summer spill, and NMFS' July 1, 2004, approval of the proposal. With respect to the claims in this supplemental complaint that challenged the elimination of summer spill, the Court

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concluded that "plaintiffs have prevailed on the merits and have demonstrated that the decisions of the agencies are arbitrary and capricious." Opinion and Order at 7 (filed July 29, 2004). The Court therefore granted NWF an injunction requiring the Corps and NMFS to implement the summer spill program as set forth in the RPA for the 2000 FCRPS BiOp during the summer of 2004. The Ninth Circuit subsequently denied an emergency motion by the federal defendants to stay this Court's injunction.

45. Despite the Court's clear direction in its summary judgment ruling, remand orders and at a number of status conferences that NMFS and the Action Agencies should focus on correcting the defects in the 2000 FCRPS BiOp that the Court had identified, it became apparent over the course of the remand that NMFS would produce a revised biological opinion for the FCRPS that would have little in common with the 1995 or 2000 FCRPS BiOps. Instead, under the rubric of "refreshing" its jeopardy analysis, NMFS and the Action Agencies set about developing an entirely new approach to consultation on the FCRPS, one that involved a re-interpretation of the ESA and its implementing regulations and a new framework for analysis of jeopardy and adverse modification. Contrary to NMFS' assertions at various points during the remand process, none of these extensive changes in approach was required by the Court's decision in NWF v. NMFS, nor are they consistent with the requirements of the ESA and its implementing regulations.

THE 2004 FCRPS BIOP

46. On November 30, 2004, NMFS released its final revised biological opinion for the FCRPS in accordance with the Court's remand schedule. In dramatic contrast to the 1995 and 2000 FCRPS BiOps, the 2004 FCRPS BiOp concludes that Action Agencies' Updated Proposed Action ("UPA") will not jeopardize any of the ESA-listed salmon and steelhead ESUs

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affected by the FCRPS, including the eight ESUs for which the agency previously had concluded that the FCRPS would cause jeopardy. See 2004 FCRPS BiOp at 8-4, Table 8.1.[8]

47. The UPA consists of selected aspects of the RPA from the 2000 FCRPS BiOp, including specific dam and reservoir requirements, some flow augmentation and limited spill at certain projects during the spring and summer salmon migration seasons, and an aggressive effort to capture and transport juvenile salmon, especially during the summer migration season. Its "mitigation" measures include eventual installation of "removable spillway weirs" – an expensive modification to a number of FCRPS dams with questionable benefits – and a limited number of habitat restoration projects in upstream spawning areas and the estuary below the last FCRPS project. The entire UPA is available at http://www.salmonrecovery.gov/implementation.shtml.[9]

48. When NMFS considered in the 2000 FCRPS BiOp whether a substantially similar agency action consisting of FCRPS management and operation measures would cause jeopardy, it concluded that it would. See, e.g., 2000 FCRPS BiOp at 9-200 to 203 & Table 9.7-6

[8] NMFS issued a "State/Tribal Review Draft Biological Opinion" on September 8, 2004, and accepted comments on it for thirty days. A number of state, tribal, and other entities provided written comments critical of the draft opinion and its new approach to determining whether the FCRPS would jeopardize ESA-listed salmon and steelhead or adversely modify or destroy these species' critical habitat including the State of Oregon, Columbia River Intertribal Fish Commission, Alaska Department of Fish and Game, the State of Washington, Washington Department of Fish and Game, the Nez Perce Tribe, Confederated Tribes of the Warm Springs Reservation, and Save Our Wild Salmon Coalition. Many fishing and outdoor recreation businesses and over 85,000 individuals also submitted comments. All of these comments are available at http://www.salmonrecovery.gov/R_biop_comments.shtml.

[9] The UPA also does not include the BOR's upper Snake Projects, and the 2004 FCRPS BiOp does not address all of the effects of these projects on ESA-listed salmon and steelhead, see, e.g., 2004 FCRPS BiOp, App. D at D-13, even though these projects are part of a single federal action and their effects should be considered in a single consultation. See American Rivers v. NMFS, No. CV-00061-RE, American Rivers Motion for Partial Summary Judgment (filed May 19, 2004) (explaining in more detail why these projects cannot properly be segmented from the rest of the FCRPS for purposes of section 7 consultation).

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(estimating survival improvements above those from the RPA needed to avoid jeopardy for Snake River Spring/summer chinook). Indeed, as described above and as reflected in the graphs reproduced above, the agency concluded that such an action would provide only a small fraction of the population improvement necessary for the ESA-listed salmon and steelhead ESUs to avoid jeopardy. See supra at ¶¶ 36-38 (pie graphs illustrating small fraction of survival improvements necessary to avoid jeopardy provided by proposed action and RPA and the large improvements hoped for from the uncertain and speculative "off-site" mitigation). NWF, of course, argued that even this analysis substantially underestimated the improvement in salmon survival that would be required to meet NMFS' jeopardy standard, see First Amended Complaint for Declaratory and Injunctive Relief (filed June 29, 2001) at ¶¶ 43-46, 54, although the Court did not reach this issue. Rather than acknowledge directly the very limited capability of minor modifications to the FCRPS and its operations to protect salmon and steelhead from jeopardy, the correspondingly large and adverse impacts of these actions on the species, and the still unaddressed fact that "the situation literally cries out for a major overhaul" in order to comply with the ESA, IDFG v. NMFS, 850 F. Supp. at 900, in the 2004 FCRPS BiOp NMFS simply re-interprets the ESA and its implementing regulations in order to redefine the scope and nature of the action that is the subject of consultation and thereby remove from consideration the majority of the adverse effects of the FCRPS and its operations on salmon and steelhead. The agency cynically asserts that these changes were required by this Court's decision in NWF v. NMFS, 254 F. Supp.2d 1196 (D. Or. 2003), even though that is not the case as a matter of law or fact. In the paragraphs that follow, NWF describes and summarizes NMFS' "refreshed" approach to the ESA and consultation for the FCRPS.

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A. NMFS' NEW APPROACH TO AGENCY ACTION

49. While NMFS summarizes the five-step jeopardy analysis described above and employed in the 1995 and 2000 FCRPS BiOps, see supra at ¶ 35 (summarizing steps), the jeopardy framework in the 2004 FCRPS BiOp does not actually employ or rely on this approach. Instead, NMFS explains that it will limit its consideration of the "action" for consultation to only a small portion of the Action Agencies' on-going management and operation of the FCRPS because "the ESA requires a Federal agency to consult on actions that it proposes to authorize, fund, or carry out that are within its discretionary authority." 2004 FCRPS BiOp at 1-10 (citing 50 C.F.R. § 402.03). According to NMFS, "the ESA does not require consultation on any elements of the pre-existing project that are beyond the agency's current discretion or control . . . [or] the continuing effects of those aspects of the FCRPS dams and USBR projects that are not subject to Action Agency discretion, such as their existence and operations necessary to satisfy Congressionally mandated purposes (e.g., flood control and navigation)." Id. at 5-1 (also citing 50 C.F.R. § 402.03). Neither the ESA nor its implementing regulations support this narrow re-interpretation of the scope and nature of actions subject to consultation. See, e.g., 16 U.S.C. § 1536(a)(2) (requiring consultation for "any action authorized, funded, or carried out" by any federal agency without any limitation to only the discretionary aspects of such actions); 50 C.F.R. § 402.02 (defining action as "all activities or programs of any kind" authorized, funded or carried out by a federal agency).[10]

50. After asserting that the "action" that is the subject of consultation in the 2004 FCRPS BiOp properly may include only the "discretionary" aspects of the FCRPS and its

[10] To the extent NMFS' interpretation of 50 C.F.R. § 402.03 is correct and the regulation as applied here excludes from consultation actions that are "authorized, funded, or carried out" by a federal agency, the regulation is under-inclusive and contrary to law.

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operations, NMFS turns to the problem of delineating precisely what these discretionary actions are. The agency states that applying the discretionary action limitation it finds in 50 C.F.R. § 402.03 to this consultation requires it to separate both the effects of the existence of the FCRPS and the "effects of the existing project that are beyond the current discretion of the action agency" (on the one hand) from those operations that are within the discretionary control of the Action Agencies (on the other hand). 2004 FCRPS BiOp at 1-9. The effects of the "non-discretionary" operations and the effects of the existence of the FCRPS, the agency explains, are not within the scope of the present consultation but may be considered only as "part of the 'no action' environment to which will be added the effects of the proposed action." 2004 FCRPS BiOp at 1-9; see also id. at 5-5 ("NOAA Fisheries must, where possible, determine what effects of FCRPS operations on the listed species and critical habitat are attributable to the existence rather than the proposed operations of the dams.")

51. However, as the agency immediately recognizes, "[i]t is analytically impossible" to actually separate the effects of the existence and so-called non-discretionary operation of the FCRPS from the purportedly "discretionary" operations because the FCRPS requires continuous action to operate, modify, and manage, making it impossible to identify the boundaries of discretion for the FCRPS. Even the existence and configuration of the FCRPS itself is constantly being altered and adjusted in major and minor ways. As NMFS puts it, any analysis of the effects of the FCRPS must assume some sort of operation and choice about configuration of the system, 2004 FCRPS BiOp at 5-5, because "water necessarily flows through the projects every year," id. at 5-7. As Judge Marsh put it in rejecting an earlier argument for separating the effects of the existence of the FCRPS from the effects of its operation for purposes of ESA-section 7 consultation, "[t]he idea that the dams are immutable and uncontrollable like the weather ignores

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decades of fish improvements (such as bypass facilities and ladders) and other structural and operational enhancements." IDFG v. NMFS, 850 F. Supp. at 894.

52. Undeterred by these fundamental legal and practical difficulties, and while conceding explicitly that "it is beyond NOAA Fisheries and the Action Agencies' technical ability to [separate the effects of the existence and non-discretionary aspects of the FCRPS from the proposed discretionary operation of the system] with analytic precision," NMFS nevertheless contends that the ESA regulations require it to remove from the scope of the action (and ultimately the consultation, see infra at ¶¶ 57-63) the existence of the FCRPS and any operations that NMFS characterizes as non-discretionary. This self-inflicted paradox leads NMFS to posit a hypothetical "reference operation" to act as "an operational surrogate" for the existence and purportedly non-discretionary operations of the FCRPS, even though the agency admits that these fictional operations are not actually composed of non-discretionary operations and the existence of the system. See, e.g., 2004 FCRPS BiOp at 5-8.[11] NMFS then uses this invented "reference operation" as a stand-in for the effects of the existence and non-discretionary operation of the FCRPS and declares that these actions and effects are not part of the action subject to consultation but may only be considered as part of the effects of the environmental baseline. Id. at 5-6.

[11] Although NMFS states that the reference operation is intended as a stand in for the existence and non-discretionary operation of the FCRPS, 2004 FCRPS BiOp at 5-5 to 5-6, in the next breath, the agency states that the reference operation reflects a set of hypothetical operations that would "provide the maximum benefits for listed fish, regardless of discretion." Id. at 5-8 (emphasis added); see also id. at 5- 6 (reference operation "does not acknowledge other statutory purposes . . . [and] is a theoretical operation that the Action Agencies cannot implement, because it fails to meet all the authorized purposes of the projects or the Action Agencies lack the discretion to implement it.").

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53. By the agency's own account then, the "reference operation" does not accomplish what the agency admits it cannot do in any event but asserts the ESA regulations require it to do – segregate the effects of the discretionary FCRPS operations (which it claims constitute the entirety of the action subject to consultation) from the effects of the non-discretionary operations and existence of the FCRPS. Even if the agency were correct about the distinctions the regulations require it to draw (and it is not), NMFS cannot properly conclude that the law requires it to do one thing and then disregard that requirement in favor of a different approach that has no basis in the law. Neither the ESA nor its implementing regulations allow, let alone require, the contorted distinctions NMFS asserts are necessary to engage in section 7 consultation on the effects of the FCRPS on ESA-listed salmon and steelhead.

54. Although NMFS also asserts that its "reference operation" or "operational surrogate" was developed to "maximize fish benefits," 2004 FCRPS BiOp at 5-6, it does not do so and, in fact, is similar in most important respects to the UPA. For example, the flow, spill, and transportation operations of the FCRPS are substantially identical during the spring migration season for both the reference operation and the UPA. 2004 FCRPS BiOp, App. D at D-13 & Table D-1 (comparing seasonal average flows under the proposed and reference operations), D-13 to D-16 (including tables comparing spill and transportation assumptions). During the summer migration season, there is a slight difference in flows between the reference operation and the UPA, but spill – and especially transportation – operations are again essentially the same. Id. App. D at D-16 to D-20. Consequently, the reference operation and the proposed action overlap substantially and include many of the same measures. Not surprisingly, the difference between the effects of the reference operation and the effects of the UPA on ESA-listed salmon and steelhead is minor. Indeed, for each of the ESUs for which NMFS would have

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made a jeopardy finding in the 2000 FCRPS BiOp for the RPA in the absence of extensive and uncertain additional "off-site" mitigation, it now makes the finding that the UPA – which is essentially that same RPA – will have "no net effect" on the ESU over the ten-year term of the 2004 FCRPS BiOp when compared to the effects of the fictional reference operation. See, e.g., 2004 FCRPS BiOp at 6-76 (conclusion for Snake River spring/summer chinook); 6-89 (conclusion for Snake River fall chinook); 6-136 (conclusion for Snake River sockeye).

55. Moreover, the reference operation is not the set of operational measures that "maximizes fish benefits" by disregarding the other statutory purposes of the FCRPS, as NMFS claims. 2004 FCRPS BiOp at 5-8. For example, while the reference operation allegedly disregards supposed non-discretionary requirements for delivery of irrigation water from some BOR projects in order to minimally enhance flows, id. at 5-9 & n.4, it does not include any additional flow augmentation water from other projects and other sources, including the use of additional irrigation water from the BOR's upper Snake River projects beyond that already provided to enhance summer flows. The agency refused to include these operations that would provide increased benefits to fish in its reference operation because these operations and projects are "outside the action area of this consultation" and are "undergoing separate section 7 consultation." 2004 FCRPS BiOp, App. D at D-13, D-25; see also id. at 5-9 & n.4 (reference operation assumes irrigation withdrawals from 6 of 19 BOR projects in the lower river). Similarly, the reference operation, despite asserting that it disregards other statutory purposes such as "navigation," does not include operations that would drawdown reservoirs on the navigable portions of the Snake and Columbia Rivers to levels recommended in earlier analyses, even though such drawdowns have long been recognized as beneficial to salmon and steelhead survival.

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56. In short, the reference operation in the 2004 FCRPS BiOp is an irrational amalgam of actions that neither consist of the existence/non-discretionary operations of the FCRPS nor describe a set of FCRPS operations that would best benefit these species. Nor would such a starting point for ESA consultation be appropriate in any event. There is no rational basis for disregarding some alleged limits on agency discretion in order to develop a reference operation that benefits fish while refusing to disregard other operational constraints of the same kind. Moreover, the development of a reference operation is driven by a fundamental misunderstanding of the nature of the agency action that should be the subject of this consultation and has been the subject of at least two earlier consultations in 1995 and 2000.

B. NMFS' NEW APPROACH TO THE EFFECTS OF AGENCY ACTION AND EVALUATING JEOPARDY.

57. Despite the contradictions and flaws in its construction of the "action" that is the subject of consultation in the 2004 FCRPS BiOp, some of which the agency even acknowledges, NMFS carries the fictional reference operation forward and uses it as the basis of comparison to determine the effects of the UPA on salmon and steelhead. This analysis of effects, however, is not a jeopardy analysis that follows the ESA-implementing regulations, let alone the five-step approach to assessing jeopardy described in the 1995 and 2000 FCRPS BiOps. Rather, NMFS' dispositive analysis in the 2004 FCRPS BiOp is grounded in the language of the regulatory definition of the phrase "jeopardize the continued existence of." 50 C.F.R. § 402.02. NMFS reads this regulation for the proposition that if the effects of an action do not "reduce[] the reproduction, numbers, or distribution of a species," by definition the action cannot appreciably reduce the species' "likelihood of both survival and recovery" and hence cannot jeopardize the species. Based on its reading of this regulation, NMFS goes on to assert that if a proposed action standing alone has "no net effect" on a species' current reproduction, numbers or distribution, the

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jeopardy inquiry is at an end and the only appropriate finding is "no-jeopardy." In the agency's view, under these circumstances, there is no need to consider the effects of the action in combination with the environmental baseline and cumulative effects in order to make a jeopardy determination. But see 50 C.F.R. § 402.14(g) (describing features of a biological opinion). Indeed, NMFS states explicitly in describing its approach to evaluating the effects of the proposed action and the baseline and cumulative effects (step 5 of the alleged jeopardy analysis) that step 5 is unnecessary:

> [I]f, in step 3, NOAA Fisheries determines that the proposed action would either not affect or would result in a net improvement in survival or habitat condition for a given ESU, NOAA Fisheries would conclude that the action is not likely to jeopardize that ESU or adversely modify critical habitat. Because there would be no net reduction in the productivity, abundance or distribution of the ESU, there could not be an appreciable reduction in the likelihood of both survival and recovery in accordance with the regulatory definition of "jeopardize the continued existence of" (50 C.F.R. § 402.02).

2004 FCRPS BiOp at 1-12 (emphasis added).

58. With this new framework as the basis for its analysis of the UPA, NMFS states that in order to determine whether the UPA will have a net negative effect on any ESU, it will evaluate the effects of the UPA "compared to the environmental baseline." 2004 FCRPS BiOp at 1-12. The reference operation, in turn, serves as the surrogate for the environmental baseline – the "point of reference for measuring effects of the proposed hydro operation, i.e., the difference between the two operations represents the effects caused by the Action Agencies' exercise of discretion to achieve all authorized project purposes." 2004 FCRPS BiOp at 5-6. Based on this manufactured comparison between the effects of the fictional reference operation and the effects of the UPA, NMFS is able to determine that the UPA has no "net effect" on any ESU and hence cannot cause jeopardy. Compare, e.g., 2004 FCPRS BiOp at 6-68 (predicting "no net change" for Snake River spring/summer chinook) with id. at 8-7 ("no change" means that "the proposed

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action is not likely to appreciably reduce the likelihood of survival and recovery of the ESU"); compare id. at 6-89 with id. at 8-12 (same for Snake River fall chinook); compare id. at 6-109 with 8-22 to 8-23 (same for Snake River steelhead); compare id. at 6-136 (predicting improvement for Snake River sockeye from the UPA as compared to the reference operation) with id. at 8-35 (no-jeopardy determination).

59. Under these circumstances – with the agency action purportedly limited to discretionary measures, the creation of a fictional reference operation, and its new "net-effects" approach for comparing these two in order to determine whether the analysis needs to proceed any further – NMFS never actually considers whether, in light of the current status of the species, the combined effects of a properly defined agency action, together with the effects of the environmental baseline and any cumulative effects, would cause jeopardy. While the 2004 FCRPS BiOp contains a discussion of the environmental baseline, it is aimed primarily at describing and assessing the effects of the reference operation in order to establish a point of comparison to the UPA and provide a basis for making the comparative "no net effects" determination. 2004 FCRPS BiOp at 6-1 (evaluating the effects of the propose action involved determining the "difference between the effects of the proposed action and the 'reference operation'"). Once the discussion of the effects of the environmental baseline has served this purpose, its actual role in the 2004 FCRPS BiOp ends. Similarly, while the 2004 FCRPS BiOp includes a discussion of cumulative effects (a discussion that is itself incomplete and inadequate), consideration of these effects plays no direct role in NMFS' no-jeopardy finding for the UPA.

60. Among many other problems, NMFS' new approach to defining the action and then considering its effects allows the agency to ignore the continuing decline in wild salmon

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populations and its prior analyses of both the survival and recovery risks that these declines present as well as the effects of the FCRPS and its operations on these species. So long as the "action" has "no net effect" on the species' current population, in NMFS view, whether the species has any likelihood of survival and recovery becomes irrelevant. As long as the supposed "action" that is the subject of consultation does not increase the speed of the species' spiral towards extinction, NMFS evidently contends that the action cannot cause jeopardy and the Action Agencies' ESA obligations under section 7(a)(2) are satisfied. Despite all of its multiple shortcomings, at least the jeopardy analysis in the 2000 FCRPS BiOp framed a more appropriate and legally adequate inquiry: whether the effects of the proposed action (or RPA) when combined with the effects of the environmental baseline and cumulative effects would appreciably reduce the species' likelihood of survival and recovery. 50 C.F.R. § 402.14(g). In this inquiry, survival and recovery were not improperly defined as the perpetuation of the species' current decline towards extinction but as a condition in which the species would not face an unacceptable risk of extinction and would enjoy an adequate potential for recovery. See 2000 FCRPS BiOp at 1-12.

61. By re-interpreting the ESA and its implementing regulations and creating a new framework for defining the agency action and evaluating its effects, the 2004 FCRPS BiOp avoids the questions section 7 requires NMFS to address in a jeopardy analysis and violates the ESA.

C. NMFS' NEW APPROACH TO CRITICAL HABITAT

62. NMFS proposes two new methods to determine whether the UPA will destroy or adversely modify critical habitat. The first of these is strikingly similar to its relativistic and narrow approach to determining whether the UPA will jeopardize the species. With this "Environmental Baseline Approach" NMFS proposes to compare the effects of UPA on critical

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habitat to the essential features of that habitat under the fictional environmental baseline of reference operation conditions. "If NOAA Fisheries finds any alteration from the environmental baseline caused by the proposed action, it then determines whether the proposed action adversely modifies any of these essential features." 2004 FCRPS BiOp at 6-1. The agency's second method, which it calls a "Listing Conditions Approach" assesses destruction or adverse modification of critical habitat by "compar[ing] the conditions of the essential features of critical habitat that would exist under the proposed action and those conditions existing at the time the species were listed." 2004 FCRPS BiOp at 6-2.

63. By definition, both of these approaches fail to consider whether the proposed action destroys or adversely modifies the essential features of critical habitat that are necessary for the survival and recovery of the species (as opposed to the features that happen to exist at the time the species were listed or that exist today). See 16 U.S.C. §1532(5)(A)(i); Gifford Pinchot Task Force v. USFWS, 378 F.3d 1059 (9th Cir. 2004). Indeed, comparing the UPA to either existing conditions or conditions that existed at the time of listing does not indicate whether the UPA will impair habitat necessary for both survival and recovery of the species. In addition, NMFS "Listing Conditions Approach" allows the action agencies to take credit for actions since the listing that have resulted in even a slight improvement as if they were part of the UPA. See, e.g., 2004 FCRPS BiOp at 6-77 (concluding that for Snake River spring/summer chinook, UPA is not likely to "negatively impact essential features of critical habitat from conditions at the time of listing. The levels of safe passage in 2010 –2014 are higher than that in 1992, when this ESU was listed.").

D. OTHER SIGNIFICANT FLAWS IN THE 2004 FCRPS BIOP

64. Apart from the overarching structural problems with the new framework and

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jeopardy analysis described above, there are a number of other significant legal shortcomings in the agency's description and analysis of the factors it must address in the 2004 FCRPS BiOp in order to comply with the ESA. These failings include, but are not limited to, the following.

65. First, the jeopardy analysis in the 2004 FCRPS BiOp fails to include an accurate and complete description of the cumulative effects that should be considered together with the effects of the action in determining whether the proposed action will cause jeopardy. 50 C.F.R. § 402.14(g). NMFS relied almost exclusively on states and tribes to identify actions occurring in the action area that would meet the standards of the ESA's regulations for cumulative effects. 2004 FCRPS BiOp at 7-2 to 7-4. NMFS cannot abdicate its duty to identify these cumulative effects by delegating the task to others. Moreover, NMFS' approach limits its consideration largely to state and tribal actions and virtually ensures that the agency will miss a number of ongoing and future private actions that are reasonably certain to occur in the action area. Indeed, NMFS' limited inquiry leads the agency to the remarkable (and cynical) supposition that state and private activities that "have occurred in the past, and have limited survival and productivity of the listed ESUs are not necessarily going to occur in the future." 2004 FCRPS BiOp at 7-2. Nor can the agency properly assume, as it does after its limited inquiry, that conditions in the Columbia River Basin will improve toward a "more pristine condition over time" based on its incorrect and disingenuous interpretation of the decision in NWF v. NMFS, 254 F. Supp.2d 1196 (D. Or. 2003). See 2004 FCRPS BiOp at 7-4.

66. Second, the 2004 FCRPS BiOp and its underlying analysis fail to utilize the "best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), as pointed out by numerous commenters, including state and tribal biologists. For example, the Opinion analyzes impacts of the narrow "action" NMFS considers in the context of an artificially constrained base timeline

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that presents an inappropriately optimistic picture of salmon numbers and survival. See, e.g., 2004 FCRPS BiOp at 4-5 (citing recent study indicating returns for Snake River Spring/summer chinook were "higher in 2002 and 2003 compared to the 1990s"); id. at 8-7 (concluding that "[s]trong returns of adults during the past four years suggest that a short-term lag in achieving beneficial effects would not have serious consequences"). NMFS also utilizes a model to assess the effects of the action and reference operations that is inadequate and inappropriate. See, e.g., id. App. D at D-4 to D-10, D-26 (gap analysis relies exclusively on the SIMPAS model). In addition, NMFS utilizes selectively, and at times ignores altogether, science regarding mortality to salmon caused by transportation and the detriments and benefits of transportation. See, e.g., 2004 FCRP BiOp at 6-17 (pointing to "uncertainty" about the benefits of transporting fall chinook salmon as a reason to transport all of the fish that can be collected); but see id. App D. at D-14 (identifying the same uncertainty as a basis for not transporting more spring migrants). Finally, NMFS also speculates without basis about the potential benefits to be derived from various technological modifications to the dams.

67. Third, in the 2004 FCRPS BiOp, NMFS also authorizes incidental take of a limited number of individuals of all relevant ESUs in an Incidental Take Statement ("ITS"). See 2004 FCRPS BiOp at § 10. The ITS by its own terms, however, covers only the mortality associated with the difference between the so-called "reference operation" and the UPA. See 2004 BiOp at 10-2. This is only a small fraction of the number of fish killed by the FCRPS and its operation. The magnitude of the remaining take is quite large. For example, total mortality of Snake River fall chinook caused by the FCRPS and its operation is estimated as 79% to 92%. Id. at 10-4. However, the ITS for the UPA permits take of only 1% to 4% of this mortality. Id. at 10-2. Thus, NMFS' ITS allows the Action Agencies to take 1-4% of listed fall chinook even

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though the Action Agencies are clearly killing or injuring many more salmon and steelhead through their actions. Like its limited jeopardy analysis, NMFS limited ITS arbitrarily masks and ignores the true impacts of the action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

NATIONAL MARINE FISHERIES SERVICE'S VIOLATIONS OF THE ESA AND APA

68. Plaintiffs incorporate by reference all preceding paragraphs.

69. NMFS has violated the requirements of ESA section 7 and its implementing regulations by arbitrarily, capriciously and without any rational basis concluding in the 2004 FCRPS BiOp that the proposed actions of the Corps, BPA and BOR are not likely to jeopardize any listed species or destroy or adversely modify their critical habitat and by issuing a biological opinion that is otherwise not in accordance with law. The defects in the 2004 FCRPS BiOp include, but are not limited to, the following:

- The 2004 FCRPS BiOp fails to address and consider the entire agency action and, consequently, fails to make a rational or legal determination of whether the action will avoid jeopardy and adverse modification of critical habitat contrary to the requirements of the ESA and its implementing regulations. This failure includes, but is not limited to, the failure to provide a legal or rational basis for purportedly partitioning the existence and non-discretionary operations of the federal action from the so-called discretionary operations, improper reliance on a fictional "reference operation" that has no basis in law and is incomplete and irrational in any event, and the failure to consider all of the federal projects that are part of the action, including the BOR projects in the upper Snake Basin.

- The jeopardy analysis in the 2004 FCRPS BiOp improperly fails to actually evaluate whether the proposed action (once properly identified), when combined with the effects of the environmental baseline and cumulative effects, and in light of the current status of the species, is likely to jeopardize the survival and recovery of the species as required by the ESA and its implementing regulations. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(g). This failure includes, but is not limited to, the failure to properly describe and identify the "effects of the action," including the effects of the environmental baseline, the failure to properly and fully identify and evaluate cumulative effects, the failure to identify the conditions that would constitute jeopardy to the species and adverse modification of critical habitat, and the arbitrary and illegal assumption that avoiding an appreciable

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reduction in the species' "reproduction, numbers, or distribution" as they exist at the time of consultation is sufficient to avoid an appreciable reduction in the species' likelihood of both survival and recovery.

- The 2004 FCRPS BiOp fails to accurately or adequately assess whether the proposed action is likely to destroy or adversely modify critical habitat as required by 16 U.S.C. § 1536 and 50 C.F.R. § 402.14(g), because the proposed action is improperly and incompletely identified, because the critical habitat analysis improperly compares either the existing condition of the habitat or its condition at the time of listing to its condition following the proposed action, and because the analysis fails to address whether the proposed action destroys or adversely modifies the essential features of critical habitat necessary for both the survival and recovery of the species.

- The Incidental Take Statement for the proposed action that accompanies the 2004 FCRPS BiOp is invalid because it relies on the Opinion's inadequate jeopardy analysis, fails to address all of the take caused by the agency action, and fails to identify adequate independent triggers for incidental take apart from implementation of the action as proposed. NMFS' grant of an incidental take statement to accompany the RPA is contrary to the requirements of the ESA and its implementing regulations.

- The 2004 FCRPS BiOp fails to utilize the best scientific and commercial data available.

70. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Adjudge and declare that NMFS has violated ESA section 7 and its implementing regulations by making a no-jeopardy/no-adverse modification finding in the 2004 FCRPS BiOp and issuing an incidental take statement that are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;

2. Enjoin NMFS to withdraw the 2004 FCRPS BiOp and the accompanying incidental take statement, notify the Action Agencies of these withdrawals, and reinitiate consultation with the Action Agencies in order to prepare a biological opinion for the FCRPS, its

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operations, and any related actions that complies with the requirements of the ESA, on a schedule to be set by the Court;

3. Grant plaintiffs such preliminary and permanent injunctive relief as they may from time-to-time request and as may be necessary to protect the environment and ESA-listed species until the Court decides the merits of this case or the agency complies with the law;

4. Award plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys fees, associated with this litigation; and,

5. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 30th day of December, 2004.

/s/ Todd D. True
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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On December 30, 2004, I served a true and correct copy of the following documents on the parties listed below:

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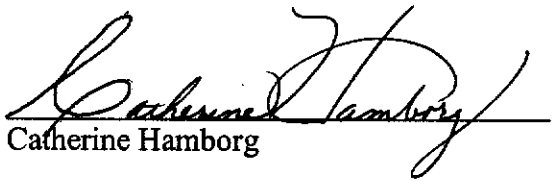
I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of December, 2004, at Seattle, Washington.



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