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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF OREGON

14 NATIONAL WILDLIFE FEDERATION, IDAHO) Civ. No. CV'01-640- JE
WILDLIFE FEDERATION, WASHINGTON)
15 WILDLIFE FEDERATION, SIERRA CLUB,)
TROUT UNLIMITED, PACIFIC COAST) COMPLAINT FOR DECLARATORY
16 FEDERATION OF FISHERMEN'S) AND INJUNCTIVE RELIEF
ASSOCIATIONS, INSTITUTE FOR FISHERIES)
17 RESOURCES, IDAHO RIVERS UNITED, IDAHO)
STEELHEAD AND SALMON UNITED,)
18 NORTHWEST SPORTFISHING INDUSTRY)
ASSOCIATION, FRIENDS OF THE EARTH,)
19 SALMON FOR ALL, and COLUMBIA)
RIVERKEEPER,)

20 Plaintiffs,)

21 v.)

22 NATIONAL MARINE FISHERIES SERVICE,)
23)

24 Defendant.)

25 Earthjustice Legal Defense Fund
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1 PRELIMINARY STATEMENT

2 1. This action seeks review of a biological opinion issued by the National Marine
3 Fisheries Service (“NMFS”) on December 21, 2000, following reinitiation of consultation with
4 the U.S. Army Corps of Engineers (the “Corps”), the Bonneville Power Administration (“BPA”),
5 and the U.S. Bureau of Reclamation (“BOR”) (collectively the “Action Agencies”) under Section
6 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536, regarding the operation of the
7 Federal Columbia River Power System (“FCRPS”), including a Juvenile Fish Transportation
8 Program, and nineteen BOR projects in the Columbia River basin. A searchable CD-ROM copy
9 of this opinion and the accompanying “Basinwide Salmon Recovery Strategy” (“BSRS”), is
10 attached to this complaint as Exhibit A.

11 2. The opinion (hereinafter the “2000 FCRPS BiOp” or the “BiOp”) addresses the
12 effects of proposed FCRPS operations and other actions on salmon and steelhead that inhabit the
13 Columbia River basin and that are listed as threatened or endangered under the ESA. The BiOp
14 concludes that the actions proposed by the Corps, BPA, and BOR would jeopardize the
15 continued existence of a number of these listed species and adversely modify their designated
16 critical habitat. Accordingly, pursuant to the requirements of ESA section 7(b)(3)(A), 16 U.S.C.
17 § 1536(b)(3)(A), and 50 C.F.R. § 402.14(h)(3), NMFS proposes in the BiOp a “reasonable and
18 prudent alternative” course of action (the “RPA”) that it concludes will avoid both jeopardy to
19 these species and adverse modification of their critical habitat.

20 3. This action seeks review of the 2000 FCRPS BiOp and RPA for at least the
21 following reasons:

- 22 • NMFS’ analysis of the current status of listed salmon and steelhead in the BiOp
23 consistently and misleadingly understates the grave and immediate risk of
24 extinction these species face, contrary to the best available scientific information

1 and the requirements of the ESA;

- 2 • NMFS' assessment of why the steps it proposes in the BiOp's RPA will avoid
3 jeopardy and adverse modification of critical habitat: (1) relies extensively on
4 speculative and voluntary actions by other federal agencies, as well as state and
5 private entities, in areas unrelated to FCRPS operations and beyond the control or
6 authority of the Action Agencies; and, (2) ignores the effects of sweeping
7 emergency exemptions that make many key RPA measures optional, contrary to
8 the requirements of the ESA and its implementing regulations;
- 9 • NMFS' analysis of why the RPA and voluntary and speculative actions by others
10 will avoid jeopardy and adverse modification of critical habitat relies on a series
11 of improbably optimistic assumptions, for which the agency offers no rational or
12 credible explanation, and a qualitative assessment of the benefits of these
13 measures that runs counter to the available evidence and is contrary to the best
14 available scientific information and the ESA; and,
- 15 • NMFS' grant of an incidental take statement to accompany the RPA, as well as its
16 approval of an ESA section 10(a)(1)(A) permit for the Juvenile Fish
17 Transportation Program, are both contrary to the requirements of the ESA and its
18 implementing regulations.

19 4. For at least these reasons, this action seeks a declaration that the no-jeopardy/no-
20 adverse modification finding for the RPA, as set forth in the 2000 FCRPS BiOp, violates ESA
21 section 7, 16 U.S.C. § 1536, and is arbitrary, capricious, an abuse of discretion, and not in
22 accordance with law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §
23 706(2)(A).

1 and perpetuation of Washington’s wildlife and wildlife habitat through education and
2 conservation.

3 D. Sierra Club, a national environmental organization founded in 1892 and
4 devoted to the study and protection of the earth’s scenic and ecological resources – mountains,
5 wetlands, woodlands, wild shores and rivers, deserts, plains, and their wild flora and fauna.
6 Sierra Club has some 60 chapters in the United States and Canada, including chapters in
7 Washington, Oregon, and Idaho, and a principal place of business in San Francisco, California.

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

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

22 G. Institute for Fisheries Resources (“IFR”), a nonprofit corporation that
23 constitutes the conservation arm of PCFFA and shares PCFFA’s offices in Sausalito, California
24

1 and Eugene, Oregon.

2 H. Idaho Rivers United (“IRU”), a nonprofit corporation organized under the
3 laws of the State of Idaho with a principal place of business in Boise, Idaho. IRU and its
4 approximately 2,400 members throughout the State of Idaho are dedicated to the protection and
5 restoration of Idaho’s rivers and river resources.

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

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

17 K. Friends of the Earth, a national environmental organization, with its
18 headquarters in Washington, D.C., dedicated to preserving the health and diversity of the planet
19 for future generations. The Northwest Office of Friends of the Earth, located in Seattle,
20 Washington, is dedicated to improving environmental quality in Oregon, Idaho, Montana, and
21 Washington through public education and citizen advocacy. The Northwest Office leads efforts
22 to restore river ecosystems, protect and restore the region’s wild salmon and steelhead runs,
23 improve water quality, reduce and eliminate environmentally-destructive impacts of
24

1 hydroelectric dams, and cut government subsidies that harm the environment.

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

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

16 7. Plaintiffs and their members use the Columbia River and its tributaries throughout
17 Idaho, Oregon, and Washington for recreational, scientific, aesthetic, and commercial purposes.
18 Plaintiffs and their members derive or, but for the threatened and endangered status of salmon
19 and steelhead in the Columbia River basin, would derive recreational, scientific, aesthetic, and
20 commercial benefits from the existence of these species in the wild through wildlife observation,
21 study and photography, and recreational and commercial fishing within the Columbia River
22 basin and the Pacific Ocean. The past, present, and future enjoyment of these benefits by
23 plaintiffs and their members has been, is being, and will continue to be irreparably harmed by
24

1 NMFS’ disregard of its statutory duties, as described below, and by the unlawful injuries
2 imposed on listed species by these actions.

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

8 9. The defendant in this action is the National Marine Fisheries Service, an agency
9 of the United States Department of Commerce responsible for administering the provisions of
10 the Endangered Species Act with regard to threatened and endangered marine species, including
11 the species of threatened and endangered salmon and steelhead that inhabit the Columbia River
12 basin.

13 JURISDICTION AND VENUE

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

17 11. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because
18 members of the plaintiff organizations reside in this district and these members and organizations
19 do business here. In addition, a substantial part of the events or omissions giving rise to the
20 claims in this case occurred in this district, and the defendant maintains an office in the district.

21 STATUTORY FRAMEWORK

22 12. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
23 action to hold unlawful and set aside final agency action, findings, and conclusions that are
24 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5

1 U.S.C. § 706(2)(A). Biological opinions issued pursuant to Section 7 of the ESA are reviewed
2 under this provision of the APA. See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997).

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

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

11 16 U.S.C. § 1536(a)(2).

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

20 15. Section 7 of the Act also establishes an interagency consultation process to assist
21 federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or
22 adverse modification of critical habitat. Under this process, a federal agency proposing an action
23 that “may affect” a listed species, including salmon and steelhead, must prepare and provide to
24 the appropriate expert agency, here NMFS, a “biological assessment” of the effects of the
25 proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). For those actions that may
26 adversely affect a species, NMFS must review all information provided by the action agency, as

1 well as any other relevant information, to determine whether the proposed action is likely to
2 jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50
3 C.F.R. § 402.14(h)(3). This determination is set forth in a biological opinion from NMFS. Id.;
4 16 U.S.C. § 1536(b)(3)(A).

5 16. In formulating its biological opinion, NMFS must evaluate the “effects of the
6 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
7 This multi-step analysis requires NMFS to consider:

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

10 b. the “environmental baseline,” to which the proposed action will be added.

11 This baseline includes “all past and present impacts of all Federal, State, or private
12 actions and other human activities in the action area; the anticipated impacts of all
13 proposed Federal projects in the action area that have already undergone formal or early
14 section 7 consultation; and the impact of State or private actions which are
15 contemporaneous with the consultation in progress,” 50 C.F.R. § 402.02; and,

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

19 17. The regulations do not, however, permit NMFS to consider the effects of future
20 Federal actions when determining whether a proposed Federal action will jeopardize a listed
21 species. Id.; see also 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
22 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
23 point be subject to the section 7 consultation process pursuant to these regulations, their effects
24

1 on a particular species will be considered at that time and will not be included in the cumulative
2 effects analysis.”). Such future Federal actions also are not properly a part of the environmental
3 baseline since they have not yet occurred.

4 18. If, based upon an analysis of these factors, NMFS concludes that the proposed
5 action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat,
6 NMFS must identify and describe any reasonable and prudent alternative (“RPA”) to the
7 proposed action that it believes would avoid jeopardy and adverse modification. 16 U.S.C. §
8 1536(b)(3)(B). An RPA may only consist of measures that are within the scope of the action
9 agency’s legal authority and jurisdiction, that can be implemented consistent with the purpose of
10 the proposed action, and that will avoid jeopardizing the continued existence of the listed
11 species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The effects of an RPA must be
12 analyzed under the same section 7 framework (described above) as an action proposed by an
13 action agency. Finally, if NMFS believes that there is no reasonable and prudent alternative to
14 the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

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

21 THE STATUS OF ANADROMOUS FISH IN THE COLUMBIA RIVER BASIN

22 20. Steelhead and salmon are anadromous fish. They are born and rear in fresh water,
23 migrate downstream through tributaries of the Columbia River and the River itself to the Pacific
24 Ocean where they grow and live as adults, returning to their natal streams and lakes to spawn and

1 die. The Columbia River, its tributaries, and estuary historically provided habitat for chinook,
2 sockeye, chum, and coho salmon, as well as steelhead. A century ago, between 10 and 16
3 million salmon returned to the Columbia each year. As of 1991, 67 stocks of Columbia River
4 salmonids were extinct and 76 stocks were at risk of extinction.¹

5 21. During the course of their juvenile and adult lives, the remaining Columbia River
6 basin salmon and steelhead face numerous artificial obstacles to successful migration,
7 reproduction, and rearing. Chief among these obstacles for many salmon and steelhead stocks is
8 the series of hydroelectric dams and their associated reservoirs, facilities, and operations on the
9 Columbia and Snake rivers that comprise the FCRPS. The FCRPS seriously and adversely
10 affects ESA-listed salmon and steelhead in a variety of ways, including but not limited to the
11 following: (1) operation of the FCRPS alters the hydrograph of the Snake and Columbia Rivers,
12 reducing and shifting river flows in ways that directly and indirectly kill and injure juvenile and
13 adult salmon; (2) juvenile salmon migrating down the Snake and Columbia Rivers are killed and
14 injured in significant numbers at the dams themselves, regardless of the route they take to pass
15 each dam, although some dam passage routes are more lethal than others; (3) even before
16 juveniles reach each dam, passage through the reservoirs created by the dams and operated as
17 part of the FCRPS takes a high toll on survival through mechanisms ranging from increased risks

18
19 ¹ In order for an imperiled species to enjoy the ESA’s protections, it must first be placed on the
20 Act’s “threatened” or “endangered” species lists. 16 U.S.C. § 1533(c). A “species” that may be
21 listed for protection under the ESA includes “any subspecies of fish or wildlife or plants, and any
22 distinct population segment of any species of vertebrate fish or wildlife which interbreeds when
23 mature.” 16 U.S.C. § 1532(16). When deciding whether to list populations of Pacific salmon for
24 protection as a “distinct population segment” under this definition, NMFS employs the concept
25 of “evolutionarily significant unit” (“ESU”). A population of Pacific salmon is an ESU if it is
26 “(1) . . . reproductively isolated from other population units of the same species, and (2) . . . an
important component in the evolutionary legacy of the biological species.” 64 Fed. Reg. 14,308
14,310 (Mar. 24, 1999).

1 of disease, predation, and mortality, to trapping and stranding, disorientation, and stress; (4) once
2 past the FCRPS, the toll the system imposes on juvenile salmon through reduced fitness and
3 survival is still high even in the estuary and ocean, especially for juvenile fish captured and
4 transported downstream around the FCRPS dams and reservoirs by truck or barge. Returning
5 adult salmon and steelhead also must face upstream passage through the FCRPS risking injury,
6 death, and reduced reproductive success through a variety of FCRPS-imposed mechanisms
7 ranging from delays at upstream fishway facilities, to fallback (leading to repeated passage of the
8 same dam), disorientation, trauma, and disease.

9 22. While some of the Columbia River basin salmon and steelhead listed under the
10 ESA are affected to a lesser extent by FCRPS operations, those salmon and steelhead ESUs that
11 must successfully pass the four FCRPS lower Snake River hydropower projects, as well as the
12 four mainstem Columbia River projects, on their way to and from the ocean are particularly hard
13 hit by FCRPS operations. These ESUs include Snake River spring/summer chinook, Snake
14 River fall chinook, Snake River sockeye, and Snake River steelhead. The upper Columbia River
15 spring chinook and steelhead also are hard hit by passage through hydropower projects because
16 they must navigate both the four mainstem Columbia River projects and as many as six
17 additional federally-licensed projects to reach the ocean or return to their spawning streams.

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

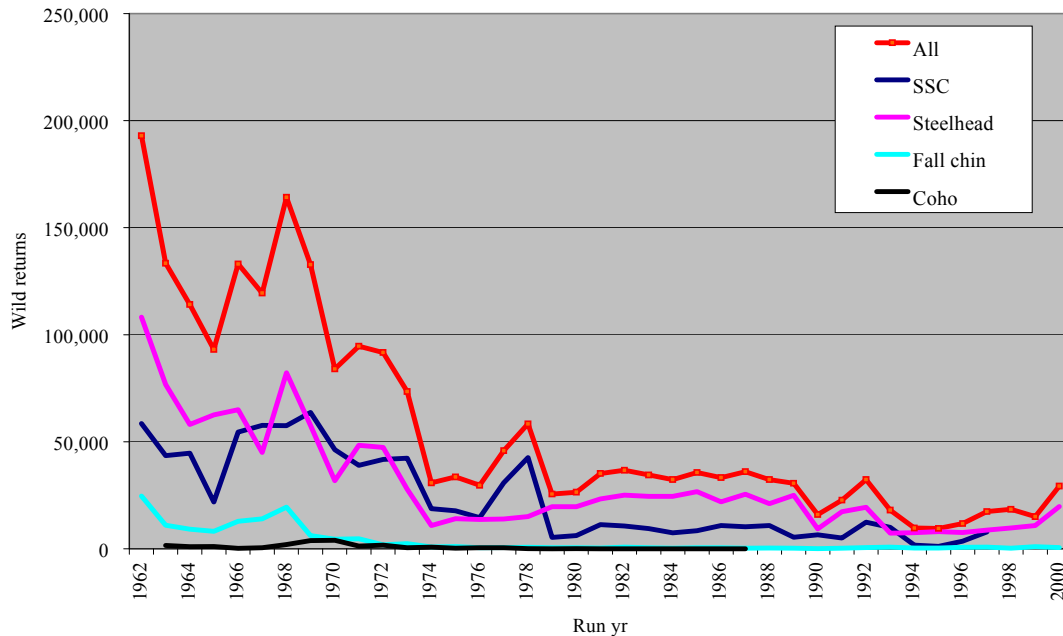
1 24. As a consequence of these and other obstacles, populations of salmon and
2 steelhead in the Columbia River basin have declined precipitously since the advent of European
3 settlement. In fact, Snake River coho salmon have been considered extinct since 1986, the year
4 that the last adult native coho passed Lower Granite Dam on the Snake River. Several sockeye
5 populations also have become extinct.

6 25. Chinook salmon populations too have declined greatly. Snake River spring and
7 summer chinook, whose return rates once exceeded 1.5 million adult fish per year, averaged only
8 9,674 wild fish per year from 1980 through 1990. In 1994, only 1,822 wild spring/summer
9 chinook were estimated to have passed Lower Granite Dam, the last federal dam separating these
10 fish from their spawning grounds. Between 1992 and 1996 the mean was only 3,820 naturally
11 produced spawners, constituting less than 0.3% of the estimated historic abundance of wild
12 spring and summer chinook. Despite a sharp rebound in returns in 2000 and 2001, the
13 populations of these fish are expected to continue their downward spiral towards extinction. The
14 population of Snake River fall chinook, once the most important fall chinook stock in the
15 Columbia River basin with estimated annual returns of 72,000 fish earlier this century, declined
16 to 78 wild fish in 1990 and 742 wild fish in 1993. Between 1992 and 1996, the estimated mean
17 of adult spawners returning to Lower Granite Dam was 1,020 per year. The estimated number
18 reaching Lower Granite Dam was 797 in 1997, 306 in 1998, 905 in 1999, and 567 in 2000.

19 26. Steelhead in the Columbia and Snake Rivers also have declined during this
20 century. Although estimates of adult steelhead returning to the Snake River prior to 1962 are
21 limited, the run of steelhead in the 1960's is estimated at several times the sportfish take, which
22 ranged from 20,000 to 55,000 fish. The most recent 5-year geometric mean, between 1994 and
23 1999, for escapement below the Lower Granite Dam was approximately 8,900 wild adults. In
24

1 recent years average densities of wild juveniles have also decreased significantly.

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



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

- 18 • Snake River sockeye, 56 Fed. Reg. 58619 (Nov. 20, 1991) (listed as endangered);
19 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical habitat);
- 20 • Snake River spring/summer chinook, 57 Fed. Reg. 14653 (April 22, 1992) (listed
21 as threatened); 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical
22 habitat);
- 23 • Snake River fall chinook, 57 Fed. Reg. 14653 (April 22, 1992) (listed as
24

1 threatened); 58 Fed. Reg. 68543, 68546 (Dec. 28, 1993) (designating critical
2 habitat);

- 3 • Snake River steelhead, 62 Fed. Reg. 43937 (Aug. 18, 1997) (listed as threatened);
4 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat);
- 5 • Upper Columbia River steelhead, 62 Fed. Reg. 43937 (Aug. 18, 1997) (listed as
6 endangered); 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat);
- 7 • Lower Columbia River steelhead, 63 Fed. Reg. 13347 (March 19, 1998) (listed as
8 threatened); 65 Fed. Reg. 7779 (Feb. 16, 2000) (designating critical habitat);
- 9 • Upper Columbia River spring-run chinook, 64 Fed. Reg. 14308 (March 24, 1999)
10 (listed as endangered); 65 Fed. Reg. 7778 (Feb. 16, 2000) (designating critical
11 habitat);
- 12 • Lower Columbia River chinook, 64 Fed. Reg. 14308 (March 24, 1999) (listed as
13 threatened); 65 Fed. Reg. 7778 (Feb. 16, 2000) (designating critical habitat).

14 29. On March 24 and 25, 1999, NMFS listed as threatened four additional
15 anadromous fish populations affected by FCRPS operations, the mid-Columbia River steelhead,
16 the upper Willamette River steelhead, the upper Willamette River chinook, and the Columbia
17 River chum salmon. 64 Fed. Reg. 14517 (March 25, 1999) (middle Columbia River steelhead);
18 64 Fed. Reg. 14517 (Mar. 25, 1999) (upper Willamette River steelhead); 64 Fed. Reg. 14308
19 (March. 24, 1999) (upper Willamette River chinook); 64 Fed. Reg. 14507 (March 25, 1999)
20 (Columbia River chum). NMFS designated critical habitat for these species in February of 2000.
21 65 Fed. Reg. 7778 (Feb.16, 2000).

22 30. Many of these twelve listed stocks face a serious and immediate risk of extinction.
23 For example, a total of only 31 wild Snake River sockeye returned to spawn from 1990 through
24

1 1999. NMFS has estimated that the immediate extinction risk for this ESU is “very high.” 2000
2 FCRPS BiOp at 4-21. Similarly, NMFS scientists have calculated that the probability that Snake
3 River spring/summer chinook salmon populations will decline by a further 90 percent from their
4 present extremely low levels within 24 years is 45 to 99 percent (depending on NMFS’
5 assumptions about the reproductive effectiveness of hatchery fish in the wild). For Snake River
6 fall chinook, the probability of a 90 percent population decline within 24 years is 39 to 96
7 percent (depending on the hatchery fish assumptions). For Snake River steelhead, the
8 probability of such a decline is 100 percent within 24 years regardless of the assumptions.

9 31. Other Columbia River salmon and steelhead ESUs face similarly dismal prospects
10 of further precipitous population declines. For example, NMFS scientists have calculated the
11 probability of a further 90% population decline within 24 years for upper Columbia River spring
12 chinook at 97 to 98 percent (depending on assumptions) and for upper Columbia steelhead at 100
13 percent regardless of the assumptions. These and similar dire population decline projections for
14 species already listed under the ESA have led NMFS scientists to conclude that: “the probability
15 [that] many [salmon and steelhead] stocks and ESUs will severely decline or go extinct in both
16 the short and long-term [is] substantial.” McClure, et al., *A Large-Scale Multi-Species Risk*
17 *Assessment* at 2 (2001).² Such further population declines would far surpass the legal threshold
18 of jeopardy to a species which is defined as “reduc[ing] appreciably the likelihood of both the
19 survival and recovery of a listed species in the wild.” 50 C.F.R. § 402.02. (Emphasis added).³

20 _____
21 ² Citations to documents other than the 2000 FCRPS BiOp and the BSRS are to documents that
22 should be a part of the administrative record. Because some of these documents are voluminous
and will be submitted to the Court as part of the record, plaintiffs have not provided copies of the
documents as exhibits to this complaint.

23 ³ These pessimistic population decline projections do not appear to play any role in NMFS’
24 assessment of jeopardy for either the Action Agencies’ proposed actions or the RPA in the 2000
FCRPS BiOp. See *infra* at ¶¶ 43-63.

1 PRIOR PROCEEDINGS REGARDING FCRPS OPERATIONS AND THE ESA

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

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

9 Idaho Dep’t of Fish and Game v. National Marine Fisheries Service, 850 F. Supp. 886, 900 (D.
10 Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995) (hereinafter “IDFG”).⁴ The Court went
11 on to say:

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

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

17 33. Following the Court’s ruling in IDFG, and pursuant to a Court supervised
18 schedule, NMFS and the Action Agencies reinitiated consultation under ESA section 7(a)(2) on
19 FCRPS operations. In March of 1995, NMFS released its revised “Biological Opinion on
20 Reinitiation of Consultation on 1994-1998 Operation of the Federal Columbia River Power
21 System and Juvenile Transportation Program in 1995 and Future Years” (the 1995 FCRPS
22 BiOp). In this opinion, NMFS found that the Action Agencies’ proposed actions would

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24 ⁴ The Court’s opinion in IDFG also provides a summary of the history of litigation over FCRPS
25 operations and ESA-listed salmon prior to 1994. See IDFG, 850 F. Supp. at 888-91.

1 jeopardize listed Snake River salmon⁵ and, therefore, set forth an RPA for interim system
2 operations until it could make a long-term decision about the FCRPS that would both respond
3 the Court's concerns regarding the need for a "major overhaul" of the system, IDFG, 850 F.
4 Supp. at 900, and be informed by further scientific analysis. 1995 FCRPS BiOp at 91-135. The
5 1995 FCRPS BiOp thus described certain FCRPS operations which were intended to provide
6 immediate and near-term improvements in salmon survival through the FCRPS while the
7 agencies assessed and chose among several alternative courses of action for long-term
8 configuration and operation of the system. 1995 FCRPS BiOp at 91-4, 94-116 (describing
9 immediate actions), 116-135 (describing plans for study and evaluation of long-term actions).

10 34. In March 1996, a coalition of conservation and fishermen's organizations,
11 including many of the plaintiffs in this action, sought judicial review under the APA and ESA of
12 the 1995 FCRPS BiOp, as well as certain aspects of its implementation by the Action Agencies.
13 American Rivers v. NMFS, No. 96-384-MA (D. Or.) (complaint filed March 14, 1996).
14 Following a preliminary injunction motion that the parties resolved by stipulation, plaintiffs
15 sought summary judgment on a number of their claims. In April 1997, the Court upheld the
16 1995 FCRPS BiOp against these challenges stating, "I find that NMFS' selection of an
17 acceptable probable recovery range is largely a question of policy rather than science as it
18 necessarily depends upon the agencies' comfort level for risk tolerance." American Rivers v.
19 NMFS, No. 96-384-MA, Opinion and Order at 25 (D. Or. Apr. 3, 1997). The Court did,
20 however, observe:

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23 ⁵ In 1995, the only Columbia River basin salmon listed under the ESA were the Snake River
24 spring/summer chinook, Snake River fall chinook, and Snake River sockeye. See supra at ¶ 28
(describing history of salmon and steelhead listings).

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

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

5 35. Plaintiffs appealed the Court's decisions to the U.S. Court of Appeals for the
6 Ninth Circuit. In March 1999, the Court of Appeals affirmed this Court's decision, although it
7 rejected the Court's "immunization [of NMFS' formulation of the probabilities of survival and
8 recovery required by its jeopardy standard in the 1995 FCRPS BiOp] from judicial review under
9 the rubric of a 'policy' decision" American Rivers v. NMFS, Ninth Cir. No. 97-36159, slip
10 opinion at 8 (9th Cir. 1999) (memorandum disposition).

11 36. The 1995 FCRPS BiOp indicated that it would be replaced in 1999 by an opinion
12 that made a long-term decision about configuration and operation of the FCRPS to ensure the
13 survival and recovery of ESA-listed salmon and steelhead. 1995 FCRPS BiOp at 94-95. NMFS,
14 however, did not issue a new draft biological opinion until July 2000 and did not complete a final
15 opinion until December 21st of last year. In its new opinion, the 2000 FCRPS BiOp, NMFS
16 acknowledged that, for seven of the twelve listed salmon stocks, including all four of the Snake
17 River stocks, a continuation of the actions required by the 1995 FCRPS BiOp would violate the
18 ESA. 2000 FCRPS BiOp at 8-3 (statement for Snake River spring/summer chinook) (statement
19 repeated for six other ESUs at 8-5, 8-7, 8-13, 8-15, 8-17, 8-25). Accordingly, the 2000 FCRPS
20 BiOp, the RPA it proposes for the Action Agencies, and the analysis it offers for why the RPA
21 will avoid jeopardy and adverse modification will determine whether Columbia River basin
22 salmon and steelhead continue to be a part of this region's future.

23 THE 2000 FCRPS BIOP

24 37. While the 2000 FCRPS BiOp shares many similarities with its predecessor

1 opinion from 1995, it departs from the structure and analysis of the earlier opinion in important
2 ways. The similarities between the two opinions include the fact that the 2000 FCRPS BiOp
3 “uses the five-step approach for applying ESA section 7(a)(2) [jeopardy] standards developed in
4 the 1995 FCRPS Biological Opinion” 2000 FCRPS BiOp at 1-8 (describing steps).⁶ The
5 new BiOp also adopts the narrative language of the 1995 FCRPS BiOp for determining whether
6 proposed or alternative actions meet the survival and recovery requirements of the ESA’s
7 jeopardy standard. *Id.* at 1-9. This narrative language states:

8 At the species level, NMFS considers that the biological requirements for
9 survival, with an adequate potential for recovery, are met when there is a high
10 likelihood that the species’ population will remain above critical escapement
11 thresholds over a sufficiently long period of time. Additionally, the species must
12 have a moderate to high likelihood that its population will achieve its recovery
level within an adequate period of time. The particular thresholds, recovery
levels, and time periods must be selected depending upon the characteristics and
circumstances of each salmon species under consideration.

13 Id.

14 38. Further, like the 1995 FCRPS BiOp, the new BiOp concludes that under this
15 standard, the Action Agencies’ proposed actions, which are a continuation of the 1995 FCRPS
16 BiOp RPA, 2000 FCRPS BiOp at 3-1, would jeopardize ESA-listed salmon and steelhead and
17 destroy or adversely modify their critical habitat, 2000 FCRPS BiOp at 6-1 to 6-146.⁷

18 ⁶ These steps require: (1) an assessment of the current population status and risks for each
19 species; (2) consideration of the environmental baseline before the proposed action or RPA; (3)
20 an assessment of the effects of the proposed action; (4) a determination of whether the proposed
21 action will avoid jeopardy and adverse modification; and, (5) development and evaluation of an
22 RPA if the proposed action is insufficient to meet the requirements of ESA section 7. 2000
23 FCRPS BiOp at 1-8.

24 ⁷ Specifically, the BiOp concludes that the proposed actions would jeopardize and adversely
25 modify the critical habitat of Snake River spring/summer chinook, 2000 FCRPS BiOp at 8-3,
26 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, and mid-Columbia River steelhead, *id.* at 8-17.

1 Consequently, the new BiOp, like the one it replaces, sets forth a reasonable and prudent
2 alternative course of action for which it reaches a no-jeopardy/no-adverse modification finding.
3 Id. at 9-181 to 9-287.

4 39. Both the RPA in the 2000 FCRPS BiOp and the assessment of its effects on ESA-
5 listed salmon and steelhead in the Columbia River basin are markedly different from anything in
6 the 1995 FCRPS BiOp. The RPA itself lists some 199 measures. 2000 FCRPS BiOp at 9-23 to
7 9-180. Many of these measures discuss FCRPS operations, the Juvenile Fish Transportation
8 Program, certain BOR projects, and further studies and analyses in these areas. Id. at 9-53 to 9-
9 132. Others describe a complex process for planning, monitoring and evaluation, production of
10 reports, and procedural steps NMFS and the Action Agencies may take that extend well beyond
11 FCRPS operations. Id. at 9-1 to 9-51, 9-161 to 9-180. Still others generally describe behaviors
12 affecting salmon habitat, hatchery operations, and salmon harvest management for which the
13 Action Agencies have only limited responsibility. Id. at 9-133 to 9-141 (habitat discussion), 9-
14 143 to 9-150 (harvest discussion), 9-151 to 9-160 (hatchery discussion).

15 40. The 2000 FCRPS BiOp then sets forth NMFS' assessment of whether this wide-
16 ranging suite of RPA "measures" together with "activities expected of other Federal and non-
17 Federal entities[,]" see, e.g., 2000 FCRPS BiOp at 9-203 (statement for Snake River
18 spring/summer chinook), will be sufficient to avoid jeopardy to ESA-listed salmon and steelhead
19 or adverse modification of their critical habitat. See generally 2000 FCRPS BiOp at 9-181 to 9-
20 287. For each listed species for which NMFS concluded that the Action Agencies' proposed
21 actions would cause jeopardy or adverse modification, see supra note 7, this assessment of the
22 RPA and other "expected" actions reaches the opposite conclusion: that the RPA and these
23 actions, "taken together," will avoid jeopardy and adverse modification. Id. at 9-203, 9-207 to
24

1 208, 9-212, 9-283 (conclusions for Snake River spring/summer chinook, Snake River fall
2 chinook, upper Columbia River spring chinook); 9-239 to 240, 9-287 (conclusions for Snake
3 River sockeye); 9-222-23, 9-284 (conclusions for Snake River steelhead); 9-226 to 227, 9-230 to
4 231, 9-285 (conclusions for upper and middle Columbia River steelhead). The structure and
5 content of this analysis forms the heart of the 2000 FCRPS BiOp.

6 41. There are a number of serious, substantial, and fundamental defects in this
7 analysis that render the no-jeopardy/no-adverse modification conclusions of the BiOp for the
8 RPA arbitrary, capricious, and otherwise not in accordance with law. These defects, especially
9 as they relate to ESA-listed Snake River salmon and steelhead, are described below.

10 A. NMFS' Analysis of Current Salmon and Steelhead Population Status and Risks Is
11 Misleadingly Optimistic, Arbitrary, and Contrary to Law.

12 42. The first of these flaws affects NMFS' assessment of the "starting point," 2000
13 FCRPS BiOp, App. A at A-2, or analysis of the population status and risks for each of the listed
14 Columbia basin salmon and steelhead ESUs, see id. at 4-1 to 4-21 (summarizing results); App. A
15 (describing and summarizing analysis). This initial assessment of each species' status and risks
16 is critical to the remaining analysis in the 2000 FCRPS BiOp because it defines, in quantitative
17 terms, the baseline population condition against which NMFS analyzes the magnitude, timing,
18 and feasibility of the population improvements necessary to ensure the survival and recovery of
19 these species.

20 43. In the 2000 FCRPS BiOp, NMFS calculates this baseline in terms of the median
21 population change rate and the probability that a species will "survive" for both 24 and 100
22 years. For purposes of this analysis, NMFS further defines "survive" as the probability that at
23 least one adult fish of the species will return once over an entire multi-year salmon generation.
24 2000 FCRPS BiOp at 1-13. NMFS' analysis based on this one-fish threshold sharply,

1 significantly, and misleadingly underestimates the magnitude of the risk that these species will
2 not survive for another 24 years, let alone 100 years.

3 44. NMFS' selection of this one-fish survival threshold fails to make use of the best
4 available scientific evidence, inexplicably ignores or fails to address relevant factors, and is
5 contrary to law for at least the following reasons:

- 6 • By defining a species' "survival" as the return of one adult fish over an entire
7 salmon generation, NMFS' initial population status and risk analysis is at odds
8 with widely accepted scientific principles for identifying a population
9 threshold that would be adequate to avoid extinction, principles developed to
10 express a precautionary and conservative approach to extinction risk analysis.⁸
- 11 • NMFS' adoption of a one-fish salmon survival threshold also leads it to ignore
12 available and credible scientific data for at least the Snake River ESUs that
13 identifies specific population numbers for risk analysis that are significantly
14 higher than one returning adult fish in an entire generation.
- 15 • NMFS' attempt to justify ignoring these higher population thresholds because,
16 "[a]n extinction threshold of one fish is the only extinction threshold that has
17 the same biological meaning regardless of which index stock or population is
18

19 ⁸ This threshold also is inconsistent with other population risk standards NMFS' scientists have
20 used for Columbia basin salmon and steelhead ESUs elsewhere, such as the probability of a 90
21 percent population decline from current levels in 24 or 100 years, see supra at ¶¶ 30-31
22 (summarizing probabilities of a 90 percent population decline for listed salmon and steelhead), a
23 standard that NMFS scientists have concluded is "the best measure of risk," McClure, M., et al.,
24 Cumulative Risk Initiative, Draft Report at 15 (Apr. 7, 2000), and a standard that, if applied,
25 leads to a far more urgent and dire prediction of the risks facing these species. Yet this
26 population decline standard does not appear to have played any role in NMFS' analysis of
jeopardy.

1 addressed,” 2000 FCRPS BiOp at 1-13, is contrary to law: nothing in the ESA
2 supports a focus on standardizing or simplifying risk analysis across listed
3 species in order to facilitate an assessment of comparative risks at the expense
4 of an analysis that uses the best scientific and commercial data available to
5 evaluate the specific risk each species faces.⁹

6 45. There is at least one additional serious flaw in the initial population status and risk
7 analysis that forms the foundation of the 2000 FCRPS BiOp: the analytic tools NMFS uses for
8 this analysis necessarily assume that salmon and steelhead populations have been declining at a
9 constant rate over the period of analysis and will continue to decline at this constant rate into the
10 future absent intervention or changed conditions. In fact, the available scientific evidence
11 demonstrates that several of the ESA-listed Snake and Columbia River salmon and steelhead
12 populations have been declining at an accelerating – not a constant – rate.

13 46. The effect of ignoring an accelerating population decline, using a one-fish
14 population threshold, and other similar and inexplicable errors or decisions is to consistently and
15 irrationally underestimate both the magnitude and the immediacy of the extinction risks facing
16 these species in ways that combine and compound to present an analysis that is both
17 misleadingly optimistic and contrary to law.

18
19 _____
20 ⁹ NMFS itself recognizes as much in the BiOp. Its narrative definition of what would constitute
jeopardy for each of the listed salmon and steelhead ESUs concludes with the statement:

21 The particular thresholds, recovery levels, and time periods must be selected
22 depending upon the characteristics and circumstances of each salmon species
under consideration.

23 2000 FCRPS BiOp at 1-9 (quoting and adopting the 1995 FCRPS BiOp) (emphasis added). Yet
24 the agency has ignored precisely this point by selecting a one-size-fits-all, one-fish extinction
threshold for all of the Snake River and other Columbia River basin salmon and steelhead ESUs.

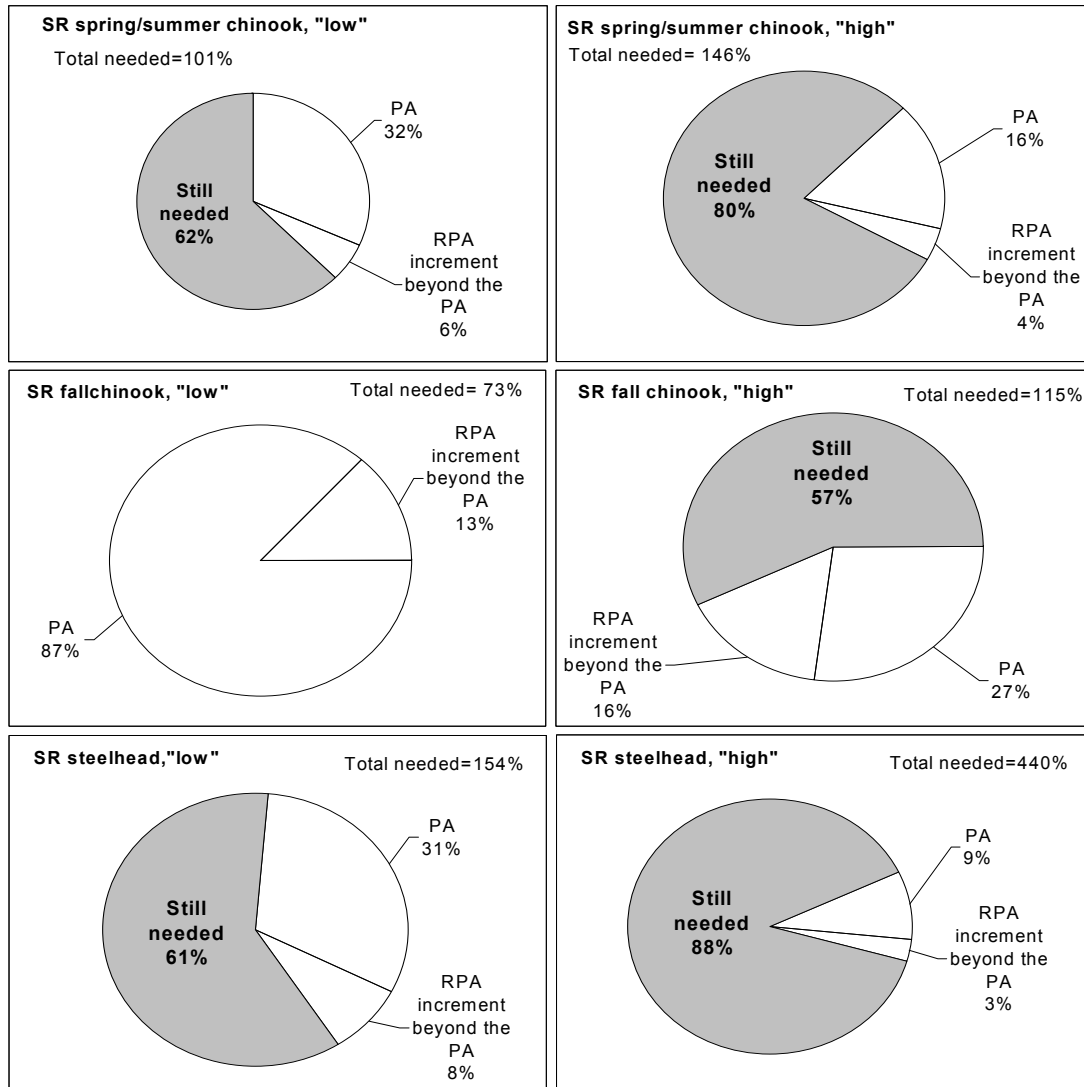
1 B. NMFS' Analysis of Why the Measures of the RPA Will Avoid Jeopardy and
2 Adverse Modification Improperly Depends on Speculative, Voluntary Actions
3 and Is Arbitrary and Contrary to Law.

4 47. Despite its arbitrary and legally defective initial assessment of the population
5 status and risks facing Columbia River basin salmon and steelhead ESUs, NMFS correctly
6 concludes that the Action Agencies' proposed actions would jeopardize all of the listed Snake
7 River salmon and steelhead ESUs and four of the Columbia River ESUs because these actions
8 would not improve the probability of the species' survival and recovery enough to avoid
9 jeopardy. See supra at note 7 (citing jeopardy findings of 2000 FCRPS BiOp for proposed
10 actions). In light of its conclusion, NMFS develops and presents in chapter 9 of the 2000 FCRPS
11 BiOp a collection of actions and other measures it asserts offer a "reasonable and prudent
12 alternative" to the proposed actions, together with its analysis for why this RPA will avoid
13 jeopardy and adverse modification of critical habitat for all of the basin's 12 ESUs.

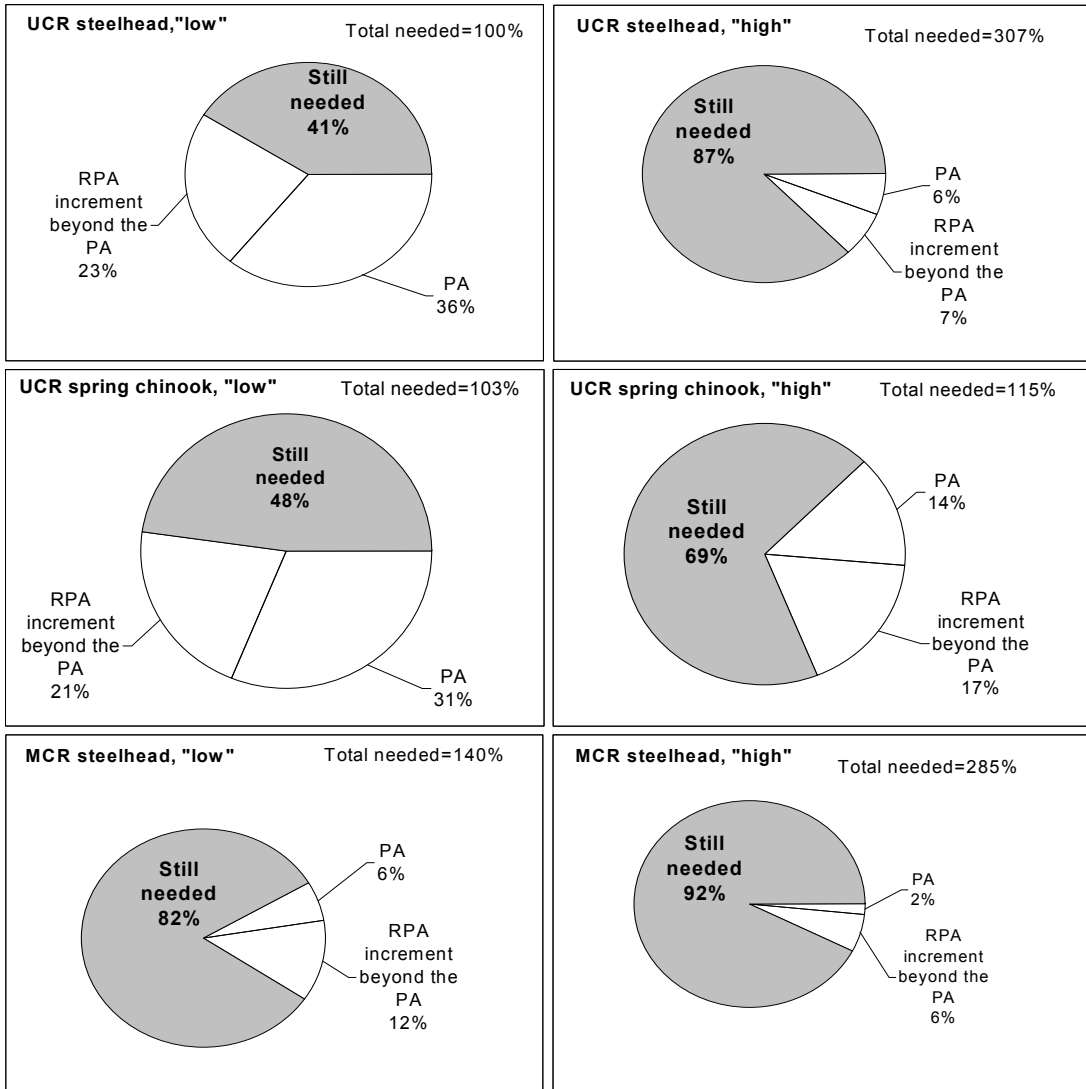
14 48. NMFS' analysis and explanation of why the measures of the RPA in the 2000
15 FCRPS BiOp will avoid jeopardy and adverse modification is markedly different from the
16 analysis of the RPA in the 1995 FCRPS BiOp in at least one important respect: the 1995 FCRPS
17 BiOp and its analysis focused primarily on the effects of measures identified in the RPA to
18 improve salmon and steelhead survival and recovery through the FCRPS dams and reservoirs
19 and concluded that these hydrosystem management measures would avoid jeopardy and adverse
20 modification. 1995 FCRPS BiOp at 91-135 (describing RPA). In the 2000 FCRPS BiOp, by
21 contrast, NMFS recognizes that even the measures of the new RPA it proposes for operation of
22 the FCRPS – which includes any related changes in harvest measures for those ESUs affected by
23 harvest, see, e.g., 2000 FCRPS BiOp, App. A at A-38 (table A-10) (Snake River fall chinook
24 harvest assumptions) – will not avoid jeopardy and adverse modification for the Snake River
25 ESUs and some Columbia River ESUs.

1 49. This conclusion compels NMFS to rely on measures unrelated to operation of the
2 FCRPS, such as salmon habitat and hatchery measures by other Federal or state agencies and
3 private parties, in order to reach a no-jeopardy/no-adverse modification finding for the RPA in
4 the 2000 FCRPS BiOp. In fact, the degree to which the no-jeopardy/no-adverse modification
5 finding for the new RPA depends on actions unrelated to operation of the FCRPS, the Juvenile
6 Fish Transportation Program, and the management of BOR projects is remarkable. As the pie
7 charts on the following pages show, for all of the Snake River salmon and steelhead ESUs for
8 which NMFS performed an analysis, under all sets of assumptions NMFS applies except one (the
9 optimistic assumptions for Snake River fall chinook), substantially more than one-third, and in
10 many cases two-thirds or more, of the survival improvements needed to avoid jeopardy and
11 adverse modification for the RPA come from non-hydrosystem/non-harvest measures, most of
12 which are to be carried out by entities other than the Action Agencies. Similarly, for three of the
13 Columbia River ESUs, NMFS' analysis discloses that as much or more of the survival
14 improvements necessary to avoid jeopardy are predicted to come from such non-
15 hydrosystem/non-harvest measures. Moreover, under all of the assumptions NMFS uses in the
16 2000 FCRPS BiOp analysis, the measures of the RPA that do address FCRPS operations only
17 provide a small fraction of the necessary survival improvements beyond the improvements that
18 would be provided by the proposed actions – a suite of actions for which NMFS reached a
19 jeopardy/adverse modification conclusion.

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



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50. NMFS' conclusion that the limited survival improvements from hydrosystem and harvest measures in the RPA, when combined with the other habitat and hatchery measures, including the additional "activities expected of other Federal and non-Federal entities," see, e.g., 2000 FCRPS BiOp at 9-203), will improve the survival and recovery probabilities for each of the ESA-listed salmon and steelhead ESUs enough to avoid jeopardy and adverse modification is arbitrary, capricious, and contrary to law for at least the following reasons.

51. First, as described above, NMFS concludes that for many of the listed ESUs, most

1 of the survival improvements it believes are necessary to avoid jeopardy and adverse
2 modification will be achieved through “the activities expected of other Federal and non-Federal
3 entities.” See, e.g., 2000 FCRPS BiOp at 9-203 (statement for Snake River spring/summer
4 chinook). These steps are apparently to be taken, in part, with support from the Action Agencies,
5 but also to a significant but unspecified degree, they are to be taken by other Federal agencies
6 whose management activities affect the habitat of listed salmon, and by unidentified non-federal
7 state and private parties throughout the Columbia and Snake River basin.

8 52. NMFS’ inclusion of these speculative, voluntary, and largely unidentified future
9 actions by other Federal and non-federal entities in its RPA, and the analysis of whether the
10 measures of the RPA will avoid jeopardy, is contrary to law. The measures of an RPA are
11 defined by regulation to include only those “that can be taken by the Federal agency or applicant
12 in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A). Furthermore, the regulations
13 governing consultation prohibit consideration of future Federal actions by other agencies, as well
14 as unidentified and uncertain future actions by non-federal state and private entities. See 50
15 C.F.R. § 402.14(g) (NMFS must consider the “effects of the action” and “cumulative effects” in
16 formulating its biological opinion); 50 C.F.R. § 402.02 (defining these terms to exclude all future
17 federal activities and all state and private activities that are not “reasonably certain to occur.”).

18 53. To the extent NMFS relies on these other unspecified Federal and non-federal
19 actions because, in its view, they “have a reasonable chance of being implemented,” BSRS, vol.
20 1 at 23-24; but see 2000 FCRPS BiOp at 9-282 (asserting that the RPA only makes these
21 measures more likely to occur), NMFS has failed to offer a rational account of the bases for its
22 conclusion, or to identify to which measures the conclusion applies. Indeed, NMFS appears to
23 take contradictory positions with respect to implementation of these measures because it also
24

1 admits in the BiOp that:

2 despite full use of the best scientific evidence available, substantial uncertainty
3 remains about the effectiveness of measures available to meet the biological
4 requirements of listed ESUs In habitat, critical uncertainties are associated
5 with the feasibility of implementing protective measures in light of the existing
6 institutional frameworks (e.g., addressing in-stream flow needs in over-
7 appropriated streams).

8 2000 FCRPS BiOp at 9-4.¹⁰

9 54. Second, not only does NMFS rely in large part on the survival improvements
10 from these “activities expected of other Federal and non-Federal entities,” which it
11 acknowledges cannot be quantified and are uncertain to occur for a variety of reasons, but
12 NMFS’ analyses of risks and effects also assume that the benefits to salmon and steelhead
13 populations of these activities (and indeed all other activities described in the RPA) will accrue
14 immediately. See, e.g., 2000 FCRPS BiOp at 9-202-03 (acknowledging the effects of this
15 assumption for Snake River spring/summer chinook). Throughout the BiOp and BSRS, NMFS
16 repeatedly recognizes, as it must, that many of these unspecified “activities” would not even be
17 implemented for ten years or more. See, e.g., 2000 FCRPS BiOp at 9-202 (“To the extent that
18 improvements are implemented gradually, the analysis underestimates the survival change that
19 will ultimately be required.”) (discussing assumptions for survival improvements needed for
20 Snake River spring/summer chinook); BSRS, vol. 2 at 6, 10 (habitat actions); 72 (hydrosystem
21 actions).

22 55. NMFS attempts to deflect criticism of its unwarranted assumption of immediate
23 benefits from actions that will not even be defined in many cases, let alone implemented, for
24

25 ¹⁰ Nonetheless, NMFS includes in the measures of the RPA on which it relies to reach a no-
26 jeopardy/no-adverse modification finding precisely the categories of actions it acknowledges are
plagued by institutional uncertainties – e.g., addressing in-stream flows. See, e.g., 2000 FCRPS
BiOp at 9-55 to 9-73 (describing “actions” 14-36).

1 years, or effective for years after that, by asserting that “NMFS considers [the effects of this
2 assumption] qualitatively in making a jeopardy determination.” *Id.* at 9-203. NMFS, however,
3 fails to identify how, where, or to what extent such “qualitative” consideration occurred and
4 informed its conclusions. Moreover, it is apparent that the optimistic effects of this assumption
5 of immediate benefits are quite large: NMFS’ sensitivity analyses show that the inevitable and
6 actual delay in implementing improvement measures, and the corresponding delay in their
7 effects, will greatly increase the magnitude of population change required to avoid jeopardy and
8 adverse modification while also allowing the species to decline even further before any benefits
9 accrue. See, e.g., 2000 FCRPS BiOp, App. A at A-67 to A-70. As NMFS scientists have
10 calculated elsewhere, the probability of a further 90% decline in the population of many Snake
11 and Columbia ESUs within 24 years is nearly 100%. See supra at ¶¶ 30-31 (describing
12 probability of declines by ESU). The combination of these anticipated population declines and
13 the inevitable implementation delays NMFS acknowledges will occur will mean reducing entire
14 ESUs that already are listed under the ESA to a few dozen or hundred spawners before
15 mitigation measures are even identified or implemented, let alone have any of the hypothesized
16 beneficial effects.

17 56. Third, even assuming that NMFS may rely on the actions of other Federal and
18 non-federal entities to supply the bulk of the survival and recovery improvements it believes are
19 necessary to avoid jeopardy and adverse modification for many of the listed ESUs, NMFS has
20 failed to provide any credible scientific basis or analysis to support its “qualitative” conclusion
21 that these benefits will, in fact, accrue to the degree (and within a timeframe) that will ensure
22 compliance with the requirements of ESA section 7(a)(2). See, e.g., 2000 FCRPS BiOp at 9-203
23 (qualitative “analysis” for Snake River spring/summer chinook), 9-208 (same for Snake River
24

1 fall chinook), 9-222 to 223 (same for Snake River steelhead); 9-212 (same for upper Columbia
2 River chinook). Although this “qualitative” analysis of the benefits of an array of unspecified
3 non-hydrosystem/non-harvest measures is the linchpin to NMFS no-jeopardy/no-adverse
4 modification finding for the entire RPA, it is cursory, unsupported, and runs counter to the
5 evidence before the agency.

6 57. NMFS also seeks to substitute for the required identification of specific survival
7 and recovery actions and an analysis of why such actions will avoid jeopardy and adverse
8 modification, a planning and evaluation framework that could be used to develop and assess
9 actions that might provide some benefits to listed salmon and steelhead at some (likely distant)
10 future date, if they are implemented. But NMFS cannot properly substitute this framework for
11 identification of actions that will ensure against jeopardy and adverse modification. Indeed, the
12 implementation schedules for the planning steps themselves indicate that, for example, planning
13 is only required for 16 priority subbasins out of 61 subbasins in the Columbia River basin within
14 the next five years. Moreover, most of the RPA “actions” identified for the next 5 to 10 years
15 consist of planning activities such as setting up a “foundation” to design pilot projects, and
16 determining how the Action Agencies can work with other federal agencies and non-federal
17 entities to actually identify what needs to be done to avoid jeopardy and where, who, and how it
18 will be paid for and done. These are not actions that themselves will avoid or even mitigate for
19 jeopardy, they are planning exercises to be carried out while salmon and steelhead continue to
20 decline and FCRPS operations continue to take their toll.¹¹

21 _____
22 ¹¹ Remarkably, even many of the FCRPS actions identified in the RPA need not actually be
23 implemented until 2010, a delay of 10 years. See 2000 FCRPS BiOp at 9-2, 9-3, 9-6, 9-53
24 (discussing attainment of hydrosystem performance standards by 2010 but setting no schedule
25 for implementing actions).

1 58. Fourth, apparently because NMFS recognizes that the survival and recovery
2 improvements that must accrue to the Snake and Columbia River ESUs in order to avoid
3 jeopardy are large, the actions necessary to achieve those benefits across the range of actors who
4 must take them highly uncertain to occur, and the benefits that will accrue from the various
5 actions even if they occur as planned also are uncertain (even speculative) and unquantifiable,
6 the agency sets forth an extensive monitoring and evaluation program for these ESUs and actions
7 as a part of the RPA. See, e.g., 2000 FCRPS BiOp at 9-1 to 9-52, 9-161 to 9-180. While this
8 monitoring and evaluation effort may provide some interesting and even some useful
9 information, one thing it cannot provide is a basis for a scientifically credible analysis of whether
10 any change in the population status and trends for any of the listed salmon and steelhead ESUs
11 has occurred within the short five and eight-year timeframes allowed by the provisions of the
12 RPA. Accordingly, this monitoring and evaluation program fails to provide any additional, let
13 alone rational, basis for NMFS' conclusion that the RPA will avoid jeopardy and adverse
14 modification.

15 59. While NMFS apparently recognizes this shortcoming of its monitoring and
16 evaluation program, it asserts that it will develop analytic tools to allow it to make meaningful
17 evaluations of population change at five and eight years. 2000 FCRPS BiOp at 9-46. This
18 assertion lacks any rational or scientific support. In substance, it is an acknowledgement that
19 NMFS does not know whether the measures of the RPA will avoid jeopardy and adverse
20 modification and does not even have the tools to make such an evaluation within the timeframes
21 set in the RPA. Nonetheless, NMFS asserts that the RPA will avoid jeopardy and adverse
22 modification because it will invent the missing tools in time to both detect and correct any
23 problem. This sweeping assertion of confidence in unknown and uncertain future actions is
24

1 arbitrary, at odds with the best available scientific information, and contrary to law.

2 60. Fifth, even with respect to its limited hydrosystem measures, the RPA includes
3 broad emergency exemptions that allow the Action Agencies to eliminate, in whole or in part,
4 river management requirements that NMFS has concluded are necessary to avoid jeopardy and
5 adverse modification. See 2000 FCRPS BiOp at 9-62 (emergency exemption from increased
6 river flow and water spill requirements), 9-88 (same). NMFS' no-jeopardy/no-adverse
7 modification findings for the RPA, however, are based on the very FCRPS operation
8 requirements (e.g., flow and spill) that the emergency provisions make optional. Furthermore,
9 the RPA does not include any requirement to adjust its measures for the protection of listed
10 salmon and steelhead if the Action Agencies invoke these broad emergency exemptions, or any
11 analysis of the effect of these exemptions on listed salmon and steelhead.

12 61. As a consequence, NMFS' no-jeopardy/no-adverse modification finding for the
13 RPA is arbitrary and contrary to law for at least the following reasons: (1) inclusion of an
14 emergency exemption of unspecified scope that can be invoked at any time, and as often as the
15 Action Agencies may choose to invoke it, prevents any rational determination that the RPA's
16 hydrosystem measures are sufficiently certain to be implemented to contribute to avoiding
17 jeopardy; (2) NMFS' assessment of whether the RPA will avoid jeopardy and adverse
18 modification unaccountably fails to address, analyze, or discuss the biological effects of these
19 emergency exemptions on listed salmon and steelhead, nor does it disclose how actions
20 permitted by these exemptions are likely to affect the prospects of survival and recovery of the
21 listed species; and, (3) inclusion of these emergency exemptions in the RPA without any
22 corresponding mechanism to compensate for the impacts to salmon and steelhead when the
23 exemptions are invoked, or any requirement to re-initiate consultation under these circumstances,

1 fails to comply with the requirements of ESA section 7(a)(2) to insure against jeopardy and
2 adverse modification.

3 62. Finally, NMFS' conclusion that the RPA will avoid jeopardy and adverse
4 modification rests on NMFS' arbitrary and illegal initial analysis of the current population status
5 and risk each of the salmon and steelhead ESUs faces. See supra ¶¶ 42-46 (describing flaws in
6 this analysis). Because NMFS bases its jeopardy analysis on population status and risk estimates
7 that substantially, consistently, and improperly understate the risk these species face, its
8 conclusions about what is required of the RPA to avoid jeopardy necessarily also understate the
9 magnitude and urgency of improving population survival and are arbitrary and contrary to law.
10 Moreover, even assuming NMFS has rationally assessed the current status and magnitude of the
11 risk these species face (which it has not), its assessment of the measures needed to avoid this risk
12 and hence jeopardy begins by assuming, contrary to the available data and the best available
13 scientific analysis of the data, that the rate at which a number of the listed ESUs are surviving
14 today already has begun to improve significantly and that this improvement will continue into
15 the future. See, e.g., 2000 FCRPS BiOp at 6-80 (Snake River spring/summer chinook), 6-91
16 (Snake River fall chinook), 6-97 (upper Columbia River chinook) (each assuming that changes to
17 FCRPS operations since 1980 have produced salmon survival improvements). In fact, this
18 assumption of current population survival improvements and an improving survival trend is
19 without credible factual support or analysis even though NMFS' error in making such an
20 assumption has previously been called to its attention by a number of credible scientific critics.
21 See, e.g., U.S. Fish & Wildlife Service, *Comments on NMFS CRI Document: A standardized*
22 *Quantitative Analysis of Risks Faced by Salmonids in the Columbia Basin* at 7-9 (2000); U.S.
23 Fish & Wildlife Service, *Analysis of CRI population growth rate prediction method: Additional*
24

1 *USFWS comments on November 22, 2000 Draft Biological Opinion at 1, 11-12 (2000).*

2 C. The Incidental Take Statement and the ESA Section 10(a)(1)(A) Juvenile Fish
3 Transportation Permit That Are Part of the 2000 FCRPS BiOp Are Arbitrary and
4 Contrary to Law.

4 63. In addition to the above-described shortcomings of the no-jeopardy/no-adverse
5 modification findings in the 2000 FCRPS BiOp for the RPA, the Incidental Take Statement
6 (“ITS”) that NMFS has issued for the RPA is arbitrary, capricious, and otherwise not in
7 accordance with law because NMFS has issued the ITS without analyzing the additive and
8 combined effects of the incidental take authorized by the ITS for the 2000 FCRPS BiOp and
9 incidental take for these same salmon and steelhead ESUs authorized in other incidental take
10 statements and permits for other actions.

11 64. Despite NMFS’ failure to track the number of biological opinions, incidental take
12 statements, incidental take permits, and incidental take the agency has authorized for Columbia
13 River basin salmon and steelhead, NMFS has approved substantial additional incidental take of
14 these species in the ITS for the 2000 FCRPS BiOp, and continues to issue other biological
15 opinions authorizing even more incidental take within the Columbia River basin. For example,
16 the ITS for the 2000 FCRPS BiOp authorizes incidental take of up to 88 percent of Snake River
17 fall chinook juveniles and up to 43 percent of Snake River spring/summer chinook juveniles as a
18 result of implementing the RPA. 2000 FCRPS BiOp at 10-3.

19 65. NMFS’ failure to track or otherwise evaluate the amount of incidental take it has
20 authorized in incidental take statements and permits for Columbia River basin salmon and
21 steelhead prevents the agency from making a rational or legal determination that the actions
22 approved in the 2000 FCRPS BiOp and RPA, when combined with other previously approved
23 and concurrent actions, will avoid jeopardy to the listed species and the destruction or adverse
24 modification of their critical habitat. See 50 C.F.R. §§ 402.14(g); 402.02; see also Defenders of

1 Wildlife v. Babbitt, 130 F. Supp.2d 121 (D.D.C. 2001) (setting aside as arbitrary a biological
2 opinion for Sonoran pronghorn where agency failed to assess the effects on the species of
3 incidental take authorized in the opinion when combined with incidental take authorized in other
4 opinions).

5 66. Finally, NMFS' conclusion that the RPA in the 2000 FCRPS BiOp avoids
6 jeopardy and adverse modification of salmon and steelhead critical habitat in the mainstem
7 Columbia and Snake Rivers is arbitrary and contrary to law because this conclusion improperly
8 depends on a Juvenile Fish Transportation Program permitted under section 10(a)(1)(A) of the
9 ESA, 16 U.S.C. § 1539(a)(1)(A), a program that for the duration of the RPA removes the
10 majority of salmon and steelhead smolts from their designated critical habitat – the Snake and
11 Columbia Rivers – each year during an important life stage in order to reach the conclusion that
12 the measures of the RPA meet the requirements of section 7(a)(2) and its implementing
13 regulations. These regulations, however, state that a federal action avoids jeopardy and adverse
14 modification of critical habitat only if the action does not appreciably reduce the prospects of a
15 species' survival and recovery in the wild. 50 C.F.R. § 402.02. The need to remove a majority
16 of the species from their designated critical habitat for an entire life stage demonstrates adverse
17 modification of that habitat by FCRPS operations under the RPA, and long-term fish
18 transportation cannot be a valid part of the RPA.

19 67. Moreover, the ESA section 10(a)(1)(A) juvenile fish transportation permit itself is
20 arbitrary and contrary to the ESA and its implementing regulations because the law and
21 regulations allow capture and removal of a listed species from the wild only on a temporary basis
22 and only for reasons not applicable here. The effect of the improper section 10(a)(1)(A) permit
23 is to mask the adverse modification of designated salmon and steelhead critical habitat and the
24

1 jeopardizing effects to these species caused by the measures of the RPA. NMFS cannot simply
2 bypass the requirements of either section 7(a)(2) or section 10(a)(1)(A) in order to avoid an
3 obvious and unavoidable conclusion: the FCRPS operations required by the RPA for the 2000
4 FCRPS BiOp so alter the designated critical habitat of Columbia and Snake River salmon ESUs
5 that the habitat is lethal and uninhabitable for these species, a situation that readily meets the
6 statutory and regulatory definition of adverse modification and a situation the law requires
7 NMFS to identify and correct, not circumvent.

8 ACTIONS SINCE NMFS ISSUED THE 2000 FCRPS BIOP

9 68. A series of events since NMFS issued the 2000 FCRPS BiOp highlights many of
10 its defects. First, low precipitation has resulted in one of the driest year on record in the
11 Columbia River basin. This is not, however, an unpredictable event. Indeed, as early as
12 November 2000 – before the 2000 FCRPS BiOp was even released – the federal agencies
13 responsible for the operation of the FCRPS recognized that below-average precipitation
14 conditions existed in the basin and would affect salmon migration this year. Federal Agencies’
15 2001 Operations Proposal at 4. (Draft, Apr. 13, 2001) (summarizing prior assessments).

16 69. Rather than purchase power on the open market to replace the power that FCRPS
17 agencies knew as early as November 2000 would be lost due to low water conditions at FCRPS
18 dams, the federal agencies began declaring short-term “power emergencies” in January and
19 February. See, e.g., Columbia River Regional Forum Technical Management Team Meeting
20 Notes January 18, 2001 <<http://www.nwd-wc.usace.army.mil/TMT/2001/minutes/tmt0118.htm>>
21 (visited Apr. 25, 2001). The agencies declared these initial emergencies not because the
22 Bonneville Power Administration was unable to purchase the replacement power on the open
23 market, but because it deemed such purchases harmful to the agency’s overall financial health.
24 According to the Action Agencies and NMFS, these declarations of “emergency” are permitted

1 under, and are consistent with, the “emergency clause” in the 2000 FCRPS BiOp and RPA. See
2 supra ¶¶ 60-61 (discussing these provisions of the 2000 FCRPS BiOp).

3 70. The consequences of these repeated declarations of an “emergency” have been to
4 allow the Action Agencies to curtail or halt measures otherwise prescribed in the 2000 FCRPS
5 BiOp to avoid jeopardy, including, but not limited to augmentation of river flows to benefit
6 salmon survival and spill of water at the FCRPS dams to aid juvenile salmon passage. For
7 example, on April 3, 2001, citing these same financial concerns, the Action Agencies, with
8 NMFS approval, again declared an “emergency” and announced that they would not release
9 water to assist juvenile salmon in their spring migration for at least two weeks. See
10 <<http://www.bpa.gov/Corporate/KCC/nr/01nr/nr040301x.shtml>> (visited Apr. 25, 2001) (BPA
11 press release). On April 13, 2001, these agencies also released a draft “Federal Agencies’ 2001
12 FCRPS Operations Plan Proposal” in which they announced their intention to continue the
13 emergency declaration indefinitely unless water levels drastically improved.
14 <<http://www.salmonrecovery.gov/draft%5Ffcrops%5Foperations%5Fplan.pdf>> (visited May 1,
15 2001) at 12. In addition, the Action Agencies and NMFS announced that all Snake River
16 juvenile fish will be transported by truck or barge to below Bonneville dam this migration
17 season, id. at 16, meaning that the agencies expect migration conditions in the river will be lethal
18 to these listed species.

19 71. In addition, it has become increasingly clear that many of the measures NMFS has
20 discussed for the Action Agencies, as well as for other federal and non-federal entities, in order
21 to improve salmon and steelhead survival (and hence relied on in reaching its no-jeopardy/no-
22 adverse modification finding for the RPA in the 2000 FCRPS BiOp), are likely to see little or no
23 action. For example, NMFS predicts that significant habitat protection will result from the
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1 implementation of other federal programs like the Interior Columbia Basin Ecosystem
2 Management Plan (“ICBEMP”). BSRS, vol. 2 at 18-20; see also, e.g., 2000 FCRPS BiOp at 9-
3 203 (referring generally to such actions). ICBEMP has been in development for over seven
4 years and although the Basinwide Salmon Recovery Strategy anticipates that the “final ICBEMP
5 record of decision, [is] expected in early 2001,” BSRS, vol. 2 at 19, it has not been signed.
6 Similarly, biological opinions for related federal actions which are relied on in the 2000 FCRPS
7 BiOp have not been issued. See, e.g., 2000 FCRPS BiOp at 1-1 & n.1 (referring to biological
8 opinion for certain BOR projects in the upper Snake River basin).

9 72. Further, on March 8 and 9, 2001, NMFS and the U.S. Fish and Wildlife Service
10 withdrew supplemental biological opinions that evaluated the existing interim federal salmon
11 habitat management guidelines for the basin, the so-called PACFISH and INFISH documents.
12 Without these biological opinions in place, the adequacy, status and benefits of even these
13 federal actions is in serious doubt.

14 73. Moreover, recent budget proposals from NMFS and the Action Agencies do not
15 contain enough funding to implement many of the measures discussed in the RPA. For example,
16 Oregon has estimated that funding only NMFS’ share of the measures in the RPA would require
17 increasing its salmon budget by \$183 million, but NMFS’ current budget proposal for the next
18 fiscal year actually cuts the agency’s salmon funding. U.S. Dept of Commerce, National
19 Oceanic and Atmospheric Admin., FY 2002 Budget Summary, April 9, 2001 (proposing
20 \$900,000 in cuts to NMFS’ Pacific salmon recovery budget). Similarly, the U.S. Army Corps of
21 Engineers has requested only \$81 million of the estimated \$110 million necessary to implement
22 its share of the RPA.

1 CLAIMS FOR RELIEF

2 VIOLATIONS OF THE ESA AND APA

3 74. Plaintiffs incorporate by reference all preceding paragraphs.

4 75. NMFS has violated the requirements of ESA section 7 and its implementing
5 regulations by arbitrarily, capriciously and without any rational basis concluding in the 2000
6 FCRPS BiOp that the actions set forth in the RPA are not likely to jeopardize any listed species
7 or destroy or adversely modify their critical habitat and by issuing a biological opinion that is
8 otherwise not in accordance with law. The defects in the 2000 FCRPS BiOp include, but are not
9 limited to, the following:

- 10 • NMFS' analysis of the current status of listed salmon and steelhead in the BiOp
11 consistently and misleadingly understates the grave and immediate risk of
12 extinction these species face, contrary to the best available scientific information
13 and the requirements of the ESA;
- 14 • NMFS' assessment of why the steps it proposes in the BiOp's RPA will avoid
15 jeopardy and adverse modification of critical habitat: (1) relies extensively on
16 speculative and voluntary actions by other federal agencies, as well as state and
17 private entities, in areas unrelated to FCRPS operations and beyond the control or
18 authority of the Action Agencies; and, (2) ignores the effects of sweeping
19 emergency exemptions that make many key RPA measures optional, contrary to
20 the requirements of the ESA and its implementing regulations;
- 21 • NMFS' analysis of why the RPA and voluntary and speculative actions by others
22 will avoid jeopardy and adverse modification of critical habitat relies on a series
23 of improbably optimistic assumptions, for which the agency offers no rational or
24 credible explanation, and a qualitative assessment of the benefits of these

1 measures that runs counter to the available evidence and is contrary to the best
2 available scientific information and the ESA; and,

- 3 • NMFS' grant of an incidental take statement to accompany the RPA, as well as its
4 approval of an ESA section 10(a)(1)(A) permit for the Juvenile Fish
5 Transportation Program, are both contrary to the requirements of the ESA and its
6 implementing regulations.

7 76. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
8 and otherwise not in accordance with law and are reviewable under the APA, 5 U.S.C. §§ 701-
9 706.

10 PRAYER FOR RELIEF

11 WHEREFORE, plaintiffs respectfully request that the Court:

12 1. Adjudge and declare that NMFS has violated ESA section 7 and its implementing
13 regulations by making a no-jeopardy/no-adverse modification finding in the 2000 FCRPS BiOp
14 for the RPA and issuing an incidental take statement that are arbitrary, capricious, an abuse of
15 discretion and otherwise not in accordance with law;

16 2. Enjoin NMFS to withdraw the 2000 FCRPS BiOp, the RPA, and the
17 accompanying incidental take statement, notify the Action Agencies of these withdrawals, and
18 reinstate consultation with the Action Agencies in order to prepare a biological opinion for
19 FCRPS operations and any related actions that complies with the requirements of the ESA, on a
20 schedule to be set by the Court;

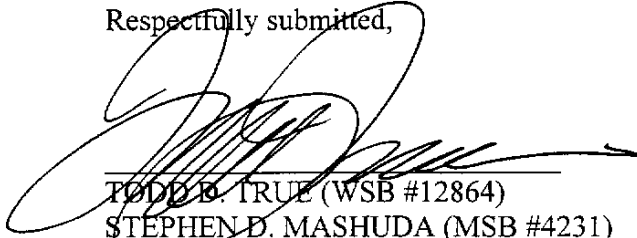
21 3. Award plaintiffs their reasonable fees, costs, expenses, and disbursements,
22 including attorneys fees, associated with this litigation; and,

23 4. Grant plaintiffs such further and additional relief as the Court may deem just and
24

1 proper.

2 Dated this 2nd day of May, 2001.

3 Respectfully submitted,

4 
5
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