

IMPOSING JUDICIAL RESTRAINTS ON THE “ART OF DECEPTION”: THE COURTS CAST A SKEPTICAL EYE ON COLUMBIA BASIN SALMON RESTORATION EFFORTS

BY

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In an article published two years ago, one of us made the claim that the federal agencies in charge of Columbia Basin salmon restoration efforts were engaged in a widespread practice of deception—attempting to make it appear to the public that meaningful restoration efforts were underway when in fact hydropower domination remained the status quo. That article claimed that the courts would soon inaugurate an era of active and skeptical review.

That era has unfolded more quickly and more dramatically than we imagined. In a series of decisions throughout 2007, the Ninth Circuit and district courts have consistently rejected agency attempts to portray their cynical efforts to deceive as rational decision making. Thus, the Ninth Circuit 1) struck down as arbitrary the National Oceanic and Atmospheric Administration’s (NOAA) biological opinion on Columbia Basin hydroelectric operations under the Endangered Species Act (ESA), 2) refused the Bonneville Power Administration’s (BPA) proposed defunding of the Fish Passage Center, an agency providing critical information on salmon migration in the Columbia Basin, and 3) rejected BPA’s failure to fully fund fish and wildlife mitigation measures in its wholesale electric power rates, as required by the Northwest Power Act.

District courts have followed the Ninth Circuit’s lead concerning close review, as the Western District of Washington rejected NOAA’s salmon hatchery policy, which had led to a downlisting of Upper Columbia steelhead, as inconsistent with the ESA’s preference for wild salmon. And the District Court of Oregon, which had earlier ruled that NOAA possessed only limited authority to distinguish between wild and hatchery salmon, allowed NOAA to treat wild salmon differently than hatchery salmon after listing. Another judge in the same district subsequently rejected NOAA’s attempt to delist Oregon Coast coho salmon as arbitrary.

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All of these results of 2007 indicate that a new era of close and skeptical review is underway in the Columbia Basin. The imperiled salmon runs, which have endured the longstanding deception of the federal agencies, are surely the better as a result of the courts' emerging mistrust.

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"At its core, the 2004 [biological opinion] amounted to little more than an analytical sleight of hand, manipulating variables to achieve a no jeopardy finding. Statistically speaking, using [the agency's] analytical framework, the dead fish were really alive. The ESA requires a more realistic, common sense examination."

—Judge Sidney Runyan Thomas of the Ninth Circuit Court of Appeals¹

I. INTRODUCTION

The Columbia Basin salmon saga, the subject of a lengthy analysis in this journal two years ago,² has, as predicted in that article, come under "active and skeptical judicial review."³ In this update, we explain several recent decisions of significance which, while they certainly do not

¹ Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. (*NWF v. NMFS*), 481 F.3d 1224, 1239 (9th Cir. 2007) (discussed *infra* Part I).

² Michael C. Blumm, Erica J. Thorson & Joshua D. Smith, *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 ENVTL. L. 709 (2006) [hereinafter *Practicing Deception*]. Unless otherwise indicated, the term "salmon" includes both Columbia Basin salmon and steelhead (*Oncorhynchus mykiss*). "While steelhead . . . is actually a trout, scientists include steelhead among salmonids because it, like salmon, is an anadromous fish (i.e., migrates from the sea to fresh water to spawn)." *Id.* at 711 n.1. Native fishers traditionally made no distinction between salmon and steelhead, either. See, e.g., Native American Rights Fund, *Nez Perce Water Rights*, JUSTICE NEWSLETTER, Fall, 1997, <http://www.narf.org/pubs/justice/1997fall.html> (last visited Jan. 27, 2008).

³ *Practicing Deception*, *supra* note 2, at 809.

guarantee that the agencies entrusted with Columbia Basin salmon recovery will finally begin to take meaningful steps to turn around the salmon's long-term decline,⁴ will make more difficult the continuation of the practice of the art of deceiving the public into thinking something significant is happening when in fact the status quo predominates in Columbia Basin dam operations.⁵

These decisions, three from the Ninth Circuit and two from district courts, have 1) upheld a lower court's rejection of the National Oceanic and Atmospheric Administration's (NOAA) attempt to comply with the Endangered Species Act (ESA) in its 2004 biological opinion (BiOp);⁶ 2) reversed the Bonneville Power Administration's (BPA) effort to dismantle the Fish Passage Center, an entity established by the Northwest Power and Conservation Council to collect data and study salmon migration in the Columbia;⁷ 3) rejected BPA's underfunding of salmon restoration in its latest rate case;⁸ and 4) determined that NOAA's downlisting of Upper Columbia steelhead due to abundant hatchery fish was inconsistent with the ESA's preference for wild salmon, thus apparently disagreeing with the District Court of Oregon on this issue.⁹

⁴ Salmon runs in the Columbia Basin, the most hydroelectrically developed river basin in the world, declined throughout the 20th century and continue to decline in the 21st. Overall, wild salmon populations are less than 10% of their historic sizes, twelve runs are listed under the Endangered Species Act, and several more are extinct, due largely to a 55% loss in salmon habitat and a 31% loss in accessible stream miles. See Northeast-Midwest Institute, Large-Scale Ecosystem Restoration Initiatives, <http://www.nemw.org/columbiariver.htm> (last visited Jan. 27, 2008). According to the watchdog group Save Our Wild Salmon, in 2007 "[f]ewer than 67,000 adult spring Chinook" salmon passed Bonneville Dam, the first of eight dams upper basin salmon must navigate during their upstream migration to Idaho. That was "30% fewer than [2006] (itself a dismal year), significantly below the 10-year average, and just a fraction of the 400,000-plus fish needed for sustained recovery." Save Our Wild Salmon, Decline of Wild Columbia and Snake River Salmon Continues, <http://www.wildsalmon.org/library/2007-salmon-returns.cfm> (last visited Jan. 27, 2008). Summer chinook returns at Bonneville "registered less than half of the 2006 count, and only about two-thirds of the 10-year average." *Id.*

⁵ See *Practicing Deception*, *supra* note 2, at 806–10. A decade ago, it seemed possible that the status quo logjam might be broken by breaching the four lower Snake River Dams, but that proposal was quickly rejected by the Bush Administration, despite favorable scientific and economic studies. See Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 ENVTL. L. 997 (1998) [hereinafter *Saving Snake Water and Salmon*]. In 2006, a group of scientists for the National Marine Fisheries Services concluded that "[b]arring removal of Snake and Columbia River dams—a very contentious proposition presently debate[d] in the Pacific Northwest—restoration of historical migration conditions will not occur." William D. Muir et al., *Post-Hydropower System Delayed Mortality of Transplanted Snake River Stream-Type Chinook Salmon: Unraveling the Mystery*, 135 TRANSACTIONS OF THE AM. FISHERIES SOC'Y 1523, 1532 (2006).

⁶ *NWF v. NMFS*, 481 F.3d at 1233. See discussion *infra* Part II.

⁷ *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 691 (9th Cir. 2007). See discussion *infra* Part III.

⁸ *Golden Nw. Aluminum v. Bonneville Power Admin.*, 501 F.3d 1037, 1052–53 (9th Cir. 2007). See discussion *infra* Part IV.

⁹ See discussion *infra* Part V.C–E. As this Article went to press, the Oregon District Court Judge Garr King adopted a federal magistrate's findings and set aside NOAA's delisting of the

This analysis examines each of these cases and explains their significance.

II. *NWF v. NMFS*: REJECTING THE DECEPTION OF THE 2004 BiOp

The long-running litigation over Columbia Basin hydrosystem BiOps, ushered in by the ESA listings of Columbia Basin salmon in the early 1990s,¹⁰ continued as the Ninth Circuit resoundingly affirmed Judge James Redden's rejection of NOAA's 2004 BiOp.¹¹ That BiOp was produced under court order, after NOAA's 2000 BiOp also failed to survive judicial scrutiny because it relied on both federal mitigation measures that had not undergone ESA scrutiny and nonfederal measures that were not reasonably certain to occur.¹² But the 2004 BiOp did not attempt to address the district court's call for more scrutiny and more specifics about the measures that NOAA claimed would avoid jeopardy and thus comply with the ESA.¹³ Instead, the new BiOp materially changed its approach to ascertaining whether annual Columbia Basin hydrosystem operation produced jeopardy to listed salmon.¹⁴ The result was that unlike earlier BiOps in 1995 and 2000,¹⁵ this time NOAA was able to claim that proposed hydrosystem operations from 2004 until 2014 would not jeopardize listed salmon.¹⁶

Oregon Coast coho (*Oncorhynchus kisutch*) because of the agency's failure to make decisions based on the "best available evidence" as required by the ESA. *Trout Unlimited v. Lohn (Trout Unlimited III)*, No. CV-06-1493-ST, slip op. at 62, 2007 WL 2973568 at *33 (D. Or. Oct. 5, 2007). See discussion *infra* note 229.

¹⁰ See MICHAEL C. BLUMM, *SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON* 175, 213–17 (2002) [hereinafter *SACRIFICING THE SALMON*]. See also Michael C. Blumm, Michael A. Schoessler & R. Christopher Beckwith, *Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s*, 27 ENVTL. L. 21, 39, 42, 98 (1997) (discussing the effects of ESA listings of two Columbia Basin salmon species, the Oregon District Court's rejection of the 1993 BiOp, and legal challenges to the 1995 BiOp).

¹¹ *NWF v. NMFS*, 481 F.3d at 1233. Although NMFS has changed its name to NOAA Fisheries, the court referred to it as NMFS throughout its opinion, since "much of the record before us uses the prior name." *Id.* at 1229 n.1. The lead plaintiff, National Wildlife Federation, was part of a coalition of some 15 environmental and fishing groups. The state of Oregon intervened on the side of NWF, and the Nez Perce, Yakama, and other lower Columbia Basin "Treaty Tribes" submitted an amicus brief in support of NWF's position. *Id.* at 1228. The states of Idaho and Montana, several industrial and farm groups, one golf course, and the Kootenai Tribe of Idaho intervened on the side of NMFS, which also included the U.S. Army Corps of Engineers and the Bureau of Reclamation as defendants. *Id.*

¹² *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (2003); see also *Practicing Deception*, *supra* note 2, at 760–63.

¹³ Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by [them] . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [designated critical] habitat." 16 U.S.C. § 1536(a)(2) (2000). The Ninth Circuit surveyed some of the details of complying with this ESA directive in its opinion. *NWF v. NMFS*, 481 F.3d at 1230–31.

¹⁴ The details are discussed in *Practicing Deception*, *supra* note 2, at 769–74 (describing NOAA's abandoning of the analytic approach the agency employed in previous BiOps).

¹⁵ See *id.* at 738–48, 749–60 (discussing the 1995 and 2000 BiOps, respectively).

¹⁶ See *NWF v. NMFS*, 481 F.3d at 1232.

The means to this “no jeopardy” end were hardly straightforward, however. There were no new studies showing that listed salmon populations were rebounding or that previous appraisals of the hydrosystem’s toll on those populations were overestimates. Instead, NOAA made what the Ninth Circuit referred to as “several structural changes to its jeopardy analysis.”¹⁷ The result was that NOAA claimed that it achieved ESA compliance not through any changes in environmental conditions, or through improved health of the listed salmon, but through legal re-definition. It was as if the Bush Administration lawyers had overrun NOAA’s scientists.

Judge Redden would have none of this, and neither would a unanimous Ninth Circuit panel. The appeals court affirmed Judge Redden on all particulars.¹⁸ The court affirmed the district court’s rejection of NOAA’s jeopardy analysis on three grounds. First, the court rejected NOAA’s claim that the agency possessed much less discretion than it had claimed in the past to affect Columbia Basin dam operations. The court concluded that NOAA impermissibly interpreted the ESA jeopardy rule restricting the application of federal consultation procedures to “any *portions* of admittedly-discretionary actions that the agency deems non-discretionary,” since such an interpretation conflicted with the ESA’s “basic mandate” of saving listed species.¹⁹ NOAA’s claim that there existed competing non-

¹⁷ *Id.* at 1231.

¹⁸ *Id.* at 1233–43. Earlier, the Ninth Circuit had affirmed Judge Redden’s preliminary injunction granting the plaintiffs’ request for increased river flows and spills of water to facilitate dam passage, although the court remanded to the district court to determine if the injunction could be “more narrowly tailored or modified.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 800 (9th Cir. 2005).

¹⁹ *NWF v. NMFS*, 481 F.3d at 1233–34. The Ninth Circuit cited its own decision in *Defenders of Wildlife v. EPA* (*Defenders*), 420 F.3d 946 (9th Cir. 2005), *rev’d sub nom.* *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), in reaching this conclusion, mostly for the propositions that novel interpretations of the ESA’s consultation requirements were suspect, and that NMFS interpretation of the ESA as applying only to discretionary actions was unreasonable. *Id.* at 1234. Subsequently, the Supreme Court overruled *Defenders* narrowly, 5 to 4, on the latter ground.

On July 19, 2007, the state of Idaho petitioned the Ninth Circuit to rehear *NWF v. NMFS en banc*, arguing that “[t]he Supreme Court’s decision in *Home Builders* has altered markedly the [three-judge] panel’s legal assumptions concerning the application of section 7(a)(2) to the FCRPS.” *Idaho Petitions Ninth Circuit to Rehear FCRPS BiOp Case*, COLUMBIA BASIN BULL. (Bend, Or.), July 27, 2007, <http://www.cbbulletin.com/Archive/07272007/230657.aspx> (last visited Jan. 27, 2008). NMFS, a defendant in *NWF v. NMFS*, opted against joining Idaho in seeking reconsideration of the three-judge panel’s decision. *Feds Won’t Join Idaho on BiOp Case Rehearing Request*, COLUMBIA BASIN BULL. (Bend, Or.), Aug. 3, 2007, <http://www.cbbulletin.com/Archive/09032007/default.aspx> (last visited Jan. 27, 2008). *En banc* rehearings are generally disfavored and will not be ordered unless 1) *en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions, or 2) the proceeding involves a question of exceptional importance. FED. R. APP. P. 35(a).

Even if the Ninth Circuit agreed to rehear the case, Idaho is unlikely to succeed. Not only was the discretion issue only one of several grounds on which the Ninth Circuit affirmed Judge Redden’s rejection of NOAA’s jeopardy analysis, but NOAA was unable to articulate a reasonable statutory conflict between the ESA and other Columbia Basin dam statutes. And there are at least two such statutes—the Northwest Power Act, Pacific Northwest Power

discretionary directives for flood control, irrigation, and power production was unpersuasive, as the court noted that NOAA acknowledged that Congress had never quantified any of these allegedly immutable obligations, leaving considerable agency discretion as to how to fulfill them.²⁰ Thus, the court forbade NOAA from excluding so-called non-discretionary actions from ESA scrutiny under the jeopardy analysis, noting that “ESA compliance is not optional,” and “[t]he very fact that the agencies are unable to define the limits of their discretion here reveals that all [Columbia Basin dam] operations are intertwined and subject to discretionary control.”²¹

The second flaw in NOAA’s jeopardy analysis concerned the agency’s failure to include degraded baseline conditions.²² NOAA’s jeopardy analysis of the effects of proposed dam operations in the 2004 BiOp was unlike that

Planning and Conservation Act, 16 U.S.C. §§ 839a–839h (2000), discussed in *NWF v. NMFS*, 481 F.3d at 1235, and the River and Harbors Act of 1945, 33 U.S.C. §§ 603a, 544b (2000) (promising adequate measures for naturally spawning salmon), discussed in *SACRIFICING THE SALMON*, *supra* note 10, at 97—which expressly direct Columbia Basin dam operating agencies to protect migrating salmon. The existence of these complementary directives seems to make the *Defenders* decision distinguishable from the Columbia Basin situation. Even if these statutory directives do not sufficiently distinguish *Defenders*, since the Ninth Circuit had two other grounds for affirming on jeopardy analysis grounds, as well as a critical habitat ground, *Defenders* should have no practical affect on the result in *NWF v. NMFS*.

In any event, a reversal of the Ninth Circuit panel’s decision will have little practical effect as NOAA’s revised biological opinion was due October 31, 2007, after this article went to press, and the federal action agencies indicated that they abandoned the 2004 BiOp’s analytical framework and are returning to the approach of the 2000 BiOp. See U.S. ARMY CORPS OF ENG’RS, BONNEVILLE POWER ADMIN. & U.S. BUREAU OF RECLAMATION, EXECUTIVE SUMMARY TO BIOLOGICAL ASSESSMENT FOR COMPREHENSIVE ANALYSIS OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM AND MAINSTEM EFFECTS OF UPPER SNAKE AND OTHER TRIBUTARY ACTIONS 2–5 (2007), available at http://www.salmonrecovery.gov/biological_opinions/fcrps/ba-ca/index.cfm [hereinafter 2007 BA EXECUTIVE SUMMARY] (“The agencies have generally returned to the approach used in the 2000 BiOp . . . [T]he analysis of the action makes no distinction between discretionary and non-discretionary actions . . .”). Of course, the 2000 BiOp failed to survive judicial review, see *Practicing Deception*, *supra* note 2, at 760–63, and it is hardly clear how the federal agencies will ensure that their promised mitigation will be “reasonably certain” to occur.

Of course, rather than comply with the law or seek to amend the ESA, the Bush Administration may take a different course—by changing the regulations implementing the ESA. In late March 2007, two environmental groups obtained a leaked draft of a U.S. Fish and Wildlife Service proposal to alter dozens of regulations governing the ESA. See Jodi Peterson, *An Endangered Endangered Species Act?*, HIGH COUNTRY NEWS, Apr. 16, 2007, at 6. One of the proposed rewrites seems to be a direct response to Judge Redden’s rulings on the Federal Columbia River Power System (FCRPS). If the Bush Administration has its way, the “environmental baseline” would be “the reference condition representing the status of the species and the environmental conditions existing at the time the Agency requests consultation The environmental baseline does include the effects of the non-discretionary portion of the action under consultation.” *Id.* The proposed change to the regulatory definition of the environmental baseline would effectively overrule Judge Redden’s holding that the federal defendants may not exclude the existence and operations of the FCRPS from the scope of the consultation. *Id.*

²⁰ *NWF v. NMFS*, 481 F.3d at 1234–35.

²¹ *Id.* at 1235. The court also observed that “[t]he so-called ‘non-discretionary’ operations might also qualify as ‘interrelated’ actions, which must be considered in the jeopardy analysis” under the ESA regulations. *Id.* at 1235 n.7 (citing 50 C.F.R. § 402.02).

²² *Id.* at 1235–36.

in its earlier BiOps because the agency employed a new, so-called “comparative approach,” under which environmental baseline conditions in the Columbia River and tributaries were essentially discounted: instead of considering the effect of proposed operations in combination with environmental baseline conditions and cumulative effects (the so-called “aggregation approach” that NOAA previously employed), NOAA now would find jeopardy only if the proposal would produce “appreciably worse” effects than baseline conditions.²³ According to the Ninth Circuit, this redefinition of jeopardy would allow NOAA’s analysis to take place “in a vacuum,” allowing species to be “gradually destroyed, so long as each step on the path to destruction is sufficiently modest.”²⁴ The court thought “[t]his type of slow slide into oblivion” was impermissible under the ESA, and was in fact “one of the very ills the ESA seeks to prevent.”²⁵ Because the ESA demanded a contextual analysis of the effects of the agency proposal in light of the current environmental conditions affecting listed species, the court rejected NOAA’s artificial, unconnected redefinition of jeopardy.²⁶

A third shortcoming in the BiOp’s jeopardy analysis was its failure to consider recovery.²⁷ The court gave no deference to NOAA’s interpretation of the jeopardy regulation that an agency need only consider the effects on species survival, not its recovery, when determining if a proposal violated the statutory standard of “likely to jeopardize the continued existence of” a listed species.²⁸ The court thought that reading “recovery” out of the text in this fashion was inconsistent with the plain language of the regulation,²⁹ with NOAA’s prior interpretation and application,³⁰ and with the regulatory background of the regulation.³¹ As in an earlier decision ruling that the ESA required the listing agency to consider recovery as well as survival of the

²³ *Id.*

²⁴ *Id.* at 1235.

²⁵ *Id.* The court rejected NOAA’s claim that the “aggregation approach” the agency formerly used would have the effect of preventing all proposed actions once background conditions placed a species in jeopardy, explaining that only those actions which caused further species deterioration would be forbidden. *Id.* at 1235–36. According to the court, the ESA bans all actions that would “tip a species from a state of precarious survival into a state of likely extinction.” *Id.* at 1236.

²⁶ *Id.* at 1235 (noting that the ESA requires NOAA to consider proposed dam operations “in their actual context”).

²⁷ *Id.* at 1236–38.

²⁸ Endangered Species Act (ESA) of 1973, 16 U.S.C. § 1536(a)(2) (2000). The ESA regulations interpret this directive to prohibit any agency action “that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.” 50 C.F.R. § 402.02 (2008).

²⁹ *NWF v. NMFS*, 481 F.3d at 1237 (“NMFS’s reading of the jeopardy regulation inexplicably reads ‘and recovery’ out of the text.”). See *supra* note 28 for the text of the regulation.

³⁰ *Id.* at 1237–38 (“Until issuing the 2004 BiOp, the agency had consistently interpreted [the jeopardy regulation, *supra* note 28,] as requiring a joint analysis of both survival and recovery impacts.”).

³¹ *Id.* at 1238 (discussing comments on 1986 revisions to the regulation, emphasizing that “in exceptional circumstances,” injury to recovery prospects alone could result in a jeopardy finding” (quoting 51 Fed. Reg. 19,934 (June 3, 1986))).

species in evaluating adverse modification of critical habitat,³² the Ninth Circuit concluded that the jeopardy regulation also required ascertaining both survival and recovery effects.³³ Given the “highly precarious” status of Columbia Basin salmon, the court determined that there was a “substantial possibility” that requiring NOAA to evaluate recovery prospects could change the jeopardy analysis.³⁴

Thus, the exclusion of allegedly non-discretionary actions, baseline conditions, and recovery prospects from NOAA’s jeopardy analysis constituted independent grounds for striking down the 2004 BiOp. The court concluded that the BiOp “[a]t its core amounted to . . . little more than an analytical slight of hand, manipulating the variables to achieve a ‘no jeopardy’ finding.”³⁵ Somewhat astonished, the court continued, “[s]tatistically speaking, using the 2004 BiOp’s analytic framework, the dead fish were really alive.”³⁶ But this “Alice in Wonderland” world the BiOp attempted to create would not stand, for, as the court concluded, “[t]he ESA requires a more realistic, common sense examination.”³⁷

The flawed jeopardy analysis was not the only grounds for striking down the 2004 BiOp. The Ninth Circuit agreed with Judge Redden that NOAA’s failure to ensure that proposed hydrosystem operations would avoid adversely modifying designated critical habitat for several listed Snake River salmon species was arbitrary and capricious.³⁸ NOAA’s response to the Ninth Circuit’s earlier decision requiring consideration of both species survival and recovery in deciding whether a proposed action would adversely affect critical habitat³⁹ was, according to the court, inadequate.⁴⁰ NOAA acknowledged that proposed hydrosystem operations would produce negative effects on “the essential habitat feature of safe passage in the juvenile migration corridor” for five years, but claimed that over the ensuing five years, long-term improvements in fish passage, such as installation of removable spillway weirs, would offset the short-term adverse effects.⁴¹

³² *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

³³ *NWF v. NMFS*, 481 F.3d at 1237.

³⁴ *Id.* at 1238. Although the court did not conclude that Columbia Basin salmon recovery risks merited a jeopardy finding, it did note that the fact that Snake River sockeye is almost wholly dependent on hatchery programs “may seriously harm its chances of recovery.” *Id.* at n.11.

³⁵ *Id.* at 1239.

³⁶ *Id.*

³⁷ *Id.* The Ninth Circuit therefore determined that Judge Redden’s rejection of the BiOp’s jeopardy analysis was “entirely correct.” *Id.*

³⁸ *Id.* at 1239–41. Only the Snake River species had designated critical habitat at the time of the suit, the others having been withdrawn as a result of a settlement to which NOAA agreed. *See id.* at 1239 & n.12.

³⁹ *Gifford Pinchot Task Force*, 378 F.3d 1059, 1069 (9th Cir. 2004).

⁴⁰ *NWF v. NMFS*, 481 F.3d at 1239–41.

⁴¹ *See id.* at 1240–41. The quote in the text concerned Snake River spring/summer chinook; with respect to Snake River sockeye, NOAA found that the proposed dam operations would produce “significant impairment” of safe passage. *See id.* at 1240. Removable spillway weirs are immense structures—approximately 105 feet tall, 70 feet wide, and 1.7 million pounds—installed on the surface of a dam’s reservoir, which allow juvenile salmon to pass through dams

Discounting short-term effects while emphasizing long-term improvements had already been found wanting twice by the Ninth Circuit,⁴² so it was no surprise that it failed here as well, especially since NOAA had no “specific and binding” plans concerning spillway weirs and no idea what level of in-river juvenile salmon survival was necessary for recovery.⁴³

Finally, the Ninth Circuit upheld the district court’s authority to issue injunctive relief that it specified in its October 2005 remand order, which required NOAA to produce a “failure report” to the court whenever the agency believes that the proposed action will not avoid jeopardy.⁴⁴ Perhaps because dam breaching was among the alternative measures the court directed NOAA to consider in such a “failure report,”⁴⁵ NOAA challenged the remand order as beyond the court’s authority.⁴⁶ NOAA also challenged the court’s authority to direct the agency to collaborate with the states and the tribes on a revised BiOp and in resolving policy and scientific differences.⁴⁷ The Ninth Circuit affirmed on both counts, finding “failure report” to be “a reasonable combination of a time limit and progress reports and . . . appropriate under the circumstances of this case.”⁴⁸ The collaboration requirement was consistent with the ESA’s command that agencies use “best scientific and commercial data available”⁴⁹ and a “reasonable procedural restriction given the history of this litigation.”⁵⁰

near the water’s surface, thus avoiding turbine passage. U.S. Army Corps of Eng’rs, Walla Walla Dist., Spillway Weir Fact Sheet, http://www.nww.usace.army.mil/spillway_weir/SW_FctShtMay05.pdf (last visited Jan. 27, 2008). For further discussion of the use of removable spillway weirs and their use in promoting juvenile salmon passage, see *Practicing Deception*, *supra* note 2, at 753 n.256.

⁴² Pac. Coast Fed’n of Fishermen’s Associations v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1092–95 (9th Cir. 2005); *Gifford Pinchot Task Force*, 378 F.3d at 1069.

⁴³ *NWF v. NMFS*, 481 F.3d at 1241 (stating that the record showed “[no] clear, definite commitment of resources for future improvements”). The court also concluded that “[r]equiring some attention to recovery issues does not improperly import the ESA’s separate recovery planning into the section 7 consultation process.” *Id.*

⁴⁴ *Id.* at 1242. The remand order stipulated:

If, at any time during the remand period, NOAA concludes that the Action Agencies are not making sufficient progress in developing a proposed action and/or RPA [reasonable prudent alternative] that avoids jeopardy to the listed species, NOAA shall advise the court of that circumstance immediately and shall issue a “failure report” similar to that required in the 2000 BiOp that advises the court and the parties of those additional measures, including the breaching of the dams that may be necessary to achieve a valid no-jeopardy finding.

Id.

⁴⁵ See *id.* On the dam breaching option, see *Saving Snake Water and Salmon*, *supra* note 5.

⁴⁶ *NWF v. NMFS*, 481 F.3d at 1241–42. NOAA did not challenge the provision in the remand order that called for regular status reports every 90 days during the remand. Nor did the agency contest the court’s authority to impose a deadline on the remand proceedings. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* The court noted that district courts have “broad latitude in fashioning equitable relief when necessary to remedy an established wrong.” *Id.* (quoting *Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994)).

⁴⁹ 16 U.S.C. § 1536(a)(2) (2000).

⁵⁰ *NWF v. NMFS*, 481 F.3d at 1242.

Thus, the Ninth Circuit's decision represented a complete affirmation of Judge Redden's decision and the injunctive relief he ordered. It is certainly possible that the district court has instituted a procedure that will produce substantial improvements in the condition of the listed Columbia Basin salmon.⁵¹ But the history suggests that optimism is not warranted.⁵² Since

⁵¹ In October 2005, Judge Redden remanded the 2004 BiOp to NOAA, instructing the agencies to correct: 1) the 2004 BiOp's improper distinction between discretionary and non-discretionary actions, 2) its improper comparison, rather than aggregation, of the effects of the proposed action and the environmental baseline, 3) its flawed critical habitat analysis, 4) the BiOp's failure to consider the species' prospects for recovery, and 5) the agencies' past reliance on mitigation measures that were not reasonably certain to occur, or which had not yet undergone section 7 consultation. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-640-RE, 2005 WL 2488447, at *5 (D. Or. Oct. 7, 2005). The judge ordered the federal defendants to prepare detailed quarterly status reports for the court and the parties. He also required the federal agencies to meet regularly with the states and the tribes for the purposes of developing a proposed action and narrowing policy, scientific, and technical disagreements. *Id.*

Nearly two years, six status conferences, and innumerable technical and scientific meetings later, the federal action agencies (the U.S. Army Corps of Engineers, the Bonneville Power Administration, and the U.S. Bureau of Reclamation) released a Biological Assessment (BA) and a Comprehensive Analysis (CA) for the FCRPS and the U.S. Bureau of Reclamation's Upper Snake River Projects on September 6, 2007. *See* U.S. ARMY CORPS OF ENG'RS, BONNEVILLE POWER ADMIN. & U.S. BUREAU OF RECLAMATION, COMPREHENSIVE ANALYSIS OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM AND MAINSTEM EFFECTS OF UPPER SNAKE AND OTHER TRIBUTARY ACTIONS (2007), *available at* http://www.salmonrecovery.gov/Biological_Opinions/FCRPS/BA-CA/CA/CA-Final.pdf; U.S. BUREAU OF RECLAMATION, BIOLOGICAL ASSESSMENT FOR BUREAU OF RECLAMATION OPERATIONS AND MAINTENANCE IN THE SNAKE RIVER BASIN ABOVE BROWNLEE RESERVOIR (2007), *available at* <http://www.usbr.gov/pn/programs/UpperSnake/2007ba/2007usba.pdf>. The BA includes descriptions of the Action Agencies' Proposed Actions (PA) in the Columbia and Snake Rivers. The CA integrates the effects of the FCRPS and the Upper Snake River Projects to conduct qualitative and quantitative biological analyses for each endangered or threatened species. NOAA Fisheries will now conduct its own biological analyses based on the federal action agencies' PAs and BAs, and then produce a biological opinion to determine whether the PAs jeopardize the listed species. A revised draft Biological Opinion was due October 31, 2007.

Although the federal action agencies hailed the new plan as the "most comprehensive approach ever" to revive protected salmon and steelhead, environmentalists maintain that the new strategy simply protects the status quo, charging that the federal agencies continue to refuse to consider any changes to hydrosystem operations beyond minor tweaks. *Feds Release New Columbia Basin Salmon Recovery Strategy*, COLUMBIA BASIN BULL. (Bend, Or.) July 27, 2007, <http://www.cbbulletin.com/Archive/09072007/236175.aspx> (last visited Jan. 27, 2008) [hereinafter *Feds Release New Strategy*]. Indeed, the federal defendants claim there are "very little—very few benefits [that] can be obtained from new hydro operations, either structural modifications or operational changes." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-640-RE, Transcript of Status Conference Proceedings, at 8–9 (D.Or. June 20, 2007). Because the existence and operation of the FCRPS alone is likely to result in a jeopardy finding for all Columbia and Snake River stocks, the proposed action focuses on improvements in estuary habitat, predator management, and hatchery management. *Id.*; 2007 BA EXECUTIVE SUMMARY, *supra* note 19, at 3. One problem with the federal defendants' focus on habitat, hatcheries, and predation is that such measures are unlikely to produce any tangible results for several years. *Feds Release New Strategy, supra*.

⁵² For example, a draft PA submitted by NMFS in June 2007 seemed to revive the off-site mitigation approach that the 2000 BiOp employed, and that Judge Redden found wanting, because implementation of the promised measures was not reasonably certain to occur. *See supra* note 12 and accompanying text. The proposal also called for reductions in spill and flows and increased reliance on artificial transport of juvenile salmon downstream, shopworn

the ESA listings over fifteen years ago, precious little has changed in terms of the way Columbia Basin dams are operated.⁵³ True, the success of the *NWF v. NMFS* litigation has curbed the ability of NOAA and federal agencies operating the hydrosystem to define away by “analytical sleight of hand”⁵⁴ the ESA’s potential to restore Columbia Basin salmon. But in a larger sense, NOAA and the other federal agencies mostly achieved their purpose in the 2004 BiOp and the ensuing litigation: they bought more time to maintain a deadly status quo, a status quo in which hydropower operations continue to dominate salmon restoration through administrative discretion.⁵⁵ Salmon advocates who have been calling for substantial changes in Columbia Basin dam operations for some three decades must acknowledge this unsettling reality.

III. RESISTING BPA’S ATTEMPT TO SHOOT THE MESSENGER

The Northwest Power and Conservation Planning Council (Council) established the predecessor of the Fish Passage Center (FPC) in 1982 to help fulfill the Northwest Power Act’s dual goals of protecting and enhancing Columbia Basin fish and wildlife, while also assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply.⁵⁶ Under the

suggestions that have failed in the past. See Ed Chaney, *Sudden Death Overtime for Wild Snake River Basin Salmon and Steelhead*, FLYFISHER, Summer 2007, at 21, 25, available at www.nwric.org/reports/TroubleOnTheSnakePartIVlowres.pdf (last visited Jan. 27, 2008).

Also worth noting is that it appears likely that the BiOp will be based, at least in part, on a controversial new biological metrics analysis authored by D. Robert Lohn, Regional Administrator of NOAA Fisheries. See 2007 BA EXECUTIVE SUMMARY, *supra* note 19, at 3-1 to 3-8. The so-called Lohn Metrics Memo suggests that the recovery prong of the jeopardy analysis would be satisfied if the species is found to be “trending towards recovery, within a reasonable time.” *Practicing Deception*, *supra* note 2, at 768 n.343. In other words, so long as a particular species has a population growth ratio greater than one to one, a proposed action would not jeopardize the species’ path to recovery. The Metrics Memo also suggests that mitigation measures will be sufficient to avoid jeopardy if they can be “reasonably expected to accrue” within “a reasonable period of time.” 2007 BA EXECUTIVE SUMMARY, *supra* note 19, at 3. Aside from the obvious uncertainty of such a standard, several parties have argued that a slightly positive population growth rate is not equivalent of a trend toward recovery, given the current imperiled status of the species. See *Practicing Deception*, *supra* note 2, at 798 n.492. Although Judge Redden has been reluctant in the past to question whether NOAA Fisheries is using the “best available science” in determining jeopardy, such an inquiry may be inevitable.

⁵³ On the ineffectiveness of the ESA, see Michael C. Blumm & Greg D. Corbin, *Salmon and the ESA: Lessons From the Columbia Basin*, 74 WASH. L. REV. 519 (1999).

⁵⁴ See *supra* text accompanying notes 1, 35 (quoting the Ninth Circuit).

⁵⁵ See generally Chaney, *supra* note 52 (providing a brief overview of hydropower’s dominance of the Columbia Basin).

⁵⁶ See 16 U.S.C. § 839b(h)(1)(A) (2000). The predecessor to the FPC, called the Water Budget Center, oversaw the annual water budget, which the Council adopted as part of its Fish and Wildlife Program. NW. POWER PLANNING COUNCIL, COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM §§ 302–04 (1982). For a description and history of the Water Budget, see Michael C. Blumm, *Reexamining the Parity Promise: More Challenges than successes of the Columbia Basin Fish and Wildlife Program*, 16 ENVTL. L. 461, 469–71 (1986); Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 674–79 (1991).

Council's program, the FPC, which collects and analyzes scientific data on salmon survival in the Columbia Basin,⁵⁷ receives funding from the Bonneville Power Administration (BPA),⁵⁸ a situation producing considerable institutional conflict.⁵⁹

In 2005, in what must be the paradigmatic example of how important control over scientific information is to those who operate Columbia Basin dams, the FPC became embroiled in a controversy that might seem unusual for an agency whose charter is simply to gather and disseminate scientific information.⁶⁰ In June 2005, in the BiOp litigation described in section I, Judge Redden issued an injunction requiring federal hydrosystem operators to spill water over the Lower Snake River and McNary Dams during the late spring and summer of 2005.⁶¹ That fall, the FPC issued a preliminary study

⁵⁷ See NW. POWER & CONSERVATION COUNCIL, MAINSTEM AMENDMENTS TO THE COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM, 27-28 (2003) [hereinafter Council's 2003 Fish and Wildlife Program], available at <http://www.nwcouncil.org/library/2003/2003-11.pdf> (stating the Center "shall conduct" smolt monitoring and gather and analyze information related to fish passage).

⁵⁸ The current Fish and Wildlife Program continues the operation of the FPC. See *id.* BPA, a federal agency, sells and transmits wholesale electricity from 31 federal hydroelectric plants, one non-federal nuclear power plant, and other non-federal power plants in the Columbia River Basin. See BONNEVILLE POWER ADMIN., BPA FAST FACTS 1 (2006), available at http://www.bpa.gov/corporate/about_BPA/Facts/FactDocs/BPA_Facts_2006.pdf. The Northwest Power Act requires BPA to use the revenues from electricity sales to protect, mitigate and enhance fish and wildlife "in a manner consistent with . . . the [Fish and Wildlife] [P]rogram adopted by the Council." 16 U.S.C. § 839b(h)(10)(A) (2000).

⁵⁹ For an overview, see *Practicing Deception*, *supra* note 2, at 798-802. See also NIC LANE & ADAM VANN, THE COLUMBIA RIVER BASIN'S FISH PASSAGE CENTER, at CRS-3 (Cong. Research Serv., Report for Congress RS 22414, Feb. 23, 2007), available at <http://www.ncseonline.org/NLE/CRSreports/07March/RS22414.pdf>.

⁶⁰ The Council's 1987 amendments to the Fish and Wildlife Program called for the creation of a Fish Passage Center to monitor salmon migration through the Federal Columbia River Power System, oversee dissolved gas programs, and report on comparative fish survival. NW. POWER PLANNING COUNCIL, 1987 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM § 303(b), at 57 (1987). The FPC's functions have expanded to include assisting in formulating flow and spill recommendations and providing data and analysis to federal hydrosystem operators, state agencies, and tribes. See Council's 2003 Fish and Wildlife Program, *supra* note 57, at 27-28, calling for the Fish Passage Center to:

- 1) Plan and implement the annual smolt monitoring program; 2) Gather, organize, analyze, house, and make widely available monitoring and research information related to juvenile and adult passage, and to the implementation of the water management and passage measures that are part of the Council's program; 3) Provide technical information necessary to assist the agencies and tribes in formulating in-season flow and spill requests that implement the water management measures in the Council's program, while also assisting the agencies and tribes in making sure that operating criteria for storage reservoirs are satisfied; and 4) In general, provide the technical assistance necessary to coordinate recommendations for storage reservoir and river operations that, to the extent possible, avoid potential conflicts between anadromous and resident fish.

See also Fish Passage Center, FPC HomePage, http://www.fpc.org/fpc_homepage.html (last visited Jan. 27, 2008) (providing more information on the FPC); Elizabeth Rusch, *Swimming Upstream*, PORTLAND MONTHLY, Sept. 2007, at 121.

⁶¹ Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-640-RE, CV 05-23-RE, 2005

assessing the effects of the court-ordered spill on juvenile salmon survival in the Columbia Basin, suggesting that the court-ordered spill resulted in the highest levels of salmon survival recorded in recent years.⁶² Judge Redden proceeded to rely on the 2005 FPC study when he issued another injunction calling for spills during the spring and summer of 2006.⁶³ The judge declared that “[t]he [FPC]’s expertise at gathering such useful data must be replicated for the spring of 2006 and beyond. Only with such data can the relative benefits of spill and/or transportation be determined.”⁶⁴

The effect the FPC’s preliminary study had on Judge Redden did not go unnoticed by members of Congress. In late 2005, Senator Larry Craig (R-Idaho)—the 2002 National Hydropower Association’s legislator of the year⁶⁵ and a member of the Senate Appropriations Committee—inserted language into the Conference Report on the 2006 Senate Energy and Water Appropriations bill, aiming to eliminate funding for the FPC.⁶⁶ The language

WL 1398223, at *5 (D.Or. June 10, 2005). *See supra* note 11 and accompanying text (discussing the Ninth Circuit’s upholding of Judge Redden’s June 2005 injunction). *See also Practicing Deception, supra* note 2, at 794–97 (discussing the Redden decision).

⁶² *See Fish Passage Center Offers Preliminary Analysis on Spill*, COLUMBIA BASIN BULL., (Bend, Or.) Sept. 16, 2005 (on file with author). The FPC conducted the 2005 study at the request of the Fish Passage Center Oversight Board, which the Council established as part of its 2000 Fish and Wildlife Program to oversee the operations of the FPC. Nw. POWER PLANNING COUNCIL, COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM 28 (2000), *available at* <http://www.nwcouncil.org/library/2000/2000-19/Default.htm>.

⁶³ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, No. CV 01-640-RE, 2005 WL 3576843, at *8 (D. Or. Dec. 29, 2005) (“The most recent information on the benefits of summer spill came from the [FPC]’s count of fish that survived the 2005 summer migration, which involved court-ordered spill. The [FPC]’s count showed that more spill improved the survival rate of salmon passing the dams compared to previous years.”).

⁶⁴ *Id.*

⁶⁵ Press Release, National Hydropower Association, Craig Receives Legislator of the Year Award (Apr. 23, 2002) (on file with author). *See* Blaine Harden, *Zeroing Out the Messenger*, WASH. POST, Nov. 30, 2005, at A21, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/29/AR2005112901288.html>. The National Hydropower Association is a non-profit organization dedicated to advancing the interests of the U.S. hydropower industry. For more information, see the National Hydropower Association website, <http://www.hydro.org> (last visited Jan. 27, 2008). Senator Craig subsequently encountered political difficulties that jeopardize his role as a hydropower defender. *See, e.g.,* Erika Bolstad & Rocky Barker, *Craig Launches Drive to Save His Job; Ethics Panel Refuses to Call Off Complaint*, IDAHO STATESMAN, Sept. 5, 2007, *available at* <http://www.idahostatesman.com/larrycraig/story/150661.html>.

⁶⁶ *See* S. REP. NO. 109-84, at 178–79 (2006):

The Committee is concerned about the increasing cost of salmon recovery efforts in the Columbia River Basin, and about the potential adverse impact of those increased costs on customers of the Bonneville Power Administration. The Committee also is concerned about the quality and efficiency of some of the fish data collection efforts and analyses being performed. As a result, during fiscal year 2006, the Bonneville Power Administration may make no new obligations from the Bonneville Power Administration Fund in support of the Fish Passage Center. The Committee understands that there are universities in the Pacific Northwest that already collect fish data for the region and are well-positioned to take on the responsibilities now being performed by the Fish Passage Center, and that the universities can carry out those responsibilities at a savings to the region’s ratepayers that fund these programs.

Senator Craig introduced this language with the alleged purpose of protecting the Pacific

suggested that the FPC should be defunded and its functions transferred.⁶⁷ But the final version of the energy bill made no reference at all to the FPC.⁶⁸ Nonetheless, BPA assumed that the language in the conference report required the agency to cease funding the FPC. Consequently, just a few weeks after Congress passed the appropriations bill, BPA proceeded to release a “Program Solicitation – Request for Applications” (Program Solicitation), soliciting replacement agencies for the FPC.⁶⁹

A coalition of environmentalists and sport-fishery advocates, led by the Northwest Environmental Defense Center (NEDC), challenged BPA’s decision to transfer the functions of the FPC to two new entities.⁷⁰ NEDC

Northwest’s economy, allegedly harmed by the cost of the FPC’s studies, which Craig deemed redundant. *See* Blaine Harden, *Senator Aims to Kill Agency That Tracks Salmon*, WASH. POST, June 24, 2005, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062301915.html> (quoting Sid Smith, a spokesperson for Sen. Craig: “[p]ower rates are going up, [and] we think ratepayers ought to have some answers for how their money is being spent”). Craig’s justification hardly seemed persuasive, considering that the FPC had only 12 employees and an annual budget that amounted to less than one percent of BPA’s budget for fish and wildlife mitigation programs. *See* Harden, *supra* note 65. *See also Senate Panel Orders BPA to Cease Fish Passage Center Funding*, COLUMBIA BASIN BULL., (Bend, Or.), July 1, 2005 (“BPA . . . spends about \$139 million a year to fund more than 300 fish and wildlife mitigation projects. The FPC’s budget for FY 2005 was \$1.3 million”). A number of regional experts on salmon recovery have argued that “[e]liminating or reducing funding for the [FPC] will actually increase salmon recovery costs, as the states and tribes will need additional staff to replace the lost functions.” Harden, *supra* note 65 (quoting Jeffrey P. Koenings, Director of the Washington Fish and Wildlife Department).

Senator Craig claimed that “other institutions” in the Northwest were capable of doing most of the FPC’s work, maintaining that dismantling the agency would reduce duplicative work and increase efficiency. *Id.* But in 2000, the Independent Scientific Review Panel for the Northwest Power Planning Council concluded that there was little duplication between the FPC and other organizations. INDEP. SCIENTIFIC REVIEW PANEL FOR THE NW. PLANNING COUNCIL, REVIEW OF DATABASES FUNDED THROUGH THE COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM 5 (2003), available at <http://www.nwcouncil.org/library/isrp/isrp2000-3.pdf> (noting the potential for duplication but stating that “multiple data centers do not necessarily represent either duplication or inefficiency”). *See also Redden Says Will Order Remand While 2004 BiOp Stays in Place*, COLUMBIA BASIN BULL., (Bend, Or.), Oct. 3, 2005.

⁶⁷ *See* H.R. REP. NO. 109-275, at 174 (2005), *reprinted in* 2005 U.S.C.C.A.N. 1065, 1125 (“The conferees call upon [BPA] and the [Council] to ensure that an orderly transfer of the [FPC] functions . . . occurs within 120 days of enactment of this legislation. These functions shall be transferred to other existing and capable entities in the region in a manner that ensures seamless continuity of activities.”).

⁶⁸ Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, 119 Stat. 2247, 2276 (2005).

⁶⁹ BPA, INTEGRATED FISH AND WILDLIFE PROGRAM, PROGRAM SOLICITATION – REQUEST FOR APPLICATIONS 1 (2005), available at <http://www.efw.bpa.gov/IntegratedFWP/RequestForApplications.pdf> (“Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the [FPC].”); Peter Sleeth, *Groups Seek Aid for Fish Center*, OREGONIAN, Jan. 24, 2006, at B5 (quoting BPA spokesperson Mike Hansen as saying, “[w]e have basically been instructed by Congress to stop funding the [FPC]”).

⁷⁰ Petition for Review, *NEDC v. BPA (NEDC)*, 477 F.3d 668 (9th Cir. 2007) (No. 06-70430) (filed Jan. 21, 2006), available at http://www.peaclaw.org/objects/BPA_final_petition.pdf. NEDC was joined by co-petitioners Public Employees for Environmental Responsibility and the Northwest Sportfishing Industry Association. *Id.* NEDC filed an amended petition for review on February 6, 2006. Amended Petition for Review, *NEDC*, 477 F.3d 668 (No. 06-70430) (filed Jan.

charged that the transfer was a violation of BPA's duty to act consistent with the Council's Fish and Wildlife Program, which called for the continued operation of the FPC.⁷¹ NEDC claimed that BPA's withdrawal of funding for the FPC also violated the Northwest Power Act,⁷² which requires BPA to use its funding to "protect, mitigate and enhance fish and wildlife . . . in a manner consistent with" the Fish and Wildlife Program.⁷³

Nonetheless, BPA proceeded. In early 2006, the agency announced that it had selected two entities to replace the FPC: Battelle Pacific Northwest Laboratory (Battelle) and Pacific States Marine Fisheries Commission (Pacific States).⁷⁴ Shortly thereafter BPA offered contracts to Battelle and Pacific States. NEDC filed suit, and the Ninth Circuit granted temporary injunctive relief, requiring BPA to continue to fund the FPC, pending the court's review of BPA's actions.⁷⁵

A. Rejecting BPA's Attempt to Dismantle the FPC

In January 2007, the Ninth Circuit decided that BPA acted unlawfully when it decided to eliminate the FPC's funding.⁷⁶ The court reasoned that

21, 2006). The Confederated Tribes and Bands of the Yakama Nation filed a similar petition for review on March 3, 2006. Petition for Review, Confederated Tribes of the Yakama Indian Nation v. BPA, 477 F.3d 668 (No. 06-71182) (filed Mar. 6, 2006). The Ninth Circuit consolidated these petitions. Consolidation, *NEDC*, 477 F.3d 668 (Nos. 06-70430, 06-71182) (filed Apr. 7, 2006). The Council intervened on behalf of the petitioners. Brief of Intervenor, *NEDC*, 477 F.3d 668 (Nos. 06-70430, 06-71182).

⁷¹ The 2003 Mainstem Amendments to the Fish and Wildlife Program, which are currently in force, expressly call for "the continued operation of the Fish Passage Center." Council's 2003 Fish and Wildlife Program, *supra* note 57, at 27.

⁷² Petition for Review, *NEDC*, 477 F.3d 668 (No. 06-70430).

⁷³ 16 U.S.C. § 839(b)(h)(10)(A) (2000). Under the Northwest Power Act, the Council must adopt a program to protect, mitigate, and enhance fish and wildlife (the Fish and Wildlife Program). *Id.* § 839(b)(h)(1)(A) (2000). The statute requires BPA to use its funding to protect, mitigate, and enhance fish and wildlife "in a manner consistent with . . . the program adopted by the Council." *Id.* § 839(b)(h)(10)(A) (2000). In its brief to the Ninth Circuit, the Council argued that a "key question" for the court was its interpretation of the Act's consistency provision, for it went "to the heart" of the "ability of the Council to see its extensive fish and wildlife mitigation program implemented in the manner intended by Congress." Brief of Intervenor Nw. Power & Conservation Council, *NEDC*, 477 F.3d 668 (Nos. 06-70430, 06-71182) (filed June 10, 2006). "[F]or Bonneville to act 'in a manner consistent with' the Council[s] [Fish and Wildlife] [P]rogram requires . . . [a] high substantive standard of adherence and agreement to the Council's [Fish and Wildlife] [P]rogram." *Id.* at *35.

⁷⁴ Press Release, Bonneville Power Admin., BPA Selects Successors to Fish Passage Center (Jan. 26, 2006), <http://www.bpa.gov/corporate/BPAnews/2005/NewsRelease.cfm?ReleaseNo=695> (last visited Jan. 27, 2008). Under BPA's proposed plan, Pacific States would "[m]anage the smolt monitoring program," "[p]erform functions associated with related data collection and management," and "[c]onduct routine analysis and reporting of that data," while Battelle would "oversee, coordinate, and facilitate broader, non-routine scientific analysis of that data, including independent peer review." *Id.*

⁷⁵ Order, *NEDC*, 477 F.3d 668 (9th Cir. 2007) (No. 06-70430) (filed on Mar. 17, 2006); see Bill Rudolph, *Fish Passage Center Gets Contract Extension Through November*, NW. FISHLETTER No. 213, Apr. 18, 2006 (explaining that the injunction assured BPA would not close the FPC at the end of March, as it had planned).

⁷⁶ *NEDC*, 477 F.3d at 691. The Northwest Power Act gives the Ninth Circuit exclusive

BPA had violated both the Administrative Procedure Act (APA) and Article I of the Constitution.⁷⁷

1. Unlawfully Relying on Legislative History

The Ninth Circuit agreed with NEDC that BPA violated the APA and Article I of the Constitution by transferring the functions of the FPC on the basis of mere legislative history.⁷⁸ The court gave two reasons for its decision: 1) the language in the committee report on which BPA relied was not connected to any text in the statute,⁷⁹ and 2) if courts were to allow such legislative history to become law, it would pervert the process for creating legally binding action—which, under Article I of the Constitution, requires both bicameralism and presentment.⁸⁰ Thus, without statutory support,⁸¹ the language in the committee report referring to the FPC was insufficient to require BPA to transfer the functions of the FPC because “legislative history, untethered to text in an enacted statute, has no compulsive legal effect.”⁸²

The court also decided that by giving binding effect to legislative history, BPA had “frustrated the statutory design of the Northwest Power

jurisdiction over challenges to “final actions and decisions taken pursuant to [the Northwest Power Act] . . . by the Administrator [of BPA] or the Council, or the implementation of such final actions.” 16 U.S.C. § 839(f)(e)(5) (2000). BPA raised two challenges to the Ninth Circuit’s subject matter jurisdiction, both of which were rejected by the court. *NEDC*, 477 F.3d at 678–79, 681.

⁷⁷ *Id.* at 691.

⁷⁸ *Id.* at 682–85.

⁷⁹ *Id.* at 682. “[C]ourts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point.” *Id.* at 683 (second and third alterations in original) (quoting *Shannon v. United States*, 512 U.S. 573, 584 (1994)). In many respects, this result is hardly a surprise in light of the Supreme Court’s well-known decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978), where the Court rejected a TVA argument that the Tellico Dam was not subject to the requirements of the ESA because of statements in committee reports on appropriation bills.

⁸⁰ *NEDC*, 477 F.3d at 684. “[A]n executive branch agency which views itself as subservient to a sentence in a legislative report undermines the distribution of authority in our federal government in which every exercise of political power is checked and balanced.” *See id.* at 685.

[L]egislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Id. at 684 n.13 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); *see also* U.S. CONST. art. I, § 7, cl. 2 (requiring both the House of Representatives and the Senate to pass a bill and the President to sign it, or, if the President returns the bill to the House in which the bill originated, Congress may pass the bill into law if a two-thirds majority approves it).

⁸¹ The statute never mentioned the FPC. Its only reference to BPA stated that “[e]xpenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for official reception and representation expenses in an amount not to exceed \$1500. During fiscal year 2006, no new direct loan obligations may be made.” Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, 119 Stat. 2245, 2276 (2005).

⁸² *NEDC*, 477 F.3d at 682.

Act,” which established a broad participatory process involving diverse interest groups and the public to advise BPA.⁸³ That statute requires BPA to exercise its authority in a manner consistent with the Council’s Fish and Wildlife Program.⁸⁴ The most recent version of the Council’s Fish and Wildlife Program calls for “the continued operation of the [FPC].”⁸⁵ The court suggested that BPA might depart from the Fish and Wildlife Program’s directives “if such a departure was necessary for BPA to comply with its statutory obligation to use its authority in a manner consistent with the Council’s Power Plan or purposes of the [Northwest Power Act].”⁸⁶ However, because BPA adopted a “slavish adherence to a sentence in a committee report,” the court determined that “no nice question of balancing potentially conflicting obligations [was] presented.”⁸⁷ Since BPA made no attempt to explain how terminating the FPC was consistent with the Council’s program, the court concluded that the termination was arbitrary and capricious.⁸⁸

2. Unreasonably Departing from Past Practices

BPA unsuccessfully attempted to convince the court that its decision to defund the FPC was based on factors independent of the language on the congressional committee report. But in transferring the functions of the FPC to two new entities, BPA departed from a two-decades-old precedent.⁸⁹ While an agency may change course if doing so is in the public interest, the Ninth Circuit ruled that the agency “must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”⁹⁰ In deciding whether BPA supplied a reasoned analysis, the court considered only the agency’s analysis in the administrative record, refusing to accept “appellate counsel’s post hoc

⁸³ *Id.* at 685. The Ninth Circuit noted that one purpose of the statute is “to allow the States, local governments, and citizens of the Pacific Northwest . . . to participate in the development of regional energy conservation plans, plans for renewable resources, and plans for environmental protection and enhancement.” *Id.* at 685–86; *see* 16 U.S.C. § 839(3) (2000).

⁸⁴ 16 U.S.C. § 839b(h)(10)(A) (2000); *see NEDC*, 477 F.3d at 686.

⁸⁵ Council’s 2003 Fish and Wildlife Program, *supra* note 57, at 27. *See also id.* at 28 (“The [FPC] shall continue to provide an empirical database of fish passage information for use by the region.”).

⁸⁶ *NEDC*, 477 F.3d at 686.

⁸⁷ *Id.*

⁸⁸ *Id.* at 690. Although the Ninth Circuit concluded that BPA’s actions “frustrated the statutory design of the Northwest Power Act,” *id.* at 685, the court did not directly rule on NEDC’s claim that BPA’s decision to defund the FPC violated section 4(h)(10)(A) of the Northwest Power Act (requiring BPA to use its funds in a manner consistent with the Council’s Fish and Wildlife Program, the Council’s Power Plan, and the purposes of the Act); *See* Brief of Petitioner at 29–31, *NEDC*, 477 F.3d 668 (9th Cir. 2007) (No. 06-70430) (dancing around the issue with the quotation in the text accompanying note 86).

⁸⁹ *NEDC*, 477 F.3d at 690. *See also supra* note 56 and accompanying text (on the origins of the Fish Passage Center).

⁹⁰ *Id.* at 687 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 57 (1983) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted))).

rationalizations for agency action.”⁹¹ Nor would the court “supply a reasoned basis for the agency’s action that the agency itself has not given.”⁹²

According to the Ninth Circuit, BPA provided “scant evidence”⁹³ of its decision to defund the FPC. The agency argued that the court should uphold its decision to transfer the functions of the FPC as a reasonable application of the Northwest Power Act’s consistency requirement.⁹⁴ But the only evidence BPA could offer referencing the statute’s consistency requirement were letters to the Yakama Tribe and to five members of the Pacific Northwest’s congressional delegation, in which the agency simply asserted, without any supporting documentation, that its Program Solicitation complied with the agency’s statutory duty to act “in a manner consistent with the Council’s Fish and Wildlife Program.”⁹⁵ The Ninth Circuit decided that this conclusive language in the letters neither reflected a rational decision-making process,⁹⁶ nor satisfactorily explained BPA’s decision to transfer the functions of the FPC.⁹⁷ Consequently, the court held that the agency’s decision to transfer the functions of the FPC was arbitrary.⁹⁸

B. The Continued Existence of the Messenger

Although the Ninth Circuit enjoined BPA from defunding the FPC,⁹⁹ the decision hardly ensures the FPC’s continued existence. The relief the court granted was limited to an order to continue funding the FPC under the terms and conditions of the existing contract “unless and until” BPA can provide a

⁹¹ *Id.* at 688 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁹² *Id.* at 688 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974)).

⁹³ *Id.* at 688 n.16.

⁹⁴ Brief of Respondent at 25–32, *NEDC*, 477 F.3d 668 (9th Cir. 2007) (No. 006-70430).

⁹⁵ *NEDC*, 477 F.3d at 689 (quoting the letters).

⁹⁶ *Id.* The court also rejected BPA’s assertion that a PowerPoint slide, which assessed the capabilities of potential replacements for the FPC, provided evidence of a rational decision-making process. *Id.* Not only did the PowerPoint slide fail to provide such evidence, it was not clear whether BPA actually relied on the information presented in the slide because BPA released the PowerPoint presentation on the same day the agency announced that it was transferring the functions of the FPC to two entities. *Id.* at 688–89. Similarly, the court considered a memorandum comparing the functions of the FPC with the combined proposed functions of Battelle and Pacific States and determined that BPA could not have relied on that memorandum in deciding to transfer the functions of the FPC, since it was drafted six weeks *after* BPA awarded the contracts to Battelle and Pacific States. *Id.* at 689. The court concluded that the memorandum was not evidence of a rational decision-making process. *Id.*

⁹⁷ *Id.* at 690.

⁹⁸ *Id.* BPA also argued that “its interpretation of the Northwest Power Act and its decision to transfer the functions of the FPC [were] entitled to substantial deference.” *Id.* at 688 n.16; Brief of Respondent at 30–32, *NEDC*, 477 F.3d 668 (9th Cir. 2007) (No. 06-70430), 2006 WL 2984628. The court suggested that BPA might be entitled to deference if it was interpreting the Northwest Power Act but reiterated that “there is scant evidence in the record that BPA . . . was interpreting any . . . provision of the Act.” *NEDC*, 477 F.3d at 688 n.16.

⁹⁹ *Id.* at 691.

legitimate “basis for displacing the FPC.”¹⁰⁰ Thus, it appears that the relief the court ordered could be interim.

The court suggested that BPA might be able to justify the dismantling of the FPC by following the appropriate channels, noting that “on a proper record with factual determinations and an adequate explanation of a rational connection between facts determined and action taken,”¹⁰¹ BPA might be able to show that a decision to “transfer the functions of the FPC [was] consistent with the Council’s Fish and Wildlife Program” as well as “the objectives of the Northwest Power Act.”¹⁰² But how BPA could provide such a “proper record” is not at all clear, as defunding the FPC appears to be flatly inconsistent with the Council’s Fish and Wildlife Program, which expressly calls for the continued existence of the FPC.¹⁰³ However, in late 2007 the Council was in the process of amending the Fish and Wildlife Program¹⁰⁴ and could either call for the continuation of the FPC or its elimination.

The other means BPA and other opponents of the FPC might employ to eliminate its existence is to change the law. But having declined to eliminate the FPC in 2005, it does not seem likely that the current Congress will pass legislation requiring the transfer of the FPC’s functions. As of this writing, the FPC remains in operation, providing information on the state of salmon migration. The controversy over this rather obscure entity stands as an illustration of the importance of independent science in the contentious Columbia Basin.¹⁰⁵

IV. MAKING BPA FUND ALL FISH AND WILDLIFE RESTORATION COSTS

One of the primary purposes of the 1980 Northwest Power Act was to elevate fish and wildlife protection and restoration to an “equal footing” with hydropower generation in the operation of the Columbia Basin

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 690 n.19.

¹⁰² *Id.* (“Because we hold that BPA’s decision to transfer the functions of the FPC was not the output of a reasoned decision-making process . . . we need not determine whether, on a proper record with factual determinations and an adequate explanation of a rational connection between facts determined and action taken, a decision of BPA to transfer the functions of the FPC is consistent with the Council’s Fish and Wildlife Program and with the [Power] Plan and the objectives of the Northwest Power Act.”).

¹⁰³ *See supra* note 85 and accompanying text.

¹⁰⁴ To amend the Council’s program, the Northwest Power Act requires the Council to solicit recommendations from the region’s fish and wildlife agencies and appropriate Indian tribes for measures for fish and wildlife affected by the hydropower operations in the Columbia River and its tributaries. 16 U.S.C. § 839b(h)(2) (2000). The Council must make these recommendations available for public comment, *id.* § 839b(h)(4)(B) (2000), and act on them within one year, *id.* § 839b(h)(9) (2000). The Council may reject a recommendation only for specified reasons. *Id.* § 839b(h)(7) (2000). *See, e.g.,* *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 35 F.3d 1371, 1395 (9th Cir. 1994) (remanding to the Council for further reconsideration of a Fish and Wildlife Program that “failed to explain a statutory basis for [the Council’s] rejection of recommendations of fishery managers and . . . failed to evaluate proposed [Fish and Wildlife] [P]rogram measures against sound biological objectives”).

¹⁰⁵ *See* Rusch, *supra* note 60 (article explaining the genesis and some of the personalities behind the *NEDC* suit).

hydrosystem.¹⁰⁶ One means of doing so is to alter project operations to benefit migrating salmon, as the BiOp litigation discussed in section I of this paper has struggled, without much success, to accomplish. Another means is ensuring that the Bonneville Power Administration (BPA) raises sufficient revenues through its rates to satisfy BPA's fish and wildlife obligations. The Northwest Power Act explicitly directs BPA to set its wholesale power rates sufficient to cover all its costs, including fish and wildlife costs.¹⁰⁷ But BPA has never been enthusiastic about covering all fish and wildlife costs, as higher costs mean its utility and industrial customers will pay higher rates and might even purchase power elsewhere.

In order to pressure BPA to fulfill its statutory obligations toward fish and wildlife, the Yakama and Umatilla tribes¹⁰⁸ became active participants in BPA's administration proceeding setting wholesale power rates for the years 2002 to 2006. When BPA underestimated its fish and wildlife costs in that proceeding, the tribes appealed to the Ninth Circuit,¹⁰⁹ and on May 3, 2007 they won a resounding victory.¹¹⁰

As a precursor to its 2002 to 2006 rate case, in 1998, BPA undertook a public process of estimating its fish and wildlife costs, producing what it called "Fish and Wildlife Funding Principles," which laid out thirteen different alternatives, each with its own cost, for satisfying BPA's fish and wildlife obligations.¹¹¹ But because decisions on the means of fish and wildlife recovery had not been made—and some were awaiting completion of the 2000 BiOp—BPA decided to treat all thirteen alternatives as if they had an equal

¹⁰⁶ 16 U.S.C. § 839(6) (2000) (setting forth that a purpose of the Act is "to protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation"); *Confederated Tribes & Bands of the Yakima Indian Nation v. Fed. Energy Regulatory Comm'n*, 746 F.2d 466, 473 (9th Cir. 1984) ("One purpose of the [Act] is to place fish and wildlife concerns on an equal footing with power production.").

¹⁰⁷ 16 U.S.C. § 839e(a), (g) (2000). Under a 1999 amendment, BPA's rates for fish and wildlife costs during 2002 to 2006 must "preserv[e BPA's] ability to establish appropriate reserves and maintain a high Treasury payment probability." *Id.* § 839e(n) (2000). BPA is obligated to repay "the Federal investment in the Federal Columbia River Power System." *Id.* § 839e(a)(1)(2000); *see also id.* § 839(4) (2000) (establishing that one purpose of the Act is to ensure that BPA continues to "pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements").

¹⁰⁸ Technically, the tribes are called the Yakama Nation and the Confederated Tribes of the Umatilla Indian Reservation.

¹⁰⁹ Appeals of BPA rate decisions must be filed in the Ninth Circuit. 16 U.S.C. § 839f(e)(5) (2000).

¹¹⁰ *Golden Nw. Aluminum, Inc. v. Bonneville Power Admin.*, No. 03-73426, 501 F.3d 1037, 1041 (9th Cir. 2007) (holding "that BPA's fish and wildlife cost estimates and, by extension, the rates based on those estimates, are not supported by substantial evidence"). BPA's preference customers (mostly public utilities) also appealed the BPA rate case decision, unsuccessfully arguing that BPA impermissibly saddled them with the costs of supplying power to its industrial customers. *Id.* at 1045–46. However, the preference customers succeeded in convincing the court that BPA unlawfully charged them with the costs of a settlement reached with investor-owned (private) utilities. *Id.* at 1046–48.

¹¹¹ *Id.* at 1049.

chance of occurring.¹¹² Moreover, the agency refused to “revisit the policy merits or wisdom” of this strategy during the rate case, or change its assumption that annual fish and wildlife costs could range anywhere from \$438 to \$721 million.¹¹³

The tribes objected to BPA’s giving equal weight to all thirteen alternatives, maintaining that BPA should assume that the more expensive alternatives were more likely to occur and arguing that the agency should update the projected costs based on new information and a new risk analysis provided by fish and wildlife agencies and tribes.¹¹⁴ The tribes considered BPA’s reliance on outdated projections to be “arbitrary and unrealistic,” amounting to “willful blindness.”¹¹⁵ Later, during a supplemental rate proceeding undertaken due to problems caused by runaway electric prices, BPA again refused to revise its projection, even though the tribes pointed to new legal obligations under the Clean Water Act and the 2000 BiOp that significantly raised the cost of habitat and hatchery restoration.¹¹⁶

The Ninth Circuit agreed with the tribes that BPA’s unwillingness to recalculate its fish and wildlife costs was arbitrary, producing a rate determination that was not supported by substantial evidence in the record.¹¹⁷ The court was influenced by BPA’s failure to adjust its 1998 estimates in response to a 1999 interagency staff report by fishery managers, whose analysis, the court noted, was entitled to “substantial weight” under the Northwest Power Act.¹¹⁸ The staff report pointed out significant new information on cost increases, and the tribes introduced undisputed testimony that alternatives likely to satisfy ESA requirements would cause BPA’s chances of repaying its Treasury obligations to fall well below the prescribed minimum of eighty percent that BPA set in its rate case.¹¹⁹

¹¹² 2002 Notice of Proposed Wholesale Power Rate Adjustment, Public Hearing, and Opportunities for Public Review and Comment, 64 Fed. Reg. 44,318, 44,321 (Aug. 13, 1999).

¹¹³ *Id.* at 44,322–23 (describing that the decision to consider all thirteen alternatives as equally likely to occur are not at issue in the rate case); *Golden Nw. Aluminum*, 501 F.3d at 1049 (giving BPA’s range of estimated fish and wildlife costs). BPA did revise the cost estimates in the “Fish and Wildlife Funding Principles” to \$430 to \$780 million, based on changes in the market price for electricity, explaining that it was reasonable “to update one set of data, the market prices, with the most recent data . . . and not update other data (on fish and wildlife costs) where the source of that data is substantially less authoritative.” *Id.*

¹¹⁴ *Golden Nw. Aluminum*, 501 F.3d at 1049.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1052–53. The court rejected the tribes’ challenge to the Federal Energy Regulatory Commission’s (FERC’s) confirmation of BPA’s rate determination, as the tribes filed a petition for review of that decision one day past the sixty-day time period. *Id.* at 1050. Although parties may challenge BPA rate decisions within ninety days of final agency action under the Northwest Power Act, 16 U.S.C. §§ 939f(e)(1)(G), 939f(e)(5) (2000), challenges to FERC decisions must be filed within 60 days under the Federal Power Act. 16 U.S.C. § 8251(b) (2000). However, the court considered its inability to review FERC’s action “of little practical consequence,” since the focus of the judicial review provisions of the Northwest Power Act “is on BPA, not FERC.” *Golden Nw. Aluminum*, 501 F.3d at 1050.

¹¹⁸ *Golden Nw. Aluminum*, 501 F.3d at 1051 (citing *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 35 F.3d 1371, 1388 (9th Cir. 1994)).

¹¹⁹ *Id.* On BPA’s repayment obligations, see *supra* note 107 (explaining BPA must maintain a

The court cited three developments that underscored the need for new BPA cost projections when it undertook the supplemental rate proceeding in late 2000 and early 2001: 1) the changed market conditions that caused BPA to declare a financial emergency,¹²⁰ 2) increased costs associated with implementing new Clean Water Act requirements imposed by an Oregon District Court decision,¹²¹ and 3) increased costs from implementing the requirements of the 2000 BiOp.¹²² For these reasons, the Ninth Circuit concluded that BPA's reliance on outdated cost estimates was not supported by substantial evidence, and its exclusion of information on fish and wildlife costs violated the Northwest Power Act's commands that BPA recover all its costs and operate "in accordance with sound business principles."¹²³

The result in this case did not receive the publicity that the Ninth Circuit's affirmation of Judge Redden in the 2004 BiOp case did, but the ramifications are potentially quite far-reaching. The court was unwilling to defer to BPA, even though BPA has a long record of success in defending itself against utility and industrial challenges to its rates.¹²⁴ Instead, it reiterated that it was the fishery managers to whom the court should defer under the terms of the Northwest Power Act.¹²⁵ Perhaps the court sensed that in the case of fish and wildlife restoration, BPA is not exactly a neutral judge, as it has a long history of shortchanging Columbia Basin fish and wildlife.¹²⁶

high Treasury payment probability to support its obligation to repay federal investment).

¹²⁰ *Golden Nw. Aluminum*, 501 F.3d at 1052. On the 2000 financial emergency experienced by BPA, see *Practicing Deception*, *supra* note 2, at 807 (describing the 2000 to 2001 West Coast electricity crisis and BPA's role in it, including the agency's invocation of waivers of salmon protection authorized by the 2000 BiOp); Michael C. Blumm & Daniel J. Rohlf, *The BPA Power-Salmon Crisis: A Way Out*, 31 ENVTL. L. REP. 10,726, 10,726-27 (2001).

¹²¹ *Golden Nw. Aluminum*, 501 F.3d at 1052 (citing *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 132 F. Supp. 2d 876 (D.Or. 2001)).

¹²² *Id.* The 2000 BiOp, of course, failed to survive judicial scrutiny because the "offsite mitigation" on which it relied either was not scrutinized in ESA consultation or was not reasonably certain to occur. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (D.Or. 2003), discussed *supra* text accompanying note 12, and in *Practicing Deception*, *supra* note 2, at 760-63.

¹²³ *Golden Nw. Aluminum*, 501 F.3d at 1052-53 (citing 16 U.S.C. § 839e(a)(1) (2000)).

¹²⁴ See, e.g., *Cent. Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1129 (9th Cir. 1984) (upholding BPA's 1981 rate determinations); *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1482 (9th Cir. 1985) (upholding BPA's decision to provide electricity to its direct service industrial customers at reduced rates on the ground that unusual circumstances justified BPA in acting without strict compliance with ratemaking procedures called for by the Northwest Power Act, 16 U.S.C. § 839e); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 851 (9th Cir. 2001) (upholding BPA's determination that aluminum smelters purchasing power directly from BPA could purchase surplus firm power only under a fixed rate, rather than under a more flexible rate).

¹²⁵ *Golden Nw. Aluminum*, 501 F.3d at 1051.

¹²⁶ See, e.g., *SACRIFICING THE SALMON*, *supra* note 10, at 18 (maintaining that the Northwest Power Act was only advisory); *id.* at 25 (encouraging a congressional "cost cap" on salmon recovery costs); *id.* at 140 (failing to supervise a study to establish restoration goals for Columbia Basin fish and wildlife); *id.* at 155-56 (resisting the Northwest Power Act's equitable treatment directive); *id.* at 159 (declaring a power emergency in 2001 that allowed invocation of an administratively created ESA exemption); *id.* at 188-89 (opposing breaching of the Lower

But maybe the most significant development in the case was the participation of the tribes in the rate case itself. If BPA rate proceedings—which are long, complex, technical affairs—are no longer limited to utility and industrial customers whose interests are largely limited to keeping BPA rates low, but also includes tribal governments whose primary interest is fish and wildlife restoration, the dynamics of these proceedings will surely change. And if the tribes know they can call upon the Ninth Circuit for careful review, the incentives to participate will be high. The result could be, at long last, sufficient funding for Columbia Basin fish and wildlife restoration.

V. REQUIRING NOAA TO IMPLEMENT THE ESA'S PREFERENCE FOR WILD SALMON

The preponderance of hatchery salmon in the Pacific Northwest has created confusion and controversy in ESA implementation.¹²⁷ Since some salmon runs, particularly those in the Columbia Basin, consist of upwards of eighty percent hatchery fish,¹²⁸ and since scientists now widely recognize that hatchery salmon pose threats to salmon spawning in the wild,¹²⁹ some

Snake Dams); *id.* at 254 (damaging salmon migration with peak power operations).

¹²⁷ See Endangered and Threatened Species: Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead, 71 Fed. Reg. 834, 854 (Jan. 5, 2006) (to be codified at 50 C.F.R. pts. 223–24) [hereinafter Final Listing Determinations] (“The predominance of hatchery-origin natural spawners . . . generates uncertainty in evaluating trends in natural abundance and productivity.”); Joseph A. Brown, *Commercially Harvesting Endangered Salmon? Rethinking the Interaction of Salmon Hatcheries and the Endangered Species Act After Alsea Valley Alliance v. Evans*, 40 GA. L. REV. 253, 261 (2005) (suggesting that “the sheer magnitude and historical entrenchment of hatchery use will ensure that hatcheries affect the future of salmon as a federally protected species and natural resource”). See also SACRIFICING THE SALMON, *supra* note 10, at 109–28 (discussing the failed attempts to use salmon hatcheries to artificially enhance Columbia Basin salmon runs); JIM LICHATOWICH, SALMON WITHOUT RIVERS: A HISTORY OF THE PACIFIC SALMON CRISIS 123–50, 207–21 (1999) (providing an historical overview of the Pacific Northwest’s reliance on hatcheries).

¹²⁸ See, e.g., Final Listing Determinations, *supra* note 127, at 854 (noting that hatchery-origin natural spawned salmon can account for approximately seventy to ninety percent of adult returns in some areas).

¹²⁹ NOAA Fisheries, Northwest Fisheries Science Center, *Risks to Wild Populations From Hatchery Fish*, <http://www.nwfsc.noaa.gov/resources/salmonhatchery/risks.cfm> (last visited Jan. 27, 2008) (discussing genetic, ecological, and behavioral risks; risks from overharvesting mixed-stock fisheries; and risks from disease). Judge Coughenour, in *Trout Unlimited v. Lohn*, No. CV06-0483-JCC, 2007 WL 1795036, at *3 (W.D. Wash. June 13, 2007) (citations omitted) [hereinafter *Trout Unlimited I*], citing liberally from the administrative record developed in that case, recognized these risks:

[T]he presence of hatchery salmon in an ecosystem can negatively impact the viability of the wild populations in a variety of ways. Hatcheries are capable of releasing far more fish fry than result from natural spawning. These floods of hatchery fish can result in the appearance of a well-stocked fishery, though in actuality it would not be so without human interference. This, in turn, can lead to overfishing and increased pressures on wild stocks. Hatchery and wild salmon also have ecological interactions that are detrimental to the wild population—hatchery fish, which tend to be larger than wild fish, compete for habitat and food and prey upon smaller wild fish. Interbreeding between hatchery and wild stocks poses genetic risks to wild populations as well, due to the ways

salmon advocates see continued reliance on hatchery fish to sustain salmon harvests as a Faustian bargain.¹³⁰ But those who chafe at the development restrictions imposed by the ESA see hatchery fish as a vehicle to terminate ESA listings: if hatchery fish are part of the same salmon “species,” this thinking goes, there is no shortage of salmon and no reason for ESA listings. The federal agency in charge of salmon listings, NOAA, has taken a middle ground, adopting neither of these opposing perspectives. NOAA believes that, under certain circumstances, hatchery salmon can help in conservation and in recovery of salmon that spawn in the wild.¹³¹

Disagreements over the role of hatchery salmon in ESA listings and implementation have generated numerous lawsuits over issues such as whether to assess the effects of hatchery fish on wild fish in making listing determinations,¹³² whether NOAA may choose not to list hatchery salmon under the ESA if they interbreed with wild salmon,¹³³ and whether hatchery fish should, or must, receive the same protections that wild fish receive after listing.¹³⁴

This section briefly summarizes the events leading to recent challenges to NOAA’s hatchery salmon policies and related ESA salmon listing decisions. It then examines two recent district court decisions concerning the role of hatchery fish in the ESA. The Western District of Washington ruled that because the ESA’s primary purpose is to protect wild fish, NOAA’s hatchery fish policy violated the ESA by allowing listing decisions to be

in which the environmental pressures of the hatchery differ from those in the wild, thus leading to the selection of different traits.

¹³⁰ To characterize a bargain as “Faustian” is to attribute it with “sacrificing spiritual values for material gain” or “insatiably striving for knowledge and mastery.” WEBSTER’S THIRD NEW INT’L DICTIONARY 829 (Philip Babcock Gove ed. 1971).

¹³¹ Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead, 70 Fed. Reg. 37,204, 37,213 (June 28, 2005) (to be codified at 50 C.F.R. pts. 223–24) [hereinafter Hatchery Listing Policy] (noting that hatchery fish can positively affect a salmon ESU by increasing abundance and productivity, improving spatial distribution, and serving as a means to repopulation of unoccupied habitat). NOAA uses the term “natural populations” to refer to salmon that spawn in the wild, “recognizing that these fish may be the progeny of naturally-spawned and hatchery-origin fish in varying proportions.” *Id.* at 37,214. NOAA considers hatchery fish to be a “genetic lineage of hatchery fish propagated at one or more hatchery facilities, recognizing that a hatchery stock can have a wide range of gene flow with populations of natural-origin fish.” *Id.* For simplicity purposes, this article refers to NOAA’s “natural populations” as wild fish.

¹³² See, e.g., *Trout Unlimited I*, 2007 WL 1795036, discussed *infra* Parts V.B, D (considering whether NOAA’s decision to assess collectively the threat of endangerment of populations of wild salmon and hatchery salmon violated the purpose of the ESA).

¹³³ See, e.g., *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D.Or. 2001) [hereinafter *Alsea I*], discussed *infra* Parts IV.A, D (considering whether NOAA’s decision to list only wild populations of coho salmon, and not hatchery populations, as “threatened” was arbitrary and capricious).

¹³⁴ See, e.g., *Alsea Valley Alliance v. Lautenbacher*, No. 06-6093-HO, 2007 WL 2344927 (D.Or. Aug. 14, 2007) [hereinafter *Alsea II*], discussed *infra* Parts IV.C–D (discussing NOAA’s decision to promulgate protective regulations for wild salmon listed as threatened, but not for some hatchery populations).

affected by hatchery fish.¹³⁵ On the other hand, the District Court of Oregon upheld NOAA's hatchery policy, which itself was a response to an earlier decision from the same court,¹³⁶ deferring to the agency's determination that because hatchery fish may provide important benefits to wild fish, hatchery fish may influence the listing of wild fish.¹³⁷ The ramifications of these decisions on the future of ESA protection for wild salmon are potentially far-reaching.

A. Challenging NOAA's Hatchery Policies

The ESA authorizes the Secretary of the Interior and the Secretary of Commerce to decide whether to list a species as endangered or threatened.¹³⁸ The statute defines a "species" to include "any subspecies . . . and any distinct population segment of any species . . . which interbreeds when mature."¹³⁹ The ESA does not, however, define "distinct population segment (DPS),"¹⁴⁰ nor does that term have an accepted scientific meaning. In 1991, NOAA concluded that "a major motivating factor behind the ESA was the desire to preserve genetic variability, both between and within species."¹⁴¹ Consequently, the agency interpreted a salmon DPS to be an "evolutionarily significant unit (ESU) of a biological species."¹⁴² Under this policy, a salmon stock would qualify as an ESU if it were: 1) "substantially reproductively isolated" from other population units, and 2) represented an "important component in the evolutionary legacy of the species."¹⁴³

¹³⁵ *Trout Unlimited I*, 2007 WL 1795036, at *20. NOAA uses the term "natural populations" to refer to salmon spawning in the wild. *See supra* note 131. We prefer to use the latter term.

¹³⁶ *Alsea I*, 161 F. Supp. 2d at 1163–64.

¹³⁷ *Alsea II*, 2007 WL 2344927, at *5.

¹³⁸ ESA, 16 U.S.C. § 1533(a)(1) (2000). Under the ESA, the Secretary of the Interior makes listing determinations for terrestrial and freshwater species, while the Secretary of Commerce makes listing determinations as to marine and anadromous species. *Id.* § 1532(15) (2000). Because salmon are anadromous, the agency in charge of listing determinations for salmon species is NOAA, formerly NMFS, *see supra* note 11. ESA, 16 U.S.C. § 1532(15) (2000). After conducting a status review of a species, the Secretary is to make a determination "solely on the basis of the best scientific and commercial data available," *id.* § 1533(b)(1)(A) (2000), as to whether a species is threatened or endangered due to any of five factors, *id.* § 1533(a)(1) (2000). The relevant factors are: 1) the deterioration of the species' habitat or range, 2) overuse due to "commercial, recreational, scientific, or educational activities," 3) disease and predation, 4) existing regulatory schemes, and 5) "other natural or manmade factors affecting [the species'] continued existence." *Id.* § 1533(a)(1)(A)–(E) (2000).

¹³⁹ *Id.* § 1532(16) (2000).

¹⁴⁰ *See, e.g., Trout Unlimited I*, 2007 WL 1795036, at *4 (stating "[t]he term 'distinct population segment' . . . is not further defined in the statute, nor does it have an understood meaning in scientific circles").

¹⁴¹ Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,612 (Nov. 20, 1991) [hereinafter ESU Policy].

¹⁴² *Id.* at 58,618.

¹⁴³ *Id.* As to the first criterion: the isolation "does not have to be absolute, but it must be strong enough to permit evolutionarily important differences to accrue in different population units." *Id.* As to the second criterion: a population represents an important component of the species' evolutionary legacy if extinction of the population would "represent a significant loss to the ecological/genetic diversity of the species." *Id.* In making this determination, NOAA would

Two years after adopting the ESU policy, in 1993, NOAA issued a policy explaining how the agency would consider hatchery populations when making salmon listing decisions under the ESA.¹⁴⁴ This interim hatchery policy interpreted the ESA to require NOAA to focus recovery efforts on “natural populations.”¹⁴⁵ Despite acknowledging the substantial risks that hatchery fish pose to wild salmon populations and their habitats,¹⁴⁶ the interim policy maintained that artificial propagation “may represent a potential method to conserve listed salmon species when the artificially propagated fish are . . . similar to the listed natural population in genetic, phenotypic, and life-history traits, and in habitat use characteristics.”¹⁴⁷ Nonetheless, the interim hatchery policy “was clear that artificial propagation was to be used only to the extent that it could further the ESA’s central purpose of preserving and promoting self-sustaining natural populations.”¹⁴⁸ The interim hatchery listing policy did not, however, establish standards governing how NOAA would conduct a status review of a salmon ESU that included both wild and hatchery fish.¹⁴⁹

This interim hatchery policy did establish parameters for listing hatchery fish as threatened or endangered.¹⁵⁰ The policy provided that even if hatchery fish were included in an ESU in danger of extinction, NOAA would not include hatchery fish as part of the listed species unless the hatchery fish were “essential for the recovery of the species.”¹⁵¹ Since NOAA

consider whether the population: 1) is “genetically distinct from other conspecific populations;” 2) “occup[ies] unusual or distinctive habitat;” and 3) “show[s] evidence of unusual or distinctive adaptation to its environment.” *Id.*

¹⁴⁴ Interim Policy on Artificial Propagation of Pacific Salmon Under the Endangered Species Act, 58 Fed. Reg. 17,573, 17,573 (Apr. 5, 1993) [hereinafter Interim Hatchery Policy].

¹⁴⁵ *Id.* (stating that the ESA “mandates the restoration of threatened and endangered species in their natural habitats to a level at which they can sustain themselves without further legal protection. For Pacific salmon . . . the ESA’s focus is, therefore, on natural populations—the progeny of naturally spawning fish—and the ecosystems upon which they depend.”).

¹⁴⁶ *Id.* at 17,574 (discussing the potentially harmful genetic and ecological risks that hatchery fish may pose to natural salmon populations).

¹⁴⁷ *Id.*

¹⁴⁸ *Trout Unlimited I*, No. CV06-0483-JCC, slip op. at 9; 2007 WL 1795036, at *6 (W.D. Wash. filed June 13, 2007), discussed *infra* Part IV.B.

¹⁴⁹ See *id.*; see generally Interim Hatchery Policy, *supra* note 144 (discussing policies and guidelines for listing hatchery fish, but conveying no information on status review).

¹⁵⁰ Interim Hatchery Policy, *supra* note 144, at 17,574–75.

¹⁵¹ *Id.* at 17,575. Under the Interim Hatchery Policy, hatchery fish would not be considered part of the biological ESU if:

- (1) the hatchery population in question is of a different genetic lineage than the listed natural populations,
- (2) artificial propagation has produced appreciable changes in the hatchery population in characteristics that are believed to have a genetic basis, or
- (3) there is substantial uncertainty about the relationship between existing hatchery fish and the natural population.

Id. Situations that could warrant listing of the hatchery fish portions of an ESU could arise “if the natural population faces a high, short-term risk of extinction, or if the hatchery population is believed to contain a substantial proportion of the genetic diversity remaining in the species.”

determined that hatchery salmon populations could pose risks to wild salmon populations, the agency elected not to apply ESA protections to all hatchery fish.¹⁵²

In 1998, NOAA employed both the 1991 ESU policy and the 1993 interim hatchery policy in listing Oregon Coast coho as threatened.¹⁵³ The agency defined the coho ESU as consisting of both wild populations and several Oregon hatchery populations.¹⁵⁴ But NOAA did not include the hatchery populations in the listing because it did not consider the hatchery populations to be “essential to recovery.”¹⁵⁵

In 2001, after a widely circulated video showed surplus coho hatchery salmon being clubbed to death by fishery managers, a coalition of agricultural, forestry, and development interests, led by Alsea Valley Alliance (Alsea), challenged application of the interim hatchery policy in the context of NOAA’s listing of Oregon Coast coho.¹⁵⁶ Alsea argued that NOAA had no authority to decide not to protect hatchery fish the agency had included in the Oregon Coast ESU, while protecting the wild fish in that ESU. Doing so, Alsea maintained, was arbitrary, and therefore unlawful under the Administrative Procedure Act.¹⁵⁷

Judge Michael Hogan of the District of Oregon largely agreed, ruling that NOAA lacked the statutory authority to make listing distinctions below that of subspecies or a DPS of a species under the ESA.¹⁵⁸ More specifically, he said “[t]he central problem with the . . . listing decision . . . is that it makes improper distinctions, below that of an [ESU], by excluding hatchery coho populations from listing protection even though they are determined to be part of the same [ESU] as natural coho populations.”¹⁵⁹ Thus, according to Judge Hogan, once NOAA determined that both hatchery populations and wild populations were present within the same ESU, it could not choose to protect only the wild fish.¹⁶⁰ Hogan was unmoved by environmentalist claims

Id.

¹⁵² *Id.*

¹⁵³ Threatened Status for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon, 63 Fed. Reg. 42,587, 42,587, 42,589 (Aug. 10, 1998) (to be codified at 50 C.F.R. pt. 227) (generally utilizing the 1991 ESU policy and explicitly referencing the 1993 interim hatchery policy).

¹⁵⁴ *Id.* at 42,589.

¹⁵⁵ *Id.*

¹⁵⁶ *Alsea I*, 161 F. Supp. 2d 1154, 1154–55 (D.Or. 2001). Alsea was represented by the Pacific Legal Foundation, a national property-rights organization that proclaims that it acts as “a potent representative in the courts for Americans who have grown weary of overregulation by big government, overindulgence by the courts, and excessive interference in the American way of life.” Pacific Legal Foundation, About Us, <http://www.pacificlegal.org/?mvcTask=about> (last visited Jan. 27, 2008).

¹⁵⁷ *Alsea I*, 161 F. Supp. 2d at 1159.

¹⁵⁸ *Id.* at 1163.

¹⁵⁹ *Id.* at 1162 (emphasis added).

¹⁶⁰ *Id.* (“NMFS may consider listing only an entire species, subspecies or [DPS] of any species.”) (citing ESA, 16 U.S.C. § 1532(16) (2007)). According to Judge Hogan, “[o]nce NMFS determined that hatchery spawned coho and naturally spawned coho were part of the same DPS/ESU, the listing decision should have been made without further distinctions between members of the same DPS/ESU.” *Id.* See also Hatchery Listing Policy, *supra* note 131, at 37,212 (interpreting Judge Hogan’s decision to mean that if NOAA determines “that a DPS warrants

that affording ESA protection to hatchery fish would undermine the ESA's principal goal of protecting wild fish and their habitat.¹⁶¹

Ignoring scientific evidence suggesting that there are important differences between wild and hatchery fish populations,¹⁶² Judge Hogan proclaimed that wild and natural coho were "genetically identical."¹⁶³ He also disregarded NOAA's contention that a central goal of the ESA is to conserve wild salmon populations.¹⁶⁴ Consequently, Judge Hogan invalidated NOAA's 1998 listing decision as arbitrary and remanded the issue to the agency for further consideration.¹⁶⁵

B. Revising NOAA's Hatchery Policies

The federal government chose not to appeal Judge Hogan's 2001 decision,¹⁶⁶ but instead opted to redraft the 1993 interim hatchery policy, and then re-evaluate the status of twenty-seven listed West Coast salmon stocks.¹⁶⁷ The new policy announced that "[s]tatus determinations for Pacific salmon . . . ESUs will be based on the status of the entire ESU."¹⁶⁸ NOAA maintained that it would "apply this policy in support of the conservation of naturally-spawning salmon and the ecosystems upon which they depend,

listing, all members of the defined species must be included in the listing. The court did not rule on how the agency should determine whether the species is in danger of extinction or likely to become so in the foreseeable future.").

¹⁶¹ See *Alsea I*, 161 F. Supp. 2d at 1160 n.3 (discussing Oregon Trout's amicus curiae brief).

¹⁶² See, e.g., Interim Hatchery Policy, *supra* note 144, at 17,574:

Because there is, at present, considerable uncertainty about artificial propagation as a means to increase natural salmon populations, and because artificial propagation may have profound consequences for the viability of natural salmon populations, consideration of its use should be based on an objective assessment of genetic and ecological risks, balancing the potential for deleterious effects against risk to the population of irreversible harm or extinction if artificial propagation is not implemented.

¹⁶³ *Alsea I*, 1161 F. Supp. 2d at 1163.

¹⁶⁴ See *id.* ("Although I agree with the general concept that 'genetic diversity' is one factor in the long term success of a threatened species, and thus is one of many underlying goals of the ESA, genetics cannot, by itself, justify a listing distinction that runs contrary to the definition of a DPS.").

¹⁶⁵ *Id.* at 1163.

¹⁶⁶ The Western District of Washington later noted that NMFS declined to appeal the *Alsea I* decision "for reasons that strike the Court as rather transparent." *Trout Unlimited I*, No. CV06-0483-JCC, slip op. at 13; 2007 WL 1795036, at *7 (W.D. Wash. filed June 13, 2007). Although the federal government did not appeal, environmentalists attempted to challenge the Hogan decision, but the Ninth Circuit did not reach the merits of their appeal due to lack of jurisdiction. Because the environmentalists were not party to the original *Alsea I* case, and their appeal was interlocutory in nature, the court determined that Judge Hogan's order was not a final decision, and therefore was not appealable by the environmentalists. *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1181 (9th Cir. 2004).

¹⁶⁷ Hatchery Listing Policy, *supra* note 131. Endangered and Threatened Species: Proposed Listing Determinations for 27 ESUs of West Coast Salmonids, 69 Fed. Reg. 33,102 (proposed June 14, 2004) (to be codified at 50 C.F.R. pts. 223-24).

¹⁶⁸ NOAA's 2003 revised hatchery listing policy continued to employ the 1991 ESU policy to determine the makeup of an ESU. Hatchery Listing Policy, *supra* note 131, at 37,215.

consistent with section 2(b) of the ESA.”¹⁶⁹ And, consistent with Judge Hogan’s decision, the 2005 hatchery listing policy required NOAA to list both wild and hatchery fish as if both were part of an endangered or threatened salmon ESU.¹⁷⁰

Along with the new hatchery listing policy, NOAA made revised listing determinations for sixteen ESUs of West Coast salmon and promulgated amended protective regulations under section 4(d) of the Act for salmon listed as threatened.¹⁷¹ In conducting the status reviews that produced these listing determinations,¹⁷² NOAA employed a two-step process.¹⁷³ First, the Pacific Salmonid Biological Review Team (BRT) assessed the viability of wild populations within each ESU.¹⁷⁴ Second, NOAA evaluated the effects of hatchery stocks on the extinction risk of the entire ESU.¹⁷⁵ These status reviews resulted in the removal of Oregon Coast coho from the ESA list and the downlisting of Upper Columbia River steelhead from endangered to threatened status.¹⁷⁶ Then, declaring that “[n]ot all hatchery stocks

¹⁶⁹ *Id.* Section 2(b) of the ESA states that the purposes of the ESA

are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

ESA, 16 U.S.C. § 1531(b) (2000).

¹⁷⁰ Hatchery Listing Policy, *supra* note 131, at 37,215.

¹⁷¹ Endangered and Threatened Species: Final Listing Determinations for 16 ESUs of West Coast Salmon and Final 4(d) Protective Regulations for Threatened Salmonid ESUs, 70 Fed. Reg. 37,160 (June 28, 2005) (to be codified at 50 C.F.R. pts. 223–24) [hereinafter 2005 Listing Determinations]. Under section 4(d) of the ESA, NOAA may issue conservation regulations authorizing the regulated taking of threatened (but not endangered) species. ESA, 16 U.S.C. § 1533(d) (2000).

¹⁷² The ESA calls for secretarial determinations concerning the status of a species in section 4(a), 16 U.S.C. § 1533(a) (2000) (determinations made on the basis of habitat loss, overuse, disease or predation, inadequate regulatory alternatives, and other natural or manmade factors). These determinations must be made on the basis of best available science. *Id.* § 1533(b)(1)(A) (2000).

¹⁷³ 2005 Listing Determinations, *supra* note 171, at 37,162.

¹⁷⁴ Endangered and Threatened Species: Proposed Listing Determinations for 27 ESUs of West Coast Salmonids, *supra* note 167, at 33,110. The Biological Review Team was comprised of an expert panel of scientists from several federal agencies including NOAA, the Fish and Wildlife Service, and the U.S. Geological Survey. *Id.*

¹⁷⁵ *Id.* at 33,111. NOAA considered the findings of an Artificial Propagation Evaluation Workshop (APEW) which analyzed the BRT and SHIEER findings and assessed the overall extinction risk of the entire ESU. *Id.* The APEW group consisted of federal scientists with expertise in artificial propagation. *Id.*

¹⁷⁶ On the downlisting of Upper Columbia River steelhead, see Final Listing Determinations, *supra* note 127, at 854–55 (noting that “assessment of the effects of artificial propagation on the DPS’s extinction risk concluded that hatchery programs collectively mitigate the immediacy of extinction risk for the Upper Columbia River steelhead DPS in the short term, but that the contribution of these programs in the foreseeable future is uncertain”). Much to the disappointment of the *Alsea I* plaintiffs, who hoped their victory in Judge Hogan’s court would lead to large-scale ESA deregulation, NOAA reaffirmed the status of all the other salmon ESUs it reviewed. *See id.* at 834; 2005 Listing Determinations, *supra* note 171, at 37,193. On the

considered to be part of listed ESUs are of equal value for use in conservation and recovery,”¹⁷⁷ NOAA promulgated section 4(d) regulations for salmon listed as threatened that extended protection only to wild fish and select hatchery fish.¹⁷⁸

C. Trout Unlimited I: Recognizing the ESA's Goal of Protecting Wild Salmon

By allowing hatchery fish to affect the listing status of wild fish, the new hatchery policy drew the opposition of environmentalists, who claimed that it was both inconsistent with the ESA's central purpose of protecting self-sustaining populations in their natural habitats and failed to comply with the statutory directive of using the best available science.¹⁷⁹ Environmentalists also challenged NOAA's downlisting of the Upper Columbia River steelhead ESU.¹⁸⁰ Groups championing water rights, land development, and agricultural interests also argued against NOAA's decisions, but on the ground that NOAA had no statutory authority to make distinctions between hatchery and wild salmon once they were in the same ESU.¹⁸¹

In *Trout Unlimited v. Lohn*, Judge John Coughenour of the Western District of Washington announced that “[t]hough it scarcely seems open to debate . . . in evaluating any policy or listing determination under the ESA, its polestar must be the viability of naturally self-sustaining populations in their naturally-occurring habitat.”¹⁸² He noted that NOAA previously interpreted the ESA to focus on the protection and promotion of self-sustaining wild populations “on numerous previous occasions,”¹⁸³

delisting of Oregon Coast coho, see *infra* note 229.

¹⁷⁷ 2005 Listing Determinations, *supra* note 171, at 37,195.

¹⁷⁸ *Id.* Regulations protect threatened salmon with intact adipose fins, but authorize the taking of hatchery salmon with clipped adipose fins. *Id.* NMFS can use its section 4(d) authority to allow the harvest of listed hatchery fish that are surplus to the conservation and recovery needs of the ESU, consistent with approved harvest plans. *Id.* at 37,194.

¹⁷⁹ See, e.g., *Trout Unlimited I*, No. CV-06-0483-JCC, 2007 WL 1795036 (W.D. Wash. June 13, 2007). The plaintiffs were Trout Unlimited, American Rivers, Pacific Rivers Council, Wild Steelhead Coalition, Native Fish Society, Sierra Club, and the Federation of Fly Fishers. The Building Industry of Washington, the Coalition for Idaho Water, the Idaho Water Users Association, and the Washington State Farm Bureau intervened on the side of NOAA.

¹⁸⁰ *Id.* at *12. The delisting of Oregon Coast coho was the subject of another suit in the Oregon District Court. See *infra* note 229.

¹⁸¹ *Trout Unlimited I*, at *16 n.12. Citing *Alsea I*, the deregulatory groups argued that the ESA requires NOAA to treat both hatchery and naturally spawned fish the same at every stage of the ESA listing process. Defendant-Intervenors' Motion for Summary Judgment at 15, *Trout Unlimited I*, 2007 WL 1795036. Judge Coughenour disagreed. He stated that “it is not only permissible for [NOAA] to treat hatchery and naturally-spawning salmon differently in assessing the risk of extinction faced by an ESU, it will sometimes be required in order to adhere to the central purpose of the ESA.” *Trout Unlimited I*, at *16 n.12.

¹⁸² *Id.* at *15 (citing 16 U.S.C. §§ 1531(b) (2000) (ecosystem purpose of the ESA), 1533(a)(3)(A)(i) (authority to designate critical habitat), 1532(5)(A) (2000) (definition of critical habitat) H.R. REP. NO. 95-1625, at 5 (1978) (providing the requirement to return species to naturally self-sustaining condition)).

¹⁸³ *Id.* at *16. The court also pointed to legislative history emphasizing the relationship

including the interim hatchery policy¹⁸⁴ and the ensuing hatchery listing policy.¹⁸⁵

Judge Coughenour observed that the revised hatchery listing policy required status determinations to be based on the entire ESU, including both hatchery and natural components, instead of using only wild populations as the benchmark.¹⁸⁶ He noted that if NOAA had made the status determinations based only on the viability of the wild salmon, the status review would have ended with the BRT's assessment of the viability of naturally spawning populations in each ESU, instead of following the BRT assessment with NOAA's evaluation of the effects of hatchery salmon on the entire ESU.¹⁸⁷ The upshot in the case of the Upper Columbia steelhead ESU was that the BRT's recommended endangered status, based on wild populations that were "only a fraction of interim recovery targets" and that showed no improvement in an "extremely low replacement rate," became only a partial assessment.¹⁸⁸ NOAA's final assessment, which considered the effects of six hatchery programs on the ESU, thought it "reasonable" to conclude that "the benefits provided by the artificial propagation programs to the ESU's abundance and spatial structure could mitigate the immediacy of the ESU's extinction risks."¹⁸⁹ This possible mitigation produced the downlisting of Upper Columbia steelhead from endangered to threatened status.¹⁹⁰

between viable species and their ecosystems. *Id.* at *15.

¹⁸⁴ Interim Hatchery Policy, *supra* note 144, at 17,573 ("The ESA . . . mandates the restoration of threatened and endangered species in their natural habitats to a level at which they can sustain themselves without further legal protection. For Pacific salmon . . . the ESA's focus is, therefore, on natural populations . . .").

¹⁸⁵ Hatchery Listing Policy, *supra* note 131, at 37,207–08 ("We agree that the intent of the ESA is to conserve natural self-sustaining populations and functioning ecosystems."). This perceived change in policy may have influenced Judge Coughenour's decision not to give *Chevron* deference to NOAA's hatchery listing policy. See *Trout Unlimited I*, 2007 WL 1795036 at *13 (reviewing the validity of the hatchery policy under the arbitrary and capricious standard of the Administrative Procedure Act).

¹⁸⁶ *Trout Unlimited I*, 2007 WL 1795036 at *17.

¹⁸⁷ *Id.* at *18. On the BRT, see *supra* note 174 and accompanying text. The BRT did not ignore the effects of hatchery fish, but limited its consideration to the effects of hatchery fish on viability of wild populations, warning that "[h]atchery production may mask declines in natural populations that will be missed if only raw population abundance data are considered. Therefore a true assessment of the viability of natural populations cannot be attained with information about the genetic and demographic contribution of naturally spawning hatchery fish." *Id.* at *18 (quoting the BRT report). Judge Coughenour specifically approved the BRT focus on sustainability of wild populations as consistent with the ESA's "central purpose." *Id.* at *19.

¹⁸⁸ *Id.* at *19. There was some dissent among BRT members concerning the endangered status of the Upper Columbia steelhead because of resident steelhead existing alongside anadromous steelhead with no obvious barriers to interbreeding. *Id.* at *18 (discussing the BRT report).

¹⁸⁹ *Id.* at *20 (quoting from a NOAA Artificial Propagation Evaluation Workshop).

¹⁹⁰ *Id.* ("Then, in a separate evaluation, [the Artificial Propagation Evaluation Workshop] considered the effects of artificial propagation on the entire ESU, found that hatcheries provided increases in total abundance and spatial structure and recommended that the ESU be listed as threatened.").

This result, Judge Coughenour concluded, was inconsistent with the ESA's central purpose of conserving naturally self-sustaining populations.¹⁹¹ He reasoned that there was nothing in the agency's administrative record providing scientific justification for basing status determinations on the entire ESU, and that doing so was contrary to the best available scientific evidence because "a healthy hatchery population is not necessarily an indication of a healthy natural population, and that in actuality, a healthy population can negatively affect the viability of a natural population."¹⁹² He therefore set aside both the hatchery listing policy and the downlisting of the Upper Columbia River steelhead ESU.¹⁹³ Both the reasoning and the result

¹⁹¹ *Id.* at *16 ("The Court concludes that the central purpose of the ESA, and the organizing principle upon which ESA listings must be made, is the protection and promotion of endangered and threatened species to the point of being naturally self-sustaining."). *See also id.* at *20 (repeating that the ESA's "central purpose" is "to promote and conserve naturally self-sustaining populations").

¹⁹² *Id.* at *21. *See id.* at *20 ("The scientific evidence in the record does not support a conclusion that an assessment of the status of an entire ESU is an appropriate proxy for assessing the status of natural populations."); *id.* at *21 ("[M]easuring the health of a salmon population by reference to the combined hatchery and natural populations does not necessarily provide an appropriate assessment of whether the natural population is on its way to becoming self-sustaining without human interference, and indeed, a healthy hatchery population may mask or obscure the decline of a natural population."). While Judge Coughenour endorsed the preservation of wild salmon populations, he was unwilling to hold that hatchery and wild fish could never be included in the same ESU. *Id.* at *22. He thought it enough to conclude "that status determinations must be made with the health and viability of natural populations as the benchmark." *Id.*

¹⁹³ *Id.* at *23. However, Judge Coughenour did refuse to overrule NOAA's denial of petitions requesting the agency to place wild and hatchery fish in separate ESUs. *Id.* Although he concluded that "[i]t is clear that hatchery fish have important differences from wild fish," he refused to rule that that NOAA's denials were arbitrary and capricious. *Id.* at *22. On the same day Judge Coughenour ruled on *Trout Unlimited*, he ruled on a parallel case involving nearly all of the same parties and having the same caption. *Trout Unlimited v. Lohn*, No. CV05-1128-JCC, 2007 WL 1730090 (W.D. Wash. June 13, 2007) [hereinafter *Trout Unlimited II*]. In this case, the environmentalists claimed that NOAA violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS) or an Environmental Assessment before adopting the hatchery listing policy. *Id.* at *9; *see also* National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000) (requiring that "to the fullest extent possible," agencies prepare an EIS for any major federal action significantly affecting the quality of the human environment). Judge Coughenour noted that exemptions from the procedural requirements of NEPA apply if there is either a direct conflict between NEPA and other statutes, or if the NEPA procedures would be "redundant with those provided for under the statute seeking exemption." *Trout Unlimited II*, 2007 WL 1730090 at *12. He held that both exemptions applied to NOAA's hatchery listing policy. *Id.* at *17. As to the first exemption, he observed that the purposes of NEPA and the ESA "will often be in harmony, but to the extent that they are not, the considerations set out in the ESA control, and cabin the Secretary's discretion in drafting guidance documents as well as making listing determinations." *Id.* at *13. As to the second exemption, "[T]he purposes of NEPA have been served in the present case" because "the public had notice and opportunity to comment on the [hatchery listing policy], and [NOAA] considered alternatives proposed in these comments, and because the ESA procedures that displaced those of NEPA as to listing designations will apply to any action taken pursuant to the [hatchery listing policy]." *Id.* at *16. Judge Coughenour concluded by asserting that "the decision to exempt the [hatchery listing policy] from NEPA procedures does no harm to the shared conservationist purposes of NEPA and the ESA." *Id.* at *17.

seemed contrary to Judge Hogan's decision in *Alsea I*, which interpreted the ESA to foreclose making distinctions between wild and hatchery populations within a given salmon ESU.¹⁹⁴

D. Alsea II: Deferring to NOAA's Hatchery Policy

While Judge Coughenour was considering the validity of NOAA's 2005 hatchery policy, Alsea led a coalition of agricultural, forestry, water, and development interests in a separate challenge to the same policy in the District Court of Oregon, perhaps hoping to build on their success several years earlier in *Alsea I*.¹⁹⁵ In *Alsea v. Lautenbacher (Alsea II)* the plaintiffs challenged NOAA's decision to list sixteen salmon ESUs as well as NOAA's protective regulations for salmon populations listed as threatened.¹⁹⁶ They claimed that, under Judge Hogan's decision in *Alsea I*, NOAA lacked statutory authority to distinguish between populations of hatchery and wild salmon populations within the same ESU in listing species and in promulgating 4(d) protective regulations.¹⁹⁷

Judge Hogan, somewhat surprisingly given his *Alsea I* decision (where he interpreted what might have been legislative ambiguity into administrative prohibition),¹⁹⁸ noted that the ESA did not specify how NOAA should conduct the status review.¹⁹⁹ With no statutory prohibition against making distinctions among populations within salmon ESUs at the status review stage, and no allegations that NOAA improperly excluded any hatchery populations from listed ESUs, Hogan upheld the agency's hatchery listing policy, even though it authorized differential treatment of populations within an ESU.²⁰⁰ Judge Hogan was apparently unwilling to extend the implications of his *Alsea I* opinion to impose an administrative straightjacket on the ESA listing process.

The environmentalists also brought identical ESA claims in both challenges. *Id.* at *9. Because Judge Coughenour issued his final order in both opinions contemporaneously and the administrative record in *Trout Unlimited I* was more complete, he elected to consider the ESA claims only in *Trout Unlimited I*. *Id.*

¹⁹⁴ See *supra* notes 158–60 and accompanying text. Judge Coughenour recognized the apparent conflict, anticipating “the happy result of instigating needed appellate review.” *Trout Unlimited I*, 2007 WL 1795036, at *7.

¹⁹⁵ See *supra* notes 156–65 and accompanying text; see also Complaint at 1, *Alsea II*, 2007 WL 2344927 (D.Or. Aug 14, 2007) (filed on May 1, 2006) (providing a full list of Alsea's co-plaintiffs).

¹⁹⁶ *Alsea II*, 2007 WL 2344927, at *1. Alsea pointed to section 4(d) of the ESA, which directs the Secretary to issue regulations for the conservation of threatened species, which may include regulated taking “in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved.” *Id.* at *6 (quoting the ESA, 16 U.S.C. § 1532(3) (2000)).

¹⁹⁷ *Id.* at *5, *6. Alsea further claimed that NOAA could not include salmon that do not interbreed in listed populations. *Id.* at *6.

¹⁹⁸ Hogan interpreted the statutory definition of “species,” which includes “subspecies . . . and any distinct population segment . . .” to prohibit listing distinctions below distinct population segments. *Alsea I*, 161 F.Supp.2d 1154, 1162 (D.Or. 2001) (emphasis removed).

¹⁹⁹ See ESA, 16 U.S.C. § 1533(b)(1)(A) (2000) (requiring status review determinations but declining to specify how they should be conducted). The hatchery listing policy specifically called for status review determinations. Hatchery Listing Policy, *supra* note 131, at 37,215.

²⁰⁰ *Alsea II*, 2007 WL 2344927, at *5 (noting that “Congress did not specify how [NOAA] should conduct a species review”).

Judge Hogan also sustained NOAA's 4(d) regulation allowing the taking of most hatchery fish—but not wild fish—in a threatened ESU because, he ruled, the ESA does not require equal treatment of wild and hatchery fish.²⁰¹ He rejected Alsea's contention that disparate treatment in taking regulations was inconsistent with the ESA's definition of conservation, which limits regulated takings to "extraordinary case[s],"²⁰² noting that the ESA does not even prohibit the taking of threatened species, and giving deference to NOAA's reasonable interpretation of statutory ambiguities.²⁰³

Finally, Judge Hogan rejected Alsea's contention that NOAA's ESUs were over-inclusive because they included salmon populations that do not in fact interbreed, as they spawn at different times and at different places.²⁰⁴ Ruling that the term "distinct population segment" was ambiguous, Judge Hogan deferred to NOAA's interpretation of the "reproductive isolation" component of DPS, which considered genetic factors, stray rates, recolonization rates, and other criteria, in addition to actual reproduction.²⁰⁵ He observed that if Alsea's view of the ESA prevailed, requiring actual interbreeding to be within a DPS, the ESA would forbid U.S. protection of imperiled species that were abundant elsewhere in the world, which was something the ESA's drafters clearly authorized.²⁰⁶ Judge Hogan therefore ruled that the hatchery listing policy's criteria for inclusion of salmon populations was "within permissible limits under the ESA."²⁰⁷

Thus, in August 2007—less than nine weeks after the Western District of Washington set aside the hatchery listing policy and the downlisting of Upper Columbia steelhead as contrary to the ESA—the District of Oregon upheld the policy and declined to set aside other NOAA listing decisions.²⁰⁸ It therefore appeared that NOAA's hatchery policy was operative in Oregon but not in western Washington.

E. Implications of the District Court Hatchery Salmon Decisions

The *Alsea I*, *Trout Unlimited I*, and *Alsea II* decisions can be interpreted to be consistent with each other. *Alsea I* ruled that NOAA lacked authority to make listing decisions below the ESU level, although it did not suggest that

²⁰¹ *Id.* at *6 ("Plaintiffs' authority does not require [NOAA] to treat natural populations and hatchery stocks equally.") On the NOAA regulation protecting fish with intact adipose fins but authorizing takes of fish with clipped fins, see *supra* note 178.

²⁰² *Alsea II*, 2007 WL 2344927, at *6. See ESA, 16 U.S.C. § 1532(3) (2000) (authorizing regulated takings "in the extraordinary case where population pressure within a given ecosystem cannot be otherwise relieved").

²⁰³ *Alsea II*, 2007 WL 2344927, at *6 (noting that section 4(d) of the ESA, 16 U.S.C. § 1533(d) (2000), does not prohibit the taking of threatened species).

²⁰⁴ See *id.* at *6 (noting that, for example, the Lower Columbia River chinook ESU contains 31 separate populations and includes both spring and fall spawners in an area over 130 miles long and 120 miles wide).

²⁰⁵ *Id.* at *7.

²⁰⁶ *Id.* (citing, *inter alia*, *Alsea I*, 161 F. Supp. 2d 1154, 1162 n.3 (D.Or. 2001), quoting S. REP. NO. 96-151, on the need to protect imperiled U.S. species, even if they are abundant elsewhere).

²⁰⁷ *Alsea II*, 2007 WL 2344927, at *7.

²⁰⁸ *Id.*

hatchery and wild fish had to be included in the same ESU.²⁰⁹ *Trout Unlimited I* held that the ESA's overarching policy of protecting and promoting wild fish and their habitats prevented NOAA from applying its hatchery listing policy because it allowed the abundance of hatchery fish to affect listing decisions about wild fish.²¹⁰ *Alsea II* rejected an attempt to restrict NOAA's discretion to make distinctions between wild and hatchery fish in status reviews concerning listing decisions and in promulgating 4(d) protective regulations.²¹¹ There are no obvious inconsistencies with these results, but they reflect an apparently dichotomous perspective on the role of hatchery salmon under the ESA.

Judge Coughenour recognized that the results in *Alsea I* and *Trout Unlimited I* were in conflict.²¹² Moreover, many of the assumptions underlying those two decisions are diametrically opposed: the Hogan opinion interpreted the ESA to foreclose differential treatment to wild and hatchery populations included within the same ESU,²¹³ but the Coughenour opinion struck down NOAA's hatchery policy because it lumped together wild and hatchery fish, and therefore was inconsistent with the ESA's overriding goal of protecting wild fish and their habitats.²¹⁴ Judge Coughenour questioned Judge Hogan's interpretation of the only case on which he relied in *Alsea I*.²¹⁵ Judge Hogan, in *Alsea II*, expressly pointed to the lack of deference that Judge Coughenour gave to NOAA's hatchery policy.²¹⁶ Judge Coughenour referred to the result of Judge Hogan's *Alsea I* opinion as "odd."²¹⁷ Coughenour called upon the Ninth Circuit to resolve these issues.²¹⁸ An even more obvious conflict concerns *Trout Unlimited I*'s striking down the same hatchery policy which the *Alsea II* decision affirmed.²¹⁹ Ninth Circuit review seems on the horizon, as both NOAA and the Washington State Farm Bureau, Idaho Water Users Association, Coalition for Idaho Water, and the Building Industry Association of Washington have filed notices of appeal of Judge Coughenour's *Trout Unlimited I* ruling.²²⁰

²⁰⁹ See *supra* notes 158–65 and accompanying text.

²¹⁰ See *supra* notes 182–94 and accompanying text.

²¹¹ See *supra* notes 199–208 and accompanying text.

²¹² *Trout Unlimited I*, No. CV06-0483-JCC, 2007 WL 1795036, at *7 (W.D. Wash. June 13, 2007) ("To the extent that this Court's order can be read to conflict with *Alsea*, perhaps this will have the happy result of instigating needed appellate review.").

²¹³ See *supra* notes 158–60 and accompanying text.

²¹⁴ See *supra* notes 186 & 191 and accompanying text.

²¹⁵ *Trout Unlimited I*, 2007 WL 1795036, at *7 n.7 ("Southwest Center for Biological Diversity v. Babbitt does not appear to support the point for which it is cited in the [*Alsea I*] decision.").

²¹⁶ *Alsea II*, No. 06-6093-HO, 2007 WL 2344927, at *5 (D.Or. Aug. 14, 2007) ("Declining to apply deferential . . . review, [Judge Coughenour] recently held unlawful and set aside the Hatchery Policy . . .").

²¹⁷ *Trout Unlimited I*, 2007 WL 1795036, at *22 ("[T]he inclusion of hatchery fish alongside natural fish in a given ESU, and listing the entire ESU as required by *Alsea I*, when status determinations are ultimately to be made with reference to the health of the natural population alone, strikes the Court as odd.").

²¹⁸ *Id.* at *7.

²¹⁹ *Id.* at *20; *Alsea II*, 2007 WL 2344927, at *5.

²²⁰ *Trout Unlimited I*, 2007 WL 1795036, *appeal docketed*, No. 07-35750 (9th Cir. Sept. 10, 2007).

When resolving these inconsistencies, the Ninth Circuit should also consider a significant law-and-science issue. In *Alsea I*, Judge Hogan announced that wild and hatchery fish in the Oregon Coast coho ESU were “genetically identical,”²²¹ a declaration that seems to be without scientific support.²²² On the other hand, Judge Coughenour concluded that “[i]t is clear that hatchery fish have important differences from wild fish.”²²³ Judge Hogan did not repeat his claim of genetic similarity in *Alsea II*. Moreover, in that decision he accepted NOAA’s distinction between hatchery and wild fish, quoting language from the hatchery listing policy and from NOAA’s listing rule explaining the distinctions.²²⁴ Further, he concluded that “the ESA does not require that protective regulations treat natural populations and hatchery stocks equally.”²²⁵ Thus, despite his *Alsea I* pronouncement, Judge Hogan’s *Alsea II* decision accepted NOAA’s determination that there were important differences between wild and hatchery fish, recognition that will defeat most of the aspirations of the *Alsea* plaintiffs, who were aiming to dismantle ESA salmon-based regulation.²²⁶

On the other hand, in *Trout Unlimited I*, Judge Coughenour enjoined NOAA’s 2005 hatchery policy as contrary to ESA’s “central purpose . . . to promote and conserve naturally self-sustaining populations.”²²⁷ Judge Hogan did not recognize this overriding ESA policy in either *Alsea I* or *Alsea II*. Thus, he was able to uphold NOAA’s hatchery policy in *Alsea II*, while Judge Coughenour struck it down.²²⁸ At the least, the Ninth Circuit must resolve this conflict—even if it is possible to interpret all district court decisions on the role of hatchery salmon in ESA implementation as

²²¹ *Alsea I*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001).

²²² See *Trout Unlimited I*, 2007 WL 1795036, at *3 (stating that “[s]cientific consensus is that there remain behavioral, genetic, and phenotypic difference between hatchery and natural fish.”). Due to conditions in fish hatcheries, hatchery salmon are subjected to unnatural environmental pressures, which leads to artificial selection and domestication. “[H]atchery fish show less efficient foraging ability, increased aggression, lower territorial fidelity, a preference for surface habitat . . . and a tendency to approach predators.” Additionally, hatchery populations typically have decreased breeding success compared to wild populations. *Id.* at *2–*3.

²²³ *Trout Unlimited I*, 2007 WL 1795036, at *22.

²²⁴ *Alsea II*, 2007 WL 2344927, at *5 (“Not all hatchery stocks considered to be part of listed ESUs are of equal value for use in conservation and recovery . . . and these hatchery fish could fulfill other purposes . . . while preserving all future recovery options”); *id.* at *3 (“[H]atchery fish within the ESU can positively affect the overall status of the ESU Conversely, a hatchery program . . . can affect a listing determination by reducing adaptive genetic diversity of the ESU, and by reducing the reproductive fitness and productivity of the ESU.”).

²²⁵ *Id.* at *1.

²²⁶ Pacific Legal Foundation—an organization “dedicated to property rights, limited government, and a balanced approach to environmental protection”—represented the *Alsea* plaintiffs, whom it referred to as “farmers, property owners, and fishing families who face stringent restrictions because of unnecessary federal listing of salmon.” Press Release, Pacific Legal Foundation, PLF Vows Appeal of Salmon Ruling So That All Fish Get Counted (Aug. 15, 2007), available at <http://www.pacificlegal.org/?mvcTask=pressReleases&id=825>.

²²⁷ *Trout Unlimited I*, 2007 WL 1795036, at *20; see *supra* note 191 and accompanying text.

²²⁸ *Alsea II*, 2007 WL 2344927, at *5; *Trout Unlimited I*, 2007 WL 1795036, at *20.

consistent with each other—because NOAA’s hatchery listing policy must either apply in both Oregon and western Washington or in neither jurisdiction.

VI. CONCLUSION

Given the pace of events, following Northwest salmon litigation closely is obviously more than can be attempted in a law journal.²²⁹ But the cases surveyed in this update reflect several persistent themes: 1) the agencies charged with salmon restoration are not interested in making the Columbia River safer habitat for migrating salmon if the tradeoff is lost hydropower revenues; 2) the development agencies opposed to meaningful salmon restoration are quite powerful, persistent, and duplicitous; and 3) the courts will usually, but not invariably, defer to the agencies’ determinations. In fact, these decisions reveal a clear trend toward skeptical judicial review. Given the sorry track record of agencies like NOAA and BPA over the last quarter-century,²³⁰ the advent of skeptical judicial review must be considered a therapeutic development.

By affirming Judge Redden in *NWF v. NMFS*,²³¹ the Ninth Circuit gave its imprimatur to his continued oversight of ESA implementation in the context of Columbia Basin salmon. Like Judge Boldt thirty years ago concerning the implementation of Indian treaty fishing rights,²³² Judge Redden has a lonely but critical job; the agencies responsible for designing and implementing the BiOp on Columbia Basin hydroelectric operations

²²⁹ As evidence of the statement in the text, on October 9, 2007, while this article was in press, Judge Garr King of the Oregon District Court accepted U.S. Magistrate Janice Stewart’s recommendations that struck down the delisting of Oregon Coast coho, adding another chapter to the long-running controversy over ESA protection of Oregon Coast coho. *Trout Unlimited III*, CV-06-1493-ST, 2007 WL 2973568, at *1 (D.Or. Oct. 5, 2007). See, e.g., *supra* notes 157–65 (discussing *Alsea I* and its effect on the Oregon coho listing); *supra* note 175 (discussing NOAA’s delisting of Oregon coho); *supra* notes 192–94 and accompanying text (discussing how *Alsea I* led to *Alsea II*); Laura Hartt, *Pacific Coast Federation of Fishermen’s Associations v. NMFS: A Case Study on Successes and Failures in Challenging Logging Activities with Adverse Cumulative Effects on Fish and Wildlife*, 32 ENVTL. L. 671, 681 & n.75 (2002) (discussing NOAA’s listing, delisting, and relisting as threatened the Oregon Coast ESU of coho); *id.* at 715 n.410 (discussing the role *Alsea I* played in NOAA’s delisting of the Oregon Coast coho). In his original opinion Judge Stewart concluded that NOAA’s delisting decision, which was based in part on Oregon’s novel theory that coho are inherently resilient at low population levels and therefore did not require ESA protection, did not reflect best available science. *Trout Unlimited v. Lohn*, CV-06-1493-ST, slip op. at 35–50 (D. Or., July 13, 2007) [hereinafter *Trout Unlimited IV*], available at http://www.earthjustice.org/library/legal_docs/court-decision-to-restore-coho-salmon-protections.pdf (quoting, at 36, NOAA scientists who said that the state’s theory “simply does not pass the red face test—too much theoretical and empirical data suggest otherwise for a wide variety of species”). The court gave NOAA 60 days to reconsider its delisting decision. *Id.* at 62–63.

²³⁰ See generally *supra* note 2; Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons From the Columbia Basin*, 74 WASH. L. REV. 519 (1999).

²³¹ See *supra* notes 18–55 and accompanying text.

²³² SACRIFICING THE SALMON, *supra* note 10, at 80–86 (discussing the Boldt decision and its aftermath).

seem as incapable of producing an effective salmon restoration blueprint as the state of Washington was of producing equitable salmon harvests in the 1970s. The Ninth Circuit's *NWF* decision should signal to agencies like NOAA and BPA that the legal legerdemain and analytical sleights of hand that characterized the 2004 BiOp²³³ will not substitute for better in-river migration conditions which are possible only from substantial operational changes. Judge Redden will not be easily deceived.

In the *NEDC v. BPA*, the Ninth Circuit refused to allow BPA to defund the Fish Passage Center, an indispensable source of critical information about the science of salmon migration.²³⁴ Although perhaps not as dramatic as the Ninth Circuit's affirmance of Judge Redden's rejection of the NOAA BiOp, this case may have just as long-lasting significance. That is, if the Fish Passage Center is maintained by the Northwest Conservation and Power Council in its forthcoming amendments to the Columbia Basin Fish and Wildlife Program.²³⁵

Also flying somewhat under the radar is the *Golden Northwest Aluminum* case, in which the Ninth Circuit ruled that BPA had failed to include in its proposed wholesale electric rates sufficient revenues to carry out all its fish and wildlife responsibilities.²³⁶ This is a significant result, particularly in light of the deference courts historically have given to BPA rate decisions.²³⁷ Perhaps the same mistrust underlying both Judge Redden's decision and the Ninth Circuit's decisions in *NWF v. NMFS* and *NEDC v. BPA* accounts for the *Golden Northwest Aluminum* result. If so, BPA surely earned that distrust, given its shallow reasoning for underfunding fish and wildlife.²³⁸ Perhaps of even more long-term significance is the participation of Columbia Basin tribes in BPA's rate case, a complex administrative proceeding with high transaction costs. If the tribes intend to be repeat players in rate cases the ramifications could be quite significant. Since the participants in those proceedings traditionally have been almost exclusively utilities and BPA this is hardly a recipe for sufficient funding of fish and wildlife measures.

Finally, the recent district court decisions in the hatchery fish cases—*Trout Unlimited I* and *Alsea Valley II*—clarified that wild salmon is the priority in ESA restoration.²³⁹ Some may have thought that *Alsea I* called that priority into question by rejecting NOAA's attempt to distinguish between wild and hatchery salmon within the same ESU,²⁴⁰ but *Trout Unlimited* invoked ESA's wild fish preference to strike down both NOAA's hatchery

²³³ See *supra* Part II (describing NOAA's exclusion from the BiOp of so-called non-discretionary actions, degraded baseline conditions, and prospects of salmon recovery).

²³⁴ See *supra* Part III.A (describing how the court held BPA had violated both the Constitution and the APA by unlawfully defunding the FPC).

²³⁵ See *supra* note 104 and accompanying text.

²³⁶ See *supra* notes 117–26 and accompanying text.

²³⁷ See cases cited *supra* note 124.

²³⁸ See *supra* notes 111–16 and accompanying text.

²³⁹ See *supra* Parts V.C–D.

²⁴⁰ See *supra* notes 158–65 and accompanying text (explaining the basis for Judge Hogan's determination in *Alsea I* that wild and natural coho are genetically identical).

fish policy and an ESA downlisting.²⁴¹ This result is of considerable regional importance, since flooding the Columbia Basin with hatchery fish has been the prevailing policy for generations,²⁴² and has in fact been an integral component of operating Columbia Basin dams without paying close attention to salmon survival for three-quarters of a century.²⁴³

Alsea II must have been a considerable disappointment to its plaintiffs, since its message was that the court would defer to NOAA's hatchery policy use of status reviews to make the kind of distinctions between wild and hatchery fish that seemed foreclosed by *Alsea I*.²⁴⁴ No such administrative deference characterized *Trout Unlimited I*,²⁴⁵ Judge Redden's review of the NOAA BiOp,²⁴⁶ or the Ninth Circuit's decisions in *NWF v. NMFS*, *NEDC v. BPA*, and *Golden Northwest Aluminum*.²⁴⁷ for that matter. If the Ninth Circuit decides to resolve the tension between *Alsea II* and *Trout Unlimited I*,²⁴⁸ it will almost certainly address the deference issue. But whether or not NOAA's hatchery policy should receive judicial deference, the other decisions surveyed in this Article indicate that salmon law in 2007 has been characterized not by deference but by judicial skepticism. The salmon are assuredly the better for this mistrust.²⁴⁹

²⁴¹ See *supra* Part V.C.

²⁴² See SACRIFICING THE SALMON, *supra* note 10, at 109.

²⁴³ *Id.* at 87–88.

²⁴⁴ Compare *supra* notes 158–65 and accompanying text (discussing *Alsea I*) with Part V.D. (discussing *Alsea II*).

²⁴⁵ See *supra* Part V.C.

²⁴⁶ See *Practicing Deception*, *supra* note 2, at 775.

²⁴⁷ See *supra* notes 18–55 and accompanying text (discussing *NWF v. NMFS*); Part III.A. (discussing *NEDC*); and *supra* notes 117–23 and accompanying text (discussing *Golden Northwest Aluminum*).

²⁴⁸ While there is significant tension between the two decisions, see *supra* notes 212–19 and accompanying text, they are not actually in conflict with each other, see *supra* notes 209–11 and accompanying text.

²⁴⁹ Also benefiting the salmon is another district court decision, by Judge Anthony Gonzalez of the Western District of Washington, ruling that implied in the 19th century Indian treaties that promised the tribes “the right of taking fish in common with [settlers]” was the right to have the salmon protected against state-constructed and maintained road culverts, which block access to habitat. *United States v. Washington*, No. CV-9213RSM, 2007 WL 2437166, at *10 (W.D. Wash. Aug 22, 2007). Professor Blumm is at work on an article about this decision and its significance.