

No. 22-35641
D.C. No. 2:21-cv-00570-TSZ

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FISH NORTHWEST, a Washington non-profit corporation,

Plaintiff-Appellant,

---v.---

SCOTT RUMSEY, in his official capacity as Acting Regional Administrator for
NOAA Fisheries' West Coast Region, et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON.

APPELLANT'S BRIEF

JOE D. FRAWLEY
WSBA #41814

SCHEFTER & FRAWLEY
1415 College Street SE
Lacey, WA 98503
(360) 491-6666
Attorneys for Plaintiff-Appellant

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,
Plaintiff-Appellant Fish Northwest, by and through its undersigned
counsel, hereby certifies that it has no parent corporation and that no
publicly held corporation owns 10% or more of its stock.

s/ JOE D. FRAWLEY
JOE D. FRAWLEY, WSB #41814
SCHEFTER & FRAWLEY
1415 College Street SE
Lacey, WA 98503
(360)491-6666
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	4
A. BACKGROUND	5
B. PROCEDURAL HISTORY	35
SUMMARY OF ARGUMENT	36
ARGUMENT	37
A. Legal Standards.	37
B. Overview of the Endangered Species Act.	38
C. NMFS Failed To Ensure Compliance with <i>U.S. v. Washington</i> .	40
D. NMFS Has Failed to Ensure No Jeopardy and Acted Arbitrarily and Capriciously.	41
1. NMFS Fails to Ensure no Jeopardy In Violation of Section 7, and Acted Arbitrarily and Capriciously, Because it Authorizes the Harvest of Listed Salmon at a Rate That Exceeds the Maximum	44

Rate of Harvest That Can Occur Without Jeopardizing the Existence of the Listed Species.	
2. NMFS Ignores the Known Risk of Hatchery Fish Spawning in the Wild.	45
3. NMFS Acted Arbitrarily and Capriciously Because it Fails to Coordinate Harvest with Hatchery Genetic Management, and NMFS Acted Arbitrarily and Capriciously by Failing to Manage Hatchery and Harvest Management Jointly.	46
4. NMFS Acted Arbitrarily and Capriciously, Because It Fails to Account for the Increased Risk of Single Year Fisheries Authorizations.	47
E. The Court Should Vacate the 2021 BiOp and Grant Fish Northwest Injunctive Relief.	47
1. The Court Should Vacate the 2021 BiOp.	47
2. Enjoin Single Year BiOps.	
3. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Includes Only Natural Origin Spawners in Its Analysis of Escapement and Recovery of Natural Origin Spawners.	48
4. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Addresses Hatchery Fish Straying by Requiring Responsible and Prudent Alternatives Including Selective	49

Fishing.

- | | |
|--|----|
| 5. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Adequately Addresses Meeting the RERs. | 50 |
| 6. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Ensures Compliance with the PSSMP. | 50 |

CONCLUSION	54
STATEMENT OF RELATED CASES	56
REQUEST FOR ORAL ARGUMENT	57
CERTIFICATE OF COMPLIANCE	58

TABLE OF AUTHORITIES

CASES

<i>U.S. v. Washington</i> , 384 F. Supp. 312, aff'd, 520 F.2d 676	28, 10, 11, 36, 40, 41, 50, 53, 54
<i>U.S. v. Oregon</i>	3,10,41
<i>Occidental Eng'g Co. v. Immigr. & Naturalization Serv.</i> , 753 F.2d 766, 769-70 (9th Cir. 1985)	37
<i>Karuk Tribe of California v. U.S. Forest Serv.</i> , 681 F.3d 1006, 1017 (9th Cir. 2012)	37, 48
<i>San Luis & Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581, 601 (9th Cir. 2014)	37
<i>N. Plains Res. Council, Inc. v. Surface Transp. Bd.</i> , 668 F.3d 1067, 1074-75 (9th Cir. 2011)	38
<i>Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.</i> , 515 U.S. 687, 696-700 (1995)	38
<i>O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm.</i> , 92 F.3d 940, 942 (9th Cir. 1996)	42
<i>S. Yuba River Citizens League v. NMFS</i> , 723 F. Supp. 2d 1247, 1270 (E.D. Cal. 2010)	43
<i>Marsh v. Or. Natural Res. Council</i> , 490 U.S. 360, 378 (1989)	42
<i>Sacks v. Office of Foreign Assets Control</i> , 466 F.3d 764, 780 (9th Cir.2006)	43

STATUTES

50 C.F.R. § 223.203(b)(6)(ii)	3, 10, 40,41,53
50 C.F.R. § 402.02	22, 42
16 U.S. C. § 1531(b)	28
5 U.S.C. § 706(2)(A)	37, 47
50 C.F.R. § 17.3	38
65 Fed. Reg. 42, 422, 47, 475-81	39
70 Fed. Reg. at 37,194	39
16 U.S.C. § 1538(a)(1)	38

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331 because this case addresses claims by Fish Northwest that Appellees violated the Endangered Species Act.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final judgment.

The district court entered a judgment on July 25, 2022 granting summary judgment in favor of Appellees and dismissing Appellant's claims.

The Notice of Appeal was filed with the Clerk of the district court on August 8, 2022. This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. National Marine Fisheries Service (hereinafter “NMFS”) ignored the heightened risk of recovery to Puget Sound Chinook salmon that resulted from fisheries it approved and funded. These fisheries harvest listed Puget Sound Chinook at a rate that NMFS’ analysis shows results in a reduced likelihood of recovery. May NMFS ignore a heightened risk of extinction in order to approve the over harvest of salmon listed under the Endangered Species Act (hereinafter the “ESA”)? Must NMFS ensure activities that it funds and authorizes do not jeopardize listed Chinook salmon?

II. NMFS ignored the risks posed by hatchery Chinook salmon spawning with natural origin salmon despite clear, undisputed evidence that fisheries management should seek to remove hatchery origin salmon before they can spawn with natural origin salmon. Hatchery salmon are known to reduce the likelihood of recovery of natural origin salmon when allowed to comeingle on the spawning grounds. May NMFS ignore available biological information in order to approve status-quo fisheries that result in increased risk to ESA listed species?

III. NMFS is required to recover natural origin Chinook salmon that are listed under the ESA. May NMFS count hatchery salmon as natural

origin salmon in order to ignore the effects of overharvest and hatcheries?

IV. 50 C.F.R. § 223.203(b)(6)(ii) requires that management plans intended to exempt take of listed salmon from the prohibitions of the ESA “be implemented and enforced within the parameters set forth in *U.S. v. Washington* or *U.S. v. Oregon*.” May NMFS ignore this requirement when evaluating a fisheries plan?

STATEMENT OF THE CASE

A. INTRODUCTION

This is an appeal of the District Court’s order granting summary judgment in favor of the Appellees. The issue before the district court was whether the 2021 Biological Opinion of NMFS that enabled Puget Sound salmon fisheries was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law. By accepting NMFS’s justification of the 2021 BiOp, the court allowed fisheries to proceed that are likely to jeopardize the recovery of salmon that are listed as threatened under the Endangered Species Act.

Puget Sound Chinook salmon are listed as threatened under the Endangered Species Act. Despite the threatened status of Puget Sound Chinook salmon certain fisheries are allowed each year. These fisheries are conducted by the public, commercial interests, and Puget Sound Indian tribes in accordance with seasons that are established annually by the State of Washington and treaty tribes. Due to the Endangered Species Act’s general prohibition of the “take” of endangered species, these fisheries may only proceed if, in the opinion of NMFS, the fisheries will not jeopardize the existence or recovery of the species. Fish Northwest brought this action because, as described herein, the seasons approved by NMFS during its Section 7 consultation jeopardize the existence and recovery of Puget Sound Chinook salmon.

B. BACKGROUND

A. Fish Northwest is a Non-Profit Corporation Dedicated to Recreational Fishing and Preserving Puget Sound Salmon.

FNW is a Washington non-profit corporation “committed to the conservation and preservation of Puget Sound salmon and restoring and expanding fishing opportunities for Washington’s anglers.” 2-ER-258. The organization’s members include individuals who “enjoy fishing and care deeply about the conservation and recovery of Puget Sound salmon” and businesses “that rely on salmon fisheries for Puget Sound salmon.” 2-ER-258—259. As detailed in the declarations submitted by Fish Northwest, the members of Fish Northwest have long-standing connection to Puget Sound salmon, fishing, and conservation.

FNW has submitted declarations from three of its members describing recreational injuries. Specifically, Barry Allyn was raised “along the North Fork of the Stillaguamish River and developed a passion for fishing and the outdoors beginning at age six.” 2-ER-277. Allyn “care[s] deeply about habitat and salmon conservation” and started salmon fishing in Puget Sound as a young adult. 2-ER-277—278. Mr. Allyn has experienced “reduced opportunity” for recreational fishing in recent years. 2-ER-278. Similarly, Art Tachell has been fishing recreationally in Puget Sound for 60 years. 2-ER-273. Mr. Tachell also “care[s] deeply about Puget Sound salmon . . . and the conservation and recovery of Puget Sound salmon” and has been involved in “many conservation projects aimed at” salmon recovery. 2-

ER-273—274. Finally, Curt Smitch previously served as the president of FNW. 2-ER-51. Mr. Smitch fishes recreationally in Puget Sound and has “spent years working on fishery issues . . . to reform fisheries to be more selective and enable the recovery of wild salmonids in Puget Sound and Washington.” 2-ER-51. Mr. Smitch is “regularly” in contact with members of the Washington legislature “to advocate for fisheries improvements and recovery.” Mr. Smitch believes that “[i]f Puget Sound Chinook were recovered, there would be far more opportunity for fisheries (both tribal and non-tribal).”

B. Puget Sound Chinook Salmon Are “In Crisis.”

Puget Sound Chinook salmon were listed as threatened under the ESA in 1999. 9-ER-1978. The “Puget Sound ESU includes all naturally spawned Chinook salmon originating from rivers flowing in Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia.” 9-ER-1979. In the 2021 Biological Opinion (“BiOp”), which is the subject of this litigation, NMFS confirmed that:

Since 1999, most Puget Sound Chinook populations have mean natural-origin spawner escapement levels well below levels identified as required for recovery to low extinction risk (Table 5). Long-term, natural-origin mean escapements for eight populations are at or below their critical thresholds. Both populations in three of the five biogeographical regions are below or near their critical threshold: Georgia Strait, Hood Canal and Strait of Juan de Fuca (Table 5).

9-ER-1987. NMFS further clarified that “[c]urrently, only five populations, in two regions, show long-term neutral to positive growth rates in natural-origin recruitment (Table 6). Additionally, most populations are consistently well below the productivity goals identified in the recovery plan (Table 5).” 9-ER-1991.

NMFS confirms that Puget Sound Chinook continue in a downward spiral:

Over the long-term trend (since 1990), there is a general declining trend in the proportion of natural-origin spawners across the ESU (Table 3). While there are several populations that have maintained high levels of natural-origin spawner proportions, mostly in the Skagit and Snohomish basins, many others have continued the trend of high proportions of hatchery-origin spawners in the most recent available period (Table 3). It should be noted that the pre-2005-2009 estimates of mean natural-origin fractions occurred prior to the widespread adoption of mass marking of hatchery produced fish. Estimates of hatchery and natural-origin proportions of fish since the implementation of mass marking are considered more robust.

9-ER-1982—1983. “Since 1999, most Puget Sound Chinook populations have mean natural-origin spawner escapement levels well below levels identified as required for recovery to low extinction risk.” 9-ER-1991. The State of Washington confirms that Puget Sound Chinook are “In Crisis.” 10-ER-2428.

C. NMFS Has Been Consulting on Single Season Management Plans Since 2014. Those Consultations are Based on a Resource Management Plan That Expired in 2014, and NMFS Acknowledges That Single Year Fisheries Plans Pose a Risk to Listed Puget Sound Salmon.

Beginning in 2001, NMFS received, evaluated, and approved under § 4(d) of the ESA a series of jointly developed resource management plans (“RMPs”) from the Washington Department of Fish and Wildlife (“WDFW”) and the Puget Sound

Treaty Indian Tribes (“PSIT”) (collectively the “co-managers”). 9-ER-1964—1965. “These RMPs provided the framework within which the tribal and state jurisdictions jointly managed all recreational, commercial, ceremonial, subsistence and take-home salmon fisheries, and steelhead gillnet fisheries impacting listed Chinook salmon within the greater Puget Sound area.” 9-ER-1965. The last of the RMPs approved by NMFS expired on April 30, 2014. 9-ER-1965.

Since 2014, NMFS has consulted under Section 7 of the ESA on single-year fishery plans. 9-ER-1965. These consultations considered the effects of Puget Sound salmon fisheries based “on the general management framework described in the 2010-2014 RMP...” 9-ER-1965. NMFS issued one-year biological opinions for the 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021 Puget Sound fishery cycles that considered BIA’s, USFWS’s and NMFS’ actions related to the planning, authorization and funding of the Puget Sound fisheries based on the 2010-2014 RMP framework. 9-ER-1965. Importantly, NMFS’ action of funding the fisheries results in the take of listed Chinook. The fisheries would not occur but for NMFS’ funding.

On April 26, 2021, the BIA formally requested consultation on its authority to assist with the development and implementation of the co-managers 2021-2022 Puget Sound Harvest Plan, and expenditure of funding to support implementation of federal court decisions including *U.S. v. Washington*, as described in (Mercier 2021). 9-ER-1965. The request “included a joint plan produced by the WDFW and the PSIT, as an

amendment to the 2010-2014 Puget Sound RMP, for the proposed 2021-2022 Puget Sound salmon and hatchery steelhead fisheries.” 9-ER-1965. In addition to consultation on BIA’s authority to assist with the development of the co-managers’ plan, NMFS also considered some of its own actions as well as those carried out by USFWS.¹ 9-ER-1968—1969. After examining the effects of these proposed actions, NMFS concluded that the actions were not likely to jeopardize the continued existence of the listed species, including the Puget Sound Chinook salmon ESU, or adversely modify the species.

NMFS acknowledges in the 2021 BiOp that single year fisheries plans create risk to listed Puget Sound salmon. NMFS acknowledges that “there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery.” 9-ER-1993. NMFS is required to reinitiate consultation if the harvest plans result in more take of a listed species than was approved. That never occurs, however, because the fisheries are approved each year under a new plan, the result is that NMFS never addresses the failures of past fisheries management plans. It also never occurs

¹ In the 2021 BiOp, NMFS considered three actions it proposed to take between May 1, 2021, and May 14, 2022. 9-ER-1969. Two of the actions concerned NMFS’s role under the Pacific Salmon Treaty (“PST”) for Fraser Panel fisheries. 9-ER-1969. The third action was associated with its funding of activities by WDFW “for the implementation, management, and monitoring of Puget Sound fisheries, consistent with the PST.” 9-ER-1969.

because NMFS fails to comply with the PSSMP which requires analysis of harvest post season.

D. The Seasons Approved by NMFS Do Not Comply with the Court's Orders in *U.S. v. Washington*.

50 C.F.R. § 223.203(b)(6)(ii) requires that management plans intended to exempt take from the prohibitions of the ESA “be implemented and enforced within the parameters set forth in *U.S. v. Washington* or *U.S. v. Oregon*.” 50 C.F.R. § 223.203(b)(6)(ii). The 2010 RMP, which serves as the basis for the 2021 BiOp, acknowledges that NMFS is required to ensure compliance with the Court’s orders in *U.S. v. Washington*. 11-ER-2453—2455. Indeed, Table 1 of NMFS’ Evaluation of and Recommended Determination on a Resource Management Plan (RMP), Pursuant to the Salmon and Steelhead 4(d) Rule, dated May 27, 2011, acknowledges that an RMP must be “consistent with other plans and conditions established in any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.” 11-ER-2455. Incredibly, NMFS made no effort to conduct any analysis concerning the RMP’s compliance with the Court’s orders in *U.S. v. Washington*. Instead, NMFS’ entire discussion of the issue is as follows:

The RMP explicitly states in its general principles that it will comply with the requirements of *U.S. v. Washington* Case No CV-70-9213 (W.D. Wash.), *U.S. v. Oregon*, Case No. CV-68-512 (D. Or.), other applicable court orders, and the Pacific Salmon Treaty (see page 6 of the RMP).

11-ER-2629. NMFS did not ensure compliance with *U.S. v. Washington* or even attempt to.² As discussed below, the Court should require that NMFS do so for any future fishery management plans, BiOps, or ITS issued for Puget Sound salmon fishing.

Further, as discussed below in the discussion of remedies, the fisheries covered by the 2021 BiOp and ITS do not come close to complying with the Puget Sound Salmon Management Plan (“PSSMP”).³ First, NMFS conducted no analysis regarding the PSSMP, which is not in the record before the Court. Second, as described below, very basic provisions such as calculating the number of harvestable fish, the scheduling deadlines, the post-season catch calculations, and harvest allocation were either not analyzed by any party (including the state and treaty tribes) or did not comply with the PSSMP. The PSSMP is a Court-ordered plan that was intended to conserve Puget Sound salmon, and, as discussed below and in the Declaration of Curt Smitch, enforcing the PSSMP would remedy many of the management deficiencies that currently exist.

E. It Is Widely Accepted That Recovery of ESA Listed Puget Sound Chinook Will Require Addressing “All H’s,” Including Habitat, Hydropower, Hatcheries, and Harvest.

² Could NMFS provide the same lack of analysis of the other requirements of the ESA, such as ensuring the fisheries plan does not reduce the likelihood of survival and recovery of listed species? Could an assertion in the RMP that the RMP’s general principles state that harvest levels will not endanger listed species be given the same complete lack of analysis and deference? The answer is clearly no, and NMFS would never make such an argument.

³ The PSSMP is a court-ordered management plan issued in *U.S. v. Washington* that governs salmon management and harvest allocation between the State of Washington and the treaty tribes. *See* 2-ER-124—173.

The United States Congress funded the Hatchery Reform Project in 2000 because it recognized that, in addition to providing harvest and, in limited circumstances, aiding in conservation goals, the hatchery system needed comprehensive reform. 10-ER-2351. It was recognized that many hatchery programs were contributing to the risks facing endangered and threatened salmon. 10-ER-2351—2356. As a result of that funding, the Hatchery Scientific Review Group (HSRG) was formed. The HSRG worked with state, tribal and federal fisheries managers, along with others, to review over 200 hatchery programs. 10-ER-2351—2356. Relevant to this litigation, HSRG reached several broadly accepted conclusions regarding salmon management. One of the most important conclusions is that, “[t]o be successful, hatcheries should be used as part of a comprehensive strategy where habitat, hatchery management and harvest are coordinated to best meet resource management goals that are defined for each population in the watershed.” 12-ER-2703.

One of the 17 major recommendations provided by the HSRG was that hatchery programs should be managed to achieve proper genetic integration with or segregation from natural populations. 12-ER-2699. HSRG noted that hatchery fish have a lower reproductive fitness in the wild than do natural origin fish and, as a result, they “represent a risk to a natural population (if present) when they spawn in the natural environment.” 12-ER-2699—2700.

HSRG developed standards for the percent of hatchery fish that should be allowed to spawn in the wild, and those standards are expressed in clear terms in Recommendation 8 of the Report to Congress. The HSRG also recommended that harvest and hatcheries need to be managed together in order to ensure that brood stock and natural spawning escapement meet HSRG standards appropriate to the affected natural population's designation. 12-ER-2707—2708. The specific recommended maximum proportion of hatchery fish spawning with wild fish varies depending on the biological significance and recovery phase of the natural population. 12-ER-2707—2708. For populations defined as the most important or essential for recovery, hatchery fish should comprise no more than 5 percent of the fish that spawn in the wild if they are from a segregated hatchery program and should comprise no more than 30 percent of the fish on the spawning grounds if they are from an integrated hatchery program. 12-ER-2707. A segregated hatchery program is one that maintains a genetically distinct population of hatchery fish and uses only hatchery origin fish for reproduction. 12-ER-2700. An integrated hatchery program utilizes both hatchery and natural origin salmon in the hatchery for reproduction. 12-ER-2700—2701. For a contributing population, hatchery salmon should comprise no more than 10 percent of the salmon that spawn in the wild if from a segregated hatchery program and less than 30 percent if from an integrated program. 12-ER-2708.

These genetic findings are widely accepted. NMFS' 2021 BiOp cites the 2009 Report to Congress, among other HSRG documents, as the basis for its analysis. 9-ER-2000 (citing HSRG 2009 Report to Congress). Similarly, in its biological opinions concerning Puget Sound salmon, NMFS acknowledges that HSRG's recommendations are sound science. 7-ER-1630 (stating "NMFS has not adopted Hatchery Scientific Review Group (HSRG) gene flow (i.e., pHOS, pNOB, PNI) standards per se. However, at present the HSRG standards and the 5% (or 0.05) stray standard (from segregated programs) from Grant (1997) are the only acknowledged quantitative standards available, so NMFS considers them a useful screening tool. For a particular program, NMFS may, based on specifics of the program, broodstock composition, and environment, consider a pHOS or PNI level to be a lower risk than the HSRG would but generally, if a program meets HSRG standards, NMFS will typically consider the risk levels to be acceptable.").

The 2021 BiOp acknowledges that hatchery stray rates present a known risk to listed populations. For example, NMFS also acknowledges that hatchery fish comprise over 95 percent of the spawning salmon in the Skokomish River, which must be recovered in order to recover the ESU, with 182 natural origin spawners and 3,787 total spawners. 9-ER-2128 (table 23). NMFS provides data that show this is not a recent occurrence. In fact, the majority of the 22 populations of Chinook in Puget Sound have had over 50% hatchery fish on the spawning grounds since 2010 Table 3. 9-ER-1983.

Despite this scientific evidence, NMFS allows harvest at a rate that it agrees presents a heightened risk of jeopardy, does not attempt to craft harvest methods to minimize straying of hatchery fish onto natural spawning grounds, and entirely fails to quantify the risk of overly high proportions of hatchery salmon spawning in the wild.

F. NMFS is Failing to Address Half the “H’s:” Hatcheries and Harvest.

1. The Salmon Harvest of the Treaty Tribes and State of Washington Hugely Exceeds the Levels (Rebuilding Exploitation Rates or “RERs”) NMFS Has Determined Are Scientifically Defensible.

NMFS, the Treaty Tribes and the State of Washington annually agree to violate the ESA by intentionally overharvesting ESA listed salmon. In the 2021 BiOp, NMFS acknowledges that it is managing based on “exploitation rate limits at the total, Southern U.S. (SUS), or preterminal SUS level (table 21).” 9-ER-2119. NMFS claims to use a quantitative analysis of the effects of harvest: “NMFS analyzes the effects of harvest actions on populations using quantitative analyses where possible and more qualitative considerations where necessary.” 9-ER-2119. In conducting this analysis, NMFS relies on rebuilding exploitation rates (“RER”) and explains as follows:

The Viable Risk Assessment Procedure (VRAP), detailed in Appendix A provides estimates of the maximum, population-specific exploitation rates (called Rebuilding Exploitation Rates or RERs) that are associated with a high probability of attaining escapement levels which will maximize the natural production for each population (the rebuilding escapement threshold) and a low probability of escapements falling below levels at which the population may become unstable (the critical escapement threshold) due to effects of fisheries. In that way, the RERs

are consistent with survival and recovery of that specific population, under current environmental conditions. The RERs are an important reference for NMFS in determining the likely implications of a proposed fishery for the viability/recovery of a population. When the exploitation rate from a proposed fishery is likely to be at or below the RER, that results in reasonable confidence that the likely effects of the fisheries pose a low risk to that population.

9-ER-2119—2120. NMFS acknowledges that exceedance of the RER presents a heightened risk of jeopardy:

Total fishery exploitation rates on most Puget Sound Chinook populations have decreased substantially since the late 1990s when compared to years prior to listing (average reduction = -18%, range = -52 to +41%), (Fishery Regulation Assessment Model (FRAM) base period validation results, version 6.2) but weak natural-origin Chinook salmon populations in Puget Sound still require enhanced protective measures to reduce the risk of overharvest. The risk to the species' persistence because of harvest remains the same since the last status review. Further, there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery.

9-ER-1993. Recognizing the importance of RERs, NMFS provides RERs for all the (22) populations and (14) management units. 9-ER-2121—2122(Table 21).

RERs are THE ONLY quantitative evaluation of fisheries impacts. NMFS plainly states in the 2021 BiOp that “[a] population will be identified in this opinion as having an increased level of risk when the expected escapement of that population does not meet its critical threshold or the expected exploitation rate exceeds its RER.” 9-ER-2123.

NMFS acknowledges that exceedance of the RERs makes recovery less certain and is a “threat” to the recovery of Puget Sound Chinook. It acknowledges that harvest remains a problem. However, because meeting RERs would require greatly changing existing fisheries, and despite the claim that “NMFS analyzes the effects of harvest actions on populations using quantitative analyses where possible and more qualitative considerations where necessary,” (9-ER-2119), NMFS elects to ignore their own RERs and rely on qualitative arguments.

Rather than address the RER exceedances with fisheries changes, NMFS attempts to explain away overharvest in order to maintain the status quo. In 2020, RERs were exceeded in 13 of 14 management units but NMFS found that no risk to recovery.⁴ The 2021 BiOp acknowledges that the RER is exceeded for 11 of the 14 management units. 9-ER-2127—2128 (Table 23).

Importantly, the level of RER exceedance is often not small. For example, in 2021 Puyallup River Chinook are harvested at a rate that exceeds the RER by 35 percent (47.3% vs 35% RER). *Id.* Nisqually River Chinook are harvest at a rate that exceeds the RER by 36 percent (47.7% vs 35% RER) and Skokomish Chinook at a rate that exceeds the RER by 41 percent (49.2% s 35% RER). 9-ER-2127—2128. Most egregiously, Green River Chinook are harvested at a rate that exceeds the RER by **221 percent**

⁴ This is relevant to risk to recovery created by the single year analysis conducted by NMFS. There is no consideration given to, or analysis of the effects of, exceeding the RERs for the majority of the management units each year and the failures of past year’s fishery management plans.

(54.7% vs 17% RER). 9-ER-2127—2128. All of the RER exceedances, with the exception of the Skokomish River, are approved without any apparent quantification or analyzing of the increased risk of exceeding the RERs.

The only RER exceedance that appears to have been analyzed in any detail in 2021 is the RER exceedance for the Skokomish River. NMFS quantified the effects of exceeding the RER on the Skokomish River and found that “a 50 percent exploitation rate, if implemented over a 25 year period, would reduce the probability of the current Skokomish population exceeding the re-building escapement threshold by half (-50%), in that time frame, compared with achieving the RER of 35 percent.” 9-ER-2147. This is a clear admission that exceeding the RER reduces the probability of recovery. NMFS blatantly ignores the issue for nearly all of Puget Sound (11 of 14 management units). *See* 9-ER-2127 (Table 23).

Importantly, NMFS has the ability to analyze the reduced likelihood of recovery resulting from RER exceedance for each population. It is “possible.”⁵ However, because maintaining the desired fisheries is not supported by the quantitative analysis, NMFS simply elects not to rely on the available quantitative analysis and blatantly ignores available biological information. NMFS did conduct this quantitative analysis in the 2011 RMP for the only four populations that were expected to exceed their RERs:

⁵ The Court will recall that NMFS claims in the 2021 BiOp that “NMFS analyzes the effects of harvest actions on populations using quantitative analyses where possible... and more qualitative considerations where necessary.” 9-ER-2119.

“Where populations exceeded RERs, NMFS analyzed the potential increased risk associated with the proposed SUS fisheries by using the RERs as the standard.” 11-ER-2552.

1. Nooksack River – “NMFS determined the increased risk associated with the SUS fisheries proposed by the co-managers in the RMP” to be a 14 percentage point decrease in the probability rebuilt populations in 25 years”, and resulted in a 24 percentage point increase in the probability of the populations will fall below their respective critical threshold level during that same 25 year period.” 11-ER-2559.
2. Stillaguamish River – “Through modeling, NMFS determined the increased risk to the South Fork Stillaguamish River population associated with the overall fishing-related mortality potentially resulting from the implementation of the 2010 Puget Sound Chinook RMP. The 2010 RMP Likely scenario would represent a 4 percentage point decrease in the probability of a rebuilt South Fork Stillaguamish population in 25 years.” 11-ER-2567.
3. Skykomish River – “Through modeling, NMFS determined the increased risk to the Skykomish River population associated with the total fishing-related mortality potentially resulting from the implementation of the 2010 Puget Sound Chinook RMP, when compared to the RER as the standard. The 2010 RMP Likely scenario would represent a 30 percentage point decrease in the probability of a rebuilt Skykomish population in 25 years.” 11-ER-2569.
4. Skokomish River – “NMFS determined the increased risk to the Skokomish population associated with the total fishing mortality proposed by the co-managers in the 2010 Puget Sound Chinook RMP, when compared to the RER” ... “The 2010 RMP Likely scenario would represent an 18

percentage point decrease in the probability of a rebuilt Skokomish population in 25 years”. 11-ER-2584—2587.

As the Court can see, NMFS knows that any exceedance of the RER results in a reduced probability of recovery, and NMFS has the ability to quantify that reduction. In NMFS’ terms, an RER is a “ceiling” beyond which a risk to recovery is created. RER is the metric developed by NMFS to be the sole quantitative measure of the effects of fisheries and defined by NMFS as the “standard” for analyzing potential increased risk associated with the proposed SUS fisheries. Despite NMFS establishing valid, scientific methods for analyzing risks to recovery of Puget Sound Chinook populations that comprise the threatened ESU, and the availability of data to estimate such risks, NMFS simply ignored this critical component of the assessment of fishery impacts. By that failure to complete essential analyses, NMFS demonstrated its willingness to approve any exceedance of the RER, and that the “maximum” exploitation rate is meaningless. Harvest is approved at multiple times over what NMFS has determined is the maximum allowable to avoid risk to recovery for the majority of the populations in Puget Sound. If a 221 percent overharvest is acceptable, it is hard to imagine where NMFS would ever draw the line.

2. The Heightened Risk of Recovery is Not Limited to A Few Populations. Instead, it Exists for the Vast Majority of the Populations in Puget Sound and Puts the Entire ESU at Risk.

NMFS defines eight of the 22 Puget Sound populations to be essential for recovery of the ESU. 9-ER-1980 (Table 2). In 2021, RER exceedance, while measured

at the “population” level, includes 6 of 8 populations essential to recovery. NMFS never clearly adds up the number of populations where harvest exceed the RER in the 2021 BiOp. However, Table 23 demonstrates that NMFS approved harvest at a rate that exceeded the RER in 11 of 14 management units. 9-ER-2127—2128. The trial court’s conclusion that exceeding population specific RERs “conflates species and population levels” ignores ample evidence in the record demonstrating that FNW’s concern is with the full Puget Sound Chinook ESU and not just at the population level. 1-ER-26. The “species level” or ESU is comprised of 22 populations and 14 management units. The trial court failed to acknowledge that populations are the “building blocks” of the ESU. It is not possible to claim the ESU is fine if the vast majority of the building blocks, i.e., populations (including 6 of 8 essential to recovery), are harvested at rates that increase the risk of jeopardy.

By definition, “essential” populations must be recovered for the species to recover. Logically, at a minimum, those populations must not be put at a heightened risk of extinction through RER exceedance. In 2021, NMFS approved harvest rates that exceeded the RERs for 6 of 8 essential populations, thus reducing the likelihood of recovery of the ESU. FNW challenges NMFS on the basis of not simply exceeding one, or even a few, population’s RER, but rather the majority of populations that represent, collectively, the ESU. The trial court clearly missed that fact.

3. NMFS Relies on General Arguments to Justify the Overharvest, but None of the Arguments are Quantified or

Analyzed in Any Detail. NMFS Further Ignores the Adverse Effects of Allowing Far Too Many Hatchery Fish Spawning in the Wild.

In conducting its analysis, NMFS must ensure the action it funds and approves does not “...reduce appreciably the likelihood of survival and recovery ...” 50 C.F.R. § 402.02. Despite RERs being the **ONLY** quantitative analysis of the effects of harvest, NMFS argues broadly that “other information” mitigates the impact of overharvest and justifies its finding that the fisheries it approves do not present a risk to recovery despite the acknowledged exceedance of the RERs for the majority of the populations of Puget Sound Chinook.⁶ Those alleged mitigating factors are ill-defined, not quantified, and not certain to occur.⁷ NMFS blatantly ignores the existing science concerning the risks posed by hatchery fish. Some, but not all, examples of the glaring deficiencies of the 2021 BiOp are listed here.

a. NMFS Fails to Differentiate Between Hatchery and Natural Origin Salmon.

Perhaps the most egregious deficiency is NMFS’ failure to differentiate between hatchery salmon and natural origin salmon. NMFS has the duty to conserve natural

⁶ NMFS does not call the mitigation a mitigation plan. Instead, NMFS simply states that “other information,” including but not limited to unspecified hatchery changes, considering hatchery salmon spawning in the wild beneficial, and assuming that hatchery fish are as genetically fit as wild salmon dictates that overharvest, which NMFS knows reduces the likelihood of recovery, will not jeopardize listed species. The 2021 BiOp does not analyze these mitigating factors or quantify the benefit or harm each mitigating factor produces.

⁷ NMFS has recently lost on similar claims concerning the alleged mitigation for approving overharvest. *See, e.g., Wild Fish Conservancy v. Thom, et al*, 2:20-cv-417-RAJ-MLP (U.S. District Court for the Western District of Washington), Dkt. 111 at 27-29 (finding that NMFS “failed to create a binding mitigation measure that described in detail the action agency’s plan to offset the environmental damage” caused by the Chinook salmon fisheries NMFS approved in its BiOp).

origin Chinook salmon. 9-ER-1979 (“[t]his Puget Sound ESU includes all naturally spawned Chinook salmon originating from rivers flowing in Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia.”). Throughout the biological opinion, and despite acknowledging that the status of Puget Sound Chinook is not improving, NMFS claims that long-term abundance trends and recruitment of natural origin Chinook is positive. *See* 9-ER-1991.

To justify this assertion, and despite acknowledging elsewhere in the 2021 BiOp that “most Puget Sound Chinook populations have mean natural-origin spawner escapement levels well below levels identified as required for recovery or low extinction risk,” NMFS must ignore any distinction between hatchery fish and natural origin fish in order to maintain status quo for fisheries. 9-ER-1987. This decision is buried in a footnote to Table 6, stating “[t]otal natural escapement Trend is calculated based on all spawners (i.e., including both natural origin spawners and hatchery origin fish spawning naturally)...” 9-ER-1992 (table 6, footnote 1). To justify this approach, NMFS acknowledges that it is “assuming the reproductive success of naturally spawning hatchery fish is equivalent of that of natural-origin fish...” *Id.* (Table 6, footnote 2).

NMFS is fully aware that the assumption that hatchery and natural origin salmon have equivalent reproductive potential is not scientifically defensible, and NMFS

acknowledges as much throughout the BiOp. *See, e.g.*, 9-ER-1993 (“Salmon and steelhead released from Puget Sound hatcheries operated for harvest augmentation purposes pose ecological, genetic, and demographic risks to natural-origin Chinook salmon populations”). It is settled science that hatchery fish are less productive at spawning in the wild than natural origin fish. 12-ER-27008 (“hatchery fish have lower reproductive fitness (even when they come from well-integrated programs), they represent a fitness risk to a natural population ... when they spawn in the natural environment.”). NMFS provides no analysis or quantification to support the assumption that hatchery and natural origin fish have equivalent reproductive success and provides no analysis of the risk of considering hatchery and natural origin salmon interchangeable. This deficiency alone requires that the 2021 BiOp be invalidated, as the very baseline for all of NMFS’ analysis fails to differentiate between hatchery origin and natural origin salmon.

It is important for the Court to know that NMFS acknowledges that hatchery fish should not spawn with natural origin salmon, stating that “NMFS generally views genetic effects as detrimental because we believe that artificial breeding and rearing is likely to results in some degree of genetic change and fitness reduction in hatchery fish and in the progeny of naturally spawning hatchery fish relative to desired levels of diversity and productivity for natural populations based on the weight of available scientific information at this time. **Hatchery fish can thus pose a risk to diversity and**

to natural population rebuilding and recovery when they interbreed with fish from natural populations.” 13-ER-3084 (emphasis added). NMFS further acknowledges that, “[a]s a result, NMFS believes that hatchery intervention is a legitimate and useful tool to alleviate short-term extinction risk, **but otherwise managers should seek to limit interactions between hatchery and natural-origin fish** and implement hatchery practices that harmonize conservation with the implementation of treaty Indian fishing rights and other applicable laws and policies (NMFS 2011d).” 13-ER-3084—3085 (emphasis added). There is no evidence in the record that NMFS makes such an effort. Instead, NMFS acknowledges that it does not take hatchery effects into account and does not seek to manage hatcheries and harvest together. 4-ER-546—547 (stating “the effects of hatchery operations, including straying and genetic effects, are not effects of the action considered in the 2021 BiOp.”).

Including hatchery fish in its calculation of natural origin escapement allows NMFS to hide the fact that there is no positive trend. Current harvest and hatchery management is continuing to prevent recovery. Perhaps NMFS says it best in the 2021 BiOp: "even given some of the incremental increases in natural-origin spawner abundances in the most recent five-year period (Table 4), the long-term trends in both abundance and productivity, in most Puget Sound populations, are well below the levels necessary for recovery (Table 6)." 9-ER-1993.

b. Skokomish River.

Skokomish River Chinook, which NMFS considers essential to recovery, are harvested at a rate that exceed the RER by 41% (49% harvest rate to 35% RER). To justify the overharvest, NMFS argues that plans exist to replace the existing natural population of Skokomish River Chinook salmon with a different population of Chinook salmon by developing “a late-timed hatchery fall Chinook stock...”. 9-ER-2145. Not only is this effort not quantified or detailed in the 2021 BiOp, but it in essence argues that NMFS can allow the current population of Skokomish River natural origin Chinook to go extinct because there are plans to create some other population of hatchery Chinook, sometime in the future, to take its place. 9-ER-2145.

Even if that were appropriate under the ESA, the record refutes NMFS’ assertion that the planned new hatchery program has some (undetermined) future benefit, and the Finfish Program Manager for the Skokomish Tribe acknowledges that the program is a failure and should be discontinued. 9-ER-1939 (stating that “I believe it is time to re-evaluate this program’s effectiveness or lack of and seek discontinuation”).

NMFS again ignores the requirement that it address recovery of listed natural origin Chinook. NMFS acknowledges the effort to create a new hatchery run of salmon to take the place of the existing natural origin Chinook salmon, which is not certain to occur and is currently a failure, is being coordinated with some unidentified “corresponding habitat and hatchery actions...” 9-ER-2146. What is not being

addressed, of course, is harvest and hatchery effects on existing natural origin Chinook salmon.

In the 2021 BiOp, NMFS blatantly approves the acceleration toward extinction of the existing Skokomish River natural origin Chinook. 9-ER-2145—2147. No constraint of harvest to comport with the RER for Skokomish River Chinook is addressed or even suggested, much less required, and no change to the hatchery practices affecting existing natural origin Chinook is addressed. In 2021, the downward spiral of natural origin Skokomish Chinook continues, over 95% of all spawning Chinook are predicted to be hatchery origin, and NMFS ignores the genetic effects on the existing listed Chinook. 9-ER-2128 (182 natural origin spawners and 3,787 total spawners). In sum, the 2021 BiOp makes no attempt to recover the existing natural origin Skokomish River Chinook population. Allowing fishing at a level that NMFS calculates will reduce the likelihood of recovery by 50%, while hoping an unsuccessful, speculative hatchery program creates a new population to replace the extant natural population, is clearly not consistent with Congress' mandate under the ESA. There is no legal justification for simply approving the extirpation of a listed species in order to approve harvest.

NMFS decision to allow the extinction and replacement of the existing Skokomish natural origin Chinook begs a question this Court MUST answer: does the ESA allow NMFS to approve the extinction of a natural origin population by claiming

that it will be replaced with a hatchery population that may be genetically and phenotypically different than the population it is replacing? Allowing NMFS to utilize such an approach makes a mockery of the requirement under the ESA to recover natural origin salmon and steelhead.

c. Nisqually River

Nisqually River Chinook are harvested at a rate that exceeds the RER by 36% (47.7% v. 35%). 9-ER-2127. Like the Skokomish River Chinook, the Nisqually population is essential to recovery. 9-ER-2229. To justify the overharvest, NMFS argues that four considerations balance the overharvest: 1) the extirpated status of the indigenous Chinook⁸, 2) the increasing overall trend in escapement and growth in natural origin escapement, 3) the natural-origin escapement anticipated in 2021 exceeds the critical threshold, and 4) the implementation of the long-term transitional strategy for the population. *Id.*

There are a number of problems with NMFS' reliance on these "other considerations." First, NMFS includes hatchery fish in its calculations of the alleged increasing trend in overall escapements and the number of salmon anticipated to spawn in 2021. 9-ER-1992 (table 6, footnotes 1 and 2). This deficiency is discussed above.

⁸ It should not be lost on the Court that NMFS' argument appears to be that fisheries managers and the public should not be concerned about whatever natural origin salmon remain, because they can simply be replaced with hatchery fish. At minimum, the ESA requires NMFS to recover the populations of natural origin salmon that currently exist and not simply replace them in order to justify the overharvest of natural origin populations.

This assumption that hatchery fish and natural origin fish are interchangeable is not quantified or analyzed and is contrary to all available science. Indeed, NMFS acknowledges the risks posed by hatchery fish spawning with natural origin salmon. 9-ER-1993; *see also* 12-ER-2706 (“Many current hatchery programs have been responsible for loss of fitness and genetic diversity through the influence of maladapted hatchery-origin fish on the spawning grounds. Hatchery fish on the spawning grounds always represent a compromise between the demographic benefits and the genetic risk, even when they come from a well-integrated program.”).

Second, NMFS concludes that “stable growth rate for natural-origin escapement” offsets a harvest rate exceeding their estimate of the Nisqually RER by 36% (47.7% compared to 35%), but NMFS’ calculations of natural-origin growth rates show no increasing trend for either recruitment or escapement. 9-ER-192 (table 6). The recruitment rate, meaning the rate at which one spawning Chinook produces a returning spawning Chinook, is less than one. Each Chinook fails to replace itself in the next generation. NMFS’ conclusion is factually wrong and ignores the downward trend of natural origin Chinook, and the data in the BiOp demonstrates as much.

d. Puyallup River

Puyallup River Chinook are harvested at a rate that exceeds the RER by 35% (47.3% v. 35%). 9-ER-2127. NMFS’ conclusion that “fisheries may provide some stabilizing influence to abundance and productivity thereby reducing demographic

risks” is inconsistent with calculations showing the natural escapement trend for the Puyallup River is declining (Table 6), and natural-origin growth rates for both recruitment and escapement are negative (less than 1.00, Table 6). 9-ER-1992. There is no analysis or quantification of why harvest “may” provide “some” stabilizing influence. And, the language used by NMFS confirms the alleged stabilizing influence is uncertain (it “may” occur) and that no quantification of the stabilizing influence has been conducted (there may be “some” influence).

Just as importantly, the assumptions about recruitment and escapement indefensibly include hatchery fish as “natural” escapement. However tortured, this data also proves that hatchery fish are genetically inferior. Table 6, in the column titled “Recruitment (Recruits),” demonstrates that each Chinook spawning in the Puyallup River is producing .96 returning salmon. The vast majority of those spawning salmon are hatchery fish, and they are incapable of replacing themselves. If each spawning salmon produces less than one returning salmon, no increase is possible.

e. Green River

Green River Chinook are harvested at a rate that **exceeds the RER by 221%** (54.7% vs 17%). 9-ER-2127. NMFS’ statement on page 286 of the 2021 BiOp that “[n]atural-origin returns for the Green River have substantially increased in recent years” is denied by calculations of trends in overall escapement and growth rates for both recruitment and escapement that are negative or non-positive. 9-ER-1992. Even

including hatchery fish, which is not defensible, the escapement trend is negative. *Id.* The claimed existence of growth rates for natural origin escapement is consistently higher than growth rates for natural-origin recruitment in the Green River ignores the fact that the calculated growth rates for each category clearly demonstrate the lack of any growth (1.00 or less in Table 6). Again, NMFS reached this tortured conclusion by ignoring any distinction between hatchery and natural origin Chinook.

In addition, the Green River is one of the few populations for which the hatchery biological opinion was discussed in any detail by NMFS in this case. Contrary to NMFS' assertion that the hatchery reforms will lead to recovery, the Green River hatchery biological opinion demonstrates that recovery will NEVER occur under present plans.

Throughout this litigation and throughout the 2021 BiOp, NMFS relies on unspecified hatchery changes. The only time a hatchery change was discussed in detail by NMFS was in response to Plaintiff's Motion for Preliminary Injunction. 4-ER-695. After Defendants pointed to hatchery changes allegedly taking place on the Green River, Plaintiff pointed out that NMFS' representations to the Court were patently false. Specifically, the BiOp for the Duwamish/Green River hatchery states that "[a] PNI of > 0.5 indicates that natural selective forces are equivalent or greater than hatchery-influenced selective forces, and for a tier 2 population under NMFS' Population Recovery Approach is the long-term goal." The BiOp goes on to model the effects of

the hatchery changes and, in Table 12, confirms that the proposed actions are modeled to never result in a PNI of > 0.5 . 13-ER-3026. In short, the Green River hatchery changes will never result in natural selective forces becoming greater than the hatchery influenced genetic forces that result from having too many hatchery fish and too few natural origin fish.

In plain language, and even assuming the proposed changes take place (they have not and will not), natural origin fish will never be able to recover themselves because hatchery and harvest management will never allow their genetics (and the resulting fitness) to become dominant. Instead, the genetics of hatchery fish, which NMFS acknowledges cannot reproduce as successfully, will always be dominant.

f. The “Other Relevant Information” Relied on by NMFS Does Not Support Its Conclusions. Instead, it Conclusively Demonstrates NMFS’ Continued Failure.

NMFS acknowledges that “where the proposed action would result in an exploitation rate that would exceed the RER for a population, NMFS considers other relevant information in assessing the risk to the population.” 9-ER-2121. Such “other relevant information” includes measures of population-specific growth rate and productivity. 9-ER-1992 (Table 6). These growth rate and productivity estimates show the same broad negative trend across the ESU and document the same failing as is demonstrated by the NMFS’ RER analysis. Recruitment growth rates for most of the 22 populations of the ESU, including all but one of the 8 populations NMFS defines as

essential to recovery of the ESU, are less than 1.00, meaning that fewer naturally-spawning adults are being produced than the number of parent spawners. *Id.* As NMFS points out: “When progeny replace or exceed the number of parents, a population is stable or increasing. When progeny fail to replace the number of parents, the population is declining.” 9-ER-1977—1978.

The 2021 BiOp does not include any quantitative analysis of any alleged “other relevant information” that quantifies any increasing trend among natural-origin Chinook. NMFS simply says one exists despite the data showing that Puget Sound Chinook are not replacing themselves. 9-ER-1992.

4. The BiOps Fail to Address the Need to Coordinate Hatcheries with Harvest.

The well accepted “All H” approach to salmon management is completely ignored. The BiOp makes no discussion of the potential positive effects of selectively harvesting hatchery origin salmon, as recommended by the HSRG, in order to minimize the spawning of hatchery fish in the wild. Hatchery origin salmon are identified by fin clipping (removing a fin and making the hatchery origin salmon visually identifiable), and fisheries can be crafted to release natural origin salmon with intact fins while harvesting hatchery fish. *See, e.g.*, 12-ER-2897 (HSRG report recommending “fin-clipping to identify fish for harvest.” This is referred to as mass marking.).

The BiOp makes no recommendation for modification of harvest methods in order to utilize selective harvest of hatchery fish or other methods with the potential to

reduce the known risk of hatchery origin salmon straying, and instead approves many non-selective fisheries that harvest natural origin and hatchery fish together. The failure to even address selective harvest is a glaring deficiency which results in the problems, discussed above, concerning overharvest of natural origin salmon (up to 221% of the “maximum” harvest rate) and the obvious risk associated with exceedingly high hatchery fish stray rates (up to 95 percent compared to the scientifically accepted maximum of roughly five to thirty percent, depending on population and type of hatchery program).

Inexplicably, NMFS admits that its analysis of harvest management plans ignores all issues surrounding hatchery fish. 4-ER-546—47. This is clearly contrary to what is required. *See* 12-ER-2703 (“To be successful, hatcheries should be used as part of a comprehensive strategy where habitat, hatchery management and harvest are coordinated to best meet resource management goals that are defined for each population in the watershed.”); 12-ER-2699 (“Hatchery management must be aligned with harvest management and vice versa.”). NMFS admittedly ignores the need to manage harvest and hatcheries together despite the record clearly demonstrating that it must do so.

PROCEDURAL HISTORY

The district court denied Appellant's Motion for Summary Judgment and granted Appellees' Cross Motion for Summary Judgment on July 25, 2022.

Appellant requests this Court reverse the granting of Appellee's Cross Motion for Summary Judgment and order that summary judgment be granted in Appellant's favor.

SUMMARY OF ARGUMENT

This Court should reverse the district court's granting of Appellee's Motion for Summary Judgment and enter summary judgment in Appellant's favor. NMFS has ignored the overwhelming evidence that overharvest and the failure to manage hatchery fish is resulting in increased risk to ESA listed Puget Sound Chinook. Further, NMFS is required to ensure that any management plan intended to exempt take of Puget Sound salmon from ESA take exemptions be consistent with *U.S. v. Washington*. NMFS made no attempt to do so, and the PSSMP, which is the Court's order in *U.S. v. Washington*, is not even in the record. NMFS admits the single year fisheries plan create a risk to Puget Sound Chinook but makes no attempt to discuss the risk any further. The trial court and NMFS failed to address the widespread overharvest and failure to manage hatchery strays as part of harvest management. Without addressing these issues, recovery of Puget Sound Chinook salmon is not possible.

ARGUMENT

A. Legal Standards.

Summary judgment is generally the appropriate mechanism for resolving the merits of ESA claims. *See e.g., Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 769-70 (9th Cir. 1985). Summary judgment in such case is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (citing *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007)). Because this matter is a record review case, the Court may direct summary judgment be granted to either party based upon review of the administrative record. *Id.* (citing *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)).

Federal agencies' compliance with the ESA is reviewed under the APA. *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 779-80 (9th Cir. 2019); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, "an agency action must be upheld on review unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jewell*, 747 F.3d at 601 (quoting 5 U.S.C. § 706(2)(A)). A reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation and quotation marks omitted). Courts will "reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend

it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1074-75 (9th Cir. 2011).

B. Overview of the Endangered Species Act.

The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S. C. § 1531(b). Section 9 of the ESA prohibits the "take" of any species listed as "endangered" under the ESA. 16 U.S.C. § 1538(a)(1). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The ESA's implementing regulations further define "harm" as an "act which actually kills or injures wildlife" and "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 696-700 (1995) (upholding the regulatory definition of "harm").

Section 9, on its face, does not provide a blanket protection from take to "threatened" species. However, § 4(d) of the ESA provides that NMFS shall "issue such regulations ... necessary and advisable to provide for the conservation of such

[threatened] species." 16 U.S.C. § 1533(d). Pursuant to § 4(d), § 9's take prohibition has been extended to threatened anadromous fish, including the species at issue in this case. Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units, 65 Fed. Reg. 42, 422, 47, 475-81 (July 10, 2000); 70 Fed. Reg. at 37,194 (amending 2000 rule) (codified at 50 C.F.R. § 223.203).

Section 7 of the ESA imposes affirmative duties on federal administrative agencies to conserve listed species and to prevent violations of § 9. Section 7(a)(2) of the ESA requires federal agencies to "ensure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of such species' critical habitat. 16 U.S.C. § 1536(a)(2). Whenever a federal agency determines that a proposed action "may affect listed species or critical habitat," that agency must prepare a biological assessment on the effects of the action. 50 C.F.R. § 402.14(a); 16 U.S. C. § 1536(c). If the agency determines that the proposed action is likely to adversely affect a listed species or critical habitat, the agency must consult with a consultation agency (NMFS or the Fish and Wildlife Service) to determine whether the agency action is likely to jeopardize that species or adversely modify its critical habitat. *Id.*; 16 U.S.C. § 1536(c).

Once formal consultation is initiated, NMFS must review all relevant information and formulate a biological opinion regarding whether the action is likely to result in jeopardy to a listed species. 50 C.F.R. § 402.14(g). NMFS "shall use the best scientific and commercial data available" in determining whether an agency action is likely to result in jeopardy to a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). If NMFS determines that an agency action is likely to jeopardize the continued existence of a listed species, NMFS must suggest reasonable and prudent alternatives to the proposed action, if any exist, that would not result in such jeopardy. 16 U.S.C § 1536(b)(3).

If NMFS concludes that a proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, but determines that the action will nevertheless result in the take of listed species, NMFS must issue an incidental take statement (ITS). 16 U.S.C. § 1536(b)(4). An ITS authorizes the limited take of listed species that would otherwise violate § 9's "take" prohibition. *Id.*; 50 C.F.R. §402.14(i). The ITS must specify measures to limit and measure take. *Id.* If during the course of the subject action, the conditions of the ITS are exceeded, the action agency must reinitiate formal consultation. 50 C.F.R. § 402.16(a).

C. NMFS Failed To Ensure Compliance with *U.S. v. Washington*.

The Trial Court entirely ignored the fact that 50 C.F.R. § 223.203(b)(6)(ii) requires that a fisheries management plan intended to exempt take from the prohibitions of the ESA

“be implemented and enforced within the parameters set forth in *U.S. v. Washington* or *U.S. v. Oregon*.” 50 C.F.R. § 223.203(b)(6)(ii). The record does not contain the various court orders associated with *U.S. v. Washington* and *U.S. v. Oregon*, and there is no evidence NMFS took any action to analyze compliance with those cases or to ensure compliance with the various orders. This Court should enforce 50 C.F.R. § 223.203(b)(6)(ii) and require that NMFS not ignore the requirements of *U.S. v. Washington* and *U.S. v. Oregon*.

D. NMFS Has Failed to Ensure No Jeopardy and Acted Arbitrarily and Capriciously.

In the subsections below, Fish Northwest will demonstrate that NMFS failed to ensure the actions it funded did not result in jeopardy to listed Puget Sound Chinook. NMFS failed to do so by ignoring available biological information. As the relevant caselaw has described the issue, NMFS ignores important aspects of the problem. It does so in order to maintain the status quo fisheries that intentionally harvest and kill listed Puget Sound Chinook salmon at rates NMFS acknowledges are too high.

Section 7 of the ESA requires that each federal agency “ensure” that any action it funds or authorizes “is not likely to jeopardize” a protected species. 16 U.S.C. § 1536(a)(2). “Jeopardize” is defined as an action that “would be expected, either directly or indirectly, to reduce appreciably the likelihood of both the survival **and recovery** of a listed species in the wild by reducing the reproduction, numbers or

distribution of that species.” 50 C.F.R. § 402.02 (emphasis added). “Recovery” is defined as “improvement in the status of listed species to the point at which listing is no longer appropriate.” *Id.* In this case, NMFS’ analysis must ensure that the fisheries plan it funds and provides an ITS for does not “reduce appreciably” the likelihood that the status of Puget Sound Chinook improves “to the point at which listing is no longer appropriate.” Contrary to its prior assertions, NMFS must seek to recover Puget Sound Chinook when evaluating fisheries plans. 4-ER-692 (arguing that NMFS does not have to ensure recovery); *see also* 4-ER-544 (Ms. Susan Bishop, the Branch Chief for National Mariner Fisheries Services West Coast Region’s Anadromous Harvest Management Branch, acknowledging that “NMFS must determine if a proposed action would reduce appreciably the survival and recovery of the species in the wild.”).

To determine whether an agency decision is arbitrary and capricious, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). A decision is arbitrary and capricious if the agency:

[H]as relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm., 92 F.3d 940, 942 (9th

Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43). In the context of the ESA, the "problem" is whether a proposed action will cause jeopardy to a listed species and "any effect that is likely to adversely affect the species is plainly an important aspect of this problem." *S. Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247, 1270 (E.D. Cal. 2010) (citing 50 C.P.R. §§ 402.13(a), 402.14(b)(l)).

Interpretations that are “first articulated in a legal brief [are] not categorically ‘unworthy of deference,’” and “‘post hoc rationalization advanced ... to defend past agency action against attack’” is not sufficient. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 780 (9th Cir.2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (second alteration in original). “[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983) “It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.” *Id.* In short, this Court must evaluate the Federal Defendants’ actions based on the reasoning articulated in the 2021 BiOp. In conducting its analysis, NMFS must consider the best available science. 16 U.S.C. 1536(a)(2). It “cannot ignore available biological information.” *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). The record must contain evidence to support the agency’s conclusions. If the record does not contain evidence to support the agency’s decision, this Court “cannot defer to a void” and the biological

opinion must be vacated. *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1142 (9th Cir.2008).

1. NMFS Fails to Ensure no Jeopardy In Violation of Section 7, and Acted Arbitrarily and Capriciously, Because it Authorizes the Harvest of Listed Salmon at a Rate That Exceeds the Maximum Rate of Harvest That Can Occur Without Jeopardizing the Existence of the Listed Species.

NMFS has authorized harvest that exceeds the RERs it has itself determined as the maximum allowable rate without resulting in jeopardy. The sole quantification of the effects of exceeding the RER was done for the Skokomish River, and it was determined that the exceedance reduced the probability of recovery by 50%. NMFS has the ability to quantify the effects of exceeding the RER for a population and has done so in the past. Because maintaining fisheries in their present form would not be possible if the effects of the RER exceedances were taken into account, NMFS ignores that available biological information. Instead, NMFS relies on “other information” that is not quantified or analyzed in detail. Approving widespread exceedance of the RERs, in and of itself, is arbitrary and capricious and ignores an important aspect of the problem. It also results in NMFS’ action, in this case funding of the fisheries at issue, reducing the probability of survival and recovery of Puget Sound Chinook. NMFS KNOWS exceeding the RERs reduces the likelihood of recovery but approved and funded the fisheries anyway.

The trial court erroneously characterized the RER exceedance, and Fish Northwest's complaints concerning those exceedances, as limited to the "population" level and not effecting the species level. NMFS defines eight of the 22 Puget Sound populations to be essential for recovery of the ESU, and estimates that the 2021 fishing plan will subject six of those eight essential ESU populations to exploitation rates exceeding NMFS defined RERs. AR3182. NMFS' failure to meet RERs is nearly universal across the Puget Sound ESU.⁹

While NMFS attempts to explain away the exceedance, the fact remains that NMFS has already determined that exceeding the RERs creates a risk to recovery. It says as much throughout the 2021 BiOp. NMFS has quantified that risk in the past, but in this case chose not to (or chose not to put that quantification in the 2021 BiOp), and the RERs are by definition the ceiling above which risk to recovery occurs. RERs are the only quantitative analysis of the effects of fisheries on the likelihood of recovery, and NMFS blatantly ignored the RERs to allow harvest to move forward.

2. NMFS Ignores the Known Risk of Hatchery Fish Spawning in the Wild.

NMFS, without explanation, adopts the position that it can ignore the distinction between hatchery fish and natural origin fish and assume both are equally successful at

⁹ The trial court's ruling begs the question: how many populations must be put in jeopardy before it poses a risk to the ESU? Here, the vast majority of the populations, including the majority essential to recovery, are harvested at rate that exceed the RERs. The BiOp contains no analysis of how many populations can be put at risk without creating risk to the ESU.

reproducing the natural environment. As discussed above, the 2021 BiOp makes clear that hatchery fish are less successful at reproducing. NMFS has not provided a sufficient explanation for the various assumptions and logical leaps it takes. The BiOp clearly demonstrates the fallacy in NMFS' assumption. There is no positive trend in natural origin recruitment. 9-ER-1993. The natural origin Chinook spawning in Puget Sound are not replacing themselves. 9-ER-1991. The 2021 BiOp makes clear that hatchery fish are a genetic risk, and yet NMFS assumes they are interchangeable with natural origin Chinook. Not only does NMFS ignore the "problem," but the conclusion that hatchery Chinook can be assumed to be as successful as natural origin salmon at spawning is scientifically indefensible. There is no evidence in the 2021 BiOp to support that assertion, and NMFS will not be able to cite any in response.

NMFS reduced the likelihood of survival and recovery by ignoring the harm caused by hatchery Chinook spawning in the wild. This is a violation of NMFS' duty under Section 7 and makes NMFS issuance of the 2021 BiOp and ITS arbitrary and capricious.

3. NMFS Acted Arbitrarily and Capriciously Because it Fails to Coordinate Harvest with Hatchery Genetic Management, and NMFS Acted Arbitrarily and Capriciously by Failing to Manage Hatchery and Harvest Management Jointly.

Once again, NMFS ignores the overwhelming scientific evidence in order to maintain the status quo fisheries. It is not disputed that harvest and hatchery management should be combined. It is not disputed that harvest should be designed

to remove hatchery fish before they can spawn with natural origin salmon. NMFS also does not deny that it refuses to do so. NMFS again ignores an important aspect of the problem thereby reducing the likelihood of survival and recovery of Puget Sound Chinook.

4. NMFS Acted Arbitrarily and Capriciously, Because It Fails to Account for the Increased Risk of Single Year Fisheries Authorizations.

NMFS acknowledges that the use of single year fisheries authorizations presents an increased risk, especially when paired with constantly exceeding the RERs, and states as follows: “[f]urther, there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery.” 9-ER-1993. Incredibly, after acknowledging the risk of single year fisheries plan, the 2021 BiOp does not further discuss the risk presented. There is no mitigation, explanation or analysis. NMFS simply identifies the risk and ignores it.

E. The Court Should Vacate the 2021 BiOp and Grant Fish Northwest Injunctive Relief.

1. The Court Should Vacate the 2021 BiOp.

The 2021 BiOp, including the ITS, should be vacated, for NMFS’s ESA violations. The APA instructs that a “reviewing court shall . . . set aside agency action” that is “arbitrary . . . or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). This provision demands a “presumption of vacatur.” *See, e.g., All. for the Wild Rockies*

v. U.S. Forest Serv. (Wild Rockies), 907 F.3d 1105, 1121–22 (9th Cir. 2018); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 856–57 (9th Cir. 2020) (“[O]ur obligation . . . is to vacate the unlawful agency action.”). The Court should vacate the 2021 BiOp based on NMFS clear violations of the ESA.

2. Enjoin Single Year BiOps.

NMFS acknowledges that conducting single-year fisheries BiOps presents a heightened risk but does not quantify or mitigate the risk. Because conducting single-year fisheries BiOps presents a risk, in and of itself, doing so logically reduces the likelihood of recovery. Accordingly, the Court should enjoin the use of single-year biological opinions, including in 2022.

3. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Includes Only Natural Origin Spawners in Its Analysis of Escapement and Recovery of Natural Origin Spawners.

As discussed above, NMFS is required to differentiate between natural origin and hatchery origin salmon. In addition to be legally required to make that differentiation, it is also scientifically indefensible to assume that hatchery origin salmon have the same genetic fitness as natural origin salmon. The Court should require that NMFS differentiate between hatchery origin and natural origin salmon.

4. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Addresses Hatchery Fish Straying by Requiring Responsible and Prudent Alternatives Including Selective Fishing.

NMFS admits that it does not take the effects of hatchery fish into account when reviewing harvest plans submitted by the State of Washington and the treaty tribes. 4-ER-546—547. There is overwhelming evidence that hatchery fish must be removed from the spawning grounds. Selective harvest, which removes hatchery fish from the population while allowing natural origin fish to be released to spawn, must be implemented.

Indeed, HSRG found as follows:

Hatchery management must be aligned with harvest management and vice versa. The HSRG has demonstrated that increasing selective harvest on hatchery-origin fish can have a conservation benefit (population fitness and productivity), economic benefit (increased harvest) and increase the value of current habitat and habitat improvements.

12-ER-2699. NMFS admits it has made no attempt to consider selective harvest, or other methods to harvest or remove hatchery fish, and the benefits selective harvest provides to both fisheries and, most importantly for this case, conservation of listed species. The Court should enjoin future biological opinions until NMFS requires the implementation of reasonable and prudent alternatives, including increased selective fishing.

5. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Adequately Addresses Meeting the RERs.

Except for the Skokomish River, the 2021 BiOp does not analyze the consequences of exceeding the RERs. NMFS clearly has the ability to do so. In the single instance where the consequences of exceeding the RERs was analyzed, the approved fishery plans are predicted to reduce the prospect of recovery by 50%. The alleged other factors are not analyzed in any detail, and the effects are not quantified anywhere in the 2021 BiOp. Instead, NMFS simply argues that the other factors “may” provide “some” benefit. The Court must evaluate NMFS’ decision based solely on the 2021 BiOp, and not unspecified “other” considerations that “may” provide “some” benefit. The Court should enjoin future BiOps until NMFS quantifies the effects of the RER exceedances and provides a meaningful, detailed analysis and quantification of the effects of the alleged “other” factors.

6. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Ensures Compliance with the PSSMP.

The court in *U.S. v. Washington* entered orders, including the PSSMP, that were and are intended to dictate how salmon fisheries in Washington are developed and prosecuted. The Court’s orders were developed in order to address conflicts over allocation and, most importantly for this case, to address conservation concerns that arose as the State of Washington and treaty tribes jockeyed to maximize their harvest at the expense of the other.

To address the competing interests of the State of Washington and treaty tribes, the parties developed, at the direction of the court, the Puget Sound Salmon Management Plan (the “PSSMP”). NMFS, the State of Washington, and the treaty tribes purport to develop the annual seasons based on that framework. 9-ER-1965.

Indeed, the treaty tribes and State of Washington submitted a proposed 10 year management plan in February of 2022. 2-ER-178—208. Section 2.7 of the proposed plan states as follows:

The Puget Sound Salmon Management Plan (PSSMP) remains the guiding framework for jointly agreed management objectives, allocation of harvest, information exchange among the co-managers, and processes for negotiating annual harvest regimes. At its inception, the Plan implemented the court order to provide equal access to salmon harvest opportunity to Indian tribes, but its enduring principle is to “promote the stability and vitality of treaty and non-treaty fisheries of Puget Sound... and improve the technical basis for ...management.”

2-ER-207. While it is correct that the PSSMP remains the court-ordered framework for the formulation of Puget Sound salmon fisheries, the plan has been nearly entirely disregarded by the parties and the NMFS.

The PSSMP has very specific framework for enacting seasons. 2-ER-128. It begins by recognizing that escapement goals “must be preserved and protected sufficiently to ensure the perpetual existence and maximize the benefits derived from their protection.” 2-ER-141. During pre-season planning, the PSSMP required “predicted levels of harvest and/or harvestable numbers...” 2-ER-149. The requirement to calculate the amount of salmon available for harvest was specifically

negotiated as a starting point to crafting seasons in order to ensure escapement goals were reached.

The PSSMP further required in-season run size updates and methods to apportion catches from areas having a mixture of stocks. 2-ER-150. Again, this was intended to ensure escapement goals were met. The PSSMP went further, and required a “post-season audit report” in “order to permit an assessment of the parties’ annual management performance in achieving spawning escapement, enhancement, harvest and allocation objectives.” 2-ER-151. Again, this was negotiated and intended to ensure that escapement goals were met by ensuring fishery plans were performing as intended. Section 6 specifically dictated a schedule by which various steps were to be done. 2-ER-152.

To ensure that the allowable harvest levels were not exceeded, the PSSMP contained specific terms that dictated the harvest allocation between the State of Washington and treaty tribes. Shares were to “be calculated annually post-season” and deficiencies in shares shall be adjusted annually unless neither party exceeded its share by more than 5% of the total of both parties’ shares.” 2-ER-157. This “pay-back” provision was specifically negotiated to provide a disincentive to any party to overharvest.

At the time, the State of Washington had been overharvesting in marine fisheries and then arguing that the treaty tribes’ seasons (who fished predominantly in the rivers)

had to be closed in order to meet escapement goals. 2-ER-118. The pay-back provision was negotiated to put a stop to such practices. 2-ER-118—120. If the state fisheries overharvest one year, the treaty tribes would be paid back for the fish they did not catch as a result of the state's overharvest. The intent was to create a disincentive, for both parties, to attempt to game the system. It also ensures that the parties adhered to the conservation constraints required to maintain salmon stocks and, if they did not, they would be penalized the following year.

Presently, the State of Washington and the treaty tribes do not follow the PSSMP. 2-ER-120. They do not calculate harvestable shares, which is required to be the starting point of season setting. Allocation of the salmon stocks at the presumed rate of 50/50 does not occur. No post season calculation is made, past failures of the single year fisheries plans are never addressed, and there is no disincentive to overharvest.

The decision to disregard the Court's order in *U.S. v. Washington* was made for expedience. Harvest has once again taken precedence over conservation. Escapement goals have not been met in years, and fisheries plans are not crafted with any intention of doing so. The current process ignores basic requirements, such as differentiating between natural origin and hatchery origin salmon, for one reason: to maintain the status quo of non-selective harvest. This Court should enforce the Court's order in *U.S. v. Washington*, as required by 50 C.F.R. § 223.203(b)(6)(ii), and force the parties to put conservation first as was intended in 1985 when the Court ordered the PSSMP.

CONCLUSION

NMFS' must ensure that the fisheries plan it provides an ITS for does not "reduce appreciably" the likelihood that the status of Puget Sound Chinook improves "to the point at which listing is no longer appropriate." In conducting its analysis, NMFS may not ignore biological information or fail to consider an aspect of the problem. This case presents a number of actions by NMFS that were clearly arbitrary and capricious.

NMFS ignored the regulatory requirement to analyze whether the fisheries plan complied with the requirements of *U.S. v. Washington*. NMFS admits it ignored the requirement to manage harvest and hatcheries together. Despite identifying the risk in the 2021 BiOp, NMFS ignored the risk of single year fishery plans. NMFS ignored available biological information quantifying the reduced likelihood of recovery that results from exceeding the RERs. It has the ability to do so, and has done so in the past, but relied on "other information" that was not quantitative because meeting the RERs would require changes in the status quo fisheries. Finally, NMFS ignored the negative effects of too many hatchery fish spawning with natural origin fish and failed to recommend reasonable and prudent alternatives to status quo fisheries that would help alleviate this problem, including selective harvest.

The bottom line is the 2021 BiOp was not written with the intent to recovery Puget Sound Chinook. The BiOp was written with one purpose: to approve the desired fisheries and exempt them from the take prohibitions of the ESA. This Court should enjoin NMFS from issuing a similar BiOp until NMFS makes a serious attempt to address the many known problems that continue to push Puget Sound Chinook further and further toward extinction. As the State of Washington describes it, the situation truly is a “crisis.”

November 10, 2022
Lacey, Washington

Respectfully submitted,

s/ JOE D. FRAWLEY
JOE D. FRAWLEY, WSB# 41814
SCHEFTER & FRAWLEY
1415 College Street SE
Lacey, WA 98503
(360)491-6666
Attorneys for Plaintiff-Appellant

STATEMENT OF RELATED CASES

Counsel is unaware of any related cases currently pending in this Court.

REQUEST FOR ORAL ARGUMENT

Appellant requests the opportunity to present oral argument.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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