

NO. 19-35384

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC RIVERS, *et al.*,

Plaintiff – Appellants,

v.

BUREAU OF LAND MANAGEMENT, as administrative agency of the United
States Department of Interior, *et al.*,

Defendants – Appellees,

ZUBER & SONS LOGGINS, LLC, *et al.*,

Intervenor – Defendants – Appellees

OPENING BRIEF OF PLAINTIFF-APPELLANTS PACIFIC RIVERS, *ET AL.*

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CORPORATE DISCLOSURE STATEMENT
REQUIRED BY FRAP 26.1

Plaintiff-appellants Pacific Rivers, Cascadia Wildlands, Coast Range Association, Klamath-Siskiyou Wildlands Center, Oregon Wild, The Wilderness Society, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Umpqua Watersheds have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 10th day of September, 2019.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants Pacific Rivers, Cascadia Wildlands, Coast Range Association, Klamath-Siskiyou Wildlands Center, Oregon Wild, The Wilderness Society, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Umpqua Watersheds (collectively "Pacific Rivers") appeal from the district court's order affirming the Magistrate Judge's Findings and Recommendation ("F&R") denying summary judgment and declaratory relief. Excerpts of Record ("ER") ER 000007 (Judgment); ER 000008-9 (Opinion and Order); ER 000010-46 (F&R)¹ The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Pursuant to Fed.R.App.P. 4(a)(1)(B), Pacific Rivers filed a timely notice of appeal on May 3, 2019. ER 000001-6.

STATEMENT OF ISSUES

1. Whether the National Marine Fisheries Service ("NMFS") violated the mandate of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, to protect species using the best available science when it issued a biological opinion on

¹ Documents provided in the Excerpts of Record ("ER") have consecutive Bates-stamped page numbers in the bottom right margin; other page numbers on the documents are either internal pagination or page numbers from prior record compilations.

impacts of new Bureau of Land Management (“BLM”) land management plans on threatened salmon species that drastically departed from the prior, longstanding, agency-adopted best available science without adequate explanation and in the face of contrary evidence in the record from its own staff.

2. Whether BLM failed to adequately consider all impacts, as required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, when it refused to consider the direct, indirect, and cumulative environmental impacts of BLM’s new land management plan’s departure from the protections of the Northwest Forest Plan on nonfederal and other federal actors and resources within the range of the northern spotted owl.²

² Magistrate Judge Russo found several arguments waived, although she ultimately addressed each of them. F&R at 16 n.10, 19 n.11, 12, 28 n.17, 32 n.18. Those findings do not bind this Court. First, arguments raised in an opening brief, even if tersely, are not waived, and Pacific Rivers did, in fact, raise all arguments. *See Hernandez v. Cook Cty. Sheriff’s Office*, 634 F.3d 906, 913 (7th Cir. 2011). Second, Pacific Rivers submitted a combined opposition/reply brief, and the Federal Defendants responded to all arguments in their own final reply. Waiver does not apply to an opposition brief precisely because there is an opportunity to respond, and notions of fairness and equity do not come into play. *See Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846 (9th Cir. 1976). Third, the lower court addressed all arguments. Finally, this Court has discretion to review Pacific Rivers’ arguments as they raise purely legal questions and do not require additional factual development. *Resolution Trust Corp. v. First Am. Bank*, 155 F.3d 1126, 1129 (9th Cir. 1998).

INTRODUCTION

The 1994 Northwest Forest Plan is a unique land-management plan in a number of respects. Born out of the controversy of the rampant over-logging of federal forests in Oregon, Washington, and northern California, the Northwest Forest Plan was the first bioregional land management plan in the nation, covering nineteen national forests managed by the U.S. Forest Service and six districts managed by BLM. The Plan provided protections and land-management standards for imperiled species, like the northern spotted owl and the marbled murrelet, that had already been listed as threatened under the ESA due to habitat loss caused by logging. The Plan also contained a comprehensive Aquatic Conservation Strategy (“ACS”), aimed at protecting and restoring populations of native salmon, steelhead, and trout from habitat loss and degradation before they declined to such an extent as to warrant ESA consideration.

Twenty years later, BLM and Forest Service monitoring showed that the Northwest Forest Plan and its ACS had begun to do its job as a 100-year plan, maintaining (if not yet fully restoring) habitat for fish and wildlife to survive on federal forestlands. The ACS was also consistently identified as the “best available science” by the federal biological agencies—NMFS and U.S. Fish and Wildlife Service (“FWS”). Yet in August 2016, BLM withdrew from the Northwest Forest Plan by issuing revised Resource Management Plans (“RMPs”) for its six forested

districts. The 2016 RMPs reduced the size of riparian reserves and eliminated the Northwest Forest Plan's ACS objectives; BLM's environmental review of the 2016 RMPs, while lengthy, was silent on the environmental consequences of deviating from the Northwest Forest Plan and the ACS.

This case challenges the NMFS Biological Opinion ("2016 BiOp"), ER 000699-001093, that approved the 2016 RMPs on two grounds: first, NMFS failed to explain why the protections of the ACS are no longer necessary to avoid jeopardy, and second, NMFS failed to use the best available science—the science embodied in the ACS—in issuing the 2016 BiOp. While NMFS is free to rationally change its policy, the agency must provide a reasoned explanation for departing from its long-standing prior position and cannot pretend it is writing on a blank slate.

This case also challenges BLM's failure to consider the foreseeable environmental impact of BLM's large-scale withdrawal from the Northwest Forest Plan under NEPA on nonfederal and other federal land managers and natural resources. BLM received multiple warnings from the public and other federal agencies that BLM's withdrawal would undermine the Plan as a whole. It was also clear that lessened protections on federal land would force changes to non-federal land management, as non-federal landowners have relied on BLM implementation

of the Northwest Forest Plan to carry the conservation burden for over two decades. BLM, however, failed to analyze these concerns in its NEPA review.

BACKGROUND

I. STATUTORY REQUIREMENTS OF ESA CONSULTATION

The Endangered Species Act of 1973 is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). A review of the Act’s “language, history, and structure” convinced the Supreme Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174.

The heart of the ESA’s protective scheme is section 7, which requires that every federal agency shall ensure that its actions will not jeopardize the survival of listed species nor destroy or adversely modify the species’ critical habitat. 16 U.S.C. § 1536(a)(2). To ensure compliance with this mandate, federal agencies must consult with the appropriate expert fish and wildlife agency—NMFS in the case of anadromous fish—whenever their actions “may affect” an endangered or threatened species. *See* 50 C.F.R. § 402.14.

The end product of such an ESA consultation is a biological opinion in which NMFS determines whether the action will jeopardize the survival of listed species or will adversely modify the species’ critical habitat, and, if so, what

reasonable and prudent alternative is available to avoid such a result. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h). NMFS has a statutory duty to use the best available scientific information in an ESA consultation. 16 U.S.C. § 1536(a)(2).

II. THE NORTHWEST FOREST PLAN'S AQUATIC CONSERVATION STRATEGY

The Northwest Forest Plan's ACS aims to maintain and restore the ecological health of watersheds and aquatic ecosystems on public lands through four basic components: (1) a system of key watersheds comprising watersheds with the best aquatic habitat or the greatest potential for recovering at-risk fish stocks; (2) riparian reserves along streams where certain activities are constrained by enforceable standards and guidelines; (3) watershed analysis to be used to tailor activities to specific watershed needs; and (4) a comprehensive, long-term watershed restoration program. ER 001856.

The ACS establishes substantive protections for forests that benefit water quality. First, binding standards and guidelines restrict certain ground disturbing activities within riparian reserves and outside of reserves in key watersheds. *See* ER 001879; ER 00180-88. Second, to constrain degrading cumulative impacts of activities throughout the watershed, the ACS includes nine "maintain and restore" objectives requiring that all aquatic habitat be maintained and restored to properly functioning conditions. ER 001853-78. The Northwest Forest Plan gave the ACS

objectives binding force and explicitly required that federal lands shall be managed to attain the ACS objectives. ER 001837-45; ER 001853-54; ER 001855.

A. NMFS Previously Made No-Jeopardy Findings Based on Full Compliance with ACS Standards, Guidelines, and Objectives.

While no aquatic species within the area of the Northwest Forest Plan were protected under the ESA in 1994, NMFS listed the Umpqua cutthroat trout as endangered in 1996. On March 18, 1997, NMFS issued a biological opinion concluding that continued implementation of the forest plans as amended by the ACS would not jeopardize survival and recovery of Umpqua cutthroat trout. *See* ER 001748-827 (“1997 Programmatic BiOp”). That biological opinion covered other salmon populations subsequently listed after the adoption of the Northwest Forest Plan.

The 1997 Programmatic BiOp found that implementation of the ACS would improve aquatic conditions and contribute to the recovery of threatened and endangered salmon. ER 001781. The goal of the ACS was to “reverse the trend” of aquatic ecosystem degradation by contributing to the recovery of aquatic habitat. ER 001773. NMFS predicted that by using “landscape-scale strategies emphasizing the protection and restoration of aquatic and riparian habitats, [the ACS] is expected to allow for the survival and recovery of affected Pacific salmonid species.” ER 001781. NMFS found that restoration of habitat conditions under the ACS would “provide for increased survival of various life stages of these

fish and an increased probability of restoring and maintaining viable populations[.]” *Id.* Taken as a whole, the ACS would restore aquatic habitat conditions, even though some management actions would continue to adversely impact aquatic habitat. ER 001782.

The 1997 Programmatic BiOp did not assess the impact of the ACS on particular fish populations. Instead, it considered whether implementation of the Plan would maintain and restore properly functioning aquatic habitat to meet salmonids’ biological requirements. The 1997 Programmatic BiOp established that it was not enough that a proposed land management action be in compliance with the ACS standards and guidelines: the objectives had to be incorporated as well. ER 001780. (“[A]pplication of the standards and guidelines alone may not always guarantee that all management decisions had to be fully consistent with the ACS objectives.”). Moreover, future site-specific actions “must be consistent with the ACS objectives. Compliance with these ACS objectives is not left to chance or to the discretion of individual land managers.” ER 001778. Only “[i]mplementation of actions consistent with the ACS objectives and components” would provide “high levels of aquatic ecosystem understanding, protection, and restoration for aquatic-dependent species.” ER 001798-99.

B. Oregon's Threatened and Endangered Salmon

Within the geographic area of the six BLM districts at issue in this case, there are 15 separate populations of chinook, coho, chum, and steelhead trout that are federally protected as endangered or threatened. ER 000813. Salmon and steelhead are anadromous fish, meaning they are born in freshwater streams and rivers where they mature into juveniles, and then migrate into the ocean to feed, grow, and mature before returning to freshwater to spawn. Seven of those 15 listed species face a high risk of extinction within the next 100 years. ER 000816-22, 000832, 000834, 000848.

Two decades of monitoring data on implementation of the Northwest Forest Plan proved NMFS and the Forest Ecosystem Management Assessment Team ("FEMAT")³ correct. The Biological Assessment prepared by BLM for its 2016 RMPs acknowledged that over the last 20 years, implementation of the Northwest Forest Plan resulted in improving watershed seven-day average temperatures. ER 001328-29. Furthermore, "increases in macroinvertebrate diversity and decreases

³ Hundreds of expert scientists from BLM, Forest Service, National Park Service, EPA, FWS, NMFS, and several universities participated in FEMAT, and the FEMAT Report provided the scientific underpinning for the Northwest Forest Plan. FEMAT assessed ecological, economic, and social conditions of federal forests within the range of the owl and evaluated 48 options to conserve the species and its habitat, closely analyzing 10 of these options. FEMAT found that riparian reserves were not enough to protect aquatic ecosystems and needed additional watershed analysis and objectives to protect and restore habitat to meet scientific muster.

in water temperatures” suggest an improvement and restoration of aquatic habitats. ER 001330. The Northwest Forest Plan maintained stream conditions and physical habitat, and BLM lauded this as “successful” in light of the “diversity of federal entities, public and private landowners as well as the multiple use mandates of land management agencies.” ER 001330.

NMFS found that “[i]mplementation of the ACS on federal forests has become a foundational baseline component for attainment of salmonid recovery under the Endangered Species Act[.]” ER 001398. “[F]ederal lands provide important high-quality refugia for many populations [of salmon] . . . and federal forests confer regional hydrologic benefit to water quality and ecosystem integrity downstream. Nevertheless, habitat on BLM land remains in a precarious state, and is still not fully functioning.” *See* ER 000849-77. Especially given the pressures of the checkerboard pattern of alternating public and private land ownership in southwest Oregon, critical salmon habitat has not been restored. *See* ER 000869, 000874, 000877.

III. NMFS’S 2016 BIOLOGICAL OPINION

The 2016 RMPs departed from the Northwest Forest Plan’s ACS and weakened protections for threatened and endangered fish in at least the following ways: (1) BLM eliminated the requirement that management actions, including those at the broader project scale, comply with the nine objectives to maintain and

restore aquatic habitat; (2) BLM eliminated the prohibition on net new road construction in key watersheds; and (3) BLM halved the size of protected streamside riparian reserves.

During the ESA consultation process between NMFS and BLM on the 2016 RMPs, NMFS objected to elimination of the ACS requirements, finding that the proposed RMPs reduced aquatic protections without sufficient scientific substantiation. ER 001398. A few months later, NMFS issued a letter purporting to “clarify” its earlier comments, but again reiterated NMFS’s expectation that BLM would draw on the successful approaches in the Northwest Forest Plan, including the ACS objectives, to develop a landscape level strategy for aquatic conservation. ER 001343-45.

Despite these objections to eliminating provisions of the ACS, NMFS ultimately issued a biological opinion for the 2016 RMPs on July 15, 2016, concluding that implementation of the RMPs would not cause jeopardy to any ESA-listed species or cause destruction or adverse modification of any designated critical habitat for such a species. ER 000699-1093. In the 2016 BiOp, NMFS provided no explanation as to why threatened and endangered salmon no longer need aquatic protections mandated by the ACS. Nor did NMFS explain how its prior objections to eliminating these protections had been resolved.

IV. THE 2016 RESOURCE MANAGEMENT PLANS AND FINAL ENVIRONMENTAL IMPACT STATEMENT

The BLM lands at issue are arranged in a “checkerboard” pattern, with alternating square-mile sections of land being managed by BLM and other landowners (Forest Service, private timberland owners, or the State of Oregon, for example). Effective checkerboard land management is particularly daunting, and by necessity must take into consideration the land management regimes of intermingled lands. A stream flowing across different ownerships will receive differing amounts and kinds of protection along its route that may affect water quality in that stream, perhaps requiring upstream or downstream landowners to change their management practices. Similarly, at-risk species such as amphibians or great grey owls will require and receive surveys and protective buffers on some of those intermingled lands (e.g., lands managed by the Forest Service under the Northwest Forest Plan), but not on those parcels managed by BLM under the 2016 RMPs.

BLM issued the Final Environmental Impact Statement (“FEIS”) for the 2016 RMPs on August 5, 2016. ER 001291-96, available at <https://www.blm.gov/or/plans/rmpswesternoregon/feis/> (last visited September 3, 2019). On the same day, BLM issued two Records of Decision (“RODs”), the Northwest and Coastal Oregon ROD and the Southwestern Oregon ROD, which are challenged in this action. *See* ER 000047-366 (“N.W. & Coastal Or. ROD &

Res. Mgmt. Plan”); ER 000367-698 (“S.W. Or. ROD & Res. Mgmt. Plan”). These final actions collectively govern management decisions for the Salem, Eugene, Roseburg, Coos Bay, and Medford BLM Districts, and the Klamath Falls Resource Area of the Lakeview District. Neither the FEIS nor the RODs address the direct, indirect, or cumulative effects of the 2016 RMPs on nonfederal or other federal landowners and resources located within the checkerboard.

V. PROCEEDINGS BELOW

Pacific Rivers sought a judicial declaration that the 2016 BiOp violated ESA section 7, 16 U.S.C. § 1536, and was arbitrary, capricious, and not in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A). Specifically, Pacific Rivers challenged the elimination of key protections of the Northwest Forest Plan’s ACS, and the agency’s failure to explain why it departed from this scientific approach to managing forests to protect endangered species, particularly when the agency had considered it the best available science for years. Pacific Rivers also challenged BLM’s FEIS for failing to fully analyze the cumulative impacts of withdrawing these lands from the Northwest Forest Plan under NEPA.⁴

On October 12, 2018, Magistrate Judge Russo upheld the 2016 BiOps and the 2016 RMPs, rejecting Pacific Rivers’ ESA and NEPA claims. With regard to

⁴ Although challenged below, Pacific Rivers has not appealed the issue of BLM’s compliance with the Oregon and California Lands Act of 1937 or its challenge to the FWS biological opinion.

the ESA claims, the court ruled that NMFS did not depart arbitrarily from the Northwest Forest Plan. F&R at 23-33. Further, even if it did depart, the court held that NMFS need not explain its departure because NMFS was not adopting a new policy. F&R at 22-23. With regard to the NEPA claim, the court concluded that how nonfederal and other federal actors may respond to BLM's secession from the Northwest Forest Plan was unforeseeable, and that BLM adequately considered the direct, indirect, and cumulative effects of its decision to adopt the 2016 RMPs. F&R at 18-20. Pacific Rivers timely objected. On April 2, 2019, the district court affirmed the Findings and Recommendation and issued final judgment without further explanation or discussion.

SUMMARY OF ARGUMENT

Federal agencies like BLM and NMFS must make decisions that are not arbitrary, capricious, or contrary to law, a principle that has guided federal administrative law for decades. This standard is especially important when federal agencies change policies or positions, and agencies must provide a reasoned analysis when changing course from prior policy and distinguish prior factual findings that contradict any new findings. This standard applies to any reviewable final agency action, including the 2016 RMPs, FEIS, and 2016 BiOp challenged in this appeal.

Here, NMFS failed to meet this standard when it willfully ignored the 40-year history of the Northwest Forest Plan and its ACS in the 2016 BiOp, and departed from its 1997 Programmatic BiOp, which required compliance with the ACS to avoid jeopardy to threatened and endangered salmon because the ACS embodied the best available science. NMFS scientists themselves continue to characterize the ACS as the best science, yet NMFS ignored the ACS in the 2016 BiOp. NMFS also failed to resolve objections made by staff scientists during the consultation process that protested reductions in aquatic habitat protections—placing federally listed species at grave risk.

BLM too did not grapple with the full impacts of leaving the Northwest Forest Plan behind in its NEPA review. BLM failed to consider the foreseeable, cumulative environmental impact that its departure from the Northwest Forest plan would have on other land managers. Further weakened protections for forests and fish on BLM land will force changes to non-BLM land management, as non-federal landowners have relied on BLM implementation of the Northwest Forest Plan to carry the conservation burden for over two decades.

STANDARD OF REVIEW

This Court reviews *de novo* the lower court's grant of summary judgment, reviewing the agency's action under the APA's arbitrary, capricious, or contrary to law standard. *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th

Cir. 2010). Under this standard, “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quotation omitted). Further, an agency must provide a “reasoned explanation” for its reliance on factual findings that contradict earlier findings by the agency. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This is especially true when an agency’s “prior policy has engendered serious reliance interests that must be taken into account.” *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996).

In conducting this review, the Court’s job is to “ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (quotation omitted). Courts “do not hear cases merely to rubber stamp agency actions The Service cannot rely on ‘reminders that its scientific determinations are entitled to deference’ in the absence of reasoned analysis” *NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (quotation omitted).

ARGUMENT

I. THE 2016 RMPs WEAKEN AQUATIC PROTECTIONS FOR THREATENED AND ENDANGERED SALMONIDS.

A. The 2016 RMPs Eliminated the Nine Maintain and Restore Objectives of the Aquatic Conservation Strategy.

During the process leading to the issuance of the Northwest Forest Plan, FEMAT recommended adoption of the ACS objectives, and applying the objectives to federal actions across the landscape, both inside and outside of riparian reserves, because the expert scientists observed that past degradation resulted from numerous incremental deleterious actions that cumulatively degraded aquatic habitats and recovery of salmon species. ER 001397. As a result, the ACS restricted death-by-a-thousand-cuts activities that would adversely affect aquatic ecosystems, and managers could only pursue activities that were “restorative or protective in nature.” ER 001398.

The 2016 RMPs effectively eliminated the nine “maintain and restore” ACS objectives. ER 001853-55. In their place, the 2016 RMPs create different types of land use allocations across the landscape, each with its own unique management directions and objectives. *See, e.g.*, ER 000047, 000111, 000124. Management objectives apply solely within that land use allocation. ER 000103. Only the riparian reserve land use allocation—defined as areas directly adjacent to aquatic features—includes management objectives to manage activities in a way that contributes to the recovery of ESA listed fish, maintain and restore aquatic habitat,

and maintain water quality. ER 000124. Rather than applying to both waterways and the connected uplands in key watersheds like the ACS, the RMPs focus only on waterways.

Unlike the ACS, under the 2016 RMPs, compliance with aquatic conservation objectives is voluntary. ER 000103 (“Management objectives are descriptions of desired outcomes for BLM-administered lands and resources in an RMP ... As such, management objectives are not rules, restrictions or requirements by which the BLM determines which implementation actions to conduct or how to design specific implementation actions”). This is a significant shift from the Northwest Forest Plan, which gave the ACS objectives binding force and additionally provided that “[m]anagement actions that do not maintain the existing condition or lead to improved conditions in the long term would not ‘meet’ the intent of the Aquatic Conservation Strategy and thus, should not be implemented.” ER 001853-54.

Likewise, the 1997 Programmatic BiOp made compliance with the ACS mandatory to avoid jeopardy to the federally listed Umpqua River cutthroat trout, and also to avoid jeopardy to proposed and candidate species of salmon that likely would be listed as threatened or endangered. *See* ER 001748-49. The 1997 Programmatic BiOp consulted on continued implementation of resource management plans for the same BLM lands at issue in this case. *Id.* It found that

implementation of those plans would adversely affect salmonids, and required compliance with the ACS as a reasonable and prudent measure. ER 001816 (“proposed actions” must be “fully consistent” with the ACS objectives, standards and guidelines). To achieve ACS compliance, NMFS required as a term and condition of the incidental take statement that for each “proposed action[]” land managers “reach findings that actions ‘meet’ or ‘do not prevent attainment’ of the ACS objectives.” ER 001819. The Northwest Forest Plan ACS objectives applied across key watersheds, not just in riparian areas, because “[t]o succeed, any Aquatic Conservation Strategy must strive to maintain and restore ecosystem health at watershed and landscape scales.” ER 001978 (“We believe that any species-specific strategy aimed at defining explicit standards for habitat elements would be insufficient for protecting even the targeted species.”).

Meeting notes from interagency consultation sessions confirm that the 2016 RMPs abandon the ACS objectives. For a meeting on October 7, 2015, BLM prepared a document showing how elements of the 2016 RMPs compared to the ACS objectives. ER 001362. However, this document pointed only to non-binding management objectives within riparian reserves, and prescriptive management directions that did not apply across land use allocations. *Id.* The facilitator’s summary for that meeting documented the concern of NMFS scientists that “the NWFP Aquatic Conservation Strategy (ACS) objectives are as important

now as they were 20 years ago ... [and] they want to see that the BLM is considering the status, risks, and restoration opportunities when contemplating management actions within a watershed.” ER 001358. These concerns went unheeded. In meeting notes dated January 27, 2016, a few months before BLM finalized the 2016 RMPs, a representative from BLM confirmed that “the nine ACS objectives are not carried forward[.]” ER 001335.

B. The 2016 RMPs Eliminated Restrictions on New Road Construction in Key Watersheds.

“Roads are ecologically problematic in any environment because they affect biota, water quality, and a suite of biophysical processes through many physical, chemical, and biological pathways.” ER 001423. Density of spawning coho is negatively associated with road density. *Id.* High levels of suspended sediment are lethal to salmonids, and lower levels can cause chronic sub-lethal effects. ER 000955. Roads can deliver up to 90 percent of the total sediment production from timber extraction activities, and they are the primary conduit for stormwater contamination. ER 000865-66.

Under the Northwest Forest Plan, the ACS set limitations on new road construction, calling for a decrease in road density and prohibiting a net increase in roads in key watersheds.⁵ ER 001423. As the ACS explained, in key watersheds,

⁵ The lower court clearly erred in making the factual finding that the ACS did not restrict new road construction in key watersheds. *See* F&R at 30.

“for each mile of new road constructed, at least one mile of road should be decommissioned, and priority given to roads that pose the greatest risks to riparian and aquatic ecosystems.” ER 001863; *see also* ER 001397 (key watersheds “are subject to a ‘no net increase’ mandate for road density[.]”).

In contrast, the 2016 RMPs contain one plan component to restrict road construction that only applies inside riparian reserves and allows road construction outside of riparian reserves if “there is no operationally feasible and economically viable alternative.” ER 000885. This trade-off places the protection of threatened and endangered salmon at the whim of economics, impermissibly placing the burden of risk on imperiled species rather than federal action. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (“Congress clearly intended that the [agency] give the highest of priorities and the benefit of the doubt to preserving endangered species”) (citations and internal quotation marks omitted). BLM’s approach also eliminates the prohibition on net new road construction in key watersheds because new road construction no longer requires a corresponding reduction in the existing road network.

C. The 2016 RMPs Halved Riparian Reserve Widths.

Riparian reserves are a vital part of the ACS’s aquatic habitat conservation framework. As areas where logging and land-disturbing activities are generally prohibited, riparian reserves protect fish habitat, water quality, stream flows,

sediment filtering, and wood recruitment. ER 001390. The ACS created riparian reserves of two site-potential-tree-heights (“SPTH”) or 300 feet slope distance from the streambank in width for perennial fish-bearing streams, one SPTH or 150 feet for perennial non-fishbearing, and one SPTH or 100 feet for intermittent streams. ER 001394. In contrast, BLM’s 2016 RMPs shrink riparian reserves to one SPTH from the streambank for perennial streams; intermittent streams with high quality habitat have one SPTH reserves, those with lower quality habitat have 50 foot reserves. ER 000126.

D. NMFS Objected to Weakened Aquatic Protections as Contrary to Best Available Science.

During the ESA consultation process, NMFS objected that “the proposed [Draft EIS] substantially reduces the environmental protections in the [Northwest Forest Plan] while bringing little in the way of new science to the table to substantiate its assertions.” ER 001398. NMFS raised the alarm that even though BLM proposed reductions in riparian reserves and other aquatic ecosystem conservation measures, BLM nevertheless concluded that eliminating these protections would have “little to no effect” when compared with the No Action Alternative. ER 001395. NMFS found that “[t]he basis for this rather counterintuitive conclusion is unclear, and at variance with numerous published scientific findings, including the vast body of scientific literature that was used in the original development of the Riparian Reserve and Key Watershed systems[.]”

Id. NMFS critiqued BLM for failing to adequately explain “why they are proposing such a substantial departure from the science-based [Northwest Forest Plan].” ER 001397.

A few months later, after pushback from BLM, NMFS issued a letter purporting to “clarify” its earlier comments. ER 001343-45. In providing editorial feedback on the draft letter, BLM expressed concern that “[a]s written, plaintiffs (and possibly the reviewing court) will take NMFS’ comments and wording in this letter out of context to mean that BLM’s NEPA analysis was ‘legally’ deficient.” ER 001355. However, NMFS pushed back stating, “NOAA thought (and still thinks) the DEIS didn't adequately reference the scientific basis for the [smaller riparian reserves]. What we’re clarifying now is that NOAA believes the science does exist and can and should be added to the FEIS.” ER 001346-47.

Yet again, in its December 2015 letter, NMFS recommended that “BLM [] draw on the experience of implementation of the NWFP, new technologies, and adapting science to develop revised ACS components with objectives similar to those in the NWFP ACS.” ER 001343. NMFS noted that none of the alternatives to the proposed RMPs contain such a “landscape strategy,” although it expressed optimism that BLM could develop one. ER 001343-44. While BLM improved protections for riparian reserves in its final decisions, many concerns of NMFS went unaddressed. ER 001338 (noting BLM ignored “many” of NMFS’s

comments on the Forest Management section of the RMPs). The 2016 BiOp provides no explanation as to whether BLM resolved these concerns.

1. NMFS protested the elimination of the ACS objectives.

In its August 21, 2015 letter, NMFS protested that omitting the “central guiding tenet” of mandating compliance with the ACS objectives for all management actions on federal forestlands dramatically shifted the burden of proof for agency actions, and might significantly adversely affect survival of threatened and endangered salmonids. ER 001398. This “potent” requirement was central to the success of the Northwest Forest Plan because it prevented individual projects from retarding recovery of threatened and endangered salmon. ER 1397. NMFS recommended that management activities be constrained “depending on whether they would contribute to or delay attainment of the aquatic habitat objectives similar to those identified in the nine objectives of the aquatic conservation strategy of the Northwest Forest Plan.” ER 1393.

In later communications, NMFS continued to emphasize the importance of the ACS objectives. ER 001359 (ACS objectives as important in 2015 as 20 years ago). NMFS stated that cutting the size of riparian reserves in half might “ensure protection and recovery of ecological function” only if coupled with six key elements identified in their August 21, 2015 letter. ER 001344. One of those

elements included, “[s]tandards and guidelines (management objectives and direction) that are mandatory[.]” ER 001432 (emphasis added).

These concerns raised by NMFS staff during the consultation process remain relevant. The 2016 RMPs do not contain aquatic conservation objectives that apply across land use allocations to federal management actions that may adversely affect aquatic conditions. Only the riparian reserves contain an aquatic conservation management objective, and this objective is aspirational, not mandatory. However, despite NMFS’s vociferous objections to eliminating mandatory objectives to maintain and restore aquatic conditions, the final 2016 BiOp is silent regarding the need to apply such objectives to all land management actions on BLM lands.

2. *NMFS objected to reduced restrictions on new road construction in key watersheds.*

In the informal process leading up to the promulgation of the 2016 RMPs, NMFS also critiqued BLM’s proposed RMPs for failing to adequately explain how the agency would reduce watershed and water quality impacts to fisheries from roads by placing limits on new road construction and decommissioning existing roads. ER 001422. NMFS stated that reduction in fine sediments, a major risk factor for salmon, only occurred in watersheds where land managers aggressively removed roads and reduced the road network. ER 001422. NMFS cautioned that even an “incremental increase in the density and spread of roads across the

landscape” will likely cause a “near exponential” increase in erosion and sediment delivery, particularly in light of increased fires and storm intensity caused by climate change. ER 001426. Accordingly, NMFS concluded that “[a]lternatives that rely on expansion, rather than reduction, of the extant road network as is the directive under the NWFP and ‘No Action’ alternative, will exacerbate this interaction, greatly magnifying erosion and sediment deposition in streams and its harmful consequences.” *Id.*

NMFS recommended that BLM improve upon the Northwest Forest Plan by increasing restrictions on new road construction including to “[e]stablish unambiguous standards and metrics for net road density reduction[,]” prohibit net increase in road density in any watershed, and to establish a target for road density for each watershed “based on watershed conditions that elicit a positive biological response.” ER 1423-24. In its December 18, 2015 letter, NMFS did not further elaborate on new road construction, nor did it retract its earlier factual findings on the importance of decreasing road density. *See* ER 001343-45.

Despite these concerns and recommendations, the final biological opinion failed to address these prior factual findings. The 2016 RMPs do not prohibit net new road construction, and in fact permit an expansion of the road network. *See* F&R at 31 (finding that the 2016 RMPs will increase road density by 1.3%). NMFS found that timber extraction, which includes new road construction, would

adversely affect protected salmon through temperature increases, sediment delivery into streams, stormwater contaminants, reduction in woody debris, and changes in stream flow. ER 000972. The 2016 BiOp acknowledged that the 2016 RMPs will adversely affect listed aquatic species in just those ways. ER 000947, 000948, 000972, 000976, 000982 (temperature increases); ER 000949-50, 000972, 000982 (woody debris reductions); ER 000949 (peak flow increases)]. Chinook, coho, and steelhead at all life stages will likely be adversely impacted as a result. ER 000951, 000972. Despite these conclusions, the 2016 BiOp authorized RMPs that impose no meaningful restriction on new road construction.

3. *NMFS objected to cutting riparian reserves in half.*

NMFS expressed great concern over BLM's proposal, now adopted, to shrink riparian reserves and allow timber harvest within them. In its August 21, 2015 letter, NMFS criticized the proposed RMPs, stating that "[t]he Draft EIS should explain the basis for concluding that smaller Riparian Reserves are adequate when FEMAT and the subsequent accumulation of scientific evidence suggests otherwise." ER 001399. NMFS's objections were explicit:

Unexplained in the DEIS is the scientific basis for concluding that the proposed, substantially smaller Riparian Reserves and the proposed increased timber harvest activities within the smaller Reserves are sufficient for the needs of salmon and other riparian-dependent species. ... The DEIS is (implicitly) making an extraordinary claim: that the FEMAT science team ... were in error, and that up to 81% of the existing Riparian Reserve network can be opened for substantially increased levels of timber harvest. ... It is an axiom in science that

extraordinary claims require extraordinary proof, yet the DEIS provides little data or even logical cohesion in support of this extraordinary shift in fundamental scientific assumptions.

ER 001396. In the subsequent December 18, 2015 clarification letter, NMFS acknowledged that smaller riparian reserves could still protect threatened and endangered salmon, but only if coupled with mandatory management objectives to protect and restore aquatic habitat. ER 001343-45. The August 21, 2015 letter recommended no net increase in road density in any watershed as one of six road-related measures to “provide for protection and restoration of fish habitat and stream resources[.]” ER 001424. BLM never adopted binding aquatic conservation objectives, nor a prohibition on net new road construction, yet only a few months later, NMFS issued a no-jeopardy biological opinion on the 2016 RMPs and provided no explanation why its prior objections were no longer relevant.

II. NMFS VIOLATED THE ESA BY FAILING TO EXPLAIN ITS DEPARTURE FROM LONG-STANDING AGENCY RELIANCE ON THE ACS AND FAILING TO USE THE BEST AVAILABLE SCIENCE AS EMBODIED IN THE ACS.

A. NMFS Failed to Explain its Departure from the 1997 Programmatic Biological Opinion and its Prior Factual Findings.

When a federal agency issues a final decision that departs from long-standing policy and practice, it must “display[] awareness that it is changing its position . . . [and] if the new policy rests upon factual findings that contradict those

which underlay its prior policy,” the agency must provide a “reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (internal quotation marks and citations omitted). It is undisputed that NMFS fundamentally shifted from its prior precedent regarding its support for the provisions of the Northwest Forest Plan and ACS. NMFS has used the ACS as its default jeopardy standard for years. NMFS’s 1997 Programmatic BiOp found that to avoid jeopardy, BLM and the U.S. Forest Service must ensure that each site-specific action complied with the ACS—imposing this condition as a mandatory term and condition of the incidental take statement. ER 001819; *PCFFA v. NMFS*, No. 97-CV-775, 1998 WL 1988556, *10 (W.D. Wash. 1998) (*PCFFA I*). Requiring compliance with the ACS meant that its protections became mandatory, including applying ACS objectives at all spatial and temporal scales across the landscape, restricting net new road construction in key watersheds, and creating large riparian reserves. *See Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1034 (9th Cir. 2007) (action agency “must comply” with terms and conditions to implement the reasonable and prudent measures). In stark contrast, the 2016 BiOp approved plans that eliminated the ACS objectives as mandatory aquatic conservation measures, reduced the width of riparian reserves, and eliminated the no net new roads policy in key watersheds.

In light of this significant departure from NMFS's prior policy, and strong objections by staff at NMFS to weakened aquatic habitat protections, NMFS had to explain why the ACS standards, guidelines, and objectives were no longer necessary to guard against jeopardy to listed salmonids. *Vill. of Kake*, 795 F.3d at 966 (holding an agency must provide "good reasons for the new policy, which ... must include a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy") (quotations omitted). Yet NMFS provided no explanation for its swerve away from past precedent.

This is not the first time that BLM and NMFS have attempted to leave the ACS behind without explanation, and each time the courts have rejected these attempts. In the late 1990s, shortly after adoption of the Northwest Forest Plan, NMFS issued a series of site-specific biological opinions on timber sales and other actions that were tiered to the 1997 NMFS Programmatic BiOp, but failed to ensure compliance with the ACS objectives. In subsequent legal challenges, the Washington district court held that NMFS acted arbitrarily, capriciously, and contrary to the best available science by requiring compliance with the ACS only at the watershed scale, and only over the long-term. *PCFFA v. NMFS*, 71 F. Supp. 2d 1063 (W.D. Wash. 1999) ("*PCFFA II*").

This Court affirmed, holding that only requiring compliance with the ACS aquatic conservation objectives at the watershed scale "does not prevent site

degradation and does nothing to restore habitat over broad landscapes if it ignores the cumulative effects of individual projects on small tributaries within watersheds.” *PCFFA v. NMFS*, 265 F.3d 1028, 1036 (9th Cir. 2001). NMFS was not “free to ignore site degradations because they are too small to affect the accomplishment of that goal at the watershed scale.” *Id.* at 1035.

The Forest Service and BLM next attempted to amend the ACS to eliminate the requirement that each action proceeding under the Northwest Forest Plan would meet, attain, not retard, or not prevent attainment of the ACS objectives. NMFS and FWS both issued no-jeopardy biological opinions on the ACS Amendment. Both were challenged by conservation groups because they reversed the positions taken by NMFS and FWS in their previous biological opinions without an adequate explanation; they deviated from the best available scientific information in FEMAT and the ACS; and they punted to subsequent site-specific NEPA analyses and ESA § 7 consultations, which are inadequate substitutes for ensuring at the plan level that plan implementation will avoid jeopardizing listed salmon and bull trout or adversely modifying their critical habitat. The district court agreed and set aside the ACS Amendment. *See PCFFA v. NMFS*, No. C04-1299-RSM, Report and Recommendation (W.D. Wash. March 28, 2006), *adopted in part*, 482 F. Supp. 2d 1248 (W.D. Wash. 2007) (“*PCFFA IV*”).

NMFS's 2016 BiOp suffers the same problems, and likewise should be vacated by this Court. NMFS can only depart from its 1997 Programmatic BiOp concluding that the Northwest Forest Plan and ACS embody the best available science if it provides a reasoned explanation justifying that departure. The record in this case lacks such an explanation. Rather, the record documents the importance placed on the ACS by NMFS's own scientists, as well as the concerns raised that the 2016 RMPs fell fatally short of the scientific management approach needed to protect threatened and endangered salmonids. *See Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 170-79 (4th Cir. 2018) (holding agency acted arbitrarily by failing to explain whether its own objections raised during the consultation process were adequately addressed). The 2016 BiOp fails to mention the ACS and its objectives. The Northwest Forest Plan is described in passing on three pages, but the agency gave no explanation of why it diverged from its prior finding that the ACS standards, guidelines, and objectives embody the best available science. *See* ER 000707-1054; 000760, 000874, 000880; *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]”) (citation omitted). To the contrary, email correspondence shows NMFS was intentionally tight-lipped, defying its obligation to provide such an explanation. ER 001338

(NMFS email stating it would not “compar[e] the proposed action to the NW Forest Plan”).

For example, NMFS never explained why the small increase in road construction that NMFS found posed a serious threat in August 2015 (in its comment letter) and that it prohibited in the 1997 Programmatic BiOp, posed an insignificant threat to survival of threatened and endangered salmon when the agency issued the 2016 BiOp. Such an omission is quintessentially arbitrary and capricious. *Vill. of Kake*, 795 F.3d at 969 (finding action arbitrary and capricious when agency failed to explain “why an action that [an agency] found posed a prohibitive risk” in a previously issued decision, “now merely poses a minor one.”).

In the proceedings below, the court found that NMFS provided a necessary explanation for its departure by pointing to the August 21, 2015, and December 18, 2015 comment letters described in detail above. F&R at 26-27. However, these letters of dissent fail to show that NMFS believed the RMPs are a “better” policy. *See Vill. of Kake*, 795 F.3d at 966. Nor do they provide a “reasoned explanation” for disregarding ACS protections, but rather advocate for BLM to integrate these protections into its proposed forest management plans, expert advice BLM did not follow. *See id.*

The lower court also pointed to a PowerPoint presentation containing two conclusory sentences that again failed to explain why protections of the ACS were no longer necessary. *See* F&R at 27 (citing ER 001101-03. This PowerPoint merely stated that “No-thin inner zone provides more certainty than Northwest Forest Plan.” *Id.* This cursory statement, unsupported by scientific analysis, is not a reasoned explanation. Nor does it explain how “greater certainty” for unidentified parties will maintain and restore aquatic habitat for federally listed salmon.

Federal defendants also claim they had numerous meetings about the Northwest Forest Plan, but these conversations behind closed doors are not enough. In a record with over a million pages of documents, there is not a single document that provides a reasoned explanation as to why NMFS believes that the protections of the ACS were no longer necessary to avoid jeopardy. NMFS’s silence was arbitrary and capricious. *See Nw. Env’tl. Def. Ctr.*, 477 F.3d at 687-88 (“[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

B. The Arbitrary and Capricious Standard Applies to Judicial Review of NMFS’s Biological Opinion.

The lower court held that NMFS need not explain its departure from the ACS because NMFS was not “proposing agency action[,]” nor was it “endorsing any change to [its own] policies” because it was merely “reviewing another

agency's action," namely BLM's adoption of the 2016 RMPs. F&R at 23. To the contrary, this Court has held that a biological opinion constitutes a final agency action subject to judicial review because it marks the consummation of the Section 7 consultation process. *See PCFFA v. NMFS*, 265 F.3d at 1034. Courts review such final agency actions under the arbitrary, capricious, and contrary to law standard of the APA. *Or. Natural Res. Council v. Allen*, 476 F.3d at 1036.

There is nothing unusual about biological opinions that would make standard APA law inapplicable here. *See Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) (invalidating a biological opinion that failed to explain prior contradictory findings). In fact, district courts have invalidated biological opinions that rescind protective measures from a prior biological opinion without explanation. *See, e.g., Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1033–34 (D. Ariz. 2009) (invalidating biological opinion that departed from longstanding prior opinion without directly addressing why prior protections were no longer needed).

AquAlliance v. U.S. Bureau of Reclamation, 287 F. Supp. 3d 969, 1068 (E.D. Cal. 2018), *appeal voluntarily dismissed*, No. 18-16780 (9th Cir. Jun. 25, 2019), a district court opinion relied on by the lower court, provides neither precedential nor persuasive authority. In *AquAlliance*, plaintiffs challenged a biological opinion for a threatened snake, contending that FWS failed to include

protective measures that it had required in prior biological opinions. 287 F. Supp. 3d at 1067. The district court rejected the challenge, holding that “conservation measures incorporated into the BiOp are not FWS policy.” *Id.* (emphasis removed). Here, in contrast, mandatory compliance with the ACS was not only a NMFS term and condition for many prior biological opinions, it has been universally acknowledged as the best available science for almost 25 years. *See PCFFA v. NMFS*, 265 F.3d at 1035 (holding that equating ACS consistency with a no jeopardy finding required NMFS to ensure individual projects complied with the ACS objectives). To the extent that the *AquAlliance* court held a biological opinion is not a reviewable final agency action or policy, this holding was incorrect.

C. In Its Biological Opinion on the 2016 RMPs, NMFS Ignored the Best Available Science Represented by the ACS.

The ESA requires NMFS “to ensure that an action of a federal agency is not likely to jeopardize the continued existence of any threatened or endangered species.” *N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006) (internal citations and quotation marks omitted). The obligation to “ensure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d at

1386; *Wa. Toxics Coalition v. Env'tl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005).

In carrying out these duties, NMFS and FWS are required to use the best scientific information available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). NMFS cannot ignore this science in preparing biological opinions. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). This standard requires that NMFS discuss and use the best available science, and it prevents the agency from omitting from discussion science that conflicts with its findings. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068-69 (9th Cir. 2018) (finding agency failed to use best available science when it did not discuss a scientific study in the record that contradicted the science relied upon by the agency).

The ESA's best available science standard requires far more than simply acknowledging the existence of this scientific information. It requires the agency to engage with the science, develop an analysis that reflects what is known, rationally consider how the science affects its conclusions, and analyze whether additional or different actions are necessary. Deference to NMFS's scientific expertise is only justified if it provides such a "reasonable explanation for adopting its approach and discloses the limitations of that approach." *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016).

The ACS embodies the “best available science” for forestland management and protection of aquatic species. *But see* F&R at 27 n.15.⁶ The ACS is a scientific management approach that directly resulted from and represents the findings of a scientific report, the FEMAT report, authored by an interagency team of the nation’s top aquatic scientists recommending the best way to manage federal forests. ER 001845. FEMAT found that riparian buffers alone were not enough to protect aquatic ecosystems, and that additional watershed analysis and objectives were necessary to protect and restore habitat. ER 001977-78. NMFS again reached the same conclusion during the consultation process. *See supra* Argument I.D.3 (finding thinner riparian reserves will protect salmon only if coupled with mandatory aquatic conservation objectives). NMFS also characterized the ACS as the best available science during the planning process for BLM’s RMPs, explaining that “several scientific reviews (e.g., Reeves, et al. 2006, Everest and Reeves 2006) have broadly concluded that while a great deal of new information has been published, the fundamentals and rationale of FEMAT and the ACS remain consistent with available scientific information.” ER 001398.

⁶ Magistrate Judge Russo cited to the BLM’s response to comments in the FEIS as evidence that the ACS is not scientific data, but rather past agency action. This Court should defer to NMFS’s characterizations of what constitutes best science, which for years has been the science embodied in the ACS.

NMFS described the Northwest Forest Plan as “reflect[ing] the general scientific consensus at the time as to the level of protection needed for recovery of salmon over a 100-year time frame[,]” and further noted that “[s]ince that time, scientific consensus has not changed, and available evidence suggests that implementation of the Northwest Forest Plan has in fact resulted in slowly improving habitat conditions for salmonids.” ER 001396. NMFS did not change its opinion that the ACS reflects best available science in its December 18, 2015 clarifying letter, but rather offered protections that needed to be integrated into the RMPs. *See* ER 001344. Years of prior agency scientific factual findings, as well as court opinions upholding that science, affirm NMFS’s determination that the Northwest Forest Plan’s ACS is not only the best available science, but also that compliance with it could be used as a surrogate for assessing jeopardy. *See PCFFA II*, 71 F. Supp. 2d at 1069-73.

Magistrate Judge Russo pointed to meetings between NMFS and BLM as evidence that NMFS “considered” the Northwest Forest Plan’s ACS. F&R at 27-28, 28 n.16. The ESA requires more. In *Humane Soc. of U.S. v. Locke*, this Court found that NMFS failed to explain why mortality caused by sea lions was significant, when in a previous biological opinion NMFS found that comparable mortality caused by fishing was insignificant. 626 F.3d at 1049. The Court held that the failure to explain these divergent factual findings for comparable causes of

salmon mortality “raise[s] questions as to whether the agency is fulfilling its statutory mandates impartially and competently. A satisfactory explanation is therefore required.” *Id.* Using best available science requires explaining why protections of the ACS are no longer necessary. *Id.* at 1049 (“Without an adequate explanation, we are precluded from undertaking meaningful judicial review.”). By failing to provide such an explanation, NMFS acted arbitrarily and capriciously.

III. THE FEIS FAILED TO ANALYZE THE DIRECT, INDIRECT, AND CUMULATIVE EFFECTS OF SECEDING FROM THE NORTHWEST FOREST PLAN IN VIOLATION OF NEPA.

A. The Historic Ecological and Legal Rationale for Interagency Management of the Northern Spotted Owl.

Under NEPA, BLM must consider the direct, indirect, and cumulative effects of its planning decisions on federal and nonfederal actors and resources. *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1133–35 (9th Cir. 2007); 40 C.F.R. § 1508.7. While the consideration of the synergistic environmental effects of federal and nonfederal actors and actions is a standard NEPA requirement, it has particular import in the checkerboard lands managed by BLM in southwest Oregon.

Because of the unique arrangement of these intermingled forest lands, scientists and the courts have consistently recognized BLM’s unique obligation to consider the direct, indirect, and cumulative effects of its actions (or its failures to act, *see Portland Audubon Soc’y v. Lujan*, 795 F. Supp. 1489, 1495 (D. Or. 1992)

(“*Portland Audubon Soc’y II*”) on the late-successional and old growth forest ecosystem that spans the range of the northern spotted owl. The district court in *Portland Audubon Soc’y* explained that BLM’s checkerboard land ownership pattern meant that BLM biologists recognized the need for an ecosystem-wide plan in order to provide for the northern spotted owl. *Portland Audubon Soc’y v. Lujan*, 712 F. Supp. 1456, 1479-80 (D. Or. 1989) (“*Portland Audubon Soc’y I*”). The court went on to elaborate that according to a 1987 BLM analysis on the demography of the owl:

The scattered nature and amount of BLM old-growth forest lands indicate actions BLM takes to maintain the spotted owl should be done in consort with other landowners. Other agency land management actions may have a greater impact on maintenance of spotted owl populations, than will Bureau actions. Bureau lands may provide links between owl populations in the Coast and Cascade ranges, in northern California, and between Bureau lands and other ownerships....

Id. at 1474-76.

As the courts began adjudicating disputes over management of federal forests within the range of the northern spotted owl, the courts expressly held that BLM’s failure to assess the direct, indirect, and cumulative effects of its actions (or failure to act) on wide-ranging species such as the northern spotted owl violated NEPA. *Portland Audubon Soc’y II*, 795 F. Supp. at 1495. Indeed, there are decades of court decisions and prior policies requiring BLM to plan together with the Forest Service for the management of these lands. While the concept of

planning across federal jurisdictions for an entire forested ecosystem was somewhat novel at the time in the Pacific Northwest, it was then—and remains today—the only scientifically based way in which the complex, interrelated terrestrial and aquatic ecosystem could be conserved and managed at very large scales. *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1310-11 (W.D. Wash. 1994) (“the courts have repeatedly encouraged the Forest Service, the BLM, and FWS to turn from disparate strategies for managing [old growth] forests to a cooperative approach”).

In the 1980s and early 1990s, BLM steadfastly refused to work in concert with the Forest Service to develop a scientifically sound and legally responsible conservation plan for the owl and the old growth forest ecosystems upon which it depends prior to the implementation of the Northwest Forest Plan. While the Forest Service—the most prominent federal land manager responsible for management of forestlands—began to prepare management strategies to conserve the owl pursuant to court orders, that agency recognized that its own efforts would be incomplete and ultimately ineffective and unlawful if BLM was not a co-implementer of whatever strategy was adopted. *Portland Audubon Soc’y II*, 795 F. Supp. at 1494 (“In May of 1990, the Interagency Scientific Committee issued its Final Report, in which it concluded that the lack of consistent planning strategy has resulted in a high risk of extinction for the northern spotted owl subspecies”). The

Interagency Scientific Committee report—one of the first plans to attempt to conserve the owl—expressly concluded that BLM’s lack of coordination with the Forest Service undermined that agency’s attempts to comply with the National Forest Management Act. *Seattle Audubon Soc’y v. Evans*, 771 F. Supp. at 1081, 1092-93 (W.D. Wash. 1991).

The failure of BLM to create a legally and scientifically adequate conservation plan in the 1980s put the Forest Service in an untenable position, given the scientific consensus that uncoordinated efforts to conserve the owl would be inadequate to prevent the extinction of the species. *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1494, 1479-80 (W.D. Wash. 1992); *Portland Audubon Soc’y I*, 712 F. Supp. at 1470-71. As experts at the time explained, while the Forest Service had a larger management role due to the fact that it managed more acreage within the range of the owl, BLM “will also have a particularly vital role to play. Indeed, the completion of the habitat network critical to sustaining a proper distribution of the owls is heavily dependent on BLM lands in Oregon.” *Id.* at 1469. And when BLM refused to participate in a joint spotted owl conservation plan, a federal court struck down the Forest Service’s attempt to go it alone. *Moseley*, 798 F. Supp. at 1478 (holding that Forest Service EIS violated NEPA because it failed to assess the direct, indirect, and cumulative environmental effects

on national forestlands due to BLM's failure to participate in a joint conservation effort to protect the spotted owl).

Courts have explained that any deviation from an interagency conservation effort would necessarily cast substantial doubt on the agencies'—particularly the Forest Service's—ability to meet legal requirements for the conservation of wildlife. For example, Judge Dwyer in Washington observed that due to BLM's decision to implement 13 timber sales in suitable northern spotted owl habitat, “the Forest Service's viability analysis [for the owl on national forests] will have to be reevaluated.” *Moseley*, 798 F. Supp. at 1479-80. Rather than conduct this stand-alone viability analysis, the Forest Service and BLM instead jointly promulgated the Northwest Forest Plan, which Judge Dwyer held met the requirements to conserve biodiversity incumbent upon both federal land management agencies, but only by the slimmest of margins. Judge Dwyer explained that “as written [the Plan] is legally sufficient. It remains, of course, to be carried out.... If it is not funded, or not done for any reason, the plan will have to be reconsidered.” *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. at 1324 (emphasis added). Consequently, BLM's actions concretely affected the legal obligations of its sister land management agency because both agencies manage a common resource (old growth forest ecosystems and wildlife) that cross jurisdictional and political

boundaries irrelevant to wide-ranging listed species such as the northern spotted owl and salmon.

It was this shared stewardship that rendered the Northwest Forest Plan legally and scientifically defensible. The Washington district court explained that although adoption of the Northwest Forest Plan “mark[s] the first time that the Forest Service and BLM have worked together to preserve ecosystems common to their jurisdictions,” “any more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions.” *Lyons*, 871 F. Supp. at 1300. The courts also upheld the EIS supporting the Plan because the “cumulative effects, including those in federal forests, those on nonfederal land, and those arising from nonfederal actions, are discussed in a six-page section of the FSEIS (at 3 & 4–4–10) and elsewhere in the document.” *Lyons*, 871 F. Supp. at 1323 (noting that “any action taken by Federal land managers has a large impact on [] spotted owl habitat” and concluding that management of owls by one federal partner that differs from other federal partners will affect the species range wide).

B. BLM Has a Continuing Legal Obligation To Consider the Direct, Indirect, and Cumulative Effects of Its Decision to Secede from the Northwest Forest Plan.

Plainly, the legal requirement that the Forest Service and BLM manage a common resource in a coordinated and cogent manner has not always been an easy

fit, with the agencies steadfastly resisting the “arranged marriage” foisted upon them by scientists and the courts. Indeed, both agencies have attempted to dissolve the uneasy union in the past, but without success: each time that the federal agencies have attempted to alter the Northwest Forest Plan, the courts have held that the agencies have a NEPA obligation to explain rejection of Northwest Forest Plan components the agencies once determined essential to meet legal obligations. For example, when the Forest Service and BLM first unsuccessfully attempted to eliminate the Survey and Manage program,⁷ the district court explained:

Even if including the Survey and Manage standard as a part of the Plan was a policy choice by the Agencies in 1994, just as eliminating the standard is the Agencies’ policy choice in 2004, the Agencies have an obligation under NEPA to disclose and explain on what basis they deemed the standard necessary before but assume it is not now.

Nw. Ecosystem All. v. Rey, 380 F. Supp. 2d 1175, 1192-93 (W.D. Wash. 2005) (rejecting attempted elimination of the Survey and Manage program). The district court reiterated this point when the agencies made a second attempt to eliminate the Survey and Manage program, *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232 (W.D. Wash. 2009), and again when the agencies unsuccessfully attempted to dramatically alter the ACS:

⁷ The Northwest Forest Plan Survey and Manage program requires the Forest Service and BLM to survey for selected rare species prior to project implementation and provide no-timber harvest buffers around those areas if necessary.

[W]here an agency has previously made a policy choice to conform to a particular standard, and now seeks to amend that standard, “the Agencies have an obligation under NEPA to disclose and explain on what basis they deemed the standard necessary before but assume it is not now.” Under this reasoning, the 2003 FSEIS assessment of the impact of the ACS amendment is inadequate and fails to conform to NEPA standards.

PCFFA IV, 482 F. Supp. 2d at 1252-53, 1270 (citation omitted).

That a federal agency must disclose and assess the consequences in its NEPA document and the rationale for shifting its position is built on a strong administrative law foundation. In *Village of Kake*, this Court considered an environmental impact statement regarding management of roadless areas on the Tongass National Forest in Alaska, which adopted the opposite conclusion—that roadless areas should be open to development—than prior policy closing roadless areas to development, even though the new position was based on the same facts as the prior position. This Court explained that “the absence of a reasoned explanation for disregarding previous factual findings violates the APA. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *Vill. of Kake*, 795 F.3d at 969 (quoting *Fox Television* 556 U.S. at 537 (Kennedy, J., concurring) (internal quotations omitted)). While cases involving an unexplained agency change in position often manifest themselves in the rulemaking context, the law is plain that the same principles

apply in the NEPA context as well. *See also Humane Soc. of U.S.*, 626 F.3d at 1049-50 (holding that unexplained conflicting findings about the environmental impacts of a proposed agency action violate NEPA).

With the 2016 RMPs, BLM has made another run at divorcing itself from the Northwest Forest Plan, but without demonstrating that it has considered the direct, indirect, and cumulative effects of its unilateral action on nonfederal and other federal actors and natural resources. The analysis underlying the 2016 RMPs explicitly does not contain a cumulative effects discussion, candidly acknowledging that “there is not a discrete and separate section labeled as cumulative effects” in the FEIS. Instead, BLM focused its analysis on the effects of adopting the 2016 RMPs on its lands only. ER 001293-95. Indeed, there is no analysis anywhere in the voluminous administrative record of how BLM’s secession from the Northwest Forest Plan will affect lands managed by the Forest Service or private landowners who for decades have relied upon implementation of the interagency Plan to meet their own legal obligations. ER 001728 (BLM email correspondence with Forest Service staff stating that a comparison analysis of how the 2016 RMPs will affect national forestlands is “out of scope”). The lack of a cumulative effects analysis that examines how BLM’s new approach to conserving species that depend on an entire ecosystem that spans multiple federal and nonfederal jurisdictions affects those other actors violates NEPA. *Portland*

Audubon Soc’y I, 712 F. Supp. at 1479 (citing BLM conclusions offered during evidentiary hearing that “spotted owl viability cannot be met on BLM lands alone” to invalidate NEPA analysis of a prior go-it-alone approach).

That BLM refused to conduct such an analysis in the FEIS because it erroneously believed such an analysis was speculative is belied by the fact that BLM has conducted just this kind of analysis in the past: specifically, when BLM (and the Forest Service and other federal partners) adopted the Northwest Forest Plan in 1994.⁸ ER 001968-72 (“[T]here are both environmental and economic interactions with adjacent nonfederal forests”). In fact, the EIS and ROD for the Northwest Forest Plan conducted a robust direct, indirect, and cumulative effects analysis on nonfederal and other federal actors and resources, discussing the effect of the Northwest Forest Plan on these entities no less than 60 times. *See, e.g.*, ER 001954 (“The current state of non-federal lands and possible future activities on non-federal lands were considered in the design of the alternatives, analysis of the environmental impacts of the alternatives, and the cumulative effects in the Final SEIS.”).

⁸ Federal agencies, including BLM, regularly conduct analyses of the environmental effects of third parties responding to federal decisions. These effects “include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Ctr. for Env’tl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1011 (9th Cir. 2011).

Because BLM conducted this analysis in the past, it could and should have done so in the 2016 EIS. “NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (internal quotation marks and citation omitted); *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1063 (N.D. Cal. 2015) (same); *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1373–74 (D.C. Cir. 2017) (“NEPA analysis necessarily involves some ‘reasonable forecasting,’ and ... agencies may sometimes need to make educated assumptions about an uncertain future”) (quotation omitted). Because BLM has conducted an analysis in the past of how adopting the Northwest Forest Plan would affect nonfederal and other federal parties and the resources they manage, BLM cannot now rationally argue that the reverse analysis—how seceding from the Plan will affect those same landowners and resources—is somehow impossible.⁹

⁹ BLM’s NEPA Handbook states that “reasonably foreseeable future actions are those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends.” ER 001746 (emphasis added). BLM’s actions reopen the carefully crafted *détente* embodied in the Northwest Forest Plan that provided reasonable certainty for nonfederal and other federal land managers, and there will be highly probable repercussions from BLM’s unilateral action.

BLM stated that while it would be “speculative” for it to “presume knowledge of site-specific actions that would occur in the future” on lands not managed by BLM, the agency could make “assumptions about future management on other ownerships on existing plans or current trends,” and that while “these assumptions are broad and general in nature,” they nonetheless “are sufficient to provide context for evaluating the incremental effect of the alternatives.” ER 001295. Despite this acknowledgement, BLM’s subsequent analysis only focused on how the RMPs would affect BLM-managed resources, and did not address how BLM’s decision would affect “future management on other ownerships.” ER 1730-31 (“with the original NWFP drafted as [sic] a landscape level, “100 year plan,” it’s realistic to expect that we will collectively be asked what BLM’s changes could mean at the landscape/interagency level. It’s not too early for us to begin to think/talk about what these changes may mean to all of us and how we collectively talk about them”). Ultimately, BLM erroneously concluded that considering how its decision may affect other landowners was “outside the scope” of its revision effort. ER 001728-29.

The lower court held that BLM conducted an adequate NEPA analysis because the agency assessed the direct, indirect, and cumulative impacts of adopting the 2016 RMPs on a “resource-by-resource basis,” and cited to an example of such an analysis for northern spotted owls. F&R at 18. Importantly,

however, this analysis only addressed the influence of BLM's new RMPs on spotted owls and owl habitat under BLM management, not the synergistic effects of other landowners responding to BLM's new RMPs and changing their own management of owls and owl habitat. ER 001299 ("BLM examined potential BLM contributions to northern spotted owl habitat in the planning area") (emphasis added).

To the extent that BLM assumed other land managers would change nothing about their management in response to BLM's actions, this assumption was unreasonable. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 502-05 (9th Cir. 2014) (invalidating NEPA analysis that assumed no development would occur in an area that had not yet been developed for oil and gas leasing). There is nothing in the voluminous administrative record for this case that evaluates and confirms BLM's assumption that no other landowner within the range of the northern spotted owl would change its management in any way in response to BLM's unilateral decision to leave the interagency Northwest Forest Plan. Indeed, comments on the agency's proposal indicate otherwise. *See, e.g.*, ER 001450 ("If BLM continues to pursue a path that departs from the NWFP (ACS, survey and manage) it needs to discuss how its decreased protection responsibilities will affect the functionality of the NWFP, other landowners, including the Forest Service's responsibilities to pick up the slack, and how BLM's reductions in protections

affect the assumptions upon which Habitat Conservation Plans on nonfederal lands are based”); ER 001469 (“The DEIS Plan simply fails to mention or consider the very real concerns of the neighboring nonfederal property owners. Through past Forest Plan public involvement these issues have been voiced and written to forest planners—yet, the current proposed DEIS neglects to address the severe potential and ongoing impacts about how “border” BLM forest management effects their neighbors.”); ER 001471 (“The lesson here is that the BLM forests do not exist in a vacuum. Whatever practices are implemented within the national forests will generate consequences for neighboring properties and their owners. Those landowners deserve a formal seat at the table”). As an unsupported assumption at best, BLM’s conclusion of no predictable change is due no deference by this Court.

As this Court has held, “ordinarily, an agency has the discretion to determine the physical scope used for measuring environmental impacts. However, the choice of analysis scale must represent a reasoned decision and cannot be arbitrary.” *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973-74 (9th Cir. 2002) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414, (1976); *PCFFA v. NMFS*, 265 F.3d at 1037-38; *Motor Vehicle*. 463 U.S. at 43 (agency action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”). In this case, it was unreasonable for BLM to conclude that it need not assess the effects of its secession from the Northwest Forest Plan on other

landowners and the resources they manage.¹⁰ Those natural resources are inextricably bound together across ownerships, as the courts and BLM recognized when it developed the Northwest Forest Plan in 1994. Indeed, BLM gave no rational explanation in the FEIS or final RODs for eschewing the requisite analysis, other than that BLM desired to go another direction with its land management planning. This oversight was not harmless because it pervaded the entirety of BLM's NEPA analysis. *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 569-70 (9th Cir. 2016) (invalidating NEPA analysis because "the inaccurate information and unsupported assumption materially impeded informed decisionmaking and public participation"); *WildEarth Guardians v. Mt. Snowmobile Ass'n*, 790 F.3d 920, 925-26 (9th Cir. 2015) (same).

C. BLM Must Explain its "Changed Position" and Decision to Adopt a New Policy Due to Reliance on the Prior Policy by Third Parties.

While the courts have concluded that the scientifically sound and legally responsible interagency Northwest Forest Plan met legal requirements, Pacific Rivers recognizes that federal agencies can change their positions or approaches to solving problems within their jurisdiction under certain circumstances. *Encino*

¹⁰ The lower court faulted Pacific Rivers because they "have not identified, and the Court is not aware of, any reasonably foreseeable changes to the Forest Service's management plans or those of any other land manager arising out of the proposed action." F&R at 19 n. 11; *id.* at 12. It is not Pacific Rivers' obligation to conduct this analysis: that is BLM's task. *Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975).

Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-27 (2016); *Vill. of Kake*, 795 F.3d at 956. However, “in explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Navarro*, 136 S. Ct. at 2126 (internal quotations and citations omitted). The law is plain that when an agency reverses course (seceding from the Northwest Forest Plan) and chooses a new policy direction (adopting the 2016 RMPs), it must address how the new policy affects other parties who have relied upon the old policy to meet their legal obligations. *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (“change that does not take account of legitimate reliance on prior interpretation” is arbitrary and capricious); *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (prior agency positions engender justifiable reliance by third parties, and a change in position requires rational explanation); *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294-95 (1974) (same).

It is these “serious reliance interests” that BLM neglected to take into account when developing the 2016 RMPs. The Northwest Forest Plan is not an ordinary agency action that dictates activities on only a single unit of federal public

land. Instead, the Northwest Forest Plan is a comprehensive, interagency land management plan with signatories from several federal land management agencies that committed those agencies to a cooperative agreement affecting millions of acres of federal land across several jurisdictions. Over the last 25 years, nonfederal and other federal landowners have made assumptions in reliance on that joint federal framework. ER 001732 (Forest Service spotted owl researcher raising concern that BLM's modeling erroneously assumes no changes on national forestlands from BLM's secession); ER 001302-03; ((non)response to public comment regarding effects on other landowners of BLM's secession); ER 001450; ER 001469; ER 001471; ER 001497-504; ER 001131-37. Now that BLM has unilaterally seceded from that framework, those nonfederal and federal entities will be forced to reevaluate their assumptions and may alter their management accordingly. NEPA requires an analysis of these reasonably foreseeable effects.

The court below rejected these arguments, and observed that BLM did not "move alone" when it seceded from the Northwest Forest Plan because BLM worked with other land managers as "formal cooperators" in the planning process. F&R at 16-17. However, simply because other federal and nonfederal entities participated in "cooperative" closed-door meetings does not mean that the environmental consequences of one entity withdrawing from an interagency plan on natural resources shared in common by several entities were analyzed as

required by NEPA. In its opinion, the lower court did not cite any legal authority for the proposition that meetings (which were not open to the public) can substitute for the environmental analysis and public participation required by NEPA.

Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 998 (9th Cir. 2004) (reliance on non-NEPA document or process inadequate to comply with NEPA's requirements); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002) (same); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999) (same). Nor did the lower court cite any actual environmental analysis undertaken by these coordinators.

Similarly, although the lower court pointed to the existence of the Regional Interagency Executive Committee ("RIEC") as evidence that BLM coordinated its efforts with other entities, "coordination" is not equivalent to environmental analysis and public review, and there is no indication in the record that the RIEC undertook any NEPA analysis.¹¹ ER 001289-90 (explaining the RIEC's role in forest plan revision and that the analysis obligation lies with the agency undertaking revision); ER 001340-41 (observing that the coordination function of the RIEC was served by a "high level summary" of the contents of the RMPs); ER

¹¹ The RIEC serves the important policy objective of making "the federal government work together" in the public interest on federal forest management issues. ER 001893.

001357 (stating that BLM is “replacing the NWFP as a whole” and that co-decisionmaking was not welcomed). In fact, now that BLM has seceded from the Northwest Forest Plan, it will no longer be required to participate in the RIEC. *See* Regional Ecosystem Office, Northwest Forest Plan Regional Interagency Executive Committee, <https://www.fs.fed.us/r6/reo/nwfp/riec/> (last visited Sept. 3, 2019).

BLM’s secession from the Northwest Forest Plan will have real effects on lands managed by parties other than BLM. Among other consequences, the 2016 RMPs eliminate Adaptive Management Areas designed to test critical assumptions of forest management; release BLM from interagency monitoring requirements the courts have held are required to meet a number of legal obligations, *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. at 1306; absolve BLM from participation in the interagency RIEC; excuse BLM from seeking approval of the interagency Regional Ecosystem Office for destructive post-fire logging in late-successional reserves; eliminate the Survey and Manage mitigation measures designed to protect rare species from ground disturbing activities; eliminate the ACS, which conserves listed and at-risk aquatic species; and eliminate key watersheds that protected unroaded values, among other changes. And because the Northwest Forest Plan has been “the federal contribution to recovery” for more than 20 years, nonfederal actors have relied upon it to carry the bulk of species conservation

efforts. That balance must now be re-struck, and perhaps will require greater obligations to be placed on nonfederal lands. Until BLM performs that analysis, however, any new balancing remains unknown. BLM simply did not analyze any of these effects on the environment or on other federal and nonfederal parties; this failure violated NEPA.

CONCLUSION

Plaintiff-Appellants Pacific Rivers respectfully ask the Court to reverse the district court decision adopting the Findings and Recommendation, vacate the NMFS 2016 Biological Opinion, vacate the 2016 Resource Management Plans, and reinstate the Northwest Forest Plan, including its Aquatic Conservation Strategy, on these BLM lands.

DATED this 10th day of September, 2019.

Respectfully submitted,

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FOR THE NINTH CIRCUIT**

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I hereby certify that on **September 10, 2019**, I electronically filed the foregoing *Opening Brief of Plaintiff-Appellants* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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