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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF MONTANA**  
11 **GREAT FALLS DIVISION**

12 DEFENDERS OF WILDLIFE, and  
13 NATURAL RESOURCE DEFENSE COUNCIL,  
14 Plaintiffs,

15 vs.

16 UNITED STATE ARMY CORPS OF  
17 ENGINEERS; UNITED STATES BUREAU  
18 OF RECLAMATION; and UNITED STATES  
19 FISH AND WILDLIFE SERVICE,  
20 Defendants,

21 and

22 LOWER YELLOWSTONE IRRIGATION  
23 PROJECT BOARD OF CONTROL, SAVAGE  
24 IRRIGATION DISTRICT, and INTAKE  
25 IRRIGATION DISTRICT,  
Defendant-intervenors

No. CV 15-14-GF-BMM

**TRANSCRIPT OF MOTION  
HEARING**

**BEFORE THE HONORABLE BRIAN MORRIS  
UNITED STATES DISTRICT COURT JUDGE  
FOR THE DISTRICT OF MONTANA**

Missouri River Federal Courthouse  
125 Central Avenue West  
Great Falls, MT 59404  
Thursday, April 26, 2018  
1:35 p.m. to 4:30 p.m.

Proceedings recorded by machine shorthand  
Transcript produced by computer-assisted transcription

**APPEARANCES**

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## PROCEEDINGS

1  
2 (Open court.)

3 THE COURT: Please be seated.

4 Madam Clerk, please call the next case on the Court's  
5 calendar.

6 THE CLERK: This Court will now conduct a motion  
7 hearing in Cause Number CV 15-14-GF-BMM, Defenders of Wildlife,  
8 et al., versus United States Army Corps of Engineers, et al.

9 THE COURT: Good afternoon, Counsel.

10 (Simultaneous greetings.)

11 THE COURT: Good afternoon to the public.

12 I would like counsel to make appearances for the  
13 plaintiffs.

14 MS. ADAMS: McCrystie Adams, Your Honor.

15 THE COURT: Good afternoon, Ms. Adams.

16 MS. UBERUAGE: Good afternoon. Michelle Uberuage.

17 THE COURT: Good afternoon, Ms. Uberuage.

18 MS. ADAMS: And with me I have two representatives of  
19 Defenders of Wildlife: Aaron Hall and Lindsay Dofelmier.

20 THE COURT: Good afternoon, Mr. Hall and  
21 Ms. Dofelmier.

22 For the federal defendants?

23 MR. MARINELLI: Good afternoon, Your Honor.  
24 Matt Marinelli for the federal defendants.

25 MR. HOWELL: Coby Howell for the federal defendants.

1 MR. LEVIN: Joshua Levin for the federal defendants.

2 THE COURT: Good afternoon.

3 And for Treasure State -- I'm sorry, wrong case --  
4 for the irrigation district.

5 MR. STERMITZ: Your Honor, Mark Stermitz. And with  
6 us is James Brower, project manager for the Lower Yellowstone  
7 Irrigation Project.

8 MR. GREGERSON: Good afternoon, Your Honor.  
9 Clayton Gregerson.

10 THE COURT: Who are you with, Mr. Gregerson?

11 MR. GREGERSON: Interveners, the irrigation district.

12 THE COURT: Okay. Are you a member of the irrigation  
13 district, or are you counsel?

14 MR. GREGERSEN: Counsel.

15 MR. STERMITZ: He's an associate in our Billings  
16 office, Your Honor.

17 THE COURT: I got it. Thank you.

18 Now, let's clarify the issues presented today. This  
19 is a hearing to address a number of motions for summary  
20 judgment. I believe most of them are cross-motions, and I  
21 think there are six separate claims. Let me go through them  
22 and make sure I have covered them.

23 The first one, there's a Fish and Wildlife Services  
24 Biological Opinion in 2016, that the Incidental Take Statement  
25 for the intake project violates the Endangered Species Act. I

1 think that is Claim 12 in the plaintiffs' --

2 Is it the fourth amended complaint, Ms. Adams?

3 MS. ADAMS: Yes, Your Honor.

4 THE COURT: All right. The second issue to  
5 address -- well, let me just back up.

6 That's the first issue. Everybody agrees?

7 MS. ADAMS: Yes, Your Honor.

8 THE COURT: All right. And who is going to argue  
9 today for the federal defendants?

10 MR. HOWELL: Your Honor, I will do the -- I'll be  
11 primarily arguing, and to the extent NEPA comes up,  
12 Mr. Matt Marinelli would; and to the extent the Clean Water Act  
13 comes up, Mr. Levin will.

14 THE COURT: All right. Well, I'll address my  
15 questions, initially, to you, then, Mr. Howell.

16 And, Ms. Adams, are you going to argue for the  
17 plaintiffs?

18 MS. ADAMS: That's correct, Your Honor.

19 THE COURT: Okay. And, Mr. Stermitz, do you intend  
20 to argue as well?

21 MR. STERMITZ: Briefly, Your Honor.

22 THE COURT: Okay. The second issue for summary  
23 judgment today is there's a reliance by the US Army Corps of  
24 Engineers and Bureau of Reclamation on an allegedly unlawful  
25 Biological Opinion to authorize the Intake Project violates

1 Section 7 of the Endangered Species Act and its substantive  
2 duty to avoid jeopardizing the pallid sturgeon. That was  
3 Claim 13 of the plaintiffs' fourth amended complaint.

4 That's the second issue, Ms. Adams?

5 MS. ADAMS: Yes, Your Honor.

6 THE COURT: Mr. Howell?

7 MR. HOWELL: Yes.

8 THE COURT: Okay. The third issue: Does the record  
9 of decision in the Environmental Impact Statement for the  
10 Intake Project prepared by the US Army Corps of Engineers and  
11 Bureau of Reclamation violate NEPA by failing to provide the  
12 public with a meaningful comparison of different alternatives?  
13 That's Claim 11 in plaintiffs' fourth amendment complaint.

14 Ms. Adams, that's the third issue?

15 MS. ADAMS: Yes, Your Honor.

16 THE COURT: Mr. Howell?

17 MR. HOWELL: Yes.

18 THE COURT: All right. The fourth issue: If the  
19 Clean Water Act analysis conducted by the US Army Corps of  
20 Engineers for the Intake Project applied an unlawful standard,  
21 did the US Army Corps of Engineers violate a substantive  
22 statutory obligation to choose the least environmentally  
23 damaging practicable alternative? That's Claims 14 in  
24 plaintiffs' fourth amendment complaint.

25 That's the fourth issue, Ms. Adams?

1 MS. ADAMS: Yes, Your Honor.

2 THE COURT: Mr. Howell?

3 MR. HOWELL: Yes, Your Honor.

4 THE COURT: Now, the fifth issue: Did the Bureau of  
5 Reclamation fail to ensure that its existing operation of the  
6 Intake Dam does not jeopardize the pallid sturgeon? Is the  
7 unlawful taking of pallid sturgeon without an Incidental Take  
8 Statement in violation of the Endangered Species Act,  
9 Sections 7 and 9? Those are the fourth and fifth claims in the  
10 plaintiffs' fourth amended complaint.

11 Is that the fifth issue, Ms. Adams?

12 MS. ADAMS: Yes, Your Honor.

13 THE COURT: Mr. Howell?

14 MR. HOWELL: So on this one, Your Honor, I agree that  
15 it's Claims 4 and 5, but it is related to Claim 13, your second  
16 issue.

17 THE COURT: All right. And I understand there will  
18 be some overlap in these. I just want to make sure that we  
19 have all of the issues that need to be addressed here to  
20 everyone here.

21 And, again, Mr. Howell if there's overlap in the  
22 argument -- what I intend to do, at least, for your  
23 information, is have the plaintiffs argue first on all of the  
24 claims; have the federal defendants and the interveners respond  
25 to all of the claims; have any rebuttal; and, if we need any

1 surrebuttal, I'll give you a chance to do that as well. I  
2 don't want to go through them one by one. That will  
3 unnecessarily extend this hearing.

4 All right. Now, the sixth claim today: Did the  
5 United States Army Corps of Engineers fail to ensure that its  
6 ongoing operation of the Fort Peck Dam does not jeopardize the  
7 pallid sturgeon? And accompanied with that: Is the unlawful  
8 taking of the pallid sturgeon without a valid Incidental Take  
9 Statement in violation of Sections 7 and 9 of the Endangered  
10 Species Act? Those are Claims 1 and 2 of the plaintiffs'  
11 fourth amendment complaint.

12 Is that your sixth claim today, Ms. Adams?

13 MS. ADAMS: Yes, Your Honor.

14 THE COURT: Mr. Howell?

15 MR. HOWELL: Yes.

16 THE COURT: All right. Then, before we get started,  
17 I want to further try to focus our discussion today. The first  
18 thing to address is the elephant in the room: The recent  
19 decision by the United States Court of Appeals from the Ninth  
20 Circuit vacating the preliminary injunction that I had granted  
21 earlier.

22 So I would first intend to ask the plaintiffs about  
23 that order and what effect, if any, it has on the proceedings  
24 here today and get their input on it. And then I would, of  
25 course, ask the same questions of the federal defendants.



1           And then I'll also question the parties regarding  
2 both -- some of the procedural history, as well as the legal  
3 analysis, in my order granting the preliminary injunction,  
4 seeing where the parties agree or disagree as to what parts of  
5 that analysis were correct and what part they believe might  
6 have been incorrect in light of the Ninth Circuit's decision.  
7 And we'll try to focus our inquiry on some of these remaining  
8 issues that way.

9           So both sides are prepared for that, I intend to quiz  
10 both parties on those issues, as well as the issues before us.  
11 I think they are all related.

12           So given the number of issues to address, I would  
13 anticipate going till about 3:00 o'clock, taking a break, and  
14 then reconvening for as much time as we need. I'd like to rap  
15 up sometime around 4:00 o'clock. I have another hearing set at  
16 4:00 o'clock today. We'll go as long as we need to finish  
17 today. So let's start, then.

18           Ms. Adams, if you would come to argue your issues.

19           MS. ADAMS: Thank you, Your Honor. Good afternoon.

20           THE COURT: Good afternoon.

21           Let's start right away with the Ninth Circuit  
22 decision, first, before you get to your claims.

23           Madam Clerk, do you have a copy of that?

24           This will be on the screens in front of you. So this  
25 is the Ninth Circuit's order. Now some of this, of course --

1 go to page 3, Madam Clerk -- talks about the irreparable harm,  
2 balance of equities, public interest argument. That's related  
3 to the injunction, in particular. But there are some items I  
4 want to address.

5 Go to page 4, please, Madam Clerk. I'm sorry. Go  
6 back to page 3. Excuse me.

7 At the bottom page 3, Ms. Adams, the Court determined  
8 that I had erred in considering the harm caused by the  
9 continued operation of the existing weir in my assessment of  
10 irreparable harm.

11 Should I be considering the continued operation of  
12 the existing weir in addressing these motions for summary  
13 judgment?

14 MS. ADAMS: Well, the continued operation of the  
15 existing weir is relevant to the extent that this Court finds  
16 that the Intake Project itself is unlawful. So it's two  
17 separate things. Right? The Intake Project is envisioned as  
18 the solution to the problem of the ongoing operations of the  
19 Intake Dam. And the ongoing operation are challenged in  
20 Claims 4 and 5, as you just articulated. So the project itself  
21 is the project that has to be analyzed under the ESA, NEPA, and  
22 the Clean Water Act. And it has to be measured against those  
23 standards.

24 But to the extent that this Court finds that the  
25 Intake Project violates any of those statutes, the ongoing

1 operations of the dam are also relevant because that is what  
2 was challenged in Claims 4 and 5, and the ongoing operations  
3 are also unlawful. So they cannot continue unabated if this  
4 Court finds that the Intake Project is --

5 THE COURT: Let me ask the question, then: What  
6 happens if the federal defendants walked away? They say,  
7 "We're not going to do anything here with regard to the  
8 Fort Peck Dam or with regard to the Intake Dam." Would you  
9 still have a viable Endangered Species Act claim? And what  
10 would be the analysis for it?

11 MS. ADAMS: Yes, because -- so the Intake Dam's  
12 existing operations are subject to the ESA. And they are  
13 subject to the ESA because, while the weir itself was built  
14 prior to the ESA, there's ongoing operations at the dam, which  
15 involves rocking. It involves other operations in --

16 THE COURT: Your claims directly address the rocking  
17 and ongoing operations?

18 MS. ADAMS: Yes, because -- so let me back up.

19 So Reclamation owns the dam, and it has control over  
20 the dam. It has signed contracts with the irrigation district  
21 for the district to do the operations. But Reclamation is in  
22 charge. And Reclamation has the obligation to comply with  
23 every federal environmental law and, in fact, has the  
24 discretion to do so because there's nothing preventing the  
25 Reclamation from doing so. Reclamations has the obligation to

1 comply with the environment laws.

2           And so the fact that these ongoing operations of  
3 rebuilding this dam each year, rebuilding some structure each  
4 year, and causing the effects to the pallid sturgeon subjects  
5 the ongoing operations to the Engaged Species Act.

6           And so, no, the answer is they cannot just walk away.  
7 I mean, that's what's been going on for the last 25 years is  
8 that, you know, the Fish and Wildlife Service first told  
9 Reclamation in 1992, "These operations, you need to go and do a  
10 consultation on them. You need to address the problems that  
11 are being caused by these operations of the dam."

12           THE COURT: All right. Madam Clerk, turn to page 4,  
13 please.

14           In that first paragraph you see, Ms. Adams, the Ninth  
15 Circuit determined that I erred when I flipped the burden of  
16 proof and required the Corps of Engineers to prove that the  
17 proposed project would allow a successful pallid sturgeon  
18 passage around the weir. Instead, the Court determined that  
19 the US Corps of Engineers had no burden to prove that the  
20 proposed project would improve the plight of the pallid  
21 sturgeon over the status quo.

22           Do you agree with that analysis?

23           MS. ADAMS: No, Your Honor.

24           THE COURT: I mean, that is their determination  
25 regarding the preliminary injunction.

1           Does this analysis apply to your claim on summary  
2 judgment?

3           MS. ADAMS: Oh, I see.

4           Well, I mean, as you know, this is about irreparable  
5 harm. But because the Corps and Reclamation have chosen --  
6 have approved the Intake Project, that -- they must comply with  
7 federal environmental laws for that project. It is our burden  
8 to prove that they are arbitrary and capricious in doing so.  
9 But the Corps and Reclamation have to demonstrate, in the first  
10 instance, that they are complying with federal environment  
11 laws.

12           I'm not sure if I am answering...

13           THE COURT: Well, I guess, the argument in rough  
14 terms here is that the existing weir causes problems for the  
15 pallid sturgeon. There's a couple of options about how to  
16 improve the situation. One of them is the pumping alternative  
17 preferred by the plaintiffs. The other one is the Intake  
18 Project, the concrete weir with the bypass channel.

19           Do the Corps and the Bureau have an affirmative duty  
20 to prove that the bypass channel will improve the situation for  
21 the pallid sturgeon?

22           MS. ADAMS: I see.

23           THE COURT: Or is it your duty to show that it won't?  
24 Who has the burden here?

25           MS. ADAMS: I see. I understand.

1           So under the Endangered Species Act, the Service  
2 has -- and then the Corps and Reclamation in their substantive  
3 sections have a duty. In the Biological Opinion, the Service  
4 must demonstrate that this project, the Intake Project, will  
5 not jeopardize the species.

6           And to do so there has to be a rational -- they have  
7 to do the analyses that would demonstrate whether or not this  
8 project will jeopardize the species.

9           THE COURT: Let's parse that out. "Will not  
10 jeopardize the species." Right now, we have a species that's  
11 in trouble because only a few of them are passing up the  
12 existing channel every couple years, apparently.

13           Do you agree?

14           MS. ADAMS: Agree.

15           THE COURT: All right. So the proposed project is to  
16 put in this bypass channel, and I don't think the record  
17 indicates -- no one knows for sure whether it will work.  
18 There's hope that it will work. There's some analysis.

19           Is that enough? Or do they have to show that it  
20 will, in fact, work and be an improvement over the existing  
21 situation?

22           MS. ADAMS: Well, I'm not sure if you want to put it  
23 in terms of "will it work or not." So the jeopardy standard  
24 requires that the agency -- so the action cannot reduce  
25 appreciably the likelihood of survival and recovery.

1           So the analysis is what are the effects that this  
2 project will have on the likelihood of survival and recovery?  
3 And it's not simply enough to say, "The species is on the brink  
4 now, so anything we do is better." That's not the standard.  
5 The standard is what effects will it have in the likelihood of  
6 survival and recovery? And the Ninth Circuit has been clear  
7 that a simple improvement is not -- is not sufficient without  
8 actually analyzing what it means for survival and recovery.

9           And so when the federal defendants talk about whether  
10 or not this bypass channel will work, there's a lot of  
11 different elements to that. When you look at whether or  
12 not it -- how it will affect the likelihood of survival and  
13 recovery -- and the species is not going to survive if it  
14 doesn't start reproducing in the river. Putting aside  
15 recovery, there has to be some natural reproduction in the  
16 river. And simply saying, "Some fish may go up the bypass  
17 channel," doesn't answer the question.

18           And so one of the fundamental problems here of  
19 focusing on whether or not the bypass channel will work is that  
20 the question is bigger than that. Because the question goes to  
21 the jeopardy standard: "What will it do to the likelihood of  
22 survival and recovery?"

23           And the Ninth Circuit has said, as far as recovery is  
24 concerned, will this put it at risk? Will the species just  
25 never be able to recover as a result of this project? And

1 that's the question, as far as whether or not it will work.

2 And, yes, the Service has to do the analysis in the  
3 first instance. The Service has to use, you know, its  
4 judgment, the best developed science, and do that analysis. In  
5 this case, the Service did not do that full analysis. And to  
6 the extent there is analysis, the findings do not support their  
7 no-jeopardy conclusion.

8 And to the extent you are, you know, asking about  
9 burdens, it's certainly our burden to demonstrate that the  
10 Service acted arbitrary and capriciously in failing to do those  
11 current analyses and failing to support their conclusion.

12 THE COURT: What are the shortfalls in the analysis  
13 in your view?

14 MS. ADAMS: So there's two respects -- well, two and  
15 a half respects -- two major respects that there are shortfalls  
16 in the analysis. One is that the -- the first two are both --  
17 this Court is very familiar with them. The fact that the  
18 Incidental Take Statement assumes that and permits more than  
19 half of the adults that are going upstream to be blocked by the  
20 dam, turn around, go back downstream, and so they won't breed.  
21 They will be taken.

22 There's --

23 THE COURT: So the federal defendants argue that  
24 that's the worst-case scenario. They expect more to make it.

25 MS. ADAMS: Well, first of all, there's no support



1 for that in the record. And, second of all, that's not the  
2 relevant standard because, I think, as this Court noted in your  
3 preliminary injunction order, the Incidental Take Statement  
4 allows a particular amount of take for a reason because it  
5 provides the federal defendants with safe harbor. And so if  
6 they make the number -- you know, have an overly large number  
7 of take, they don't have to go back and consult again because  
8 that number won't be exceeded.

9 I didn't articulate that very well. But the purpose  
10 of the Incidental Take Statement is to provide a safe harbor.  
11 And so, you know, overestimating take doesn't comply with what  
12 the purpose of this ITS is.

13 And so, I mean, you asked -- to get back to your  
14 question of the shortfalls in the analysis, the second way that  
15 there's a shortfall in the analysis is the fact that, you know,  
16 as I mentioned, there's no analysis in the Biological Opinion  
17 about what this means for recovery. Will this project put the  
18 species at risk? Will it forever preclude recovery? That  
19 analysis just isn't in the record.

20 And I would just sort of highlight the *Wild Fish*  
21 *Conservancy* case on this issue in the Ninth Circuit because  
22 there's an extremely similar factual scenario. In that  
23 situation, there was a hatchery that had been in operation for  
24 70 years. No bull trout had spawned during the 7 years leading  
25 up to 2001. And when bull trout were listed in 1999, the

1 Reclamation and the Service started working on ways to mitigate  
2 that problem. And by the time it went to the Ninth Circuit,  
3 the issue that was in that Biological Opinion claimed that  
4 there would be some improvement for the bull trout. And the  
5 Ninth Circuit recognized, "Well, some bull trout may actually  
6 go upstream." But that's not the analysis. The analysis is  
7 what will this project mean for survival and recovery? Will it  
8 place the species at risk?

9           And I wanted to add one more thing about the failure  
10 to -- the original question about where are the shortfalls in  
11 the analysis. When the Biological Opinion concludes that the  
12 likelihood of survival and recovery will be substantially  
13 improved, the focus of that analysis is almost entirely on the  
14 adult fish going up the bypass channel, and whether or not  
15 there will be more fish going up that bypass channel than  
16 currently use the existing side channel.

17           And whether or not that analysis -- I mean, you know,  
18 we don't believe that that analysis is supported by the record.  
19 But to answer your question, there's no -- the analysis doesn't  
20 continue on. The analysis doesn't address what does that mean  
21 for survival or recovery? Will these -- will this species --  
22 does it even have a chance at survival with this project? And  
23 that question is not answered by the Biological Opinion.

24           THE COURT: Let's go on, then, to the bottom of  
25 Page Number 4 -- Madam Clerk -- addresses the differential

1 standard of review under the Administrative Procedure Act, and  
2 the Ninth Circuit states, "At its core, the standard simply  
3 requires an agency to, quote, 'articulate a rational connection  
4 between facts found and conclusions made,'" end quote.

5 And the Court determined, under this standard,  
6 there's no basis to conclude that -- well, that's success on  
7 the merits.

8 But what is the -- how should I apply this -- do you  
9 agree with the Court about the deferential standard? And how  
10 should I apply it here?

11 MS. ADAMS: Well, the APA -- I mean, the case law  
12 about the APA on differential standard is well-established, and  
13 that is why it is our burden to prove that the activity is --  
14 or the action is arbitrary and capricious.

15 But there's a limit to it. I mean, there still has  
16 to be -- the analyses have to be done, and there has to be a  
17 rational connection between the findings and the conclusion.  
18 The fact that an agency says something is true is not  
19 sufficient.

20 And so this Court's obligation is to apply the  
21 standard of review in the sense of looking at were the analyses  
22 done that would lead the agency to a reasonable conclusion?  
23 And for those facts that are in the Biological Opinion, do they  
24 have that rational connection with the conclusion, of the  
25 no-jeopardy conclusion?

1           And while this is a deferential standard, it is  
2 certainly not limitless. The Ninth Circuit has been clear that  
3 the Court's, you know, job is to make sure that what is  
4 stated -- that the agency has articulated the reasons for its  
5 conclusion and that those reasons have some rational basis.

6           THE COURT: Madam Clerk, go to Page Number 5, please.

7           With regard to the ESA analysis, the Court discusses  
8 the two issues you brought up: the Incidental Take Statement,  
9 as well as the quantifiable recovery goal. And the Court  
10 cites, at the bottom of page 5, there are some instances where  
11 "Analysis of the Incidental Take Statement and identification  
12 of a recovery goal may be needed to explain the reasoned basis  
13 for a no-jeopardy finding," and cites to the *Bartel* decision by  
14 the district court, as well as the *National Wildlife Federation*  
15 by the Ninth Circuit. The Court says, "Such analyses were not  
16 required here," and instructs that I committed a legal error  
17 when I treated the absence of a specific Incidental Take  
18 Statement analysis and the failure to identify a quantifiable  
19 recovery goal as technical deficiencies that precluded a  
20 no-jeopardy finding in the Biological Opinion.

21           How do you respond to that statement?

22           MS. ADAMS: I'll take them one at a time --

23           THE COURT: Please.

24           MS. ADAMS: -- with your permission.

25           With respect to whether or not the analysis is

1 required, as far as whether or not the take that's incidental  
2 to the action will cause jeopardy, that flies in the face of  
3 fundamental administrative law principles. There's no dispute  
4 here that the agency cannot conclude no jeopardy if the  
5 incidental take will jeopardize the species.

6           And so to reach a no-jeopardy conclusion, the agency  
7 has to articulate a reason, a rational reason, that the effects  
8 of incidental take will not jeopardize the species. And  
9 there's nothing in the Biological Opinion that gets at that  
10 point.

11           And I will note that the Ninth Circuit doesn't argue  
12 that that analysis is there. As you noted, it simply excuses  
13 the agency from doing that analysis. But there's no basis,  
14 that I'm aware of, for doing that. And they don't state a  
15 basis in this sentence about excusing the Service from doing  
16 this analysis.

17           And so the conclusion that the Service has drawn here  
18 is contrary to what the Ninth Circuit has said in many other  
19 situations, which is, you know, where an agency reaches a  
20 no-jeopardy conclusion, they have to articulate the basis for  
21 that. And that's all we're looking for here is the actual  
22 analysis. What effects will this have?

23           And I'll note that in the briefing the Service was  
24 not arguing that it did not need to do the analysis. It was  
25 arguing that it did do the analysis. So the debate has been --

1 THE COURT: In the briefing before the Ninth Circuit?

2 MS. ADAMS: I'm sorry?

3 THE COURT: In the briefing before the Ninth Circuit?

4 MS. ADAMS: I believe so, Your Honor.

5 THE COURT: Okay.

6 MS. ADAMS: So the debate has been about whether or  
7 not that analysis is there. And the reply brief has changed a  
8 little, to be clear. But, you know, the major debate here,  
9 where the action has been, is whether or not that analysis was  
10 in the Biological Opinion. And it's simply required by basic  
11 APA principles.

12 And with regard to the second issue of whether or not  
13 the agency has to identify some sort of tipping point with  
14 regards to the recovery -- and I would distinguish -- I don't  
15 know if it was intentional or not, but this panel opinion talks  
16 about a recovery goal, which to me implies aspirationally that  
17 they have to recover the species. This project does not have  
18 to recover the species. What this project has to do is not  
19 foreclose recovery forever.

20 And so what the Ninth Circuit --

21 THE COURT: You mean this project on its own doesn't  
22 have to provide recovery?

23 MS. ADAMS: No.

24 THE COURT: It just has to prevent recovery  
25 sometime -- not impede recovery sometime in the future.

1 MS. ADAMS: Exactly.

2 And so the word "recovery goal" is a little, you  
3 know, squishy in that respect. But the statement that, "While,  
4 it's been required" -- and they cite *NWF I* -- "it's not  
5 required here," again, the panel opinion doesn't explain why it  
6 would be here, and it doesn't cite law that would support that.  
7 But *NWF I* and *Wild Fish Conservancy* are both binding Ninth  
8 Circuit cases on this Court. And both have required that in  
9 order to make the determination of whether or not an action is  
10 going to place a species at risk, you have to figure out where  
11 that point is and then measure this project against it.

12 THE COURT: Did you make those arguments in the brief  
13 to the Ninth Circuit?

14 MS. ADAMS: Yes.

15 THE COURT: Go ahead.

16 MS. ADAMS: Did you have more questions about the  
17 panel opinion?

18 THE COURT: Well, yes.

19 Madam Clerk, go on to NEPA, page 6.

20 So with regard to the NEPA claims, it sets the  
21 standard for NEPA about "rigorously explore and objectively  
22 evaluate all reasonable alternatives." It cites to federal  
23 regulations, as well as the opinion in *Center for Biological*  
24 *Diversity*.

25 And on page 7 -- the top of the page, Madam Clerk, on

1 the next page -- it states that I acknowledged the agency's  
2 analysis of the differing environmental consequences, including  
3 the pumping alternative proposed by the plaintiffs. And the  
4 Court concluded under the standard of review identified in  
5 *Center for Biological Diversity*; my analysis did not support an  
6 arbitrary and capricious finding.

7           Why? Do you agree with that statement? Is that the  
8 proper analysis for the standard under the *Center for*  
9 *Biological Diversity*?

10           MS. ADAMS: No, I don't agree with it, Your Honor.  
11 I -- the panel opinion --

12           THE COURT: Well, not that you agree with it. Let me  
13 be clear. It's the ruling with regard to the preliminary  
14 injunction. The question is whether it applies to your claims  
15 on the summary judgment presented today.

16           MS. ADAMS: Understood. Thank you, Your Honor.

17           And the reason I say I don't agree with it is because  
18 our claims in the NEPA claim in the summary judgment addresses  
19 a slightly different issue than the way this panel opinion  
20 addressed NEPA, which is, you know, here, the panel opinion  
21 states that this Court acknowledged the agency's analysis, as  
22 if that is the end of the story.

23           But the problem was that the analysis that this Court  
24 acknowledged in the preliminary injunction ruling and the  
25 analysis that the agency has pointed to during that briefing



1 was the analysis in the Fish Passage Connectivity Index, or the  
2 FPCI, which concluded that, roughly, you know, half -- the  
3 bypass channel presented about half of the potential for fish  
4 passage as the open -- any of the open river alternatives.

5           So the problem, though, was that, on the one hand,  
6 there's the FPCI, and then there's the multiple expert comments  
7 indicating that of course there will be a difference in fish  
8 passage between a wide open river and a bypass channel. But  
9 then, on the other, the EIS does not meaningfully distinguish  
10 between those differences.

11           And that's the key question for the NEPA claim for  
12 this summary judgment argument: Did the agencies present a  
13 candid, clear, meaningful comparison? And simply, as this  
14 Court noted in the preliminary injunction ruling, the fact that  
15 the FPCI is there isn't enough because they muddled those  
16 results. To the extent that's the analysis the agencies have,  
17 which it mostly is, then they muddled that analysis when the  
18 EIS actually portrayed the effects, at least as compared to  
19 fish passage.

20           And, you know, just to elaborate on that a little  
21 bit, in the -- there's a couple different ways the agency did  
22 that in the EIS: There's the summary tables, which we have  
23 cited to because that's the only place in the EIS that the  
24 agencies really put a side-by-side comparison. And then the  
25 agencies have cited to, "Well, there's hundreds of pages of

1 analysis in Chapter 4 of the EIS.

2 To the extent those analyses address fish passage,  
3 which, you, know, some portions do -- but to the extent they  
4 do, they also portray them as roughly similar. They have a lot  
5 of the same language. They are not put in a side-by-side  
6 comparison. But if you read the bypass channel alternative and  
7 then read the multiple-pump alternative, the outcome is so  
8 similar as to be, you know, indistinguishable.

9 And that's the key problem, and that's not the  
10 problem that the Ninth Circuit really identified here in this  
11 panel opinion. And so the panel doesn't get at what the legal  
12 violation that defenders has alleged in the summary judgment  
13 brief.

14 THE COURT: All right. One more issue on the Ninth  
15 Circuit's order, then I'll let you go back to your argument as  
16 you wish.

17 On page 7 of the Clean Water Act claim, the Court's  
18 opinion sets out a standard. It cites the federal regulation.  
19 It cites my conclusion that "the Clean Water Act claim was  
20 likely to succeed on the merits because the Corps of Engineers  
21 failed to make a finding that the multiple pump alternative was  
22 impractical." The Ninth Circuit notes, however, that "The  
23 Corps of Engineers expressly found there was no practical  
24 alternative to the proposed project that would have less  
25 adverse impact on sturgeon populations, and that finding was

1 supported by ample evidence in the record."

2 All right. So, again, does this determination have  
3 any effect on the argument today? And, if not, why, with  
4 regard to the summary judgment?

5 MS. ADAMS: Because this determination is not  
6 supported by the record.

7 THE COURT: Well, if you review the oral argument,  
8 there was much discussion about the language in the  
9 administrative record about was it practical? Was it  
10 impractical? What the federal defendants said about the  
11 different alternatives. And they checked the box on one spot  
12 about what was the most practical.

13 What's the proper standard on summary judgment here?  
14 How do I analyze your Clean Water Act claim on summary  
15 judgment?

16 MS. ADAMS: Well, Your Honor, the key factor for the  
17 Clean Water Act claim is -- I mean, the panel opinion and the  
18 federal defendants are pointing to what you are referring to  
19 and as the panel referred to at that argument is the box  
20 checking, which is the question at the end of the Clean Water  
21 Act analysis: Is this the least environmentally damaging  
22 practical alternative? Check the box "yes."

23 But the key question for this Court is did the Corps  
24 apply the appropriate factors in getting there? And did it  
25 support that analysis with record evidence? In here, although

1 the panel opinion says the finding was supported by evidence,  
2 it doesn't point to any. And, in fact, the only evidence in  
3 the record is that the Corps found the project to be  
4 potentially practicable, which is not an impracticality  
5 finding.

6 THE COURT: What does the "potentially practicable"  
7 mean? That you could build it if you want it?

8 MS. ADAMS: I'm sorry?

9 THE COURT: That you could build it if you want it?  
10 "Potential practicable"?

11 MS. ADAMS: My reading of the record is that -- well,  
12 I think it's a better question for the Corps, honestly. But my  
13 reading of the record is that the Corps had concerns about the  
14 costs of the intake -- I'm sorry -- of a less environmentally  
15 damaging alternative, which would be anything that takes the  
16 dam out of the river.

17 But what the Corps didn't do is figure out whether  
18 those costs were so high as to make the project impracticable.  
19 And either because they aren't so high that it's impracticable,  
20 or they didn't do the analysis. But, either way, that is not  
21 an impracticability finding.

22 And having concerns, having doubts, having worries  
23 about the costs of any open river alternative doesn't meet the  
24 standard. The standard for the Clean Water Act is very clear.  
25 And the issue is can the Corps approve the bypass channel? It

1 is not whether or not they should have approved a different  
2 alternative. It's solely can they approve the bypass channel  
3 alternative under this standard.

4 And that means they have to walk through the steps of  
5 is there a less environmentally damaging alternative, which the  
6 record supports that there is. At this point the Corps is now  
7 claiming in its latest brief that, in fact, "No, all the  
8 alternatives are the same, environmentally," which is not at  
9 all supported by the record and contrary to the record.

10 And then, as far as practicability prong is  
11 concerned, costs are absolutely a fair thing to consider in  
12 that analysis. But simply having more costs -- a higher cost  
13 alone isn't sufficient. The analysis has to be completed and  
14 taken to its logical end. Okay. Is it so high that it's  
15 impracticable or not?

16 THE COURT: How do you make that determination? How  
17 should the federal agency make that determination?

18 MS. ADAMS: Well, that has to be done, certainly,  
19 within the -- that is within the Corps's -- you know, it's a  
20 measurement against the purposes of the project, which in this  
21 case include both fish passage and, you know, the ongoing  
22 operation of the irrigation district.

23 THE COURT: So it would be measured against what they  
24 could squeeze out of Congress?

25 MS. ADAMS: That would be one way to make it more

1 practicable. I mean, those are factors --

2 THE COURT: Well, as I understand, Congress has  
3 appropriated 50-some million dollars for this project. Is that  
4 what we should say that's -- if the federal defendants are able  
5 to squeeze that money out of Congress, based upon that  
6 benchmark, here's the best we can do? Is that how I analyze  
7 it?

8 MS. ADAMS: That's actually a slightly different  
9 issue, Your Honor, because the cost that the Corps has  
10 expressed concerns and doubts about are the costs for operation  
11 and maintenance of the project, or whatever alternative they  
12 choose.

13 THE COURT: The pumping alternative you are talking  
14 about?

15 MS. ADAMS: Right. Because the operations and  
16 maintenance cost will be paid for by the Irrigation District,  
17 whereas the up-front cost, at least at this point, would be  
18 paid for by the Corps.

19 And so the issue, as far as the Corps is concerned,  
20 with practicability, is whether or not those operation and  
21 maintenance costs are too high for the Irrigation District.  
22 And so that's an analysis that is within the Corps's expertise,  
23 and it simply wasn't done here. Or it is practicable, and,  
24 know you, that conclusion certainly doesn't support the  
25 findings.

1 THE COURT: So should it relate to the operation and  
2 maintenance cost, not the up-front cost?

3 MS. ADAMS: I am just saying this is how the Corps in  
4 the Clean Water Act analysis has analyzed it. That's my  
5 understanding of --

6 THE COURT: In other cases or in this case?

7 MS. ADAMS: I'm sorry?

8 THE COURT: In this case?

9 MS. ADAMS: In this case.

10 THE COURT: Okay. And why is that deficient?

11 MS. ADAMS: Because -- it's not deficient. There's  
12 nothing wrong with the Corps looking at those issues. That's  
13 not the problem. The problem is that they found the less  
14 environmentally damaging alternative to be potentially  
15 impracticable, which means it is not impracticable. They can't  
16 both be true. And the Corps cannot approve the bypass channel  
17 alternative when there is a less environmentally damaging  
18 alternative that is not impracticable.

19 THE COURT: All right. Ms. Adams, I am going to turn  
20 you loose now on your argument. I will note, though, that this  
21 was a strong opinion by the Ninth Circuit. They didn't agree,  
22 and they didn't waste much time in telling me so. So you need  
23 to persuade me why you think your summary judgment claims  
24 prevail and why the Ninth Circuit's analysis doesn't impede  
25 your ability to prevail on those summary judgment claims.

1 MS. ADAMS: Thank you, Your Honor. I appreciate that  
2 guidance.

3 So before I launch in, I guess I would say two more  
4 things about this panel opinion, then. One of which is --

5 THE COURT: And I know it's not binding. It's not  
6 published. And I know it's not simply an analysis of legal  
7 issues. So I understand all of that, but it's there. It's  
8 strongly worded in places.

9 Go ahead.

10 MS. ADAMS: I understand.

11 Well, first, I just want to highlight the fact that  
12 the entire record was not in front of the panel. And also it  
13 did not have all of the arguments that are in front of you in  
14 this summary judgment briefing. So the panel opinion did not  
15 have the same context as far as the facts of this project that  
16 this Court has. It didn't have all of the arguments that I'll  
17 try to walk through today.

18 And the second thing I just wanted to highlight was,  
19 as you know, there's not a lot of explanation. So while it was  
20 strongly worded, it's difficult to parse out the rationale and  
21 difficult to reconcile it with -- by any case law in the Ninth  
22 Circuit.

23 So given that -- some of these issues we have  
24 discussed. But I will start with the first issue, as you laid  
25 out earlier, which is the Biological Opinion and the Incidental



1 Take Statement, which is Claim 12.

2           And with the Biological Opinion itself, there are  
3 four different issues with it, and I -- as I sort of eluded to  
4 earlier, they sort of fit into two rough boxes: a failure to  
5 do the analysis that's required to measure this project of  
6 facts against the jeopardy standard; but then also, where the  
7 analysis occurs in the Biological Opinion, a failure to provide  
8 a rational connection with the facts that were found.

9           So I don't want to be too repetitive for Your Honor,  
10 but I will walk through the first two issues of the failure to  
11 do analysis, which we have touched on, with the failure to look  
12 at the effects of what it means for the pallid sturgeon  
13 population if more than half of the adults that go upstream to  
14 the dam are turned around and go back down because they don't  
15 use the bypass channel.

16           And one of the things -- I need to correct something  
17 I said earlier. Actually, I just need to clarify it -- is that  
18 I mentioned earlier that the debate in this case has been about  
19 whether or not the analysis actually took place. And there has  
20 been some back-and-forth in the briefs about whether this  
21 analysis is required -- at what stage this analysis is  
22 required. I believe the federal defendants have referred to it  
23 as sequencing.

24           And I just want to be clear that the analysis we're  
25 talking about is the analysis that should be in the Biological

1 Opinion, not some additional analysis. This is a fundamental  
2 part of the no-jeopardy conclusion because they can only -- the  
3 Service can only issue an Incidental Take Statement if that  
4 take will not jeopardize the species.

5           And so it needs to be in the body of the Biological  
6 Opinion. There has to be some sort of analysis about what it  
7 means for the pallid sturgeon that more than half of what is  
8 already -- you know, not -- only a small percentage -- I  
9 believe it's 12 to 26 percent -- of the pallid sturgeon go up  
10 to the dam anyway. And so turning around more than half of  
11 those is a huge number of fish when the entire future of this  
12 species in the Upper Missouri River Basin depend on this  
13 project.

14           And that is an issue that the Biological Opinion the  
15 Service needed to walk through and needed to come to a rational  
16 conclusion about why that would not reduce appreciably the  
17 likelihood of survival and recovery. And it's simply not  
18 there.

19           The second issue, in terms of that we've already hit  
20 on, in terms of the analysis that's missing, is that analysis  
21 of whether or not this project will place the species recovery  
22 at risk. And I just want to highlight again that the panel  
23 opinion cannot be reconciled with binding published Ninth  
24 Circuit law, and that the *Wild Fish Conservancy* case, as I  
25 mentioned, addressed a very similar issue. And district courts

1 in applying this law have consistently said, "Okay. Maybe  
2 there's some benefit here, but that doesn't mean they are not  
3 still precluding recovery."

4 A species can, as *NWF I* in the Ninth Circuit said, "A  
5 species can hang on to survival without ever having a chance at  
6 extension." And the court in *NWF I* said, "You cannot take an  
7 action that tips a species that's already just hanging on into  
8 sure extension."

9 And that analysis is simply not here in this  
10 Biological Opinion. Simply saying that this is an improvement  
11 over what is also unlawful and which has never been fully  
12 analyzed in a consultation, improvement is not the standard,  
13 and the Ninth Circuit has made that clear.

14 And so while I understand that this panel opinion is  
15 strongly worded, it doesn't explain why it departed from that  
16 finding by the Ninth Circuit.

17 THE COURT: Well, if you review the oral argument --  
18 and you were probably there -- there's a prevailing  
19 undercurrent that there are two options available to rectify  
20 what everyone agrees is a dire situation for the sturgeon.  
21 There's the intake proposal that you have here, and there's the  
22 pumping option. And even if the plaintiffs prefer the pumping  
23 option, the federal defendants are well within their  
24 discretionary rights to choose their option because it made the  
25 situation better.

1           And you can't force -- or I, the Court can't force  
2 the federal defendants to pick a particular alternative. They  
3 have discretion to choose among alternatives, as long as the  
4 alternative improves the situation from what it is.

5           MS. ADAMS: There was indeed the prevailing  
6 undercurrent, but that's not the law.

7           THE COURT: Why? What should have been the analysis?  
8 First, why is that not the law? And tell me what should have  
9 been the analysis.

10          MS. ADAMS: Well, the standard, going back to the  
11 jeopardy regulation, is whether or not this action will reduce  
12 depreciable the likelihood of survival and recovery. So you  
13 have to have some sense of what the likelihood and recovery  
14 means -- or survival and recovery means, excuse me.

15          And that's where the court in *NWF I* said, "We have to  
16 have some idea of how many need to survive before you can  
17 decide that this project does not place the species at risk."  
18 And the same with the *Wild Fish Conservancy* case. Said, "Yeah,  
19 a few bull trout might be spawning." And they never did up  
20 until these mitigation actions took place.

21          But that doesn't mean that overall the population is  
22 going to avoid, you know, being unable to recover. The  
23 population as a whole might still be going down. So the narrow  
24 view of improvement is not the law.

25          And then getting back to the issues that were not in

1 front of the Ninth Circuit, the next issue that I wanted to  
2 walk through, as far as this Biological Opinion, is the fact  
3 that --

4 THE COURT: Hold on, Ms. Adams. Before you do that,  
5 let me just make a comment to the people in the audience.

6 I recognize it's very warm in here. And if anyone  
7 needs to take a break or step outside for fresh air, please  
8 just feel free. Leave quietly and come and go, just don't  
9 disrupt the proceedings. Come and go as you need to. I don't  
10 want to have anyone expiring on us in the middle of the  
11 hearing.

12 Sorry. Thank you, Ms. Adams. Go ahead, please.

13 MS. ADAMS: No worries.

14 I think it's important to consider what the Service  
15 means by "improvement," and that's an issue that was not in  
16 front of the panel.

17 The third issue that we have raised with the  
18 Biological Opinion is the fact that the Service's conclusion  
19 that this project will substantially improve the likelihood of  
20 survival and recovery does not have a rational connection with  
21 the findings in the record, and not just because the bypass  
22 channel itself is uncertain, but also because if -- as I  
23 mentioned earlier, if the species is going to survive, there  
24 has to be some natural reproduction. The jeopardy regulation  
25 is talking about survival and recovery in the wild. And

1 there's nothing in the Biological Opinion that concludes that  
2 there will be any natural reproduction in the river. There's  
3 just nothing there to support this claim that the status of the  
4 species will improve. Whether or not a few more fish go up the  
5 bypass channel, does not answer the question. And that's an  
6 issue that, again, was not in front of the panel.

7 THE COURT: But isn't that the crux of the matter? I  
8 mean, whether the fish make it upstream by using a bypass  
9 channel or whether they make it upstream by removing the dam,  
10 getting upstream is the important part so they can spawn there,  
11 and have sufficient drift distance for the larvae to develop?

12 MS. ADAMS: Yes. But there's two variables that I'd  
13 like to throw into that. One is that there's spawning habitat  
14 just upstream of the dam, and there's also some historic  
15 spawning habitat, the confluence of the Tongue and Powder  
16 River. If the pallid sturgeon go up just high enough above the  
17 dam and spawn, that's probably not enough drift distance. If  
18 they continue on and go to the Tongue and Powder, there very  
19 well may be enough drift distance.

20 THE COURT: How would we ever know, though, what they  
21 would do? It seems like you're imposing an impossible burden  
22 on the Wildlife Service and other agencies to try to evaluate  
23 what a species might do given that the weir has been in place  
24 for a hundred years. How could you possibly make that  
25 analysis?

1 MS. ADAMS: Well, the key here is that the Service  
2 didn't try. So it may be that that analysis is difficult. It  
3 may be that the science isn't, but there's nothing in the  
4 Biological Opinion that explains that. The Service still has  
5 an obligation to say, "We understand this is an issue. Here's  
6 the best available science. It doesn't answer the question."  
7 If that turns out to be the case, then we're, you know, moving  
8 on from there based on that science. There is no narrative  
9 analysis of it. There's no acknowledgment. There's nothing in  
10 the Biological Opinion that looks at that issue.

11 And, you know, to the extent -- I'm a little  
12 uncomfortable with comparing the bypass channel to the open  
13 river alternative. I want to make sure it's clear that our  
14 preference is irrelevant here. What is relevant is whether the  
15 project that was chosen by the agencies complies with the law.  
16 And if there's no analysis of that critical factor, then, you  
17 know -- and if there's a lot of uncertainty about how far  
18 upstream they'll go, then maybe the influence is whether or not  
19 having a few fish use the channel is sufficient.

20 But those are connections that just weren't drawn,  
21 and those are connections that are key to figuring out whether  
22 or not recruitment -- whether survival is likely to improve,  
23 which is the conclusion that the Service drew. So the  
24 conclusion that they drew has to be supported by what is in  
25 the Biological Opinion.

1           And the other issue with larvae drifting down the  
2 stream -- not the stream -- the Yellowstone River is there's  
3 going to be a concrete weir in the river. The existing dam is  
4 going to stay in the river. And the rocks that have been  
5 piling up and eroding off the dam for decades, or however long  
6 they stay, are in the river. That's a lot of hazards for these  
7 larvae that are going to suffer some level of mortality.

8           And so that analysis, too, has to be supported by the  
9 record. For the Service to say, "Survival is likely to  
10 increase" -- and not even talking about recovery, but "survival  
11 is likely to increase or improve," the analysis has to be  
12 supported that we think enough adults are going to go upstream,  
13 we think they are going to go high enough, and the larvae are  
14 going to survive the downstream drift.

15           And that is an issue that, again, in the Biological  
16 Opinion, on the downstream drift, it was analyzed. But the  
17 findings do not have a rational connection with what's in the  
18 conclusion. The Service simply came to the -- it drew sort of  
19 this arbitrary comparison where they said, "Well, the  
20 shovelnose sturgeon also have similar biological  
21 characteristics, and they are abundant in the Yellowstone River  
22 right now. So since they are doing fine with the existing  
23 weir, pallid sturgeon will do fine with a new weir." And so  
24 that is the fundamental basis for the Service's conclusion that  
25 survival of -- that larvae will survive this downstream drift



1 in enough numbers.

2 But that comparison is not supported by the best  
3 available science. The shovelnose sturgeon are indeed related  
4 to pallid sturgeon, but there's also signs saying they are not  
5 a great stand-in for pallid sturgeon. And one of the reasons  
6 is that they have a different drift distance. They may be able  
7 to spawn in areas of the river where their larvae are not  
8 running over the existing dam and wouldn't run over the new  
9 dam.

10 And that's a critical difference that for the Service  
11 to base its conclusion on this comparison, the Service has to  
12 walk through the steps of why does this comparison make sense?  
13 What does the science say about it? Acknowledge the fact that  
14 they have -- if the different drift distances aren't a critical  
15 factor, then the Service needed to look at those drift  
16 distances and explain why, but they didn't. They didn't  
17 acknowledge the differences that could make this comparison --  
18 that does make this comparison be clearly arbitrary and  
19 unsupported by the findings in the record.

20 And so the conclusion that this project as a whole  
21 will substantially improve the likelihood of survival and  
22 recovery is resting on a series of either arbitrary conclusions  
23 or a lack of information. And to get there the Service had to  
24 reach -- you know, had to actually support its conclusion. And  
25 that is a fundamental job of the administrative law review is

1 while the Service gets deference, the facts have to be there  
2 that the Service could draw a reasonable conclusion from them.

3           So the fourth issue I wanted to raise with the  
4 Biological Opinion is the issue about whether or not -- well,  
5 the fact that the Biological Opinion is up-front that, if we  
6 build this project, the first thing we're going to do is fill  
7 in the side channel. And so adult pallid sturgeons are not  
8 going to go up the side channel during this construction  
9 period. And that means absolutely no breeding during this  
10 construction period.

11           The Biological Opinion absolutely acknowledges those  
12 are facts. The problem with the analysis is it still concluded  
13 that the project would not jeopardize the species because --  
14 basically, they had three reasons why the project overall would  
15 compensate for that loss. But what the Biological Opinion  
16 doesn't ever acknowledge is we're talking about a species  
17 that's near the end of its lives -- life. We're talking about  
18 at least for the wild population. We're talking about a very  
19 small number of individuals. And so the Service did not  
20 address that issue: What does it mean for this population?

21           THE COURT: I thought they're going to net them?

22           MS. ADAMS: There are allusions -- I assume you mean  
23 and transport them up?

24           THE COURT: That's what the argument in the Ninth  
25 Circuit was.

1 MS. ADAMS: There are allusions to that. It's not  
2 really in the record, as far as whether or not what sort of  
3 parameters are going to be applied for that, whether or not  
4 their larvae are going to survive if the river is under  
5 construction for those two to three years, even assuming some  
6 are brought upstream. It's not -- there's a few sentences in  
7 the Biological Opinion about this possibility, but it's not  
8 nailed down in the record of what that means. And so, as a  
9 result, I don't know what it means because it's not in the  
10 record.

11 And, you know, the Service's primary response is  
12 that, "Well, there's a lot of hatchery fish in the river." And  
13 there absolutely are a lot of hatchery fish in the river. The  
14 problem is two-fold. One is that the Biological Opinion didn't  
15 rely on the hatchery fish for its opinion. The Biological  
16 Opinion talks about it in terms of, "Well, if hatchery fish  
17 behave like wild fish and if they migrate up the Yellowstone  
18 and if they use the bypass channel, there's potential for  
19 reproduction." But that's not an analysis that reaches the  
20 conclusion that hatchery fish will compensate if the wild fish  
21 are unable to reproduce as a result of this project.

22 So this analysis is deficient because it didn't take  
23 into account where we are with the wild population. And to the  
24 extent it's going to rely on the hatchery fish, the analysis  
25 just isn't there.

1           So I'd like to -- unless you have more questions  
2 about the Biological Opinion, I was going to turn to the  
3 Incidental Take Statement, but I'd like to pause and see if  
4 there are questions about the Biological Opinion.

5           THE COURT: No, go ahead.

6           MS. ADAMS: Okay.

7           THE COURT: I think you covered it pretty  
8 extensively.

9           MS. ADAMS: Okay. As far as the Incidental Take  
10 Statement is concerned with the project, you know, there's a  
11 couple of standards for Incidental Take Statements that are  
12 relevant here. One is that when the agency sets a number by  
13 which, you know, take cannot be exceeded, there has to be a  
14 clear standard. The preference is for an actual number, but  
15 that is not required. A surrogate way of measuring take is  
16 absolutely allowable, but only if the surrogate measure has a  
17 causal link with the take and can also be measured and serves  
18 as an adequate trigger for reinitiating consultation.

19           So there's two issues with the Incidental Take  
20 Statement for the project, and one gets back to this issue  
21 about the larvae drifting down the river and the hazards they  
22 are going to encounter at the new weir, the old weir, and the  
23 boulder field, and also the fish screens. Although, it sounds  
24 like, I think the bigger issue, as far as I can tell from the  
25 record, is the existing weir and the new weir and the boulder

1 field.

2           And the Service concluded that it could not count the  
3 number of larvae in absolute numbers and so which, again -- so  
4 they chose a surrogate, which, again, the fact of choosing a  
5 surrogate is not the problem, but the surrogate still has to  
6 have a rational basis. And the surrogate that the Service is  
7 using is that the proportion -- they will do sampling of larvae  
8 below the weir. And if the proportion of the dead or wounded,  
9 I guess, larvae for shovelnose sturgeon and pallid sturgeon are  
10 roughly the same, then take will not be exceeded.

11           But what that means is there can be anything between  
12 zero dead and 100 dead -- or 100 percent dead, I should say.  
13 But as long as it's the same as shovelnose sturgeon proportion,  
14 then take hasn't been exceeded. And so that's not a clear  
15 standard, and it doesn't necessarily set a trigger for  
16 reconsultation.

17           And because 100 percent could die, theoretically -- I  
18 mean, we don't know. I mean, that's the problem with the  
19 surrogate. It could be anything between 0 and 100 percent, as  
20 long as it's similar to shovelnose. And it doesn't have an  
21 quick causal link with the shovelnose sturgeon larvae because,  
22 again, the differences between these species are potentially so  
23 significant that the effects of whatever number of larvae die  
24 of shovelnose sturgeon are going to have a very different  
25 effect on the population of shovelnose sturgeon, which is

1 abundant in the Yellowstone River versus the pallid sturgeon,  
2 which is just barely hanging on.

3           And so the logical link, the rational connection,  
4 between that surrogate and the actual take that's occurring is  
5 simply not there.

6           So the second issue with the Incidental Take  
7 Statement is the take of adults coming up to the dam, again,  
8 during that two- to three-year construction period for the  
9 project. And the Biological Opinion acknowledges all of them  
10 will be taken because -- not through death but because they  
11 will not be able to proceed up the river and breed because,  
12 again, the side channel is the first thing that's going to be  
13 filled.

14           And the problem there is simply that in the case of  
15 *ONRC v. Allen*, the Ninth Circuit made very clear that there has  
16 to be a trigger for reconsultation. And if a take statement  
17 allows the take of every individual that's affected by the  
18 project -- and in this case that would be every adult that goes  
19 to the dam, not every adult overall. But every adult that goes  
20 to the dam would be taken. There's not going to be any trigger  
21 for reconsultation because it allows every individual that's  
22 affected by the action to be taken. And the Ninth Circuit has  
23 made clear that that is not a lawful trigger.

24           If you don't have questions, I'll move on to your  
25 second issue, Claim 13, as you articulated at the beginning.

1 THE COURT: Go ahead.

2 MS. ADAMS: Okay. So there's been some confusion in  
3 the briefs about Claim 13 versus Claims 4 and 5. Claim 13, as  
4 you articulated it, is exactly right, that the Corps and  
5 Reclamation, in approving the Intake Project, are relying on  
6 this 2016 Biological Opinion. The fact that the Biological  
7 Opinion is unlawful means that the Corps and the Reclamation  
8 cannot rely on that unlawful Biological Opinion.

9 The federal defendants have raised the issue that  
10 plaintiffs are obligated to not just show that the Biological  
11 Opinion was unlawful but also present new information, and that  
12 is not the law. The case being cited is *Pyramid Lake*. But  
13 since that time, the Ninth Circuit has repeatedly stated that  
14 an agency violates its Substantive Section 7 duty if it relies  
15 on a Biological Opinion that is unlawful or if it presents new  
16 information that the agency should have been aware of.

17 So if the Biological Opinion is unlawful, the  
18 agency's reliance on it also violates their Substantive  
19 Section 7 duty to not proceed with a project that will violate  
20 the ESA.

21 THE COURT: And you believe that the Biological  
22 Opinion is unlawful for the reasons we've discussed so far?

23 MS. ADAMS: Correct.

24 THE COURT: So that if you rely on that, you violate  
25 your Section 7 duties under the Endangered Species Act?

1 MS. ADAMS: That's correct.

2 THE COURT: Okay. Go ahead.

3 MS. ADAMS: Okay. I'll move on to your third issue,  
4 the NEPA violation, unless you have further questions.

5 THE COURT: No.

6 MS. ADAMS: And I actually feel like we already  
7 addressed it. The key issue here is that you've got this  
8 disconnect. You've got the FPCI that says one thing, and  
9 you've got the EIS and the summary tables that muddled all of  
10 these alternatives to make them all seem like they are all  
11 going to have a major beneficial effect of increase to fish  
12 passage.

13 THE COURT: So your argument is that the federal  
14 defendants, you think, mislead the public because we have a  
15 table that seems to indicate there's an equality about the two  
16 alternatives, and then we have the text which you think more  
17 correctly discusses the differences between the alternatives?

18 MS. ADAMS: I would correct that slightly. There's  
19 nothing in the text either that really clarifies the  
20 differences between the alternatives. The only real difference  
21 that's demonstrated in the EIS is in that FPCI, which is a  
22 muddling exercise, a planning tool, that is, as this Court  
23 noted in its preliminary injunction order, difficult if not  
24 impossible for the public to understand.

25 And then instead of taking that FPCI and explaining



1 what it means for fish passage, both the narrative and the  
2 summary tables state that there will be a major beneficial  
3 effect of increased fish passage. So it's not that there's  
4 narrative in the EIS that distinguishes between these  
5 alternatives. There's not. That is the fundamental problem.

6           We highlighted the summary tables because that is the  
7 place in the EIS that the agencies chose to put side-by-side  
8 comparisons. But walking through the analysis in Chapter 4,  
9 where it's not side-by-side but it does walk through the  
10 effects of each alternative, that Chapter 4 also roughly  
11 equates the fish passage of the chances of fish passage of  
12 upstream -- I'm sorry -- upstream fish passage.

13           And, you know, in the federal defendants' briefs,  
14 they don't cite to a particular place in the EIS where there's  
15 a meaningful comparison. They cite to the entirety of  
16 Chapter 4, but it's not there. There is not the meaningful  
17 comparison.

18           And so, in that sense, it is like the Ninth Circuit  
19 case, *CBD versus BLM*, in which the information was available --  
20 within this case, in the FPCI -- then the experts opinions, the  
21 experts who commented about the project, but it's not in the  
22 EIS in a way that the public could actually understand. And  
23 it's not just buried, but it's portrayed as if they are  
24 equivalent.

25           THE COURT: So to remedy that problem, the federal

1 defendants would have to rewrite the EIS and lay out the  
2 evidence in a way that was easier to understand for the public?

3 MS. ADAMS: That's correct.

4 And I would add that this claim also implicates the  
5 Clean Water Act issue because the Corps relied on this EIS, as  
6 it's entitled to do, for its Clean Water Act analysis. And the  
7 Corps concluded that in the Clean Water Act analysis that all  
8 the alternatives have a similar scale of impact.

9 So if the agencies went back and did a new analysis  
10 in the EIS that addressed these critical -- this critical  
11 difference alone, between alternatives, that would also assist  
12 the Corps in doing the Clean Water Act analysis, in which they  
13 are required to pick the least environmentally damaging  
14 alternative unless it's impracticable, of course.

15 But the Corps in the Clean Water Act analysis also  
16 equated all of the alternatives so they could avoid doing --  
17 presumably, so they could avoid doing that actual -- you know,  
18 make that finding.

19 And so it's not just a paper-pushing exercise. There  
20 are some real world consequences here for not just NEPA but  
21 also for the Clean Water Act analysis.

22 Does the Court have further questions about NEPA or  
23 should I...

24 THE COURT: No, I understand.

25 MS. ADAMS: Okay.

1 THE COURT: That was covered in the preliminary  
2 injunction argument.

3 MS. ADAMS: And, you know, the Clean Water Act  
4 analysis, I feel like we have also addressed, but I would --

5 THE COURT: Let me just clarify something. Is it  
6 your view under the Clean Water Act that the agency was  
7 obligated to choose the least environmentally damaging  
8 practicable alternative?

9 MS. ADAMS: The standard is not about what the Corps  
10 has to choose. The standard is about whether it can approve  
11 the proposed project. So the only issue here is, was the  
12 approval of the bypass channel alternative consistent with the  
13 Clean Water Act? And this Court cannot approve the bypass  
14 channel alternative if there is a less environmentally damaging  
15 or practicable alternative.

16 THE COURT: So to evaluate this case, what was the  
17 environmentally damaging -- the least environmentally damaging  
18 one, in your view, would be the one that allowed the most  
19 passage?

20 MS. ADAMS: Well, the Clean Water Act requires the  
21 agency to address the effects on the aquatic ecosystem, which  
22 those are the effects that we're particularly concerned about.  
23 So it wouldn't be just pallid sturgeon, but it would be the  
24 aquatic ecosystem impacts, which include the pallid sturgeon.

25 THE COURT: All right. Why don't you move on to the

1 claims -- I guess we have the Fort Peck, as well as -- I  
2 believe Issue 5 has been addressed somewhat. That's Claims 4  
3 and 5, related to Claim 13, I think.

4 MS. ADAMS: Well --

5 THE COURT: Tell me the difference between Claims 4  
6 and 5 and Claim 13.

7 MS. ADAMS: Right. So Claim 13 solely addresses the  
8 Corps and the Reclamation's reliance on the Biological Opinion  
9 to approve the new project, and that is it. Claims 4 and 5  
10 address Reclamation's operation of Intake Dam, which is  
11 jeopardizing and unlawfully taking the species.

12 You only get to Claims 4 and 5 if the project is set  
13 aside, because the project is, in the agency's view, intended  
14 to --

15 THE COURT: So 4 and 5 would be your challenge to the  
16 existing operation?

17 MS. ADAMS: Correct.

18 THE COURT: Okay.

19 MS. ADAMS: And the reason the Biological Opinion  
20 does not provide the Section 7 coverage or the Section 9  
21 Incidental Take Statement is that the Biological Opinion -- its  
22 conclusion about jeopardy or no jeopardy looks at the project  
23 as a whole. And so while it considers the short-term impacts  
24 in some respects for the next two to three years, the  
25 no-jeopardy conclusion is premised on the idea that things will

1 get better after those two to three years.

2           Claims 4 and 5 are intended to address what happens  
3 if the project is not -- you know, has been set aside? The  
4 Reclamation cannot simply continue with what it's been doing,  
5 which it's been doing for decades in violation of the ESA.  
6 Reclamation has to come up with some plan to address those  
7 violations.

8           THE COURT: All right. Now, on Tuesday there was a  
9 filing with the court of the executive summary, as well as a  
10 letter from the Fish and Wildlife Service to the Corps of  
11 Engineers regarding, I believe, a new Biological Opinion issued  
12 by the Fish and Wildlife Service.

13           Does that new opinion affect this claim, Claims 4  
14 and 5?

15           MS. ADAMS: No. So that Biological Opinion solely  
16 addresses the Missouri River Dam operations.

17           THE COURT: Fort Peck.

18           MS. ADAMS: Fort Peck.

19           THE COURT: Okay. So anything else on Claims 4  
20 and 5?

21           MS. ADAMS: No, Your Honor.

22           THE COURT: So, finally, finish up with the sixth  
23 issue, which are Claims 1 and 2, which I believe are the  
24 Fort Peck operations.

25           MS. ADAMS: Right. So the Corps has been operating

1 Fort Peck in a way that jeopardizes the species and takes the  
2 species in violation of the Biological Opinion from 2003.

3           The filing that came in on Tuesday about the new  
4 Biological Opinion and ITS federal defendants assert that moots  
5 our claims. It does not moot our claims. The Section 7  
6 substantive claim against Fort Peck Dam operations is not  
7 mooted by a new Biological Opinion. As we've discussed, action  
8 agency has a separate -- Section 7, substantive duty, than the  
9 Biological Opinion. I would characterize as evidence of their  
10 compliance or noncompliance with that Section 7 duty. But the  
11 existence of a Biological Opinion is not enough to moot that  
12 claim.

13           There still is a question of whether or not that  
14 Biological Opinion addresses these ongoing violations in a way  
15 that remedies that Section 7 problem.

16           And the same issue with Section 9. As far as I -- I  
17 want to be careful here because our clients have not had time  
18 to review the Biological Opinion or Incidental Take Statement,  
19 but a cursory review suggests that --

20           THE COURT: Did you have the actual Biological  
21 Opinion?

22           MS. ADAMS: Last week.

23           THE COURT: Okay. All I have is the executive  
24 summary and the cover letter.

25           MS. ADAMS: Right. Our clients found it on the

1 internet last week. So our clients have seen it over the past  
2 week, but this is a complex document that does not appear to  
3 change Fort Peck operations, at least in a mandatory way. And  
4 it is not clear to my clients --

5 THE COURT: So we're talking Fort Peck operations,  
6 talking about whether the timing of their discharges and the  
7 amounts of the discharge, in conjunction with Fort Peck and  
8 perhaps Lake Sacajawea, are not sufficient to provide the  
9 ability of sturgeon to spawn there?

10 MS. ADAMS: That is exactly right. Right.

11 And it is not clear to my clients that -- I mean, the  
12 new Biological Opinion concludes that the same operations that  
13 once jeopardized the species now do not cause jeopardy to the  
14 species. And there's an Incidental Take Statement, but it is  
15 not at all clear to my client that it even addresses the  
16 takings that we have alleged in Claim 2.

17 THE COURT: All right. So you think that an analysis  
18 of this issue would be premature?

19 MS. ADAMS: Correct.

20 THE COURT: Okay.

21 MS. ADAMS: And we would request not very much -- you  
22 know, some short amount of time to read the Biological Opinion.

23 THE COURT: All right. I understand. Anything else  
24 to address today?

25 MS. ADAMS: No, thank you, Your Honor.

1           THE COURT: All right. Thank you, Ms. Adams. You  
2 may be seated.

3           Mr. Howell, we're going to take a break before we  
4 move on.

5           Members of the public, we're going to have quite a  
6 challenge here. If you go out the door in the back of the  
7 courtroom and turn to your right, there's bathrooms, men and  
8 women's bathrooms. I believe there's only one on this floor.

9           And then other bathrooms are on the first floor,  
10 Madam Clerk?

11          THE CLERK: There's some on the second too.

12          THE COURT: Public bathrooms? Okay.

13          You can take the staircase or the elevators to the  
14 second floor as well, and then there are some on the first  
15 floor.

16          We're going to start back right around 3:00 o'clock.  
17 Maybe let the lawyers out first to use the bathrooms. We're  
18 going to restart at about 3:00 o'clock.

19          Please come back in as you are ready. If you're not  
20 here when we start, please feel free to file back into the  
21 seats you had, and we'll get started. I know it's warm in  
22 here. I'm the only one wearing a blanket. So we'll get this  
23 done as best we can. So we'll be in recess till about 3:00  
24 o'clock.

25          Counsel, as soon as you're ready, have the clerk let



1 me know. Thank you.

2 (Proceedings were in recess from 2:52 p.m. until 3:04 p.m.)

3 THE COURT: Please be seated.

4 We're not accustom to these kinds of crowds for our  
5 court proceedings. So I'll give everyone a chance to settle  
6 in.

7 Hold on, Mr. Howell, please.

8 (Public settled into their seats.)

9 THE COURT: All right. Mr. Howell, are you ready to  
10 proceed, sir?

11 MR. HOWELL: I am, thank you, Your Honor.

12 THE COURT: Mr. Howell, to be fair, let me start the  
13 same way I did with Ms. Adams and ask you some questions about  
14 the Ninth Circuit's order.

15 Madam Clerk, would you pull up that document, again,  
16 please. Let's start on page 4, top of page 4.

17 Mr. Howell, the Ninth Circuit discusses the fact that  
18 I made a mistake, that I flipped the burden of proof and  
19 required the Corps to prove that the proposed project would  
20 allow successful pallid sturgeon passage around the weir. And  
21 the Ninth Circuit states that "the Corps had no burden to prove  
22 that the proposed project would improve the plight of the  
23 pallid sturgeon over the status quo." Instead, the plaintiffs  
24 "had the burden of proving some irreparable harm that would  
25 result from the construction of the proposed project.

1 Is that the correct analysis?

2 MR. HOWELL: So, Your Honor, I agree with Ms. Adams,  
3 that this is the irreparable harm analysis. And I do agree  
4 that that is the correct analysis under irreparable harm.

5 THE COURT: Okay.

6 MR. HOWELL: But with respect --

7 THE COURT: And irreparable harm relates to the  
8 issuance of -- whether to issue the preliminary injunction?

9 MR. MARINELLI: It's one prong of the preliminary  
10 injunction.

11 THE COURT: Right. But that's the analysis that  
12 forms part of the preliminary junction determination, not  
13 summary judgment?

14 MR. MARINELLI: That's what this sentence is speaking  
15 to.

16 THE COURT: Right. All right. I'm not trying to  
17 hook you. I just want to make sure we're --

18 So with regard to the summary judgment, that's not  
19 really relevant?

20 MR. HOWELL: Pardon?

21 THE COURT: With regard to summary judgment, those  
22 statements by the Ninth Circuit are not really relevant?

23 MR. HOWELL: Correct.

24 THE COURT: Okay. Let's move on then.

25 On the bottom of page 4, Madam Clerk.

1 "Likelihood of success on the merits," another  
2 preliminary injunction factor, but the court makes a statement  
3 about the APA standard.

4 Do you agree that's the APA standard?

5 MR. HOWELL: I do, Your Honor.

6 THE COURT: All right. Fine.

7 Go on to the ESA on page 5. At the bottom of page 5,  
8 Mr. Howell, they're talking about the Incidental Take Statement  
9 and identification of the recovery goal, carrying over to  
10 page 6, that analysis "may sometimes be needed to explain the  
11 reasoned basis for an agency's no-jeopardy finding." It cites  
12 to -- the bottom of page 5, Madam Clerk -- the *Bartel* decision,  
13 as well as on page 6, the *National Wildlife Federation*. It  
14 says, "Such analyses were not required here."

15 As you know, in my preliminary injunction order, I  
16 cited to those two cases as precedence to support that kind of  
17 analyses. They say that analyses were not required here.

18 Do you agree that's the appropriate standard?

19 MR. HOWELL: I do, Your Honor.

20 THE COURT: You do. Okay.

21 Why don't *National Wildlife Federation* and *Bartel*  
22 apply in these circumstances with regard to summary judgment?

23 MR. HOWELL: Why do they not apply?

24 THE COURT: Right. That's what the Ninth Circuit  
25 said that they don't apply -- or that such analyses were not

1 required here.

2 MR. HOWELL: So with respect to *Bartel*, it's a  
3 completely different situation than what we have here,  
4 factually.

5 THE COURT: How so?

6 MR. HOWELL: The agency actually did analyze the fact  
7 that is causing take in the Biological Opinion.

8 THE COURT: In *Bartel* or here?

9 MR. HOWELL: In here.

10 THE COURT: Okay.

11 MR. HOWELL: And so this issue gets to the  
12 plaintiffs' argument what we call sequencing. Under the  
13 Endangered Species Act, Fish and Wildlife Service has to  
14 identify direct and indirect effects of the project. One of  
15 those effects is post-construction. What's the effect of  
16 post-construction after they've build it?

17 And they did recognize in the Biological Opinion that  
18 pallid sturgeon would swim up to the bypass channel and to a  
19 new weir, and some of them would not pass -- would choose not  
20 to pass. That's an adverse effect. It is also identified as a  
21 take.

22 THE COURT: 59 percent wouldn't.

23 MR. HOWELL: So I want to be real clear on this  
24 because the plaintiffs muddled this completely, and I think  
25 they -- they are doing it to confuse the Court. 59 percent is

1 a surrogate trigger that was developed after the analysis was  
2 performed in the Biological Opinion.

3 In the Biological Opinion, what the Service said is  
4 that some of these fish are going to come up, and they are not  
5 going to pass. They think somewhere between 41 percent and  
6 85 percent are going to pass. So that analysis is in the  
7 Biological Opinion.

8 THE COURT: 41 to 85 percent.

9 MR. HOWELL: That's how many they think are going to  
10 pass.

11 THE COURT: So if it's 41, that means 59 percent  
12 won't.

13 MR. HOWELL: That's true, potentially.

14 THE COURT: So how is that muddling?

15 MR. HOWELL: So the sequence in the statute is they  
16 make that finding, and they reach a no-jeopardy conclusion.  
17 Then they go over and develop the Incidental Take Statement.  
18 That Incidental Take Statement formulated the 59 percent  
19 surrogate. They said, "If more than 59 percent of these  
20 motivated fish come up to the bypass channel and do not pass,  
21 you have exceeded your Incidental Take Statement trigger, and  
22 you reinitiate consultation."

23 But the important part is what the plaintiffs are  
24 arguing -- what they are saying is that there needs to be a  
25 subsequent analysis; that the Biological Opinion didn't analyze

1 this; you authorized 59 percent take; and, therefore, you need  
2 to do an analysis. Well, the analysis was already done in the  
3 Biological Opinion. They just didn't formulate the trigger.

4           And that's exactly -- I mean, this is the same  
5 argument that was up at the Ninth Circuit. It's the same  
6 record, same Biological Opinion, same exact arguments that we  
7 made in that brief, same arguments that came up on the oral  
8 argument. And the Ninth Circuit said, "No, you don't have to,  
9 as a matter of law, do a secondary analysis on this 59 percent  
10 surrogate trigger."

11           So that's what the muddling is about. The Service  
12 did the analysis, and the Biological Opinion reached a  
13 no-jeopardy conclusion.

14           Now, *Bartel*, that's not what happened there. There  
15 was this additive that was never analyzed in the Biological  
16 Opinion. So, factually, it's distinct. Legally, it's distinct  
17 now that we have this from the Ninth Circuit.

18           THE COURT: Well, *Bartel*, this additive -- *Bartel*, I  
19 thought there was a -- San Diego did a comprehensive plan.  
20 There was going to be destruction of this vernal pool habitat,  
21 and then up to 12 percent of it would be lost. The question is  
22 whether that would allow the species to recover. Right?

23           MR. HOWELL: So, I mean, those were the general facts  
24 in *Bartel*.

25           THE COURT: So how is that different than here?

1 MR. HOWELL: They never did the analysis on the  
2 12 percent in that Biological Opinion. Here, they did do the  
3 analysis on the post-construction effect. That is absolutely  
4 the finding.

5 THE COURT: All right. And then let's move on to the  
6 other case, the *National Wildlife Federation*, whether the  
7 defendants have a duty to talk about recovery. What is needed  
8 to support a no jeopardy?

9 MR. HOWELL: So *NWF I* -- and this is at 524 F.3d 936.  
10 The relevant quote is "Will not appreciably reduce the odds of  
11 success for future recovery planning by tipping a listed  
12 species too far into danger." That's what *NWF* held.

13 You had an action that was causing a fairly  
14 significant adverse effect to the species. You had species  
15 that were both endangered and threatened in that case. And the  
16 question was does the mitigation offset that adverse effect  
17 enough?

18 We don't have anything remotely close to that going  
19 on here. First of all, there's no question that pallid  
20 sturgeon will survive. There are plenty of pallid sturgeon in  
21 the system. I think within the next five years you're going to  
22 have 18,000. I think the total number is somewhere around  
23 43,000.

24 THE COURT: And those are hatchery fish, and we don't  
25 know whether they will spawn.

1 MR. HOWELL: Well, the fact that they are hatchery  
2 fish or wild doesn't make any difference under the ESA. Zero  
3 difference. They are not -- the United States Fish and  
4 Wildlife Service has not --

5 THE COURT: Wait a minute. Wait a minute. If we  
6 could just breed hatchery fish all we want, why were they  
7 declared an engaged species in 1993? And why have we been  
8 looking to revise the operation of the Fort Peck Dam or intake?

9 MR. HOWELL: Well, so back in 1990, there were no  
10 hatchery programs. They were at critically low numbers.

11 THE COURT: Why don't we just produce hatchery fish  
12 and call it good and go home? What's the point of this  
13 project?

14 MR. HOWELL: Well, I think the wild component is  
15 important to the Fish and Wildlife Service. It's dwindling.

16 But, I mean, the question they were getting in *NWF*,  
17 is the species going to survive? Is it going to preclude --

18 THE COURT: Can't they raise salmon in hatcheries  
19 too?

20 MR. HOWELL: They do. But the National Marine  
21 Fisheries Service treats salmon differently. They actually  
22 delineate between hatchery and wild fish. There's a whole  
23 hatchery policy that was litigated in the Ninth Circuit. Fish  
24 and Wildlife Service does not make that distinction between  
25 hatchery and wild fish. So for these purposes, a pallid



1 sturgeon is a pallid sturgeon, whether it's wild or hatchery.  
2 That's Fish and Wildlife Service's position on it.

3 THE COURT: Well, that doesn't make any sense. Why  
4 are we going through this exercise? Why worry about the Intake  
5 Dam if we've got a butch of pallid sturgeon larvae growing in  
6 hatcheries?

7 MR. HOWELL: So we want them to spawn and reproduce  
8 on their own.

9 THE COURT: But the ESA doesn't require it. We just  
10 want them to do that?

11 MR. HOWELL: I think that's a more complicated  
12 question.

13 THE COURT: Well, it seems like a very important  
14 question. Why are we gathered here for the 15th time if we  
15 could just raise hatchery pallid sturgeon?

16 MR. HOWELL: Because the agencies are proposing a  
17 project to allow for passage that is going to both serve wild  
18 and hatchery fish.

19 THE COURT: Well, the agencies are proposing a  
20 project, so what? We have hatchery fish all we need. Why  
21 would we even care about the project?

22 MR. HOWELL: Because it's a listed --

23 THE COURT: With regard to ESA? We have ESA claims.  
24 I haven't seen the defense saying, "Well, don't worry about it.  
25 We don't have to -- we have hatchery fish." You said for ESA

1 purposes, it doesn't matter if they are wild or hatchery.

2 MR. HOWELL: That's correct.

3 So, Your Honor, they are still listed under the

4 Endangered Species Act. It still triggers the act.

5 Reclamation and the Corps have to act appropriately with

6 respect to those listed fish. It's not like it just goes away

7 just because there are hatchery fish.

8 THE COURT: Well, you're telling me you've got plenty

9 of them. You've 20,000 you said.

10 MR. HOWELL: I believe the total number is somewhere

11 around 43,000. There's more today than there probably

12 historically was.

13 THE COURT: Go ahead.

14 MR. HOWELL: So I want to come back to this Ninth

15 Circuit decision. The plaintiffs in their sur-reply and here

16 today said this Court can ignore that opinion. I think their

17 words were, in their sur-reply, "Neither controlling nor

18 persuasive."

19 THE COURT: Well, it is not published. I understand

20 their argument. It's not a published opinion. It's a

21 preliminary injunction. We talked about that before.

22 I am asking you what parts of it that you think do

23 control here and what parts relate solely to the preliminary

24 injunction and don't relate to the summary judgment arguments.

25 MR. HOWELL: Okay. So the parts that I would say

1 impact the summary judgment, standard review.

2 THE COURT: Of the APA?

3 MR. HOWELL: It's a legal issue. It said this Court  
4 erred in failing to apply a differential standard of review.  
5 That's directly relevant and, I would say, controlling on this  
6 Court as law of the case because it's a pure legal issue.

7 THE COURT: Differential to what decision? To what  
8 part? To the whole thing?

9 MR. HOWELL: Biological Opinion, record of decision,  
10 EIS, Clean Water Act finding.

11 THE COURT: Why don't -- you still haven't told me  
12 why *National Wildlife Federation* doesn't apply. You said we  
13 have hatchery fish available.

14 MR. HOWELL: So that was one component. So survival  
15 is not an issue. So in that case, what they said is you have  
16 to address recovery, recovery of the species in some capacity.  
17 "Recovery planning" is actually the words that they used.

18 THE COURT: Recovery of wild pallid sturgeon or  
19 hatchery pallid sturgeon? Or does it matter?

20 MR. HOWELL: Both. It does not matter.

21 THE COURT: But this is the first I've ever heard of  
22 this argument about the hatchery fish can displace the wild  
23 fish for purposes of the Endangered Species Act analysis.

24 MR. HOWELL: They are both listed under the act. The  
25 plaintiffs are the ones that are trying to draw a distinction

1 between hatchery and wild fish. And we've briefed this up in  
2 our briefs. There is no distinction. The ESA specifically  
3 contemplates artificial production. The Ninth Circuit has  
4 looked at this issue in *Trout Unlimited versus Lohn* and has  
5 upheld this hatchery policy.

6 Hatchery fish, the fact that they are raised in a  
7 hatchery, doesn't somehow dispel them of ESA protection.  
8 That's black letter law in the Ninth Circuit. So when Fish and  
9 Wildlife Service listed the pallid sturgeon, it didn't  
10 differentiate between the wild or hatchery fish. So if they  
11 are --

12 THE COURT: Mr. Howell, this is the third or fourth  
13 hearing that we have had --

14 MR. HOWELL: That's correct.

15 THE COURT: -- and not once have you raised this  
16 issue. Not in one of the hearings we've had have you said, "It  
17 doesn't matter if they are hatchery fish or wild fish, they  
18 count toward the total, and we've got plenty of pallid  
19 sturgeon."

20 MR. HOWELL: Your Honor, that's not correct. I did  
21 raise that at the second preliminary injunction hearing. We've  
22 had this argument.

23 THE COURT: I don't recall. Go ahead. Why don't you  
24 enlighten me about it.

25 MR. HOWELL: So, *NWF*, you have an action that's

1 causing a significant adverse effect with a little bit of  
2 mitigation. Is that sufficient enough for recovery?

3           Here, we have an entirely factually different  
4 scenario. You have an action that is identified in the  
5 recovery plan. This is a High Priority 1 action in the  
6 recovery plan under Section 4 of the ESA. The agency is  
7 proposing to implement that recovery plan action. The analysis  
8 builds on that recovery plan and says, "Not only is this  
9 consistent, it is implementing a high priority recovery  
10 action."

11           THE COURT: Who has the burden of demonstrating  
12 whether the recovery plan will work?

13           MR. HOWELL: The recovery plan is not binding. But  
14 in the Biological Opinion, the analysis -- and this goes back  
15 to *NWF* -- it was completely reasonable for Fish and Wildlife to  
16 say, "This is not going to preclude recovery. It's not going  
17 to inhibit the recovery because it's actually implementing an  
18 action in the recovery plan." And, therefore, they adequately  
19 addressed recovery.

20           And I think that's why the Ninth Circuit said, "You  
21 don't even need to do that in this case because the factual  
22 circumstances are so unique that the agency is trying to do  
23 something with a net benefit for the recovery of the species."

24           THE COURT: Let me interrupt you, Mr. Howell. Let's  
25 go back to the beginning. In 1990, this species was listed.

1 Correct?

2 MR. HOWELL: Correct.

3 THE COURT: All right. Since 1990, the federal  
4 defendants first tried to tinker with the operation of the Fort  
5 Peck Dam to increase spawning. That effort failed. Right?

6 MR. HOWELL: I think the jury is still out. But,  
7 yeah, more or less.

8 THE COURT: Okay. Well, I understand.

9 Then the next option was looking at putting in a  
10 concrete weir with ramps at intake for the pallid sturgeon to  
11 go up the ramps and clear the new weir. And it was determined  
12 that wouldn't work because the fish tipped over. They couldn't  
13 swim in that kind of current, and that was discarded as an  
14 option to try to increase passage.

15 So now we have this -- you agree with that as well?

16 MR. HOWELL: I agree that there was a rock ramp  
17 alternative. I disagree -- there are other reasons why it was  
18 disregarded as an alternative.

19 THE COURT: Besides the fact it wouldn't work?

20 MR. HOWELL: Well, I -- they didn't know -- they  
21 didn't know if it was going to work.

22 THE COURT: Okay. So they didn't know that. That  
23 was why. They did not know whether it would work.

24 That's your position?

25 MR. HOWELL: Well, there was also the cost --

1 THE COURT: Okay.

2 MR. HOWELL: -- was significantly more than they  
3 anticipated.

4 THE COURT: All right.

5 MR. HOWELL: And, at that time, new information came  
6 up that demonstrated that pallid sturgeon were using side  
7 channels.

8 THE COURT: All right. So now we have this new  
9 option to put in a concrete weir, obliterate the existing side  
10 channel, and build a new side channel. Correct?

11 MR. HOWELL: Correct.

12 THE COURT: All right. Who has the burden to  
13 demonstrate whether that side channel will work?

14 MR. HOWELL: So the burden under the ESA is that the  
15 Corps and Reclamation in doing this cannot appreciably reduce  
16 the survival and recovery of the species -- appreciably reduce.

17 THE COURT: Right. Will that bypass channel increase  
18 the passage?

19 MR. HOWELL: Absolutely.

20 THE COURT: Absolutely?

21 MR. HOWELL: That's what Fish and Wildlife Service  
22 found in the Biological Opinion.

23 THE COURT: Based on what? Point to the record where  
24 you think they made that determination.

25 MR. HOWELL: So going back to the analysis, they

1 believe that at least -- that somewhere between 41 percent and  
2 85 percent of the pallid sturgeon will use this bypass channel.  
3 That's significantly more than the handful of fish that are  
4 using the natural channel right now. That is a significant  
5 increase.

6           So in the next couple years there are approximately,  
7 I think, 18,000 fish that are going to be encountering and  
8 coming up the Yellowstone. Of those fish -- and I forget the  
9 numbers. They are in my reply brief. If you'd give me a  
10 moment.

11           THE COURT: Is that 18,000 hatchery fish that are  
12 maturing and reaching the age where they are going to spawn?

13           MR. HOWELL: Correct.

14           And so far we have seen evidence of hatchery fish  
15 exhibiting spawning behavior.

16           THE COURT: What evidence do we have of hatchery fish  
17 exhibiting spawning behavior?

18           MR. HOWELL: Well, we have seen hatchery fish  
19 actually -- and this goes back to the translocation. We had a  
20 trap-and-haul in place from this Biological Opinion. One of  
21 those hatchery fish actually went up into the Powder River and  
22 spawned -- well, presumably spawned. But it exhibited that  
23 spawning behavior way up into the Powder River.

24           You have other hatchery fish coming up to the weir,  
25 the existing weir, that can't get by that's exhibiting spawning



1 behavior. Those are hatchery fish. And that's in the  
2 Biological Opinion.

3 THE COURT: Can you give me citations for that?

4 MR. HOWELL: Yes. And this issue is fully briefed in  
5 the pleadings. There is a --

6 THE COURT: Is this in your brief?

7 MR. HOWELL: It is in my brief.

8 THE COURT: All right. Which brief?

9 MR. HOWELL: Well, both briefs, the opening and the  
10 reply.

11 THE COURT: All right. I'll look at the cites in the  
12 briefs.

13 MR. HOWELL: If I may, this is in the conclusion of  
14 the Biological Opinion. This is BOR0063: "Thousands of  
15 hatchery fish produced from wild stock are present in the  
16 actuary and will be reaching sexual maturity in the next few  
17 years and on into the next decade. In fact, this number of  
18 fish may represent a population larger than ever historically  
19 occurred in the Missouri and Yellowstone River near intake  
20 diversion dam. As this large cohort of pallid sturgeon mature,  
21 they will naturally seek out spawning opportunities. Hatchery  
22 fish of spawning age have already been detected at the intake  
23 diversion dam."

24 And, like I said, this is briefed in our -- it's all  
25 in our briefs.

1 THE COURT: All right. Anything else with regard to  
2 the ESA claim in the Ninth Circuit order before we go on to  
3 NEPA and the Clean Water Act claims?

4 MR. HOWELL: I do have general comments about the  
5 opinion, but we can move on to the NEPA claim.

6 THE COURT: All right. So, as you know, the Ninth  
7 Circuit determined that my analysis did not support an  
8 arbitrary and capricious finding under the differential  
9 standard in *Center for Biological Diversity*, due to the fact  
10 that the federal defendants' analysis demonstrated the  
11 differing environment consequences as the alternative.

12 That's sufficient, you believe? And you think that's  
13 controlling for summary judgment purposes as well?

14 MR. HOWELL: So I think it's absolutely persuasive.  
15 It's certainly relevant. And here's the issue, Your Honor:  
16 This wasn't some expedited preliminary injunction. This wasn't  
17 a TRO that we were doing over the weekend, and then we had  
18 some, you know, 12-week trial like there was in the *Stormans*  
19 case. We had a motion for dissolution of injunction, fully  
20 briefed hearing decision. We had second preliminary  
21 injunction, fully briefed hearing. We weren't doing this on an  
22 expedited basis. The record, the decision documents, the EIS,  
23 was presented to Ninth Circuit. It's the same one that was  
24 presented to this Court: motion for dissolution, second  
25 preliminary injunction. It's the same document that's in front

1 of this Court right now. There's nothing new.

2 So whether it's law of the case or not -- I mean, I  
3 think it's intellectually interesting. But as a practical  
4 matter, there's been no further factual development. The  
5 arguments are identical. And we know what the Ninth Circuit  
6 thinks about that factual record applying the law.

7 So when the plaintiffs are up here saying, "It  
8 doesn't matter," it's wishful thinking. It does matter.  
9 There's nothing new. It was their burden to put something new  
10 in front of the Court. You know, the factual record hasn't  
11 been any further developed. There's been no intervening case  
12 law. They didn't cite to anything new. So how can the result  
13 be different?

14 Now, whether it's controlling or not, it doesn't  
15 matter. It's the same result.

16 THE COURT: All right. Let's turn now to the Clean  
17 Water Act claim? This is the language regarding practicable,  
18 impractical. And we were talking about up-front cost or  
19 operation and maintenance cost.

20 Let's talk first, in the analysis by the federal  
21 defendants, does that relate to the up-front cost or the  
22 operation and maintenance cost?

23 MR. HOWELL: You know, Your Honor, I'm going to have  
24 to defer to my colleague, Mr. Levin, on the Clean Water Act.  
25 Can we come back to that question?

1 THE COURT: All right. We'll come back to that  
2 later.

3 Why don't you go back, then, and discuss the summary  
4 judgment claims that we set out at the beginning of the  
5 hearing.

6 MR. HOWELL: So I do think the standard of review is  
7 controlling on this Court. That's a legal issue. Now, ESA,  
8 NEPA, Clean Water Act, like I said before, there's been no  
9 further factual development. There's no intervening case law  
10 on this. It's the same thing that the Ninth Circuit was  
11 looking at.

12 And I think, at that argument, one thing that was  
13 instructive, at one point Judge Hurwitz was kind of maybe  
14 musing. And he said, "Well" -- and I think this is at minute,  
15 like, 737 to 835. He says, "Well, I don't think there's  
16 anything left to try here."

17 And the government's attorney said, you know, "If you  
18 apply the correct differential standard of review, we agree."

19 I think it was a rhetorical question, but I think  
20 it's instructive because we're in a little different situation  
21 than the *Stormans case* or even the *Ranchers Cattlemen* case.  
22 You know, *Ranchers Cattlemen* was similar to this, but we have  
23 extra evidence trying to come into that case. Granted, it  
24 didn't end up coming in, but there was an attempt for further  
25 factual development.

1           Here, there's been no attempt for further factual  
2 development. I mean, the plaintiffs could have -- they could  
3 have cited something else. They could have made a new  
4 argument. They chose not to.

5           THE COURT: Well, in *Ranchers Cattlemen*, to be fair,  
6 the district court said, "Gosh, my hands are tied. Sorry. The  
7 Ninth Circuit reviewed that decision and said, 'No, as a matter  
8 of fact, you should have analyzed the law and the facts at  
9 length. You're just relying on the decision of the Ninth  
10 Circuit in reversing the preliminary injunction.'"

11           MR. HOWELL: I do agree. And one of the issues was  
12 that there was an issue about whether further factual  
13 development was appropriate or not.

14           THE COURT: There was no further development, though.

15           MR. HOWELL: They ended up concluding that there was  
16 not.

17           And, yes, I do agree with you, Your Honor. They  
18 faulted the district court for saying, "My hands are tied."  
19 But they did review it de novo.

20           THE COURT: So why are my hands tied or not tied?

21           MR. HOWELL: Well, I'm not saying that -- I mean, I  
22 am saying that they are tied with respect to the standard of  
23 review. I think that's a pure legal issue.

24           THE COURT: Isn't that what -- okay, standard of  
25 review, fine. That's a differential. Everyone agrees under

1 the APA it's a differential standard of review. The decision  
2 of the agency has to be arbitrary and capricious and not  
3 supported by the facts, or whatever the --

4 MR. HOWELL: I think on ESA, NEPA, Clean Water Act  
5 it's a closer call. But, I mean, think about the standard that  
6 was being utilized in the Ninth Circuit. It was substantial  
7 likelihood of success on the merits, an abuse of discretion  
8 standard, whether there was a likelihood of success. They  
9 reviewed the same record, the same legal arguments, had a  
10 hearing, and they arrived at a result, and they said, "There's  
11 no likelihood of success on the merits."

12 The plaintiffs here today, they have a higher burden.  
13 It's not likelihood of success. It is success. They have to  
14 demonstrate that they can win. But we have this Ninth Circuit  
15 opinion saying, "On these claims, there's not even a likelihood  
16 of success."

17 So, you know, whether your hands are tied or not, you  
18 know, like I said, it's an interesting issue. But, practically  
19 speaking, we know where the Ninth Circuit stands on this.

20 THE COURT: Well, in reviewing the Ninth Circuit  
21 argument -- and I don't recall any discussion about these  
22 hatchery fish, any discussion that it doesn't matter how many  
23 wild fish pass up weir. We have all of these hatchery fish.  
24 That wasn't part of the Ninth Circuit discussion.

25 MR. HOWELL: I can't recall, Your Honor.

1 THE COURT: Were you there?

2 MR. HOWELL: I was.

3 THE COURT: Okay. I have reviewed the video of the  
4 argument several times trying to understand the court's  
5 reasoning. There's no discussion about the hatchery fish being  
6 equal to the wild fish for purposes of the ESA analysis, and  
7 that it doesn't matter whether these fish can clear the weir or  
8 not. We've got plenty of them.

9 MR. HOWELL: I'm sorry?

10 THE COURT: Why wasn't that argument presented to the  
11 Ninth Circuit? I'm still kind of stunned by the argument made  
12 here about that.

13 MR. HOWELL: So I guess -- and maybe we're talking  
14 past each other. Hatchery fish are listed under the ESA. They  
15 are taken into account in the Biological Opinion. Fish and  
16 Wildlife, in both Biological Opinions, addresses the issue of  
17 hatchery fish. We have briefed this up. We briefed this up to  
18 you in the second preliminary injunction. We had this argument  
19 about, you know, whether we could consider hatchery fish. It  
20 was definitely part of the record that went up to the Ninth  
21 Circuit.

22 THE COURT: All right. Let's move on.

23 Let's go back, then, with regard to the Ninth Circuit  
24 on the NEPA and CWA claims. Let's focus on those first and  
25 then on the ESA claims.

1 MR. HOWELL: So I have nothing else to add to those  
2 issues, unless --

3 THE COURT: Okay. Your colleague will address those?

4 MR. HOWELL: Yes.

5 THE COURT: Okay. Go back to the ESA claims, then,  
6 please.

7 MR. HOWELL: Okay. So switching gear, going back, so  
8 this is Claim 12, whether the Biological Opinion is arbitrary  
9 and capricious.

10 We already discussed this about the statutory  
11 sequencing, so I am not going to repeat that. I do -- bear  
12 with me because I was a little bit frustrated listening to  
13 argument earlier and the repeated statements that there's  
14 simply nothing in the BiOp that analyze this.

15 I would point the Court to Administrative Record 58,  
16 59, 50, 62, 25, and 64. Those are the pages in the Biological  
17 Opinion that analyze the post-construction of fact of some  
18 pallid sturgeon not proceeding up the bypass channel.

19 And I would just like to read this. This is from  
20 Administrative Record BOR58 through 59: "After the replacement  
21 weir and bypass channel are complete, spawning adult pallid  
22 sturgeon will have the opportunity to passage every year for  
23 the entire spawning period around the Intake Diversion Dam.  
24 Some percentage of the spawning adults at the weir will not  
25 pass above using the bypass channel." They're identifying the



1 adverse effect.

2           Back to the quote, "Others are likely to be  
3 temporarily delayed at the weir as they seek and find the  
4 bypass channel to move above and below the weir. Although  
5 there may be adverse effects to sturgeon from temporary delays  
6 at the weir or not passing, there will be a considerable net  
7 gain for sturgeon that do pass because of access to 162 miles  
8 of river upstream of the Intake Diversion Dam via the new  
9 bypass channel." That's just one example.

10           So when plaintiffs' counsel says, "There's nothing in  
11 the BiOp," that's not accurate. There's an analysis in the  
12 BiOp discussing both the adverse and beneficial effects from  
13 the post-construction project.

14           Switching to whether you need to analyze recovery,  
15 putting aside -- and a couple things. To be clear, the  
16 plaintiffs, they talk about analyzing recovery. Recovery was  
17 analyzed in this Biological Opinion. It found that this  
18 proposed action was going to promote the recovery of the  
19 species. We're not talking about appreciable reduction. We're  
20 talking about an increase in the likelihood of recovery.

21           So the regulatory standard: Is there an appreciable  
22 reduction? There's no reduction here. Fish and Wildlife  
23 Service in their expertise thinks that there is going to be a  
24 substantial benefit to the recovery of a species, and that  
25 makes sense because it's in the recovery plan.

1           So this is just a completely factually different  
2 scenario. And their argument is that it doesn't go far enough  
3 to promote recovery. That's not the standard. They are  
4 leading this Court down a path, like they did with the second  
5 preliminary injunction. It's just not accurate.

6           So the cases, Counsel talked about the Ninth Circuit  
7 cases. The cases I would ask the Court to look at: *Cascadia*  
8 *Wildlands v. Thrailkill*, 806 F.3d at 1244. In that case, there  
9 was a dispute over the jeopardy analysis, whether the analysis  
10 engaged on the recovery prong enough. And what the Ninth  
11 Circuit said is that because this action was consistent with  
12 the recovery plan and Fish and Wildlife Service made that  
13 consistency finding, that was good enough. It was nearly  
14 consistent with the recovery plan, not that it was actually  
15 implementing an identified action in the recovery plan. So  
16 *Cascadia Wildlands*, it's very on point.

17           *Center for Biological Diversity*, 807 F.3d at 1051 to  
18 52, that's another one. These are cases that are looking at  
19 whether the -- you know, it presents an issue of whether the  
20 agency is doing enough. And on both of those cases the Ninth  
21 Circuit said, "Yeah, the recovery analysis is good."

22           So I think this is why the Ninth Circuit said, "You  
23 don't even need to do it." That's what they said. And it  
24 makes sense because if you are implementing a recovery action,  
25 what analysis do you do? I mean, plaintiffs are looking for a

1 benchmark, a recovery benchmark. If you want to call it that,  
2 that benchmark is an identification of the action in the  
3 recovery plan. That's the benchmark. The proposed project is  
4 to implement that benchmark. So how is that precluding  
5 recovery? It just doesn't make any sense.

6 And this case is different than any case I've ever  
7 handled because there's a net beneficial effect to the species.  
8 That's what Fish and Wildlife Service predicts.

9 Ms. Adams touched on -- she talked about how the  
10 improvement finding was not rational; that there was nothing in  
11 the Biological Opinion to support that conclusion.

12 Here, again, I point the Court to BOR -- this is the  
13 administrative record -- BOR0048, 0049, page 50, and 0053.  
14 It's right there. It's both in the Biological Opinion, and  
15 it's in our briefing.

16 Larval drift, so there's two components to this:  
17 One, did we analyze it in the Biological Opinion? Ms. Adams,  
18 she did concede that we did analyze it. She doesn't think we  
19 did a good enough job. And then there's the surrogate in the  
20 ITS. So those are two distinct issues, but they get conflated.

21 The bottom line, the existing data on pallid larvae  
22 or free embryo -- it depends which stage they are at when they  
23 are drifting -- we have studies. We have monitoring. We know  
24 shovelnose sturgeon are above the weir. We know free embryo  
25 are drifting past those screens. One has been in train. We

1 found that.

2           We also have a study about white sturgeon finding  
3 that free embryo drifting past riprap, man-made rocks. There's  
4 not significant levels of mortality. We know shovelnose  
5 sturgeon -- so their larvae is drifting through, past the  
6 screen, over the existing weir, through that rock field, and  
7 there's no population response -- measurable population  
8 response. So we know there's a low level of mortality going  
9 on. That's the existing science.

10           And so what Fish and Wildlife Service is doing, they  
11 are looking at that existing science, and they are saying,  
12 "Well, we think that's going to be the same for pallid sturgeon  
13 as they interact with the screen and the weir."

14           And the plaintiffs come in and say, "Well, they have  
15 different drift distances. You know, they are all different."

16           Well, the free embryo of the larvae stage of  
17 shovelnose and pallids, they are nearly identical. And we know  
18 shovelnose larvae are coming through. So it was reasonable to  
19 infer that the same life stage is going to interact with those  
20 characteristics the same way. So that's imminently reasonable.

21           With respect to the Incidental Take Statement  
22 surrogate issue, they come up with this hypothetical: "Well,  
23 if all of the shovelnose sturgeon larvae die, 100 percent  
24 mortality, and then sturgeon larvae die, we're getting  
25 100 percent mortality, there's never going to be a trigger for

1 the ITS. There's never going to be a requirement to reinitiate  
2 consultation."

3           And the first problem with that is that it ignores  
4 that existing underlying data, the studies. We know that  
5 there's a low level of mortality. And that science informs the  
6 surrogate. So on top of that, you also have the separate  
7 independent trigger. If the project is not performing as Fish  
8 and Wildlife thinks it's going to, then they have to reinitiate  
9 consultation. If you saw 100 percent mortality, separate and  
10 apart from the ITS, they are going to reinitiate consultation.  
11 So this idea that you can get this massive amount of mortality  
12 and never reinitiate, it's not going to come to pass. It's  
13 just not going to happen.

14           So unless the Court has any questions on the BiOp and  
15 ITS, I'll move to Claim 13.

16           THE COURT: Why don't do you that, please.

17           MR. HOWELL: So the reason -- at the beginning, they  
18 said that Claim 13 is the same as 4 and 5. So you have the  
19 Bureau of Reclamation and the Corps, plaintiffs contend they  
20 can't rely on an unlawful Biological Opinion. That's not the  
21 existing case law.

22           *Village of Akutan*, 869 F.2d 1185, there's an  
23 independent duty. *Pyramid Lake*, 898 F.2d 1410, there's an  
24 obligation for the plaintiffs to bring forward new evidence,  
25 new information, irrespective of the Biological Opinion. They

1 didn't do that here. And they can't because -- and this gets  
2 back to the Court's question about the existence of the weir.

3 The existence of the weir, the harm that is occurring  
4 from of the existence of the weir, the blocked passage right  
5 now, it can't be attributed to the agencies. Congress put it  
6 there. 1910, it was complete. ESA is not retroactive.

7 So plaintiffs, what they've got to do is they come in  
8 and say, "This project to alleviate the harm is causing  
9 jeopardy. This recovery action is causing jeopardy."

10 THE COURT: Well, what about -- I believe Ms. Adams  
11 argued the annual rocking of the weir could constitute an ESA  
12 violation.

13 MR. HOWELL: So this issue wasn't fully briefed by  
14 either the United States or the plaintiffs. I believe the  
15 interveners did brief this issue. I think the question of  
16 whether maintaining a weir put there in 1910, whether that  
17 maintenance is subject to the ESA, that's a complicated issue,  
18 and we didn't brief it.

19 And, on top of that, there's also -- there's also  
20 another legal criteria that it actually has to be  
21 discretionary. And it wouldn't make sense to put in a weir  
22 that you can't maintain, that would just wash away, and defeat  
23 the very purpose of providing irrigation water.

24 So I think there's two issues, two really thorny  
25 legal issues, that were never addressed by the United States or

1 plaintiffs. And so there's a question mark there.

2 In any event, that yearly rocking was included as  
3 part of the proposed action in the Biological Opinion. It was  
4 analyzed. Fish and Wildlife said, "What's the effect of this?"  
5 So for analytical purposes, it's in the Biological Opinion, and  
6 they took it into account. They reasonably dealt with that  
7 adverse effect. So it was analyzed. And that's the obligation  
8 here for Fish and Wildlife to wrestle with that effect.

9 There's a difference between Claim 13. So Corp and  
10 Reclamation are coming to -- they are not engaging in jeopardy.  
11 It's not like their act of making things better is not likely  
12 to jeopardize.

13 4 or 5, it's almost pled in the alternative, that if  
14 the BiOp goes down, the existing operation is somehow out of  
15 compliance with the ESA. Like, that doesn't make any sense  
16 because the existing operations -- there's a proposed action in  
17 the Biological Opinion that says, "Prior to, during, and after  
18 construction." That's the proposal. Part of that is  
19 Reclamation's activities prior to the construction. That's  
20 ongoing. So it's included in the Biological Opinion. So they  
21 have satisfied their Section 7 and Section 9 duties.

22 THE COURT: Well, I think all of those claims rise  
23 and fall with the adequacy of the Biological Opinion, don't  
24 they?

25 MR. HOWELL: No. No. That's the point behind

1 *Village of Akutan and Pyramid Lake*. Even if the BiOp goes  
2 down, plaintiffs need to come to this court and present  
3 information that irrespective of the existence of the weir,  
4 what the agencies are proposing to do is likely to jeopardize  
5 the species. And I don't think they can. They certainly  
6 haven't carried that burden, and I don't think they could.  
7 That's why they didn't try. It's a recovery action. How is  
8 that going to jeopardize the species?

9           Shifting to Claims 1 and 2, this is Fort Peck  
10 operations: So the existing claim where it said the Corps was  
11 not following the 2003 RPA and 2003 ITS, the Missouri RPA and  
12 ITS, plaintiffs came in and said, "You are not following this."  
13 Well, now we have a new Biological Opinion. That dictates how  
14 the Corps is going to act moving forward. So those Section 7  
15 and Section 9 claims --

16           THE COURT: And that was just issued?

17           MR. HOWELL: Correct.

18           THE COURT: The parties have not had a chance to  
19 brief that for the Court or analyze it.

20           MR. HOWELL: Nor should they. That's a whole  
21 separate agency action.

22           THE COURT: Right.

23           MR. HOWELL: And if plaintiffs want to challenge  
24 that, they can send in their 60-day notice. They can file a  
25 complaint, and we'll go have that battle, but not in this case.



1 And there's reasons why they can't do that. I mean, if we were  
2 to move forward with the Corps -- you know, the Corps, a  
3 Section 7 claim or a Section 9 claim against the Corps for Fort  
4 Peck operations in light of this new BiOp, there's  
5 jurisdictional problems with lack of 60-day notice, amending  
6 the complaint.

7 Bottom line, Your Honor, those claims are moot. The  
8 ESA, the citizen's supervision, it doesn't contemplate  
9 retrospective relief. And that's comes from the Supreme Court  
10 in *Gwaltney*.

11 THE COURT: All right. Anything else, Mr. Howell? I  
12 want to hear from Mr. Levin on the Clean Water Act claim.

13 MR. HOWELL: Nothing further, Your Honor.

14 THE COURT: Thank you.

15 MR. LEVIN: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MR. LEVIN: May I inquire if the Court wants to take  
18 a break at 4:00, or have you adjusted the schedule?

19 THE COURT: No. I'd prefer to push on and finish up.  
20 Otherwise, we'll here till 5:00. We're all getting tired. If  
21 we push on to the end, we'll get done quicker.

22 MR. LEVIN: I hope I can frame the issues that the  
23 Court is most concerned about succinctly.

24 In the Court's PI hearing, it concluded that because  
25 of the finding regarding the Fish Passage Connectivity Index,

1 there was, essentially, a conclusion that the multiple pumps  
2 option had the least adverse impact, and that drove the Court's  
3 conclusion that, thus, there had to be an affirmative finding  
4 of impracticability, which was not found.

5           The Ninth Circuit panel, I believe, read the act  
6 differently and reads the act in the way the United States does  
7 as well. The 404(b)(1) guidelines do not require a specific  
8 finding that another alternative to a proposed project is less  
9 adverse. Rather, they require that if such an alternative is  
10 found to exist, in that case, it must be selected if it's  
11 practicable.

12           Here, there is no finding in the record that the  
13 multiple pumps option was practicable. And the Corps did not  
14 conflate the notion of the fish passage benefits with the  
15 conclusion that the alternative that yielded the greatest  
16 benefit is, therefore, the one with the least adverse impact.

17           As our briefs are going to detail, as Ms. Adams  
18 touched on in her own remarks, there is an entire chapter in  
19 which the whole range of adverse impacts to the aquatic  
20 ecosystem are assessed, and the Corps concluded that those  
21 effects yielded the conclusion there they were of a similar  
22 scale.

23           If the Court found that the multiple pumps option  
24 was, in fact, the least adverse alternative, this would have  
25 been a different case, and there would have had to have been

1 some showing in the record that multiple pumps was not  
2 practicable. We maintain that that showing exists. We go into  
3 some detail about the Corps's questioning about the  
4 practicability of the multiple pumps. But there was no  
5 findings of adverse impacts, and so --

6 THE COURT: Back to the practicability analysis, does  
7 that relate to cost?

8 MR. LEVIN: Not just cost. As we've tried to make  
9 clear, it goes to the very viability of the project. Cost, it  
10 was not --

11 THE COURT: Whether it would work?

12 MR. LEVIN: I'm sorry, sir?

13 THE COURT: Whether it would work? You said,  
14 "viability." You mean, you couldn't pump the water high enough  
15 to get it into the canal?

16 MR. LEVIN: The whole pack, as it were, and the  
17 reason why the costs are really a linchpin of the analysis is  
18 because at so many levels whether it's the operation of the  
19 pumps, whether it's the need to oversee and monitor those  
20 pumps, whether it's having to make constant adjustments in the  
21 flow to no make sure that sufficient irrigation water is being  
22 delivered to farmers, cost has a material bearing on the  
23 district's ability to pay for this project in the long term.

24 This project is going to be paid for, ultimately, by  
25 many people in this room. And the Corps recognized that,

1 per se, when you build --

2 THE COURT: What do you mean by that, about being  
3 paid for by people in this room?

4 MR. LEVIN: Because the district pays for the  
5 long-term operation of the project through assessments. And  
6 whereas the bypass channel has very little ongoing  
7 hands-on costs --

8 THE COURT: So you mean the irrigation will be  
9 responsible for the maintenance of the pumps, the operation of  
10 the pumps, as oppose to the bypass channel at the lower cost?

11 MR. LEVIN: The bypass channel is a hands-off  
12 operation. And there are some inherent cost of additions when  
13 you build a multiple pumps option. But there's far more, based  
14 on the Corps's prior experience, because these things are  
15 complicated, and they take a lot of hands-on work.

16 And all of those assessments, which are not mere  
17 speculation but are based on record evidence on the Corps's  
18 prior experience, all of these factors led the Corps to state  
19 that it had -- there were questions about whether the multiple  
20 pumps option was really practicable. In fact, the Court  
21 faulted the Corps for not definitively finding it  
22 impracticable. And I respectfully --

23 THE COURT: What were the operation and maintenance  
24 costs going to be? A couple million dollars a year?

25 MR. LEVIN: Well, let's see. I think it's -- the

1 record has information to the effect that it would be \$4,950  
2 year. I don't know whether that's -- maybe I'm missing some  
3 zeros. But it was about 75 percent more than the bypass  
4 channel.

5           There's information on costs in the Clean Water Act  
6 analysis at Record Cite 5060, and I can supply other ones.  
7 Cite 6650 has additional information regarding the relative  
8 costs, and the reasons why those costs added up to the  
9 determination that the bypass channel -- well, that the  
10 multiple pumps alternative viability was not certain.

11           Again, because the adverse effects were not found to  
12 be less in the case of the multiple pumps option, that trigger  
13 was not reached. They found the adverse effect to be on a  
14 similar scale, and the Corps was reasonable in choosing the  
15 alternative that fulfilled the greatest range of overall  
16 purposes.

17           I'll stress that the overall purpose of this project  
18 is not limited to pallid sturgeon recovery. It's a three-fold  
19 purpose with continued operation of the project, a project  
20 that's been around for over 100 years. One of the central  
21 purposes -- and if that central purpose is jeopardized, as the  
22 Corps believed might be the case, then the overall purposes  
23 can't be achieved. Where, by contrast, the bypass channel  
24 satisfied them all.

25           And we submit that the briefs of the plaintiffs are

1 unconvincing about the ability of the multiple pumps option to  
2 meet that core central objective of continuing the Intake  
3 Project's effect of operations.

4 That's essentially my argument, Your Honor. I'm  
5 happy to answer any questions.

6 THE COURT: No, thank you, Mr. Levin. I'll give  
7 Mr. Stermitz a chance to argue as well.

8 Mr. Marinelli, do you wish to say anything?

9 MR. MARINELLI: Thank you, Your Honor.

10 THE COURT: You are regarding the NEPA claims?

11 MR. MARINELLI: Yes, Your Honor.

12 THE COURT: All right. I think we covered most of  
13 that. If there's something you think we haven't addressed,  
14 please feel free.

15 MR. MARINELLI: I guess I would add, just to note one  
16 point that we address in our briefs, but I wanted to flag in  
17 response to Ms. Adams's argument, the public comments on the  
18 EIS, we submit affirmatively disprove plaintiffs' theory that  
19 the public was unable to distinguish between the multiple pump  
20 and the bypass alternative. If the Court has no other  
21 questions, we're happy to rest on our briefs on that part.

22 THE COURT: Well, the question was not whether the  
23 public could discern the difference, but whether the public  
24 could understand the analysis related to the two options,  
25 whether the consequence of the two options were different.

1           Is that what you meant?

2           MR. MARINELLI: Yes.

3           THE COURT: Not that they couldn't distinguish  
4 between the two options, but the consequences of the two  
5 options.

6           MR. MARINELLI: Correct. Yes. And I think if the  
7 Court will indulge me to go back to that *CBD* case that  
8 Ms. Adams cited and the Ninth Circuit cited, that case presents  
9 a radically different factual scenario where the agency, the  
10 Bureau of Land Management, assumed that the mining consequences  
11 of two different options were the same and, therefore,  
12 conducted no analysis.

13           That is not the case here. And the fact that there  
14 was that analysis that allowed the public and plaintiffs to  
15 distinguish between the alternatives at issue is evident from  
16 the plaintiffs' briefs in this case, from the EIS and its  
17 appendixes, and from the public comments, which do address  
18 among other things the differences between the open river fish  
19 passage and the 67 percent fish passage identified by -- from  
20 the bypass channel alternative.

21           THE COURT: Okay.

22           MR. MARINELLI: To help out the Court, I believe one  
23 of the places that Mr. Howell was referring to regarding fish  
24 going into the Powder River, there's a cite available at  
25 ECF 181, pages 53 to 54.

1 THE COURT: Thank you very much.

2 Mr. Stermitz.

3 MR. STERMITZ: Thank you, Your Honor.

4 I'm going to assume, unless you tell me otherwise,  
5 that I don't need to go through the Ninth -- you don't need to  
6 ask me about the Ninth Circuit.

7 THE COURT: No, I don't think so. We beat that  
8 horse.

9 MR. STERMITZ: It's pretty well hashed out.

10 I would like to -- just taking the last subject  
11 first, while it's fresh in the Court's mind, about the problems  
12 with the multiple pump alternative. We didn't really spend a  
13 lot of time briefing this, maybe we did earlier on in the  
14 injunction briefing, because we think it's covered fairly well  
15 by the government. But the record -- and there's citations to  
16 it in the government's brief -- talks about lots of other  
17 effects. That figure for the cost, for one thing, is hundreds  
18 of thousands of dollars a year difference for maintenance. I  
19 mean, you can imagine. We have a pretty low-tech operation  
20 going now, and this would replace that with a complicated and  
21 damaging, we think, series of pumps. I mean, they identify --

22 THE COURT: Damaging how?

23 MR. STERMITZ: Well, for each one of their -- there  
24 will be multiple stationing, five pump stations with four pumps  
25 each. And for the pumps to be able to withdraw enough water



1 for irrigation, there has to be a little structure built around  
2 them. So you are talking about, basically, a small weir around  
3 each one of those pumps and with a river that's very highly  
4 "sedimentated" -- however the word is -- filled with sediment.  
5 So there's dredging that would be required every year.

6           There's noise. There's vibration. There's the  
7 incredible amount of power that these things would require.  
8 There's not enough power available up there right now to do it,  
9 so there would have to be new lines brought in. We're talking  
10 a huge addition to power generation that's -- you know,  
11 compared to the current status. All of these things, of  
12 course, have monetary impacts. Riprap downstream and which,  
13 you know -- which doesn't exist now. Channelling. There's  
14 more. So there's a long laundry list of practical problems  
15 with the multiple pump alternative.

16           I'd like to address the basic issue here, especially  
17 when you look at the jurisdiction under the ESA, which requires  
18 a discretionary agency action. And it has been pointed out,  
19 and I'm not going to belabor that. The action here for the  
20 existence of intake is congressional action that's more than  
21 100 years old.

22           The question that you've posed multiple times and  
23 that was talked about a minute ago is whether rocking is  
24 included within that congressional authorization. And, to be  
25 clear, we'll just cite the language from Congress that

1 authorize the construction of dams across the Yellowstone  
2 River, in or across, in 1905: "The Secretary in the Interior  
3 is hereby authorized to construct and use and operate these  
4 dams."

5           So we talk about operation as if that just means the  
6 division sits there. But since it was been constructed in  
7 1910, it's been the same. It's been in the same configuration,  
8 and it has required the same exact maintenance. And, as  
9 Mr. Howell said, it's nonsensical to expect that Congress would  
10 have authorized this and not authorized that it be maintained  
11 so that it continued on the way it was intended to operate.

12           The plaintiffs emphasize that the Fish and Wildlife  
13 Service has contended that intake has been out of ESA  
14 compliance for 10 or 20 years, whatever it is. And I'd like to  
15 first point out that the government in its briefs has expressly  
16 agreed that the existence of the weir is congressionally  
17 authorized. The briefs don't take the position that rocking is  
18 part of that, but we've walked through in our briefs the logic  
19 that shows why it is, and no one has disputed that. The  
20 plaintiffs haven't. The government hasn't. And the fact is  
21 that this is -- this case is complicated enough as it is  
22 without complicating a really fundamental point that there has  
23 to be a discretion there, and there's no discretion, just let  
24 that congressionally authorized facility wash away.

25           THE COURT: Mr. Stermitz, let me just nudge you

1 slightly. I understand your view about the rocking, and that's  
2 part of the operation. But given the listing in 1990, of the  
3 pallid sturgeon as an engaged species, can the federal  
4 defendants simple choose to do nothing here? Just say, "We're  
5 not going to take any action with these properties. The  
6 alternatives are too complicated and expensive, so we're going  
7 to continue to operate the weir."

8 Can they do that without violating the ESA?

9 MR. STERMITZ: Yes. The existence of the weir and we  
10 maintaining the maintenance of the weir is not subject to the  
11 ESA because it was created before the ESA was created and --

12 THE COURT: Well, so was the Fort Peck Dam. Why is  
13 that -- why are we worrying about the sturgeon on the Upper  
14 Missouri if the Fort Peck Dam has been there for 100 years --  
15 80 years?

16 MR. STERMITZ: Well, we haven't looked that closely  
17 at Fort Peck because it doesn't directly affect us, to be  
18 honest.

19 THE COURT: But we have been -- the agencies have  
20 been spending 30 years trying to come up with a solution to  
21 Fort Peck and the intake.

22 MR. STERMITZ: Well, again, the project on the table  
23 is a recovery project that the government believes is necessary  
24 to carry out the recovery plan, which is also not required, but  
25 that's the goal.

1           So two things: Again, this emphasizes --

2           THE COURT: Wait a minute. The recovery project is  
3 not required. Is that what you said?

4           MR. STERMITZ: That's what I said.

5           THE COURT: So they are just doing this because it's  
6 a good thing?

7           MR. STERMITZ: Because it's a good idea for the fish.

8           THE COURT: Not because the ESA is forcing their  
9 hand?

10          MR. STERMITZ: No. No.

11          And let's assume that I'm wrong about that. Nothing  
12 has changed at intake, nothing, in the way that they operate it  
13 since it was congressionally authorized.

14          We briefed in our -- twice, this time-barred nature  
15 of plaintiffs' claims as to the presence and operation of that  
16 dam, and the only response was a footnote to the *Klamath* case,  
17 which we cited earlier, which is different because there was an  
18 action, a federal action, that renewed jurisdiction. There's  
19 been no federal action at intake until this one that's on the  
20 table now. And this one is subject to the ESA.

21          So we're very clear on that, Your Honor. And, I  
22 mean, I know it probably makes some people uncomfortable, but  
23 that's the law. And it starts with -- it's a jurisdictional  
24 issue, and it's been fully briefed. And there's been no  
25 meaningful, if any, argument with what we had to say about

1 that.

2 THE COURT: All right. Anything else, Mr. Stermitz?

3 MR. STERMITZ: If I could, briefly, Your Honor.

4 I don't want to belabor the hatchery fish either.

5 But I think when you go back and have an opportunity to look,  
6 you will see that there's lots of reference to that.

7 And I think the problem here, my perception, sitting  
8 over there, was that maybe you and Mr. Howell were talking past  
9 each other a little. You said, "What difference does it make  
10 if we could just raise as many as we want? Why bother doing  
11 that?" Well, that wouldn't make any sense if they are just  
12 going to wink out because they can't reproduce.

13 And so there's a difference between whether they are  
14 counted as endangered and whether it's a good idea to have  
15 these augmentation programs just pump fish into the river  
16 knowing that they are going to run into intake and suffer the  
17 same fate that the wild fish have for 100-plus years. So  
18 that's the deal on hatchery fish.

19 THE COURT: All right. Thank you, Mr. Stermitz.

20 MR. STERMITZ: Thank you, Your Honor.

21 THE COURT: Ms. Adams, brief rebuttal.

22 MS. ADAMS: Thank you, Your Honor. I will be  
23 extremely brief, but I'm happy to answer whatever questions  
24 that came up for you.

25 It seemed like with the lengthy discussion of

1 hatchery versus wild fish, it's worth spending a minute on that  
2 issue.

3 We agree that the hatchery fish are part of the  
4 listed population. That's not the issue here. The issue is  
5 the fact that the ESA requires to avoid jeopardy that an action  
6 not appreciably reduce the likelihood of survival and recovery  
7 in the wild. So what that means is the hatchery fish, while  
8 listed, can still be jeopardized if they cannot reproduce in  
9 the wild.

10 THE COURT: All right.

11 MS. ADAMS: And that's the key issue.

12 THE COURT: Okay. Let me ask you: Mr. Howell  
13 pointed to a number of pages, I believe, as part of the  
14 Biological Opinion. There was BOR 58, 59, 50, 62, and 64. He  
15 said there was a discussion regarding fish passage.

16 Do you agree?

17 MS. ADAMS: I do not agree that those passages  
18 addressed the issue. The section that Mr. Howell read out loud  
19 acknowledged that some fish are not going to go upstream, and  
20 they are hoping that some fish do use the bypass channel.  
21 That's not an analysis of can the pallid sturgeon withstand  
22 more than half of them not going up the channel? And that's  
23 the question. What does it mean for pallid sturgeon? Not that  
24 there are some pros and some cons, but what does it actually  
25 mean for the species and their likelihood of survival and

1 recovery in the wild.

2 THE COURT: All right. Also, Mr. Howell talked about  
3 the *Cascadia Wildlands* case. He said that even if -- no, I'm  
4 sorry. That was a dispute over jeopardy analysis. I believe  
5 the *Cascadia Wildlands* case that he cited involved a dispute  
6 over the jeopardy analysis. How would you distinguish that  
7 case from circumstances here?

8 MS. ADAMS: That case does not apply here. That case  
9 was -- the issue that the plaintiffs were alleging was that the  
10 service -- let me restate this.

11 There was a recovery plan. There were actions in the  
12 recovery plan. But the action that was at issue in the  
13 Biological Opinion did not match up with that recovery plan.  
14 Plaintiffs thought it wasn't as good as the recovery plan. And  
15 the Court simply held that recovery plans are guidance  
16 documents, and they are not binding.

17 That's not in dispute here. And it's apposite here  
18 because the recovery plan in this situation sets a goal. And  
19 one of those goals is restore fish passage. It explicitly  
20 declines to describe how to achieve that goal.

21 Someone wrote in on a comment on the recovery plan,  
22 talked about -- I believe it was the bypass channel, but I'm  
23 not sure about that. And the response was "That's not what  
24 we're doing here. We're setting out the things that need to  
25 happen to facilitate recovery."

1           Everyone agrees that restoring fish passage is a  
2 goal. The problem is that this is the action that the agencies  
3 have decided to fulfill -- to take to fulfill that goal, and  
4 this action has to comply with Section 7. And Section 7  
5 requires some attention to recovery issues. And, as I said, it  
6 doesn't require that this action will recover the pallid  
7 sturgeon, but it does require that it not impede recovery of  
8 pallid sturgeon.

9           THE COURT: All right. Finally, Mr. Howell argued  
10 that even if the Biological Opinion were deemed inadequate or  
11 unlawful, plaintiffs still had a burden to present evidence  
12 that there is an ESA violation.

13           How do you respond to that argument?

14           MS. ADAMS: The Section 7 of the ESA, the Corps and  
15 Reclamation's obligation under Section 7, is that they have to  
16 ensure that their action does not jeopardize the species. If  
17 the Court holds that the Biological Opinion is unlawful, the  
18 agencies cannot go forward with the project and argue that, in  
19 fact, it ensures no jeopardy because the no-jeopardy conclusion  
20 will have been tossed out. And the Ninth Circuit has been  
21 clear about that.

22           THE COURT: Where?

23           MS. ADAMS: I can get you the cites. The first cite  
24 is the *Wildlife Fish Conservancy* case. I have three cites for  
25 you, Your Honor. I apologize.



1           *Wildlife Fish Conservancy v. Salazar*, 628 F.3d 532,  
2 the quote is, "Where the opinion's flaws are legal in nature,  
3 discerning them requires no technical or scientific expertise,  
4 and the failure to do so may result in an action based on  
5 reasoning not in accordance with the law and thus arbitrary and  
6 capricious." The action -- the agencies' action violates the  
7 Section 7 standard.

8           *CBD versus BLM*, 698 at 1127 through 1128.

9           THE COURT: F.3d?

10          MS. ADAMS: Yes, 698 F.3d 1101. And then the pin  
11 cite is 1127 through 1128.

12          And they specifically say that an agency cannot meet  
13 its Section 7 -- this is not a quote, but a paraphrase --  
14 cannot meet its Section 7 obligations by relying on a  
15 Biological Opinion that is legally flawed or by failing to  
16 discuss information that would undercut the opinion's  
17 conclusions.

18          There's also *Defenders of Wildlife v. EPA*, 420 F.3d  
19 946. The pin cite is 976. "Arbitrarily and capriciously  
20 relying on a faulty Biological Opinion violates the Section 7  
21 duty."

22          THE COURT: Anything else, Ms. Adams?

23          MS. ADAMS: I'd like to make one more point if --

24          THE COURT: Go ahead.

25          MS. ADAMS: And that's about the Clean Water Act

1 argument, which is that, as far as I understand the argument  
2 today, the Corps is stating that -- in fact, their conclusion  
3 in the Clean Water Act analysis that all of the alternatives  
4 have a similar scale of impacts, it's supported by the record,  
5 and that all of these alternatives are equal environmentally.

6           There is no support in the record for that. And, in  
7 fact, the record is replete with the Montana chapter of the  
8 American Fishery Society saying, "The multiple pump alternative  
9 is the most scientifically defensible." The State of Montana  
10 saying, "Taking the dam out of the river reduces the risk for  
11 pallid sturgeon" -- well, for all native fish, actually. The  
12 Fish and Wildlife Service itself has said, "The desired  
13 baseline condition is for the dam to be removed."

14           And I mention it because the premise I heard today  
15 was that if one of the alternatives was less environmentally  
16 damaging, then, yeah, they would have to demonstrate that that  
17 was impracticable. But the Corps appears to be arguing now  
18 that their comparative practicality analysis is acceptable  
19 because all of the alternatives are environmentally similar.  
20 And, again, that is just not supported by the record and is  
21 undermined by the available evidence.

22           THE COURT: Okay. Anything else?

23           MS. ADAMS: No.

24           THE COURT: Thank you, Ms. Adams.

25           MS. ADAMS: Thank you.

1 THE COURT: Are we done, Mr. Howell?

2 MR. HOWELL: I am, Your Honor.

3 THE COURT: All right. Thank you.

4 Then this matter will be submitted, all of these  
5 motions for summary judgment. I'll take it under advisement.  
6 I'll have an order out forthwith.

7 Is there anything else to address today? Ms. Adams?

8 MS. ADAMS: No, Your Honor.

9 MR. LEVIN: Your Honor, I feel hesitant to take up  
10 the Court's time, but I might want to briefly address the Clean  
11 Water Act argument.

12 THE COURT: Well, briefly, Mr. Levin. It's been a  
13 long day for everyone.

14 Go to the podium, please, Mr. Levin.

15 MR. LEVIN: Oh, excuse me. I was trying to be even  
16 briefer.

17 THE COURT: I want to make sure we can hear you,  
18 Mr. Levin.

19 MR. LEVIN: I'll just quickly identify the parts of  
20 the record by --

21 THE COURT: Please do.

22 MR. LEVIN: I'm sorry, sir?

23 THE COURT: I said, "Please do."

24 MR. LEVIN: The Court should look at the record with  
25 regard to the FEIS, for wildlife, beginning at Bureau of

1 Reclamation Cite 14931; aquatic communities, Bureau of  
2 Reclamation Cite 14905; water quality, Bureau of Reclamation  
3 Cite 14892; geomorphology, 14837; ground and water hydrology,  
4 14849; surface water flows, 18416; and I believe there are  
5 others as well.

6           The Court may not agree that the effects are on a  
7 similar scale. The Court's objective should be to determine  
8 whether the Corps had a rational basis for finding that. And  
9 if the Court finds that a rational basis exists, the  
10 differential standard under the APA establishes a presumption  
11 that the agencies' expert decision will be honored.

12           THE COURT: All right. Thank you, Mr. Levin.

13           MR. LEVIN: Thank you.

14           THE COURT: Anyone else? Speak now or forever hold  
15 your peace.

16           All right. The matter is now submitted, all of the  
17 motions for summary judgment are under advisement. I will have  
18 an order out as soon as I can.

19           We will be in recess. Thank you all.

20           (The proceedings concluded at 4:25 p.m.)

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## 1 REPORTER'S CERTIFICATE

2 I, Yvette Heinze, a Registered Professional  
3 Reporter and Certified Shorthand Reporter, certify that the  
4 foregoing transcript is a true and correct record of the  
5 proceedings given at the time and place hereinbefore mentioned;  
6 that the proceedings were reported by me in machine shorthand  
7 and thereafter reduced to typewriting using computer-assisted  
8 transcription; that after being reduced to typewriting, a  
9 certified copy of this transcript will be filed electronically  
10 with the Court.

11 I further certify that I am not attorney for, nor employed  
12 by, nor related to any of the parties or attorneys to this  
13 action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at Great Falls,  
15 Montana, this 20th day of May, 2018.

16  
17 */s/ Yvette Heinze*

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19 Yvette Heinze  
20 United States Court Reporter  
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