Testimony of Mike Kelly
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to The House Natural Resources Committee

Oversight hearing on "Crisis of Confidence: The Political Influence of the Bush Administration on Agency Science and Decision-Making.

Tuesday, July 31, 2007

My name is Mike Kelly. I am representing myself at my own expense in this hearing. I was a fishery biologist with the U.S. Fish and Wildlife Service (USFWS) from 1995 to 2000 and with NOAA Fisheries (NMFS) from 2000 to 2004. I am currently a private consultant specializing in the monitoring of construction projects to ensure permit compliance and avoidance of adverse impacts to aquatic resources. While with NMFS I worked in the Protected Resources Division as an Endangered Species Act (ESA) section 7 biologist. My duties included analyzing Federal projects under section 7 of the ESA to ensure protection of ESA-listed salmon species.

In this testimony, I will:

1) describe my role as the "technical lead" biologist during development of the 2002 NMFS Biological Opinion (BiOp) for the Bureau of Reclamation's 10-year Klamath Operations Plan, which was found to violate the ESA;

2) discuss problems with the National Research Council's (NRC) interim report, which reviewed the 2001NMFS and USFWS BiOps, and demonstrate that NRC itself admitted in their final report that it did not apply the standard that the law required;

3) discuss possible ways to avoid future abuse of ESA decision making processes, and to strengthen the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act.

Development of the 2002 Biological Opinion for the 10-year Klamath Project Operations plan

The US District Court for the Northern District of California (Case #C-02-2006) found the NMFS 2002 BiOp for the 10-year Klamath Project Operations Plan to be illegal on three separate points. In this part of my testimony I hope to clearly demonstrate to the Committee that NMFS' final decision was no accident, and that someone at a higher level than the regional NMFS office was responsible for forcing the illegal action.

To make it more obvious to the Committee where this long story is headed, I provide these excerpts from the final court decision, which address one of the three illegal aspects of the BiOp:

> *(w)hile the [NMFS] can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence. An agency does not avoid the likelihood of jeopardy to a listed species when it disregards the life cycle of the species in crafting the measures designed to protect it. Nor can the agency provide only partial protection for a species for several generations without any analysis of how doing so will affect the species.*
>
> *Phase III clearly presents 'specific quantitative target flows' that the NMFS concluded were necessary to avoid jeopardy. The federal defendants ask us to disregard their quantitative conclusions in favor of their assertions that the first eight years of the RPA will avoid jeopardy.*
>
> *We conclude that the RPA is arbitrary and capricious because it fails to analyze the effects of eight of ten years of the proposed action on the SONCC coho, a species that has a three-year life cycle.*

In the winter of 2001 NMFS selected me to be the "technical lead" fisheries biologist for the upcoming (2002) ESA section 7 consultation for Klamath Project Operations. The previous year's (2001) BiOp found "jeopardy" to the Southern Oregon/Northern California Coasts (SONCC) coho salmon, which resulted in dramatically reduced irrigation deliveries to farms in the Klamath Project, and much controversy. So we began to prepare early for an anticipated similar proposal from Reclamation.

My immediate supervisor advised me that she had been informed that Vice President Cheney had been briefed on our consultation, apparently with the intent of impressing upon me the importance of this consultation. That is the only time that the Vice President was mentioned to me during the consultation process. I was aware that President Bush had declared that he would do everything he could to get the water for the farms. And I was keenly aware of the controversy surrounding the 2001 decision.

However, my duty – which was to determine whether the proposed action would jeopardize the continued existence of SONCC coho salmon, and what would be required to avoid jeopardy if that were the outcome of the analysis – was all that should and did matter to me.

I realized that political pressure might be applied to my superiors, but I naively believed that I was shielded from such pressure. I thought that my analysis would, as is always required, be based on a logical analysis of the best available science, and have a logical outcome. I viewed it as a somewhat complicated case of 1+1=2. Regardless of what I found in my analysis, it would have to make sense and satisfy the legal requirements of the use of science under the ESA, and certainly no political pressure could magically change that. I never suspected that I would be asked to support the conclusion that 1+1=3, but I was.

I developed a draft BiOp, in which I used every approach I could think of to analyze the effects to coho salmon, and in each case the result was that the proposed action was inadequate to avoid jeopardy to coho.

I then developed an alternative 10-year plan that I thought would be adequate to avoid jeopardy, but still allow the Klamath Project to operate, as is required of any "Reasonable and Prudent Alternative."

My draft BiOp was then reviewed by the Department of Justice, according to my supervisor, and deemed "indefensible." I was never told what was indefensible about it, and I think Justice was mistaken in their conclusion. My draft was certainly more defensible than the final BiOp. I suspect that it was called indefensible simply because it was not perceived as being consistent with the interim National Research Council (NRC) report on the 2001 BiOp. (More about the NRC report later.) Therefore, I would suggest that the GAO look into Justice's role, if they did actually review my draft.

Jim Lecky, the Assistant Southwest Region Administrator at the time, then came to our field office in Arcata, California to help us finish a "defensible" BiOp. Mr. Lecky developed a different jeopardy analysis, which I thought was much weaker than mine, but was consistent with the NRC report. I continued to build a case for the alternative to avoid jeopardy.

But before Mr. Lecky came to Arcata, and before my original draft BiOp had been reviewed by Justice, he sent a letter to Reclamation concluding that the Klamath Project "was not likely to adversely affect" coho salmon if they operated the project as proposed while we continued to develop the final BiOp. (Reclamation had delivered their proposal to us much too late to finish our BiOp before the start of the 2002 irrigation season.)

This is when I began to worry. Stating that Reclamation's proposed April and May flows would not be likely to adversely affect coho, for the same action that we had already concluded would jeopardize SONCC coho in 2001 and in our working draft, was a case of 1+1=3 logic. In fact, my supervisor told me that Lecky had written the letter without our input in order to "distance" us from his action. Not only was this action bizarre, but it may have been a violation of section 7(d) of the ESA, which prohibits the irretrievable commitment of resources that may otherwise be required to protect species on completion of the consultation.

The decision to allow the proposed April and May flows is the federal action that made it possible for Secretaries Norton and Venneman, and U.S. Senator Gordon Smith to pose for cameras while opening the Klamath Headgates on April 1 to ceremoniously begin the irrigation season. Obviously, there was a lot of incentive for the decision in order to show support for the Administration's political base.

As we continued to develop the BiOp, there was at least one additional "1+1=3 moment" proposed by Lecky. I don't recall the exact details, but it had to do with how we treated outmigrating juvenile coho in our analysis. I warned him that I would refuse to continue working on this assignment if we did as he advised. My supervisor backed my position and Mr. Lecky gave in to our logic.

Eventually we finished our draft BiOp and delivered it to Reclamation. The final alternative flow schedule was less cautious in terms of protecting coho than my original draft, but I thought it still marginally would avoid jeopardy. However, Reclamation promptly advised us that our

alternative was unacceptable to them, which is their prerogative. Reclamation proposed that we meet to work out a solution.

We met for two days in April at Reclamation's Shasta Lake office. When Mr. Lecky, my supervisor, and I arrived, Reclamation already had their alternative plan posted on wall charts. They clearly had no intention to negotiate. They were only willing to accept 57% of the responsibility for any water that we decided was needed to avoid jeopardy to coho, with additional water to come from unidentified sources. This was based on the completely arbitrary calculation that they only operated 57% of the irrigated land in the upper basin. This proposal was quite "innovative" so we obviously needed some time to consider its implications under the ESA. (Of course, NMFS ultimately accepted this proposal, which was later ruled to be in violation of the ESA due to its illegal partitioning of jeopardy-avoidance responsibility, which is entirely the responsibility of the federal action agency.)

We considered their proposal during the first day, but obviously could not accept it for further analysis until we fully understood it. On the morning of the second day, Mr. Lecky was on his cell phone when my supervisor and I met him in the hotel lobby. After the call, Lecky informed us that he had been told that we needed to stop "stonewalling" Reclamation's proposal. He seemed somewhat un-nerved by the call. He did not say who he had spoken to or where the order to stop stonewalling had originated.

During the second day, Reclamation's Regional Director, Kirk Rodgers, and Mr. Lecky left the room for approximately 45 minutes. I assume they made a call to someone up the chain of command. When they returned, Mr. Rodgers asked Mr. Lecky to make the announcement that NMFS would accept Reclamation's alternative.

On the way home I once again warned my supervisor that if we were to accept Reclamation's alternative without a complete analysis, I would be forced to refuse to continue working on the project.

A day or two later, my supervisor and I received a call from Lecky stating that we would accept Reclamation's alternative with no further analysis. So I requested to be dismissed from the project team because I would not participate in an illegal action. I never took insubordination lightly, and this was by far the most difficult moment of my professional life. But I was being asked to provide scientific support for a "1+1=3" conclusion, which, of course, would be a clear violation of my professional ethics and official federal ethics rules, as well as a possible violation of the law.

I also had hoped that my refusal to participate would apply some "back pressure" up the chain of command. I expected that it would be untenable to develop a BiOp without a staff biologist. But my insubordination was never entered into the record, so no one would have known that I had protested if I hadn't filed for whistleblower protection. Also, I was never reprimanded, and, in fact, I received an award for my work on the BiOp. I think that they didn't reprimand me and gave the award because NMFS knew that I was right all along.

It was obvious to me that someone up the chain of command was applying a tremendous amount of pressure on Mr. Lecky. There's simply no other explanation for anyone in NMFS developing or accepting such a completely bogus and illegal BiOp.

NMFS sets a very high bar for our BiOps. Our BiOps go through a very rigorous review process, and they are routinely returned to biologists if there are any faults in the "logic train," any misinterpretations of the ESA or agency policy, or even minor problems with formatting, etc. Again, I would like to stress that NMFS would never accidentally produce such a faulty BiOp, especially when the lead biologist clearly points out the faults during its development. Additionally, a report by the Commerce Inspector General (IG) into Mr. Lecky's alteration of biological conclusions of the Central Valley Project/OCAP BiOp, found that Mr. Lecky had bypassed the normal checks used in development of BiOps. These checks include a detailed review by the regional section 7 coordinator. The section 7 coordinator revealed that Mr. Lecky had also bypassed these checks during the Klamath consultation, and that these two instances were the only two of which she was aware during her tenure.

So my superiors finished the BiOp without me. I don't know how to stress any further just how bad this BiOp was. Clearly it didn't matter if 1+1=3. They had obviously been ordered to push the thing through anyway.

I began to investigate whether and how I should file for whistleblower protection and disclose what I had observed. I certainly didn't want to cause unproductive trouble for my supervisor – I just wanted to find a way to legally get NMFS to go back and re-do the consultation. And I felt secure that I had made the correct ethical decision in refusing to support the BiOp, so filing a whistleblower disclosure was not ethically required and was probably premature.

Then a couple of weeks after issuance of the BiOp, we received a letter from Kirk Rodgers at Reclamation stating that NMFS had mischaracterized their 57% alternative and, therefore, Reclamation was rejecting the BiOp. I wrongly assumed that this letter spelled the end of the faulty BiOp, and that soon we would get another chance to get it right. This certainly would have been the case in any other consultation. So I gave up on the idea of filing a whistleblower disclosure.

Then came the fish kill. The USFWS officially estimated that approximately 64,000 adult salmon died in the lower Klamath River with low river flows being a causative factor. The vast majority of the dead fish were non-ESA listed Chinook salmon and steelhead trout, but at least several dozen ESA-listed wild coho salmon were also killed. Several dozen adult fish may seem small compared to the overall magnitude of the kill, but it is a large number of a rare species. While the death of several dozen fish in a single incident may not doom the SONCC coho to extinction, it may have been a significant portion of an early-returning sub-population from a particular tributary, which could have significant impacts to the overall population in the long term. Also, this was only the first year of the 10-year plan, so it would be possible to repeat this incident several times in short order, which could then have a cumulative effect that would be highly significant.

Whether the fish kill was clearly a direct result of the BiOp should not have mattered. A precautionary approach should have caused NMFS to conclude that there was a significant likelihood that there had been unauthorized "lethal take" of coho due to the project, and should have caused us to call for a re-consultation. In my experience, this would usually have been the case if even a single juvenile coho had been unexpectedly killed under any other BiOp.

So I once again assumed that we would get another chance to do this consultation correctly and provide adequate protection for the fish. However, Lecky told the audience at a conference in October 2002 that the BiOp was "working" and that NMFS expected to "get a couple more years" out of it. That's when I decided that I had no choice but to disclose what I had observed during the consultation.

While I was certain that the BiOp was illegal for several reasons, I focused my disclosure on the lack of any analysis of the first eight years of Reclamation's alternative. The body of the BiOp clearly demonstrated the need for river flows that were protective of coho salmon, yet the alternative did not provide the flows for the first eight years of the 10-year plan.

I filed my whistleblower disclosure using the normal Office of Special Council (OSC) process. The OSC punted my case to the courts, stating they could not be "arbiters of science." This conclusion was mistaken, however, since NMFS was actually in violation of procedure as we had argued to the OSC.

Ultimately, the courts found the BiOp to be "arbitrary and capricious" for at least three separate reasons. These reasons included the exact reason that I had originally given for refusing to help finish the BiOp and that I had detailed in my whistleblower disclosure. The other reasons, detailed in the US District Court for the Northern District of California (Case #C-02-2006) include the 57% jeopardy avoidance responsibility discussed above, and the improper reliance on actions that are not reasonably likely to occur to avoid jeopardy.

If the Committee intends to investigate political manipulation of the process used to develop the 2002 BiOp, I suggest asking the following questions.

I would begin by questioning Jim Lecky about communications he had with his superiors. Specifically, I would ask him who directed him, or otherwise suggested to him, that he provide the "not likely to adversely affect" letter regarding Reclamation's April and May 2002 flows. I would ask who called him to complain that we were "stonewalling" Reclamation's alternative at our April meeting. I would ask who he and Kirk Rodgers spoke to, or what they discussed, just before Mr. Lecky agreed to accept Reclamation's alternative. I would ask whether Mr. Lecky informed anyone that his lead biologist had refused to continue working on the BiOp, and, if so, what their response was and why it wasn't entered into the record. And I would then ask any superiors that he identifies who up the chain of command they had communicated with on these matters.

Additionally, NMFS Director Bill Hogarth made the following statement regarding development of the 2002 BiOp to the NR Committee on March 13, 2002, in his testimony about the NRC report:

> *I can assure the Committee that we will work hard to get the work completed as soon as possible, and I will be monitoring the progress of our efforts very closely.*

While Mr. Hogarth may have "monitored the progress of our efforts very closely," he never contacted me for my thoughts, even after I had refused to continue my participation. Therefore, I would ask Mr. Hogarth a similar set of questions.

Additionally, because there is strong evidence that ESA-listed salmon were killed due to a blatantly illegal decision, there should be an investigation by the appropriate authorities, including those outside the agencies, such as the Public Integrity Section of the Justice Department, to determine whether any civil or criminal violations of any law may have occurred, for example, of the take provisions of the ESA.

Typically, NMFS Law Enforcement would investigate illegal take of listed species, so I've never been sure why they have not pursued this case when presented with such compelling evidence of illegal action. Certainly, the magnitude of the taking and strength of the evidence (court rulings as well as scientific studies of the mechanism of the taking) should make this an obvious case for enforcement. If this had been caused by a private individual, rather than the agency charged with protecting the fish, NMFS Law Enforcement would have pursued, and likely won, this case. Agency personnel or others who did not have reason to believe that the BiOp was engineered to specifications weaker than the law requires should not be liable of course, but those who did have reason to know should be held to account like any other person who commits an un-permitted taking or other violation of law.

Problems with the National Research Council review of the 2001 BiOps

The Departments of Commerce and Interior requested that the NRC independently review the scientific and technical validity of the government's 2001 biological opinions for the Klamath Project. The recent Washington Post story questions the Bush Administration's use of the NRC to review the BiOps.

As described above, we were required by someone higher in the Administration, not the law, to ensure that our jeopardy analysis was consistent with the findings of the interim NRC report (*Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report*), which considerably weakened our ability to use our ESA-required professional judgment based on unpublished literature, non-peer reviewed literature, personal communication with professionals in the field, our own experiences in the field, and relevant information from studies conducted in other locations.

Here is an excerpt from the February 2002 interim NRC report's executive summary:

> *On the basis of its interim study, the committee concludes that there is no substantial scientific foundation at this time for changing the operation of the Klamath Project to maintain higher water levels in Upper Klamath Lake for the endangered sucker*

populations or higher minimum flows in the Klamath River main stem for the threatened coho population.

This conclusion begs two questions. Firstly, how does the NRC define "substantial scientific foundation" (that is, what burden of proof) and, secondly, is their definition consistent with the required standard of the ESA? The NRC did not choose to address these important questions until their final report 18 months later.

A parallel report issued by the State of Oregon sheds some light on these questions. *The Independent Multidisciplinary Science Team Review of the USFWS and NMFS 2001 Biological Opinions* (IMST Report) reached the opposite conclusion of the NRC Report.

The IMST Report concludes:

IMST agrees with NMFS that increased instream flows in the Klamath River are defensible.

Additionally, the IMST report cites a report jointly developed by the University of California Davis and Oregon State University that also supports NMFS' conclusions, stating:

OSU-UC Davis report says increased flows in mainstem Klamath River are justified based on presence of coho salmon.

So, why does the NRC conclusion differ from the IMST, OSU-UC Davis, and the NMFS/USFWS conclusions? Because they used an inappropriate burden of proof.

The IMST Report directly addresses this point:

Thc NRC (2002) focused its conclusions on relationships for which there is clear evidence from measurements in Upper Klamath Lake and did not give strong weight to evidence from the larger scientific literature and broader scientific concepts in its findings (D. Policansky, pers. comm.). However, the IMST considers information on habitat use, studies of other lake systems and fish Communities, as well as empirical evidence from Upper Klamath Lake to be relevant scientific information that resource management agencies are required to use in making resource management decisions.

We recognize the increased certainty provided by basing conclusions only on direct evidence for a specific location, such as the National Research Council applied in its evaluation of management actions for Upper Klamath Lake. At first glance, the more limited and conservative perspective of the NRC committee would seem to lower the chances of being wrong. However, limiting the scientific basis for the determination of appropriate management actions increases the potential for placing a resource at risk simply because the available observations are inadequate and the larger body of valid scientific information from other systems has been ignored. If management actions for all natural resources were limited only to the specific system that was being managed, many

> *lakes and streams would have no management because empirical evidence for those individual lakes or streams is nonexistent.*

In its final report issued in the fall of 2004 (*Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery*), the NRC Committee finally acknowledges that they used a different burden of proof than the standard required by the ESA. From chapter 9 of the NRC final report:

> *The NRC committee's charge to assess "whether the [agencies'] biological opinions are consistent with the available scientific information" requires the committee to adopt a burden of proof that would apply in the scientific community rather than the legal burden of proof that applies under the ESA.*

Therefore, the NRC used an inappropriate standard for evaluating the BiOps. They used an entirely different standard to evaluate the BiOps than the standard that was required to develop the BiOps. This fact renders the interim NRC Report irrelevant in judging the appropriateness of the BiOps' conclusions; however, that is what the Bush administration (predictably) used the report for.

Why did the NRC chose this inappropriate standard without acknowledging it? Certainly, at least some of the NRC committee members knew that the ESA requires a completely different burden of proof. And they should have known that the Bush Administration would use their interim conclusions in development of the 2002 BiOps for the Klamath Project. If any members knew that the standard was inappropriate, did they state it to the rest of the NRC committee members? If the stated it, why did it not appear in the interim report?

I can only conclude that Bush Administration officials knew that the NRC would use an academic burden of proof, rather than the ESA standard, which would necessarily not support the BiOps' conclusions. Simply stated, the Bush Administration asked the NRC the wrong question. And in my opinion, officials in Interior and Commerce, as well as certain members of the NRC Committee, would have known that it was the wrong question to ask. I am convinced that the interim NRC report was engineered to give the Bush administration its desired answer. As one biologist familiar with the situation put it, "The Bush Administration played the NRC like a fiddle."

I would recommend that this Committee question the Administration officials involved in requesting the NRC review what they knew regarding the burden of proof to be used by the NRC versus the legal standard of the ESA. I would also ask the NRC committee members with background in ESA law (e.g., Dr. J.B. Ruhl) why the NRC did not choose the appropriate burden of proof. I would also question Dr. William Lewis, the NRC committee chair, about his involvement in developing the review in cooperation with administration officials.

I have also provided as an attachment an analysis of the NRC report that was developed by the biologist who wrote the 2001 BiOp. I had included this analysis in my original draft of the 2002 BiOp in order to help demonstrate why the NRC report provided little relevant information. Mr.

Lecky removed this section from the draft and final BiOps, and it was not entered into the administrative record until the courts ordered it to be.

I would like to add that the NRC's final report includes many excellent recommendations and related information that should be used in efforts to restore the Klamath River.

IDEAS FOR AVOIDING FUTURE ABUSE IN ESA DECISION MAKING

I have had many discussions over the years with colleagues and former colleagues about ways that ESA decision making, and specifically the section 7 process, could be better implemented to avoid abuse by administrators. These ideas have come from biologists with considerable experience in ESA decision making and analyses. Two relatively simple remedies are repeatedly cited.

Currently, only the final BiOps signed by an administrator are routinely entered into the administrative record. This practice makes it relatively easy for administrators to alter the conclusions of biologists without leaving a trace. Allowing the lead biologist(s) to co-sign the final BiOp as acknowledgement of support for the conclusions/reasoning could greatly decrease the ability of administrators to alter conclusions for non-scientific reasons. Alternatively, a "biologist's draft" BiOp could be entered into the record to allow comparisons with the final version, and administrators would be required to explain any changes they made.

A second/additional remedy could be to have the lead agency attorney for the consultation sign the final BiOp as an indication of legal approval. In my experience, and in the experiences of my colleagues, agency attorneys have always provided excellent guidance during our development of BiOps. Guidance supplied to biologists and administrators is protected by attorney/client privilege, so the guidance does not appear in the record. I suspect that legal guidance is often ignored by administrators when the guidance does not support predetermined outcomes. I also suspect that this is the reason that administrations lose so many ESA law suits.

STRENGTHENING OF THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENS FISHERY MANAGEMENT AND CONSERVATION ACT

Whenever NMFS does an ESA section 7 consultation, it conducts a concurrent Essential Fish Habitat (EFH) consultation for affected federally-managed species. The result of these consultations is a set of recommendations intended to protect the habitat of these species. Some of these species are the same as the ESA-listed species, and others are not ESA-listed. In the case of the Klamath Project, the affected EFH species were the ESA-listed coho salmon and the non-listed Chinook salmon.

During the 2002 Klamath Project consultation, when I asked about doing the EFH consultation, I was told that we would not be doing one. Our EFH coordinator in the Regional Office must have realized this and produced a generic EFH consultation for us. I edited this generic consultation to include specifics for Klamath coho salmon, which is my specialty species, and

developed at least a dozen recommendations to protect coho habitat. I then informed my superiors that one of the office biologists with Klamath Chinook expertise should review the EFH document and make recommendations for that species.

I don't know whether another biologist analyzed the effects to Chinook salmon, but the final EFH document did not include specific recommendations meant to protect Chinook salmon habitat, and it did not include any of the additional recommendations that I had developed for coho. The single EFH recommendation was simply to implement the alternative in the BiOp.

The EFH recommendations should have recognized that while Chinook and coho have very similar habitat requirements, the Klamath fall Chinook up-river migration run typically peaks a month or more earlier than the coho migration. A legitimate EFH analysis would have recognized this fact and would have recommended higher flows in September. Higher flows in September could have averted the fish kill.

The reason that NMFS administrators are "not willing to fall on their swords for EFH" (a quote to me from my supervisor) is that the EFH provisions only require making recommendations to action agencies. Agencies are then free to ignore these recommendations. As one biologist I know was fond of saying, "EFH is a gummy bear – no teeth, no claws."

I recommend that Magnuson-Stevens Fishery Management and Conservation Act be strengthened to provide EFH requirements, not just recommendations. Such a measure would make NMFS take EFH seriously, and could help avert future fish kills and preserve commercial fisheries.

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In closing, I would like to mention that much progress has recently been made by parties in the upper and lower Klamath Basins toward restoration of the Klamath River. While I think it is very important to investigate what happened during development of the 2002 NMFS BiOp in order to prevent future abuses of the ESA, I sincerely hope that any investigation does not interfere with the encouraging progress in the Klamath Basin.