No. 14-402

In The Supreme Court of the United States

STATE WATER CONTRACTORS, *et al.*,

Petitioners,

v.

SALLY JEWELL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NEBRASKA, ALASKA, ARIZONA, ARKANSAS, KANSAS, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Secretary, pursuant to the Endangered Species Act, must consider and address the technical and economic feasibility of proposed "reasonable and prudent alternatives," including the impact those alternatives have on third parties.

2. Whether the Secretary, pursuant to the Endangered Species Act, may disregard the "best scientific data" when developing a biological opinion.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE WRIT 4

I. Certiorari Is Warranted To Resolve A Conflict Among The Circuits And This Court Regarding Whether A Consulting Agency Must Consider Technological And Economic Feasibility When Proposing "Reasonable And Prudent Alternatives" 4

II. The Ninth Circuit Misapplied The Best Scientific And Commercial Data Available Standard Embodied In 16 U.S.C. § 1536(a)(2) 8

A. The Ninth Circuit improperly supplied its own reasoning to justify the Biological Opinion 9

B. The Biological Opinion is not based upon the best scientific and commercial data available 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Am. Wildlands v. Kempthorne, 530 F.3d 991 (D.C. Cir. 2008).....11

Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001).....9

Bennett v. Spear, 520 U.S. 154 (1997) 1, 6, 7, 8

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988).....11

Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv., 795 F. Supp. 2d 1199 (D. Colo. 2011) 11

Defenders of Wildlife v. U.S. Dep't of Navy, 733 F.3d 1106 (11th Cir. 2013).....11

Dow AgroSciences v. Nat'l Marine Fisheries Serv., 707 F.3d 462 (4th Cir. 2013) 1, 6

Greenpeace v. Nat'l Marine Fisheries Serv., 80 F. Supp. 2d 1137 (W.D. Wash. 2000).....12

Humane Soc. of U.S. v. Locke, 626 F.3d 1040 (9th Cir. 2010) 10

In re Consol. Salmonid Cases, 791 F. Supp. 2d 802 (E.D. Cal. 2011) 12, 14

In re Operation of Missouri River System Lit., 421 F.3d 618 (8th Cir. 2005) 3

In re Operation of the Missouri River Sys. Lit., 363 F. Supp. 2d 1145 (D. Minn. 2004) 3

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).....5

TABLE OF AUTHORITIES – Continued

Page

Kelley v. Calio, 831 F.2d 190 (9th Cir. 1987).....4

Kern County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006) 11

Maine v. Norton, 257 F. Supp. 2d 357 (2003) 13

Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).....9

N. Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).....14

Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554 (D.C. Cir. 2002).....14

Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).....13

Public Employees for Env'l Responsibility v. Beaudreau, ___ F. Supp. 2d ___ (D.D.C. March 14, 2014) 9

San Luis & Delta-Mendota Water Authority v. Jewell, 2014 WL 975130 (9th Cir. March 13, 2014).....1, 5, 9, 10

South Dakota v. Ubbelohde, 330 F.3d 1014 (8th Cir. 2003).....3

Sw. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58 (D.C. Cir. 2000).....12

Trout Unlimited v. Lohn, 559 F.3d 946 (9th Cir. 2009).....12

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

5 U.S.C. § 706 6

Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*.....2, 3, 6, 8

16 U.S.C. § 1536 .....2, 9

16 U.S.C. § 1536(a)(2).....*passim*

16 U.S.C. § 1536(b)(3)(A).....4

16 U.S.C. § 1540(g)(1)(A).....6

29 U.S.C. § 652(8) 5

RULES AND REGULATIONS:

50 C.F.R. § 402.02 .....4, 5

50 C.F.R. § 402.03 2

50 C.F.R. § 402.16 2

OTHER AUTHORITIES:

128 Cong. Rec. 13,184 (1982) 13

Congressional Research Service, *The Endangered Species Act and "Sound Science"* (January 23, 2013) 9

Final ESA Section 7 Consultation Handbook, pages 1-7 (March 1998).....13

Interagency Policy for Peer Review in ESA Activities, 59 Fed. Reg. 34270 (July 1, 1994) 11

TABLE OF AUTHORITIES – Continued

Page

U.S. Fish and Wildlife Service, Consultations with Federal Agencies, Section 7 of the Endangered Species Act, available at http://www.fws.gov/endangered/esa-library/pdf/consultations.pdf 2

U.S. Fish and Wildlife Service, *Information Quality Act Guidelines* ("IQA Guidelines") Part VI, http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised 6_6_12.pdf 11

http://www.fws.gov/feature/Mo_river.html 3

https://www.platteriverprogram.org/Pages/Default.aspx 3

INTEREST OF *AMICI CURIAE*[1]

The States of Nebraska, Alaska, Arizona, Arkansas, Kansas, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming (collectively the "*Amici* States") file this brief in support of the Petition for Certiorari filed by State Water Contractors, the Metropolitan Water District of Southern California, Coalition for a Sustainable Delta, Kern County Water Agency, San Luis & Delta-Mendota Water Authority, and Westlands Water District (collectively the "State Water Contractors").

The Ninth Circuit's decision in *San Luis & Delta-Mendota Water Authority v. Jewell*, 2014 WL 975130, *39 (9th Cir. March 13, 2014) ("*San Luis*") directly conflicts with the Fourth Circuit's decision in *Dow AgroSciences v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 474 (4th Cir. 2013), which found the Service is obligated to address substantively the "non-jeopardy" elements of reasonable and prudent alternatives ("RPA") in its biological opinions including the technological and economic feasibility of the proposal. The Ninth Circuit's decision also cannot be reconciled with this Court's holding in *Bennett v. Spear*, 520 U.S. 154, 177 (1997), where this Court underscored the importance of considering technological and economic feasibility in support of its finding that

[1] Counsel for *Amici* States provided timely notice to counsel of record for Petitioners and Respondents pursuant to Rule 37.2(a) on October 27, 2014.

third parties impacted by biological opinions and RPAs had standing sufficient to challenge the same. In addition, the Ninth Circuit misapplied the "best scientific and commercial data available" standard contained in 16 U.S.C. § 1536(a)(2) and acted as a *de facto* scientific advisory board to justify what the agency itself failed to justify. The intent of the *Amici* States' participation is to underscore the national importance of the issues on which the State Water Contractor Appellees seek certiorari.

Proper application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*. is of great importance to the *Amici* States. The precise number of consultations ongoing pursuant to 16 U.S.C. § 1536 ("ESA Section 7") is undeterminable. However, in April 2011, the U.S. Fish and Wildlife Service ("Service") reported: "In Fiscal Year 2010, the Service assisted Federal agencies in carrying out their responsibilities under section 7 on *more than 30,000 occasions*." U.S. Fish and Wildlife Service, Consultations with Federal Agencies, Section 7 of the Endangered Species Act, available at http://www.fws.gov/endangered/esa-library/pdf/consultations.pdf (emphasis added). Multiple consultations are presently ongoing in each of the *Amici* States, and completed consultations remain subject to re-initiation. *See* 50 C.F.R. § 402.16. Given the volume of consultations and breadth of projects to which ESA Section 7 applies – *see* 50 C.F.R. § 402.03 ("all actions in which there is discretionary Federal involvement or control") – the ESA must be properly implemented to avoid significant adverse societal impacts.

The State of Nebraska, for example, relies heavily on the waters of the Missouri and Platte Rivers to sustain municipal, industrial, agricultural, recreational and wildlife values. Both river systems are subject to the long arm of the ESA. Nebraska spent nearly a decade litigating to ensure the ESA was administered on the Missouri River in concert with other federal obligations, including flood control and navigation. *See, e.g., In re Operation of Missouri River System Lit.*, 421 F.3d 618 (8th Cir. 2005); *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003).[2] The U.S. Army Corps of Engineers, which manages the federal facilities on the Missouri River, remains subject to a biological opinion, including sophisticated RPAs, to protect listed species in that system.[3] In the Platte Basin, Nebraska is engaged with Colorado, Wyoming, and the Department of the Interior, in a partnership to create and maintain habitats to satisfy various ESA obligations.[4] Nebraska's ability to access its water supplies, and to implement its wildlife recovery objectives in concert with its own priorities, hinges on proper interpretation of the ESA provisions at bar.

[2] The Service's obligation to evaluate third-party impacts when adopting RPAs was litigated before the district court. *In re Operation of the Missouri River Sys. Lit.*, 363 F. Supp. 2d 1145, 1161 (D. Minn. 2004). The issue, however, was rendered moot on appeal by supervening events. 421 F.3d at 631.

[3] *See* http://www.fws.gov/feature/Mo_river.html.

[4] *See* https://www.platteriverprogram.org/Pages/Default.aspx.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted To Resolve A Conflict Among The Circuits And This Court Regarding Whether A Consulting Agency Must Consider Technological And Economic Feasibility When Proposing "Reasonable And Prudent Alternatives"

If the Service concludes an agency action will jeopardize a listed species, the Secretary "shall suggest those reasonable and prudent alternatives . . . that can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). The Secretary of the Interior has promulgated a regulation defining "reasonable and prudent alternatives" as:

> . . . alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is (*sic*) *economically and technologically feasible*, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (emphasis added).

"It is the duty of a reviewing court to ensure that an agency follows its own procedural rules." *Kelley v. Calio*, 831 F.2d 190, 191-92 (9th Cir. 1987), citing

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417-19 (1971). Yet the Ninth Circuit in *San Luis* found that, as a mere definition, 50 C.F.R. § 402.02 carries no substantive weight and that nothing in the rule "obligates the [Service] to address the non-jeopardy factors when it proposes RPAs." 2014 WL 975130, *39.

As a preliminary matter, the Ninth Circuit's conclusion that a regulatory definition inherently lacks legal substance is misguided. As this Court noted in a comparable situation regarding 29 U.S.C. § 652(8):

> While it is true that § 3 is entitled "definitions," that fact does not drain each definition of substantive content. For otherwise there would be no purpose in defining the critical terms of the statute. Moreover, if the definitions were ignored, there would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents. We may not expect Congress to display perfect craftsmanship, but it is unrealistic to assume that it intended to give no direction whatsoever to the Secretary in promulgating most of his standards.

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 641, n. 45 (1980). This rationale led this Court to reject the government's assertion that a definition designed to implement a

regulatory scheme was essentially meaningless. It applies with equal vigor in the case of RPAs.

The Fourth Circuit, in *Dow AgroSciences*, directly addressed the substantive import of the so-called "non-jeopardy" elements embodied in the definition of RPAs. There, as here, the Secretary asserted "the economic feasibility requirement [is] simply a limitation that the [RPA] be economically *possible*, without any need for discussion" in a biological opinion. *Dow AgroSciences*, 707 F.3d at 474 (emphasis in original). The Fourth Circuit expressly rejected that interpretation, because it "effectively reads out the explicit requirement" of the regulation. *Id*. Further, without discussion of economic feasibility, it is "impossible for [a court] to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decisionmaking." *Id.* at 475.

The Ninth Circuit's conclusion also conflicts with this Court's ultimate holding in *Bennett*, which underscored the importance of accounting for economic benefit. *Bennett* involved another western water dispute on the Klamath River in Oregon. There, the Service issued a biological opinion to the U.S. Bureau of Reclamation that included an RPA that would reduce downstream releases. The irrigation districts and ranchers sued. After addressing the scope of the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), the Court addressed whether the plaintiffs could bring certain other claims under 5 U.S.C. § 706 in the Administrative Procedure Act ("APA").

The *Bennett* Court concluded that plaintiffs had standing to assert their APA claim challenging a biological opinion because they fell within the zone of interests protected by the "best scientific and commercial data available" standard in 16 U.S.C. § 1536(a)(2). As explained by this Court:

> Petitioners contend that the available scientific and commercial data show that the continued operation of the Klamath Project will not have a detrimental impact on the endangered suckers, that the imposition of minimum lake levels is not necessary to protect the fish, and that by issuing a Biological Opinion which makes unsubstantiated findings to the contrary the defendants have acted arbitrarily and in violation of § 1536(a)(2). The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. *That economic consequences are an explicit concern of the ESA* is evidenced by § 1536(h), which provides exemption from § 1536(a)(2)'s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency

> action clearly outweigh the benefits of any alternatives. We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake is plainly within the zone of interests that the provision [§ 1536(a)(2)] protects.

Bennett, 520 U.S. at 176-77 (emphasis added).

The Ninth Circuit's conclusion that the Service need not consider technological and economic feasibility cannot be squared with this reasoning. The *Bennett* plaintiffs would not have had standing to sue over misapplication of the law if the ESA generally, and particularly the regulations designed to implement 16 U.S.C. § 1536(a)(2), were not designed in some part to protect third party economic interests. The Ninth Circuit's view that RPAs can be developed without regard to third party impacts ignores the essence of the *Bennett* Court's rationale.

II. The Ninth Circuit Misapplied The Best Scientific And Commercial Data Available Standard Embodied In 16 U.S.C. § 1536(a)(2)

The Ninth Circuit also erred when it circumvented the Service's failure to abide by the "best scientific and commercial data available" standard. This is, unfortunately, another in a long line of instances raising serious questions about the level of scientific

integrity applied in ESA Section 7 consultations. *See* Congressional Research Service, *The Endangered Species Act and "Sound Science"* (January 23, 2013).

A. The Ninth Circuit improperly supplied its own reasoning to justify the Biological Opinion.

As a preliminary matter, and despite its contrary admonition, the Ninth Circuit went beyond the bounds of standard APA review when it rejected key portions of the record as properly supplemented by the district court,[5] then went about its own *post hoc* rationalization for the Service's conclusions. *See San Luis*, 2014 WL 975130, *11-12. Where an agency fails to articulate a rational connection between the facts found and the choice made, an agency action is arbitrary and capricious. *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983). *See also Public Employees for Env'l Responsibility v. Beaudreau*, ___ F. Supp. 2d ___ (D.D.C. March 14, 2014) (a court cannot uphold a decision

[5] As the dissenting opinion by Judge Arnold states, the district court's admission of expert testimony was proper under narrow exceptions articulated by the Ninth Circuit. *San Luis*, 2014 WL 975130, *56-*57, citing *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006), *Lands Council v. Powell,* 395 F.3d 1019, 1030 (9th Cir. 2004), and *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.,* 100 F.3d 1443, 1450 (9th Cir. 1996).

where an agency's path cannot be reasonably discerned). A "reviewing court should *not* attempt itself to make up for an agency's deficiencies: we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) (emphasis added; internal quotations omitted). That is precisely what the Ninth Circuit did here.

The peer review panel convened by the Service, as well as the California Department of Water Resources, informed the Service the Biological Opinion was not "clear, concise, complete, or understandable," and that it was "largely unintelligible" – an opinion the Ninth Circuit adopted when it stated "the BiOP is a jumble of disjointed facts and analyses . . . it is a ponderous, chaotic document, overwhelming in size, and without the kind of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning." *San Luis*, 2014 WL 975130, *13. The proper course in such situations is to remand to the agency to connect the dots, not for the Court to paint a new picture by cherry-picking the record for elements that might support the Service's ultimate conclusion.

B. The Biological Opinion is not based upon the best scientific and commercial data available.

Although "[i]t is for the agencies to determine how best to structure consultation to fulfill [16 U.S.C.

§ 1536(a)(2)]'s mandate,"[6] a failure by the agency to utilize the best scientific and commercial data available is arbitrary and capricious. *See Ctr. for Native Ecosystems v. U.S. Fish & Wildlife Serv.,* 795 F. Supp. 2d 1199, 1207 (D. Colo. 2011). The ESA prohibits the Service from disregarding available scientific evidence that is in some way better than the evidence it relies on; it cannot ignore available biological information or fail to develop projections relevant to an analysis of the effects of a proposed action. *See Am. Wildlands v. Kempthorne,* 530 F.3d 991, 998 (D.C. Cir. 2008); *see also Kern County Farm Bureau v. Allen,* 450 F.3d 1072, 1080-81 (9th Cir. 2006); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

To facilitate the Service's identification and development of the best scientific and commercial data, the agency's own guidelines call for peer review, in addition to the statutory and regulatory requirements for public comment and consultation with other relevant agencies. *Interagency Policy for Peer Review in ESA Activities*, 59 Fed. Reg. 34270 (July 1, 1994); U.S. Fish and Wildlife Service, *Information Quality Act Guidelines* ("IQA Guidelines") Part VI.[7] Data and analytical results that have been subjected to formal, independent, peer review carry a presumption of acceptable objectivity. IQA Guidelines, § IV-3.

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[6] *Defenders of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1121-22 (11th Cir. 2013).

[7] http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf.

In contravention of its own guidance regarding peer-reviewed data, and despite the generally-accepted view of the relevant scientific community, the Service refused to comply with the peer review committee's recommendations, as well as expert comments, regarding the use of salvage data and the synthesis of models in the Biological Opinion. There was no expectation that the Service conduct new studies; rather, the recommendations simply would have required the Service to utilize the best available data and develop a proper framework for analysis. *See Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000) (agency's failure to analyze data and develop projections rendered biological opinion inadequate under 16 U.S.C. § 1536(a)(2)). *Compare*, *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 827 (E.D. Cal. 2011) (The Service is also required to "apply generally recognized and accepted biostatistical principles, which constitute best available science, in reaching its decisions.").

This refusal by the Service is distinguishable from cases where an agency properly refused to collect new data,[8] rely upon data with uncertain scientific validity,[9] or where there was a "close call" within the scientific community as to the type and

[8] *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 59-60 (D.C. Cir. 2000) (best scientific and commercial data available requirement does not obligate an agency to conduct new independent studies).

[9] *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009).

proper analysis of data to be relied upon in a biological opinion.[10] This is a case where the best available scientific and commercial data were simply rejected.

Furthermore, the Biological Opinion appears to be based largely on affording a "benefit of the doubt" to the Delta smelt, an overly conservative approach. *Final ESA Section 7 Consultation Handbook*, pages 1-7 (March 1998), citing H.R. Conf. Rep. No. 697, 96th Cong., 2nd Sess. 12 (1979). On the record of the district court, it is clear that any gaps in information were a product of the Service's failure to fill them.

Federal and state water projects vital to the physical and economic survival of half the population of California should not be curtailed on the record in this case. *See Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 219, *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005), citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992) (the Service "could properly reach a no-jeopardy opinion and allow a proposed action to proceed even in the face of scientific uncertainty"). *See also* 128 Cong. Rec. 13,184 (1982) ("Section 7 of the [ESA] . . . provides a vital consultation mechanism whereby neither desirable projects nor species survival need be sacrificed.").

The Service is not entitled to deference when its conclusion "runs counter to that of other agencies or

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[10] *Maine v. Norton*, 257 F. Supp. 2d 357, 389 (2003) ("where the scientific data are equivocal, it is the agency's prerogative to . . . make a policy judgment").

individuals with specialized expertise in a particular technical area." *In re Consol. Salmonid Cases*, 791 F. Supp. 2d at 823, citing *Sierra Club v. U.S. Army Corps of Eng'rs,* 701 F.2d 1011, 1030 (2d Cir. 1983) ("court may properly be skeptical as to whether [an agency action has] a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of others having pertinent experience"). *See also Nat'l Wildlife Fed'n v. EPA,* 286 F.3d 554, 565 (D.C. Cir. 2002) (a court will reject the choice of a model "when the model bears no rational relationship to the characteristics of the data to which it was applied"); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (court should "reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation"). Because the Service disregarded the guidance provided by the peer review panel, and refused to incorporate appropriate data and synthesize the models utilized in the Biological Opinion, it plainly failed to establish its reliance on the best scientific and commercial data available as required by 16 U.S.C. § 1536(a)(2).

CONCLUSION

For the reasons set forth herein and as explained in the State Water Contractors' petition, the Court should grant certiorari.

Respectfully submitted this 6th day of November, 2014.

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