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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, U.S.  
ARMY CORPS OF ENGINEERS, and U.S. BUREAU  
OF RECLAMATION,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC  
POWER COUNCIL, WASHINGTON STATE FARM  
BUREAU FEDERATION, FRANKLIN COUNTY  
FARM BUREAU FEDERATION, GRANT COUNTY

Civ. No. 01-0640-RE (Lead Case)  
CV 05-0023-RE  
(Consolidated Cases)

NWF'S REPLY MEMORANDUM  
IN SUPPORT OF MOTION FOR  
AN INJUNCTION

NWF'S REPLY MEMORANDUM IN SUPPORT OF  
MOTION FOR AN INJUNCTION

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FARM BUREAU FEDERATION, and STATE OF  
IDAHO,

Intervenor-Defendants.

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COLUMBIA SNAKE RIVER IRRIGATORS  
ASSOCIATION, and EASTERN OREGON  
IRRIGATORS ASSOCIATION,

Plaintiffs,

v.

CARLOS M. GUTIERREZ, in his official capacity as  
Secretary of Commerce, NOAA FISHERIES, and D.  
ROBERT LOHN, in his official capacity as Regional  
Director of NOAA Fisheries,

Defendants.

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## INTRODUCTION

NWF has moved the Court for a carefully tailored injunction that would reduce the harm to ESA-listed juvenile salmon in the Snake and Columbia Rivers this summer. This injunction is built around two measures that the National Marine Fisheries Service (“NMFS”), has consistently identified as the most effective ways to assure juvenile survival: (1) faster water velocity; and, (2) increased spill of water past the Snake and Columbia river dams. Specifically, NWF seeks measures to decrease water particle travel time (“WPTT”) in the Snake and Columbia rivers by 10% during the summer salmon migration season together with increased spill at the four lower Snake river projects and McNary dam on the Columbia.<sup>1</sup> Even though NWF has asked for only modest improvements in each of these areas, the federal defendants, and their allied intervenors and *amici* vigorously oppose any change in river operations. Remarkably, these parties oppose NWF’s injunction request without ever evaluating its ability to reduce harm to migrating juvenile salmon as compared to operations under the 2004 BiOp, and without ever seriously attempting to identify or assess a combination of river operations that would comply with the injunction. In addition, these parties raise a host of legal arguments against an injunction. None of these arguments is persuasive.

The Court should grant NWF’s motion for an injunction for three simple and compelling reasons:

- First, both general biological principles and extensive evidence about the factors affecting the survival of juvenile Snake River fall chinook salmon during the summer migration season, as well as specific modeling to compare the effects of the injunction on juvenile survival to the effects of operations under the 2004 BiOp, establish that NWF’s injunction will avoid substantial harm to Snake River fall chinook juveniles migrating down the Snake and Columbia rivers this summer.

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<sup>1</sup> In its motion for an injunction, NWF also asked the Court to order the federal defendants to continue to implement all of the measures of the RPA from the 2000 BiOp to the extent they do not conflict with NWF’s specific request for improved river conditions. NWF addresses this aspect of its injunction motion *infra* at 5 & n.6.

- Second, there are *combinations* of river operations that could be implemented this summer, including modest drawdowns of some reservoirs and modest increases in water flows from upstream reservoirs, that would meet the terms of NWF’s injunction without the kind of large drawdowns or high levels of flow augmentation suggested by the federal defendants in their effort to dismiss NWF’s injunction.
- Finally, contrary to the arguments of the defendants and their allied parties, NWF is likely to succeed on the merits of its claims against the Corps of Engineers (“COE”), Bureau of Reclamation (“BOR”), and NMFS; there are no procedural or other legal obstacles to granting the relief NWF seeks; and, both the law and the balance of harms require an injunction.<sup>2</sup>

## ARGUMENT

### I. THE INJUNCTION NWF SEEKS WILL AVOID HARM TO MIGRATING JUVENILE SALMON THIS SUMMER AND INCREASE THEIR SURVIVAL AS COMPARED TO OPERATIONS UNDER THE 2004 BIOP

NWF seeks a limited injunction in this case to reduce the harm to ESA-listed juvenile fall chinook salmon as they migrate down the Snake and Columbia rivers this summer. This relief consists primarily of measures to improve water velocity in the rivers and increase safe passage past dams. In this section, NWF explains why this relief will reduce harm to migrating juvenile salmon and increase their survivability this summer as compared to operations under the 2004 BiOp and why the biological objections to this relief by the federal defendants and their allied parties either miss the mark or are unsupported.<sup>3</sup>

#### A. The Injunction NWF Seeks Will Reduce Harm to Migrating Juvenile Fall Chinook This Summer.

NWF has asked the Court to enjoin the federal defendants to decrease water particle travel time (“WPTT”) in the Snake and Columbia rivers by 10% during the 2005 summer salmon

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<sup>2</sup> In order to expedite resolution of this case, and because NWF’s legal claims against the federal defendants either have been fully briefed on cross-motions for summary judgment or have been briefed in the context of this injunction motion, and all of the federal defendants have filed administrative records for their actions, NWF respectfully requests that the Court advance and consolidate a hearing on the merits of NWF’s claims with a hearing on its injunction request pursuant to Fed. R. Civ. P. 65(a)(2).

<sup>3</sup> NWF addresses these parties’ operational objections *infra* at 9-11, and their economic concerns *infra* at 38-40.

migration season as compared to the WPTT that would occur under 2004 BiOp operations. NWF also has asked the Court to enjoin these agencies to provide spill at the four lower Snake River dams and McNary Dam to facilitate juvenile fish passage. Spill at other projects would not change. These two measures – improved water velocity and increased spill – are widely recognized as beneficial to juvenile salmon survival and will reduce the harm migrating juveniles would otherwise face under 2004 BiOp summer operations.

Stephen W. Pettit, a fisheries biologist with extensive experience in the effects of hydrosystem operations on migrating salmon and steelhead, described in his earlier declaration in support of NWF’s injunction request the various lines of biological evidence which indicate that improved water velocity and increased spill will significantly reduce the harm to juvenile fall chinook this summer. Declaration of Stephen W. Pettit at ¶¶ 19-23 (discussing improved flows), 24-26, 30-32 (discussing increased spill) (“Pettit Dec.”). As Mr. Pettit explains in his reply declaration, with respect to increased water velocity, “NOAA itself has said that ‘consistent and highly significant relationships have been observed between flow and survival for *juvenile fall chinook* (summer migrants)’ . . . [and] recent studies have confirmed the strong relationship between water particle travel time and the seaward migration rate of juvenile fall chinook.” Stephen W. Pettit at ¶ 6 (“Pettit Reply Dec.”) (emphasis added, citations omitted). Similarly, with respect to increased spill, Mr. Pettit notes, “because spill has proven to be so effective in assisting young salmon on their migration to the sea, NOAA prescribed in 2000 that ‘measures that increase juvenile fish passage over FCRPS spillways are the highest priority’ for passage improvements.” *Id.* at ¶ 7.

Significantly, the technical staff at the Columbia River Inter-Tribal Fish Commission has analyzed the effects of the improved river velocity and increased spill that NWF seeks for the lower Snake River as compared to the effects of operations under the 2004 BiOp using the SIMPAS hydrosystem juvenile fish passage model that NOAA has frequently employed to

calculate the effects of different operations on migrating juvenile salmon. This analysis is described in detail in the Declaration of Thomas K. Lorz (submitted concurrently herewith) and summarized in Mr. Pettit's Reply Declaration.<sup>4</sup> Briefly, this analysis shows that the injunction operations NWF seeks likely will substantially reduce the harm to migrating juvenile fall chinook this summer, and increase their survivability, as compared to operations under the 2004 BiOp. As Mr. Pettit states:

[T]his [SIMPAS] analysis confirms my conclusion that summer operations that provide the decreased water particle travel time and increased spill that plaintiffs seek will increase, likely by more than two-fold, the survival of migrating juvenile fall chinook this summer. This improvement is extremely significant for these salmon.

Pettit Reply Dec. at ¶ 13 (emphasis added).

As Mr. Lorz explains, his SIMPAS analysis for the lower Snake River (which uses the same model assumptions as NMFS' SIMPAS analyses) shows that each component of the relief NWF seeks – improved river velocity and increased spill – provides a significant reduction in harm and an increase in survival for juvenile fall chinook migrating this summer. See Lorz Dec. at ¶¶ 8-12 (discussing increased survival from spill operations); 13-15 (discussing increased survival from improved river velocity).<sup>5</sup> Very significantly, however, as Mr. Lorz notes,

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<sup>4</sup> As both Mr. Pettit and Mr. Lorz note, the SIMPAS model has significant limitations but is most appropriately used to compare the effects on juvenile salmon survival of two different sets of hydrosystem operations, not in order to determine the precise degree of difference between the two as NMFS has frequently used the model to do, but in order to identify which of the two sets of operations causes comparatively less harm and whether the difference in effects is likely to be large or small. Pettit Reply Dec. at ¶ 12; Lorz Dec. at ¶¶ 6-7, 20. It is for this comparative purpose that Mr. Lorz conducted his SIMPAS analysis. Lorz Dec. at ¶ 6.

<sup>5</sup> Mr. Lorz' SIMPAS analysis is for increased water velocity and improved spill on the lower Snake River. It does not specifically assess how increased water velocity and additional spill would affect survival of juvenile migrants in the Columbia River. Thus the significant system survival improvements Mr. Lorz calculates assume conditions in the Columbia are *not* improved as NWF requests. Mr. Robert Heinith in his declaration (submitted herewith) addresses the effects of the injunction operations in the Columbia River and concludes that they would reduce *even further* the harm to migrating juveniles this summer as compared to operations under the 2004 BiOp. Declaration of Robert Heinith ("Heinith Dec.") at ¶¶ 19, 30, 40.

[w]hile spill and drawdown each result in some increase in survival, the largest benefit was achieved when both operations were performed together. The difference in survival between the Plaintiffs' proposal and the BiOp operation was not merely an additive benefit but a multiplicative one. This would tend to support Mr. Pettit's assertion . . . that flow and spill act synergistically together and provide greater benefits when applied together.

Lorz Dec. at ¶ 15 (emphasis added). As Mr. Lorz concludes, "system survival under the Plaintiffs' operation far exceeded the system survival under the 2004 BiOp . . . . [Under the plaintiffs' injunction operations] there was just over a two-fold increase in system survival." *Id.* at ¶ 17.<sup>6</sup>

In sum, the general biological principles and past agency research and analyses discussed by Mr. Pettit in his declarations and also addressed by Mr. Frederick P. Olney in his declarations, Pettit Dec. at ¶¶ 24-26, 29-32; Pettit Reply Dec. at ¶¶ 5-13; Reply Declaration of Fred E. Olney at ¶¶ 5-6, 10-15 ("Olney Reply Dec."), as well as the specific SIMPAS analysis prepared by Mr. Lorz and described in his declaration, Lorz Dec. at ¶ 17, and the evaluation of Columbia River operations by Mr. Heinith, *see* Heinith Dec. at ¶ 13-18, all confirm and establish that the improved river velocity and increased spill NWF seeks in its injunction motion will significantly reduce the harm to, and increase the survival of, migrating juvenile fall chinook this summer as compared to operations under the 2004 BiOp.<sup>7</sup>

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<sup>6</sup> As Mr. Lorz explains in his declaration, his analysis employed a range of values for delayed mortality from transportation or "D." Lorz Dec. at ¶ 7. As he notes, for all D values he employed, the improved water velocity and increased spill under the injunction operations, individually and in combination, increased the survival of juvenile fall chinook. The twofold increase cited in the text assumes a D value of .41, which would reflect much *better* survival of transported fish than the D value of .20 that NMFS has used in its SIMPAS analyses. Using the average D value of .20 that NMFS uses in its analyses, "there was nearly a four-fold increase in system survival" for the injunction operations. *Id.* at ¶ 17.

<sup>7</sup> NWF also has asked the Court to require BOR and the COE to comply with all of the requirements of the RPA in the 2000 BiOp that do not conflict with the increased spill and improved water velocity that NWF seeks. In the Declaration of David J. Ponganis, the COE suggests that some aspects of the UPA addressed in the 2004 BiOp go beyond the actions required by the RPA in the 2000 BiOp, e.g., refined spread-the-risk for spring chinook, increased predator control measures, certain estuary restoration efforts, some habitat protections and so on. Declaration of David J. Ponganis at ¶¶ 74-85 ("Ponganis Dec."). To the extent that the point of

B. None of the Biological Objections Raised by the Federal Defendants and Their Allied Parties Undercuts the Conclusion That NWF’s Injunction Would Reduce the Harm to Juvenile Salmon This Summer.

Despite the compelling evidence and lengthy record of research to show that the increased water velocity and spill NWF seeks will reduce harm to ESA-listed fall chinook this summer, the federal defendants and their allies attempt, in a series of declarations, to raise biological objections to an injunction. Messrs. Pettit, Olney, Lorz and Heinith each respond to these objections in their declarations. See, e.g., Pettit Reply Dec. at ¶¶ 8-9, 15-26, 29-42; Olney Reply Dec. at ¶¶ 15-21, Lorz Dec. at ¶¶ 19-42; Heinith Dec. at ¶¶ 6-7, 11-18, 20-40. Rather than summarize each of these responses here, NWF briefly identifies some of the major answers to these biological concerns and refers the Court to the above declarations for additional detail.

First, Mr. McKern, Mr. Ocker, and others suggest there is no scientific evidence to support the claim that increased spill would benefit juvenile fall chinook migrants. See, e.g., Declaration of John L. McKern at ¶ 15 (“McKern Dec.”); Declaration of Paul A. Ocker at ¶¶ 6-8 (“Ocker Dec.”). Apart from the compelling rebuttal of this point provided by Mr. Lorz’ SIMPAS analysis, which shows that increased spill alone provides substantial survival increases for fall chinook juveniles, Lorz Dec. at ¶¶ 10, as Mr. Pettit explains, there is a significant amount of research, including recent studies of fall chinook, that contradicts the claims of Mr. McKern and others, Pettit Reply Dec. at ¶¶ 8-10 (discussing studies).

Second, in a related argument, Mr. Lohn, Mr. Ocker, Mr. McKern, and others argue that the injunction NWF seeks would harm fall chinook because it would prevent a “spread-the-risk” approach to summer migrating juvenile salmon that they believe would be more beneficial than

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these statements is to argue that the 2000 RPA provides less protection for salmon than the UPA, nothing in NWF’s injunction motion seeks to set an *upper* bound on the actions the COE and BOR can take to protect ESA-listed salmon and steelhead. Accordingly, NWF’s injunction would not seek to *prevent* additional predator control measure that go beyond those required by the 2000 BiOp RPA. Interpretation of NWF’s injunction motion to require such a result is misguided at best and certainly not aimed at a constructive effort to improve the survivability of ESA-listed species.

the injunction. Declaration of D. Robert Lohn at ¶¶ 15-20 (“Lohn Dec.”); Ocker Dec. at ¶¶ 19-32; McKern Dec. at ¶¶ 16-18, 24. As Messrs. Pettit, Lorz, and Olney explain, this is a remarkable claim in light of the fact that summer operations under the 2004 BiOp call for maximum collection and transportation of juveniles rather than spreading the risk between transportation and in-river migration with improved river conditions. Pettit Reply Dec. at ¶15; Lorz Dec. at ¶¶ 25-26; Olney Reply Dec. at ¶ 10-15. By contrast, the plaintiffs’ injunction request would allow for a more balanced approach to salmon migration. See, e.g., Lorz Dec. at ¶¶ 25-26 (the federal approach requires transportation of about 94% of the fall chinook juveniles but NWF’s request would lead to a more even balance with about 50% of fall chinook still transported). As Messrs. Pettit, Lorz, and Heinith explain, it is the injunction operations that NWF seeks that would lead to true “spread-the-risk” management this summer, an approach for which there is abundant scientific support and which will have significant survival benefits. Pettit Reply Dec. at ¶ 15; Lorz Dec. at ¶ 26; Heinith Dec. at ¶ 25. In an attempt to find some support for their maximization of transportation, Mr. Lohn and Mr. Ocker, among others, also argue that NWF’s injunction could harm a small subgroup of fall chinook that holdover and migrate to the ocean as yearlings rather than subyearlings. Lohn Dec. at ¶¶ 19-20; Ocker Dec. at ¶¶ 27-29. As Mr. Pettit explains, available scientific evidence does not support managing migration conditions for this small group of fish at the expense of the rest of the migrating subyearling fall chinook. Pettit Reply Dec. at ¶¶ 19-20; see also Heinith Dec. at ¶¶ 29-31 (stating that the federal transportation operations are likely to be more harmful for these holdover fish than plaintiffs’ request). The simple fact is that plaintiffs’ injunction request provides a significantly more balanced approach to spread-the-risk management than would the 2004 BiOp operations.

Third, several of the defendants’ declarations assert that the injunction operations NWF seeks will have adverse effects on water temperature and hence juvenile salmon. See, e.g.,

Declaration of Don Chapman at ¶¶ 22-39 (“Chapman Dec.”); Ocker Dec. at ¶¶ 16-17. As Dr. Chapman notes, the Snake and Columbia rivers often exceed the Clean Water Act temperature standard of 20 degrees Celsius set for those rivers during the summer. Chapman Dec. at ¶ 23-29, 32. Dr. Chapman states correctly that plaintiffs’ request is unlikely to solve completely these continuing water temperature problems but then goes on to suggest that because plaintiffs’ request is not perfect it should be denied. Chapman Dec. at ¶ 31, 37. Mr. Ocker, by contrast, suggests that plaintiffs’ request could actually increase the temperature problem and thus be worse for migrating Snake River fall chinook. Ocker Dec. at ¶17. As Messrs. Heinith, Lorz, and Pettit explain, this concern is unfounded. See Heinith Dec. at ¶ 22 (explaining why “the operations the Plaintiffs propose would help mitigate temperature problems to a greater extent than the federal operations that would be otherwise in place.”); Lorz Dec. at ¶ 24 (explaining that “the Plaintiffs’ proposal will actually improve temperature conditions in the Snake River as compared to the BiOp Operations.”); Pettit Reply Dec. at ¶ 24-25 (while the plaintiffs’ relief request will may not ensure compliance with Clean Water Act standards, it “will certainly provide a *better* chance of meeting those standards than will the operations under the 2004 BiOp” and will help the salmon move through the warmer temperatures faster than under the federal approach).<sup>8</sup>

Finally, some of the defendants’ declarations argue that the operations NWF seeks would cause dissolved gas to reach levels harmful to migrating juveniles. See, e.g., Declaration of Cynthia A. Henriksen at ¶¶ 24-26 (“Henriksen Dec.”); Declaration of Rock Peters at ¶¶ 21-22 (“Peters Dec.”); McKern Dec. at ¶ 14. Mr. Lorz, however, explains that this is very unlikely to occur, Lorz Dec. ¶ 29-36 and, as Mr. Pettit notes, even if it did, existing dissolved gas

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<sup>8</sup> It is worth noting that if the federal defendants implement the combination of measures to improve water velocity and spill in 2005 that NWF seeks, any comparisons to river conditions in 2001 would be unwarranted, see, e.g., Idaho/BPA Customer Group (“Idaho/ BPA”) PI Opp. Mem. at 14-17, because with these measures in place, both river temperatures and dam passage would be far better for in-river migrants than in 2001.

monitoring protocols would allow for adjustment of river operations to avoid harm, Pettit Reply Dec. at ¶ 34.

The simple fact is that federal defendants have failed to identify any serious biological risk from the injunction NWF seeks, an injunction that will significantly reduce the harm to ESA-listed juvenile fall chinook during the summer migration season on the Snake and Columbia rivers this year as compared to the effects of operations under the 2004 BiOp.

## II. THE RIVER FLOW IMPROVEMENTS NWF SEEKS CAN BE IMPLEMENTED THROUGH A REASONABLE COMBINATION OF MEASURES

As NWF explained in its memorandum in support of its motion for an injunction, the decreased WPTT in the Snake and Columbia rivers that it seeks can be achieved by a combination of modest reservoir drawdowns and increased flows from upstream reservoirs. See NWF Inj. Mem. at 18-19, 32-33; see also Pettit Dec. at ¶¶ 27-36 (generally describing one such combination of operations). Notwithstanding this explanation, the federal defendants oppose NWF's injunction by disregarding *all combinations* of drawdown and flow augmentation to decrease WPTT. They then argue that meeting the injunction with either *all* drawdown or *all* flow augmentation would lead to unacceptable impacts on salmon and other river users. See, e.g., Ponganis Dec. at ¶¶ 45-49, 58-59, 63-64; McKern Dec. at ¶¶ 20-23; Henriksen Dec. at ¶¶ 29, 31, 41. These declarations and the issues they raise based on the extreme "all drawdown" or "all flow" scenarios they address are simply irrelevant to NWF's injunction motion.

As Mr. Pettit explains in his reply declaration, the extreme approach to meeting the 10% decrease in WPTT described by the federal defendants is entirely unnecessary. Rather, as he explains again, and as Mr. Lorz and Mr. Heinith confirm, there are available combinations of modest reservoir drawdowns and modest flow augmentation that would provide a 10% decrease in WPTT. For the Snake River, these operations would involve holding three of the lower Snake reservoirs at Minimum Operating Pool ("MOP") elevation (rather than one or two feet above this elevation as the COE plans to do even though the 2000 and 2004 BiOps call for operating these

reservoirs at MOP), drawing down the fourth lower Snake reservoir, Lower Granite, to a level ten feet below MOP, and providing approximately 143,000 acre feet of additional water for flows from the BOR reservoirs in the upper Snake basin, for a total flow augmentation from these reservoirs of some 343,000 acre feet, well below even the 487,000 acre feet the federal defendants assert they are limited to providing.<sup>9</sup>

On the Columbia River, the federal defendants could meet the 10% WPTT decrease NWF seeks by operating McNary reservoir at MOP, keeping John Day reservoir at Minimum Irrigation Pool (“MIP”) – the level called for in the 2000 and 2004 BiOps (rather than up to several feet above MIP as would likely actually occur) – and managing The Dalles reservoir at average pool elevation, together with additional flows of 920,000 acre feet from upstream reservoirs (only 45-60% of what the federal defendants state would be required, see Declaration of Roger Scheme at ¶ 12; Declaration of D. James Fodrea, Jr. at ¶¶ 6-8). As Mr. Heinith explains in his declaration, these Columbia River operations can be implemented without the kind of dire consequences for upstream reservoirs the federal defendants suggest with their calculation that more than 1.5 million acre feet of additional water would be required to comply with the injunction on the Columbia. Heinith Dec. at ¶¶ 13-18.

A key feature of this combination of operations is the drawdown of Lower Granite reservoir to ten feet below MOP. According to Mr. Lorz’ analysis, this measure alone decreases WPTT on the lower Snake River by almost 7% and hence allows a 10% decrease in WPTT with substantially less than the 430,000 additional acre feet of flow augmentation the federal defendants calculate would be required without any reservoir drawdowns on this river. Lorz Dec. at ¶¶ 13, 16. The federal defendants raise a number of biological objections to this deeper drawdown of Lower Granite but as Mr. Pettit explains in his reply declaration, based on his experience and the specific operations he has suggested for this drawdown, none of these

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<sup>9</sup> As NWF explains infra at 32-36, there is no legal limit on the amount of water BOR can provide if it is necessary to protect ESA-listed salmon and steelhead.

objections has merit. Pettit Reply Dec. at ¶¶ 37-41. For example, as Mr. Pettit explains, drawdown of Lower Granite to 10 feet below MOP would indeed require use of the emergency exit chute from the adult fish ladder for upstream migrating salmon and steelhead. *Id.* at ¶ 38. However, based on his experience with use of this chute during a 1992 drawdown of Lower Granite and other adult fish facilities at other Columbia River dams that rely on continuous use of a false weir like the one at Lower Granite, there is little risk of harm to upstream adult migrants from a deeper drawdown at Lower Granite. *Id.* at ¶¶ 37-41.

In sum, contrary to the unrealistic operations assessed by the federal defendants, there is a reasonable combination of drawdown and flow measures that could be implemented this summer to decrease water particle travel time in the Snake and Columbia rivers by 10% as NWF requests.

### III. NWF IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS UNDER THE ESA

For the reasons set forth in NWF's memoranda in support of its motion for summary judgment, NWF is likely to prevail on its claims that NMFS' 2004 BiOp is arbitrary, capricious, and contrary to law. NWF has also challenged the decisions by the COE and BOR to adopt and implement the Updated Proposed Action ("UPA") in reliance on the 2004 BiOp for violations of sections 7 and 9 of the Endangered Species Act, 16 U.S.C. §§ 1536, 1539. For the reasons described in its opening memorandum in support of this motion for an injunction and discussed again below, NWF is likely to prevail on these claims as well.

#### A. NWF Is Likely to Prevail on Its ESA § 7 Claims Against the COE and BOR.

As NWF explained in its opening memorandum, if the Court concludes that the 2004 BiOp is arbitrary, capricious and contrary to law, then the COE and BOR also are in violation of ESA § 7(a)(2) because they rely exclusively on the no-jeopardy finding of the 2004 BiOp to satisfy both their procedural and substantive obligations under § 7(a)(2). *See* NWF Inj. Mem. at 21-23, 28-29. As federal defendants correctly note, these agencies have both procedural and

substantive duties under § 7. Fed. PI Opp. Mem. at 11-12. Substantively, the statute requires every federal agency to insure that its actions are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). This duty is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9<sup>th</sup> Cir. 1988). Procedurally, the heart of § 7's requirement is the consultation process which Congress designed "to ensure compliance with the [ESA's] substantive provisions." Thomas v. Peterson, 753 F.2d 754, 764 (9<sup>th</sup> Cir. 1985). Here, the COE and BOR have failed to comply with both their procedural and their substantive § 7 duties.

*1. The COE and BOR Have Failed to Comply With the Procedural Requirements of § 7.*

If the Court concludes that the 2004 BiOp is arbitrary, capricious, and contrary to law (and it should), the COE and BOR will be in violation of the procedural requirements of § 7 because they will not have properly completed consultation for the on-going operation of the FCRPS. The agencies ignore this fundamental problem altogether in opposing NWF's injunction motion, but it is dispositive.

*a. Standard of review for procedural § 7 violations.*

The Ninth Circuit held in Thomas v. Peterson that "[i]f a project is allowed to proceed without substantial compliance with [the ESA's] procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." 753 F.2d at 764 (citations omitted). In light of this close structural relationship between a procedural violation of the statute and a substantive violation, in Thomas the Ninth Circuit enjoined construction of a road pending compliance with § 7's procedural requirements based on a minimal showing of potential harm to a listed species. "Given a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA." Id. at 764. Any other remedy for a procedural violation of § 7

would require the district court, absent proof by the plaintiffs to the contrary, to make a finding that the ... road is not likely to effect [sic] the [endangered wolf], and that therefore any failure to comply with ESA procedures is harmless. This is not a finding appropriate to the district court at the present time. Congress . . . . has prescribed procedures for [the agencies'] . . . evaluation. Only by following the procedures can proper evaluations be made. It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed. We therefore hold that the district court erred in declining to enjoin construction of the ... road pending compliance with the ESA.

Id. at 765 (citation omitted) (emphasis added). The likely presence of the listed species together with a failure to comply with the ESA's procedural requirements is sufficient to support an injunction against the proposed federal action even without proof that the action likely will harm a listed species. Id. at 763. As the court observed, where an agency has not completed the consultation process successfully, knowledge about the effects of the action on listed species and critical habitat is necessarily incomplete and the risk of uncertainty is borne by the species, a result that is "impermissible" under the ESA. Id. at 764. Accordingly, under circumstances similar to those in this case, courts in this Circuit have routinely enjoined agency actions, even on-going actions, in the absence of compliance with the procedural requirements of § 7. See, e.g., Pacific River Council v. Thomas, 30 F. 3d 1050, 1057 (9<sup>th</sup> Cir. 1994) (enjoining "ongoing and announced timber, range, and road projects"); Conner v. Burford, 848 F. 2d at 1458 (enjoining actions covered by inadequate biological opinions); Greenpeace Foundation v. Mineta, 122 F. Supp.2d 1123, 1139 (D. Haw. 2000) (same).<sup>10</sup>

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<sup>10</sup> Federal defendants attempt to distinguish Thomas and its progeny because the action agencies in those cases purportedly did not "engage in any kind of consultation" and lacked completed biological opinions. Fed. PI Opp. Mem. at 11-12. Defendants even go so far to as to posit that Thomas is "inapplicable where there is a completed consultation and resulting biological opinion." Id. This is surely a distinction without a difference if the Court has determined that the 2004 BiOp does not comply with the law. Moreover, this creative theory conflicts with the Ninth Circuit's decision in Conner, 848 F. 2d at 1458 (invalidating biological opinions covering oil and gas leasing activities and enjoining any further leasing surface-disturbing activities until adequate biological opinions were prepared); see also Greenpeace v. National Marine Fisheries Service, 106 F. Supp.2d 1066, 1072, 1078 (W.D. Wash. 2000) ("Greenpeace II") (applying Thomas to enjoin ongoing action after setting aside illegal biological opinion).

- b. The action agencies have not complied with the procedural requirements of § 7.

As NWF has noted, the likely predicate to this Court's consideration of NWF's request for injunctive relief is a decision by the Court that the 2004 BiOp is invalid. If that has occurred, there is very little for the Court to consider in determining whether the COE and BOR have complied with the procedural requirements of § 7. "In the absence of a completed comprehensive biological opinion [the action agency] has not, and cannot, insure that [the action] will not result in harm to endangered [species]" and "an injunction pending compliance must be the remedy." See Greenpeace II, 106 F. Supp.2d at 1072, 1078.<sup>11</sup>

Greenpeace II involved a situation remarkably similar to the present case. Like this Court, the district court in Greenpeace II had previously determined that NMFS' BiOp evaluating the effects of several fishery management plans on the endangered Stellar sea lion was arbitrary and capricious. See Greenpeace v. National Marine Fisheries Service, 80 F. Supp.2d 1137,1150 (W.D. Wash. 2000) (holding that BiOp "was legally inadequate under the ESA because it was not a comprehensive opinion and failed to analyze the full scope of the [plans]"). While NMFS engaged in re-consultation to correct these deficiencies, it planned to allow the very fisheries authorized by the plans that lacked an adequate biological opinion to continue. Id. at 1069-70.

After determining that NMFS' failure to obtain a comprehensive biological opinion "constitutes a substantial violation of the procedural requirements of the ESA," Greenpeace II, 106 F. Supp.2d at 1072, the Court found that the agency's:

procedural violation directly implicates its duty to insure against jeopardy and adverse modification. By authorizing the yearly fisheries in the absence of an

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<sup>11</sup> Greenpeace II involved the unusual situation where one arm of NMFS was acting as the action agency – through its approval of fishery management plans and issuance of fishing permits – and another arm played the agency's more traditional role as the expert consulting agency. Greenpeace II, 106 F. Supp.2d at 1069, n.1 (noting the two different offices of NMFS and their roles). All of the references to "NMFS" in Greenpeace II concern the agency's role as the action agency, the same role the COE and BOR have in this case.

adequate, comprehensive biological opinion, NMFS has failed to ‘insure’ that these fisheries will not likely jeopardize the Steller sea lion or adversely modify its critical habitat. This failure is not merely a technical oversight.

Id. at 1075. Applying Thomas, the Court enjoined fishing in specific areas of sea lion critical habitat as requested by the plaintiffs in order to better protect the species while NMFS completed a valid consultation. Id. at 1080. The Court held that, until consultation was complete:

NMFS is unable at present to conclude that the overall effects of these numerous fisheries . . . are not likely to adversely effect Steller sea lions. NMFS cannot validly authorize continued fishing within Steller sea lion critical habitat until it meets its substantive obligations under the ESA. Under Thomas, an injunction pending compliance must be the remedy.

Id. at 1076. The Court in Greenpeace II specifically found that “[a] substantial procedural violation necessarily implicates compliance with the substantive requirements of the ESA because the consultation process is the only means by which the substantive mandate of the statute is met. It is precisely for this reason that Thomas rejected the notion that a party seeking injunctive relief for a substantial procedural violation of ESA section 7 has the burden of showing a prohibited effect on a listed species, i.e., harm.” Id. at 1074.

Continued operation of the FCRPS in the absence of a valid biological opinion warrants a similar response. Until the COE and BOR complete a valid consultation and receive a biological opinion for their proposed actions that complies with the procedural requirements of § 7(a)(2) – an opinion that ensures continuing hydrosystem operations will not jeopardize ESA-listed salmon or destroy their critical habitat – an injunction to reduce the harm to these fish and improve their survivability is appropriate.

2. *The COE and BOR Have Not Complied With the Substantive Requirement of § 7(a)(2).*

In addition to their procedural violation of § 7 by operating the FCRPS without a valid biological opinion, the COE and BOR have violated the substantive duty to avoid jeopardy by relying on and adopting the 2004 BiOp’s arbitrary no-jeopardy finding. Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 989 F.2d 1410, 1415 (9<sup>th</sup> Cir. 1990) (“the Navy may not rely solely

on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)"). Defendants respond by arguing that: (1) the action agencies may rely on the 2004 BiOp unless plaintiffs present "new information" that was not before the agencies that undermines the 2004 BiOp's no-jeopardy conclusion, Fed. PI Opp. Mem. at 16-17; and (2) in any event, the action agencies independently concluded that they have complied with § 7(a)(2) based on their own analysis and did not "reflexively rely upon NMFS' conclusions," *id.* at 6-7, 17. Neither of these arguments is persuasive.

a. The COE and BOR cannot rely on an invalid biological opinion.

The federal defendants' argument that reliance on an invalid biological opinion is improper only if plaintiffs can identify "new information" before the action agency to show a substantive violation of § 7 inaccurately and improperly narrows the scope of the Ninth Circuit's holding in Pyramid Lake and subsequent cases. Indeed, while "new information" that the agencies withheld during the consultation process may certainly form the basis for a substantive violation of § 7, it is not the only basis. *See, e.g., Pyramid Lake*, 898 at 1416 (finding that "the record contains no other data which undermines seriously the FWS's opinions"). In Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9<sup>th</sup> Cir. 1993), the Ninth Circuit reaffirmed Pyramid Lake's holding that "[a]n agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary and capricious" (citations omitted). Similarly, this Court has noted that, "[w]hile formal consultation will satisfy the agency's procedural obligation under § 7, an agency's reliance upon a biological opinion issued by the NMFS must nevertheless be 'reasonable' to satisfy the act's substantive obligations." Pacific Northwest Generating Co-op. v. Brown, 822 F. Supp. 1479, 1487-1488 (D. Or. 1993). More recently, in Northwest Environmental Advocates v. EPA, 268 F. Supp.2d 1255 (D. Or. 2003), this Court invalidated a NMFS BiOp regarding the impact of proposed water quality standards on ESA-listed fish and held that the action agency

violated § 7 when it approved those water quality criteria “notwithstanding extensive evidence in the record indicating that the criteria were harmful to the threatened species and in reliance on NMFS’s facially arbitrary no-jeopardy determination.” *Id.* at 1274 (emphasis added); see also Center for Biological Diversity v. Rumsfeld, 198 F. Supp.2d 1139, 1157 (D. Ariz. 2002) (“the Army knew of the need to take immediate and drastic measures to maintain flows. . . . [but] sought to rely on the FWS’s arbitrary and capricious determination that its action was not likely to cause jeopardy. The Army committed a clear error in judgment when it relied on the Final BO, which failed to consider all the relevant factors.”)

It is undisputed that the action agencies have a continuing independent duty to ensure that their actions will avoid jeopardy. Pyramid Lake, 898 F. 2d at 1410. In this case, the agencies cannot satisfy that substantive duty by relying on the flawed analysis in the 2004 BiOp, especially where, as here, there is also extensive record evidence that the effects of on-going FCRPS operations will harm ESA-listed salmon and steelhead. See supra at 2-5 (discussing harmful effects of 2004 BiOp operations). The COE and BOR simply have no basis for asserting their compliance with the substantive requirements of § 7.<sup>12</sup>

- b. The COE and BOR have no independent basis for concluding that their actions will avoid jeopardy and adverse modification.

The COE and BOR next argue that NWF is unlikely to prevail on a substantive § 7 claim

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<sup>12</sup> Federal defendants reason that the presence of the word “likely” in Section 7 means that federal agencies do not have to “establish with 100% certainty that there will not be significant adverse effects on the species.” Fed. Mem. at 16 & n.20. Congress, however, made clear when adding the term “likely” to section 7 in 1979 that “[t]his language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).” H. Conf. Rep. No. 96-697, at 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576. Moreover, the agencies’ argument is meaningless in the context of NWF’s request for injunctive relief because without a valid biological opinion, the agencies cannot ensure that their actions are even likely to avoid jeopardy. In this injunction motion, the question is not what short-term operation will avoid jeopardy – that is a question to be resolved, if at all, in the consultation process – but what operation will reduce the harm to listed species and improve their survival while the agencies comply with the law.

against them because they only “relied, in large part, [but] not exclusively, on the ‘no-jeopardy’ 2004 BiOp issued by NMFS.” Fed. PI Opp. Mem. at 6. Federal defendants support this claim with two anemic statements from the BOR and COE Records of Decision (“RODs”) – the BOR’s statement in its ROD that the agency based its no-jeopardy finding on “the 2004 BiOp *and other relevant material considered in the consultation,*” *id.* at 6, and the statement in the COE ROD that “*the Corps has determined*” that the actions in the UPA and Incidental Take Statement (“ITS”) will meet its § 7 obligations, *id.* at 7 (emphases added in Fed. Mem.). Of course, defendants do not specifically identify what this “other relevant material” or basis for the COE determination might be and tellingly offer no citation to the record. It is not surprising that the action agencies cannot point to any specific analysis or record evidence that would buttress the contention that they made an independent assessment of jeopardy and adverse modification and reached their own separate and rational conclusions on these issues because here, the action agencies were inextricably involved in every step of the development and analysis in the 2004 BiOp. Indeed, federal defendants have highlighted and emphasized this merger of functions between expert and action agency elsewhere. See Fed. SJ Reply Mem. (Docket # 897) at 38-40; Tribal SJ Reply Mem. at 5-8 (Docket # 857) (citing record documents); see also 2004 BiOp AR Doc. D.3 (Memo from BOR commenting on new jeopardy framework to be applied in 2004 BiOp); COE ROD AR Doc.146 (COE and BOR providing NMFS early draft of the UPA for review as “a step in the iterative exchange for materials between the Action Agencies and NOAA” on development of UPA) (emphasis added); COE ROD AR Docs. 95-97, 105 (Action Agencies negotiating with NOAA to scale back terms and conditions of BiOp’s ITS through inclusion of related measures in UPA); COE ROD AR Docs. 149-155 (negotiating revisions to “reference operation” in 2004 BiOp).

In this case, where there has been no independent analysis beyond the 2004 BiOp and where the action agencies helped to develop the opinion, the no-jeopardy conclusions in the

RODs are unavoidably anchored to the fate of the 2004 BiOp.<sup>13</sup> See Resources Ltd., 35 F.3d at 1304-05 (finding that the “Forest Service’s reliance on FWS’s opinion was not justified in light of its failure to provide the FWS with all of the data and information....”). If the Court determines that the 2004 BiOp is arbitrary and capricious or contrary to law, the Court should also conclude that the action agencies’ self-serving, general statements that their actions will avoid jeopardy in their RODs are similarly illegal.<sup>14</sup> See Florida Key Deer v. FEMA, – F. Supp.2d – 2005 WL 824118 at \*10 (S.D. Fla. Mar. 29, 2005) (holding that action agency’s failure to “engage in any independent consideration of the sufficiency of the 2003 RPAs renders its actions arbitrary and capricious.”); Hawaii Longline Ass’n. v. National Marine Fisheries Service, 281 F. Supp.2d 1, 26-27 (D.D.C. 2003) (same).

B. NWF Is Likely to Prevail on Its ESA § 9 Claim Against the COE and BOR.

NWF has demonstrated that the incidental take statement (“ITS”) in the 2004 BiOp covers only a small percentage of the total “take” of ESA-listed salmon and steelhead that will result from on-going operation of the hydrosystem. See NWF Inj. Mem. at 26-27. Because the 2004 BiOp expressly did not analyze this large increment of take as an effect of the action under consultation – and therefore did not exempt it in the ITS – the COE and BOR have no “safe haven” for this take and are in violation of ESA § 9, 16 U.S.C. § 1538. In an attempt to obscure this straightforward legal flaw, federal defendants distort NWF’s arguments and tie the statute and regulations in knots. None of the statutory somersaults they attempt have any bearing on the

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<sup>13</sup> Because the action agencies so extensively participated in the development of the 2004 BiOp and relied on it exclusively in their RODs, federal defendants’ assertion that NWF is attempting to “bootstrap” its claims against the action agencies to their claims against the 2004 BiOp is nothing but a rhetorical flourish. Fed. PI Opp. Mem. at 17, 23-24. In fact, the only “bootstrapping” that has occurred is the action agency’s reliance on the 2004 BiOp to establish their compliance with ESA § 7.

<sup>14</sup> If the Court rules that the 2004 BiOp is illegal, this result would distinguish this case from Aluminum Co. of America v. Bonneville Power Admin., 175 F.3d 1156 (9<sup>th</sup> Cir. 1999), where the Court turned away a collateral attack on NMFS’ 1995 BiOp – which had been challenged, but upheld by the courts. See id. at 1160 (citing Pyramid Lake, 898 F.2d at 1415).

agencies' violation of § 9.

1. *The Action Agencies Have No Take Protection for Actions Excluded From Consultation.*

Federal defendants first distort the fundamental nature of an ITS by attempting to shift the inquiry from whether the ITS covers all of the take caused by the agency action to whether the action agencies have complied with the terms and conditions of the ITS. Fed. PI Opp. Mem. at 17 (making the remarkable statement that “absent proof that the Corps and BOR are not complying with the terms and conditions of the incidental take statement included in the 2004 BiOp, ‘any taking’ incidental to the hydropower project is not prohibited by § 9 of the ESA.”). This argument, however, renders the ITS meaningless and contradicts the ESA and its implementing regulations.

It is irrelevant whether the action agencies are complying with terms and conditions in an ITS issued as part of an illegal biological opinion. As NWF has explained in its summary judgment briefs, the 2004 BiOp did not analyze the impacts of the entire agency action, and therefore never considered the full amount of incidental take the entire action is likely to cause. NMFS cannot authorize, and the action agencies have no coverage for, take that results from actions and effects that NMFS expressly did not consider part of the action in the 2004 BiOp.<sup>15</sup>

If NMFS determines in a biological opinion that the effects of an action, which include some level of “take” incidental to the action, do not cause jeopardy, then it may issue an incidental take statement that exempts *that* level of non-jeopardizing take from the prohibitions in § 9. 50 C.F.R. § 402.14(i)(1) (ITS is permissible only if NMFS determines that the level of

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<sup>15</sup> As a threshold matter, it is worth noting that the government’s expansive reading of “any taking” in ESA § 7(o)(2) stands in sharp contrast to its selective refusal to apply the same broad reading to § 7(a)(2)’s requirement that the consultation process must consider “any action.” Compare 16 U.S.C. § 1536(o)(2) with 1536 (a)(2); see also Lewis Carroll, Through the Looking Glass (available from <http://www.literature.org/authors/carroll-lewis/through-the-looking-glass/chapter-06.html>) (“‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’”).

take from the action it is analyzing does not jeopardize the continued existence of the species). In other words, the level of take allowed in the ITS is tied directly to the scope of the no-jeopardy finding for the action. See AR Doc. B.251 (NMFS' Consultation Handbook) at 4-49 (“The requirement that incidental take not reach the level of jeopardy or adverse modification is addressed in the biological opinion that finds no jeopardy/no adverse modification for the action”). In the 2004 BiOp, NMFS concluded – based on its improperly limited analysis of the effects of the action – that the limited amount of take attributed to that narrow action would not cause jeopardy. If this narrow evaluation is inadequate – and it is for all of the reasons discussed in NWF’s summary judgment briefs – then, the limited ITS cannot protect the action agencies from take that results from a broader action that NMFS did not analyze.<sup>16</sup>

For similar reasons, defendants’ legal argument that the action agencies may continue to “take” a far larger number of fish through on-going FCRPS operations than the level of take specified as incidental to the action, as long as they comply with the terms and conditions set forth in the ITS and do not exceed the overall take calculation for hydrosystem operations, also fails. The ESA’s implementing regulations require an ITS to (1) identify “reasonable and prudent measures” necessary to “minimize” the impact of any taking and, (2) set forth the “terms and conditions” required to implement the reasonable and prudent measures. 50 C.F.R. § 402.14(i)(1)(i)-(iv). Terms and conditions in an ITS are set to minimize the impact of the take that has been authorized, but they are not ends in themselves – they are the means to reduce take to the level allowed by an ITS. Excusing continued take above this level by pointing to

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<sup>16</sup> Both federal defendants and Idaho/BPA Customers claim that the ITS in the 2004 BiOp is a “separate final agency action from the associated biological opinion.” Fed. PI Opp. Mem. at 17, n.21; Idaho/BPA Mem. at 11 (presuming, incorrectly, that the ITS will remain in place and valid even if the 2004 BiOp is illegal). There is no support for this contention in the law and neither party offers any legal basis for their argument. The idea that an ITS for an action could continue to provide protection to the agencies after the biological opinion that forms the basis for the ITS is found invalid is especially inappropriate here, where the ITS seeks to authorize take only for the narrow subset of agency “actions” that NMFS analyzed in the 2004 BiOp.

compliance with the terms and conditions of an ITS is especially inappropriate in this situation where those conditions have been designed to minimize only the very small effects that NMFS analyzed in the 2004 BiOp rather than the massive effects actually caused by on-going operation of the hydrosystem. See Ramsey v. Kantor, 96 F.3d 434, 441 (9<sup>th</sup> Cir. 1996) (incidental take is permitted “provided the actions in question are contemplated by an incidental take statement.”). In short, the terms and conditions in the ITS almost certainly would be much more stringent if NMFS had assessed jeopardy from the entire agency action and then sought to minimize the much higher take from that action, rather than merely addressing take from the limited subset of purportedly “discretionary” operations analyzed in the 2004 BiOp.<sup>17</sup>

Moreover, allowing “any taking” to continue so long as the agencies comply with the terms and conditions robs the ITS of its vital function as an independent check on NMFS’ no-jeopardy finding. An ITS must specify the amount or extent of incidental take. 50 C.F.R. § 402.14(i)(1)(i). This requirement acts as a check on the agency’s no-jeopardy determination by setting a “trigger” that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision [the protection from ESA § 9], and requiring the parties to re-initiate consultation.” Arizona Cattle Growers Ass’n v. United States Fish and Wildlife Serv., 273 F.3d 1229, 1249 (9<sup>th</sup> Cir. 2001) (emphasis added). Though federal defendants correctly identify reinitiation of consultation as one consequence of exceeding the level of take, it is not the only consequence. It cannot be credibly argued that an agency may continue an action that

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<sup>17</sup> According to federal defendants, if Congress meant to prohibit levels of take above those discussed in an ITS, it would have said so explicitly in § 7(o)(2) of the statute. Fed. PI Opp. Mem. at 19 (highlighting § 7(o)(2)’s allowance of “any taking” in compliance with terms and conditions). Section 7(o)(2), however, refers to the take addressed in the “written statement provided under subsection 7(b)(4)(iv).” 16 U.S.C. § 1536(o)(2). Section 7(b)(4)(iv) allows only take that is “incidental to the agency action” that NMFS analyzes in the BiOp and which NMFS has determined “will not violate” section 7(a)(2)’s jeopardy prohibition. 16 U.S.C. § 1536(b)(4)(iv). Because NMFS has not analyzed the effects from most of the agencies’ operation of the hydrosystem in the 2004 BiOp, its ITS – and any terms and conditions it contains – do not protect the agencies for take resulting from those operations.

actually kills up to 20 times the number of fish authorized by the ITS so long as it meets the narrow terms and conditions set to minimize only a small amount of this take.<sup>18</sup> Compare 2004 BiOp at Table 10.1 with id. at Table 10.3 (4% versus 92% mortality estimates for Snake River fall chinook). If the action agencies were immune from take liability no matter how far their actual level of take exceeded the level analyzed in a biological opinion, there would be little sense in accurately estimating the impacts of the take in an ITS, let alone attempting to monitor that take after an opinion is issued.

2. *NMFS' Identification of the Amount of Take in the 2004 BiOp Is Sufficient Evidence to Establish That the COE and BOR Are Taking ESA-listed Salmon and Steelhead in Violation of § 9.*

Federal defendants cannot claim – and indeed they do not – that they have concluded that taking more than 90% of some species of migrating juvenile salmon and steelhead will not cause jeopardy, and hence can be considered as “incidental” to the agency action. Nor have they claimed – and they cannot – that operation of the hydrosystem does not cause such extensive mortality. See 2004 BiOp at 10-4 (Table 10.3). Instead, the government argues that any take above and beyond the small amounts (ranging from 0-10% of these ESUs) permitted by the ITS is not “actionable” take because it arises from “the dams’ existence or any non-discretionary aspects” of COE and BOR operations, Fed. PI Opp. Mem. at 20-21, or, alternatively, because the plaintiffs have not presented evidence of an actual take. Id. at 21-22. Each of these contentions

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<sup>18</sup> Allowing take at more than 20 times the levels actually attributed to the “action” in the 2004 BiOp while the agencies proceed with reinitiation of consultation – as federal defendants believe is the sole remedy for these violations – would easily trigger Congress’ concern that such take not “cause an irreversible and adverse impact on the species” while the agencies complete a reinitiated consultation. Fed. PI Opp. Mem. at 20 (citing H.R. Rep. No. 567, 97<sup>th</sup> Cong., 2d Sess. 27, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2827 (1982)). Contrary to defendants’ portrayal, this legislative history actually supports granting NWF the relief it seeks to reduce harm to the species while the agencies complete consultation. Moreover, this argument inappropriately presumes that actions that have been through consultation – regardless of the adequacy of that consultation – enjoy the benefit of the doubt to move forward. Id. This turns the ESA on its head. Where federal agencies have not complied with § 7, the risk must fall on the project, not the species. Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9<sup>th</sup> Cir. 1987).

lacks merit.

First, the notion that take caused by “non-discretionary operations” is not actionable under § 9 finds no support in the law. Section 9’s take prohibition is neither constrained by, nor subject to, the discretionary/non-discretionary limitation that federal defendants find in 50 C.F.R. § 402.03 and which NMFS used to limit the scope of the action it considered in the 2004 BiOp. 16 U.S.C. § 1538(a)(1)(B) (unlawful for any person to take).<sup>19</sup> Second, federal defendants would incorrectly require NWF to demonstrate that FCRPS operations are “reasonably certain” to result in “actual take.” Fed. PI Opp. Mem. at 22. In the Ninth Circuit, however, a plaintiff claiming a § 9 violation must demonstrate only “a reasonably certain threat of imminent harm” to listed species. Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9<sup>th</sup> Cir. 1996). Federal defendants’ more stringent standard has never been the test for demonstrating a prospective take in connection with an injunction request. See, e.g., National Wildlife Fed. v. NMFS, 235 F. Supp.2d 1143, 1161 (W.D. Wash. 2002) (enjoining dredging in the Snake River based on showing of a “possibility” of harm to threatened fall chinook salmon). NWF has easily satisfied the Ninth Circuit’s requirements here by pointing to the agencies’ own documents and analysis, as well as the declarations of Messrs. Pettit, Lorz, Heinith, and Olney, all of which discuss the harm that BOR and COE operations under the 2004 BiOp will cause this summer. See supra at 2-5 (citing these declarations).

The agencies do not confront any of this evidence specifically and instead criticize NWF for pointing “only” to the agencies’ own statements in the 2004 BiOp and the record regarding the “potential for some amount of take” above and beyond the small amount of take that the ITS attributes to the UPA. Fed. PI Opp. Mem. at 22. As NWF has explained, the additional

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<sup>19</sup> Regardless of whether NMFS’ consideration of a scaled-down action in the 2004 BiOp is addressed in this Court’s ruling on summary judgment, NWF’s § 9 claim against the COE and BOR for unauthorized take of salmon and steelhead provides an independent basis for establishing a violation of the ESA and issuing an injunction until the defendants comply with the law.

unpermitted take calculated by NMFS is massive for many ESUs. It is difficult to imagine a better source for information about the imminent threat of harm – including direct mortality – or actions that “injure[] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering,” 50 C.F.R. § 222.102, caused by the operation of the hydrosystem than the agencies’ own accumulated empirical evidence in the record.<sup>20</sup> Given this evidence, defendants cannot seriously contest that hydrosystem operations cause take which is not analyzed or permitted by the ITS in the 2004 BiOp.

IV. THERE IS NO LEGAL BARRIER TO THE INJUNCTION NWF SEEKS AND SUCH RELIEF IS REQUIRED BY THE ESA AS WELL AS THE FACTS OF THIS CASE

NWF seeks a limited injunction to protect migrating juvenile Snake River fall chinook from harm they would otherwise face this summer if the COE and BOR implemented the UPA under the 2004 BiOp. NWF has already described how this relief will improve juvenile salmon survival and can be implemented through a combination of reasonable and effective measures. Federal defendants argue that NWF must meet a “heightened burden” to obtain the relief it seeks because, in their view, this relief would “alter the status quo” by requiring affirmative action rather than merely prohibiting an action from proceeding. Fed. PI Opp. Mem. at 13-14. In a variation on this argument, defendant-intervenors assert that NWF must meet the standards for a writ of mandamus in order to obtain the relief it seeks. Idaho/BPA Customer Group (“Idaho/BPA”) PI Opp. Mem. at 4-9. Neither point has any merit. Rather, as NWF has explained, there are well-established standards that govern injunctive relief under the ESA. See supra at 12-15. It is these standards that control in this case. Under them and in light of the available evidence,

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<sup>20</sup> In addition, NWF and *amici* have also submitted extensive expert evidence in support of their injunction motion to identify the harm that operations under the 2004 BiOp will cause this summer as compared to alternate operations NWF has asked the Court to require. For example, as the analysis completed by tribal *amici*’s declarants demonstrates, modifying dam operations this summer will reduce the harm to juvenile fall chinook by as much as two-fold or more. Lorz Dec. at ¶ 17. Without an injunction, fish survival rates this summer will be lower and more fish will perish.

NWF is entitled to an injunction.

A. There Is No Legal Barrier to the Injunction NWF Seeks.

First, both arguments against NWF's injunction are built on a fundamental misconception about the "status quo" for an on-going action such as the operation of the hydrosystem. As the federal defendants repeatedly have pointed out, there is no alternative that does not involve some level of operation of this system. Fed SJ Mem. (Docket # 825) at 19 (observing that "water runs downhill, and the action agencies would have to operate the dams in some fashion whether or not they propose an operation."); see also 2004 BiOp at 5-7 and 5-5 (same). Under these circumstances, asserting that the only appropriate relief is maintaining the status quo is tantamount to asserting that illegal agency action must be allowed to continue unchanged while the agency complies with law. The law is not so blind, nor the power of the Court so limited as to require this result. In the ESA context, the status quo is protecting endangered species from threats even from ongoing activities; it is not protecting the on-going activity. See Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Id. 1996) ("In light of the protective purpose of the ESA, the status quo necessarily contemplates the absence of action in this particular case – i.e., disallowing the grazing activity."). By reducing threats to salmon from operation of the FCRPS, the injunction NWF seeks better preserves the only relevant status quo – juvenile fall chinook survival during their migration.

For their part, the argument by Idaho and the BPA Customer Group that NWF is seeking mandamus relief, and hence must meet the legal standards for obtaining such relief, depends on a similarly inaccurate assertion that NWF's injunction seeks a "mandatory" change to status quo FCRPS operations. They then proceed to knock down a request for such "mandatory" relief based on their view that such relief is in the nature of mandamus and their professed inability to find the "core element of mandamus relief – a ministerial, non-discretionary duty" for the agencies to change their operations. Idaho/BPA Mem. at 9. This argument is based on

semantics: there is no material difference between “mandatory” and “prohibitory” injunctions and certainly none that would change NWF’s motion into a petition for a writ of mandamus. As the D.C. Circuit has observed, “[e]xperience has shown that the dichotomy [between mandatory and prohibitory injunctions] is an illusion and cannot be maintained. To the extent that mandatory and prohibitory represent semantic opposites, any rule based on them is ridiculously easy to circumvent. The mandatory injunction has not yet been devised that could not be stated in prohibitory terms.” United States v. Western Elec. Co., 46 F.3d 1198, 1206 (D.C. Cir. 1995).<sup>21</sup> Indeed, it would be as easy for NWF to frame its injunction motion in prohibitory terms as to frame it in the terms in which it is currently stated. For example, NWF could have asked the Court to prohibit the agencies from generating any more electricity at the four lower Snake River projects than necessary for station service during the summer migration season. The effect would have been to require the agencies to spill river flows above the amount of water needed for station service generation. Similarly, NWF could have asked the Court to prohibit BOR from delivering any water to irrigators and the COE from operating its reservoirs in a manner that would preclude a 10% decrease in water particle travel time.<sup>22</sup>

Defendants’ arguments also ignore the broad powers that courts retain to enforce and

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<sup>21</sup> In addition, even if NWF’s motion for an injunction were construed as a petition for a writ of mandamus – and it is not one – Idaho/BPA acknowledge as they must that a ministerial, non-discretionary duty is not the only basis for granting a mandatory injunction. Idaho/BPA Mem. at 8 (citing Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9<sup>th</sup> Cir. 2002)). Mandamus may also be “employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion.” Idaho Watersheds, 307 F.3d at 832 (citations omitted). In Idaho Watersheds, the district court imposed interim grazing standards while the Bureau of Land Management completed a required environmental review. Id. The relief NWF seeks – a 10% decrease in water particle travel time and spill above flows required to generate station service at certain projects with direction to the federal agencies to use their expertise to provide a combination of operations to best implement these operations – aligns perfectly with the injunction examined and upheld in Idaho Watersheds. See id. at 833 (holding that the district court had properly “urged the BLM to proceed to the exercise of its discretion but did not direct the exercise of that discretion in a particular way”).

<sup>22</sup> More fundamentally, of course, NWF *is* seeking a prohibitory injunction: it is asking the Court to *prohibit* actions that would cause greater harm to and take of migrating juvenile salmon.

give meaning to their own orders. For example, as long ago as Lester v. Parker, 235 F.2d 787 (9<sup>th</sup> Cir. 1956), the Ninth Circuit upheld a district court that had “enjoin[ed] the defendants from interfering with the employment of these plaintiffs, and from declining or refusing to take steps to advise shipping companies and unions that these seamen are entitled to employment,” and in addition, “direct[ed] the defendants to issue to these seamen documents showing they may be employed.” Id. at 788-89. The defendants argued that the decree was beyond the jurisdiction of the district court because it “grant[ed] relief in the nature of mandamus” by ordering the defendants to take affirmative action. Id. at 789. The Ninth Circuit rejected this argument, noting:

The court here has done no more than to follow the recognized power of courts of equity in issuing injunctions, to make those injunctions effective by ancillary provisions, in aid of the injunction, which may require the defendant to do something . . . . [T]he court below, . . . in issuing the injunction, had the inherent power possessed by any court of equity to make that injunction effective, and to prevent the frustration thereof . . . .

Id. at 789-90 (emphasis added); see also Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9<sup>th</sup> Cir. 1982) (absent explicit statutory limitation, district court’s equitable authority includes “the authority to grant any ancillary relief necessary to accomplish complete justice.”).<sup>23</sup>

Finally, even if the Court concludes that the injunction NWF seeks is mandatory, the ESA injunction standards, rather than mandamus law, control. Mandamus is unavailable if there is another adequate remedy, and the ESA provides such a remedy through the preservation of the Court’s equitable powers in its citizen suit provision. 16 U.S.C. § 1540(g)(1)(A) (any person may commence a suit “to enjoin any person, including the United States . . . who is alleged to be

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<sup>23</sup> This also is not a case like Fallini v. Hodel, 783 F.2d 1343, 1345-46 (9<sup>th</sup> Cir. 1986), cited in Idaho/BPA Mem. at 6, where plaintiffs have asked for relief that is outside the agencies’ current authority or discretion. As NWF explained in its summary judgment memoranda, the statutes governing operation of the hydrosystem provide ample discretion as to how FCRPS operations are carried out. NWF’s motion for an injunction does not ask the Court to order the agencies to take action beyond their statutory mandates.

in violation of any provision of this chapter . . .”). An injunction designed to prevent harm to a listed species during consultation, under the ordinary standards governing injunctive relief for § 7(a)(2) violations, is a proper remedy. See supra at 12-15 (discussing injunction standard for violations of § 7).<sup>24</sup> “Injunction is a recognized remedy when adequate grounds therefore are established. It is an equitable remedy, obtainable only when the remedy at law is not adequate. Mandamus, while governed by equitable considerations, is a legal remedy.” Vaughan v. Winston, 83 F.2d 370, 375 (10<sup>th</sup> Cir. 1936) (cited in Lester v. Parker, 235 F.2d at 790, n.2). NWF’s injunctive request is not an action at law for mandamus but one in equity for injunction. The relief NWF seeks lies well within the Court’s powers to grant.

B. The Injunction NWF Seeks Is Appropriate Under the Law and the Facts of This Case.

Where, as here, NWF has shown that it has succeeded, or is likely to succeed, on its § 7 and § 9 claims against the COE and BOR, the balance of hardships and the public interest require an injunction. See National Wildlife Fed. v. NMFS, 235 F. Supp.2d at 1161 (enjoining dredging in the Snake River based on risk of harm to threatened fall chinook salmon); Greenpeace II, 106 F. Supp.2d at 1072. This is because the traditional balancing test for injunctive relief is not the test under the ESA. TVA v. Hill, 437 U.S. 153, 173, 193-95 (1978); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9<sup>th</sup> Cir. 1996). In enacting the ESA, Congress “foreclosed the exercise of the usual discretion possessed by a court of equity,” Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982), and tipped the balance in favor of protecting listed species whatever the cost. TVA, 437 U.S. at 184.

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<sup>24</sup> Idaho/BPA cite Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508-09 (9<sup>th</sup> Cir. 1995), an APA case in which the plaintiffs had asked for an extraordinary injunction compelling the COE to demolish a partially constructed dam pending additional NEPA analysis, to argue that NWF’s injunction request is improper and that NWF has an adequate legal remedy in the “adaptive management process” under the flawed 2004 BiOp. Idaho/BPA Mem. at 7. Idaho/BPA misconstrue the concept of an “adequate remedy.” Moreover, the “adaptive management” process of the 2004 BiOp cannot provide an adequate legal remedy when the BiOp itself is legally flawed.

Under this standard, as described above, the injunction NWF seeks will reduce harm to ESA-listed Snake River fall chinook during the critical summer juvenile migration season and can be implemented through a combination of reasonable measures. Moreover, as described in the Declarations of Ernest G. Niemi (“Niemi Dec.”) and Edward Sheets (“Sheets Dec.”), filed concurrently herewith, the economic consequences of an injunction will be temporary and, in the context of both the Northwest economy and the sectors of it that may be affected, relatively minor. Under these circumstances, the public interest in protecting ESA-listed salmon far outweighs these limited financial impacts.

*1. The ESA Injunction Standard Applies Fully to NWF’s Injunction Motion.*

Despite the well-established legal standard for an injunction under the ESA, the federal defendants raise an incorrect legal argument against application of that standard and an incorrect legal argument against a particular measure that the injunction may require, limitation of irrigation water deliveries by the BOR.

- a. The ESA does not require NWF to show harm to the entire species in order to obtain an injunction.

Federal defendants attempt to side-step their own analysis and extensive record that on-going hydrosystem operations will irreparably harm ESA-listed salmon this summer by arguing that NWF must show harm to the “species as a whole” before it may obtain an injunction. Fed. PI Opp. Mem. at 13, 17, 22 (citing the First Circuit’s decision in Water Keeper Alliance v. U.S. Dep’t of Defense, 271 F.3d 1, 34 (1<sup>st</sup> Cir. 2001), and arguing that “harm is to be evaluated with respect to the species as a whole, rather than with respect to individual members of the species”). Whether an activity will actually cause jeopardy or a species-wide impact has never been the test for a showing of irreparable harm under any applicable preliminary injunction standard and has been explicitly rejected by the Ninth Circuit. In National Wildlife Federation v. Burlington Northern RR, 23 F.3d 1508 (9<sup>th</sup> Cir. 1994), which defendants cite for other reasons, the Court declined to issue an injunction because there was no evidence that *any* single member of the

protected species would be injured in the future. Id. at 1511. However, the Court emphasized that “[w]e are not saying that a threat of extinction to the species is required before an injunction may issue under the ESA. This would be contrary to the spirit of the statute.” Id. at 1511, n.8 (emphasis added); see also Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 785 (9<sup>th</sup> Cir. 1995) (“Once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult.”). Many other courts have also rejected this view and have properly granted injunctive relief in situations where an action poses a risk of harm to a species even though it would not result in harm to the prospects of the entire species. See NWF v. NMFS, 235 F. Supp.2d at 1161 (enjoining dredging in part of Snake River based on a finding that “active spawning redds of the Snake River fall chinook could be disturbed.”); Greenpeace v. Mineta, 122 F. Supp.2d at 1134 (enjoining continued fishing where it had not been demonstrated to threaten endangered Hawaiian monk seal with extinction).

In addition, while the evidence shows that status quo dam operations would substantially harm Snake River fall chinook this summer, requiring NWF to demonstrate impacts to the “species as a whole” mischaracterizes the concept of irreparable injury, which has nothing to do with the magnitude of the harm. See Big Country Foods, Inc. v. Board of Educ., 868 F.2d 1085, 1088 (9<sup>th</sup> Cir. 1989) (party must demonstrate threat of irreparable injury “irrespective of the magnitude of the injury”); Sierra Club v. Martin, 71 F. Supp.2d 1268, 1327 (N.D. Ga. 1999) (“The question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is irreparable – that is, whether there is any adequate remedy at law for the injury in question.”). Here, as in the district court decision enjoining Snake River dredging, there is no adequate remedy at law for the juvenile Snake River fall chinook that will be lost this summer under the operations approved in the 2004 BiOp any more than there was for the redds that would be disturbed if dredging proceeded. Harm to ESA-listed species is the essence of “irreparable injury” and calls for the highest level of caution,

including injunctive relief. Marsh, 816 F.2d at 1383 (“the balance has been struck in favor of affording endangered species the highest of priorities”).

- b. Idaho state law does not prevent BOR from complying with an injunction under the ESA.

In an argument that is tellingly not joined by the federal defendants, Idaho/BPA argue that NWF’s injunction request is impossible to implement because BOR is legally unable to provide additional water for flow augmentation consistent with Idaho water law. According to Idaho/BPA, the total permissible amount of water for downstream flow augmentation is capped by Idaho law at 487,000 acre-feet per year.<sup>25</sup> In addition, these parties argue that Idaho law only allows BOR to obtain water for flow augmentation from willing lessors. On this basis, Idaho/BPA asserts that it is impossible to provide *any* additional water from the BOR’s upper Snake projects, beyond the approximately 200,000 acre feet that BOR plans to provide this summer, without running afoul of these state law constraints. This is not correct.

First, BOR only intends to provide 200,000 acre-feet of flow augmentation this year. Dreher Dec. ¶ 12. This means that even if Idaho law limits the total amount of water available for flow augmentation, an additional 287,000 acre-feet of water can be provided consistent with state law. As explained in the Lorz and Pettit Reply declarations submitted herewith, a combination of reservoir drawdowns on the lower Snake River and additional flow augmentation from the BOR’s upper Snake projects of as little as 143,000 acre feet above the 200,000 acre feet the agency plans to provide would meet the 10% WPTT decrease in the Snake River that NWF seeks. Lorz Dec. at ¶ 16. Separately, the mere fact that 2005 is a low water year does not mean, *a priori*, that willing lessors cannot be found to provide this additional water, depending on the

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<sup>25</sup> During oral argument on NWF’s motion for summary judgment on April 27, 2005, the Court indicated that it would not be considering NWF’s argument that NMFS erred by segmenting BOR’s upper Snake projects from the 2004 BiOp. NWF has incorporated a similar claim against BOR in this motion for an injunction but, based on the Court’s comments, NWF rests on its prior briefing of this claim.

price BOR is willing to pay to lease the water. Idaho/BPA offer nothing but speculation to support the argument that NWF's injunction would require the BOR and COE to violate the Idaho state law limitation on the total amount of flow augmentation.

Second, the contracts between BOR and Idaho irrigators who receive water from BOR's upper Snake projects authorize BOR to withhold water needed to meet other statutory goals, including protection of ESA-listed species. Idaho/BPA devote considerable effort to arguing that BOR lacks this authority but their arguments ignore virtually all of the controlling law as well as the language of the BOR contracts themselves, which specifically contemplate that it may occasionally be necessary to divert water from irrigation under the contracts in order to meet other statutory objectives. Indeed, the scope of BOR's sometimes competing obligations under water service or repayment contracts and the ESA is legally well-trodden ground. In O'Neill v. United States, 50 F.3d 677 (9<sup>th</sup> Cir. 1995), for example, water users brought suit against the United States seeking performance on a BOR water service contract. The water users had received less than a full contractual supply because water had been allocated to ESA-protected species. The court turned to the contract at issue and noted that it contained a provision stating that the United States was not liable for water shortages attributable to errors, drought or "any other causes." Id. at 682. The Court concluded that the provision covered water shortages that resulted from "the mandates of valid legislation," including statutes—like the ESA—that required BOR to use the water elsewhere. Id. at 684; see also Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1126 (9<sup>th</sup> Cir. 1998) (holding that BOR had authority to "reduce the amount of water available if necessary to comply with the ESA" where contracts only granted irrigators a right to the "available" water supply).

Although Idaho/BPA have not submitted any BOR contracts to support their arguments – and indeed barely mention the contracts at all – NWF has obtained several contracts and notes they contain provisions virtually identical to those deemed dispositive in the cases cited above.

For example, the contracts uniformly obligate BOR to provide only a percentage share of “available” water. Compare Minidoka I.D. Contract at 4, 12-14, 41; Idaho I.D. Contract at 9; American Falls R.D. Contract at 8, 29 (excerpts attached as Exhibits 1-3 hereto); with Houston, 146 F.3d at 1126 (under BOR contracts “available” project water “could be reduced in order to comply with the ESA”). Similarly, each of the contracts explicitly contemplates that “shortages in the quantity of water available” could arise by reason of drought, errors, hostile diversions, “or other similar causes of whatsoever kind.” Compare, e.g., Exh. 1 (Minidoka I.D. Contract) at 42; Exh. 2 (Idaho I.D. Contract) at 39; Exh. 3 (American Falls R.D. Contract) at 30; with O’Neill, 50 F.3d at 683 (contract provision holding U.S. harmless for shortages by “any other causes” covered shortages caused by requirement of ESA). Finally, each of the contracts expressly gives BOR the ability to adjust the amount of water to be furnished “whenever there are determinations that the active capacity [of the reservoir] is other than above stated.” See, e.g., id. Exh. 1 (Minidoka Contract) at 14, 23; Exh. 2 (Idaho I.D. Contract) at 4, 23; Exh. 3 (American Falls R.D. Contract) at 4, 10, 12. Clearly, under the terms of these contracts as interpreted by the courts, BOR retains ample authority to reduce the amount of water to irrigators if the water is needed to assure compliance with the ESA.

Ultimately, of course, the constraints imposed by Idaho water law and the contracts themselves are subservient to the BOR’s overarching legal obligation to “halt and reverse the trend towards species extinction, whatever the cost.” TVA, 437 U.S. at 184. BOR’s assertion in a declaration that “it does not have authorization to halt these irrigation diversions,” Gregg Dec. ¶ 15, is simply wrong as a matter of law, regardless of what the contracts say. The Ninth Circuit has been abundantly clear that the ESA imposes duties on BOR to ensure against harm to listed species, even if it means *defaulting* on contracts (which is not the case here). If BOR cannot deliver water to contract holders consistent with its ESA obligations, then it cannot deliver the water at all: the ESA’s overarching prohibition against jeopardy takes “priority” over BOR’s

“primary mission,” TVA, 437 U.S. at 185, at least in the absence of an exemption from the ESA. Conner, 848 F.2d at 1452, n. 26. While NWF agrees that defaulting on irrigation contracts should be a last resort, and is in all probability unnecessary, BOR has the authority to do so if needed to meet its duties under the ESA.<sup>26</sup>

In PCFFA v. BOR, 138 F. Supp.2d 1228 (N.D. Cal. 2001), the court reached a similar conclusion regarding irrigation deliveries from BOR’s Klamath Project in southern Oregon and northern California. Having established a violation of the ESA, plaintiffs asked the court to issue an injunction limiting water deliveries to irrigators to prevent river flows from falling below a certain level. Intervenor argued that the BOR lacked the authority to withhold such water, which was supplied to the irrigators under contracts. The court disagreed, concluding that the requirements of the ESA “override the water rights of the irrigators” id. at 1250 & n.20, and an injunction issued. See also Klamath Water Users Protective Assoc. v. Patterson, 204 F.3d 1206, 1213 (9<sup>th</sup> Cir. 2000) (since BOR owns and retains authority over dam, ESA imposes overarching duty to “tak[e] control of the dam when necessary to meet the requirements of the ESA”). The Idaho/BPA intervenors tellingly do not address a single one of these cases. As in O’Neill and PCFFA, if BOR needs to provide contract water to satisfy the ESA, it not only has the authority to do so, it must do so.

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<sup>26</sup> The Ninth Circuit in O’Neill made this point explicitly when it asked what would happen if a water supply contract obligated the government “to supply, without exception” water to irrigators. 50 F.3d at 686. Even where the contract offered no specific authority to withhold water, the court concluded that the contract remained subservient to subsequently enacted statutes, including the ESA. Absent a clear indication in the contract that surrenders in unmistakable terms Congress’s sovereign power to enact legislation, such contracts remained subject to shifts in the law “modifying the priority of water uses.” Id. Section 8 of the Reclamation Act of 1902 does not change this. As the Ninth Circuit has determined, contracts executed pursuant to the 1902 Reclamation Act and “all acts amendatory or supplementary thereto” allow for later legislation “modifying the priority of water uses.” O’Neill, 50 F.3d at 686; see also Exh. 3 (American Falls R.D. Contract) at 3 (identical language); Exh. 2 (Idaho I.D. Contract) at 3; Exh. 1 (Minidoka I.D. Contract) at 3 (same).

2. *The Injunction NWF Seeks Will Reduce Irreparable Harm to ESA-Listed Salmon This Summer and Will Have Limited Economic Effects.*

As NWF has explained, the 2004 BiOp is arbitrary, capricious and contrary to law. The COE and BOR, consequently, are in violation of ESA §§ 7 and 9 because they cannot ensure that on-going hydrosystem operations will avoid jeopardy and adverse modification of critical habitat and they have no protection for the take of ESA-listed salmon and steelhead their actions will cause. See supra at 14-15. In these circumstances, the ESA and case law applying it require an injunction. See Thomas, 753 F.2d at 764-65 (“the remedy [for a procedural violation] must be an injunction of the project pending compliance . . . . [i]t is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on the species”); Greenpeace II, 106 F. Supp. 2d at 1072-76 (applying Thomas to enjoin ongoing fishery permitted by arbitrary BiOp).<sup>27</sup>

Notwithstanding the defendants’ puzzling contention that NWF has failed to show irreparable harm from on-going hydrosystem operations because the agencies’ own discussion and identification of harm to salmon and steelhead in the 2004 BiOp and record is unreliable or somehow discountable, Fed. PI Opp. Mem. at 22; but see 2004 BiOp at 5-19 to 5-20 (“a substantial rate of juvenile injury and mortality occurs during downstream passage” including direct mortality from passing through the dams and indirect mortality from delay, temperature,

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<sup>27</sup> Intervenor-applicant Irrigators suggest that if the Court issues an injunction, a bond is required. They are wrong. First, consideration of a bond is appropriate only in cases involving preliminary injunctions, and NWF has asked the Court to consolidate a hearing on the merits of NWF’s claims with a hearing on its injunction request under Fed. R. Civ. P. 65. Second, contrary to the Irrigators’ implication, Save Our Sonoran v. Flowers, 381 F.3d 905 (9<sup>th</sup> Cir. 2004), does not stand for the proposition that *any* bond, let alone a bond above nominal levels, is required in cases where public interest litigants seek preliminary relief. See id. at 916 (rejecting argument that a bond approximating actual damages is required and reaffirming district court’s discretion to “dispense with the security requirement” altogether) (citations omitted). Finally, the Irrigators’ requested bond is based almost entirely on a belief that they will be impacted by drawdown of John Day Reservoir below Minimum Irrigation Pool (“MIP”). As clarified elsewhere, the injunction NWF seeks should not require lowering John Day reservoir below MIP. See Pettit Reply Dec. at ¶ 31.

and predation).; *id.* at 10-4 (Table 10.3) (estimates of “passage mortality” for juvenile salmon ranging up to 92% for Snake River fall chinook), there can be no legitimate doubt that on-going hydrosystem operations under the 2004 BiOp will kill and injure thousands of ESA-listed salmon and steelhead, including, many juvenile Snake River fall chinook migrating downstream this summer.<sup>28</sup> *See, e.g.*, 2004 BiOp at 5-62, 6-78 to 6-80, Chpt. 10; 2004 BiOp AR Doc. C.214 (NOAA Technical Memorandum “Passage of Adult and Juvenile Salmon Through Federal Columbia River Power System Dams”); COE ROD AR Doc. B.266 (NOAA Technical Memorandum “Effects of the Federal Columbia River Power System on Salmon Populations”) at 131-32 (“Summer migrants suffer greater mortality in reservoirs than do spring migrants, and improvements in river conditions may confer considerable survival improvements. The low survival experienced by spring migrants in 2001 and generally lower survival of summer migrants likely resulted from conditions in the reservoirs, potentially low flow, and possibly a lack of spill.”). As this Court stated last year when it enjoined the government’s attempt to curtail spill at several dams during the summer migration, “it is not difficult to conclude that plaintiffs have made the requisite showing of harm. The agencies’ own analysis concludes that a curtailment of spill will kill many listed juvenile fish, yet there is no real offset offered by the government.” *NWF v. NMFS*, CV-01-640-RE, Opinion and Order (July 29, 2004) (Docket

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<sup>28</sup> Indeed, the only real question before this Court is how much can be done to alleviate that harm while the agencies comply with the law. At their core, defendants’ arguments about harm are simply a claim that the 2004 BiOp already requires all that can be done to protect ESA-listed salmon. As NWF has demonstrated, *supra* at 2-10, this is simply not true. Federal defendants also invoke one instance of this Court’s past refusal to enjoin juvenile salmon transportation in *American Rivers v. NMFS*, 1995 WL 464544 (D. Or. Apr. 14, 1995), Fed. PI Opp. Mem. at 27, to support their contention that the hydrosystem is simply too complicated for a federal court to issue any injunction affecting its operation. Defendants fail to mention that the Ninth Circuit vacated that decision on ripeness grounds in an unpublished decision in *American Rivers v. National Marine Fisheries Service*, 168 F.3d 497, 1999 WL 68644, (9<sup>th</sup> Cir. Feb. 11, 1999). Thus, it has no precedential or other legal effect. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9<sup>th</sup> Cir. 1991) (“a decision that has been vacated has no precedential authority whatsoever.”). More importantly, the argument that the hydrosystem is too complicated to be the subject of any injunction is itself unprecedented and unsupported.

#602) at 8. Those same words apply fully to operations under the 2004 BiOp this summer.<sup>29</sup> In addition, NWF and the Tribes have submitted extensive evidence in support of NWF's injunction motion to demonstrate and confirm this harm. See supra at 2-5 (summarizing evidence from declarations).<sup>30</sup>

Even though the law is clear that an injunction to protect listed salmon from harm is necessary regardless of economic costs, NWF v. NMFS, 235 F. Supp.2d at 1161; Sierra Club v. Marsh, 816 F.2d at 1383 (the “language, history and structure” of the ESA “indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”) (citations omitted), defendants and their allied parties attempt to inject economic considerations into this case by arguing that the “public interest” in *status quo* river use should outweigh protecting listed salmon. Fed. PI Opp. Mem. at 24-35; Idaho/BPA Mem. at 37-43; Farm Bureau Mem. at 2 (citing declarations). The ESA simply does not provide for such considerations. TVA, 437 U.S. at 184 (“The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”).<sup>31</sup>

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<sup>29</sup> Federal defendants' contention that water years like 2005 were considered in the 2004 BiOp and that the opinion nonetheless reached a no-jeopardy finding, Fed. PI Opp. Mem. at 24-26, is irrelevant. A no-jeopardy finding in the 2004 BiOp – especially one based on an illegal analysis – provides no support for the view that hydrosystem operations do not harm salmon or that such harm is not “irreparable” for purposes of injunctive relief. See Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1275-76 (10<sup>th</sup> Cir. 2004) (“no jeopardy” conclusion does not necessarily mean impacts are insignificant); Makua v. Rumsfeld, 163 F. Supp.2d 1202, 1218 (D. Haw. 2001) (“no jeopardy” does not equate to “no effect”).

<sup>30</sup> The Ninth Circuit has made clear that plaintiffs only need to show a “possibility” of irreparable harm, not a “probability” in order to obtain an injunction under the ESA. Earth Island Inst. v. U.S. Forest Serv., 351 F.3d 1291, 1298 (9<sup>th</sup> Cir. 2003). NWF has easily met this standard.

<sup>31</sup> Notwithstanding the out-of-circuit precedent relied on the Irrigators, Irrigators' PI Opp. Mem. at 20-21, courts in this circuit routinely decide preliminary injunctions based on written testimony and oral argument without a full-blown evidentiary trial. See, e.g., NWF v. NMFS, CV – 01-640-RE, Opinion and Order (July 29, 2004) (Docket #602) (enjoining defendant COE from curtailing summer spill at FCRPS projects); Greenpeace II, 106 F. Supp.2d at 1078-1080 (evaluating harm based on expert declarations filed by parties).

To the extent the Court considers defendants' discussion of economics as part of the public interest, however, it is important to highlight that while there certainly would be some economic impacts from NWF's injunction, those impacts will be far more limited, less significant, and more easily mitigated than the defendants and their allies suggest. For example, the potential \$50-100 million foregone power generation costs that BPA projects from an injunction this summer translates to worst case rate increases for the average residential ratepayer of only \$0.27 - \$1.34 per month for one year, depending upon how much of their electricity comes from BPA and whether BPA recovers these costs in one or two years. Sheets Dec. at ¶¶ 5-7. Even impacts from potential rate increases on large industrial power users are minimal when compared to other costs these entities face. Niemi Dec. at ¶¶ 20-24.

The government's prediction of a \$2.5 million impact to commerce on the Snake River from drawdown of Lower Granite reservoir is also likely significantly overstated because it incorrectly assumes a halt to all transport on the entire Snake River during the injunction, fails to account for new information, and fails to recognize that navigation on the river ebbs during the summer months. Niemi Dec. at ¶¶ 15-19. The impacts to irrigators in Idaho if contract water deliveries are reduced also likely would be mitigated to some extent by these irrigators and certainly would be small in the context of the regional economy. *Id.* at ¶¶ 25-26.

More importantly, none of the predictions of economic impact by defendants account for the *benefits* to the regional economy from the increased salmon survival and returns to which NWF's injunctive will contribute. In addition to their status as a well-recognized regional icon, salmon are a significant economic engine for thousands of families in the Northwest, including tribal, commercial, and sport fishermen, fishing tackle and boat manufactures, and tourism businesses. See, e.g., Ben Johnson Associates, Inc., "The Potential Economic Impact of Restored Salmon and Steelhead Fishing in Idaho" Exec. Summ. at 2 (restored salmon and

steelhead fishery in Idaho worth \$544 million/year to State economy) (Feb. 2005).<sup>32</sup> As Mr. Niemi explains, though the exact amounts are difficult to estimate, Northwest citizens are willing to pay for increased salmon runs. Niemi Dec. at ¶¶ 27-29. The economic benefits of restoring depressed salmon caused by the business-as-usual approach of the 2004 BiOp will accrue to these interests in ways that defendants fail to acknowledge, let alone balance. These economic benefits from restored salmon populations also are consistent with the ESA's species protection mandates whereas the financial interests asserted by defendants are what has led to the current perilous condition of salmon and steelhead populations.

In sum, both the law and the balance of harm – to the extent the Court considers it – support NWF's motion for an injunction.

#### CONCLUSION

In Idaho Dep't of Fish and Game v. NMFS, 850 F. Supp. 866 (D. Or. 1994), vacated as moot, 56 F.3d 1075 (9<sup>th</sup> Cir. 1995), Judge Marsh observed that operation of the Snake and Columbia river hydrosystem “literally crie[d] out for a major overhaul” in order to balance protection of ESA-listed salmon with other river uses. Id. at 900. More than ten years and three biological opinions later, little has changed. Instead, as the Court ruled last summer, we are still “working from a deficit situation,” NWF v. NMFS, No. 01-640-RE, Opinion and Order at 8 (July 29, 2004) (Docket # 602). It has become all too clear that a continuing cycle of biological opinions, litigation, and remands for revised opinions will not protect ESA-listed salmon and steelhead from harm or achieve compliance with the ESA. Indeed, this harmful situation will only become worse this summer in the absence of the injunction NWF seeks. Accordingly, for all of the reasons discussed above and in the declarations submitted in support of this motion, NWF respectfully asks the Court to grant its request for an injunction to protect juvenile fall

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<sup>32</sup> A copy is available from <http://www.idahorivers.org/pdf/FishingEconReport.05.pdf> (visited May 12, 2005).

chinook this summer.

Respectfully submitted this 16<sup>th</sup> day of May, 2005.

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