

THE HONORABLE JAMES A. REDDEN

Tim Weaver, WSB #3364
weavertimatty@qwest.net
Law Offices of Tim Weaver
402 E Yakima Ave Suite 190
Yakima, WA 98901
509-575-1500
509-575-5227 Fax
ATTORNEY FOR AMICUS YAKAMA NATION

**UNITED STATES DISTRICT COURT
FOR THE 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
FARM BUREAU FEDERATION, and STATE OF
IDAHO,

Intervenor-Defendants.

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

JOINT REPLY MEMO OF THE
UMATILLA, WARM SPRINGS
AND YAKAMA TRIBES IN
SUPPORT OF PLAINTIFF'S
MOTION FOR INJUNCTION

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

Plaintiffs,

v.

DONALD L. EVANS, 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.

/// /// ///

Law Offices of Tim Weaver
402 E Yakima Ave., Suite 190
Yakima, WA 98901
509-575-1500

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INTRODUCTION

Instead of looking for what can be done to protect the species from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption.

IDF&G v. NMFS, 850 F. Supp. 886, 900 (D. Or. 1994).

Despite the 2004 FCRPS BiOp being illegal for all the reasons articulated in the summary judgment filings of the Plaintiffs, State of Oregon, and the Columbia River treaty tribes, the consistent recognition by NOAA of the benefits of faster river flows and increased spill for migrating salmon, and the further confirmation that transportation neither helps nor harms Snake River fall Chinook, neither NOAA nor the Action Agencies have made any effort to investigate, much less provide, a single additional measure to improve survivability of migrating Snake River fall Chinook in the Snake and Columbia Rivers this summer. In contrast, these very same federal agencies (joined by BPA) left no stone unturned in their exhaustive quest last year to improve BPA's financial situation by reducing summer spill for fish and attempting to "offset" this tried-and-true protection. It is telling that not a single NOAA scientist has filed a declaration in response to the Plaintiffs' requested injunctive relief. It is also telling that the federal agencies' response rejects any change in river operations out-of-hand by evaluating drawdown and flow augmentation in isolation, rather than considering combinations of river operations that exist and could be implemented this summer.

The Treaty Tribes urge this Court to grant the Plaintiffs' injunctive relief because the effects of the improved flow and increased spill that Plaintiffs seek will substantially reduce the harm to migrating Snake River fall Chinook salmon and greatly improve their

survivability. The magnitude of these benefits are revealed by using the very same hydrosystem juvenile fish passage model that NOAA has frequently employed to calculate the effects of different operations on migrating juvenile salmon:

[s]ystem survival under the Plaintiffs' operation far exceeded the system survival under the 2004 BiOp...there was just over a two-fold increase in system survival.

Lorz PI Dec. ¶ 18 (emphasis added). Moreover, spill and increased water velocity act synergistically:

[w]hile [spill and increased water velocity] each result in some increase in survival, the largest benefit was achieved when both operations were performed together. The gap in survival between the Plaintiffs' proposal and the [2004 FCRPS] BiOp operation was not merely an additive benefit but a multiplicative one.

Id. at ¶ 16. The Plaintiffs' requested relief addresses the deficit situation that Snake River fall Chinook will face as a consequence of the flaws in the 2004 FCRPS BiOp, and maintains the flexibility of the federal agencies to select between operations to achieve the overall improvement.

As discussed below, there are no procedural or legal impediments to granting the narrowly tailored equitable relief the Plaintiffs seek. Under the Endangered Species Act, the species needs must be placed first, warranting this injunctive relief. Moreover, as Mr. Neimi discusses, any resultant economic impacts will be imperceptible at the regional level and will transfer benefits from power economies to fishing economies, and as Mr. Sheets discusses, the impacts on BPA's rates is minor when placed in perspective and are a consequence of BPA's inadequate rate-setting.

The Treaty Tribes urge this Court to grant the Plaintiffs' requested relief to provide such in-river protection for Snake River fall Chinook until NOAA develops a new biological opinion for the FCRPS that complies with the law.

ARGUMENT

I. The Requested Relief will Enjoin Defendants to Reduce the Harm - the Unlawful Take of Salmon – Caused by Their Actions.

A. The Status Quo the Tribes seek to Protect is the Capacity of Snake River Fall Chinook to Survive and Recover.

Consistent with the policy of the ESA to conserve endangered and threatened species, the Tribes seek to preserve the capacity of Snake River fall Chinook to survive and recover salmon. *See* 16 U.S.C. §1531 (c) (all Federal departments and agencies shall seek to conserve endangered species and threatened species). The government as well as the State of Idaho and BPA Customers (hereinafter referred to as “BPA Customers” or “Customers”) mistakenly assert that the FCRPS operations Plaintiffs seek to change actually are the status quo with which this Court must concern itself. *E.g.* Fed Br. at 13; ID/Cust. Br. at 5 - 9. Following the government’s logic, no *ongoing* federal activity however unlawful would be subject to injunctive relief, since the ongoing action represents the status quo. This logic is flawed. In many circumstances, the federal courts have intervened to enjoin, wholly or partially, ongoing federal activities to protect threatened species and habitats. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 834 (9th Cir. 2002) (upholding an injunction limiting ongoing grazing activity); *Pacific Coast Fed. of Fishermen’s Ass’ns v. Bureau of Reclamation*, 138 F. Supp.2d 1228, 1249 (N.D. Cal. 2001) (enjoining ongoing irrigation deliveries when flows drop below certain levels).

The status that the ESA concerns is not the status of the FCRPS, rather it is the status of the listed species; affording endangered species the “highest of priorities,” and

“halt[ing] and revers[ing] the trend towards species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 184 (1978). In this proceeding, the Tribes seek to protect the status of Snake River fall Chinook from the unlawful operations of the FCRPS. The magnitude of the FCRPS’ threat to Snake River fall Chinook is astounding. The total mortality the FCRPS exacts upon juvenile Snake River fall Chinook is supposed to fall between 78% to 92%. 2004 BiOp Table 10.3. Yet the FCRPS has recently exceeded even these extraordinary system mortality proscriptions from NOAA. Olney 1st PI Decl. ¶¶22-23 . In 2005, it is again unlikely that the FCRPS will meet NOAA’s system survival standards. *See* Lorz PI Decl. ¶ 28 (SIMPAS studies for 2005 federal operations show a 95.5% juvenile system mortality).¹

The government and BPA customers argue that the Plaintiffs’ requested relief should be denied because it does not cure all of the flaws associated with the 2004 BiOp’s incidental take statement. *E.g.* ID/Cust. Br. at 12. Their argument does not stand. Not only is the law clear that the requested relief need not wholly cure the unlawful activity, but the relief requested by Plaintiffs will directly address one of the critical failings of the 2004 BiOp; the governments failure to properly assess the impact of FCRPS specifically to Snake River fall Chinook.

¹ As discussed more fully in the Tribes’ opening brief and in summary judgment, the 2004 BiOp actually only allows the FCRPS an incidental take of 1% to 4% of the juvenile Snake River fall Chinook. 2004 BiOp Table 10.1; Tribes’ Sum. J. Br. at 19; Plaintiffs’ Sum. J. Br. at 10. Because NOAA can’t discern this “net effect” as a factual matter, the allowable take for the FCRPS is measured as the total system mortality. 2004 BiOp 10-1 to 10-2; Cust. Br. 11-12. The Tribes assert that not only is NOAA’s discernment of “net effects” faulty as a factual matter, it is fatally flawed as a legal matter. Tribes’ Sum. J. at 12, 20; Plaintiffs’ Sum. J. Br. at 5.

As the Tribes argued in summary judgment, the survival gap or net effect based formulation of the 2004 BiOp is arbitrary and capricious. Even assuming NOAA's "net effects" framework has legal validity, which the Tribes strongly contest, NOAA's calculation of the FCRPS' net effect was arbitrary. Tribes Sum J Br. 18 - 20; Oregon Sum J Br. 15 - 17. This is particularly evident with respect to Snake River fall Chinook, where NOAA arbitrarily eliminated summer spill operations from the Reference Operation. This one step arbitrarily reduced the "net effect" or survival gap from 15-30% to 1-4%. Tribes Sum J 19. ; Lorz PI Decl. ¶ 11, showing similar reductions for spring Chinook. Resting on NOAA's arbitrary and capricious analysis, the system mortality levels described in NOAA's incidental take statement for Snake River fall Chinook are fatally flawed. The Plaintiffs' requested relief would at least partially redress NOAA's system survival error with regard to this summer's operations.

Plaintiffs' request is tailored to the harm caused by NOAA's faulty 2004 BiOp. The Plaintiffs' requested relief will reduce system mortality likely to occur in 2005 to the target levels of the 2000 BiOp. Lorz PI Decl. ¶ 28. While NOAA remedies the flaws in the 2004 BiOp and incidental take statement on remand, the injunctive relief sought by the Plaintiffs and supported by the Tribes would reduce the adverse biological effects of the operations permitted by the 2004 BiOp and Incidental Take Statement.²

² The Plaintiffs' complaint specifically requested that the Court set aside the BiOp and its incidental take statement. Complaint p. 53. The customer's suggestion that the Plaintiffs' implicitly concede that the take statement should not be set aside makes no sense. See ID/Cust 11. Moreover, it is at odds with the Plaintiffs' explicit claim for relief.

The ESA does not limit the injunctive power available in a citizen suit. Rather, the ESA “grant[s] a district court the full scope of its traditional equitable injunctive powers.” *Strahan v. Coxe*, 127 F.3d 155, 170 (1st Cir. 1997). Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, “the full scope of that jurisdiction is to be recognized and applied.” *Id. citing, Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1981) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946)). “Equitable injunction includes the power to provide complete relief in light of the statutory purpose.” *Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc.*, 376 F.2d 40, 41 (10th Cir.1967). When a biological opinion has been rendered invalid, “an injunction pending compliance must be the remedy.” *Greenpeace v. National Marine Fisheries Service*, 106 F. Supp.2d at 106 F. Supp.2d 1066, 1072, 1078 (W.D. Wash. 2000).

B. The ESA Prohibits Unlawful Take

The Endangered Species Act clearly prohibits the unauthorized take of listed species. Any person “who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.” *See §§ 1540(a) and (b)* (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year); *also see, Bennett v. Spear*, 520 U.S. 154, 170, 117 S.Ct. 1154, 1165 (1997).³

³ As discussed in the following sections of this brief, the faulty incidental take statement in the 2004 BiOp does not immunize the government from the take prohibitions of the Act.

The government and BPA customers assert that the Plaintiffs' remedy is tantamount to an action in mandamus, not equity. They are mistaken. The ESA provides for equitable relief in citizen suits, such as the present action.⁴ The Act explicitly states that any person may commence a suit "to **enjoin** any person, including the United States . . . who is alleged to be in violation of any provision of this chapter" 16 U.S.C. §1540(g)(1)(A) (emphasis added). The Plaintiffs have sought to enjoin at least some of the illegal take caused by the government's operation of the dams.⁵ Moreover, it is of no consequence that the Plaintiffs have framed their request to reduce the harm to salmon in terms of river operations, since the court's equity jurisdiction extends to compelling those actions, e.g. river operations, necessary to enforce its orders, i.e. to refrain from taking or harming the listed salmon. *See United States v. Crookshanks*, 441 F.Supp. 268, 270 (D.Or. 1977) ("this court can properly command the obedience of non-parties to orders of the court").

As the Plaintiffs set forth in their opening brief, an injunction is the appropriate remedy for violations of the Endangered Species Act. Pl. Br. 29, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it

⁴ Notably, the citizen suit provisions of the Act speak only to injunctive remedies, unlike the prior sections of the Act that define certain legal remedies allowing the United States to impose fines and other penalties. *Compare* 16 U.S.C. § 1540(a) & (b) with 16 U.S.C. §1540(g)(1)(A).

⁵ The Plaintiffs asked "the Court to enjoin these agencies to reduce the harm to salmon and steelhead listed under the Endangered Species Act...." NWF PI Mot. 1.

described as ‘institutionalized caution,’” *Sierra Club v. Marsh*, 816 F. 2d 1376, 1383 (9th Cir. 1987). Thus, the traditional test for injunctive relief is not the test under the ESA. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173, 193-195 (1978); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996). Congress, in enacting the ESA, “foreclosed the exercise of the usual discretion possessed by a court of equity.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

C. Judicial Oversight is Appropriate to Remedy the Defendant’s Unlawful Take and to Improve the Survival of Snake River Fall Chinook.

The Plaintiffs’ requested relief does not “shut down” operation of the FCRPS, nor does the Plaintiffs’ relief seek to compel any particular operation of the FCRPS. The Plaintiffs have not asked the court to run the river or engage in micro-management. Instead, the Plaintiffs seek a reduction in harm to listed salmon while a remand of the 2004 FCRPS BiOp is ongoing. The Plaintiffs’ request an order directing the government to achieve a reduction in harm by increasing water flow velocities, water spillage at the dams, and risk-spreading operations. In addition, the Plaintiffs request that the government report periodically to the court. These are remedial actions that the Tribes have sought for years. *See* Heinith Decl. ¶ 9 (the Corps has largely ignored tribal river operation plans since first published in 1999); *Yakima Nation v. NPPC*, 35 F.3d 1371, 1381-82 (9th Cir. 1994) (overturning NW Council decision that rejected tribal recommendations for Snake River summer flows). Exactly how these actions are to be implemented is left to federal discretion. NWF PI Mot. 1-2.

The requested relief is similar in nature to that granted in *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) and *High Sierra Hikers Ass’n v. Blackwell*, 38 F.3d

886 (9th Cir. 2004). In both cases, the courts ordered a reduction in harm to protected resources by limiting the extent of ongoing activities. In *Idaho Watersheds Project*, the court adopted interim grazing limitations while grazing allotment decisions were remanded to the BLM with an order compelling timely NEPA analyses. The court did not entirely prohibit grazing during the remand, but ordered interim limitations based on expert declaration. *Idaho Watersheds Project*, 307 F.3d at 823. In *High Sierra Hikers*, after briefing from all sides on the needed remedy, the district court adopted a combination of remedies that were proposed by the parties at the hearing and in post-hearing submissions. The court did not eliminate commercial pack operations, rather it chose “to reduce the current levels in order to minimize the harm.” *High Sierra Hikers*, 38 F.3d at 899.

The government and BPA Customers cite *ONRC v. Harrell*, 52 F.3d 1499 (9th Cir. 1995) to oppose the Plaintiffs’ request. The situation in *Harrell* is clearly distinguishable from the relief requested in this case concerning the FCRPS. In *Harrell* the district court refused to order the Corps of Engineers to demolish a dam while a remand was pending to consider new information brought forward under the Wild and Scenic Rivers Act.⁶ Both the district court and the court of appeals found flaws in the Corps’ decision process that warranted remand, but neither thought that the defects rose to a level that compelled “temporarily” removing the dam during the remand. *Harrell*, 52 F.3d at 1509. In the

⁶ The BLM and Forest Service had recently issued a report indicating that the partially completed dam, which in its current state lacked fish passage facilities, resulted in an “unreasonable diminishment” of the Wild and Scenic status of Elk Creek. The report found that once fish passage was established, the dam would no longer constitute an unreasonable diminishment of river values. *Harrell* at 1502-03. The report did not call for demolition of the dam.

current litigation, the Plaintiffs' requested relief is wholly different than the demolition of Elk Creek dam that was requested in *Harrell*. Here the Plaintiffs do not seek any structural changes to the dams, let alone project demolition. Rather, the relief sought calls for modest limitations of ongoing project operations during the summer of 2005 to reduce the harm to Snake River fall Chinook. In the absence of court direction, it is clear that the government will not undertake survival improvements it has not already contemplated. In fact, without court oversight, it is entirely plausible that the government will seek to reduce protection for salmon as it did in 2004.

The Plaintiffs' requested relief does not improperly intrude upon the agencies' scope of discretion. The ESA is intended to impress upon all Federal agencies the obligation to conserve endangered species and threatened species. 16 U.S.C. 1531 (c).⁷ Moreover, the Act and its regulations are structured to limit the harm and incidental take of listed species so as to not jeopardize their survival and recovery. 16 U.S.C. 1536 (a)(2), (b)(4)(b). The requested relief seeks to effectuate the ESA's policies and regulations by reducing harm to the listed species, while leaving the details of actual operational management to the government.

The government has a duty to limit the harm and incidental take consistent with the purposes of the Endangered Species Act. Here, the government has developed a flawed

⁷ The government has authority to operate its dams for purposes of protecting and restoring salmon populations. Blumm, *Hydropower v. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 *Envtl. L.* 211, 261 (1981) ("...Congress has long and universally recognized that both the construction and operation of [Columbia River] power dams and facilities are to be made as compatible as possible with fish." *quoting* 83 Interior Dec. 589, 601 (1976)).

Updated Proposed Action and BiOp that overlook more than 90% of the FCRPS-caused mortalities to juvenile Snake River fall Chinook.⁸ The framework by which the government reached its decisions is contrary to the ESA, its implementing regulations, and the needs of the species. *E.g.* Tribes Sum J at 12-20, NWF Sum J memo 11-20, OR Sum J at 6-14.

Direction in injunctive relief to implement governing statutes and regulations is within a district court's discretion. *See, High Sierra Hikers*, 38 F.3d at 900. Moreover, a district court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 999 (9th Cir.2000) (internal quotation marks omitted).

II. THE REQUESTED RELIEF WILL PRODUCE BIOLOGICAL BENEFITS AND REDUCE LEVELS OF UNLAWFUL TAKE.

A. The Requested Relief will Improve Survival One to Three-Fold, Reducing Harm to the Species.

The published scientific literature, the same literature which forms the foundation of many elements in 2004 BiOp, strongly supports the Plaintiffs' contention that improving flows and spills, while reducing the number of juvenile Chinook that are transported, will improve the survival of this species of fish. AR C.237 (Oregon) at 10-15, Pettit 1st Decl. ¶¶19-23, 25, 26, 29-31; Pettit 2nd Decl ¶¶ 5-13, 17, 24-26; Olney 1st Decl ¶¶ 6-8, 10, 17-17, 20; Olney 2nd Decl. ¶¶ 5-6, 10, 15. Not satisfied with the weight of scientific

⁸ The government's decisions purport to limit allowable take to 1%-4%, though the government admits that the measure of this take is 78%-92% total mortality of the migrating juvenile Snake River fall Chinook. In 2005, the government will exceed even these unlawful take levels. Lorz PI Decl. ¶ 28.

literature, the BPA customers respond that the Plaintiffs' assertions were made "without quantitatively evaluating" the effectiveness of their proposed summer operations. *E.g.* ID/Cust Br. 12-13. The government argues the opposite side of the coin; that the Plaintiffs provided "no evidence" that the Corps and BOR are not complying with the terms and conditions of the 2004 BiOp's incidental take statement. Fed Br. 18; *see also* Fed Br. 4 (plaintiffs do not endeavor to show that operations will cause irreparable injury).

In fact, the Plaintiffs' requested relief will benefit listed Snake River fall Chinook, whether those benefits are established by the weight of published scientific literature, including publications of NOAA's own scientists, or whether they are quantitatively determined by computer modeling analyses using the government's own assessment tools. In the absence of relief in the nature requested by the Plaintiffs, it is clear that the government's operations of the FCRPS in 2005 will once again exceed the incidental take limitations of its 2000 and 2004 BiOps. So, for the fourth time in six years the government will fail to meet the take limitations of the applicable FCRPS BiOp. Olney 2nd Decl. ¶ 20; *see NWF v. NMFS*, p. 8 (D. Or. July 29, 2004) (Docket # 602) (action agencies are already operating from a deficit situation).

The Tribes' technical staff has performed a quantitative analysis of the government's proposed 2005 summer river operations and an operations scenario based on the Plaintiffs' requested relief. Lorz PI Decl. ¶¶ 8-17.⁹ The analysis shows that the effectiveness of the Plaintiffs' request is significant. Simply adding the spill requested by the Plaintiffs results in reducing system mortality from about 95.5% to about 91%. Lorz

Decl. ¶ 10. Adding flow related measures (LGR drawdown to ‘723 and 143 kcfs from the Upper Snake) decreases system mortality to approximately 80%. *Id.* at ¶ 17. The relative importance of these mortality levels is critical in terms of reducing the harms and the incidental take levels.¹⁰ Not only do the Plaintiffs’ flow and spill measures produce up to a 300% increase in survival, these measures reduce the anticipated system mortality to within the incidental take requirements of the 2004 BiOP and they achieve the target mortality levels of the 2000 and 2004 BiOps. Conversely, the government’s proposed operation once again fails to meet its own biological requirements. This is precisely the type of harm that the ESA was intended to avert. The following table is illustrative:

2005 Summer Operations SRF Chinook Mortality compared to BiOp levels.

Operating Scenario	System Mortality ¹¹	2004 BiOp Incidental Take Indicator ¹²	2004 BiOp Target avge. ¹³	2000 BiOp Incidental Take Target ¹⁴
Federal Base Case 2005	95.5%	78%-92%	86%	88%
PI’ffs’ Spill	91%	78%-92%	86%	88%
PI’ffs’ Spill and Flows per Pettit	80%	78%-92%	86%	88%

¹⁰ While SIMPAS analyses are not conclusive with respect to absolute numbers of fish killed, they are useful in assessing relative levels of mortality, i.e. comparing one set of SIMPAS studies to another. Lorz PI Decl. ¶ 6. The take levels identified in the 2000 and 2004 BiOps are based on SIMPAS outputs.

¹¹ Lorz PI Decl. ¶¶ 10, 17.

¹² 2004 BiOp, Table 10.3, p. 10-4. These take levels are based on SIMPAS results set forth at Table D.57 and accompanying text. 2004 BiOp pp. D-89 to D-94. As discussed above, because NOAA is incapable of discerning the “net effects” of the baseline compared to discretionary operations, NOAA has chosen to use the total system mortality as a surrogate measure of allowable take.

¹³ *Id.*

¹⁴ 2000 BiOp Table 10.1-1, p 10-3. This take levels is based on SIMPAS results set forth at Tables 6.2-7 and 9.7-5. 2000 BiOp pp. 6-54 to 6-55 and 9-196 to 9-197.

B. Ongoing Unlawful Actions By The Government Constitute Irreversible And Adverse Harm That Is Not Immune From The Proscriptions Of The ESA

The government and BPA customers claim that the incidental take statement in the 2004 BiOp immunizes the Corps and BOR from section 9 prohibitions of the ESA. Fed Br. 17 ; ID/Cust. Br. 11. They are wrong. By exceeding the take ceilings in four of six most recent years, clearly, the government is causing harm and failing to comply with the take limitations of the 2000 and 2004 BiOps. The Act, the regulations, and the 2004 BiOp each contemplate that when allowable take levels are exceeded, remedial action is appropriate. Among other things, the action agencies will reinitiate consultation with NOAA. The legislative history, for example, states that

If the specified impact on the species is exceeded, the Committee expects that the Federal agency or permittee or licensee **will immediately reinitiate** consultation since the level of taking exceeds the impact specified in the initial section 7(b)(4) statement. In the interim period between the initiation and completion of the new consultation, the Committee would not expect the Federal agency or permittee or licensee to cease all operations unless it was clear that the impact of the additional taking would cause an irreversible and adverse impact on the species.

H.R. Rep. No. 567, 97th Cong., 2d Sess. 27 reprinted at 1982 USCCAN 2807, 2827 (1982) (emphasis added). Of course, the action agencies have not reinitiated consultation on this matter.¹⁵ Consequently, any argument that such a procedure immunizes the action agencies from the Act's take limits fails for lack of their own compliance.

¹⁵ The government previously has been directed to reinitiate consultation on the topic of transporting salmon in barges. *See Idaho Fish and Game v. Nat'l Marine Fisheries Service*, 850 F. Supp, 886, 889 (D. Or. 1994) (discussing history of ESA litigation on Columbia River salmon issues).

The government also argues that this legislative history demonstrates that any further remedial measures (other than immediately reinitiating consultation) are unnecessary. That is not what the committee report says. The report says that it should not be necessary to “cease all operations,” unless an “irreversible and adverse impact” would occur. From the standpoint of a Snake River fall Chinook salmon, protected by the Endangered Species Act, it is hard to imagine an impact that is more irreversible and adverse than death. Dead juvenile salmon do not contribute to the rebuilding of the population. Moreover, the Plaintiffs have not asked that the government “cease all operations” of the FCRPS. The Plaintiffs have asked for a modest change in FCRPS operations to reduce avoidable mortality of Snake River fall Chinook.

C. Significant Portions Of The Action Agencies’ Take Of Snake River Fall Chinook Is Avoidable And Caused By The Discretionary Operations Of The FCRPS.

The government mistakenly argues that there are no discretionary operations for it to modify to improve the survival of Snake River fall Chinook. As discussed in the Tribes’ and Oregon’s summary judgment briefs, the government is wrong. Tribes’ Sum J at 8, OR Sum J at 15-17.¹⁶

¹⁶ When CRITFC analyzed the alternative of including spill in its Reference Operation (RO), the results showed on average a large difference in survival. The RO, with spill, demonstrated significantly higher survival levels (30%) than the UPA with no spill. Lorz. PI Decl. ¶ 11. CRITFC’s findings are consistent with the NOAA Gap analysis from August, 2004, which also showed a 15% to 30% gap between the RO and UPA, when the RO did not include maximizing transportation. AR 7110; *see also* Lorz Decl. ¶ 12. This NOAA analysis was included with the record in March, 2005 pursuant to the Court’s order.

The government does not dispute that it has discretion to increase spill levels for Snake River fall Chinook. Rather, based on the declaration of NOAA administrator Mr. Lohn, an attorney by training, the government asserts that increasing spill will not benefit Snake River fall Chinook. Yet, the information attached to this declaration, a memorandum from NOAA staff member Dr. Williams, a PhD scientist by training, indicates the opposite. Lohn Decl. Exhibit B. The existence of “scientific uncertainty may contribute to the complexity of a problem, but the existence of a scientific dispute should not insulate an agency from meaningful, but limited, judicial review.” *Idaho Fish and Game v. Nat’l Marine Fisheries Service*, 850 F. Supp, 886, 898 (D. Or. 1994) The scientific information in Dr. Williams memorandum is entitled to greater weight in this matter than the views of a NOAA Administrator. *See Daubert v. Dow Merrill Pharmaceuticals*, 43 F.3d 1311, 1317 (9th Cir. 1995)(independent research carries its own indicia of reliability).

The Williams memorandum indicates that juvenile Snake River fall Chinook that were “return[ed] to the river” produced higher adult returns than those fish which were transported from Little Goose or Lower Granite dams in 2001, the flow year most similar to the 2005 projected conditions. “Return to river” fish are those that were collected by a screen bypass system, but routed back to the river downstream of the dam rather than being placed in a barge for transportation. Such fish do not encounter that dam’s turbines.

Similarly in February, 2005 NOAA scientists issued a report reiterating the view that transportation of Snake River fall Chinook neither benefits nor harms the species. It

is clear that transportation does not benefit the species under the adverse river conditions currently prevalent in the FCRPS. The report urges improving in-river survival conditions and a spread the risk approach. Heinith Decl. ¶ 28. The Tribes' analyses demonstrate that with the Plaintiffs' requested relief, survival of juvenile fall Chinook in 2005 may increase as much as 300%. Lorz PI Decl. ¶ 17.

D. High River Temperatures Will Be Mitigated By Plaintiffs' Requested Relief

The BPA Customers assert that because river temperatures in 2005 are likely to exceed EPA's maximum water temperatures for most of this summer, in-river migration will be lethal to juvenile Snake River fall Chinook. BPA Br. 14-17, *citing* Chapman Decl. The Customers imply that as a result of high river temperatures juvenile fall Chinook are better off being transported. *Id.* at 15. The Customers and declarant Chapman overlook important information in making their argument:

- Juvenile fall Chinook returned to the river in 2001 survived better than those that were transported. Lohn Decl Ex. B (Williams memo).
- Water circulating in transportation barges is drawn from the warmest portion of the river. Heinith Decl. ¶ 24.
- Water in transportation raceways often exceeds EPA temperature standards and significant fish kills have occurred. Heinith Decl. ¶ 24.
- The average in-river survival for 2000, 2001 and 2002 was higher than the average juvenile system survival with transportation for the same period. Olney 2nd Decl. ¶ 17.

Contrary to the Customers' position, transporting salmon in barges does not cure the effects of warm river temperatures. On the other hand, the Plaintiffs' requested relief should maximize the cooling effects of the releases of water from Dworshak reservoir. Flow augmentation measures are routinely managed to obtain the benefits of cool water releases from Dworshak Reservoir, which can be done consistently with the Plaintiffs' request and in a manner that its enhances cooling effects. Pettit 2nd Decl. ¶¶ 24-26; Lorz PI Decl. ¶¶ 23-25; Heinith Decl. ¶¶ 11, 20-22; Olney 2nd Decl. ¶ 8.

E. Plaintiffs' Requested Relief will Provide a Spread the Risk Operation.

According to the BPA Customer's inaccurate assertion, Plaintiffs' proposed summer operations would result in a "complete abandonment of the 'spread the risk' principle by requiring all juveniles to migrate in-river..." ID/Cust Br. 18. Contrary to this assertion, the Plaintiffs' requested relief would actually lead to actual spread the risk management as compared to operations under 2004 BiOp by allowing for approximately 50% of the Snake River fall Chinook to be transported and 50% to migrate in-river. Lorz PI Decl. ¶26. The Tribes assert that spreading the risk equally between in-river and transport actions is the "best management option... [performing] two or more management options in an attempt to maintain stock viability and genetic diversity." *See* BPA Cust Br. 18 (describing spread the risk); Pettit 2nd Decl. ¶ 26. In comparison, the government's policy for the past 25 years of maximizing the transportation of Snake River fall Chinook under all flow conditions, not just low flow conditions, is hardly a "spread the risk policy" at all. The government's maximum transport policy did not avert the population declines

of Snake River fall Chinook. Olney 2nd Decl ¶ 13. Moreover, the government’s policy of maximizing transport of Snake River fall Chinook is contrary to the advice of NOAA’s own scientists. Heinith Decl. ¶ 28.

For more than a decade, NMFS has put off true spread-the-risk management of fall Chinook pending, an “experiment” to test a “spread-the-risk” transport operation for Snake River fall Chinook; for more than a decade, the action agencies have come up with one excuse after another for not conducting this “experiment”. Tribes Sum J. Br. 22-25; Tribes PI Br. 20-21. The Customers’ argument that the Snake River should not be a “Petri dish for testing Plaintiffs’ speculative theories” has no merit. It is, quite simply, at odds with the 1995, 2000, and 2004 FCRPS biological opinions, each of which have called for “evaluating in-river versus transport under the best conditions achievable.” 1995 BiOp, p. 91; *see* Tribes Sum. J. Br. 22-25.

F. Defendants and Defendant-Intervenors’ Concerns about Total Dissolved Gas Are Unfounded.

The government’s and defendant intervenors’ concerns about total dissolved gas conditions are based on unfounded premises that do not withstand even rudimentary scrutiny:

- As noted by Plaintiffs’ declarant Pettit, spill is scrupulously managed to avoid exceeding dissolved gas limitations established by state water quality agencies. 2nd Pettit Decl. ¶ 34; *also see* Lorz PI Decl. ¶35, 36. The Plaintiffs are not requesting that spill levels exceed state water quality limitations. Pettit 1st Decl. ¶ 49.

- The Corps' does not present the frequency or magnitude of TDG concentrations that its SYSTDG model predicts. Lorz PI Decl. ¶ 13. Moreover, the Corps has refused to provide the SYSTDG model results to the tribes despite several requests. Cummings Decl.
- Application of the SYSTDG model to this summer's operation is unreliable. It is highly unlikely that the Corps has calibrated the SYSTDG model to the spill conditions that are likely to occur this summer, since controlled summer spill has not previously occurred at the Snake River and McNary dams under low flow conditions. Lorz PI Decl. ¶¶ 31-34.
- Despite the Corps' SYSTDG unreported model analysis, dissolved gas concentrations are very unlikely to occur because of low flows likely to occur in the summer of 2005 and the resulting low spill volumes. Lorz PI Decl. ¶¶ 34-35.

The government's and defendant-intervenor's arguments based on SYSTDG model results concerns deserve no weight. While the government may be at liberty to choose which scientific models to apply to a problem, it must disclose "all opinions to be expressed [by a testifying expert] and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions." Fed R.Civ. P. 26(a)(2)(B). This is not the first time the Tribes have struggled to obtain information from the government. Prior disputes lead to direction from the district court to most of the governmental parties in the current proceeding to share data and analyses. See *United States v. Oregon*, Stipulated Order, Civ. # 68-513 (April 16, 1998), which provides:

5. As a permanent order of this Court, all managers at all times are under a total duty to supply all raw data, drafts of variations, preliminary findings, final findings, final publications, whatever the information is, it must be disseminated throughout the parties to U.S. v. Oregon. All such data must be shared in a prompt fashion with all the managers.

Cummings 2nd Decl. (complete order attached). The government's refusal to provide SYSTDG data and analyses to the Tribes is at least inconsistent with the spirit, if not the letter, of prior direction from the district court. As it stands, the defendant and defendant-intervenors' total dissolved gas arguments have no credible basis.

G. Defendants' Operations Are Unchanged After a Decade of Delay.

The Treaty Tribes are frustrated that the government has assumed a posture of delaying needed improvements in river survival conditions intended to benefit Snake River fall Chinook. Declarant Ponganis argues that:

A significant difference between the Corps' and other Action Agencies approach and the plaintiffs' arbitrary "just do it" tactic, is that the Corps and NOAA Fisheries **plan to develop** a spread the risk methodology for juvenile fall Chinook similar to the approach used to define spread the risk for spring/summer Chinook, which has taken several years of study and is continuing to be refined.

Ponganis Dec. ¶ 73 (emphasis added). What the Ponganis declaration fails to reveal is that the Corps of Engineers has had instruction from NMFS since 1995 to develop a spread the risk assessment for fall Chinook. *See* Tribes Sum J. Br. 23; Tribes PI Br. 17.

According to Ponganis the Corps and NOAA now "plan to develop" a spread the risk methodology. Contrary to the government's brief, Ponganis implicitly admits that the Corps and NOAA currently do not have a "spread the risk" methodology. What Ponganis also doesn't reveal is that the price of the Corps' and NOAA's spread the risk "planning,"

which “planning” has been contemplated for a decade, is ongoing take of salmon at levels exceeding incidental take requirements of biological opinions and impairment of the survival and recovery of Snake River fall Chinook. Instead of a “can do” approach, the government has given only lip service to planning for fall Chinook risk spreading.

As discussed in the declarations of Pettit, Olney, Heinith, and Lorz, spill and flow will improve the survival of Snake River fall Chinook. *E.g.* Heinith Decl. 19-20, Olney 1st Decl. 6-20, Pettit 1st Decl. 9-32, Pettit 2nd Decl. 5-22, Lorz PI Decl. 24, 38, 40. As these declarations note, NOAA admits that spill and flow improve the survival of Snake River fall Chinook. Moreover, NOAA calls for adoption of a spread the risk approach to managing the juvenile passage of Snake River fall Chinook at FCRPS dams. Even the Corps’ witness Ocker admits that spill will flush migrants out of Lower Granite pool. Ocker ¶29.¹⁷

H. Lower Granite Dam Drawdown Will Not Result In The Adverse Effects Described By The Defendants And Defendant-Intervenors.

One of the measures Plaintiffs suggest to comply with their injunction request is a drawdown of Lower Granite Reservoir to ten feet below minimum operating pool at that project. Pettit 2nd Decl. ¶¶ 34-37. This is the only project where the Plaintiffs have specifically suggested the possibility for lowering the project reservoir below its annual operating limit. Drawdown of Lower Granite Reservoir to ten feet below MOP provides

¹⁷ Declarant Peters’ concerns about spill levels at individual projects are misplaced. The Plaintiffs have not requested spill modifications at Bonneville, The Dalles, or John Day dams. To the extent his concerns are transferable to other projects, those concerns are fully addressed by Lorz. Lorz PI Decl. ¶¶ 37-38.

approximately 7% of the total 10% decrease in water particle travel time that the plaintiffs seek in the Snake River. Lorz PI Decl. ¶ 13.

Lower Granite Reservoir is the longest and largest reservoir on the lower Snake River and NOAA suggests that as much as 80% of the reservoir mortality occurring in the entire Snake River takes place in Lower Granite pool. 2004 BiOp, Appendix D, Table 5, p. D3-16. Increasing reservoir survival, i.e. reducing Lower Granite pool mortality, is critical to reduce the mortality to Snake River fall Chinook caused by the FCRPS. Yet, a number of declarations object to this measure because of three allegedly harmful effects related to fish passage at Lower Granite Dam: use of the emergency fish ladder exit; juvenile fish bypass screen operation; and tailrace hydraulic conditions. As discussed below, none of these concerns outweigh the biological benefits of operating the project 10 feet below MOP. Pettit 2nd Decl. ¶¶ 37-41.

- The emergency exit's false weir technology at the Lower Granite Dam fish ladder is similar to the false weir used at the Bonneville Dam fish ladder's adult fish trap. All of the adult salmon returning to the Snake River Basin migrate past Bonneville Dam and most are subject to collection at the Bonneville adult trap and operation of that false weir. Moreover, salmon have been observed to successfully use the false weir system at Lower Granite Dam on at least two separate occasions. Pettit 2nd Decl ¶ 38.
- As Pettit indicated in his first declaration, the bypass system gatewell orifices at Lower Granite cannot operate at a 10-foot drawdown below MOA. Consequently the fish screens should be pulled out of the intake at any operating turbine during

the drawdown. This will prevent young salmon from entering the gateway's hostile environment and from subjecting these fish to impacts associated with gateway dipping (i.e., a process of netting fish out of a gateway area). See Pettit 2nd Decl. ¶ 39. Mr. Pettit's recommendation to pull the screens would alleviate the potential harm identified by Mr. Ocker and Mr. McKern concerning the Lower Granite gateways.

- McKern's and Ocker's concerns related to tailrace conditions are also easily addressed by Lorz and Pettit's recommendations. Summer operations at Lower Granite should be limited to the operation of a single turbine unit (Unit 2) to avoid adult delay and fallback through Unit 1. In addition, using Unit 2 would provide adequate training and attraction discharge for the adult fishway entrance and would also allow for young salmon to effectively migrate through the tailrace (i.e., provide adequate juvenile egress). Lorz PI Decl. ¶ 39; Pettit 2nd Decl. ¶ 40.

III. STATE WATER LAW AND THE 1902 RECLAMATION ACT DO NOT PROHIBIT PLAINTIFFS' REQUESTED RELIEF

A. The Water Volumes from the Upper Snake Anticipated By the Plaintiffs' Requested Relief Are Consistent With The SRBA And Idaho Law.

According to the BPA Customers, the total amount of water for downstream flow augmentation from the Upper Snake that BOR may provide is limited by Idaho law to 487,000 acre-feet per year. However, this year the BOR plans to provide only 200,000 acre feet of water from the Upper Snake. Dreher Decl. ¶ 12. 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. Yet, as little as 143,000 acre-feet (roughly 150,000 acre-feet less than that allowed by Idaho law) would meet the 10% WPTT decrease in the Snake River that the Plaintiffs seek, if this flow augmentation were combined with Lower Granite drawdown. Lorz PI Dec. at ¶ 16. Moreover, neither the government nor the BPA Customers have demonstrated that they have exhausted their financial resources in an effort to obtain the full 287,000 acre-feet from willing lessors.

B. BOR's Water Supply Contracts Do Not Override The ESA.

The BOR may lawfully operate its dams to meet the requirements of the ESA. Neither Idaho law nor the BOR's contracts override the ESA. In fact, conflicts between agricultural water demands and the needs of species listed under the ESA has often confronted the BOR. The courts have consistently ruled that the BOR's agricultural water supply agreements are subordinate to federal statutory obligations such as those found in the ESA. In *Pacific Coast Fed. of Fishermens' Assoc. v. Bureau of Reclamation*, 138 F. Supp.2d 1228 (N.D. Cal. 2001), the court enjoined irrigation deliveries from the BOR's Klamath Project in southern Oregon and northern California. Water users argued that the BOR lacked the authority to withhold that was supplied by contract to irrigators. The court concluded that the requirements of the ESA "override the water rights of the irrigators" and an injunction issued. *Id.* at 1250 & n.20. See also *Klamath Water Users Protective Assoc. v. Patterson*, 204 F.3d 1206, 1213 (9th 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"); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1129 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1125 (10th Cir. 2004) (contract gave BOR

ability to reduce the amount of “available” water to meet ESA species’ needs); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th 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).

IV. THE REQUESTED RELIEF WILL NOT ADVERSELY AFFECT THE REGION’S ECONOMY

The BPA Customers go to great lengths to address the cost of the Plaintiffs’ requested relief with regard to the wholesale power rates charged by the Bonneville Power Administration. ID/Cust Br. 37. The Customers do not mention that for years the BPA has provided some of the cheapest electricity in the Nation.¹⁸ Despite the prospects of additional fish and wildlife costs, the various Customers of BPA are still jockeying for long term access to BPA’s low cost power supplies. *See* <http://www.bpa.gov/Power/PL/RegionalDialogue/chronology.shtml> (describing the chronology of the last several years’ variations on this theme); *also see* <http://www.bpa.gov/power/lp/settlement> (describing a dispute between BPA’s customers over BPA power benefits). For good reason, as noted by declarant Sheets, BPA’s firm wholesale power rates are approximately 40% below the prevailing market. Sheets ¶ 12. Even with the Plaintiff’s requested relief, BPA’s wholesale power rates will still be approximately 6% below the prevailing market. Sheets ¶ 12. As noted by declarant Niemi, the costs associated with the Plaintiffs’ requested relief represent a fraction of a

¹⁸ Electricity prices in the four Northwest states are below national averages. Niemi Decl. ¶ 9, Table 1.

percent of the production costs of Weyerhaeuser, Alcoa, and Longview Fiber addressed in declarations of the Customers. Niemi ¶¶ 20-23.

Undoubtedly there will be some economic transitions associated with the relief requested by Plaintiffs. Niemi ¶ 5. However, economic transitions are occurring all the time in the Pacific Northwest. *E.g.* Niemi ¶ 17. For example, labor and raw material costs, interest rates, and commodity markets fluctuate continuously and are far more significant economic factors for Weyerhaeuser, Alcoa, and Longview Fiber, than the costs associated with Plaintiffs’ requested relief. Niemi ¶¶ 20-24. Moreover, when viewed at a regional scale, the costs of Plaintiffs’ requested relief pale in comparison to the dislocation of tribal economic and social well-being caused by the loss of salmon. Niemi Decl. ¶¶ 5-6.

CONCLUSION

In 1995, NOAA acknowledged before this Court that only a “major system overhaul” will achieve sufficient improvements in salmon survival to ensure the perpetuation of the listed species” and NOAA promised that “adaptive management” would occur in the future as uncertainties (specifically including the “relative benefits of transportation”) were addressed. *American Rivers v. NMFS*, Civ. #960384-MA, slip op. at 26; NOAA Regional Administrator Declaration, 7-11. In the intervening decade, the “major system overhaul” has never arrived. Instead, NOAA’s 2000 BiOp revealed that the FCRPS operations contained in the 1995 BiOp had been posed jeopardy to the listed fish,¹⁹

¹⁹ See NOAA 2000 FCRPS BiOp at 8-3, 8-5, 8-7, 8-13, 8-15, 8-17, 8-23, 8-25 (noting that “continuing the proposed action...is likely to appreciably reduce the likelihood of both [the specific species’] survival and recovery”); see also *id.* at 3-1 (describing proposed action as “continu[ing] current FCRPS operations that implement the 1995 RPA as supplemented”)

and NOAA's 2004 BiOp's response to the invalidity of the 2000 FCRPS BiOp was to change the jeopardy analysis rather than ensure that Action Agencies provided additional protections for the listed fish. NOAA's promise of "adaptive management" has also rung hollow. In 2004 the State, Federal, and Tribal fishery agencies (including the Oregon Department of Fish and Wildlife, the Idaho Department of Fish and Game, the Washington Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, the Columbia River Inter-Tribal Fish Commission, and the Nez Perce Tribe) collectively stated as follows:

To conclude, we urge the federal agencies, on the basis of the available scientific information to reconsider the present policy of maximizing transportation of fall chinook juveniles in 2004 and beyond. The available information indicates that an alternative management strategy of spread-the-risk should be implemented through the provision of optimum in-river migration conditions.

As Oregon noted:

The basis for this request [by the fishery agencies] to spread the risk was contemplated in the 2000 BiOp Measure 51 which states if results of Snake River studies indicate the survival of juvenile salmon and steelhead collected and transported during any segment of the juvenile migration is no better than survival of juveniles migrating in-river, then the Action Agencies in coordination with NOAA Fisheries shall identify and implement appropriate measures to optimize in-river passage at collector dams during those periods. There is more than adequate data presented in Williams et al. (2004) and Anderson et al. (2004) to conclude that transportation does not provide a survival advantage for Snake River fall Chinook salmon, and that immediate action is warranted to modify Corps projects and operations to increase the proportion of fish migrating in-river.

NOAA has chosen to maximize transport. As WDF&W stated (AR C. 247 p. 4):

This is clearly an advantage for the hydro system, but recent evidence indicates that natural outmigrants have proportionally higher overall survivals.

And, as Idaho noted (C.234, p.8):

If indeed transportation is not helping fall Chinook survival compared to inriver survival, then the NOAAF strategy of continuing to rely on transportation just delays attention to other strategies that may improve survival and, in practical

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Law Offices of Tim Weaver
402 E Yakima Ave., Suite 190
Yakima, WA 98901
509-575-1500

effect, transfers the conservation burden to other sectors.

NOAA's treatment of the well-qualified fisheries biologists from the states and tribes takes the region full circle, reminiscent of Judge Marsh's observation more than a decade ago that the salmon managers recommendations have fallen on "deaf ears" leading him to declare:

Federal defendants are under no legal obligation to listen and respond to salmon plans from every corner of the Northwest, but the ESA does impose substantive obligations with respect to the agency's consideration of significant information and data from well-qualified scientists such as the fisheries biologists from the states and tribes.

IDF&G v. NMFS, 850 F. Supp. 886, 900 (D. Or. 1994).

A prominent and well-respected commentator has noted: "The experience in the Columbia Basin vividly demonstrates that a judicial order invalidating a biological opinion but merely remanding a case to the service to reinitiate consultation achieves little in the way of in-river protection for the fish." Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197, 269 (1998). The Treaty Tribes urge this Court to grant the Plaintiffs' requested relief to provide such in-river protection for Snake River fall Chinook until NOAA develops a new biological opinion for the FCRPS that complies with the law, and to break what otherwise will be a never-ending cycle of invalid BiOps being remanded to NOAA while the salmon bear the burden of the FCRPS's "jeopardy" operations. Injunctive relief is necessary to assure that the government reduces harm to Snake River fall Chinook and limits its unlawful take of salmon. Wherefore, the Treaty Tribes respectfully request that the Court grant the Plaintiffs' motion for preliminary injunction.

JOINT TRIBAL REPLY MEMO-
MOTION FOR INJUNCTION

Law Offices of Tim Weaver
402 E Yakima Ave., Suite 190
Yakima, WA 98901
509-575-1500

DATED this 16th day of May, 2005.

Respectfully submitted,

_____/s/_____
TIMOTHY R. WEAVER
WSB # 3364
(509) 575-1500
Attorney for *Amicus Curiae* Confederated
Tribes and Bands of the Yakama Indian Nation

_____/s/_____*
HOWARD G. ARNETT
OSB # 77099
(541) 382-3011
Attorney for *Amicus Curiae* Confederated Tribes of the Warm Springs Reservation of
Oregon

_____/s/_____*
CHRISTOPHER B. LEAHY
CSB # 23612
(303) 673-9600
Attorney for *Amicus Curiae* Confederated Tribes of the
Umatilla Reservation

*per authorization

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MOTION FOR INJUNCTION

Law Offices of Tim Weaver
402 E Yakima Ave., Suite 190
Yakima, WA 98901
509-575-1500

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and F.R. Civ. P. 5(d), I certify that on May 15, 2005, the foregoing “Joint Reply Memo of the Umatilla, Warm Springs and Yakama Tribes in Support of Plaintiffs’ Motion for Injunction,” along with the following declarations: “Declaration of Thomas K. Lorz in Support of Motion for Injunction,” “Declaration of Edward W. Sheets (Motion for Injunction),” “Second Declaration of Frederick E. Olney (Motion for Injunction),” and “Declaration of Robert Heinith (Injunction Reply) will be electronically filed with the Court’s electronic court filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first class U.S. mail:

Walter H. Evans III
Jay T. Waldron
Timothy M. Sullivan
Schwabe Williamson Wyatt PC
1211 SW 5th Avenue
Pacwest Center, Suites 1600-1900
Portland, OR 97204-3795
Fax 503-796-2900
Attorneys for Intervenor-Defendants, Inland Ports and Navigation

Beth Ginsberg
Stoel Rives
600 University Street, Suite 3600
Seattle, WA 98101-4109
Fax 206-386-7500
Attorneys for Intervenor-Defendant, NW Irrigation Utilities

Dr. Howard F. Horton, Ph.D.
Professor Emeritus of Fisheries
Department of Fisheries & Wildlife
104 Nash Hall
Corvallis, OR 97331-3803
Fax 541-737-3590
U.S. Court Technical Advisor

Harold S. Shepherd
Shepherd Law Offices
17 SW Frazer, Suite 210
Pendleton, OR 97801
Fax 541-966-4356
Attorney for Amicus Curiae Center for Tribal Water Advocacy

Executed this 16th Day of May, 2005, at Yakama, WA.

/s/ Tim Weaver