

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION,
WASHINGTON WILDLIFE FEDERATION, SIERRA CLUB, TROUT
UNLIMITED, PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, IDAHO
RIVERS UNITED, IDAHO STEELHEAD AND SALMON UNITED,
NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, FRIENDS OF
THE EARTH, SALMON FOR ALL, COLUMBIA RIVERKEEPER, NW
ENERGY COALITION, FEDERATION OF FLY FISHERS, and AMERICAN
RIVERS, INC.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC POWER COUNCIL,
WASHINGTON STATE FARM BUREAU FEDERATION, FRANKLIN
COUNTY FARM BUREAU FEDERATION, GRANT COUNTY FARM
BUREAU FEDERATION, STATE OF IDAHO, and BPA CUSTOMER GROUP,

Defendants-Intervenors.

On Appeal from the United States District Court for the District of Oregon
Judge James A. Redden, CV 01-640-RE

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 OF THE
FEDERAL APPELLANTS FOR A STAY PENDING APPEAL**

RUTH ANN LOWERY
ANDREW MERGEN
JENNIFER L. SCHELLER
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-2767

TABLE OF CONTENTS

	PAGE
CIRCUIT RULE 27-3 CERTIFICATE	i
(1)	i
(2) Facts Showing Existence and Nature of Emergency	vii
(3) Notification and Service of Motion on Counsel	
EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL	1
INTRODUCTION	3
BACKGROUND	3
A. Statutory Background	3
B. Factual Background	4
1. The 2004 BiOp	4
2. The Spill Regime Prior to the Court’s Injunction	8
C. Procedural Background	9
STANDARD FOR GRANTING A STAY	11
ARGUMENT	12
I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION AND ASSERTING CONTROL OVER RIVER OPERATIONS	12
A. The District Court Abused its Discretion by Entering a Preliminary Injunction Without a Showing of a Reasonable Likelihood of Future Harm to the Fall Chinook	14

	PAGE
B. The District Court Abused its Discretion by Failing to Recognize that Added Spill Harms Fish	15
C. The 2000 RPA does Not Support the Injunction	18
D. The District Court Abused its Discretion by Failing to Accord Proper Weight to the Public Interest	20
E. The Federal Defendants are Likely to Prevail on the Merits	20
1. NOAA’s approach of assessing whether the discretionary actions of the federal agencies result in jeopardy comports with the statute and regulations	20
2. The existence of the dams and nondiscretionary operations are properly assigned to the environmental baseline	24
3. NOAA’s jeopardy determination is properly based on the net impacts of the “action,” not on aggregate effects from the action, baseline, and cumulative effects ..	25
4. The District Court Erroneously Extended the Rationale of Gifford Pinchot	28
5. NOAA’s Critical Habitat Determination was Not Arbitrary or Capricious and the Supposed Flaws Cannot Support the Injunction Issued	31
II. THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF A STAY ...	31
CERTIFICATE OF SERVICE	33
Statutory Addendum	40

TABLE OF AUTHORITIES

CASES:	PAGE
<i>American Rivers v. NMFS</i> , No. 96-384-MA 30, 1997 WL 33797790 at *12 (D. Or. April 3, 1997)	13
<i>Caribbean Marine Servs. v. Baldrige</i> , 844 F.2d 668 (9th Cir. 1988)	11,12
<i>Defenders of Wildlife v. Babbitt</i> , 130 F. Supp.2d 121 (D.D.C. 2001)	28
<i>Defenders of Wildlife v. Norton</i> , Civ. No. 99-927 (D. D.C. Jan. 7, 2003)	28
<i>Dep't of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004)	23
<i>Envtl. Prot. Info. Ctr. v. Simpson Timber Co.</i> , 255 F.3d 1073 (9th Cir. 2001)	4,22
<i>Forest Conservation Council v. Espy</i> , 835 F. Supp. 1202 (D. Idaho 1993), aff'd, 42 F.3d 1399 (9th Cir. 1994)	28
<i>FTC v. Affordable Media, LLC</i> , 179 F.3d 1228 (9th Cir. 1999)	12
<i>Fund for Animals v. Lujan</i> , 962 F.2d 1391 (9th Cir. 1992)	11
<i>Ground Zero Center for Non-Violent Action v. United States Dep't of the Navy</i> , 383 F.3d 1082 (9 th Cir. 2004)	23
<i>Idaho Dept. of Fish and Game v. NOAA</i> , 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9 th Cir. 1995)	13,24
<i>Lamb-Weston, Inc. v. McCain Foods, Ltd.</i> , 941 F.2d 970 (9th Cir. 1991)	13
<i>Lopez v. Heckler</i> , 713 F.2d 1432 (9th Cir. 1983), <i>rev'd in part on other grounds</i> , 463 U.S. 1328 (1983)	11
<i>Marbled Murrelet v. Babbitt</i> , 83 F.3d 1068 (9th Cir. 1996)	23
<i>Martin v. Occupational Safety & Health Review Com'n</i> , 499 U.S. 144 (1991)	27
<i>Mt. Graham Red Squirrel v. Espy</i> , 986 F.2d 1568 (9th Cir. 1993)	13
<i>Natural Res. Def. Council v. Houston</i> , 146 F.3d 1118 (9th Cir. 1998)	22
<i>Nat'l Wildlife Fed'n v. Burlington N. RR</i> , 23 F.3d 1508 (9th Cir. 1994) .	11,12,14
<i>NWF v. NMFS</i> , 254 F. Supp. 2d 1196 (D. Or. 2003)	4,5
<i>Nat'l Wildlife Fed'n v. United States Army Corps of Engineers</i> , 384 F.3d 1163 (9th Cir. 2004)	25
<i>Pyramid Lake Paiute Tribe of Indians v. Dept. of Navy</i> , 898 F.2d 1410 (9th Cir. 1990)	15
<i>Sammartano v. First Judicial District</i> , 303 F.3d 959 (9 th Cir. 2002)	20
<i>San Francisco Baykeeper v. United States Army Corps of Engineers</i> , 219 F. Supp. 2d 1001 (N.D. Cal. 2002)	27

	PAGE
<i>Sierra Club v. Babbitt</i> , 65 F.3d 1502 (9 th Cir. 1995)	22
<i>Sierra Club v. U.S. Fish and Wildlife Service</i> , 245 F.3d 424 (5 th Cir. 2001) ..	31
<i>South Dakota v. Ubbelohde</i> , 330 F.3d 1014 (8 th Cir. 2003)	13
<i>Stanley v. Univ. of S. Cal.</i> , 13 F.3d 1313 (9 th Cir. 1994)	13
<i>Task Force v. U.S. Fish & Wildlife Serv.</i> , 378 F.3d 1059 (9 th Cir. 2004)	29,30,31
<i>Thomas v. Peterson</i> , 753 F.2d 754 (9 th Cir. 1985)	15
<i>Thomas Jefferson Univ. v. Shalala</i> , 512 U.S. 504 (1994)	26
<i>Turtle Island Restoration Network v. NOAA</i> , 340 F.3d 969 (9 th Cir. 2003) ...	22
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	11,12,14,31
<i>Westlands Water Dist. v. NRDC</i> , 43 F.3d 457 (9 th Cir. 1994)	11

STATUTES RULES AND REGULATIONS:

PAGE

Endangered Species Act (“ESA”)
 Section 7, 16 U.S.C. 1536 4
 Section 7(a)(2) , 16 U.S.C. 1536(a)(2) passim
 16 U.S.C. 1532(3) 29
 16 U.S.C. 1536(b)(3)(A) 4,21

50 C.F.R. 402 4
50 C.F.R. 402.02 passim
50 C.F.R. 402.03 4,6,21
50 C.F.R. 402.14(g)(4) 26
50 C.F.R. 402.14(h)(2) 21
50 C.F.R. 402.14(h)(3) 21

51 Fed. Reg. 19,926, 19,934 (June 3, 1986) 30
51 Fed. Reg. 19,932 (June 3, 1986) 21

Fed. R. App. P. 8(a) vii,1,10
Fed. R. Civ. P. 65(d) 14,16

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, the undersigned counsel for the Federal Appellants submits the following certificate:

(1)

JENNIFER L. SCHELLER

ANDREW C. MERGEN

RUTH ANN LOWERY

Environment & Natural Resources Division

U.S. Department of Justice

P.O. Box 23795 (L'Enfant Plaza Station)

Washington, DC 20026

Telephone: (202) 514-2767

Facsimile: (202) 353-1873

Attorneys for Federal Defendants-Appellants National Marine Fisheries Service and United States Army Corps of Engineers

TODD D. TRUE

STEPHEN D. MASHUDA

Earthjustice Legal Defense Fund

705 Second Avenue

Suite 203

Seattle, WA 98104

Ph: (206) 343-7340

Fax: (206) 343-1526

smashuda@earthjustice.org

ttrue@earthjustice.org

Attorneys for Plaintiffs National Wildlife Federation, et al.

DANIEL J. ROHLF

Pacific Environmental Advocacy Center

10015 S.W. Terwilliger Blvd.

Portland, OR 97219

Ph: (503) 768-6707

Fax: (503) 768-6642

rholf@lclark.edu

Attorney for Plaintiffs National Wildlife Federation, et al.

CHRISTOPHER B. LEAHY
DANIEL W. HESTER
Fredericks Pelcyger Hester & White
1075 South Boulder Road
Suite 305
Louisville, CO 80027
Ph: (303) 673-9600
Fax: (303) 673-9155
cleahy@fphw.com
dhester@fphw.com

Attorneys for Amicus Confederated Tribes of the Umatilla Indian Reservation

MATTHEW LOVE
Van Ness Feldman, PC
719 Second Avenue
Suite 1150
Seattle, WA 98104-1728
Ph: (206) 623-9372
Fax: (206) 623-4986
mal@vnf.com

Attorney for Defendant-Intervenors BPA Customer Group, Northwest Irrigation Utilities, and Public Power Council

HOWARD G. ARNETT
Karnopp, Petersen, Noteboom, Hansen, Arnett & Sayeg
1201 N.W. Wall Street
Suite 300
Bend, OR 97701-1957
Ph: (541) 382-3011
Fax: (541) 388-5410
hga@karnopp.com

Attorney for Amicus Confederated Tribes of the Warm Springs Reservation of Oregon

MICHAEL S. GROSSMAN
STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 40100
Olympia, WA 98504-0100

1125 Washington Street, SE
Olympia, WA 98501-2283
Ph: (360) 586-3550
Fax: (360) 586-3454
MikeG1@atg.wa.gov
Attorney for the State of Washington

SAM KALEN
Van Ness Feldman
1050 Thomas Jefferson Street, NW
Washington, D.C. 20007
Ph: (202) 298-1800
Fax: (202) 338-2416
smk@vnf.com
Attorney for Defendant-Intervenor BPA Customer Group

MARK THOMPSON
Public Power Council
1500 NE Irving Street
Suite 200
Portland, OR 97232
Ph: (503) 232-2427
Fax: (503) 239-5959
mthompson@ppcpdx.org
Attorney for Defendant-Intervenors Public Power Council, and BPA Customer Group

HERTHA L. LUND
Budd-Falen Law Offices, P.C.
P.O. Box 346
Cheyenne, WY 82003
300 East 18th Street
Cheyenne, WY 82001
Fax: (307) 637-3891
hertha@buddfalen.com
*Attorney for Defendant-Intervenors Washington State Farm Bureau Federation,
Franklin County Farm Bureau Federation, and Grant County Farm Bureau
Federation*

HAROLD SHEPHERD

Shepherd Law Offices
17 SW Frazer
Suite 210
Pendleton, OR 97801
Ph: (541) 966-4352
Fax: (541) 966-4356
hshepherd@uci.net
Attorney for Amicus Center for Tribal Water Authority

DAVID E. LEITH
Assistant Attorneys General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Ph: (503) 378-6313
Fax: (503) 378-6313
david.leith@doj.state.or.us
Attorney for the State of Oregon

JOHN SHURTS
851 S.W. Sixth Ave.
Suite 1100
Portland, OR 97204
Fax: (503) 820-2370
Ph: (503) 222-5161
jshurts@nwcouncil.org
Attorney for Northwest Power Planning Council

JAY T. WALDRON
WALTER H. EVANS
TIMOTHY SULLIVAN
Schwabe, Williamson & Wyatt, P.C.
Pacwest Center, Suites 1600-1900
1211 S.W. Fifth Avenue
Portland, OR 97204-3795
Ph: (503) 222-9981
Fax: (503) 796-2900
jwaldron@schwabe.com
wevans@schwabe.com

tsullivan@schwabe.com

Attorneys for Applicant for Intervention INLAND PORTS AND NAVIGATION GROUP (Port of Lewiston; Port of Whitman County, Washington; Port of Morrow, Oregon; Shaver Transportation Company, et al.)

ROBERT N. LANE

Special Assistant Attorney General

State of Montana

1420 East Sixth Ave.

Helena, MT 59601-3871

P.O. Box 200701

Helena, MT 59620-0701

Ph: (406) 444-4594

Fax: (406) 444-7456

blane@state.mt.us

Attorney for Intervenor State of Montana

CLAY SMITH

Deputy Attorneys General

Office of the Attorneys General

Natural Resources Division

P.O. Box 83720

700 W. Jefferson

Room 210

Boise, ID 83720-0010

Ph: (208) 334-4118

Fax: (208) 334-2690

clay.smith@ag.idaho.gov

Attorney for Amicus Curiae State of Idaho

TIM WEAVER

Hovis Cockrill Weaver & Bjur

402 E. Yakima Avenue

Suite 190

Yakima, WA 98901

P.O. Box 487

Yakima, WA 98907

Ph: (509) 575-1500

Fax: (509) 575-1227

weavertimatty@qwest.net

Attorney for Amicus Applicant Confederated Tribes and Bands of the Yakama Nation

KAREN J. BUDD-FALEN
MARC RYAN STIMPERT
Budd-Falen Law Offices, P.C.

P.O. Box 346

Cheyenne, WY 82003

300 East 18th Street

Cheyenne, WY 82001

Ph: (307) 637-3891

Fax: (307) 637-3891

karen@buddfalen.com

marcstimpert@earthlink.net

*Attorneys for Intervenor Defendants Washington State Farm Bureau Federation,
Franklin County Farm Bureau Federation, and Grant County Farm Bureau
Federation*

SCOTT HORNGREN

Haglund, Kirtley, Kelley, Horngren & Jones LLP

101 S.W. Main, Suite 1800

Portland OR 97204

Ph: (503) 225-0777

Fax: (503) 225-1257

horngren@hkllaw.com

*Attorney for Intervenor- Defendants Washington State Farm Bureau Federation,
Franklin County Farm Bureau Federation, and Grant County Farm Bureau
Federation*

DAVID J. CUMMINGS

Nez Perce Tribal Executive Committee

Office of Legal Counsel

P.O. Box 305

Lapwai, ID 83540

Main Street and Beaver Grade

Lapwaih, ID 83540

Ph: (208) 843-7335

Fax: (208) 843-7377

djc@nezperce.org

Attorney for Amicus Curiae, Nez Perce Tribe

JAMES BUCHAL
MURPHY & BUCHAL
2000 S.W. First Avenue
Suite 320
Portland, OR 97201
Ph: (503) 227-1011
Fax: (503) 227-1034
jbuchal@mblp.com

Attorney for Plaintiff Columbia-Snake River Irrigators Association

JAMES GIVENS
1026 F Street
P.O. Box 875
Lewiston, ID 83051
Ph: (208) 746-2374
Fax: (208) 746-6640

Attorney for Intervenor-Defendant Clarkston Golf & Country Club

RODNEY NORTON
Hoffman Hart & Wagner, LLP
1000 SW Broadway
20th Floor
Portland, OR 97205
Ph: (503) 222-4499
Fax: (503) 222-2301
rkn@hhw.com

Attorney for Intervenor-Defendant Clarkston Golf & Country Club

(2) Facts Showing Existence and Nature of Emergency

On June 10, 2005, the district court entered a mandatory preliminary injunction in this Endangered Species Act (ESA) case, requiring the United States Army Corps of Engineers (Corps) to 1) provide summer spill at Lower Granite, Little Goose and Lower Monumental dams and provide increased spill at Ice

Harbor Dam from June 20, 2005, through August 31, 2005, and 2) provide summer spill at McNary dam from July 1, 2005, through August 31, 2005. Injunction Opinion and Order (Attachment A).^{1/} An emergency stay of the injunction is critical because the injunction will prevent the Corps from implementing NOAA's strategy of maximizing the transport of juvenile Snake River Fall Chinook Salmon, the management strategy with the least risk of harm to their survival. Lohn Decl. ¶15-20 (Attachment C); 2004 BiOp at D-20 (Attachment K).^{2/} The spill ordered by the injunction may also harm listed fish by elevating the total dissolved gas in the river. Ponganis Decl ¶69-71 (Attachment D); Henriksen Decl. ¶23-25 (Attachment E). Additionally, the injunction will lower electricity production by the Bonneville Power Administration (BPA), at an estimated cost to ratepayers of approximately \$67 million. Norman Decl. ¶4 (Supp. Attachment). The harm caused by the injunction is immediate and irreparable. Accordingly, the Appellants ask the Court to grant a stay as soon as possible, but no later than **June 21, 2005**. Pursuant to Federal Rule of Appellate

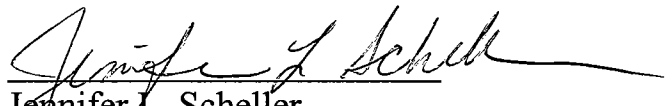
^{1/} In simple terms, "spill" as used herein means passing water through the spillgates of the dams instead of directing it through turbines for power generation.

^{2/} Attached in support of this motion are, in addition to documents submitted to the district court, two new declarations: (1) a June 14, 2005 declaration of Paul E. Norman, Senior Vice President of the Power Business Line, BPA; and (2) a June 14, 2005 declaration of Gregory K. Delwiche, Vice President, Environment, Fish and Wildlife, BPA. Declarations of both of these persons were filed in the district court; the new ones provide updated information.

Procedure 8(a), the Appellants moved for a stay in the district court. The district court denied this motion. Clerk's Record (CR) 1014.

(3) Notification and Service of Motion on Counsel

On June 15, 2005, the United States filed the Notice of Appeal in the district court. On June 15, 2005, the United States filed this Rule 27-3 motion and served the parties by overnight Federal Express and electronic mail, and the amici by regular mail and electronic mail. Counsel for all parties were notified of the filing of this motion on June 15, 2005, by electronic mail (where e-mail addresses were available), and counsel for the Plaintiffs-Appellees were also notified by telephone.


Jennifer L. Scheller
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026
(202) 514-2767

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY PENDING APPEAL**

Pursuant to Fed.R.App.P. 8(a) and Circuit Rule 27-3, appellants, the United States Army Corps of Engineers (Corps), the United States Bureau of Reclamation (Bureau), and the National Marine Fisheries Service (also known as the NOAA Fisheries Service (NOAA)) respectfully move this Court to stay the preliminary injunction entered by the district court on June 10, 2005. The district court took the unprecedented step of experimenting with salmon migration by altering longstanding Corps summer operations at five dams along the Snake and Columbia rivers, which have been based on years of research and careful management of out-migrating juvenile salmon. The court has imposed an unproven approach to river operations based on its faulty understanding of the governing law and the facts relevant to summer spill. Specifically, the injunction requires the Corps to provide large amounts of summer spill at the dams, which will significantly reduce the number of fish transported in barges, leaving a large proportion to migrate under the adverse in-river conditions in this low water year. Lohn Decl. ¶¶15-20. In so doing, the Court has substituted, at best, an experiment regarding the effects of spill on summer migration for the considered judgment of NMFS scientists as to what will work best to ensure salmon survival for this summer. The Court's error is exacerbated by the fact that it does not point to any specific findings or evidence in the record to justify this experiment, nor does it even address any of the numerous declarations and evidence put forward by NMFS and the Corps to the contrary. Instead, the Court

rests its order on mistaken interpretations of past NOAA statements and ultimately on the conjecture, not evidence, that additional spill may benefit salmon this summer. Moreover, even beyond the untested nature of the Court's spill order, on its face, the court's order does not contemplate careful management of the spill to avoid the likelihood of total dissolved gas exceedances, which would violate state water quality standards and expose fish to harm. Henriksen Decl. ¶¶23-25. The spill will also reduce power generation at the dams, resulting in millions of dollars in foregone revenues and likely increasing electricity rates. The federal defendants are likely to prevail on the merits of their appeal because the district court incorrectly characterized the nature of the violation it found, abused its discretion in assessing the relative harm to the parties and the fish, abused its discretion in issuing a remedy which is speculative as to whether it will redress the alleged harm and may very well make things worse, and committed legal error in its non-final order granting summary judgment to the environmental plaintiffs (collectively, NWF) and intervenor-plaintiff State of Oregon. (Attachment B).

The district court denied Appellants' oral motion for a stay on June 10, 2005. Clerk's Record (CR) 1014. A Notice of Appeal was filed on June 15, 2005. For the reasons below, Appellants respectfully request that this Court stay the preliminary injunction pending appeal on or before **June 21, 2005**. All grounds advanced in support of this motion were presented to the district court.

INTRODUCTION

In these consolidated cases, NWF and other parties challenge the 2004 Biological Opinion (2004 BiOp) and the Corps' and Bureau's Records of Decision (RODs) governing operations of the Federal Columbia River Power System (FCRPS).^{3/} On May 26, 2005, the district court found the 2004 BiOp legally flawed in four respects and entered a non-final order granting summary judgment against NOAA only and in favor of NWF. On June 10, 2005, the district court entered an order finding the Corps' and Bureau's (collectively, the action agencies) RODs flawed for relying on the 2004 BiOp and granting injunctive relief requiring the Corps to provide additional spill at five dams on the lower Snake and Columbia rivers.

BACKGROUND

A. Statutory Background

Section 7(a)(2) of the Endangered Species Act ("ESA"), provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat ...unless such

^{3/} The FCRPS is a system of 14 dams and associated facilities on the Columbia and Snake rivers located in Idaho, Montana, Oregon and Washington. The projects are operated under a variety of statutory mandates for multiple purposes, including recreation, fish and wildlife, water quality, water supply, providing hydropower to the Pacific northwest, flood control, navigation and irrigation. *See* Ponganis Decl. ¶4.

agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

16 U.S.C. § 1536(a)(2). Regulations implementing Section 7(a)(2) are set forth at 50 C.F.R. Part 402 (excerpted at Addendum). The regulations state: “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. 402.03 (emphasis added). *See also Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1075-76 (9th Cir. 2001) (describing ESA section 7 process).

B. Factual Background

1. The 2004 BiOp

The approach taken in previous biological opinions on the FCRPS and the case law that followed provide important context for understanding the analytical approach taken in the 2004 BiOp. Since the first listings of salmon under the ESA in 1991, the action agencies have repeatedly consulted with NOAA. *NWF v. NMFS*, 254 F. Supp. 2d 1196, 1200-01 (D. Or. 2003). The 2004 BiOp, which the Court invalidated in the May 26 order, was the most recent comprehensive BiOp on the FCRPS. Immediately preceding it was the 2000 Biological Opinion (2000 BiOp), which was a jeopardy opinion that proposed a Reasonable and Prudent Alternative (RPA) to avoid jeopardy. *Id.* at 1201; *see also* 16 U.S.C. 1536(b)(3)(A) (describing RPAs). The 2000 BiOp did not attempt to address the narrow question posed by the regulations of whether “the action” was “likely to jeopardize.” Rather, it took a broader, range-wide approach which was a product of the consultation history and the

regional interest in a broad analysis focused on the species' entire life-cycles. *See* 2000 BiOp at 1-8 to 1-12 (Attachment N). Rather than focusing precisely on the effects of "the action," NOAA attempted to predict the likelihood that the biological needs of the listed fish species would be met over the next 100 years in light of many predicted future actions to be taken by many actors (not just the action agencies) throughout the species' range. *See* 2004 BiOp at 1-5. This approach necessarily included in its consideration elements that did not fall into the categories set out at 50 C.F.R. § 402.02.

On May 7, 2003, the district court (Judge Redden) held that the 2000 BiOp was invalid, finding that NOAA had impermissibly included in its analysis federal actions that had not undergone Section 7 consultation (and thus were not properly in the "environmental baseline") and non-federal off-site mitigation actions that were not reasonably certain to occur (and thus not properly "cumulative effects"). *NWF v. NMFS*, 254 F. Supp. 2d at 1213.⁴ The court remanded to NOAA, which was "to insure that only those range-wide off-site non-federal mitigation actions that were reasonably certain to occur, are considered in the determination whether any of the 12 salmon ESUs will be jeopardized by continued FCRPS operations." *Id.* at 1215.

On remand, the action agencies' proposed action – designated the Updated Proposed Action (UPA) – was similar to and based upon the 2000 BiOp's RPA (as

⁴ The court also found that NMFS had defined the "action area" too narrowly in light of the apparent reliance NOAA had placed on mitigation beyond the defined action area. *Id.* at 1212.

refined and updated). 2004 BiOp at 2-3-4. The 2004 BiOp concludes that the UPA is not likely to jeopardize the continued existence of the fish, nor to destroy or adversely modify designated critical habitat. 2004 BiOp at 8-1-38. Thus, the 2000 BiOp and 2004 BiOp are largely consistent as to the result.

The analytical approach taken in the 2004 BiOp is different, however. NOAA concluded that it could not predict future effects to fish while providing the certainty about future actions demanded by the district court's 2003 opinion and that the court's holding had effectively rejected the range-wide, long-term approach and scientific tools utilized in the 2000 analysis. A.R. C.293 at 1-13 (Attachment M);^{5/} 2004 BiOp at 1-5. NOAA refined its analytical approach to conform the 2004 BiOp more closely to actual Section 7 requirements. A.R. C.293 at 1-13. Rather than comprehensively attempting to predict and consider the full range of effects to which the fish would be subjected up to 100 years into the future, NOAA isolated the effects of "the action" in order to focus its analysis precisely on them. To do this, NOAA applied 50 C.F.R. § 402.03, which required parsing out those parts of "the action" that were discretionary and therefore subject to consultation. 2004 BiOp at 1-9; *id.* at 5-1. The dams' existence and certain non-discretionary ongoing operations were thus properly identified as part of the pre-existing "environmental baseline," rather than part of the "action" upon which the action agencies must consult. *Id.* at 5-1. This followed from the fact that the agencies lack discretionary control over these

^{5/} All references to "A.R." refer to NOAA's record for the 2004 BiOp.

elements.

The 2004 approach also reflects the principle that the inquiry under Section 7(a)(2) should be whether or not the direct or indirect effects of the discretionary action are likely to “jeopardize the continued existence of” a listed species, as defined in the regulations, 50 CFR § 402.02, or result in the destruction or adverse modification of designated critical habitat. That is, the inquiry under the statute and regulations is not whether the effects of the discretionary action when added to the baseline and cumulative effects would result in “jeopardy” (which is not defined in the regulations) or adverse modification. A.R. C.293 at 1-4, 1-38 to 1-39. “Jeopardize the continued existence of” is defined in the regulations, and means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. 402.02.

To estimate the incremental effects that would be added to the baseline if the proposed action were implemented, NOAA compared the effects of the UPA to a hypothetical “Reference Operation.” 2004 BiOp at 5-5 to 5-6; A.R. C.293 at 1-23 to 1-24. The Reference Operation is a set of theoretical operational parameters for the dams that would maximize fish survival.⁹ NOAA concluded that for three

⁹ The Reference Operation comprises a set of theoretical operational parameters for the dams that, given their existing structures, would maximize fish survival. Conversely, the adverse effects of such an operation would be beyond the

species, the UPA would cause no net reduction as compared to the Reference Operation. See 2004 BiOp at 8-4 (Table 8.1). As to the other ten species, NOAA found reductions in the short term, *id.*, but determined that over the ten-year term of the action, as the beneficial off-site actions and hydrosystem configuration improvements are implemented, the positive effects would counterbalance initial negative effects. *Id.* at 1-12 and 8-1; *see also e.g., id.* at 8-8 to 8-12 (summary of Snake River fall chinook analysis). NOAA went on to determine that the short-term reductions would not constitute an “appreciable” reduction in terms of the species’ likelihood of both survival and recovery and thus inherently could not be likely to “jeopardize the continued existence of” any listed species. *Id.* at 8-4 (Table 8.1).

2. The Spill Regime Prior to the Court’s Injunction

Under the 2004 UPA (and previously under the 2000 BiOp RPA), there is usually no summer spill at Lower Granite, Little Goose, and Lower Monumental Dams on the lower Snake River and McNary Dam on the Columbia River (collectively, the collector projects). *See* Lohn Decl. ¶15-20; 2004 BiOp at D-20. Under both, however, there would be some spill at Ice Harbor, though not as much as the court ordered. *See* 2000 BiOp at 9-89 (Table 9.6-3); UPA at 50 (Table 4) (Attachment L). The absence of summer spill at the collector projects allows the

agencies’ discretion to avoid. 2004 BiOp 5-6. For more information on how NOAA determined what operations to include in the Reference Operation – including its conservative and precautionary approach – see 2004 BiOp 5-5-8; A.R. C.293 at 1-24.

Corps to maximize collection of migrating juvenile Fall Chinook. Lohn Decl. ¶15. The Corps then transports the fish to below Bonneville dam (the furthest downstream dam on the Columbia), where they can continue their migration unimpeded by dams. *Id.* This mode of operation reflects NOAA's determination, based on the current state of knowledge, that transportation at the collector projects is preferable to spill during the summer. *Id.* at ¶16-20. If there is spill at the collector projects, a large portion of fish will migrate through the spillways and not be collected for transportation. *See id.* ¶15.

C. Procedural Background

On May 26, 2005, the district court granted NWF's and Oregon's motions for summary judgment, holding that the 2004 BiOp was invalid because, in the court's view, NOAA: 1) improperly excluded non-discretionary elements of the proposed action, 2) based its jeopardy analysis on the net incremental effect of the discretionary actions rather than basing it on the aggregation of impacts from the environmental baseline, cumulative effects, and the action, 3) failed to adequately consider short term impacts to critical habitat in light of considerations of the species' life cycles and migration patterns and in the absence of knowing the in-river survival rate needed to ensure recovery, and 4) failed to specifically analyze the listed species' prospects for recovery in its jeopardy determination.⁷ Attachment B.

⁷ The court found it unnecessary to reach NWF's other claims and rejected the irrigator plaintiffs' claims.

NWF⁸ had previously moved for a preliminary injunction. CR 834. The district court issued an injunction on June 10, 2005, requiring the action agencies to:

- (1) Provide spill from June 20, 2005, through August 31, 2005, of all water in excess of that required for station service,⁹ on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and
- (2) Provide spill from July 1, 2005, through August 31, 2005, of all flows above 50,000 cfs, on a 24-hour basis, at the McNary Dam on the Columbia River.

Op. 10-11.¹⁰ In issuing this relief, the June 10 order contains one citation to the record to support its findings and wholly fails to address the government's numerous

⁸ Although the State of Oregon joined NWF in arguing that the 2004 BiOp is invalid, Oregon did not affirmatively support NWF's request for injunctive relief at the June 10, 2005, injunction hearing. Washington, Idaho, and Montana expressly opposed the request.

⁹ Station service is the water needed to maintain adequate generators on the electrical system to provide the station service needs of the projects themselves and to provide voltage control and support for the FCRPS electrical transmission system, but not to supply electricity to the system for sale. Schiewe Decl. ¶17 (Attachment J).

¹⁰The court denied NWF's request to require increased flow in the river, which would have entailed a combination of reservoir drawdowns and increased "flow augmentation," subject to the requirement that the parties engage in collaboration on remand "to resolve the issues raised by flow." Op. 10. The court denied plaintiffs' request to require NOAA to withdraw the 2004 BiOp. Op. 6. The court set a status conference for September 7, 2005, to discuss the remand and possible withdrawal of the 2004 BiOp. *Id.* The court also held that the action agencies violated the ESA by relying on the 2004 BiOp in issuing their Records of Decision (RODs). Op. 6. The court stated that although it intended to order the action agencies to withdraw their RODs implementing the proposed action, it reserved its final order until after the September 7, 2005, status conference. Op. 9. Briefs from NWF and the Federal Defendants on the Federal Defendants' request for an injunctive bond are due June 15, 2005.

declarations showing that the spill may cause substantial biological harm to listed species. Pursuant to Federal Rule of Appellate Procedure 8(a), the Appellants moved for a stay at this hearing, which the district court denied. CR 1014.

STANDARD FOR GRANTING A STAY

This Court evaluates requests for injunctions pending appeal under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). “[A] party must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor.” *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citation omitted). These interrelated tests are applied on a sliding scale, in which the required probability of success on the merits decreases as the degree of harm increases. *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 459 (9th Cir. 1994). If the public interest is involved, a court must determine whether the balance of public interests supports the issuance or denial of an injunction. *Caribbean Marine Servs. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

In ESA cases, Congress has insisted that species be afforded “the highest of priorities,” *TVA v. Hill*, 437 U.S. 153, 193-95 (1978), but this does not mean that injunctive relief may be granted without a demonstration that there is a likelihood of future harm to the species. *Nat'l Wildlife Fed'n v. Burlington N. RR*, 23 F.3d 1508,

1511 (9th Cir. 1994). Courts are not “mechanically obligated to grant an injunction for every violation of the law.” *Id.* at 1512. To the contrary, the movant must show that there is a reasonable likelihood of future harm to the species. *Id.* at 1511. Moreover, nothing in the ESA nor *TVA v. Hill* absolves the district court of ensuring that the ordered injunctive relief is tailored to redress any identified harm.

In reviewing the issuance of a preliminary injunction, this court “must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard.” *Caribbean Marine Servs.*, 844 F.2d. at 673. “An injunction may also be set aside if the district court misapprehended the law in its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact.” *Id.*; *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION AND ASSERTING CONTROL OVER RIVER OPERATIONS

The court issued a mandatory injunction ordering the action agencies to deviate from the long-standing summer operating plans, instituted for the protection of listed species. Mandatory preliminary injunctions are disfavored and should be denied unless the facts and law clearly favor the moving party. *E.g., Stanley v. Univ. of S.*

Cal., 13 F.3d 1313, 1320 (9th Cir. 1994).^{11/} NWF did not make such a showing. Moreover, the court abused its discretion by failing to tailor its relief to the alleged harm it perceived. Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991) (“Injunctive relief . . . must be tailored to remedy the specific harm alleged”). “An overb[roa]d injunction is an abuse of discretion.” *Id.*

By issuing its mandatory order, the court has for the first time injected itself into the day-to-day management of an extremely complicated system of dams. See Ponganis Decl. ¶4-7. Courts lack the expertise to undertake this task and should not be in the business of running dams.^{12/} See *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1030-31 (8th Cir. 2003); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993). Moreover, the court overlooked the significant harms the

^{11/} The district court has not, as yet, issued a final appealable order and the term of the injunctive order will have expired by the September 7, 2005, status conference. Thus, as a practical matter the injunction is the equivalent of a preliminary injunction.

^{12/} In previous FCRPS cases, the district court (Judge Marsh) acknowledged this. See *American Rivers v. NMFS* (“American Rivers III”), No. 96-384-MA at 30, 1997 WL 33797790 at *12 (D. Or. April 3, 1997) (“The parties raise numerous other issues which I consider *questions of FCRPS micro-management and not the proper subject of judicial review*”) (emphasis added); *Idaho Dep’t of Fish and Game (“IDFG”) v. NMFS*, 850 F. Supp. 886, 889 (D. Or. 1994) (“IDFG I”) (“[A]ny injunction against transportation would immediately necessitate some form of replacement system management – such as an improved spill program . . . a *particularly inappropriate task for the federal judiciary.*”) (emphasis added); *id.* (denying injunction against transportation because it would necessitate “*judicial micromanagement* of the Columbia River power system.”) (emphasis added).

injunction will impose on both the fish and rate-payers, and engaged in a legally erroneous analysis of the merits.

The court also engaged in an extensive substitution of its judgment for that of NOAA. Underlying most of the court’s rulings is the assumption that the listed species are “in serious decline and not evidencing signs of recovery.” *See* May 26 Op. 9.^{13/} This basic misconception led the Court to further substitute its judgment – without any explanation – for that of the agency as to what measures are necessary this year for fish survival and recovery.

A. The District Court Abused its Discretion by Entering a Preliminary Injunction Without a Showing of a Reasonable Likelihood of Future Harm to the Fall Chinook.

In *NWF v. Burlington Northern R.R.*, 23 F.3d at 1511, this Court explained that *TVA v. Hill*, 437 U.S. 153, 174 (1978), “do[es] not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA.” Courts are not “mechanically obligated to grant an injunction for every violation of the law.” *Id.* at 1512. To the contrary, what is required “is a definitive threat of future harm to the protected species, not mere speculation.” *Id.* at 1512.

The district court abused its discretion by failing to apply this standard and by

^{13/} In reaching that opinion, the court relied on a report from a scientific panel (the BRT report) rather than acknowledging NOAA’s contrary and more comprehensive conclusions. *Compare* May 26 Op. at 8 (citing BRT report in attachment), *with* 2004 BiOp 4-5-7.

offering only a cursory explanation of the justification for its injunction. *See* Fed. R. Civ. P. 65(d). Although NWF contended that the spill regime it requested would be better for fall Chinook than the current transportation regime, the undisputed record evidence shows that returns of fall Chinook have increased over the last several years under the transportation program. Lohn Decl. ¶17. The court summarily stated that it “find[s] that irreparable harm results to listed species as a result of the action agencies’ implementation of the [UPA]” without explaining how the injunction remedies the 2004 BiOp’s supposed violations of the ESA. Op. 8-9. In short, the court’s statements do not support its conclusion that NWF made the requisite showing of harm.^{14/}

B. The District Court Abused its Discretion by Failing to Recognize that Added Spill Harms Fish

The court’s order does not address the considerable evidence submitted by the

^{14/} The district court also contended that an injunction was appropriate because it purportedly found that the 2004 BiOp is “substantially procedurally flawed.” Op. 8 (citing *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)). The district court is flatly incorrect. The procedural obligation under ESA section 7(a)(2) is for the action agencies to engage in consultation with NOAA. This is precisely what the action agencies did, thereby fulfilling their procedural obligations under the statute. *Pyramid Lake Paiute Tribe of Indians v. Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (engaging in consultation and receiving biological opinion satisfies procedural obligations under ESA, which is distinct from substantive obligations under the Act). The fact that the district court found that the 2004 BiOp was substantively invalid does not change the fact that the agencies engaged in the requisite procedure. *Id.* Thus, the district court’s analysis in this regard and reliance on *Thomas* is clear error.

federal defendants showing the problems with, and likely irreparable harm resulting from, the spill ordered by the court. See Fed. R. Civ. P. 65(d). First, the court's injunction requiring spill at the collector projects will reduce the number of fish transported in barges because many fish would pass through the spillways and continue their migration in-river rather than be collected for transportation. Lohn Decl. ¶15, 18; Ocker Decl. ¶22 (Attachment G). The summer operations in the UPA are based on years of research and experience in providing the best conditions for survival. Lohn Decl. ¶15-20; Ocker Decl. ¶20-24. Moreover, the spill ordered by the court may compromise studies planned for this summer's migration. Peters Second Decl. ¶ 23 (Attachment H).

While there is still much to be learned about the relative benefits of transport versus in-river migration for summer migrants, there is strong evidence that survival for spring migrants in low flow years like 2005 is improved by transport versus in-river migration.^{15/} Ocker Decl. ¶23-31. Maximizing transportation of summer migrants is a continuation of past operations under the 2000 BiOp and even before. 2000 BiOp at 9-89, Table 9.6-3, n. 1; Lohn Decl. ¶17. In developing the Reference Operation used in the 2004 BiOp, NOAA considered and rejected a hypothetical operation that would spill water at the collector projects affected by the court's injunction. NOAA's choice for maximizing benefits to the fish in the Reference

^{15/} Although the spring migrants are a distinct evolutionarily significant unit from the summer-migrating Fall Chinook, information about the usefulness of transport in low water years is nevertheless informative here. *See* Ocker Decl. ¶23-31.

Operation was between continuing a transportation course of action in which adult fish have returned in increasing numbers and an untested course transporting fewer fish and allowing more fish to migrate in river. Lohn Decl. ¶18. Simply put, NOAA rejected the shift away from transportation and towards additional spill, pending development of better information about the relative benefits of transport. 2004 BiOp at D-20. The court has imposed unwarranted risks by substituting its judgment and in effect imposing the latter, untried and experimental approach. In effect, the district court ignored NOAA's evidence and instead premised its spill relief on its conjecture, not evidence or findings based in the record, that increased spill will be better for summer migrants. Premising such extraordinary, mandatory relief on conjecture, contrary to the evidence provided by the expert agency, is an abuse of discretion.

Second, the court's order may result in exceedences of state water quality standards for total dissolved gas ("TDG"). Ponganis Decl ¶69-71; Henriksen Decl. ¶23-25. The Corps estimated that the quantity of spill ordered by the court would result in exceedences of the state TDG standards at certain projects.^{16/} Henriksen Decl. ¶23-25; Henriksen Second Decl. ¶38-42 (Attachment F). This is significant because high levels of TDG is detrimental to fish. Lohn Decl. ¶13. Elevated TDG causes gas bubble trauma in fish, which is a condition similar to the bends for human divers. *Id.*

^{16/} The Corps intends to work collaboratively with the other parties to attempt to develop a consensus as to methods of implementing the order to minimize exceedences of TDG water quality standards. The Corps plans to report back to the district court on those efforts.

NWF dismissed the TDG problem by suggesting that the Corps could reduce spill and increase the flow going through the powerhouse in response to exceeding the TDG standard and that their request was limited to spill within TDG waiver limits. However, the district court's order makes no provision to limit the spill to ensure that TDG is not exceeded. In any event, NWF's suggestion that spill could be reduced in the event of TDG exceedences is imprudent because once spill is reduced, it takes the river about two weeks to dissipate high levels of TDG. Henriksen Second Decl. ¶39. By contrast, under the UPA, consideration of the amount of spill to provide takes into account the potential adverse effects of high levels of total dissolved gas verses the relative benefits of such passage. Lohn Decl. ¶13.

C. The 2000 RPA does Not Support the Injunction

The only basis cited by the court for its order is its mistaken belief that the ordered spill regime is consistent with what was required in the 2000 BiOp's RPA and that the ordered spill would benefit species by allowing for meaningful in-river migration against which the summer transportation would be compared. Op. 8-9. The court's reliance on the 2000 BiOp in this manner is clear error. Although the court does not cite any particular portion of the 2000 BiOp RPA, it appears to be relying on Action 46. However, Action 46 simply called for a *study* to compare summer spill versus transportation and thus any additional spill associated with Action 46 was for study purposes only. 2000 BiOp at 9-78 to 9-79. It was not a finding by NOAA that spill at these dams during the summer would avoid or reduce

mortality to migrating salmon as the district court seems to assume. Moreover, even then, the 2000 BiOp did not specify spill levels; rather it said the “development of the specific study protocol should be coordinated through the Regional Forum and research processes.” *Id.* at 9-79. The 2000 BiOp called for the study after completion of transmission line upgrades by 2004 (these have been completed). Under the 2004 BiOp, research on the relative benefits of transport is still contemplated, although it is being deferred until after completion of surface passage improvements to ensure the research yields results that will be relevant and useful into the future. UPA at 93. *See also* McNary Decl. ¶ 19-20 (Attachment I); Ponganis Decl. ¶ 27. That study is being developed. Like the 2000 RPA, the UPA leaves the determination of spill levels to be developed and coordinated through the NOAA Fisheries’ Regional Forum and research processes. Thus, the district court’s suggestion that the spill it ordered can be justified by research needs and objectives is without foundation and clearly is not tailored to remedy the specific harm the district court perceived.¹⁷

¹⁷ The district court also suggests that an injunction was necessary to preserve the “spread the risk” considerations that NOAA applied in the 2000 BiOp to the spring (not summer) migration. Op. 9. However, while NOAA adopted a spread the risk approach for spring migration in the 2000 RPA, it expressly did not adopt such a policy for summer migrants because of different circumstances facing summer migrants. 2000 BiOp at 9-79. Thus, the district court again mistakenly compared “apples with oranges” in reaching its conclusions. Likewise, the district court contends that not doing the summer spill study as contemplated by the 2000 BiOp “would not allow a meaningful evaluation of the summer spill transportation program.” Op. 9. However, while a meaningful evaluation of the summer spill program this summer may be helpful for planning in future years, it has nothing to do with preventing irreparable harm *this* summer, which is required to justify a

The district court erred in assuming that the UPA provides fewer benefits to fish because it is different from the 2000 RPA. As explained in the Declarations of McNary and Ponganis (¶¶24-28), viewed as a whole, the UPA provides greater benefit to listed species than the measures contained in the 2000 RPA.

D. The District Court Abused its Discretion by Failing to Accord Proper Weight to the Public Interest.

The public interest is an “element that deserves separate attention.” *Sammartano v. First Judicial District*, 303 F.3d 959, 974 (9th Cir. 2002). The spill ordered by the court is merely an experiment for which there is questionable evidence that any benefit would accrue to the species. The court abused its discretion by failing to include in the balance the harm to the public from lower electricity production by BPA and likely rate increases to customers. *See* Norman Decl. ¶4.

E. The Federal Defendants are Likely to Prevail on the Merits

1. NOAA’s approach of assessing whether the discretionary actions of the federal agencies result in jeopardy comports with the statute and regulations

The first two merits issues addressed in the May 26, 2005, opinion – NOAA’s segregation of discretionary actions from nondiscretionary elements and consideration of the incremental effects of “the action” rather than the aggregated effects in the action area – are closely related. The court’s rulings on these issues apparently stem from the court’s view that the “action” subject to consultation and a

preliminary injunction for this summer’s operations.

jeopardy determination includes the existence of the dams and nondiscretionary operations.

Contrary to the court's view, NOAA's analytical approach is a reasonable interpretation of the statute and regulations and finds support in this Court's case law. ESA section 7(a)(2) does not impose obligations to consult on and insure that "any action" is likely to avoid jeopardy, but rather applies only to "any action *authorized, funded, or carried out* by such agency." 16 U.S.C. 1536(a)(2) (emphasis added). These clearly are qualifying terms that all connote control, conduct and volition. Consistent with this language, the ESA implementing regulations make clear that actions subject to the agencies' substantive ESA obligation to not jeopardize species or adversely modify critical habitat include only actions over which an agency has discretionary involvement or control. 50 C.F.R. 402.03 ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control"); *see also* 50 C.F.R. 402.02 (defining "jeopardize the continued existence of" by reference to the action alone: "to engage in an action that reasonably would . . . reduce appreciably the likelihood of both the survival and recovery") (emphasis added). Consistent with an understanding that it is discretionary agency action that must avoid jeopardy, the statute directs that the biological opinion detail "how the agency action affects the species or its critical habitat." 16 U.S.C. 1536(b)(3)(A) (emphasis added). The regulations reiterate that the biological opinion must include a detailed examination of "the effects of the

action” on listed species or critical habitat and a determination of whether or not “the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. 402.14(h)(2)-(3) (emphasis added). *See also* 51 Fed. Reg. 19,932 (June 3, 1986) (“The Service’s finding under §7(a)(2) entails an assessment of the degree of impact the action will have on a listed species.”). The distinction in the regulations between impacts attributable to the “environmental baseline” and the “action” lends additional support to the position that the “actions” on which NOAA must consult and render a jeopardy determination are those actions over which the action agencies have discretionary control, not the presence of dams, which the agency has no authority to remove.

This Court has repeatedly confirmed that “where there is no agency discretion to act, the ESA does not apply.” *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-1126 (9th Cir. 1998); *Turtle Island Restoration Network v. NOAA*, 340 F.3d 969, 974 (9th Cir. 2003); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1511-12 (9th Cir. 1995) (no ESA consultation required where agreement granting right-of-way deprived federal agency of discretion to influence private activity for the benefit of listed species); *Env’tl. Prot. Info. Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (agency not required to reinitiate consultation on species listed after issuance of permit because agency did not retain discretionary control to require private party to take actions for benefit of species).

Contrary to the district court’s suggestion, the principle that the ESA

consultation duty applies only to discretionary actions logically extends to limit the scope of consultation in cases where there is sufficient discretion to warrant consultation. In *Ground Zero Center for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004), the issue was, like here, the scope of consultation. This Court approved limiting consultation to discretionary aspects of a federal program, rejecting a claim that the Navy had to consult on the location where the program would be carried out “because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of the threatened species” and any consultation regarding risks to species “if such risks arise solely from the President’s siting decision, would be an exercise in futility.” 338 F.3d at 1092.^{18/}

In short, while the action agencies possess discretion to operate the dams in a manner beneficial to fish and therefore have a duty to consult, it does not follow that the analysis may not differentiate between impacts attributable to the discretionary operations and those attributable to the existence of the dams and other

^{18/} The Supreme Court recently emphasized that the scope of an agency’s discretion is the critical factor in determining the proper scope of analysis in an Environmental Assessment prepared under the National Environmental Policy Act (NEPA). *See Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768-770 (2004). The Court made clear that the analysis should focus on the “incremental effect” of just those actions that the agency has discretion to control, and that “cumulative effects” should be considered separately and not as part of the agency action itself. *Id.* at 770. *Public Citizen* supports NOAA’s approach here, as the procedural requirements of NEPA and the ESA are very similar, as this Court has noted. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (“[t]he standards for ‘major federal action’ under NEPA and ‘agency action’ under the ESA are much the same”).

nondiscretionary aspects. Separating the existence of the dams from the discretionary actions follows from the well-established principle that “actions” subject to the ESA requirement not to jeopardize or adversely modify critical habitat are only those actions over which an agency has discretionary control.

2. The existence of the dams and nondiscretionary operations are properly assigned to the environmental baseline

NOAA’s differentiation between discretionary and nondiscretionary actions finds further support in the fact that the regulations distinguish between effects attributable to the environmental baseline, the action itself, and cumulative effects. The district court suggested that assignment of nondiscretionary elements to the baseline improperly allows an action agency to exempt itself from accountability. Op. 22. However, an agency cannot arbitrarily evade responsibility by declaring elements nondiscretionary. The 2004BiOp analysis considers the dams’ existence and six Bureau of Reclamation Projects with non-discretionary commitments to be nondiscretionary and assigns effects from these items to the baseline. The bulk of effects put into the environmental baseline here stem from the existence of the dams.

Case law supports the view that the dams’ existence is nondiscretionary and properly treated as part of the environmental baseline. Indeed, this district court (Judge Marsh) in a previous FCRPS case so recognized. *See Idaho Dept. of Fish and Game v. NOAA*, 850 F. Supp. 886, 894 (D. Or. 1994), vacated as moot, 56 F.3d 1071, 1075 (9th Cir. 1995). Moreover, this Court recently recognized in an analogous case that the dams’ existence cannot reasonably be said to “cause” violations of the Clean

Water Act, reasoning that the Act's directive to comply with state water quality standards must be construed in *pari materia* with statutory directives that the dams be built. The Court thus held that only *discretionary* operations must be consistent with state water standards. *Nat'l Wildlife Fed'n v. United States Army Corps of Engineers*, 384 F.3d 1163, 1178-79 (9th Cir. 2004). Action agencies should not be held responsible for impacts caused by the existence of dams because they have no authority to remove them.

3. NOAA's jeopardy determination is properly based on the net impacts of the "action," not on aggregate effects from the action, baseline, and cumulative effects

NWF argued and the district court suggests that under the regulations NOAA must literally add together impacts to species resulting from baseline conditions, cumulative effects, and the impacts of the proposed action, and render a jeopardy determination on the combined effects. This rigid summation or "aggregation" approach is not required by the statute or regulations. The statute requires NOAA to determine whether the "action" is likely to jeopardize and as discussed above, the action which must avoid jeopardy is the proposed discretionary action. Thus, NOAA's role is to determine whether the proposed action causes jeopardy, not whether the action combined with the environmental baseline or unrelated actions cause jeopardy.

In support of its aggregation argument, NWF relied on the regulation providing that NOAA "evaluate" "whether the action, taken together with cumulative effects,

is likely to jeopardize,” 50 C.F.R. 402.14(g)(4) (emphasis added). NOAA reasonably reads the regulation as allowing the agency to evaluate the action in light of cumulative effects, but not requiring a rigid summation approach. NWF and the district court also put misplaced reliance on 50 C.F.R. 402.02, defining “Effects of the action” to include direct and indirect effects of an action “that will be added to the environmental baseline.” That language, consistent with the statute’s focus on the agency “action” under consultation, merely recognizes that after the present consultation is concluded, the effects of the action will then be “added,” as a matter of fact, to the environmental baseline for all future consultations. Moreover, to the extent there is any ambiguity as to the meaning of the regulation, the district court’s duty was to defer to NOAA’s reasonable interpretation of its own regulations, not NWF’s alternate (and incorrect) interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (“Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.”) (internal citations omitted).

Moreover, to the extent there is any ambiguity as to the meaning of the regulations, the district court’s duty was to defer to NOAA’s reasonable interpretation of its own regulations as expressed in the BiOp. *Thomas Jefferson Univ.*, 512 U.S. at 512 (“Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency’s interpretation must be given

controlling weight unless it is plainly erroneous or inconsistent with the regulation”) (internal citations omitted). When an agency interprets its regulations in a statutorily-required document such as a Biological Opinion, the agency’s interpretation “assumes a form expressly provided for by Congress” and must be accorded full deference. *Martin v. Occupational Safety & Health Review Com'n*, 499 U.S. 144, 157 (1991).

The environmental baseline and cumulative effects are relevant and taken into account in a jeopardy analysis, along with NOAA’s evaluation of the current status of the species, because they provide context and backdrop that is relevant to evaluating the significance of adverse impacts from an action, *i.e.* a net reduction in a species’ reproduction, numbers or distribution caused by the action. The baseline and cumulative effects are expressly taken into account when determining whether or not such a “reduction” will likely “reduce appreciably the likelihood of both the survival and recovery of a listed species.” 50 C.F.R. 402.02. NOAA explained that, where the baseline is relatively poor, any reduction is more likely to be considered “appreciable.” 2004 BiOp at 1-5. Thus, for the ten species where the action produced a short-term net reduction to the species’ baseline reproduction, numbers or distribution, NOAA considered the effect of the action together with cumulative effects, in light of baseline conditions and species’ status, in determining whether there is an appreciable reduction in the likelihood of both survival and recovery.

Cases confirm NOAA’s approach. *See, e.g., San Francisco Baykeeper v. United States Army Corps of Engineers*, 219 F. Supp. 2d 1001, 1023 (N.D. Cal. 2002)

(to determine whether an action jeopardizes listed species or critical habitat, “[t]he consulting agency [] determines the effects of the action with reference to this ‘environmental baseline’”) (emphasis added); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1217 (D. Idaho 1993) (NMFS “must simply evaluate the effects of the proposed action, here the proposal to pave the [] road, given the present environmental baseline” (emphasis in original) (emphasis added)), *aff’d*, 42 F.3d 1399 (9th Cir. 1994).¹⁹

In sum, the district court’s May 26 opinion is not well-reasoned. The fact that the analytical approach in the 2004 BiOp is a shift from the 2000 BiOp analysis does not cast doubt on its legitimacy. As NOAA has explained, the shift was prompted in part by the district court’s own May 2003 order on the 2000 BiOp, a fact the district court does not adequately address. 2004 BiOp at 1-5. The analysis in the (invalidated) 2000 BiOp was designed to achieve broader purposes than the Section 7(a)(2) actually requires.

4. The District Court Erroneously Extended the Rationale of *Gifford Pinchot*

The district court faulted the 2004 BiOp for focusing on whether the proposed action, as compared to the Reference Operation, would reduce the prospects for

¹⁹ In reaching a contrary result, the district court relied on *Defenders of Wildlife v. Babbitt*, 130 F. Supp.2d 121, 127-28 (D.D.C. 2001), Op. 27, despite the fact that a subsequent decision in the *Defenders of Wildlife* litigation expressly rejected the aggregation approach the court here concluded was implicit in the earlier decision. *Defenders of Wildlife v. Norton*, Civ. No. 99-927 (D. D.C. Jan. 7, 2003), slip op. 9-10.

survival of listed species. Op. 34. The court stated:

The reasoning in Gifford Pinchot [Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004),] applies to the jeopardy analysis in a biological opinion, as well as to the critical habitat determinations. Recovery must be considered separately NOAA's jeopardy analysis is contrary to law, because it does not address the prospects for recovery of the listed species.

Op. 35. The district court's extension of *Gifford Pinchot* to jeopardy analysis is clearly erroneous. *Gifford Pinchot* held that the Services' regulatory definition of "destruction or adverse modification," 50 C.F.R. 402.02, was unlawful because by requiring adverse impact to both survival and recovery, it allowed the Services to "be indifferent to, if not to ignore, the recovery goal of critical habitat." 378 F.3d at 1070. This Court based this holding on the language in two statutory definitions. The ESA defines the term "conservation" as "all methods that can be employed to 'bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.'" 378 F.3d at 1070 (quoting 16 U.S.C. 1532(3)). In other words, "conserving" the species is essentially equivalent to "recovering" the species. The Court then noted that the ESA defines "critical habitat" in terms of the geographical areas "essential for conservation" of a species. *Id.* The Court concluded that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery" and that Congress intended to protect habitat necessary for a species' recovery not just habitat needed for a species' survival.

Nothing in *Gifford Pinchot* suggests that its rationale would extend to the duty to avoid jeopardy. Jeopardy is grounded in the concept of survival through the phrase “continued existence of” in Section 7(a)(2). *Gifford Pinchot* expressly recognized that Congress intended conservation and survival to be “distinct, though complementary, goals.” 378 F.3d at 1070. The statutory language pertaining to conservation that was the linchpin of the Court’s analysis of the adverse modification regulation in *Gifford Pinchot* is not applicable to the phrase “jeopardize the continued existence of.”

Nor does the regulation defining “jeopardize the continued existence” impose a separate recovery analysis or standard as part of the jeopardy determination. Because the regulatory definition is worded in the conjunctive -- an action must appreciably reduce both the survival and recovery of listed species to result in a jeopardy determination – there is no need to separately analyze recovery once an action is found to not appreciably reduce survival. The preamble to the regulations confirm that “[t]he ‘continued existence’ of the species is the key to the jeopardy standard, placing an emphasis on injury to a species’ ‘survival.’” 51 Fed. Reg. 19,926, 19,934 (June 3, 1986). Furthermore, the regulation provides for a jeopardy determination only when the action causes an appreciable reduction in survival and recovery by reducing the reproduction, numbers or distribution of a species. 50 C.F.R. 402.02. By focusing on whether the UPA would cause a reduction in the species’ current status, then, NMFS properly applied the regulations.

