



March 24, 2014



Via Federal Express

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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act Regarding Impacts of the Federal Columbia River Power System on Threatened and Endangered Salmon and Steelhead

Dear Sirs and Madam:

This letter provides notice of intent to sue the Bonneville Power Administration (“BPA”) for violations of § 7 and § 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536, 1538.¹ These violations arise from BPA’s failure to comply with the substantive and procedural requirements imposed by ESA § 7, 16 U.S.C. § 1536, as well as the prohibition on “take” of listed species in ESA § 9, 16 U.S.C. § 1538, in its coordinated operation and maintenance, along with other federal agencies, of federal dams, reservoirs, and related facilities and actions in the Columbia River basin. This notice is provided pursuant to § 11(g) of the ESA, 16 U.S.C. § 1540(g), and supplements earlier notices regarding the violations of law described in prior letters dated June 27, 2008, August 28, 2008, and June 17, 2010.

¹ This letter is sent by the undersigned on behalf of the following organizations: Federation of Fly Fishers, Sierra Club, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, Idaho Rivers United, and Northwest Sportfishing Industry Association. A list of these organizations’ business addresses is appended hereto.

I. BACKGROUND

A. Listed Columbia River Basin Salmon and Steelhead Populations

The dramatic decline of Columbia and Snake River salmon and steelhead populations is reflected in the listings of thirteen Evolutionarily Significant Units (“ESUs”) or Distinct Population Segments (“DPS”) of these species in the Columbia Basin under the ESA. Many other ESUs/DPSs are already extinct. As a consequence, NOAA Fisheries within the Department of Commerce (“NOAA”) has listed the following salmon and steelhead ESUs/DPSs in the Columbia River basin as threatened or endangered and designated their migratory, spawning, and rearing habitat in the basin as critical habitat: Snake River sockeye, Snake River spring/summer chinook, Snake River fall chinook, Snake River steelhead, Upper Columbia River steelhead, Lower Columbia River steelhead, Upper Columbia River spring-run chinook, Lower Columbia River chinook, Middle Columbia River steelhead, Upper Willamette River steelhead, Upper Willamette River chinook, Columbia River chum, and Lower Columbia River coho. *See* 70 Fed. Reg. 37,160 (June 28, 2005) (listing salmon ESUs); 71 Fed. Reg. 834 (Jan. 5, 2006) (listing steelhead DPSs).

The work of the Interior Columbia Technical Recovery Team (“ICTRT”) for seven of these species confirms that each of these populations requires significant improvement to be considered “viable.” *See, e.g.*, Required Survival Rate Changes to Meet Technical Recovery Team Abundance and Productivity Viability Criteria for Interior Columbia Basin Salmon and Steelhead Populations at 22 (Nov. 30, 2007). Moreover, the available scientific evidence indicates that many populations of these species have actually declined or remained at dangerously low levels in recent years.

B. BPA Coordination in Operations and Maintenance and Power Marketing

The Bureau of Reclamation (“BOR”) and the U.S. Army Corps of Engineers (“Corps”) jointly manage and operate the dams, reservoirs, irrigation projects, and other facilities including those referred to as the Federal Columbia River Power System (“FCRPS”).² BPA coordinates operations and maintenance of these and other facilities with these agencies and distributes and markets power generated by these facilities.

Specifically, within the Columbia River basin (the “Basin”), BOR oversees 30 irrigation projects. Of these, nineteen are located along the Columbia River or its non-Snake River tributaries and eleven are located within the Snake River basin. Actions by BOR at all of these projects, including water deliveries, administration of uncontracted water, power production, and

² “FCRPS” is used in this letter as shorthand for all of the dams, reservoirs, and related facilities managed by the BOR, Corps, and BPA throughout the Columbia River basin, and does not refer only to the smaller subset of these facilities considered in NOAA’s 2008 FCRPS Biological Opinion and the 2010 and 2014 Supplemental Biological Opinions.

other project management decisions, have significant influence on the hydrology and water quality of the Columbia and Snake Rivers.

The Corps has responsibility for operating 12 hydroelectric projects in the Basin. The Corps' hydroelectric dam operations directly affect the survival of salmon and steelhead attempting to migrate up and down the Snake and Columbia Rivers past the FCRPS dams. The Corps also oversees the juvenile salmon transportation program that is currently authorized under section 10 of the ESA.

BPA coordinates operation and maintenance of these facilities with BOR and the Corps and also markets the electric power created by these projects. In addition, BPA has statutory duties to fund mitigation projects and studies in the Basin in an attempt to offset the significant impacts of dam operations on salmon and other natural resources.

II. LEGAL FRAMEWORK

A. The Endangered Species Act

Under ESA § 7(a)(2), “[e]ach federal agency *shall ... insure* that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

The ESA's substantive protections are implemented in part through the consultation process, which Congress designed explicitly “to ensure compliance with the [ESA's] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated, “[i]f a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result.” *Id.* (citing *TVA v. Hill*, 437 U.S. 153 (1978)). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (NOAA in the case of anadromous fish) and, if appropriate, obtain a biological opinion evaluating the effects of any federal agency action on listed species and their critical habitat. *Id.* If NOAA concludes that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NOAA must propose reasonable and prudent alternatives, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995).

Compliance with the procedural requirements of the ESA—making the determination of the effects of the action through the consultation process—is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that “may affect” a listed species or critical habitat may not proceed unless and until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Conner v. Burford*, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); *Lane Cnty. Audubon Soc’y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (“the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development”).

Even after the procedural requirements of a consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. *See, e.g., Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). Thus, the substantive duty not to jeopardize listed species (or adversely modify critical habitat) remains in effect regardless of the status of the consultation. While this substantive duty is most readily fulfilled by implementing a federal action that properly has been determined not to cause jeopardy, or by implementing a valid RPA that results from a properly completed consultation, an action agency is “technically free” to choose another alternative course of action if it can independently ensure that the alternative will avoid jeopardy. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997).

In addition, ESA’s Section 7(a)(1) requires federal agencies to “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1) (emphasis added). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NOAA. *Id.* A program of “conservation” is one that brings the species to the point of recovery and delisting. *Id.* § 1532(3).

Separately, ESA § 7(d) prohibits federal agencies, after the initiation of consultation under ESA § 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where BOR executed water service contracts prior to completion of formal consultation); *Marsh* 816 F.2d at 1389 (construction of highway outside species habitat barred by § 7(d) pending completion of consultation). This prohibition is not an exception to the

requirements of § 7(a)(2); it remains in effect until the procedural requirements of § 7(a)(2) are satisfied, 50 C.F.R. § 402.09; and it ensures that § 7(a)(2)'s substantive mandate is met. *See, e.g., Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000).

Section 7(d) thus does not and cannot permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2); it does not grant permission to proceed with admittedly harmful activities while consultation is still ongoing. *See* 51 Fed. Reg. at 19,940 ("section 7(d) is strictly prohibitory in nature"). Additionally, harm to the protected resource itself is considered a violation of Section 7(d). *Pac. Rivers Council*, 30 F.3d at 1057 ("timber sales constitute 'per se' irreversible and irretrievable commitments of resources under § 7(d), and thus cannot go forward during the consultation process"); *Lane Cnty. Audubon Soc'y v. Jamison*, 958 F.2d at 295.

Finally, section 9 of the ESA prohibits all activities that cause a "take" of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C); 50 C.F.R. § 17.11(h). Congress intended the term "take" to be defined in the "broadest possible manner to include every conceivable way" in which a person could harm or kill fish or wildlife. *See* S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. "Take" is defined by the ESA to encompass killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). NOAA has further defined "harm" as "an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 222.102. The U.S. Supreme Court has upheld the validity of this definition. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (upholding similar definition used by Fish and Wildlife Service).

Section 9's take prohibition applies on its face to three of the 13 listed ESUs/DPSs affected by BPA's activities because they are listed as "endangered." Additionally, NOAA has enacted rules pursuant to ESA § 4(d) that extend the take prohibition to the ten salmon and steelhead ESUs/DPSs in the Snake and Columbia basins that are listed as "threatened." 16 U.S.C. § 1533(d); 70 Fed. Reg. 37,160 (June 28, 2005) (updating 4(d) rules for salmon ESUs); 71 Fed. Reg. 834 (Jan. 5, 2006) (incorporating updated 4(d) rules for steelhead DPSs). While the 4(d) rules contain some exemptions to the take prohibition for threatened species, none are applicable here.

Federal actions that have completed a legally valid § 7(a)(2) consultation and have a biological opinion generally obtain an "incidental take statement" ("ITS"). 50 C.F.R. § 402.14(i). The ITS authorizes the agency, if in compliance with the terms and conditions of the ITS, to "take" listed species without facing § 9 liability. *Id.* § (i)(5). However, if a biological opinion is legally flawed, the ITS cannot shield the action agency from liability.

B. The 2000 and 2004 Biological Opinions

NOAA issued a biological opinion for the operation of 14 federal projects that NOAA, the Corps, BOR, and BPA labeled the “Federal Columbia River Power System” on December 21, 2000 (“2000 FCRPS BiOp”). In the 2000 FCRPS BiOp, NOAA concluded that the proposed operation of these projects would jeopardize 8 of the 12 listed salmon and steelhead ESUs in the Columbia River basin. The agency included a Reasonable and Prudent Alternative (“RPA”) that, according to NOAA, would avoid jeopardy.

A coalition of fishing businesses and conservation and fishing advocacy organizations (including the organizations sending this letter) filed a lawsuit in May of 2001, alleging that the 2000 BiOp was arbitrary and capricious and contrary to law because, among other things, it relied on speculative, off-site mitigation actions from both federal and non-federal parties. On May 7, 2003, the U.S. District Court for the District of Oregon agreed with plaintiffs that the 2000 FCRPS BiOp was legally flawed and relied on improper factors in reaching a no-jeopardy finding for the RPA. *See Nat’l Wildlife Fed’n, et al. v. Nat’l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003). The Court remanded the opinion to NOAA to prepare a new opinion that complied with the law.

On November 30, 2004, NOAA issued its revised biological opinion (the “2004 FCRPS BiOp”). In sharp contrast to its previous opinions, NOAA concluded in the 2004 BiOp that the proposed FCRPS operations included in the “Updated Proposed Action” (“UPA”) from BPA, the Corps, and BOR (collectively the “action agencies”) would not jeopardize the continued existence of twelve listed ESUs of salmonids in the Columbia River basin. Both the District Court and the Ninth Circuit rejected the 2004 FCRPS BiOp and once again remanded it to NOAA. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 2005 WL 1278878 (D. Or. May 26, 2005); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, CV-01-640-RE, Opinion and Order of Remand (Oct. 7, 2005); *aff’d*, *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (amended opinion).

C. The 2008 Biological Opinion

After a nearly three-year remand, NOAA issued a new biological opinion on May 5, 2008 (the “2008 FCRPS BiOp”).³ The 2008 FCRPS BiOp concluded that the action agencies’ “Prospective Actions”—which were treated as a reasonable and prudent alternative (“RPA”)—would not jeopardize any ESA-listed salmon or steelhead ESUs/DPSs or adversely modify or destroy any of their designated critical habitat. The actions addressed in the 2008 FCRPS BiOp

³ NOAA also issued a “Supplemental Comprehensive Analysis” along with the 2008 FCRPS BiOp that contained additional explanation. The Supplemental Comprehensive Analysis purports to expand upon (but also adopts) the Action Agencies’ “Comprehensive Analysis” released in August 2007. Except where noted specifically, we refer to these documents collectively as the “2008 FCRPS BiOp.”

were not materially different from those in the 2004 UPA or the earlier, failed RPA from the 2000 FCRPS BiOp. In fact, in some vital respects the actions considered in the 2008 FCRPS BiOp provided less protection for ESA-listed salmon and steelhead. To reach a no-jeopardy/no-adverse-modification finding for actions that do little to address the fundamental obstacles to the survival and recovery of ESA-listed salmon and steelhead in the Columbia River basin, NOAA once again created from whole cloth a new kind of jeopardy analysis for this consultation that had not previously been employed in any biological opinion under ESA section 7. In doing so, NOAA departed markedly from the requirements of the ESA and its implementing regulations, failed to use the best available scientific information, and reached numerous conclusions that are otherwise arbitrary and capricious and not supported by the record.

The 2008 BiOp is arbitrary, capricious, and contrary to law for reasons that include, but are not limited to, those described below:

- The “trending towards recovery” standard for the recovery prong of the jeopardy analysis fails to address elements of a jeopardy analysis that the regulations identify as necessary and that are scientifically essential to determining whether an action appreciably reduces a species’ likelihood of recovery. *See* 50 C.F.R. §§ 402.02; 402.14. Moreover, the “trending towards recovery” standard is sharply at odds with, for example, the components of the recovery prong of the jeopardy analysis in the 2000 FCRPS BiOp—yet there is no explanation for why these components are no longer legally or scientifically relevant. The 2000 FCRPS BiOp first set the probability necessary to avoid an “appreciable” reduction in the likelihood of recovery, then identified the time in which recovery must be achieved, and finally described what population level constitutes recovery. The “trending towards recovery” standard lacks each of these elements.
- The short-term extinction risk standard NOAA uses to assess whether the 2008 PA/RPA will cause an appreciable reduction in a species’ likelihood of survival is contrary to law, disregards the best available scientific information, and is arbitrary. The quantitative survival standard in the Jeopardy Metric Memo and the 2008 FCRPS BiOp focuses on the risk of extinction for salmon and steelhead populations over a 24-year period, although NOAA now also asserts that it has not identified, and does not rely on, a quantitative standard to assess risks to species survival but only presents the results of the short-term extinction risk analysis from the SCA “for convenience.” 2008 FCRPS BiOp at 7-7 to 7-8. If NOAA does not rely on this quantitative standard for assessing risk to species survival, it has not described rationally what it does rely on or what the relevance of its quantitative analysis is to its conclusion for each ESU that the 2008 PA/RPA avoids jeopardy to species survival.
- The narrative no-jeopardy findings for each ESU/DPS in the 2008 FCRPS BiOp appear to be based on both quantitative and qualitative assessments that fail to actually articulate how the various factors discussed can be combined in a rational or logical way to support a no-jeopardy conclusion. In addition, many of the factors discussed are neither fully nor

accurately described, nor does the agency explain why its discussion omits other factors that also would be relevant to a jeopardy analysis.

- The jeopardy analysis fails to rationally address the effects of global warming in combination with the 2008 PA/RPA on the likelihood of ESA-listed salmon and steelhead survival and recovery.
- The no-jeopardy finding for Snake River sockeye salmon is arbitrary, inconsistent with other analyses, and disregards the best available scientific information. Even though this conclusion strains credulity on its face, it also ignores a number of relevant factors including, but not limited to: (1) the primary action in the 2008 PA/RPA for this species is an increase in the production of hatchery smolts from the captive breeding program, even though the species already is sustained only through hatchery production and the scientific evidence demonstrates that such production has long-term deleterious effects on species recovery; (2) a number of the hydrosystem operations NOAA asserts will help other species are likely to harm Snake River sockeye; and (3) NOAA has not identified any actions specific to this species that would reduce the negative effects of the hatchery program and improve conditions in the species' migratory corridor enough to avoid appreciable reductions in the likelihood of both survival and recovery.
- The 2008 FCRPS BiOp jeopardy analysis defers consideration of the harmful effects of hatcheries on species recovery to a future biological opinion while at the same time including the allegedly beneficial effects of hatchery programs on mitigating the short-term risk of extinction. NOAA fails to provide either a legal or a rational basis for this bifurcation, or how it may rely on the effects of future consultations to offset harm that may be occurring now.
- The 2008 FCRPS BiOp jeopardy analysis relies to a substantial degree, and for many populations, on the alleged benefits of habitat restoration actions to offset the harm from ongoing hydrosystem measures in order to reach a no-jeopardy finding. This reliance is, among other things, contrary to the best available scientific information about the potential role of habitat actions to offset hydrosystem impacts, fails to account for the risks and uncertainties surrounding these habitat measures and their effects, depends on a new and novel "habitat model" that lacks scientific validity, and fails to acknowledge or account for the contrary effects of continued habitat degradation in some or all of the watersheds targeted for beneficial actions.
- The 2008 FCRPS BiOp contains numerous optimistic and/or scientifically unsupported assumptions that fail to acknowledge or address appropriately, among other issues, (1) the increased risk of allowing populations to persist at low abundance and productivity for an indefinite period; (2) the increased risk of relying on subjective considerations for combining population and major population group risks to arrive at an overall jeopardy evaluation for an ESU/DPS; (3) the very substantial risk that the

quantitative analyses for the base-to-current adjustment, survival gap calculations, and current-to-prospective adjustments are so infected by uncertainty that they provide very little reliable information; (4) the very substantial risk that benefits for hydrosystem, habitat, and hatchery actions, both in the base-to-current and in the current-to-prospective adjustments, actually overestimate benefits because the analyses treat actions in each of these areas as fully independent when they are not; (5) the very substantial risk to both survival and recovery posed by the fact that the various models on which NOAA relies are inadequate or inappropriate to the purposes for which they are employed; (6) the very substantial risk that the research, monitoring, and evaluation in the PA/RPA either does not address the relevant biological issues or will not timely detect adverse effects or both; (7) the very substantial risk to both survival and recovery posed by freshwater and ocean effects of climate change and; (8) the very substantial risks to both survival and recovery posed by the failure to address all of the factors relevant to the adverse effects of hatchery and habitat actions, both those that are a part of the 2008 PA/RPA and those that are not.

- The 2008 FCRPS BiOp's assessment of whether the proposed action is likely to destroy or adversely modify critical habitat violates ESA § 7(a)(2) because it assesses destruction or adverse modification of critical habitat by comparing the "current pre-Prospective Action condition of designated critical habitat relative to the functionality of its PCEs (primary constituent elements)," 2008 FCRPS BiOp at 7-52, to the likely future state of critical habitat after implementation of the PA/RPA. By doing so, NOAA arbitrarily compares proposed hydrosystem operations to a baseline that already includes ongoing operations that NOAA acknowledges have adverse impacts on the designated critical habitat of ESA-listed salmon and steelhead.
- NOAA's critical habitat analysis erroneously examines the effects of the PA/RPA on the habitat's value to the listed ESUs/DPSs' "long term trend toward recovery" rather than on the species' actual "likelihood of . . . recovery." 50 C.F.R. § 402.02 (definition of "destroy or adversely modify"). This does not comply with Section 7's directive to assess whether the actions' impacts on critical habitat will reduce appreciably the likelihood that listed ESUs/DPSs will actually recover, i.e., the likelihood that listed ESUs/DPSs will increase their populations to the point that they may be removed from protection under the ESA. See 16 U.S.C. §1532(5)(A)(i); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 936. The analysis also fails to consider impacts on the PCE of water quality stemming from oil discharges and spills from federal dams on the Columbia and Snake Rivers.
- The action agencies' finding that PA/RPA is Not Likely to Adversely Affect ("NLAA") endangered Southern Resident Killer Whales and NOAA's concurrence in that finding are arbitrary and contrary to law. The analysis underlying these conclusions ignores the current degraded state of salmon populations in the Columbia/Snake and does not

consider whether these populations must increase to ensure that the FCRPS does not jeopardize the whales.

- The 2008 FCRPS BiOp defines the action area for this consultation too narrowly by focusing on watersheds where the action agencies have proposed beneficial actions. NOAA has excluded watersheds or subbasins that might contain either ongoing or future harmful projects by federal, state, or private actors. Moreover, NOAA failed to consider the harmful effects of ongoing or reasonably certain non-federal actions even in watersheds or subbasins where potential beneficial actions may occur. To the extent NOAA seeks to count the benefits of the RPA measures in certain watersheds, the action area and its analysis must also encompass those watersheds where harmful actions may occur.
- The jeopardy analysis in the 2008 FCRPS BiOp also fails to include an accurate and complete description of the cumulative effects that must be considered together with the effects of the action in determining whether the proposed action would cause jeopardy. 50 C.F.R. § 402.14(g). The actions NOAA and the action agencies included as cumulative effects come almost exclusively from the States and Tribes and are limited to actions with positive benefits for salmon. Neither the action agencies' Comprehensive Analysis, nor the 2008 FCRPS BiOp account for the negative effects of the myriad of other State, tribal, and private actions throughout the Columbia basin.

Through a formal record of decision on August 12, 2008, BPA agreed to implement the RPA in the 2008 FCRPS BiOp, and on that basis also concluded that BPA's actions would avoid jeopardy.⁴

D. The 2010 Supplemental BiOp

After notifying the Action Agencies of these violations in June and August of 2008, the fishing and conservation organizations, including those sending this letter, filed a Supplemental Complaint for Declaratory and Injunctive Relief challenging the 2008 FCRPS BiOp and the 2008 records of decision for the Corps and BOR in the district court. After oral argument on cross-motions for summary judgment, federal defendants requested an in-chambers status conference. At that meeting on April 2, 2009, "Federal Defendants, the State of Oregon, the Nez Perce Tribe, and the National Wildlife Federation committed to jointly exploring all 'possible legal avenues' for resolving this matter." Memorandum from Court to Counsel (May 18, 2009). On May 18, 2009, to assist the parties in these efforts, the Court issued guidance in the form of a memorandum to counsel providing its preliminary view that the 2008 BiOp was arbitrary and capricious and suggesting a series of steps that could address the Court's concerns. Thereafter, administration officials for the action agencies and NOAA held only brief and one-sided "listening sessions" with the undersigned organizations and other parties. Despite federal

⁴ This letter refers to this Record of Decision as the "2008 ROD."

defendants' failure to engage even in preliminary substantive and mutual discussions, these parties took repeated steps to inform federal defendants and the administration leadership about the issues they believed needed to be discussed in order to address the flaws in the 2008 BiOp and 2008 RODs and the topics raised in the Court's guidance letter.

These suggestions were ignored and on September 15, 2009, the Administration announced a unilaterally-developed Adaptive Management Implementation Plan ("AMIP") that BPA and NOAA touted as a response to the concerns outlined in the Court's May 18, 2009 guidance memorandum. In addition to the substantive legal violations detailed herein, the undersigned parties and their allies demonstrated that the AMIP was not properly before the Court but instead was an improper post-hoc rationalization for the 2008 FCRPS BiOp. The Court agreed and eventually left NOAA, BPA, and the other action agencies little choice but to take a 90-day voluntary remand of the 2008 BiOp "to consider, among other actions, integrating the Adaptive Management Implementation Plan and its administrative record into the 2008 BiOp." See *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, CV-01-640-RE, Order (Docket #1750) (Feb. 19, 2010); see also Letter to Counsel (Feb. 10, 2010) (Docket #1749) at 1-2 (explaining basis for proposed voluntary remand order, finding, among other things that "Federal Defendants have, in effect, acknowledged that the AMIP is procedurally flawed and no one seriously contends that it is properly before the court."). In addition, the Court directed the agencies to consider the best available science and to consider implementing the parties' suggestions for actions necessary to comply with the law.

On May 20, 2010, NOAA issued a Supplemental Biological Opinion ("2010 Supplemental BiOp") after reinitiating consultation with the Action Agencies on May 3, 2010. The 2010 Supplemental BiOp does not alter any of the conclusions or analyses from the 2008 BiOp and is therefore arbitrary and capricious for all of the reasons outlined above. In addition, the 2010 Supplemental BiOp does not address the Court's previous guidance, nor does it propose any new actions that will affect salmon and steelhead survival through the FCRPS. It does not, for example, propose a single new action that would assist salmon and steelhead in the face of a warming climate, nor does it consider, evaluate, or act on the best available science about the effects of climate change on its predictions of the status of the species or the agencies' speculation about the benefits of the habitat and other measures proposed in the 2008 BiOp and 2010 Supplemental BiOp. The 2010 Supplement similarly fails to consider, explain, or take action based on the best available science on topics ranging from the potential long-term negative effects of hatchery practices to the limitations of tributary and estuary habitat improvements. It fails to acknowledge or evaluate in any way the fact that the level of tributary and estuary habitat mitigation measures predicted in the 2008 FCRPS BiOp have not occurred. In short, the 2010 Supplement fails to draw a rational connection between any of the new scientific evidence and its conclusions that the 2008 FCRPS BiOp and the AMIP will avoid jeopardy and adverse modification of critical habitat. Instead, the 2010 Supplement merely catalogs this science, includes only six additional measures to study potential future actions and to compile additional data, and adds the AMIP to the 2008 BiOp as action "RPA 1A."

Moreover, in reinitiating consultation on May 3, 2010, the action agencies failed to comply with the procedural and substantive requirements of § 7(a)(2). The 2010 Supplement and the 2010 RODs fail even to acknowledge the recent scientific evidence regarding the effects of dams and hatchery operations on the prey needed to ensure survival and recovery of Southern Resident Killer Whales. Much of this scientific evidence was developed by NOAA itself and contradicts the action agencies' previous NLAA conclusion (and NOAA's concurrence with that conclusion). Similarly, neither the action agencies nor NOAA considered the effects of the FCRPS on Pacific Smelt (eulachon). *See* 75 Fed. Reg. 13012, 13019 (Mar. 19, 2010) (finding that impoundment of the Columbia River has altered river flows and winter temperatures necessary for Pacific smelt spawning and migration).

As the plaintiffs and other parties have described, the 2008 FCRPS BiOp, as modified by the AMIP and the 2010 Supplemental BiOp, fundamentally failed to address the flaws in the 2008 FCRPS BiOp and 2008 ROD, including (but not limited to) the illegal jeopardy standard and analysis and the elements tentatively described by the Court as arbitrary and capricious.

Developing and "integrating" the AMIP into the 2010 Supplemental BiOp did not alter or address the legal failings in the 2008 FCRPS BiOp. Nothing in the AMIP modified the jeopardy analysis in the 2008 FCRPS BiOp or changed its illegal "trending towards recovery" standard, the only actual jeopardy standard and analysis for the conclusion that the 2008 RPA and the 2010 Supplemental RPA avoid jeopardy to ESA-listed salmon and steelhead. The conclusory—and oft-repeated—statement in the September 15 AMIP that "the RPA as implemented through the [AMIP] satisfies the jeopardy standard that has been articulated by the Ninth Circuit," *see, e.g.*, NOAA Letter of September 14, 2009 at 2 (Exhibit 2 to September 15th Response), is not a supplemental or revised jeopardy standard or analysis, nor does it refer to one. This semantic slight-of-hand merely rephrases arguments made in the past, apparently in an attempt to distance the agencies from the "trending towards recovery" standard. This effort does nothing to change the plain fact that the jeopardy standard and analysis in the 2008 FCRPS BiOp, relied on in the 2008 ROD and 2010 ROD, remain unaltered and fail to comply with the Endangered Species Act, its implementing regulations, or the case law.

Moreover, the AMIP and its supporting materials, as well as the 2010 Supplemental BiOp, fundamentally failed to address the specific shortcomings of the 2008 FCRPS BiOp that the Court has tentatively identified as arbitrary and capricious. May 18 Letter at 2. Nor did these documents seriously attempt to implement the "additional and specific mitigation actions, independent scientific review, and the development of a contingency plan," the Court suggested. *Id.* at 3. The Court detailed six particular flaws in the 2008 FCRPS BiOp but the AMIP and 2010 Supplemental BiOp do not actually address any of them. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, CV-640-RE, NWF Plaintiffs' Response to Federal Defendants' Sept. 15, 2009 Filing (filed Oct. 7, 2009) (Docket #1723) at 8-29. The same is true for the six areas of mitigation the Court suggested the parties consider in order to resolve this case. In short, the 2010 Supplement did nothing to correct the myriad legal violations and scientific

inaccuracies in the 2008 FCRPS BiOp and the AMIP that had already been detailed, and the agencies' actions are still arbitrary, capricious, and contrary to law.

BPA and the other action agencies adopted the 2010 Supplemental BiOp through supplemental RODs signed June 11, 2010. These "2010 RODs" include BPA's "Record of Decision Following the May 20, 2010 NOAA Fisheries Supplemental Biological Opinion to the May 2008 FCRPS Biological Opinion," the Corps' "Amended Record of Consultation and Statement of Decision on NOAA Fisheries' May 20, 2010 Supplemental Consultation on Remand for Operation of the Federal Columbia River Power System, 11 Bureau of Reclamation Projects in the Columbia Basin and ESA Section 10(a)(1)(A) Permit for Juvenile Fish Transportation Program," and BOR's 2010 Supplemental Decision Document Following the May 2010 NOAA Fisheries Supplemental Consultation on Operation of the Federal Columbia River Power System, 11 Bureau of Reclamation Projects in the Columbia Basin, and ESA Section 10(a)(1)(A) Permit for Juvenile Fish Transportation Program" (collectively the "2010 RODs").

Plaintiffs, including the organizations sending this letter, after providing a supplemental 60-day notice filed a supplemental complaint challenging the 2010 Supplemental BiOp and the 2010 RODs. On August 2, 2011, the Court held that the 2008/2010 BiOps were arbitrary and capricious for their "entire ten-year term" and made clear that the agencies' fundamental approach to avoiding jeopardy required re-examination. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1128 (D. Or. 2011). The structural problems in the 2008/2010 BiOps are rooted in a jeopardy standard that violates the ESA, the agencies' inability to identify and implement mitigation measures, and their inability to reliably predict and verify any salmon survival improvements that may accrue even if these measures are identified and implemented. Specifically, the Court found that "NOAA Fisheries' analysis fails to show that expected habitat improvements—let alone the expected survival increases—are likely to materialize," *id.* at 1127, and that "[t]hus far, Federal Defendants have not implemented the habitat actions necessary to avoid jeopardy [and] there is no indication that they will be able to identify and implement the actions necessary to catch up," *id.* at 1128. The Court also specifically noted that "the lack of scientific support for NOAA Fisheries' specific survival predictions is troubling," *id.* at 1129, and further noted that the government's own scientists, "the independent experts who reviewed [the plan], and the Independent Scientific Advisory Board ("ISAB") have expressed skepticism about whether those benefits will be realized," *id.* at 1130. Overall, the Court found that "[c]oupled with the significant uncertainty surrounding the reliability of NOAA Fisheries' habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, NOAA Fisheries'" approach to these issues is "neither cautious nor rational." *Id.* at 1128. The Court required that in the new BiOp, NOAA shall (1) "reevaluate[] the efficacy of the RPAs in avoiding jeopardy," (2) "identif[y] reasonably specific mitigation plans for the life of the biological opinion, and" (3) "consider[] whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d at 1130. The Court also granted in part the

injunction requested by plaintiffs and others and ordered continuation of previous levels of court-ordered spill to alleviate some of the short-term irreparable harm to ESA-listed stocks. *Id.* at 1130.

E. The 2014 Supplemental BiOp

After more than two years on remand, NOAA issued the 2014 Supplemental BiOp on January 17, 2014. Despite the efforts of many in the region to convince the agencies to follow a new path, the 2014 Supplemental BiOp largely repeats/incorporates the problems that plagued the 2008/2010 BiOps it purports to supplement. This includes a continued reliance on the illegal jeopardy standard in the 2008 BiOp, and continued reliance on estuary and tributary habitat actions that are not reasonably certain to occur and/or that have uncertain benefits. In addition to these and all the flaws detailed above, the 2014 Supplemental BiOp compounds NOAA's previous errors in at least the following ways:

- ignoring (or arbitrarily dismissing) recent data demonstrating that productivity for many of the basin's listed stocks remains either flat or continues to decline;
- ignoring that many of the hoped-for actions in tributary and estuary habitats have either not been implemented, are far behind schedule, or are not demonstrating the predicted survival improvements;
- arbitrarily discounting new scientific information demonstrating the benefits of changing hydrosystem operations, including increasing spill;
- arbitrarily permitting BPA and the other action agencies to cut back on court-ordered spill (by reducing or otherwise changing spill levels and/or spill seasons) necessary to alleviate irreparable harm caused by the FCRPS;
- failing to consider increased flow levels, reservoir drawdown, dam removal, or other actions that would increase water travel time and downstream salmon survival, by allowing the action agencies to curtail or cut back on court-ordered spill operations in both the spring and the summer salmon migration season;
- failing to adequately consider and account for new information demonstrating that the impacts of climate change will continue to degrade habitats, to factor that information into its predictions of benefits for its habitat and other actions, or to require a single new action to account for the increased degradation caused by climate change;
- failing to account for the significant increased mortality from cormorant predation or to propose any certain means to address this predation, let alone any compensatory actions to make up for the significant increased mortality that was not factored into the 2008 BiOp's jeopardy analysis;
- failing to account for (or propose alternative remedial actions) the reduced survival benefits predicted from the kelt reconditioning program; and
- failing to adequately consider the FCRPS's impact on the prey base necessary for the survival and recovery of critically endangered Southern Resident Killer Whales.

BPA adopted the 2014 Supplemental BiOp through a Supplemental ROD signed on February 27, 2014. *See* Record of Decision following NOAA's January 2014 Supplemental Biological Opinion to the May 2008 FCRPS Biological Opinion and May 2010 Supplemental Biological Opinion for Operation of the Federal Columbia River Power System (Feb. 27, 2014) ("2014 ROD").

III. BPA'S VIOLATIONS OF THE ESA

A. BPA Has Failed to Ensure That Its Actions Are Not Likely to Jeopardize the Continued Existence of Listed Species or Destroy or Adversely Modify Their Critical Habitat.

Jeopardy is defined by regulation to mean an action that "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. For reasons including those described above, the 2008 FCRPS BiOp—and the 2010 and 2014 Supplemental BiOps that reaffirm it—incorrectly apply ESA § 7(a)(2) and its implementing regulations to determine that the proposed action would avoid jeopardy. BPA (and the other action agencies), however, have an independent duty to ensure that their actions avoid jeopardy. The current revised RPA, when added to the environmental baseline and cumulative effects, has both short-term and long-term adverse impacts on listed species that jeopardize their continued existence. Even before the 2008, 2010, and 2014 RODs were issued, BPA and the other agencies were already operating the FCRPS and taking other actions implicated by the RPA reviewed in the 2008 FCRPS BiOp and the 2010 and 2014 Supplemental BiOps. The agencies—through their continued actions, including acting pursuant to these RODs and BiOps—are knowingly violating section 7(a)(2), notwithstanding the 2008 FCRPS BiOp and the 2010 and 2014 Supplemental BiOps. This is especially true here because BPA and the other action agencies were intimately involved in the development and drafting of the analyses and data employed by NOAA in the 2008 FCRPS BiOp and the 2010 and 2014 Supplemental BiOps, and can reasonably be expected to know that the Opinions are arbitrary and capricious. *See, e.g., Res. Ltd. v Robertson*, 35 F.3d 1300, 1304-1305 (9th Cir. 1993); *Stop H-3 Ass'n. v. Dole*, 740 F.2d 1460.

BPA and the other action agencies also have failed to ensure that their actions are not likely to destroy or adversely modify the designated critical habitat of listed species. *See* 50 C.F.R. § 402.02 (adverse modification defined as "direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of a listed species."). The ESA defines critical habitat as those areas with the "physical or biological features essential to the conservation of the species...." 16 U.S.C. § 1532(5)(A)(i). The final rules designating critical habitat for listed salmon and steelhead describe many features of critical habitat essential for their recovery, including, among other things, adequate water quality and quantity, water temperature, water velocity, and safe passage conditions in migratory corridors. *See, e.g.,* 70 Fed. Reg. 52488, 52521-22 (Sept. 2, 2006). The proposed agency action, which was also adopted in BPA's 2008 ROD and its 2010 and 2014 RODs, adversely impacts

these features of designated critical habitat and destroys and adversely modifies the ability of the critical habitat to contribute to the recovery of the species. *See Gifford Pinchot Task Force*, 378 F.3d 1059; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 933-936. By implementing the proposed action under these circumstances, BPA is violating section 7(a)(2).

B. BPA Is Taking Actions That “May Affect” Listed Species and Their Designated Critical Habitat Without a Valid Biological Opinion.

The substantive goal of consultation under ESA § 7(a)(2) is to ensure that federal actions do not jeopardize the continued existence of listed species or adversely modify its critical habitat. Federal agencies may not take action that could harm a listed species until they have completed the ESA § 7(a)(2) consultation process and have received a valid biological opinion. The 2008 FCRPS BiOp, and the 2010 and 2014 Supplemental BiOps, are not valid and BPA may not rely on these documents to conclude that its actions will avoid jeopardy or to satisfy its procedural duties under the ESA. Under these circumstances, the ESA requires that BPA and the other action agencies avoid any action that causes harm to listed species or designated critical habitat pending compliance with the procedural requirements of § 7(a)(2). *See Pac. Coast Fed'n of Fishermen's Ass'ns, et al. v. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (requiring that BOR suspend water deliveries in the Klamath basin, unless flows were fully adequate for fish, pending completion of biological opinion); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000) (enjoining implementation of fishing management plans in specific areas pending completion of BiOp).

Moreover, BPA has not initiated formal consultation for the Southern Resident Killer Whale DPS, although the ongoing operation of the FCRPS is reducing the likelihood of survival and recovery of this DPS. As described above, BPA's and the action agencies' NLAA determination for these whales (and NOAA's concurrence in that determination) is not based on the best scientific and commercial data available and fails to draw a rational connection between the evidence before the agencies and the conclusion.

C. BPA Has Failed to Comply With § 7(a)(1).

As discussed above, ESA § 7(a)(1) is an additional, mandatory obligation that agencies develop programs for the recovery of listed species, in consultation with NOAA. *See Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998). As the 2008 FCRPS BiOp and the 2010 and 2014 Supplemental BiOps acknowledge, the biological requirements of salmon and steelhead in the mainstem of the Columbia and Snake Rivers are not being met, and consequently, the species continue to slide towards extinction. In neither the 2008 FCRPS BiOp nor the 2010 or 2014 Supplemental BiOps, or any other document—including the 2008, 2010, and 2014 RODs—has BPA identified, or consulted with NOAA regarding those steps it will take to recover these species to the point where they can be removed from ESA protection.

D. BPA Is Making Irretrievable and Irreversible Commitments of Resources, in Violation of ESA § 7(d).

As noted earlier, § 7(d) prevents federal agencies from making irretrievable and irreversible commitments of resources “which [have] the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” 50 C.F.R. § 402.09 (emphasis added). As this regulation makes clear, “[t]his prohibition . . . continues until the requirements of section 7(a)(2) are satisfied.” *Id.* The additional restrictions imposed by § 7(d) are in effect because BPA and the other action agencies have initiated the consultation process, but have not completed the process lawfully with the issuance of a valid biological opinion. The prohibition against the irreversible and irretrievable commitment of resources in § 7(d) applies to the ongoing operation of the FCRPS pending completion of a valid consultation, and adoption and implementation of a biological opinion that avoids jeopardy.

BPA and the other action agencies are violating this prohibition by taking actions that could potentially foreclose implementation of measures required to avoid jeopardy, including but not limited to producing power with water otherwise necessary to save fish, delivering water for irrigation, foregoing river flow levels necessary to avoid salmon and steelhead mortality, transporting salmon and steelhead in trucks and barges, and entering into agreements that could require such actions in the future. These and other actions that make irreversible or irretrievable commitments of resources are contrary to law. *See Pac. Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996) (preservation of “status quo” as required by *Conner* means enjoining the action under consultation); *Pac. Coast Fed’n of Fishermen’s Ass’ns, et al. v. Bureau of Reclamation*, 138 F. Supp. 2d at 1249 & n.19; *Pac. Rivers Council*, 30 F.3d at 1057.

E. BPA Is “Taking” Listed Species Without an Incidental Take Statement, in Violation of ESA § 9.

In their operation of the FCRPS (including all of its projects and facilities), BPA, BOR and the Corps are “taking” or causing the take of endangered and threatened salmon and steelhead. As described in the 2008 FCRPS BiOp, “take” occurs in a number of ways, including mortality and injury to adults and juveniles caused by: passing through turbines, spillways, and bypass and collection systems; delayed migration and increased predation associated with reservoir operations and altered hydrograph; loss of spawning and rearing habitat; and impaired water quality. *See generally* 2008 FCRPS BiOp at § 14.2. Neither the 2010 nor 2014 Supplemental BiOps alter the ITS in the 2008 BiOp except for authorizing additional mortality to adult Snake River sockeye for an experimental adult upstream transportation program and revising the estimates of take from research and monitoring activities. *See generally* 2010 Supplemental BiOp at § 5.2; 2014 Supplemental BiOp at 551. The magnitude of this prohibited take is quite large. For example, total mortality of Snake River fall chinook caused by the FCRPS is estimated as high as 87%. 2008 FCRPS BiOp at 14-27. In the absence of a valid ITS or exemption under the Act, this take is prohibited.

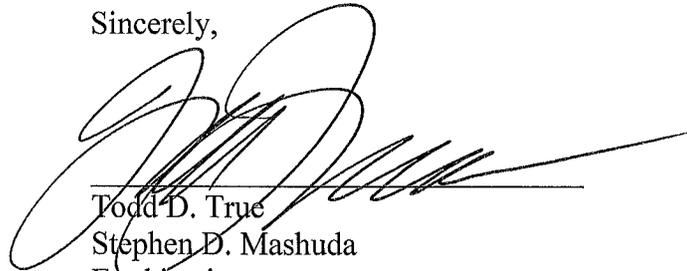
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Pursuant to the ESA and governing regulations, the 2008 FCRPS BiOp authorizes incidental take of a limited number of individuals of all relevant ESUs. *See id.* § 14.1 to 14.2. This provision does not protect BPA from liability under Section 9 because the 2008 FCRPS BiOp and the 2010 and 2014 Supplemental BiOps are arbitrary, capricious, and contrary to law. The incidental take statement (“ITS”) contained in these BiOps is consequently also invalid. Since BPA may not lawfully take listed species in the absence of a valid take statement, it is in violation of § 9.

IV. CONCLUSION

If BPA does not cure the violations of law described above immediately, upon expiration of the 60 days the parties to this notice intend to file suit against BPA pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), and other applicable laws. If you would like to discuss the significant ESA violations described herein and seek a mutually acceptable solution to them, please contact any of the undersigned.

Sincerely,



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