

TODD D. TRUE (WSB #12864)
ttrue@earthjustice.org
STEPHEN D. MASHUDA (MSB #4231)
smashuda@earthjustice.org
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]

THE HONORABLE JAMES A. REDDEN

DANIEL J. ROHLF (OSB #99006)
rohlf@lclark.edu
Pacific Environmental Advocacy Center
10015 S.W. Terwilliger Boulevard
Portland, OR 97219
(503) 768-6707
(503) 768-6642 [FAX]
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs,

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

and

STATE OF OREGON,
Intervenor-Plaintiff,

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION OR,
IN THE ALTERNATIVE, FOR A
PERMANENT INJUNCTION

v.

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

Defendants,

and

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE,
FOR A PERMANENT INJUNCTION

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

FARM BUREAU FEDERATION, and STATE OF
IDAHO,

Intervenor-Defendants.

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

Plaintiffs,

v.

DONALD L. EVANS, in his official capacity as
Secretary of Commerce, NOAA FISHERIES, and D.
ROBERT LOHN, in his official capacity as Regional
Director of NOAA Fisheries,

Defendants.

TABLE OF CONTENTS

INTRODUCTION 1

STANDARD OF REVIEW 3

BACKGROUND 4

 I. SALMON AND STEELHEAD NEED ADEQUATE RIVER FLOWS
 AND WATER VELOCITY TO SURVIVE 5

 II. SUMMER SPILL IS A KEYSTONE REQUIREMENT FOR SALMON
 SURVIVAL 8

 III. ESA-LISTED SNAKE RIVER FALL CHINOOK ARE NOT
 SURVIVING AT RATES ADEQUATE TO AVOID EXTINCTION 11

 IV. ESA-LISTED SNAKE RIVER FALL CHINOOK WILL BE HARMED
 BY MIGRATION CONDITIONS THIS SUMMER 15

 V. THE RELIEF NWF SEEKS WILL REDUCE HARM TO FALL
 CHINOOK THIS SUMMER..... 17

ARGUMENT 20

 I. NWF IS LIKELY TO PREVAIL ON ITS CLAIMS THAT THE COE,
 BOR AND NMFS ARE IN VIOLATION OF THE ESA 20

 A. The COE, BOR, and NMFS Have Violated Section 7 of the ESA. 21

 B. The COE And BOR Also Have Violated Section 9 of the ESA..... 23

 1. The ESA prohibits the “Take” of both endangered and
 threatened Columbia and Snake River salmon and
 steelhead..... 24

 2. The BOR and COE are taking, and will continue to take,
 ESA-listed salmon and steelhead in violation of section 9..... 26

 II. IMPLEMENTATION OF THE UPA AND 2004 BIOP IN THE
 ABSENCE OF AN INJUNCTION WILL HARM ESA-LISTED
 SALMON..... 28

 A. The Legal Standard for an Injunction Under the ESA..... 28

 B. The Limited Injunctive Relief NWF Seeks for Summer 2005 Is
 Both Appropriate and Necessary to Reduce the Harm to ESA-
 Listed Salmon. 30

1. The reduced water travel time NWF seeks is reasonable and will reduce harm to the listed species.31

2. The increased spill NWF seeks is reasonable and will reduce harm to the listed species.32

3. Continued implementation of other measures of the 2000 RPA is reasonable and will provide an adequate interim framework to reduce harm to the listed species in conjunction with other injunctive relief.....34

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,
515 U.S. 687 (1995).....24

Caribbean Marine Services Co. v. Baldrige,
844 F.2d 668 (9th Cir. 1988)3

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988)22

Defenders of Wildlife v. Bernal,
204 F.3d 920 (9th Cir. 2000)27

Esch v. Yeutter,
876 F.2d 976 (D.C. Cir. 1989).....29

Forest Conserv. Council v. Rosboro Lumber Co.,
50 F.3d 781 (9th Cir. 1995)27

Greater Yellowstone Coalition v. Flowers,
321 F.3d 1250 (10th Cir. 2003)29

Greenpeace v. NMFS,
106 F. Supp.2d 1066 (W.D. Wa. 2000)29, 30

Idaho Dep't of Fish and Game v. NMFS,
850 F. Supp. 866 (D. Or. 1994), vacated as moot, 56 F.3d 1075 (9th Cir. 1995)3

Kandra v. United States,
145 F. Supp.2d 1192 (D. Or. 2001)33

Marbled Murrelet v. Babbitt,
83 F.3d 1060 (9th Cir. 1996)27

Marbled Murrelet v. Babbitt,
83 F.3d 1068 (9th Cir. 1996)4

National Wildlife Federation v. Burlington Northern,
23 F.3d 1508 (9th Cir. 1994)26

National Wildlife Federation v. National Marine Fisheries Service,
254 F. Supp.2d 1196 (D. Or. 2003)20, 34

<u>National Wildlife Federation v. National Marine Fisheries Service,</u> No. 01-640-RE (July 29, 2004)	3, 15, 20, 28, 34
<u>National Wildlife Fed. v. National Marine Fisheries Service,</u> 235 F. Supp.2d 1143 (W.D. Wa. 2002)	4, 28
<u>Pacific Coast Federation of Fishermen’s Assn’ v. Bureau of Reclamation,</u> 138 F. Supp.2d 1228 (N.D. Cal. 2001)	4, 23, 29, 30
<u>Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy,</u> 989 F.2d 1410 (9th Cir. 1990)	22
<u>Ramsey v. Kantor,</u> 96 F.3d 434 (9th Cir. 1996)	25
<u>Republic of the Philippines v. Marcos,</u> 862 F.2d 1355 (9th Cir. 1988)	3
<u>Resources Ltd. v. Robertson,</u> 35 F.3d 1300 (9th Cir. 1993)	22
<u>Sierra Club v. Babbitt,</u> 65 F.3d 1502 (9th Cir. 1995)	27
<u>Sierra Club v. Corp of Engineers,</u> 935 F. Supp. 1556 (S.D. Ala. 1996).....	29
<u>Sierra Club v. Marsh,</u> 816 F.2d 1376 (9th Cir. 1987)	3, 23
<u>Stop H-3 Ass'n. v. Dole,</u> 740 F.2d 1442 (9th Cir. 1984)	22
<u>Tennessee Valley Auth. v. Hill,</u> 437 U.S. 153 (1978).....	3, 4, 28
<u>Thomas v. Peterson,</u> 753 F.2d 754 (9th Cir. 1985)	3, 23, 28, 29
<u>Weinberger v. Romero-Barcelo,</u> 456 U.S. 305 (1982).....	4

STATUTES

16 U.S.C. § 1532(13)	24
----------------------------	----

16 U.S.C. § 1532(19)	24, 25
16 U.S.C. § 1533(d)	24
16 U.S.C. § 1536.....	1
16 U.S.C. § 1536(a)(2).....	22
16 U.S.C. §§ 1536(b)(4), (o)(2)	25
16 U.S.C. § 1536(h)	22
16 U.S.C. § 1538.....	1
16 U.S.C. § 1538(a)(1)(B)	24, 27
16 U.S.C. § 1538(a)(1)(G)	24
16 U.S.C. § 1540(g)	26

REGULATIONS

50 C.F.R. § 17.3	24
50 C.F.R. § 222.102	24
50 C.F.R. § 223.102(a).....	24
50 C.F.R. § 223.203(a).....	24
50 C.F.R. § 402.14	25
50 C.F.R. § 402.14(i)(5).....	27

MISCELLANEOUS

Fed. R. Civ. P. 65(a)(2).....	1
64 Fed. Reg. 60,727 (Nov. 8, 1999).....	25
64 Fed. Reg. 73,500 (Dec. 30, 1999).....	24
65 Fed. Reg. 191 (Jan. 3, 2000)	24
S. Rep. No. 307, 93d Cong., 1st Sess. 14 (1973), <u>reprinted in</u> 1973 USCCAN 2989	24

INTRODUCTION

Plaintiffs, National Wildlife Federation et al. (“NWF”), respectfully move the Court for a preliminary injunction, or in the alternative a permanent injunction, against federal defendants, the U.S. Army Corps of Engineers (“COE”), the U.S. Bureau of Reclamation (“BOR”), and the National Marine Fisheries Service (“NMFS”), for violations of the Endangered Species Act (“ESA”) sections 7 and 9, 16 U.S.C. §§ 1536 & 1538, in connection with the on-going operation of COE and BOR multi-purpose water projects on the Columbia and Snake rivers (some or all of which are referred to by these agencies as the “FCRPS”).¹ Specifically, NWF asks the Court to enjoin these defendants, pending a decision on the merits of this case or full compliance with the requirements of the ESA to, inter alia,

(a) decrease (i.e., speed up) by at least 10% the water particle travel time in the Snake River from the head of Lower Granite reservoir to Ice Harbor between June 20, 2005, and August 31, 2005, with the decrease distributed evenly during this period, over what particle travel time would be under the Updated Proposed Action, the 2004 BiOp, and the agencies’ estimate of average Snake River flows in July and August this summer of approximately 27,750 cubic feet per second (cfs) (which includes an estimated 300,000 acre feet of total flow augmentation water from the Upper Snake and 237,000 acre feet of water from Brownlee reservoir), through an appropriate combination of reservoir drawdown, additional flow augmentation, and other measures that would provide the most favorable migration conditions for listed species;

(b) decrease (i.e., speed up) by at least 10% the water particle travel time in the Columbia River from its confluence with the Snake River to Bonneville Dam between July 1, 2005, and August 31, 2005, with the decrease distributed evenly

¹ As NWF explains in the accompanying injunction motion, if the Court decides the issue of injunctive relief before it rules on the pending cross-motions for summary judgment, NWF seeks a preliminary injunction on the terms set forth in this motion against NMFS, the COE and BOR. If the Court does not decide this motion until after it has ruled on the pending summary judgment motions, and NWF prevails in whole or in part, NWF seeks a permanent injunction on these terms against NMFS and a preliminary injunction against the COE and BOR (in the absence of consolidation of this motion with a hearing on the merits of NWF’s claims against the COE and BOR pursuant to Fed. R. Civ. P. 65(a)(2)). In either case, NWF reserves the right to seek further injunctive relief after August 31, 2005, for the spring and summer salmon migration seasons in 2006 and beyond until the defendants comply with the law.

during this period, over what particle travel time would be under the Updated Proposed Action, 2004 BiOp, and the agencies' estimate of average Columbia River flows in July and August this summer of approximately 137,250 cfs, through an appropriate combination of reservoir drawdown, flow augmentation, and other measures that would provide the most favorable migration conditions for listed species;

(c) provide spill, (i) from June 20, 2005 through August 31, 2005, of all water in excess of that required for station service,² on a 24-hour basis, at each of the four lower Snake River projects; and, (ii) from July 1, 2005 through August 31, 2005, of all flows above 50,000 cfs, on a 24-hour basis, at McNary Dam;

(d) comply with and implement, except to the extent superceded by the provisions of paragraphs (a) through (c) above, all of the measures of the RPA in the 2000 FCRPS BiOp.³

This injunction is necessary because, as explained below, NWF is either likely to prevail, or will have prevailed, on the merits of its claims against the federal defendants and the injunctive relief NWF seeks will reduce harm, and the risk of harm, that ESA-listed salmon and steelhead would otherwise experience this summer. The law is clear that where agencies do not comply with either the procedural or the substantive requirements of the ESA, an injunction is the appropriate remedy to protect listed species until the government complies with the law. Moreover, there is abundant scientific evidence to show that the modest measures NWF seeks to improve river conditions for migrating juvenile salmon and steelhead this summer will reduce the risk of harm to these species and can be implemented, even in an unfavorable water year.

² As explained in the Declaration of Stephen W. Pettit (submitted herewith) (hereinafter "Pettit Decl."), providing "station service" generally requires operation of one power unit at each of the lower Snake River projects to generate at least enough electricity to operate that project. Pettit Decl. at ¶ 46.

³ As set forth in the accompanying motion for an injunction, NWF also asks the Court to require the agencies, with respect to the measures in paragraphs (a) through (c) above, to jointly file a report with the Court, within two weeks of entry of an injunction, setting forth the operational measures they will employ to comply with the terms of the injunction and, thereafter, file reports every two weeks, beginning two weeks after June 20, 2005, until two weeks after August 31, 2005, demonstrating compliance with these terms. NWF also asks the Court to enjoin NMFS to withdraw the 2004 BiOp.

In Idaho Dep't of Fish and Game v. NMFS, 850 F. Supp. 866, 900 (D. Or. 1994), vacated as moot, 56 F.3d 1075 (9th Cir. 1995), Judge Marsh struck down a biological opinion for operation of federal defendants' projects on the Snake and Columbia rivers because "instead of looking at what *can* be done to protect the species from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption" (emphasis in original). More than a decade later, these agencies have chosen to continue in the 2004 BiOp the same *status quo* approach without regard to the Court's warning in IDFG or the concerns this Court and other parties have consistently expressed about the 2004 BiOp. As the Court ruled last summer in enjoining these same agencies from curtailing spill to protect juvenile summer migrants, "we are working from a deficit situation," NWF v. NMFS, No. 01-640-RE, Opinion and Order at 8 (July 29, 2004) (Docket # 602). This harmful situation will only become worse this summer in the absence of the injunction NWF seeks.

STANDARD OF REVIEW

In the Ninth Circuit, a court must consider three factors in ruling on a motion for a preliminary injunction: (1) plaintiff's likelihood of success on the merits; (2) whether the balance of irreparable harm favors plaintiff; and (3) whether the public interest favors issuance of the injunction. Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). The first two parts of this standard represent a "continuum in which the required showing varies inversely with the required showing of meritoriousness." Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989).

Where plaintiffs show either actual success on the merits or the probability of success on the merits of claims brought under the ESA, however, a court's inquiry is largely at an end. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985); Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). Accordingly, the

traditional balancing test for injunctive relief is not the test under the ESA. TVA v. Hill, 437 U.S. at 173, 193-95; Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996). In enacting the ESA, Congress “foreclosed the exercise of the usual discretion possessed by a court of equity.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Under the ESA, once plaintiffs show success or the probability of success on the merits, the balance of hardships and the public interest require an injunction. National Wildlife Fed. v. NMFS, 235 F. Supp.2d 1143, 1161 (W.D. Wa. 2002) (enjoining dredging in the Snake River based on showing of a “possibility” of harm to threatened fall chinook salmon); PCFFA v. BOR, 138 F. Supp.2d 1228, 1247-50 (N.D. Cal. 2001) (increasing river flows to protect listed salmon by enjoining BOR irrigation deliveries where agency had violated ESA section 7).

BACKGROUND

NWF seeks a limited injunction in this case to reduce the harm juvenile salmon and steelhead will face this summer in their migration down the Snake and Columbia rivers to the ocean. This relief consists primarily of measures to improve water velocity in the river and increase safe passage past dams. In the absence of these measures, juvenile salmon and steelhead likely will face the most lethal downriver migration conditions since the disastrous migration of 2001 – and perhaps ever. Given the already precarious existence of these fish, the relief NWF requests is both necessary and important to reduce the harm to these species and increase their survivability. In this section, NWF provides background about the biological basis for the water velocity and spill measures it seeks as well as the risks facing juvenile salmon and steelhead this summer. NWF also briefly describes why the measures it seeks will reduce the harm to these species and are practical to implement.

I. SALMON AND STEELHEAD NEED ADEQUATE RIVER FLOWS AND WATER VELOCITY TO SURVIVE

Salmon and steelhead of the Columbia and Snake River Basin, including the ESA-listed Snake River fall chinook, need sufficient amounts of clean, cool, fast flowing water to survive. These species evolved in rivers without dams and depended on the velocity of the annual runoff to aid their migration to the sea. As dams were constructed on the Snake and Columbia rivers, the river ecosystem changed significantly. Reservoirs behind each dam greatly increased the cross-sectional area of the river and reduced downstream water velocity. Water regulation in upriver storage reservoirs added to this problem by reducing flows during periods of salmon migration to levels far less than those that would occur naturally. Dams, impoundments, and water regulation also have reduced water quality. All of these changes in river flow have led to increased travel time for migrating juvenile salmon and steelhead, subjected them to greater exposure to predation and other mortality factors, affected the timing of their entry to saltwater, and ultimately significantly reduced their survival. Pettit Decl. at ¶¶ 9-23; Declaration of Frederick E. Olney at ¶¶ 14 (“Olney PI Decl.”) (filed by amicus Treaty Tribes).

Following the ESA listings of up-river salmon and steelhead during the 1990s, a series of biological opinions on FCRPS operations issued under the ESA by NMFS have attempted to address the continuing, on-going adverse impacts of hydroelectric project development and operation on river flows, water velocity, and salmon survival. For example, in the 1995 BiOp, NMFS described the flow levels that it concluded were the *minimum* necessary to avoid significant harm to the survival and recovery of ESA-listed salmon and steelhead. These flow targets were grounded in scientific studies that established a clear relationship between the survival of juvenile out-migrants, river flow levels, and water velocity, even though they were not the flows that would adequately protect the species. NMFS relied on three lines of evidence

to establish that high juvenile mortality survival is likely under flow conditions below the targets it set: (1) the river conditions under which salmon evolved; (2) the effects of flow volume on water particle and salmon travel time coupled with the effects of slow travel time on exposure of young salmon to predation and other sources of mortality; and (3) the effects of flow levels on estimates of smolt-to-adult survival.⁴ More recent research continues to support the importance of meeting or even exceeding the flow targets from the 1995 BiOp to salmon survival and, conversely, the harm to survival that occurs when these flow levels are not met.⁵ See generally Pettit Decl. at ¶¶ 13-23; Olney PI Decl. at ¶¶ 15-16.

Unfortunately, the summer flow targets in the lower Snake River have seldom been met since 1995, even on a seasonal average basis, and have only been met 33 percent of the time on this basis within the last three years. Fish Passage Center, Memorandum 1995-2003 Biological Opinion Operations (April 29, 2004). They have never been met on a weekly average basis throughout a full summer migration season. State, tribal, and federal biologists predict a zero percent chance of meeting the spring/summer flow targets in the 2004 BiOp this year as well. Technical Management Team, QADJ Run results (March 15, 2005) (<http://www.nwd-wc.usace.army.mil/tmt/agendas/2005/0316.html>). These harsh conditions for juvenile summer

⁴ As part of the underlying scientific foundation for improved river flows in the summer and flow targets to achieve these flows, NMFS has concluded “consistent and highly significant relationships have been observed between flow and survival for juvenile fall chinook (summer migrants) from release points in the free-flowing portion of the Snake River to Lower Granite Dam.” 2004 BiOp AR B.160 at 56 (NOAA 2000 Flow White Paper).

⁵ Indeed, subsequent biological opinions have retained these flow targets even though more recent information indicates that the flow levels set in 1995 do not represent optimal conditions for salmon survival. For example, the 1995 flow targets for the lower Snake River are 50 to 55 kcfs at Lower Granite dam during the summer migration season. 2000 AR C.279 at 38-44 (1995 BiOp at 38-44). In the 2000 BiOp, NMFS observed that “[d]ata collected to date regarding the effects of flow on survival of fall Chinook juvenile migrants (NMFS 2000h) indicate that flows ranging from 80 to 100 kcfs measured at Lower Granite dam during the summer migration period would be optimal for these fish.” 2004 BiOp AR B.156 at 9-56 (2000 BiOp at 9-56).

migrants have occurred despite the fact that NMFS has recognized the glaring need to find additional water to improve river flows and water velocity, especially in the summer.⁶ For example, acquiring additional water from the upper Snake River has been a key requirement identified by NMFS to improve the likelihood of achieving flow objectives at Lower Granite Dam in the both the spring and the summer. As early as 1994, NMFS included in its biological opinion for FCRPS operations the requirement that “[t]he BOR shall take the lead in coordinating efforts to secure an additional 500 kaf (above the 1993 base of 427 kaf) from the Snake River above Brownlee Dam (“upper Snake River”) by January 31, 1999, to be used for flow augmentation during fish migration periods.” 1994 BiOp at B.7 (quoted in Olney PI Decl. at ¶ 17) (emphasis added).

In the 1995 BiOp RPA, NMFS stated that, “[t]he BOR shall continue to provide the 427 thousand acre-feet (kaf) of flow augmentation from the upper Snake River as identified in the Power Planning Council’s Strategy for Salmon in 1995-97, taking such actions as are necessary to ensure a high probability of providing that volume by 1998. The BOR shall subsequently secure an additional amount of water, in coordination with the states of Idaho and Oregon, as may be necessary to further reduce human-caused mortality of endangered salmon in the Snake River. . . . Additional stored water is needed for fish flow augmentation, particularly in the Snake River, in low flow years when flow objectives cannot be achieved with presently available storage volumes” 2000 AR C.279 at 99 (1995 BiOp at 99) (emphasis added); see also Olney PI Decl. at ¶¶ 17-20 (discussing additional evidence of the need for increased volumes of

⁶ As NMFS has acknowledged, without additional flow augmentation water from the upper Snake reservoirs beyond the 427,000 acre feet that has been suggested but seldom delivered, the percent of years that flows at Lower Granite Dam are expected to meet or exceed the flow objectives in the summer are 68% in June, 40% in July, and 0% in August. Olney PI Decl. at ¶ 18.

flow augmentation water to protect juvenile salmon survival).

Rather than address this critical problem for salmon survival during the summer migration season, the COE and BOR propose to continue during the 2005 summer migration season essentially the same inadequate flow augmentation effort they have pursued for the Snake River since 1995. 2004 BiOp AR C.289 at 47-49 (Bonneville Power Administration, Corps of Engineers, Bureau of Reclamation, Updated Proposed Action (2004) [*hereinafter* UPA] at 47-49.) This year, that effort once again will not meet the 427,000 acre feet of base flow augmentation and may well produce only 175,000 to 255,000 acre feet of additional flow from the upper Snake, Technical Management Team, QADJ Run results (March 15, 2005) (available at <http://www.nwd-wc.usace.army.mil/tmt/agendas/2005/0316.html>), although reports of agency estimates range from as high as 300,000 acre feet to as low as 135,000 acre feet.

II. SUMMER SPILL IS A KEYSTONE REQUIREMENT FOR SALMON SURVIVAL

For juvenile salmon and steelhead migrating in the Snake and Columbia rivers, “spill” indisputably provides the safest passage past the FCRPS dams. See 2004 BiOp AR B.156 at 6-17 (2000 BiOp at 6-17) (“In general, relative to other passage routes currently available, direct juvenile survival is highest through spillbays;”); id. at 6-15 (2000 BiOp at 6-15) (explaining that salmon suffer the “lowest direct mortality through spillways”). Spilling water over the spillways at these dams allows juvenile salmon to avoid traveling through the power turbines, a passage route that increases mortality of these fish by subjecting them to rapid pressure changes and direct impacts with turbine blades. Id. at 9-83 (2000 BiOp at 9-83). Spill also results in lower mortality than the practice of diverting fish from the turbine intakes and “bypassing” them through a series of pipes and tunnels to be ejected at the lower side of the dam, the only other method available to ensure that fish migrating in-river are not subjected to passage through the turbines. Id. at 9-82 (2000 BiOp at 9-82). Indeed, NMFS has concluded that “measures that

increase juvenile fish passage over FCRPS spillways are the *highest priority*” for passage improvements. Id. (emphasis added); Pettit Decl. at ¶¶ 24-27; Olney PI Decl. at ¶¶ 6-8.

NMFS has identified two different seasons for spill, spring and summer. The summer season is relevant to this motion and generally lasts from June 21 to August 31 in the Snake River and from July 1 to August 31 in the Columbia River. Significantly, summer operations under both the 2004 and 2000 BiOps only call for the COE to spill a modest volume of water and even then only at four dams: Ice Harbor, John Day, The Dalles, and Bonneville. 2004 BiOp AR B.156 at 9-89 (2000 BiOp at 9-89); id. C.289 at 50 (UPA at 50). No summer spill is required at the other lower Snake projects, Lower Granite, Little Goose, and Lower Monumental or at McNary on the Columbia, so that the federal agencies can capture and transport as many juvenile migrants as possible at these projects. 2004 BiOp AR B.156 at 9-82, 9-89 (2000 BiOp at 9-82, 9-89). Summer spill chiefly benefits threatened Snake River fall chinook salmon, but does provide some benefit to other listed salmon and steelhead as well. See Olney Spill Decl. at ¶ 7 (filed July 16, 2004) (Docket # 512); see also M. DeHart, Fish Passage Center, *Memorandum re: Transportation of fall chinook smolts & related fall chinook migration & tag data concerning summer spill for fish passage* (April 6, 2004). In addition, summer spill benefits the largest unlisted chinook salmon population in the Columbia River basin, which spawns in the free-flowing Hanford Reach section of the Columbia River.

Because of longstanding concerns that the purported benefits of maximum transportation for summer migrants are not well documented and may not exist, state, tribal, and federal fish managers have consistently advocated improving in-river migration conditions during the summer through increased spill and better flows and, under these circumstances, allowing more fish to migrate in the river to provide a balance between transportation and in-river migration.

Indeed, the most recent studies indicate that transportation of wild juvenile salmonids has at best no comparative advantage to leaving the fish to migrate in-river with improved in-river migration conditions that include increased spill and flow.⁷ Analysis for summer migrants indicates fish passed by spill experience less delayed mortality than fish passing the dams through other passage routes, including transportation. Pettit Decl. at ¶ 24 (citing studies); see also Olney PI Decl. at ¶¶ 6-13 (discussing in-river migration versus transportation). Increasing spill thus increases overall salmon and steelhead survival benefits. As the Idaho Department of Fish and Game (“IDFG”) noted in comments on the draft 2004 BiOp, “[i]f indeed transportation is not helping fall chinook survival compared to in-river survival, then the NOAA[] strategy of continuing to rely only on transportation just delays attention to other strategies that may improve survival. . . .” 2004 BiOp AR C. 234 at 8 (State of Idaho Comments Concerning September 8, 2004 Draft BiOp).

In addition to providing safe passage past the dams themselves, spill is an effective tool to help fish move through the hydrosystem more quickly and thereby decrease the amount of time they are exposed to predators in the tailraces and forebays around the dams. Pettit Decl. at ¶ 29 (citing and discussing supporting scientific studies). There are other important benefits of

⁷ Because the decision to maximize transportation of Snake River fall chinook salmon was based on limited information with considerable uncertainty, RPA Action 46 in the 2000 BiOp actually required the Corps and BPA to evaluate the effects of transportation on summer-migrating subyearling Snake River chinook salmon in 2005. See 2004 BiOp AR B.156 at 9-78 (2000 BiOp at 9-78). A valid, comparative test between transportation and in-river passage requires providing suitable in-river migration conditions. This would include, as stated in RPA action 46, “spill at Snake River collector projects to reduce turbine mortality, alternative water management strategies to enhance flows and reduce water temperatures and more intensive predator management.” Id. While the tribal, state, and federal fishery managers have vigorously advocated implementation of these measures and this comparison test in 2005, the Corps has postponed the study – and the improved in-river conditions that would accompany it – until at least 2007 or 2008, after installation of removable spillway weirs. See 2004 BiOp AR C.289 at 3 (UPA at 3).

increased summer spill for fish as well. For example, higher levels of spill create a “flow net” (i.e., an attraction current on the water surface where the bulk of salmon and steelhead migrate at dam forebays) and thus reduce delays associated with passing dams. Pettit Decl. at ¶ 30; Olney PI Decl. at ¶ 6. Spill also creates tailrace conditions that make it more difficult for predators to attack juvenile salmonids exiting the dam tailwaters. Pettit Decl. at ¶ 30; Olney PI Decl. at ¶ 6. In short, spill provides the best and safest route of passage for juvenile salmon and steelhead, allowing them to avoid higher turbine and bypass mortalities, reducing passage delay, and dispersing predators.

III. ESA-LISTED SNAKE RIVER FALL CHINOOK ARE NOT SURVIVING AT RATES ADEQUATE TO AVOID EXTINCTION

According to NMFS’ own analysis, juvenile salmon survival rates for Snake River fall chinook have actually declined since NMFS issued the 2000 BiOp. NMFS identified two survival performance standards in the 2000 BiOp to assess how current survival rates compare to those expected and required by the RPA in order to avoid jeopardy:

1. the post-2000 average should be greater than the 1995-1999 average for adult river survival, juvenile in-river, and juvenile system survival; and,
2. the post-2000 average should indicate steady progress towards achieving the RPA survival rates expected by 2010.

2004 BiOp AR B.156 at 9-14 to 9-15 (2000 FCRPS BiOp at 9-14 to 9-15).⁸

NMFS’ most recent analysis shows that Snake River fall chinook are not meeting the first survival performance standard by a substantial margin: the geometric mean system survival since adoption of the RPA is 7.7%. See 2000 Corps AR 17 at 195 (NMFS Findings, App. 2 at 2) (this document appears in the COE administrative record for the decision to curtail summer spill in

⁸ It bears noting that the 2004 BiOp has dispensed with these or any other specific population-based survival improvement performance standards. 2004 BiOp AR A.1 at § 6 (2004 BiOp at § 6).

2004 and the form of citation is to that record).⁹ This is 34% below the 1995-1999 average system survival of 11.7%, certainly not an average that is “greater than” the 1995-1999 average. Olney PI Decl. at ¶¶ 21-26. The data for the second performance standard is even worse. This standard would require a geometric mean system survival for juveniles of 12.7% by 2010. The current geometric mean rate of 7.7% is 39% below this requirement, which clearly does not represent “steady progress towards achieving the RPA survival rates expected by 2010.”¹⁰

The dire situation facing Snake River fall chinook in the four years since NMFS issued the 2000 BiOp has led scientists within the region (including those from the co-manager state, tribal, and federal fishery agencies), based on mounting scientific evidence, to advocate for *increased* summer spill in order to actually improve Snake River fall chinook survival rates and avoid continued harm to this and other species. See, e.g., 2004 Corps AR 737 at 6315 (State, Federal, and Tribal Fishery Agencies Joint Technical Staff Comments re Summer Spill Analysis at 42 (Feb. 20, 2004)) (“Joint Technical Staff Feb. 2004”) (“The basic result of the analysis suggests that there is a large benefit of ceasing all transportation and increasing spill in the summer time.”).

The difficulties facing Snake River fall chinook and other listed populations are compounded by the fact that key provisions of the RPA in the 2000 BiOp have not been implemented as expected. See 2004 Corps AR 830 at 7057 (NMFS, 2003 Implementation Progress Evaluation Report at 1 (Dec. 19, 2003) (“2003 Progress Report”) (concluding that

⁹ This does not count 2002 for which no data is available due to “poor fish condition.” 2004 Corps AR 17 at 194 (NMFS Findings, App. 2 at 1).

¹⁰ In the past, NMFS has sought to dismiss this result by asserting that it has six more years to achieve the 2010 survival standard, but its performance standard is written in terms of achieving “steady progress” towards the 2010 goal, 2004 Corps AR 17 at 168-69 (NMFS Findings at 8-9), a standard that presumably does not encompass a 39% decline after four years.

several key RPA actions in the 2000 FCRPS BiOp have not yet been implemented)). These failures include a lack of funding, *id.* at 7063-64, delays in beginning pilot studies, *id.* at 7065, and delays in setting performance standards, recovery goals, developing hatchery genetic management plans, offsite mitigation plans, and safety net planning, *id.* at 7067-69. Most significantly, NMFS concluded that the “subbasin planning process” that NMFS expected to guide the offsite habitat mitigation program is significantly behind schedule. In particular, NMFS determined that subbasin planning in the “priority” subbasins – the ones that were to be the subject of the earliest and most critical offsite mitigation action – is significantly off-track. *Id.* at 7066. The actions for these subbasins formed NMFS’ chief strategy for avoiding short-term risks to salmon and steelhead. *See* 2004 AR B.156 at 9-133 (2000 FCRPS BiOp at 9-133) (“In the short term, Federal agencies commit in the Basinwide Recovery Strategy to focus immediate attention on priority subbasins.”) (emphasis added).¹¹

Finally, the full impacts of a disastrous juvenile summer migration season in 2001 – when the action agencies, including the COE, declared a power “emergency” and eliminated most of the flow and spill measures required by the 2000 BiOp – have not yet been fully felt or analyzed. It is evident, however, that this emergency declaration had disastrous impacts to summer migrating juvenile fish, especially Snake River fall chinook. “The suspension of Biological Opinion measures resulted in very poor in-river migration conditions in 2001. . . . Juvenile survival estimates through each index reach of the hydro system for steelhead and

¹¹ Of course, the 2004 BiOp simply dispenses with these measures based on its new jeopardy framework and the conclusion that the federal agencies are accountable for only a small fraction of the harm ESA-listed salmon currently suffer from on-going federal action in operating and managing the FCRPS. *See* NWF SJ Mem. at 11-36 (addressing flaws in new jeopardy framework); *see also, e.g.,* 2004 BiOp AR A.1 at 6-88 to 6-89, 8-11 to 8-12 (2004 BiOp at 6-88 to 6-89, 8-11 to 8-12) (concluding that limited mitigation efforts will avoid “net effects” to Snake River fall chinook and hence jeopardy).

chinook juveniles was the lowest observed since the use of PIT tag technology began for estimating survival.” Fish Passage Center 2001 Final Annual Report at Executive Summary pp. xix and xx (July, 2002) (available at http://www.fpc.org/documents/FPC_Annual_Reports.html). Indeed, NMFS’ own preliminary estimate of juvenile in-river survival in 2001 was only 1.5%, which was significantly lower than the 1995-1999 average of 10.2% and well below the 2010 RPA survival objective established under the 2000 BiOp. 2004 BiOp AR C.108 at App. 2 (J. Ruff, Estimation of Hydro Performance Standards for Snake River (SR) Fall Chinook Salmon, June 30, 2004). Even when NMFS combined survival of transported and in-river migrating fish, the preliminary estimate of juvenile system survival was only 4.2% for 2001. This was significantly lower than the 1995-1999 average of 11.7% and well below the 2010 RPA survival objective of 12.7%. Id.

In addition to very poor juvenile salmon survival in 2001, conditions that year also appear to have had adverse effects on adult migrants. The adult salmon returning to the Columbia and Snake river this year are the offspring of adults that migrated up-river in 2001. Adult returns of listed fish peaked in 2001 and have been headed downward ever since. This year’s adult returns are predicted to be lower than we have seen in recent years. For example, between 2004 and 2001 adult wild Snake fall chinook returns have *decreased* by 50%. Conney, T.D. and D. Matheson, NOAA Fisheries, *Updated Trend Sets for Interior Columbia Basin ESU’s* (Oct. 14, 2004); NOAA Fisheries, Northwest Fisheries Science Ctr., *Updated Status of Federally Listed ESUs of West Coast Salmon and Steelhead*, West Coast Biological Review Team (July 2003). The higher than average adult returns that NMFS repeatedly cites, see, e.g., 2004 BiOp AR A.1 at 8-11 (2004 BiOp at 8-11) (“record” returns cited to discount short-term risk to Snake River fall chinook), have largely disappeared, especially for wild ESA-listed salmon and

steelhead.

IV. ESA-LISTED SNAKE RIVER FALL CHINOOK WILL BE HARMED BY MIGRATION CONDITIONS THIS SUMMER

The currently poor survival of Snake River fall chinook and all of the adverse impacts discussed above will be compounded this summer by business-as-usual implementation of the 2004 BiOp under poor water conditions. Nothing in the 2004 BiOp compels the federal agencies to aggressively try to meet the longstanding river flow targets discussed above, let alone increase spill,¹² even though the 2004 BiOp itself states that:

Project reservoirs increase the time required for juvenile migration. This delay affects survival by increasing the time the fish are exposed to mortality vectors (e.g., disease, predators, adverse water temperatures); disrupting their time of arrival in the estuary (i.e., estuary arrival timing may affect predator/prey relationships and other environmental conditions); depleting energy reserves; and, for steelhead, delay has been show to cause residualism (a loss of migratory behavior). A substantial percentage of the mortality experienced by juvenile outmigrants through the portion of the migratory corridor affected by the FCRPS occurs in the reservoirs (e.g., about half of juvenile fall chinook mortality occurs in the reservoirs), so reducing migration delays is a focus of past and present actions to improve juvenile outmigrant survival through the FCPRS.

2004 BiOp AR A.1 at 5-25 (2004 BiOp at 5-25). Indeed, the UPA states bluntly that the flow targets are merely objectives and the agencies do not believe that it is “possible to achieve the flow objectives in many water years.” 2004 BiOp AR C.289 at 47 (UPA at 47).

Moreover, the federal defendants already have made decisions and are currently undertaking specific actions that could make the situation worse for salmon during the summer migration this year. In January, the COE notified salmon mangers that it would draft Dworshak

¹² The 2004 BiOp and UPA actually appear to invite operational changes that would reduce summer spill. See, e.g., 2004 BiOp AR C.289 at 3, 15 (UPA at 3, 15) (stating that the federal agencies can eliminate spill altogether if they deem any alternative to spill more “cost-effective” and have a plan for addressing the certain harm caused by such a decision.); but see NWF v. NMFS, No. 01-640-RE, Opinion and Order (D. Or. July 29, 2004) (Docket # 602) (enjoining proposal to curtail summer spill based on alleged “offset”).

reservoir for power purposes by up to roughly 100,000 acre feet, despite knowledge at that time that water supply forecasts were low and getting worse. This action was carried out over the objections of federal, state, and tribal salmon managers (including NMFS). State, Federal, and Tribal Salmon Managers 2005, System Operational Request: #2005-1, Subject: Operations at Dworshak Reservoir (David A. Willis, Chairperson, Salmon Managers, on behalf of USFWS, IDFG, ODFW, WDFW, NMFS, Nez Perce Tribe, Shoshone-Bannock Tribes, and CRITFC). January 12, 2005) (available at: http://www.fpc.org/documents/sor_currentyear/2005-1.pdf); Pettit Decl. at ¶ 35. Access to this water from Dworshak would have been particularly important to Snake River salmon and steelhead that migrate in the summer when water temperatures in the lower Snake River are at their highest. Additionally, the federal agencies are drafting Lake Roosevelt (the reservoir behind Grand Coulee Dam) to roughly 30 feet below its end-of-spring flood control target in order to perform maintenance work at the dam this spring. The Bureau of Reclamation has never adequately explored whether options exist to complete this maintenance at a different time, but this drawdown now means that it will be very difficult to meet spring and summer flows on the Columbia River for salmon and steelhead during the height of the migration. Pettit Decl. at ¶ 35.

The underlying fish survival and migration problems associated with the 2004 BiOp will very likely be accentuated and aggravated in the summer of 2005. Hydrologists are predicting that the 2005 water year will be one of the worst on record, perhaps similar to 2001 (the second lowest water year on record). Northwest River Forecast Center (NRFC) 2005, March Final Water Supply Forecast (March 9, 2005) (available at: http://www.nwrfc.noaa.gov/water_supply/ws_fcst.cgi). The 2004 BiOp simply does not require steps to avoid a result in 2005 that is similar to or worse than that of 2001. Instead, as discussed

above, the implementation of the 2004 BiOp this year is likely to result in extremely low in-river survivals, extended fish travel time, reduced project passage survivals, maximization of transportation, and increased risk of harm to ESA-listed salmon and steelhead. The current paradigm of maximizing transportation, not providing good in-river migration conditions through spill at all of the Snake River dams, and not adding additional flow augmentation volumes to improve the likelihood of achieving flow objectives, simply is not working and will result in serious harm to Snake River fall chinook in 2005 and beyond. Pettit Decl. at ¶¶ 35-41; Olney PI Decl. at ¶¶ 22-26.

V. THE RELIEF NWF SEEKS WILL REDUCE HARM TO FALL CHINOOK THIS SUMMER.

When NMFS adopted the 2000 BiOp, it recognized that Snake River fall chinook face a serious and immediate risk of extinction and that avoiding jeopardy from FCRPS operations would require extraordinary survival improvements for these fish. 2004 BiOp AR B.156 at 9-204 to 9-206 (2000 BiOp at 9-204 to 9-206). In the RPA NMFS developed to achieve these dramatic survival increases, it identified at least two key “biological principles” that should guide river operations to protect listed salmon and steelhead:

A primary objective of the biological opinion is to increase survival of juvenile outmigrants through the Federal hydrosystem. This objective should be accomplished consistent with two biological principles: 1) protecting biodiversity and 2) favoring fish passage solutions that best fit the natural behavior patterns and river processes.

2004 BiOp AR B.156 at 9-82 (2000 FCRPS BiOp at 9-82) (citing an ISAB report)).¹³ The injunctive relief NWF seeks follows and implements both of these principles.

¹³ As noted above, see supra at 8-9, based on these principles, NMFS specifically concluded that, “measures that increase juvenile fish passage over FCRPS project spillways are the highest priority unless it can be shown that alternative passage improvements would provide comparable survival.” 2004 BiOp AR B.156 at 9-82 (2000 BiOp at 9-82).

First, NWF seeks modest improvements in flow conditions and water velocity in the lower Snake and Columbia rivers during the migration season. These improvements are expressed in terms of a percent decrease in water particle travel time through specific reaches of these rivers.¹⁴ As discussed above, speeding the flow of water through the reservoirs of the FCRPS is widely recognized as one of the most effective ways to avoid harm and improve juvenile salmon survival. It can be accomplished by a combination of any number of operational measures including increasing the amount of flow augmentation water from the upper Snake and upper Columbia rivers, drawing down specific reservoirs on these rivers,¹⁵ or drafting additional water from up-river storage projects like Dworshak reservoir.¹⁶ NWF does not seek to specify

¹⁴ See Pettit Decl. at ¶¶ 16-23 (discussing and explaining why water particle travel time is a useful measure of improved conditions for migrating salmon).

¹⁵ For example, drawing down the large reservoir above Lower Granite Dam to minimum operating pool or lower would significantly reduce a major source of mortality to juvenile Snake River fall chinook this summer by speeding their passage through this reservoir. Pettit Decl. at ¶ 54; Olney PI Decl. at ¶ 20. Indeed, as NMFS itself has noted, “[f]or summer-migrating SR fall chinook, the overall proportion of the population collected and transported is small because significant mortality occurs before the fish reach Lower Granite.” 2004 BiOp AR B.156 at 6-54 (2000 BiOp at 6-52). Further, NMFS scientists have concluded that:

Summer subyearling migrants suffer greater mortality in reservoirs than do spring migrants, and improvements in river conditions may confer considerably improved survival. In 2001, the low survival experienced by spring migrants and generally lower survival of summer migrants likely resulted from conditions in the reservoirs, potentially low flow, and possibly a lack of spill. Therefore, we believe we may face diminishing returns in terms of improving survival via technological fixes to dams.

2004 BiOp AR B.266 at xii (J. Williams, *et al.*, Fish Ecology Division, Northwest Fisheries Science Center, “Effects of the Federal Columbia River Power System on Salmon Populations” at xii (Oct. 7, 2004)). Actions to improve migration conditions, particularly in Lower Granite Reservoir, would help to significantly improve the survival of fish migrating in river and fish that are eventually collected and transported. Olney PI Decl. at ¶ 20.

¹⁶ NWF does not seek drafts from up-stream reservoirs that would conflict with requirements for the protection of other ESA-listed species, nor does it believe such actions are required to comply with its injunction request. Similarly, NWF does not seek rapid and unnecessary

particular operations to comply with the water particle travel time improvement component of its injunction request. Instead, NWF's injunction motion allows the federal agencies to determine river operations that will comply with the injunction request and report those operations to the Court and the parties. Even so, the available evidence indicates there are a number of combinations that are both reasonable and available to comply with NWF's injunction request. Pettit Decl. at ¶¶ 42-59 (discussing and describing operational alternatives); Olney PI Decl. ¶¶ 27-32, 34-41 (discussing operations to comply with injunction).

Second, NWF seeks increased spill at all four lower Snake projects and at McNary dam on the Columbia this summer. In the absence of an injunction requiring this spill, there will be *no* spill at four of these five projects during the summer season. As explained above, increased spill at these projects will significantly improve juvenile salmon survival this summer and reduce harm to these fish because it will improve in-river conditions by providing safer dam passage, reducing other mortality risks such as predation, and allowing a "spread-the-risk" approach to moving juvenile summer migrants downstream, one that balances in-river migration and transportation as state, tribal, and federal salmon managers have long advocated. See supra at 9-10; Pettit Decl. at ¶¶ 36, 49; Olney PI Decl. at ¶¶ 7-13, 29-32.

Finally, NWF asks the Court to order the federal defendants to comply with and implement the specific measures of the RPA from the 2000 BiOp – to the extent they are consistent with and do not supercede actions necessary to achieve the flow improvement and spill measures NWF seeks. While NWF has consistently explained that these measures are not adequate to avoid jeopardy and adverse modification of critical habitat, and while the Court has

ramping of withdrawals from these reservoirs, if additional drafts from up-stream reservoirs are necessary, that would harm listed and unlisted native fish.

agreed, NWF v. NMFS, 254 F. Supp.2d 1196, 1211-1212 (D. Or. 2003), this step will help ensure that there is a more comprehensive set of operational requirements, standards, and specific actions in place to guide the COE and BOR in their management of the FCRPS this summer, as well as ensure some progress on other mitigation actions (to the extent they are moving forward), and some monitoring of conditions affecting the species. For example, RPA measure 16 requires the COE and BOR to ensure that water temperatures in the forebay at Lower Granite do not exceed 68 degrees centigrade during the summer migration season. Similarly, RPA measure 179 requires NOAA to establish final recovery goals for each of the listed ESUs to ensure that a future biological opinion can actually assess whether proposed hydrosystem operations will avoid an appreciable reduction in the prospects of salmon and steelhead recovery. These and similar RPA requirements from the 2000 BiOp will complement the measures NWF seeks to improve river and passage conditions this summer and thereby reduce the harm to listed species.¹⁷

ARGUMENT

I. NWF IS LIKELY TO PREVAIL ON ITS CLAIMS THAT THE COE, BOR AND NMFS ARE IN VIOLATION OF THE ESA

The COE, BOR, and NMFS have violated section 7 of the ESA and the COE and BOR are violating section 9 for the reasons set forth below. First, as explained in NWF's motion for summary judgment in this case, NMFS has violated section 7 because the 2004 BiOp fails to include a legally adequate jeopardy analysis, fails to properly identify the agency action for

¹⁷ The Court previously has left the RPA from the 2000 BiOp in place to guide agency actions even though that 2000 BiOp did not comply with the law. See NWF v. NMFS, No. 01-640-RE, Opinion (July 1, 2003) (Docket # 439) (denying motion to set aside 2000 BiOp). Of course, at that time, NWF was not also seeking even the kind of modest additional measures to improve salmon survivability and reduce harm, like faster water travel time and increased spill, that it is seeking now.

consultation, arbitrarily concludes that the UPA will not jeopardize ESA-listed salmon and steelhead, and reaches a flawed finding that the UPA will not destroy or adversely modify critical habitat. See NWF SJ Mem. at 10-59. The COE and BOR cannot properly rely on the inadequate 2004 BiOp to demonstrate their compliance with section 7 and thus they too have violated the requirements of this section.

Second, ESA section 9 flatly prohibits the COE and BOR from taking threatened or endangered salmon unless the take is pursuant to an incidental take statement (“ITS”) issued by NMFS under section 7. Here, the 2004 BiOp even if it is valid (and it is not) grants BOR and the COE an incidental take statement for only a small fraction of the take that their operation of the FCRPS causes. The unpermitted take in excess of their ITS is a violation of section 9 and must be remedied pending compliance with the law.

A. The COE, BOR, and NMFS Have Violated Section 7 of the ESA.

NWF has explained fully and carefully in its motion for summary judgment why the 2004 BiOp does not comply with the law and is arbitrary and capricious. Further briefing of that motion, and a cross-motion for summary judgment by NMFS, is currently proceeding on a separate schedule. Rather than repeat that briefing here, NWF adopts and incorporates it into this injunction motion and memorandum by reference. The arguments NWF has made and is pursuing in its summary judgment motion demonstrate that NWF is likely to prevail on the merits of its claims against the 2004 BiOp and, depending on the schedule set by the Court, may have actually prevailed on these claims before the Court hears and decides this motion for an injunction.¹⁸

¹⁸ In that briefing, NWF has explained that the 2004 BiOp improperly segments consultation on a single federal action, the coordinated operation of all of the federal water projects in the Columbia and Snake River Basin that were submitted for consultation to NMFS in the 1999 Biological Assessment. See NWF SJ Mem. at 36-42. The State of Idaho and NMFS have

In addition, courts in this circuit have repeatedly made it clear that all federal agencies, including the COE and BOR, have an independent and continuing legal duty to avoid any action that would jeopardize a listed species or adversely modify its critical habitat, regardless of the contents of a biological opinion. 16 U.S.C. § 1536(a)(2); Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 989 F.2d 1410, 1415 (9th Cir. 1990) (“while consultation with the FWS may have satisfied the Navy’s procedural obligations under the ESA, the Navy may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)”) (citing Stop H-3 Ass’n. v. Dole, 740 F.2d 1442, 1459-60 (9th Cir. 1984)). This substantive obligation to “insure” against a likelihood of jeopardy or adverse modification can be relieved only by an exemption from the Endangered Species Committee. See 16 U.S.C. § 1536(h); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988). Moreover, the courts have been clear that an agency cannot satisfy its independent duty to avoid jeopardy by relying on a faulty biological opinion. Resources Ltd. v. Robertson, 35 F.3d 1300, 1304-05 (9th Cir. 1993). If the opinion is flawed, the agency still must offer a rational account for why its actions meet the requirements of the ESA. Id. at 1305 (Forest Service, which had received a flawed biological opinion, acted arbitrarily and capriciously “on the record as a whole” in concluding that its actions would comply with the ESA).

Here, both the BOR and COE rely on the 2004 BiOp to establish that they have complied

argued in the context of the summary judgment motions that this improper segmentation of the action is attributable to the BOR and COE, not NMFS. See Idaho SJ Mem. at 27; NMFS SJ Mem. at 38-39. While NWF does not agree that the action agencies alone control the scope of consultation for federal actions, see NWF SJ Mem. at 40-42, BOR and the COE are defendants here and the action they have submitted for consultation is improperly segmented for all of the reasons NWF has identified in its summary judgment memorandum, see Third Supplemental Complaint at ¶¶ 73-76, 84 (stating segmentation claim against the COE and BOR) (filed concurrently herewith).

with section 7 of the ESA. See, e.g., BOR, “Decision Document Concerning the Final Updated Proposed Action and NOAA Fisheries’ November 30, 2004 Biological Opinion Consultation on Remand for Operation of the [FCRPS] including 19 Bureau of Reclamation Projects in the Columbia Basin”, at 10 (January 12, 2005) (copy attached as Exh. A); COE, “Record of Consultation and Statement of Decision Concerning the Final [UPA] for the FCRPS Biological Opinion Remand and NOAA’s November 30, 2004 Biological Opinion Consultation on Remand for Operation of the Columbia River Power System and 19 U.S. [BOR] Projects in the Columbia Basin,” at 6, 14, 19 (January 3, 2005) (copy attached as Exh. B). While the BOR decision is more explicit in its reliance on the 2004 BiOp, the COE decision also relies on it and offers no other explanation for concluding that the COE’s actions comply with section 7. As a matter of law, neither agency can properly rely on the 2004 BiOp to establish compliance with the ESA because that opinion is itself inadequate and legally flawed.

Where, as here, a flawed biological opinion provides the basis for compliance with the procedural as well as the substantive requirements of ESA section 7, the Court must issue an injunction to prevent and limit the agencies from proceeding with action that could cause the very harm to listed species that the ESA proscribes. Thomas v. Peterson, 753 F.2d at 765 (quote); Sierra Club v. Marsh, 816 F.2d at 1383 (quote); see also PCFFA v. BOR, 138 F. Supp.2d at 1247-1250 (limiting irrigation deliveries to protect listed fish where action agency had failed to comply with the procedural requirements of section 7).

B. The COE And BOR Also Have Violated Section 9 of the ESA

Apart from the federal agencies’ violations of section 7 of the ESA as set forth in NWF’s motion for summary judgment, the action agency defendants, the COE and BOR, also are in violation of the prohibition against “take” of listed species set forth in section 9 of the Act. This separate violation of the ESA provides an independent basis for an injunction against these

agencies and is described below.

1. The ESA prohibits the “Take” of both endangered and threatened Columbia and Snake River salmon and steelhead.

The ESA itself prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B).¹⁹ The Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). This is the broadest take prohibition in any federal wildlife statute. As Congress observed: “‘Take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 307, 93d Cong., 1st Sess. 14 (1973), reprinted in 1973 USCCAN 2989, 2995. By regulation, NMFS has defined “harm” to mean:

an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102; see also 50 C.F.R. § 17.3 (comparable Fish and Wildlife Service regulatory definition of “harm”). In Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995), which upheld the validity of the harm regulation, the Supreme Court stated that ESA take liability embodies ordinary requirements of proximate cause and foreseeability. *Id.* at 696 & n.9; 700 & n.13.

Under section 4(d) of the ESA, 16 U.S.C. § 1533(d), NMFS has the authority to issue regulations extending the take prohibition to threatened species. NMFS has adopted such regulations making the take prohibition applicable to the threatened species of salmon and steelhead at issue here. 64 Fed. Reg. 73,500 (Dec. 30, 1999); 65 Fed. Reg. 191 (Jan. 3, 2000)

¹⁹ The Act expressly defines “person” to include any “officer, employee, agent, department, or instrumentality of the Federal Government.” 16 U.S.C. § 1532(13).

(codified at 50 C.F.R. § 223.102(a)); see also 50 C.F.R. § 223.203(a). Under section 4(d) and section 9(a)(1)(G), 16 U.S.C. § 1533(d) & 1538(a)(1)(G), and the applicable regulations, it is therefore unlawful for the COE or BOR to take any of the endangered or threatened species of Columbia and Snake river salmon unless NMFS issues an incidental take statement allowing the activity and take to proceed, 16 U.S.C. §§ 1536(b)(4), (o)(2).²⁰

The incidental take provision of the ESA “indicates that any taking . . . that complies with the conditions set forth in the incidental take statement is permitted.” Ramsey v. Kantor, 96 F.3d 434, 441 (9th Cir. 1996). However, take that exceeds the scope of an incidental take statement is flatly prohibited. Id. at 442 (“[A] party . . . can take members of a listed species without violating the ESA, *provided* the actions in question are contemplated by an incidental take statement issued under Section 7 of the ESA and are conducted in compliance with the requirements of that statement.”) (emphasis added); 50 C.F.R. § 402.14.(i)(5).²¹ Under the ESA,

²⁰ In its final rule defining take liability for ESA-listed salmon and steelhead, NMFS – in response to a comment suggesting that “the current owner of a dam lawfully installed before a species is listed should not be liable for take based on subsequent listing” – clarified that both “maintaining or improving” an existing dam or barrier, and “diverting water” could constitute a prohibited taking. 64 Fed. Reg. 60727, 60729 (Nov. 8, 1999); see also id. at 60,728 (“Human-made barriers” to migration could create prohibited take), 60,730 (“constructing or maintaining barriers,” and “constructing or operating dams or water diversions” may constitute a take). Indeed, NMFS admits that the on-going FCRPS operations by the COE and BOR here will take listed salmon well in excess of the take caused by the agency action subject to consultation. 2004 BiOp AR A.1 at § 10 (2004 BiOp at § 10).

²¹ There can be no argument that the COE’s and BOR’s liability for take under section 9 is limited to the amount of take caused by “discretionary” agency actions. Although the agencies argue incorrectly that they need to consult under section 7 of the ESA only on so-called “discretionary” FCRPS operations, see, e.g., 2004 BiOp at 1-9, 5-1 (relying on 50 C.F.R. § 402.03); but see NWF SJ Mem. at 23-36, they have no basis whatsoever to argue that liability for take under section 9 is so limited. Section 9 applies broadly to “any person,” including anyone or anything subject to United States jurisdiction, 16 U.S.C. § 1532(13), and it prohibits any take by a federal agency unless authorized by an incidental take statement or an exemption from the ESA. See 64 Fed. Reg. at 60,730 (explaining the very limited circumstances in which the ESA authorizes NMFS to exempt parties from the Act’s take prohibitions, and failing to mention any exception for discretionary actions). The ESA’s strict language, legislative history, and

the Court is authorized “to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g). This authority includes enjoining all or part of any action that would take listed species in violation of ESA section 9. NWF v. Burlington Northern, 23 F.3d 1508, 1511-12 (9th Cir. 1994) (discussing standard for an injunction under section 9).

2. *The BOR and COE are taking, and will continue to take, ESA-listed salmon and steelhead in violation of section 9.*

In the 2004 BiOp, NMFS candidly admits that FCRPS operations by the COE and BOR will take ESA-listed salmon and steelhead at levels far in excess of the take authorized in the incidental take statement (“ITS”) for the narrow action that is the subject of consultation. For example, the incidental take statement allows the action agencies to take between 1 and 5 percent of the juveniles of each ESU migrating past FCRPS projects. 2004 BiOp AR A.1 at 10-2, Table 10.1 (2004 BiOp at 10-2, Table 10.1). However, this authorized take is only a fraction of the total take that NMFS admits will result from FCRPS operations. With respect to Snake River fall chinook, the difference between the small amount of take covered by the ITS and the total amount of take that FCRPS operations will cause is remarkable: The 2004 BiOp sets forth a “quantitative estimate” that FCRPS operations will take 84 to 86 percent of juvenile Snake River fall chinook migrating past FCRPS projects each year. 2004 BiOp AR A.1 at 10-4, Table 10.3 (2004 BiOp at 10-4, Table 10.3).²² However, NMFS provides the BOR and the COE with an

regulations confirm that section 9 take liability applies to all takings by federal agencies that are not covered by an incidental take statement.

²² Take occurs in a number of ways including mortality and injury to juveniles caused by turbine passage, bypass and collection systems, delayed migration and increased predation associated with reservoir operations and an altered hydrograph, loss of spawning and rearing habitat, and impaired water quality. See generally, 2004 BiOp AR A.1 at § 6.2 (2004 BiOp at § 6.2). FCRPS operations that reduce flows and spill are especially harmful to ESA-listed salmon and steelhead. Id. at §§ 6.2.1.1, 6.2.1.3.

ITS authorizing them to lawfully take a mere one to three percent of Snake River fall chinook each year. Id. at 10-2, Table 10.1. BOR and the COE simply have no incidental take statement or other legal basis to protect them from section 9 liability for the remaining take of more than 80% of juveniles.²³ The tables included in the 2004 BiOp demonstrate that the gulf between the agencies' actual take of listed species and their authorized level of take persists for the life of the opinion and for each of the listed upriver ESUs. See id. at 10-2, 10-4, Tables 10.1 & 10.3.

The 2004 BiOp establishes conclusively that the COE and BOR are taking listed species in excess of the take permitted under the ITS through their operation of the FCRPS. This take violates section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B), (G); see also 50 C.F.R. § 402.14(i)(5). Under well-established Ninth Circuit case law interpreting section 9, an injunction should issue to reduce, even if it cannot altogether eliminate, this unpermitted take. See Defenders of Wildlife v. Bernal, 204 F.3d 920, 925 (9th Cir. 2000); Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996); Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995); Forest Conserv. Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995). Because NMFS admits in the 2004 BiOp that FCRPS operations by BOR and the COE will “take” ESA-listed salmon and steelhead well beyond the level permitted in the incidental take statement, NWF has shown that it is likely to succeed on the merits of its section 9 claim. The unpermitted take itself is evidence of harm that requires injunctive relief until the agencies comply with the law.

²³ A “NOAA Issue Paper” dated June 9, 2004 acknowledges this vulnerability. See AR C.94 at 6 (“NOAA Issue 3”) (“Because we cannot authorize the take associated with the existence of the dams (i.e., we are not analyzing those effects), the incidental take permit will only authorize a fraction of the total ongoing FCRPS mortality. This leaves a concern about the potential lack of take coverage for mortality associated with the existence and non-discretionary operations of the FCRPS.”); see also id. C.102 (“NOAA Issue 3”) (same with comments from action agencies). While the Issue Paper recognizes this legal problem, it does not resolve it. Instead, it simply states that the ITS will cover only a portion of the take that the actions of the BOR and COE will cause. AR C.94 at 6.

II. IMPLEMENTATION OF THE UPA AND 2004 BIOP IN THE ABSENCE OF AN INJUNCTION WILL HARM ESA-LISTED SALMON

As NWF has explained, continued business-as-usual implementation of the 2004 BiOp this summer will cause substantial harm to Snake River fall chinook and other species. See supra at 11-17. NWF has also explained why the limited injunction it seeks will reduce this harm significantly and thereby improve the survival of these species. Id. at 17-20. Where, as here, NWF either has succeeded or is likely to succeed on the merits of its claims that BOR, the COE and NMFS are in violation of the ESA, the law requires an injunction to reduce and minimize the harm listed species would otherwise face. National Wildlife Federation v. National Marine Fisheries Serv., 235 F. Supp.2d at 1161 (issuing preliminary injunction based on “possibility” of harm to Snake River fall chinook); see also NWF v. NMFS, No. 01-640-RE, Opinion and Order at 5 (D. Or. July 29, 2004) (Docket # 602) (recognizing that under the ESA injunction standard, “the balance of hardships and the public interest tips heavily in favor of the protected species”).

A. The Legal Standard for an Injunction Under the ESA.

As the Supreme Court has found, the “language, history, and structure” of the ESA leave no doubt that “Congress intended endangered species to be afforded the highest of priorities.” TVA v. Hill, 437 U.S. at 174. “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184. These statutory requirements have led courts to conclude that:

If a project is allowed to proceed without substantial compliance with [the procedural requirements of ESA section 7], there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d at 764 (citing TVA v. Hill). Where an action agency has failed to comply with section 7 by, for example, relying on an invalid biological opinion, “the remedy

must be an injunction of the project pending compliance with the ESA.” Id. This is so because, as the court in Thomas concluded, “[i]t is not the responsibility of the plaintiffs to prove, nor the function of the court to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.” Id. at 765.

In two recent cases, courts have applied these standards to limit fishing to protect a listed species based on a violation of section 7, Greenpeace v. NMFS, 106 F. Supp.2d 1066, 1072-1080 (W.D. Wa. 2000), and to require irrigation water to be left in a river to protect ESA-listed salmon, PCFFA v. BOR, 138 F. Supp.2d at 1247-1250. Both cases confirm that injunctive relief for violations of the ESA is aimed at protecting the listed species from the risk of harm where the statute’s requirements have not been followed. Greenpeace, 106 F. Supp.2d at 1072-1075 (discussing standard for injunctive relief);²⁴ PCFFA v. BOR, 138 F. Supp.2d at 1247-48 (same). As the Greenpeace court explained, obtaining such relief does not require the plaintiffs to prove irreparable harm to the species, let alone that in the absence of an injunction the agency action will cause jeopardy or adverse modification of critical habitat. Greenpeace, 106 F. Supp. at 1074-1075. Where, as here, an injunction prohibiting implementation of a federal action is impractical, relief that at least reduces the risk of harm to the species pending compliance with

²⁴ As the opinion in the Greenpeace case makes clear, in deciding a motion for injunctive relief under the ESA, the Court is not limited to the administrative record and may consider other evidence of harm, even though ultimately “the ‘institutionalized caution’ mandated by section 7 strikes the balance in favor of the [listed species],” and requires an injunction to reduce or eliminate the risk of harm to the species pending compliance with the law. Greenpeace, 106 F. Supp at 1080; see also Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (recognizing need to consider evidence outside the record at the preliminary injunction stage); Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1259-1261 (10th Cir. 2003) (allowing evidence from expert witnesses on the issue of irreparable harm in a record review case); Sierra Club v. Corp of Engineers, 935 F. Supp. 1556, 1568 (S.D. Ala. 1996) (in context of a preliminary injunction, evidence that goes to irreparable injury rather than the correctness of the agency’s decision, will be considered by the court).

the ESA is necessary at a minimum. PCFFA v. BOR, 138 F. Supp.2d at 1249-1250 (recognizing that an injunction against all BOR project operations was impractical and could actually harm the listed species but granting an injunction to divert a certain amount of irrigation water to the river to provide more adequate flows for salmon).

B. The Limited Injunctive Relief NWF Seeks for Summer 2005 Is Both Appropriate and Necessary to Reduce the Harm to ESA-Listed Salmon.

The limited injunction NWF seeks in this case falls squarely within the case law on appropriate injunctive relief under the ESA. As explained above, NWF seeks modestly improved protections for migrating juvenile salmon this summer through the implementation of measures that have broad scientific support, that can be accomplished in a number of reasonable ways, and that will increase the survivability of ESA-listed summer migrants by a substantial amount. See supra at 4-20. NWF does not seek an injunction to stop water from flowing downhill through the FCRPS; it does not seek to halt all other uses of project water even temporarily. Rather, it has framed its injunction around biological principles and standards that NMFS has identified for protecting salmon and steelhead during the summer migration season, and even then it has asked for only modest improvements in protection for these species in light of the water that is available this year. See PCFFA v. BOR, 138 F. Supp. at 1249 (granting injunction and noting that plaintiffs did not seek an “order enjoining operation of the entire Klamath Project” but “more narrow relief” requiring the BOR to limit irrigation deliveries “whenever Klamath River flows . . . drop the minimum flows recommended” by the available scientific studies); see also Greenpeace v. NMFS, 106 F. Supp. at 1080 (granting “partial injunction of the North Pacific groundfish fisheries”).

Specifically, NWF seeks an injunction (1) to speed up water flow by just 10% in the lower Snake River and in the Columbia River during the summer migration season; (2) to

increase spill past specific FCRPS projects dams during the summer to allow more fish to migrate more safely in the river; and (3) to otherwise require the COE and BOR to comply with and implement the requirements of the RPA from the 2000 FCRPS BiOp. NWF addresses each of these aspects of its injunction request briefly below.

1. *The reduced water travel time NWF seeks is reasonable and will reduce harm to the listed species.*

NWF seeks an order requiring the federal defendants to improve water particle travel time, and hence water flow and velocity, in the lower Snake River and in the Columbia River by 10% over what the agencies have indicated would otherwise occur. There is extensive scientific support for this measure, including numerous studies by NMFS and others that show an even larger improvement in water travel time should occur to reduce the otherwise very high mortality of juvenile summer migrants. See Pettit Decl. at ¶¶ 13-23; Olney PI Decl. at ¶¶ 15-16. Indeed, if even the minimum flow targets NMFS has identified as necessary to avoid this high mortality were met on a weekly average basis this summer, water travel time through the lower Snake and Columbia rivers would be improved by nearly four times as much as the modest improvements NWF seeks. Pettit Decl. at ¶ 44; see also supra at 5-8 & nn. 4, 5 (discussing evidence for substantially increased flows above the levels NWF seeks). Moreover, there is compelling biological evidence that measures like improved water movement to protect ESA-listed salmon are even more critical in low flow years like 2005. Pettit Decl. ¶ 38-41; Olney PI Decl. at ¶¶ 26, 28, 30-31. There can be little doubt that the improved water flow measures NWF seeks will reduce the harm to, and increase the survival of, ESA-listed Snake River fall chinook this summer.

Moreover, steps to achieve this improved water flow are available and implementable. Significantly, NWF has not asked the Court to “run the river” but has simply asked the Court to

set a water movement standard and then allow the federal defendants to develop and implement a specific set of operations to achieve that standard. See NWF Injunction Motion at 1-3. As Mr. Pettit explains in his declaration, and as past agency studies and plans confirm, the 10% improvement in water velocity in the lower Snake and Columbia rivers can be achieved this summer through a number of combinations of actions, all of which have been previously identified and many of which have been advocated in the past by state, tribal, and federal fishery managers. Pettit Decl. at ¶¶ 42-45 (summarizing options), 9-23 (describing past studies that support implementation of these measures). The options to meet the water travel time improvements NWF seeks include a combination of modest drawdowns of certain reservoirs on the Snake and Columbia rivers for the summer migration season (for the most part no deeper than minimum operating pool or “MOP”), deeper drafts of water from some upstream reservoirs,²⁵ additional flow augmentation from the BOR’s upper Snake projects, and purchase of additional water from Canadian storage. Id. at ¶¶ 52-57; see also Olney PI Decl. at ¶¶ 34-41.

2. *The increased spill NWF seeks is reasonable and will reduce harm to the listed species.*

NWF also seeks an order requiring spill for fish passage at three lower Snake River projects (Lower Granite, Little Goose, and Lower Monumental) and one Columbia River project (McNary) where no spill would occur this summer in the absence of an injunction so that all migrating juvenile salmon could be collected for downriver transportation.²⁶ Specifically, NWF seeks to have all water in excess of that required for station service spilled at the lower Snake

²⁵ As noted above, see supra at 18 & n.15, these upstream reservoir drafts could be limited by the requirements of other ESA-listed species. NWF does not seek relief that would require a violation of the ESA elsewhere to achieve. The available evidence, however, indicates that the relief NWF has requested can be accomplished without such a conflict.

projects and all water in excess of 50,000 cfs spilled at McNary. The benefits of these measures in reducing the harm to, and improving the survival of, ESA-listed salmon and steelhead this summer are well-established. Pettit Decl. at ¶¶ 24-32; Olney PI Decl. at ¶¶ 6-13. Indeed, increased spill for summer migrants has long been advocated by state, tribal, and federal fish managers but has been rejected by the federal defendants in favor of maximum transportation. Pettit Decl. at ¶ 46-52.²⁷

Significantly, the combination of the improved water flows and increased spill that NWF seeks as injunctive relief is likely to have combined and synergistic effects in reducing salmon mortality and increasing survivability that exceed significantly the beneficial effects of either measure alone. As Mr. Pettit explains, such synergistic effects are not uncommon, Pettit Decl. at ¶¶ 50-51, and there are strong reasons to conclude that the combination of faster water movement and increased spill will have substantial synergistic effects this summer, *id.* In short, the injunction NWF seeks for the 2005 summer migration season will reduce significantly the harm ESA listed salmon and steelhead would otherwise face.

²⁶ NWF also seeks increased spill at Ice Harbor, the fourth lower Snake River project. Some spill might occur at this project this summer in the absence of an injunction. See 2004 BiOp AR C.289 at 50 (UPA at 50).

²⁷ Maximizing transportation of summer migrants also increases power generation at the FCRPS projects because water that would otherwise be used to pass juvenile salmon over dam spillways is instead routed through the dam turbines to generate electricity. Such economic considerations, however, cannot justify harm to ESA-listed species in the absence of compliance with the law. Kandra v. United States, 145 F. Supp.2d 1192, 1200-1201 (D. Or. 2001). In any event, BPA and the action agencies have argued in the past that providing spill would make a significant difference in whether the region could avoid BPA rate increases, see Declaration of Stephen J. Wright at ¶¶ 40-44 (filed July 22, 2004) (Docket # 526), only to announce within days that even with continued spill, rates would *decrease* by five to more than seven percent. See The Oregonian, “BPA Proposes Rate Decrease” (Aug. 19, 2004) (copy attached as Exh. C).

3. *Continued implementation of other measures of the 2000 RPA is reasonable and will provide an adequate interim framework to reduce harm to the listed species in conjunction with other injunctive relief.*

Finally, in addition to the above measures, NWF seeks an order requiring the defendants to implement and comply with the measures of the RPA from the 2000 BiOp to the extent these measures are not superceded by or inconsistent with the water flow and spill improvements NWF has discussed above. The Court has previously left the measures of the RPA in place to guide agency actions during a remand, NWF v. NMFS, No. 01-640-RE, Opinion and Order at 3-4 (D. Or. July 1, 2003) (Docket # 439), and has also ordered the defendants to follow its requirements, id., Opinion and Order at 8-9 (D. Or. July 29, 2004) (Docket # 602). While NWF has consistently taken the position that the measures of this RPA are not adequate to avoid jeopardy, and while the Court has agreed that the 2000 BiOp and its RPA are legally inadequate, NWF v. NMFS, 254 F. Supp.2d at 1211-1212, continued implementation of this RPA, to the extent it is not inconsistent with the other injunctive relief NWF seeks to reduce harm and improve salmon survival, is appropriate.²⁸ For example, the RPA from the 2000 BiOp includes operating requirements for COE and BOR projects, such as the requirement to maintain water temperatures in the forebay at Lower Granite dam at or above 68 degrees during the summer migration season, and the requirements to identify actual recovery levels for these species so that future biological opinions can comply with the law. See surpa at 20. These and other requirements of the 2000 RPA may eventually be replaced by an agency action or RPA that avoids jeopardy and adverse modification of critical habitat. But until the Court rules on the merits of this case or NMFS, the

²⁸ The alternative of requiring the defendants to implement the UPA except to the extent it is inconsistent with the terms of NWF's injunction request is inappropriate because the actual operations that the UPA requires or allows are uncertain, the 2004 BiOp is fundamentally flawed, and according to NMFS, it "substantially" continues implementation of the 2000 RPA in any event. NMFS SJ Mem. at 9-10.

COE, and BOR comply with the law, the measures of the 2000 RPA provide guidance to the action agencies that, while not legally sufficient, is useful when supplemented by additional immediate measures to protect salmon from harm and improve their survival.

CONCLUSION

NWF is likely to prevail, or has prevailed, on its claims that the federal defendants are in violation of ESA section 7 and it is likely to prevail on its claim that the COE and BOR also are in violation of ESA section 9. NWF also has demonstrated that ESA-listed salmon and steelhead will be harmed during the summer migration season by implementation of the UPA and 2004 BiOp. Under these circumstances, the injunctive relief NWF seeks is both required by the ESA and appropriate to at least reduce the harm to these species that would occur in the absence of an injunction.

For too long, the federal defendants have allowed ESA-listed salmon to persist “in a deficit situation.” Such conditions will continue – and even become worse – this summer in the absence of an injunction, a result the ESA flatly prohibits where its requirements have not been followed. Accordingly, NWF respectfully requests that the Court grant its motion for injunctive relief to protect these species this summer.

Respectfully submitted this 21st day of March, 2005.

/s/ Todd D. True
TODD D. TRUE (WSB #12864)
STEPHEN D. MASHUDA (MSB #4231)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
ttrue@earthjustice.org
smashuda@earthjustice.org

DANIEL J. ROHLF (OSB #99006)
Pacific Environmental Advocacy Center
10015 S.W. Terwilliger Boulevard
Portland, OR 97219
(503) 768-6707
(503) 768-6642 [FAX]
rohlf@lclark.edu

Attorneys for Plaintiffs