December 18, 2004

Via Certified Mail, Return Receipt Requested

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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 Bureau of Reclamation ("BOR") the U.S. Army Corps of Engineers ("Corps"), and the Bonneville Power Administration ("BPA") (together, the "action agencies") for violations of § 7 and § 9 of the Endangered

Species Act ("ESA"), 16 U.S.C. §§ 1536, 1538.[1] These violations arise from the action agencies' 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 the operation 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).

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 twelve Evolutionarily Significant Units ("ESUs") of these species in the Columbia Basin under the ESA. Many other ESUs are already extinct. In 1991, National Marine Fisheries Service ("NMFS") listed the Snake River sockeye salmon as an endangered species under the ESA. 56 Fed. Reg. 58,619 (Nov. 20, 1991). Six months later, NMFS listed Snake River spring/summer and fall chinook salmon as threatened species under the ESA. 57 Fed. Reg. 14,653 (Apr. 22, 1992). In 1997, NMFS further listed Snake River steelhead as threatened and the Upper Columbia River steelhead as endangered. 63 Fed. Reg. 43,937 (Aug. 18, 1997). Subsequently, the agency listed lower Columbia River steelhead as threatened. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS soon added upper Columbia River spring-run chinook (endangered) and lower Columbia River chinook (threatened) to the list. 64 Fed. Reg. 43,308 (March 24, 1999). Finally, NMFS listed as threatened four additional anadromous fish populations affected by the actions described in this notice. 64 Fed. Reg. 14,517 (March 25, 1999) (middle Columbia River steelhead); 64 Fed. Reg. 14,517 (March 25, 1999) (upper Willamette River steelhead); 64 Fed. Reg. 43,308 (March 24, 1999) (upper Willamette River chinook); 64 Fed. Reg. 14,517 (March 25, 1999) (Columbia River chum).

Recent status reviews of all ESUs confirm that each of them remains at significant risk, and no ESU has been proposed for delisting.

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[1] This letter is sent by the undersigned on behalf of the following organizations: National Wildlife Federation, Washington Wildlife Federation, Idaho Wildlife Federation, Federation of Fly Fishers, Sierra Club, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Idaho Rivers United, Northwest Sportfishing Industry Association, American Rivers, Salmon For All, and Trout Unlimited. A list of these organizations' business addresses is appended hereto.

B. BOR and Corps Operations, and BPA Power Marketing

BOR and the 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 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. Management actions by BOR at all of these projects, including water deliveries, administration of uncontracted water, power production, and 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 markets the electric power created by these projects and 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

[2] The term "FCRPS" is one of convenience, not of art, and is defined differently by the federal agencies at different times and for different purposes. "FCRPS" is used in this letter as shorthand for all of the dams, reservoirs, and related facilities managed by the Bureau of Reclamation, the U.S. Army Corps of Engineers, and Bonneville Power Administration in the Columbia River Basin, and does not refer only to the smaller subset of these actions considered in NMFS' 2004 Biological Opinion.

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, "If 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). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (NMFS, 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 NMFS concludes that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NMFS 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 Dept. of Fish and Game v. National Marine Fisheries Service, 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; Pacific Coast Fed'n of Fishermen's Assoc. 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. National Marine Fisheries Service, 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); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) ("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 agencies. 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 NMFS. 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 Resources Defense 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., Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); Greenpeace v. National Marine Fisheries Service, 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). Pacific 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 County Audubon v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992).

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). NMFS 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 Communities for a Great Oregon, 115 S. Ct. 2407, 2412-14 (1995) (upholding similar definition used by Fish and Wildlife Service).

Section 9's take prohibition applies on its face to three of the 12 listed ESUs affected by the BOR's and Corps' activities because they are listed as "endangered." Additionally, NMFS has enacted rules pursuant to ESA § 4(d) that extend the take prohibition to the nine salmon and steelhead ESUs in the Snake and Columbia basins that are listed as "threatened." 16 U.S.C. § 1533(d); 65 Fed. Reg. 42,422 (July 10, 2000). The rule, in which NMFS concluded that listed salmonids were at risk of extinction "primarily because their populations have been reduced by human take" became effective between September 2000 and January 2001 for these ESUs. Id. at 42,422. While the rule contains 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 2004 Biological Opinion

NMFS issued a biological opinion for the action agencies' operation of 14 federal projects that NMFS and the action agencies have labeled the Federal Columbia River Power System ("FCRPS") on December 21, 2000 ("2000 BiOp"). In the 2000 BiOp, NMFS 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 NMFS, would avoid jeopardy.

A coalition of fishing businesses and conservation and fishing advocacy organizations (including the undersigned groups) 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 BiOp was legally flawed and relied on improper factors in reaching a no-jeopardy finding for the RPA. See National Wildlife Federation et al. v. National Marine Fisheries Service, 254 F. Supp2d 1196 (D. Or. 2003). The Court remanded the opinion to NMFS to prepare a new opinion that complied with the law.

On November 30, 2004, NMFS issued its revised biological opinion (the "2004 BiOp"). In sharp contrast to its previous opinions, NMFS concluded in the 2004 BiOp that the proposed FCRPS operations included in the action agencies "Updated Proposed Action" ("UPA") would not jeopardize the continued existence of twelve listed ESUs of salmonids in the Columbia River Basin. The 2004 BiOp is arbitrary, capricious and contrary to law for reasons that include, but are not limited to, those described below:

- The jeopardy analysis in the 2004 BiOp fails to actually evaluate whether the effects of the proposed action, when combined with the effects of the environmental baseline and cumulative effects, is likely to jeopardize the survival and recovery of the species. 50 C.F.R. § 402.14(g).

- The jeopardy analysis in the 2004 BiOp never identifies the threshold conditions that would constitute jeopardy to the species and hence never actually assesses whether the proposed action will avoid jeopardy. See Consultation Handbook at 4.2 (explaining how consultation should identify "where future jeopardy thresholds may be reached").

- The jeopardy analysis in the 2004 BiOp improperly assumes that avoiding an appreciable reduction in the species' "reproduction, numbers, or distribution" as they exits at the time of consultation is sufficient to avoid an appreciable reduction in the species' likelihood of both survival and recovery. See 50 C.F.R. § 402.02; 2004 BiOp at 1-12. ESA section 7(a)(2) and the Consultation Handbook, however, make it clear that avoiding jeopardy to the species' "continued existence" is not the same as avoiding an appreciable reduction in whatever distribution, numbers, and reproduction the species exhibits at the time of consultation. See, e.g., Consultation Handbook at 4-35 (defining "survival").

- The jeopardy analysis in the 2004 BiOp fails to consider the entire agency action and all of its direct and indirect effects on the species. This includes, but is not limited to, the failure to provide a legal or rational basis for partitioning the

existence and non-discretionary operations of the federal action from the so-called discretionary operations that are the subject of the consultation. Such a distinction cannot properly be drawn as a matter of law or fact. See, e.g., 2004 BiOp at 8-6 to 8-7 (acknowledging NMFS' inability to "distinguish between juvenile survival associated with discretionary annual operations and environmental baseline conditions"). It also includes the failure to consider all of the federal projects that are part of the action, including the BOR projects in the upper Snake Basin.

- Even if the existence and non-discretionary operations of the dams that are a part of the action could be partitioned from their discretionary operations (which they cannot), the 2004 BiOp improperly identifies some discretionary operations as "non-discretionary."

- The jeopardy analysis in the 2004 BiOp improperly relies on the concept of a "reference operation" to determine whether the proposed action will cause jeopardy when the description of this "reference operation" is neither complete, rational, nor legal, and when the ESA and its implementing regulations do not contemplate such a hypothetical exercise as a basis for a jeopardy analysis.

- The jeopardy analysis in the 2004 BiOp fails to include an accurate and complete description of the cumulative effects that should be considered together with the effects of the action in determining whether the proposed action will cause jeopardy. NMFS cannot properly rely only on the efforts of others to identify these cumulative effects. Nor can the agency properly assume, as it does, that conditions in the Columbia River Basin will improve toward a "more pristine condition over time" based on its incorrect and cynical interpretation of the decision in NWF v. NMFS, 254 F. Supp.2d 1196 (D. Or. 2003).

- The 2004 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 "compar[ing] the conditions of the essential features of critical habitat that would exist under the proposed action and those conditions existing at the time the species were listed." 2004 BiOp at 6-2. By definition, this approach fails to consider whether the proposed action destroys or adversely modifies the essential features of critical habitat necessary for the *recovery* of the species (as opposed to the features that happen to exist at the time the species were listed). See 16 U.S.C. §1532(5)(A)(i); Gifford Pinchot Task Force v. USFWS, 378 F.3d 1059 (9th Cir. 2004).

- The 2004 BiOp and its underlying analysis fail to utilize the best scientific and commercial data available, as pointed out by numerous commenters, including

state and tribal biologists. For example, the Opinion analyzes impacts in the context of an artificially constrained base timeline that presents an inappropriately optimistic picture of salmon numbers and survival; it utilizes a model to assess effects that is inadequate and inappropriate; it ignores science regarding mortality to salmon caused by transportation; and it speculates without basis about the potential benefits to be derived from various technological modifications to the dams.

- The Incidental Take Statement for the proposed action that accompanies the 2004 BiOp is invalid because it relies on the inadequate jeopardy analysis in that Opinion, fails to address all of the take caused by the FCRPS, and fails to identify adequate independent triggers for incidental take apart from implementation of the action as proposed. See, e.g., National Wildlife Federation v. NMFS, 235 F. Supp.2d 1143, 1160 (W.D. Wash. 2002).

III. THE FEDERAL ACTION AGENCIES' VIOLATIONS OF THE ESA

A. The Action Agencies Have Failed to Insure That Their 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 reason including those described above, the 2004 BiOp incorrectly applies ESA § 7(a)(2) and its implementing regulations to determine that the proposed action would avoid jeopardy. The action agencies, however, have an independent duty to ensure that their actions avoid jeopardy. The proposed action, 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. Accordingly, by implementing the proposed action, the action agencies will violate section 7(a)(2), notwithstanding the 2004 BiOp. See, e.g., Stop H-3 Ass'n. v. Dole, 740 F.2d 1460.

The action agencies also have failed to insure 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. See, e.g., 58 Fed. Reg. at 68544 (1993). The

proposed agency action 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. By implementing the proposed action under these circumstances, the action agencies are violating section 7(a)(2).

B. The Action Agencies are 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 2004 BiOp is not valid and the action agencies may not rely on it to conclude that their actions will avoid jeopardy or to satisfy their procedural duties under the ESA. Under these circumstances, the ESA requires that the 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 Pacific Coast Fed'n of Fishermen's Assoc., et al. v. BOR, 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. National Marine Fisheries Service, 80 F. Supp.2d 1137 (W.D. Wash. 2000) (enjoining implementation of fishing management plans in specific areas pending completion of BiOp).

C. The Actions Agencies Have 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 NMFS. See Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998). As the 2004 BiOp acknowledges, the biological requirements of salmon and steelhead in the mainstem of the Columbia and Snake River are not being met, and consequently, the species continue to slide towards extinction. In neither the 2004 BiOp nor any other document, however, have the action agencies identified, or consulted with NMFS regarding, those steps they will take to recover these species to the point where they can be removed from ESA protection.

D. The Action Agencies are 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 the 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.

The 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 Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 745 (D. Id. 1996) (preservation of "status quo" as required by Conner means enjoining the action under consultation); Pacific Coast Fed'n of Fishermen's Assoc. et al. v. BOR, 138 F. Supp.2d at 1249 & n.19; Pacific Rivers Council, 30 F.3d at 1057.

E. The Action Agencies Are "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), BOR and the Corps are "taking" endangered and threatened salmon and steelhead. As described in the 2004 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 2004 BiOp at § 5.2.

Pursuant to the ESA and governing regulations, the 2004 BiOp authorizes incidental take of a limited number of individuals of all relevant ESUs. See id. § 10. This provision does not protect BOR and the Corps from liability under Section 9 for two reasons.

First, as explained above, the 2004 BiOp is arbitrary, capricious and contrary to law. The incidental take statement ("ITS") contained therein is consequently also invalid. Since the agencies may not lawfully take listed species in the absence of a valid take statement, they are in violation of § 9.

Separately, and without regard to the legality of the 2004 BiOp and its ITS, the ITS by its own terms covers only a small fraction of the species that are killed, injured or harmed by the agencies' actions. The ITS only covers the mortality associated with the difference between the so-called "reference operation" and the UPA. See 2004 BiOp at 10-2. The reference operation is defined with respect to the alleged limits on the agencies' discretion in taking particular actions. Id. 5-5.[3] The legal justification for positing such non-discretionary operations arises from a regulation defining the applicability of ESA § 7(a)(2). Id. 5-1 (citing 50 C.F.R. § 402.03).

Whatever the merits of the agencies' position that they are not required to consult on purportedly "non-discretionary" operations, and whatever the merits of the agencies' purported identification of discretionary and non-discretionary operations, the regulation on which they rely applies only to Section 7, not Section 9. There is no exception to the prohibition against take imposed by Section 9 for purportedly non-discretionary actions. The Corps and BOR must comply with Section 9 in all of their actions, regardless of discretion, in the absence of a valid ITS, an exemption under section 7(h), 16 U.S.C. § 1536(h), or a permit under section 10, 16 U.S.C. § 1539. Because the ITS that accompanies the 2004 BiOp only waives Section 9 liability for purportedly "discretionary" operations, and does not waive Section 9 liability for the take of listed species that arise from purportedly "non-discretionary" operations, "take" as a result of these latter activities is prohibited.

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 79% to 92%. 2004 BiOp at 10-4. However, the purported discretionary operations of the system and the accompanying ITS for these operations account for only 1% to 4% of this mortality. Id. 10-2. The agencies are not authorized to take more than 1-4% of listed fall chinook, but are clearly killing or injuring many more salmon and steelhead through their actions. In the absence of any permit or exemption under the Act, this take is prohibited.

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[3] Although the 2004 BiOp also claims that the reference operation is defined without regard to the agency's authorities, this is incorrect. See, e.g., 2004 BiOp at 5-9 & n.4 (irrigation withdrawals remain in reference operation, despite agencies' authority to curtail or modify them).

IV. CONCLUSION

If the BOR, Corps, and BPA do 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 BOR, the Corps, and BPA pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). If you would like to discuss the significant ESA violations described herein and seek a mutually acceptable solution to them, please feel free to contact any of the undersigned.

Sincerely,

_____

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