

DRAFT EXEMPTION APPLICATION UNDER THE ENDANGERED SPECIES ACT

Submitted pursuant to 50 C.F.R. § 450 *et seq.*

I. PURPOSE AND NEED FOR EXEMPTION

The three federal agencies (“Applicant Agencies”) that manage the Federal Columbia River Power System (“FCRPS”) submit this joint application for an exemption under section 7(g) of the Endangered Species Act (“ESA”).

An exemption would allow the Applicant Agencies to continue operating the FCRPS according to the requirements of a 2014 Supplemental Biological Opinion issued by NOAA Fisheries. The Applicant Agencies conclude that those requirements, which include detailed action items, sufficiently protect ESA-listed salmon and steelhead and should be adopted by the ESA Committee as a preferred Mitigation Plan. The Mitigation Plan would replace the *ad hoc* requirements imposed by a federal district court in Portland, Oregon, which has ordered the Applicant Agencies to implement and consider a number of detrimental alternatives.

Since 1980, the Applicant Agencies have spent approximately \$16 billion to address a variety of fish mitigation and ESA-related issues, including structural changes at dams for fish passage, improved juvenile transportation facilities, hatchery improvements and habitat restoration. As a result of those expenditures, virtually every federal dam and reservoir operation on the mainstem of the Columbia and Snake Rivers has been modified in one form or another to improve fish survival. The Applicant Agencies can show that fish passage survival generally averages 95% per hydroelectric project for juvenile salmon and steelhead migrating downstream.

The chief obstacle to salmon recovery over which the Applicant Agencies have no control is ocean conditions, where salmon spend most of their lives and where dramatic and sometimes abrupt changes in currents and temperature can greatly affect survival rates. The Applicant Agencies can therefore only address conditions within a limited portion of the salmon and steelhead lifecycle.

Nevertheless, the ESA litigation challenging FCRPS operations in federal court continues after 25 years. The 2014 Supplemental Biological Opinion has been remanded by the federal court to consider measures that do not qualify as “reasonable and prudent alternatives” under the ESA. Some alternatives, such as the breaching (removal) of four federal dams on the Lower Snake River, would significantly reduce the capability of the FCRPS to produce power at critical peak times of year and would also curtail or eliminate navigation and irrigation. Moreover, substantial technical information exists to conclude that dam breaching, or reservoir drawdowns, could actually harm fish survival by eliminating the successful juvenile fish transportation program, particularly in low water-year year conditions.

The Applicant Agencies note that the ESA Committee is sometimes called “the God Squad” because it supposedly can make life or death decisions over threatened or endangered species and could, in theory, allow for the extinction of an ESA-listed species. But in this case, the Applicant Agencies conclude that the formation of an ESA Committee that adopts a Mitigation Plan based on the requirements of the 2014 Supplemental Biological Opinion will protect ESA-fish from the vagaries of federal court decisions that are not based on the best available science, and which have advanced an interpretation of the ESA jeopardy standard that that the FCRPS cannot meet.

The exemption will provide financial and operational stability in the management of the FCRPS, the largest network of hydroelectric dams in the nation, while still requiring the Applicant Agencies to continue complying with the rigorous requirements in the 2014 Supplemental Biological Opinion.

II. APPLICANTS AND PRIMARY CONTACT INFORMATION ¹

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III. THE APPLICANT AGENCIES ²

Each of the three Applicant Agencies has distinct legal and operational responsibilities:

¹ 50 CFR § 451.02(e)(1). Any federal agency may file an exemption application with the Department of Interior.

² 50 CFR § 451.02(e)(2).

1. The U.S. Army Corps of Engineers (“USACE”). The USACE is part of the U.S. Department of Defense. It owns and operates multi-purpose dams and related infrastructure in the Columbia River Basin for hydroelectric power generation, navigation, irrigation, flood control and other uses, as described in www.nwd.usace.army.mil/missions/water/Columbia.aspx.
2. The U.S. Bureau of Reclamation (“USBR”). The USBR is part of the U.S. Department of Interior. It has built diversion, delivery and storage projects in the western United States for irrigation, hydroelectric power generation and water supply. The USBR’s Pacific Northwest Regional Office operates Grand Coulee Dam, the largest dam in the FCRPS. See generally <https://www.usbr.gov/pn/>.
3. The Bonneville Power Administration (“BPA”). The BPA is part of the U.S. Department of Energy. It is a federal power marketing agency with statutory duties to sell and deliver electricity from the USACE and USBR dams that are part of the FCRPS. In addition, BPA has responsibilities under the Northwest Power Act of 1980 to protect and help restore Columbia River salmon and steelhead runs. See generally www.bpa.gov.

The Applicant Agencies share a common purpose and mission in the management of the FCRPS and compliance with the Endangered Species Act of 1973, as amended, as well as other federal statutes that address the authorization, purpose and management of these important federal assets.

IV. COMPREHENSIVE DESCRIPTION OF THE PROPOSED AGENCY ACTION ³

Under the ESA Committee’s Mitigation Plan,⁴ the proposed action is the continued coordinated operation and maintenance of the FCRPS according to the requirements of the 2014 Supplemental Biological Opinion (“2014 Supplemental BiOp”) issued by NOAA Fisheries. The FCRPS is a network of federal dams in the Columbia River watershed, an area of 259,000 square miles that drains part of Washington State, Oregon, Idaho and western Montana.

In the 2014 Supplemental BiOp, NOAA Fisheries proposed a series of Reasonable and Prudent Alternatives (“RPAs”) to avoid the likelihood of continued jeopardy to the ESA-listed fish or the likely destruction of their habitat. NOAA Fisheries issued the document on January 27, 2014 (NOAA Fisheries Log No. 2-139562). The RPAs currently guide the three Applicant Agencies in the way they operate and manage federal assets that are part of the FCRPS.

³ 50 CFR § 451.02(e)(2)(i).

⁴ 16 U.S.C. § 1536(l)(1).

The RPAs include:

- Hydropower actions affecting mainstem and up-river projects.
- Hatchery actions throughout the Columbia-Snake River Basins.
- Habitat actions in the river basins and estuary areas.
- Predation actions in the mainstem river system.
- Harvest actions in the ocean and in-river environments.
- Research, monitoring and evaluation actions throughout the river basins and ocean environments.

The exemption would make permanent the requirements of the 2014 Supplemental BiOp and would halt judicial efforts to impose additional costly requirements that are inconsistent with scientific evidence submitted to the court by the Applicant Agencies. The Applicant Agencies conclude that the new judicially-imposed requirements diminish the value of federal assets, impair their ability to operate the FCRPS and negatively affect existing fish runs.

a. Prior Efforts and Expenditures

Since 1980, the federal government has spent approximately \$16 billion to protect and restore 13 ESA-listed salmon and steelhead runs on the Columbia River and tributaries, including the Snake River. This multi-agency effort, which also involves dozens of stakeholders, including states and Tribes, is the largest expenditure of federal funds for ESA restoration anywhere in the nation.

b. The Ocean Variable Affecting Salmon/Steelhead Survival

The chief variable affecting the long-term survival of salmon and steelhead—which the federal government cannot control—is the condition of the Pacific Ocean, where fish spend most of their lives before returning to the Columbia Basin to spawn. Scientific studies demonstrate that ocean conditions play a critical role in the lifecycle of ESA-listed fish and thus limit the ability of the Applicant Agencies to fully protect and restore the ESA-listed fish.

NOAA Fisheries and others, for example, have documented the effect of ocean conditions on returning salmon runs. Specifically, they have studied the correlation of sea surface temperatures (which oscillate between a “warm” and “cool” phase) and the number of returning fish. NOAA Fisheries has determined that the listing of several salmon stocks as threatened or endangered under the Endangered Species Act

coincides with a prolonged period of poor ocean conditions that began in the early 1990s.⁵ Conversely, when ocean conditions improve, the number of returning salmon increases.

c. The Ongoing ESA Litigation

The operation of the FCRPS has been subject to ESA litigation for the last 25 years. Federal district courts had remanded prior BiOps (2000, 2004 and 2008/10, and 2014). The continued litigation, *National Wildlife Federation v. National Marine Fisheries Service*, is now pending before the Honorable Judge Michael H. Simon, U.S. district court in Oregon, 3:01-cv-00640-SI. There are numerous intervenors and amicus participants.

In May 2016, the federal district court ruled that the 2014 Supplemental BiOp was insufficient to protect ESA-listed salmon and steelhead. The court found that the BiOp’s “no jeopardy” conclusion was “arbitrary and capricious” and a violation of federal law. (ECF 2065.⁶) Over the objections of the Applicant Agencies, the court ordered NOAA Fisheries to correct the deficiencies in the 2014 Supplemental BiOp and to prepare a new BiOp by December 31, 2018, as well as a new Environmental Impact Statement (“EIS”) by March 2021. (ECF 2089.)

d. Dams Affected by the Court Ruling

The court identified 14 dams in the Columbia River Basin that are affected by its ruling. (ECF 2065, page 26.) The dams are listed below in **Table 1**, in order from the date of completion.

TABLE 1
Dams Affected by the Federal Court’s 2016 Decision

Dam:	State:	River:	Completion Date:
Bonneville	WA-OR	Columbia	1938
Grand Coulee	WA	Columbia	1942 *
Hungry Horse	MT	S. Fork Flathead	1953 *
Albeni Falls	Idaho	Pend Oreille	1955
McNary	WA-OR	Columbia	1957

⁵ Northwest Fisheries Science Center, see discussion of the Pacific Decadal Oscillation (“PDO”), available at www.nwfsc.noaa.gov/research/divisions/fe/estuarine/oeip/ca-pdo.cfm

⁶ References to “ECF ____” refer to the numbers assigned by the federal court electronic filing system (ECF) for filings in *National Wildlife Federation, et al. v. National Marine Fisheries Service, et al.*, Case No. 3:01-CV-00640-SI (D. Oregon).

The Dalles	WA-OR	Columbia	1960
Chief Joseph	WA	Columbia	1961
Ice Harbor	WA	Snake	1962
Lower Monumental	WA	Snake	1969
Little Goose	WA	Snake	1970
John Day	WA-OR	Columbia	1971
Dworshak	Idaho	N. Fork Clearwater	1973
Libby	MT	Kootenai	1975
Lower Granite	WA	Snake	1975

Dams marked with an asterisk * are operated by the U.S. Bureau of Reclamation. The other dams are operated by the U.S. Army Corps of Engineers.

e. Dam Breaching Proposal

In its May 2016 opinion, the court directed the federal agencies preparing the EIS to consider breaching one or more of the four federal dams on the Snake River, an action that would ultimately require Congressional approval. (ECF 2065, at p. 10.) The ostensible purpose is to create a more natural river mimicking flow conditions before dams were built. But breaching a dam entails removing a portion of the structure and rendering it unable to generate electricity or provide navigation and irrigation. Yet those purposes are an intrinsic reason Congress authorized the structures. The Applicant Agencies recognize that only Congress has the power to remove or modify the statutory authorizations for the Snake River dams, not the courts.

V. LEGAL ORDERS/DIRECTIVES ⁷

There are two significant legal orders/directives compelling this application:

- In May 2016, as noted above, the court ordered the Federal defendants to prepare a new BiOp and a new Environmental Impact Statement on the operation of the FCRPS. (ECF 2065.) The court found that existing federal hydro operations fail to avoid risk of jeopardy of extinction for the listed-ESA species. The current 2014 Supplemental BiOp therefore triggers “jeopardy” status, according to the court.
- Further, in March 2017, the court ordered the federal agencies to adopt a new spill regime for implementation in spring 2018. (ECF 2190.) The court subsequently approved the new regime.⁸

⁷ 50 CFR § 451.02(e)(2)iii. This part of the application asks for legal requirements which have been satisfied or obtained, or which must still be satisfied or obtained before the proposed action can proceed.

⁸ ECF 2258 (Order for 2018 Spring Spill Operations), January 8, 2018.

An exemption will supersede those legal orders/directives. The exemption would allow the Applicant Agencies to operate the FCRPS according to the terms of the existing 2014 Supplemental BiOp. The Applicant Agencies request that the ESA Committee adopt the BiOp as a permanent Mitigation Plan. The Applicant Agencies believe the 2014 Supplemental BiOp contains extensive and proven measures to protect ESA-listed fish. The BiOp has received the support of several Northwest states, Tribes and other parties.

VI. CONSULTATION PROCESS USED UNDER SECTION 7(a)⁹

In its 2016 opinion, the court ordered NOAA Fisheries to engage in a section 7(a)(2) consultation and to complete it on or before December 31, 2018. (ECF 2089.) This consultation follows several other consultations for previous biological opinions affecting the operation of the FCRPS. As part of this process, the court has repeatedly ordered the federal defendants to consult with the other sovereigns (e.g., States and Tribes). The record reflects those extensive consultations.¹⁰ All required consultations for the ESA Committee Mitigation Plan have therefore been completed.¹¹

VII. PRIOR BIOLOGICAL ASSESSMENTS¹²

The 2014 Supplemental BiOp was preceded by multiple environmental, biological, and economic assessments (and environmental impact statements), as referenced within the BiOp and discussed above. No other federal agency action has received greater environmental and technical review under the ESA.

VIII. CURRENT BIOLOGICAL OPINION¹³

The full and complete Supplemental 2014 Biological Opinion is available at www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx.

⁹ 50 CFR § 451.02(e)(2)iv.

¹⁰ See, e.g., ECF 1804-1 (summarizing consultations with sovereigns as of April 7, 2009).

¹¹ 50 CFR § 402.14(l) states that formal consultation is finished with the issuance of a biological opinion. That action triggers a 90-day window for federal agencies to file an Exemption Application. Section 7(g)(2)(A). In this case, NOAA Fisheries is under a new consultation process as a result of the federal court order to prepare a new BiOp. The grant of an exemption will obviate the need for a new BiOp because the 2014 Supplemental BiOp would remain in effect. NOAA Fisheries will need to complete formally the current consultation process and reaffirm the adequacy and legal sufficiency of the 2014 Supplemental BiOp for purposes of this Application. See Section XV.

¹² 50 CFR § 451.02(e)(2)(v).

¹³ 50 CFR § 451.02(e)(2)(vi).

IX. NEPA COMPLIANCE

Section 7(k) of the ESA declares that:

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [NEPA]...*Provided*, that an environmental impact statement [EIS] which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

In this case, the Committee need not prepare a separate EIS for *its* exemption decision, because the Applicant Agencies have already prepared multiple EISs for operation of the FCRPS. These prior EISs include:

1992 Columbia River Salmon Improvement Measures Options Analysis EIS
1993 Supplemental Flow EIS
1997 System Operation Review EIS
2002 Lower Snake River Juvenile Migration Feasibility Report EIS
2004 Juvenile Bypass EIS
2005 Caspian Tern EIS
2006 Upper Columbia Alternative Flood Control and Fish Operations EIS

In addition, the Applicant Agencies prepared a number of Environmental Assessments (“EAs”) on discrete subjects, such as a 2004 Bureau of Reclamation decision to drawdown Banks Lake (Washington State reservoir) for increased flow and the 2014 Army Corps plan for Inland Avian Predation Management.¹⁴ The applicants also have prepared detailed environmental studies and reports—with analyses equivalent to NEPA standards—for the 2014 Biological Opinion. These documents include annual river system survival studies prepared by NOAA Fisheries, that analyze the survival rates at each project, and the effectiveness of project spill regimes versus juvenile fish transportation, since 1998.

Collectively, these documents have examined not just a reasonable range of alternative FCRPS operations, but have studied the effects of nearly any conceivable operation of the FCRPS on migratory salmonid species protected under the ESA. A large collection of non-NEPA studies have also been conducted, including multiple recovery planning documents.¹⁵

¹⁴ For a more complete analysis, see Federal Defendants’ Cross-Motion for Summary Judgment in the ESA case before Judge Simon, March 6, 2015, ECF 2001, pages 59-64.

¹⁵ The Applicant Agencies have also completed detailed environmental analyses after the court issued its opinion in May 2016. The Army Corps, for example, prepared an ESA Recovery Plan for the Snake River Spring/Summer Chinook and Steelhead in

The Applicant Agencies each issued a Record of Decision (“ROD”) when they adopted the 2014 Supplemental BiOp. The RODs found the action was consistent with NEPA and prior environmental documents.¹⁶

The Applicant Agencies hereby incorporate the prior documents listed above and other relevant environmental analysis into this Application and into the proposed Mitigation Plan. The documents and research analysis identified in this application and Committee report constitute full NEPA compliance. This environmental review addresses the Mitigation Plan reasonable and prudent alternatives for conserving the species and their critical habitat.¹⁷

X. DESCRIPTION OF THE ALTERNATIVES TO THE PROPOSED ACTION¹⁸

The continued reliance on the 2014 Supplemental BiOp is the proposed action and should serve as the ESA Committee’s Mitigation Plan. The BiOp contains 73 Reasonable and Prudent Alternatives (“RPAs”). The Applicant Agencies have determined that these RPAs have been effective in complying with ESA requirements and in meeting their statutory obligations.

The major action measures include:

- Dam passage modification.
- Significant water management and flow regimes.
- Juvenile fish transportation program.
- Research, development, and demonstration measures.
- Adaptive management protocols.
- Habitat project development.
- System operations for returning adult runs.

November 2017. The Applicant Agencies also prepared a 2016 Comprehensive Evaluation of the FCRPS under the Endangered Species Act in January 2017.

¹⁶ E.g., Corps ROD at 9 (“The Corps believes that the effects of the action [adoption of the 2014 Supplemental BiOp] are within the range of analyses conducted in the existing NEPA documents.”)

¹⁷ The Applicant Agencies have also completed detailed environmental analyses after the court issued its opinion in May 2016. The Army Corps, for example, prepared an ESA Recovery Plan for the Snake River Spring/Summer Chinook and Steelhead in November 2017. The Applicant Agencies also prepared a 2016 Comprehensive Evaluation of the FCRPS under the Endangered Species Act in January 2017.

¹⁸ 50 CFR § 451.02(e)(2)(vii).

The complete set of measures may be reviewed at:
www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx.

a. Other Alternatives: The Spill Alternative

The federal district court in Oregon has ordered the Applicant Agencies to consider and then implement additional project water spill at eight (8) lower Columbia and Snake River dams, one of the most far-reaching of the proposed alternatives now on the table.¹⁹ This alternative means that power generation will be significantly reduced. BPA has stated that the net effect of the court's order is to potentially diminish the energy output of the FCRPS by about 815 average megawatts between April and June (or about 203 aMW on an annual basis). "This loss of generation will necessitate bringing additional power generation resources online to meet demand, change the sources of power supply utilized in the Pacific Northwest, and hinder state and regional efforts to reduce carbon emissions."²⁰

The Applicant Agencies have concluded that the court's spill order is incorrect and have filed an appeal with the U.S. Court of Appeals for the Ninth Circuit. The Applicant Agencies conclude that this court-mandated alternative is counterproductive to the purposes of the ESA.²¹ The spill alternative contains a number of legal and operational defects, and it ignores the documented and long-standing benefits of transporting juvenile fish on the lower Snake River.

Since 1994, the USACE has successfully operated a spring juvenile transportation program to move juvenile fish from the Snake River dams to below Bonneville Dam, the last barrier before the Columbia River estuary. Prior court rulings on ESA matters explicitly recognized the value of transport.²² Yet the most recent orders from the court (May 2016 and March 2017) make no clear mention of the transport program operations.

¹⁹ ECF 2190.

²⁰ Declaration of BPA vice president of generation asset management Kieran Connolly, filed on BPA's behalf in opposition to the State of Oregon's request for an injunction regarding mandatory spill, ECF 2145, February 2, 2017, page 18.

²¹ See ECF 2251 (Agencies object to the lack of scientific evaluation of the effects of the injunction).

²² See, for example, the opinion of Judge James Redden in 2005 (ECF 1221, page 6). Judge Redden noted that the USACE had developed both spill and transportation operations as early as 1992 to facilitate juvenile salmon migration:

This [dual approach] increased the chance of survival past the dams to the ocean and the subsequent return of adults to propagate the species. Studies do not establish, with absolute certainty, the relative benefits of spill versus transportation. Therefore, the Corps says it has adopted a "spread the risk" philosophy, using spill and transportation in relatively equal measure. (Underline in original)

On September 29, 2017, the Columbia-Snake River Irrigators Association (“CSRIA”) filed a motion for an evidentiary hearing on the subject to discuss (among other things) the results showing that transported fish fared four times better than fish allowed to remain in the river during warm weather and low-flow conditions. (ECF 2231, (motion. ECF 2241, reply). Records show that the Fish Passage Center (a BPA contractor) and other entities (including the State of Oregon) pressured federal agencies to delay and not fully implement the juvenile fish transportation program, despite the poor in-river (temperature) conditions and the objections of NOAA Fisheries scientists.²³ Nonetheless, the court ruled against holding an evidentiary hearing that would examine the 2015 “killing Idaho fish” event or the continued benefits of the juvenile fish transportation program and the risks of rigid spill protocols.

b. Other Alternatives: Dam Breaching

Under the current EIS preparation order issued by the federal district court in Oregon,²⁴ the Applicant Agencies will have to review a wide range of other alternatives when a new BiOp is prepared. At this time, however, it is difficult to describe those alternatives in detail, except to note that the court expressly directed the Applicant Agencies to consider breaching the four Lower Snake River dams in Washington State even though the Applicant Agencies have no legal authority to breach dams without the express direction of Congress. “An environmental impact statement...requires the action agencies to consider *all* reasonable alternatives, regardless whether there currently is a funding source or whether any particular alternative is reasonably likely to occur,” the court said. (ECF 2065, at p.10.)

The Applicant Agencies have previously reviewed the dam-breaching alternatives in prior EISs and prior technical and economic reviews. Breaching entails removing a portion of the dams and rendering it unable to generate electricity or provide navigation or irrigation. These purposes are an intrinsic reason why Congress authorized the structures. The Applicant Agencies believe that only Congress has the legal authority to remove or modify those authorizations, not the courts.

Furthermore, the Applicant Agencies have demonstrated that breaching any of the four Snake River Dams will have serious impact on the operation of the FCRPS and will force BPA to buy replacement power from gas-fired power plants, thus creating additional air pollution and carbon emissions to replace the output of the dams, a renewable, carbon-free source.

If implemented properly, the “spread the risk” policy would involve an approximate 50-50 split between transportation and in-river migration, depending on water and weather conditions and other factors.

²³ These events are documented in the notes of Fish Passage Advisory Committee (FPAC) meetings on April 14, 2015 and April 21, 2015.

²⁴ ECF 2065, at p. 18. BPA now estimates the costs of the EIS process at about \$81 million.

The four Snake River dams have the capacity to generate 3,000 MW in critical peak hours (the ability to produce power instantaneously when needed), particularly in January. **Table 2** provides details.

TABLE 2
Snake River Dams

Dam:	Capacity: *	Peak MW (120 Hr): **
Ice Harbor	693 MW	586
Little Goose	930	859
Lower Granite	930	737
Lower Monumental	930	810
TOTAL	3,483 MW	2,992 MW

Source: BPA 2016 Pacific Northwest Loads and Resources Study, Table 2-4, page 18.

* The installed (nameplate) generating capacity of the dams measured in megawatts (MW).

** The maximum generation in a 120-hour period in January 2018 assuming 1937 critical water (extreme drought) conditions.

Breaching the dams would have adverse impacts on the operation of the FCRPS, including undermining voltage support in the Tri-Cities area of Washington State and making it more difficult to integrate new wind and solar resources into the federal power system. BPA has said it cannot rely entirely on wind and solar to replace the Snake River dams because they are variable, intermittent sources of power, and BPA cannot depend on them to meet instantaneous changes in customer demand.²⁵

XI. THE COURT HAS DETERMINED THAT THE PROPOSED ACTION VIOLATES SECTION 7(a)(2) OF THE ESA ²⁶

As noted above, the federal district court in Oregon ruled in May 2016 that the RPAs in the 2014 Supplemental BiOp are inadequate under Section 7(a)(2) of the ESA. The court found that the operation of the FCRPS will continue violating section 7(a)(2) because the actions of the federal agencies will not prevent the risk of extinction for all affected species. Thus, the court itself has determined that the 2014 Supplemental BiOp is inconsistent with what it believes are the ESA’s requirements.

The proposed agency action--in this case, the continued operation of the FCRPS--cannot be altered or modified to avoid violating section 7(a)(2) of the Act. Decades of litigation and multiple federal court opinions make clear that judicial interpretations of the ESA impose more and more modifications on the FCRPS and require the Applicant Agencies to consider RPAs that are neither reasonable nor prudent.

²⁵ BPA Fact Sheet, “A Northwest energy solution: Regional power benefits of the lower Snake River dams” (March 2016).

²⁶ 50 CFR § 451.02(e)(2)(viii).

The proposed dam breaching alternative, for example, which the federal court directed the agencies to consider in the forthcoming EIS, is not a Reasonable and Prudent Alternative. Federal regulations define an RPA as an alternative action “that can be implemented in a manner consistent with the intended purpose of the action, [and] that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction...” 50 CFR § 402.02 (definitions). Dam breaching would end power generation, navigation, irrigation and flat-water recreation at the four Lower Snake River dams, and it is therefore inconsistent with existing statutes requiring the USACE to operate the dams for power generation, navigation and other purposes. Moreover, the important ability of the dams to integrate new renewable resources would be permanently eliminated, contributing to further CO2-induced climate change impacts.

XII. RESOURCES COMMITTED BY THE FEDERAL AGENCIES SUBSEQUENT TO THE INITIATION OF CONSULTATION ²⁷

As noted above, the 2014 Supplemental BiOp has been preceded by multiple consultations.

Since the court’s May 2016 order, the Applicant Agencies, have engaged in renewed injunctive relief consultations, affecting hydro project operations, foreseeable costs, some fisheries impacts, and some impacts to other economic sectors, such as navigation.

To date, this effort includes:

- Initiating new EIS preparation actions and determining a schedule suitable to the court.
- Identifying the new RPA actions per the court order.
- Multiple agency meetings.

The most recent court-ordered consultation process will conclude by the end of January 2018.

XIII. ADDITIONAL INFORMATION ²⁸

a. The Nature and Extent of the Benefits of the Proposed Action

The proposed action is the continuation of the 2014 Supplemental BiOp, which will provide for the following environmental, economic and social benefits, including fish protection:

- Hydropower operations for peaking power needs (capacity demands).

²⁷ 50 CFR § 451.02(e)(2)(ix).

²⁸ 50 CFR § 452.02(e)(5).

- New renewable resources integration and climate change mitigation.
- Commercial and re recreational navigation.
- High efficiency irrigation.
- General reservoir recreation.
- Fish protection and the Juvenile Transport Program.
- Habitat projects for tributaries/estuary.

b. The Benefits of the Proposed Action Outweigh the Benefits of Each Considered Alternative Course of Action

During the past 25-years, the Applicant Agencies have examined numerous alternatives as a means of complying with the ESA and have concluded that many of those alternatives—such as dam breaching or new spill regimes—would likely disrupt the authorized purposes of the FCRPS dams while offering little or tangible benefits to ESA-listed fish.

The alternatives impose higher costs to the region, as shown in previous analyses.²⁹ The Applicant Agencies continue to question whether those economic impact estimates affecting the proposed action have been understated. In the same light, it is now indisputable (see discussion of the spring 2015 “fish kill” event below) that the survival to migrating salmon will be seriously impaired with the removal or reduction of the juvenile fish transportation program. The Applicant Agencies have therefore determined that there is overwhelming evidence to support the proposed action—the continued implementation of the 2014 Supplemental BiOp—in contrast to alternative actions.

c. The Considered Alternatives Are Not Reasonable and Prudent Alternatives

As noted above, several of the alternatives to the 2014 Supplemental BiOp have the consequences of impairing the operation of the FCRPS and offering very speculative benefits for ESA-listed fish compared with the proposed action. In some cases, the alternatives are harmful, and perhaps even lethal, to the ESA-listed fish.

This factor is explicitly clear when 2014 BiOp measures, like the juvenile fish transportation program, are critically examined with respect to returning spring wild Chinook. In spring 2015, despite some of the warmest weather and water conditions on record, 87% of juvenile fish were allowed to remain in the river. The Applicant Agencies can now measure the results of this decision. The BPA-funded Comparative Survival Study shows that transported fish survived four times better than fish that remained in-river during those

²⁹ National Economic Development (NED) and Regional Economic Development (RED) analyses.

adverse conditions.³⁰ A significant portion of the run died. The steelhead transport results are pending, but they are expected to be even greater than that for Chinook salmon.

d. The Proposed Action is in the Public Interest

The Supplemental 2014 Biological Opinion advances the public interest in several demonstrated ways:

- Hydropower operations for peaking power needs (capacity demands).
- New renewable resources integration and climate change mitigation.
- Commercial and recreational navigation.
- High efficiency irrigation.
- General stabilized pool recreation.
- Fish protection and the Juvenile Transport Program.
- Habitat projects for tributaries/estuary.

The statutory authority for the hydroelectric projects will be protected by a Mitigation Plan that adopts the 2014 Supplemental BiOp.

e. Regional and National Significance of the Proposed Action

The Columbia River and its tributaries drain most of Washington, Oregon, Idaho and Western Montana. With a footprint as large as this, the significance of the FCRPS and its continued operation are clear for both the region and the nation.

The significance of the proposed actions includes:

- **Hydropower Supply:**
The exemption allows for the continued and coordinated management of the FCRPS without impairing the federal assets. The power produced is renewable and produces no emissions of carbon; and it allows for the development of other renewable power resources.
- **Hydropower Rates:**
BPA wholesale power rates will be stabilized.
- **Navigation:**

³⁰ Comparative Survival Study of PIT-tagged Spring/Summer/Fall Chinook, Summer Steelhead, and Sockeye, 2017 Annual Report, BPA Contract #19960200 (Table A.46).

The dams on the Snake River allow for navigation upstream to Lewiston, Idaho, for both commercial and recreational purposes.

- Irrigation:
Large acreages of production agriculture will be serviced by stable reservoir pools within the Lower Snake River system and at McNary-John Day dams.
- Recreation:
General flat-water recreation will be preserved and allowed to grow in the future for the region's increasing population.
- Fish Protection and the Juvenile Transportation Program:
The survival rates for juvenile salmon and steelhead will benefit, despite fluctuating water conditions, including those associated with climate change.
- Habitat Projects
Significant fish habitat projects are funded under the 2014 Supplemental BiOp. Those types of projects would be continued under the ESA Committee's Mitigation Plan.

f. Mitigation and Enhancement Measures Proposed Under the Exemption

The product of decades of mitigation planning and development, the Supplemental 2014 BiOp will serve as the Mitigation and Enhancement Plan ("Mitigation Plan") for the continued operation of the FCRPS. The full and complete set of measures is at: www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx. The Mitigation Plan, if adopted, will ensure that Applicant Agencies can discharge their responsibilities under federal law and make management decisions based on science, not on the vagaries of federal court decisions that have adopted unrealistic and imprudent alternatives.

XIV. CONCLUSION

The Applicant Agencies request that the Secretary of the Interior ("the Secretary") convene the Committee authorized by section 7(g) of the Endangered Species Act and pursuant to 50 CFR § 452.03.

The Applicant Agencies request that the Secretary make a threshold determination that:

- A biological assessment, the foundation of the 2014 BiOp, is in place.
- The Applicant Agencies have refrained from making an irreversible and irretrievable commitment of resources. They have maintained and operated the FCRPS pursuant to the terms of the 2014 Supplemental Biological Opinion.

- Despite this effort, the federal district court in Oregon has declared that the 2014 BiOp violates the ESA jeopardy standard for the survival of Columbia-Snake River salmon and steelhead.
- The Applicant Agencies have carried out consultation responsibilities in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or potential reasonable and prudent alternatives to the proposed action which would not violate the ESA.
- The ESA Committee should: 1) grant an exemption to federal hydro system operations; and 2) approve the 2014 Supplemental BiOp as the Mitigation Plan for continued operations of the Federal Columbia River Power System.

XV. COMPLETION OF CONSULTATION

The National Marine Fisheries Service (NMFS) has reviewed the foregoing application for exemption and hereby declares that consultation process initiated by the Court's Order of May 4, 2016, as amended by the Court's Order of July 6, 2016, has been completed.

Despite proceeding in good faith and making a reasonable effort to develop and fairly consider modifications or reasonable prudent alternatives to the proposed agency action, NMFS has been unable to identify alternatives that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that NMFS believes would meet the Court's standards to avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. NMFS continues to believe that the mitigation program it developed in the 2014 Supplemental BiOp establishes reasonable mitigation and enhancement measures necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, and critical habitat concerned.

APPLICATION APPROVALS:

May XX, 2018

Application Approved By:

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