

DRAFT EXEMPTION APPLICATION UNDER THE ENDANGERED SPECIES ACT
Submitted pursuant to 50 C.F.R. § 450 et seq.
DRAFT 6-27-2019

I. PURPOSE AND NEED FOR EXEMPTION

The Governor of the State of Idaho and the federal agencies (“Applicant Agency”) 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 Columbia River System Operation (CRSO) Agencies to continue operating the FCRPS according to the requirements of a 2014 Supplemental Biological Opinion issued by NOAA Fisheries and the 2018-19 spill program agreed to by the litigation parties currently before a federal district court in Portland, Oregon, where ESA litigation is pending.

The Applicants conclude that those requirements sufficiently protect ESA-listed salmon and steelhead and should be adopted by the ESA Committee as the permanent preferred Mitigation Plan. The Mitigation Plan would replace the *ad hoc* requirements imposed by the Oregon federal district court, which has ordered the CRSO Agencies to consider a number of alternatives, such as dam breaching.

Since 1980, the CRSO Agencies have spent approximately \$17 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 Applicants 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 continues after more than 25 years. Despite the comprehensive provisions of the 2014 Supplemental Biological Opinion, the federal district court found it insufficient and remanded it to the federal agencies to consider measures that do not qualify as “reasonable and prudent alternatives” under the ESA. Some alternatives, such as the breaching of four federal dams on the Lower Snake River, or reservoir drawdowns, would significantly reduce the capability of the FCRPS to produce power at critical peak times of year and also would 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 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, in theory, could allow for the extinction of an ESA-listed species. But in this case, the Applicants conclude that the formation of an ESA Committee, that adopts a Mitigation Plan based on the requirements of the 2014 Supplemental Biological Opinion and the 2018-19 spill program, will protect ESA-fish from potential federal court decisions that are not based on the hard empirical science and that have advanced an interpretation of the ESA that degrades FCRPS operations.

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 CRSO Agencies to comply with the rigorous requirements in the 2014 Supplemental Biological Opinion and the 2018-19 spill program

II. APPLICANTS AND PRIMARY CONTACT INFORMATION ¹

The Honorable Brad Little, Governor of Idaho [name of state]

Address:

Boise, Idaho

Mr./Ms. _____

U.S. Army Corps of Engineers, Dept. of the Army

Address:

Washington, D.C.

Mr./Ms. _____

U.S. Bureau of Reclamation, Dept. of Interior

U.S. Dept. of the Interior

Address:

Washington, D.C.

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Bonneville Power Administration, U.S. Dept. of Energy

Address:

Portland, Oregon

¹ 50 CFR § 451.02(e)(1). Any federal agency or a governor of a state in which the action occurs may file an exemption application with the Department of Interior.

III. THE CRSO AGENCIES and APPLICANT AGENCIES ²

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

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 CRSO Agencies and Applicant Agency 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.

The Governor of Idaho has an interest in protecting the water resources of his state and in ensuring that the federal government implements sound natural resource policy. Under the ESA, the governor of a state can submit an ESA application on his/her own, where the action subject to the ESA occurs within the State. The Snake River dams the federal district court has suggested for removal provide important services to Northern Idaho including a pool behind Lower Granite Dam that extends into Idaho and provides navigation to the Port of Lewiston. Other actions within Idaho include releases of up to 1.2 million acre-feet of water from Dworshak Reservoir in Idaho, operation of Albeni Falls Dam, and related operations on U.S. Bureau of Reclamation projects in southern Idaho,³

² 50 CFR § 451.02(e)(2).

³ The effects of the operation and maintenance of ten Bureau of Reclamation projects and two related actions in the upper Snake River above Brownlee Reservoir have been the subject of separate ESA consultations which focused on the effects of these projects on flow in the Snake and Columbia Rivers.

IV. COMPREHENSIVE DESCRIPTION OF THE PROPOSED AGENCY ACTION ⁴

The FCRPS is a network of 14 mainstem dams on the Columbia and Snake Rivers, and associated electrical facilities within the Columbia River watershed, an area of 259,000 square miles that drains part of Washington, Oregon, Idaho and western Montana.

Under the Mitigation Plan proposed to the ESA Committee,⁵ 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 and a spill program agreed to by the litigation parties, subject to federal district court review, as a supplemental measure to move young salmon and steelhead downriver in spring. ECF 2194. The spill regime has been in effect since then and is referred to in this Exemption Application as the “2018-19 spill program.”

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.

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 the 2018-19 spill program 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 Applicants 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.

⁴ 50 CFR § 451.02(e)(2)(i).

⁵ 16 U.S.C. § 1536(l)(1).

a. Prior Efforts and Expenditures

Since 1980, the federal government has spent approximately \$17 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.⁶ Conversely, when ocean conditions improve, the number of returning salmon increases.

The NOAA Fisheries further has concluded that the current 2019 low fish returns are predominantly the result of poor ocean conditions,

c. The Ongoing ESA Litigation

The operation of the FCRPS has been subject to ESA litigation for the last 27 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.

⁶ 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

In May 2016, the federal district court ruled that the 2014 Supplemental BiOp was insufficient to protect ESA-listed salmon and steelhead.⁷ The court found that the BiOp’s “no jeopardy” conclusion was “arbitrary and capricious” and a violation of federal law. ECF 2065.⁸ Over the objections of the CRSO Agencies, the court ordered NOAA Fisheries to correct the deficiencies in the 2014 Supplemental BiOp and to prepare a new BiOp by December 31, 2021, as well as a new, Draft Environmental Impact Statement (“EIS”) by March 2020. ECF 2089.

On April 17, 2018, the court modified the deadline for the new BiOp and EIS so that both documents are due on or before March 2021. ECF 2288. The court said in its order:

NOAA Fisheries is thus under no court-ordered obligation to produce a biological opinion before the NEPA process is complete [in 2021]. If NOAA Fisheries chooses to issue the next biological opinion after December 31, 2018, the Court will at that time consider any motion for further appropriate relief relating to the incidental take statement and other related issues. ECF 2288, page 4.

In March 2019, NOAA Fisheries issued an Interim BiOp to temporarily replace the 2014 Supplemental BiOp. NOAA Fisheries said the BiOp would remain in effect until the NEPA process was complete in 2020-21. This BiOp does not claim to provide any assessment of long-term operation of the FCRPS, but only a proposed action of limited duration. NOAA concluded that the operation of the FCRPS under the Interim BiOp would **not** jeopardize ESA-listed fish runs. In addition, NOAA Fisheries has yet to submit the Interim BiOp to the court; it has received no court approval.

d. Dams Affected by the Court Ruling

The federal district court identified 14 dams in the Columbia River Basin that are affected by its May 2016 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 *

⁷ *NWF v. NMFS*, 184 F. Supp.3d 861 (D.Or. 2016)(“*NWF V*”)

⁸ 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).

Albeni Falls	Idaho	Pend Oreille	1955
McNary	WA-OR	Columbia	1957
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/Drawdown 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. ECF 2065, 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 all or a portion of the structure and rendering it unable to generate electricity or provide navigation and irrigation, purposes for which Congress authorized the structures. Even so, the The federal hydro system has already experienced an ESA-induced de-rating of the power system by about 1,200 MW under critical water conditions, and the deep drawdown proposals on the Lower Snake River projects have an equally devastating impact. The CRSO Agencies have not claimed that these effects required Congressional authorization, and whether and to what extent the federal judiciary will accept any assertions of limitations on agency authority is unclear.

V. . LEGAL ORDERS/DIRECTIVES⁹

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

⁹ 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.

species. The current 2014 Supplemental BiOp therefore triggers “jeopardy” status, according to the court.

- In March 2017, the court ordered the federal agencies to adopt a new spill program for implementation in spring 2018. ECF 2190 and 2194 (amended opinion). The court subsequently approved the new regime.¹⁰ Later the litigation parties adopted a 2019 spill program that largely reflects the 2018 operations, with minor changes.

But the federal district court also ordered the federal agencies to evaluate dam breaching, allowing for a free-flowing river and thus eliminating power generation, navigation, and irrigation at those projects. Reservoir drawdowns also might be utilized to achieve many of the same effects on river flow and temperatures. Absent action by an ESA Committee, the federal judiciary appears likely to cause significant adverse impacts on FCRPS benefits by insisting on breaching or drawdown of the federal projects.

The exemption would allow the CRSO Agencies to operate the FCRPS according to the terms of the existing 2014 Supplemental BiOp and the 2018-19 spill program. The Governor of Idaho and the Applicant Agencies therefore request that the ESA Committee adopt the 2014 Supplemental BiOp and the 2018-19 spill program as the permanent Mitigation Plan. The Applicants believe the 2014 Supplemental BiOp and the 2018-19 spill program contain extensive and proven measures to protect ESA-listed fish. The BiOp and spill program have received the support of several Northwest states, Tribes and other parties.

VI. CONSULTATION PROCESS USED UNDER SECTION 7(a)¹¹

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 from 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, including consultations to prepare the March 2019 Interim BiOp.¹² The CRSO agencies have continued consultations relative to their preparation of the BiOp EIS and the final 2021 BiOp, to be submitted to the court.

VII. PRIOR BIOLOGICAL ASSESSMENTS¹³

¹⁰ ECF 2258 (Order for 2018 Spring Spill Operations), January 8, 2018.

¹¹ 50 CFR § 451.02(e)(2)iv.

¹² See, e.g., ECF 1804-1 (summarizing consultations with sovereigns as of April 7, 2009).

¹³ 50 CFR § 451.02(e)(2)v.

The 2019 “Interim” BiOp and the 2014 Supplemental BiOp were 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 OPINION ¹⁴

The full and complete Supplemental 2014 Biological Opinion and the Interim March 2019 Biological Opinion are available at www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx. The “no jeopardy” conclusions offered in the March 2019 Biological Opinion are expressly based upon “the interim nature of this proposed action pending the decision to implement a new action as a result of the NEPA process”. (E.g., March 2019 BiOp at 574.)

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 prior response to the federal district court, the CRSO Agencies have already completed EISs and environmental review documents pertinent to the 2014 BiOp and the 2018-19 spill program.

Over the years, the CRSO Agencies have prepared multiple EISs and equivalent review documents 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

¹⁴ 50 CFR § 451.02(e)(2)(vi).

2014 BiOp
The Annual Complete Comparative System Survival Studies.

The federal CRSO Agencies also have 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.¹⁵

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, which 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 has also been conducted, including multiple recovery planning documents.

The CRSO 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 for purposes of the ESA Exemption process. Significantly, the exemption statute requires only that the “agency action” have been subject to NEPA, as distinguished from “alternative courses of action” that may be inconsistent with project purposes and outside agency jurisdiction to implement—the dam breaching alternatives sought by the federal district court. This environmental review addresses the Mitigation Plan reasonable and prudent alternatives for conserving the species and their critical habitat.¹⁶

X. DESCRIPTION OF THE ALTERNATIVES TO THE PROPOSED ACTION¹⁷

¹⁵ 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.

¹⁶ 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.

¹⁷ 50 CFR § 451.02(e)(2)(vii).

The continued reliance on the 2014 Supplemental BiOp and the 2018-19 spill regime are the proposed action in this Exemption Application and should serve as the ESA Committee's permanent Mitigation Plan. The BiOp contains 73 Reasonable and Prudent Alternatives ("RPAs"). The CRSO 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 (spill) regimes.
- Juvenile fish transportation program.
- Research, development, and demonstration measures.
- Adaptive management protocols.
- Habitat project development.
- System operations for returning adult runs.

The complete set of measures may be reviewed at:

www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx.

a. Other Alternatives: The Spill Alternative

In 2017, the federal district court in Oregon ordered the CRSO 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.¹⁸ 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 MWA 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."¹⁹

The CRSO Agencies concluded that the court's spill order was incorrect and filed an appeal with the U.S. Court of Appeals for the Ninth Circuit. The Agencies argued that this court-mandated alternative was counterproductive to the purposes of the ESA.²⁰ The spill alternative contained a number of legal and

¹⁸ ECF 2190.

¹⁹ 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.

²⁰ See ECF 2251 (Agencies object to the lack of scientific evaluation of the effects of the injunction).

operational defects, and it ignored the documented and long-standing benefits of transporting juvenile fish on the Lower Snake River. In 2018, however, the U.S. Court of Appeals for the Ninth Circuit upheld the 2017 order from the federal district court mandating a spill program.²¹ The program remains in effect to this day; and a further revision to the spill program was agreed to by the litigation parties for 2019 operations.

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.

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 federal district 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. Notwithstanding the above, the CRSO Agencies operated the 2018 fish transportation program consistently with the 2014 BiOp provisions, and unlawful attempts to limit the program did not occur. The CRSO Agencies undoubtedly are interesting in comparing the in-river fish survival to the transported fish given the high gas supersaturation levels in the river. This information will not be available until after the 2020 adult fish returns.

²¹ *NWF v. NMFS*, 886, F.3d 803 (9th Cir. 2018).

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)

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.

b. Other Alternatives: Dam Breaching

Under the current EIS preparation order issued by the federal district court in Oregon,²⁴ the CRSO Agencies will have to review a wide range of other alternatives when a new BiOp is prepared. In May 2019, the Agencies unveiled five basic alternatives for the draft EIS scheduled for release in 2020:

- The No-Action Alternative. This alternative consists of the status quo as of September 2016, before the federal district court issued its opinion. The spill program includes the regime in effect prior to that date and does not include the 2018 spill program adopted by the court.
- Multi-Objective 1. This alternative includes the spill program currently in effect.
- Multi-Objective 2. This alternative calls for the least amount of spill for juvenile fish passage and increases power generation in spring, summer and August.
- Multi-Objective 3. This alternative calls for breaching all four lower Snake River dams, with MOP type operations at the remaining river projects.
- Multi-Objective 4. This alternative features the highest spill operations as well as limited drawdowns at the Snake River dams and at the four lower Columbia River dams; as well as additional flow augmentation water from the Upper Columbia Basin projects.

At this time, however, it is difficult to describe those alternatives in more detail, except to note that the court expressly directed the CRSO Agencies to consider breaching the four Lower Snake River dams in Washington State. “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, p.10.

The CRSO 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 stable irrigation pools. These purposes are an intrinsic reason why Congress authorized the structures.

Furthermore, the CRSO 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 carbon emissions to replace the output of the dams, a renewable, carbon-free source.

The BPA estimates that the four Snake River dams have the capacity to generate over 1,000 MW in critical peak hours (the ability to produce power instantaneously when needed), particularly in January. **Table 2** provides the nameplate capacity in if full river flows are available.

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

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.

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

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).

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

The 2019 Interim BiOp and the 2014 Supplemental BiOp were 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 current consultation process coincides with the preparation of the new BiOp EIS and the final BiOp for court review.

XIII. ADDITIONAL INFORMATION ²⁸

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

The proposed action is the continuation of the 2014 Supplemental BiOp and the 2018-19 spill program, 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 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 CRSO 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 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 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 CRSO 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 adverse

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

conditions.³⁰ A significant portion of the run died. The steelhead transport results are consistent with that for Chinook salmon.

d. The Proposed Action is in the Public Interest

The Supplemental 2014 Biological Opinion and 2018-19 spill program 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 and the 2018-19 spill program.

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.
- Water Supply:
Additional water supplies for fish flows will not be needed from either the upper Columbia River or Snake River basins.

f. Mitigation and Enhancement Measures Proposed Under the Exemption

The product of decades of mitigation planning and development, the Supplemental 2014 BiOp (and 2018-19 project spill regimes) 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 Governor of Idaho and 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 Governor and 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 CRSO 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, as modified by the Court.
- 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 CRSO 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

Since issuance of the March 2019 Biological Opinion, the National Marine Fisheries Service (NMFS) has continued to assess operation of the FCRPS. In addition, NMFS has reviewed the foregoing application for exemption and hereby declares that 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 to long-term operation of the FCRPS 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. Accordingly, NMFS hereby declares all ESA consultation processes concerning the long-term operation of the FCRPS.

NMFS continues to believe that the mitigation program it developed in the 2014 Supplemental BiOp, with the 2018-19 project spill program, 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. NMFS will assist the Secretary in developing information concerning alternative courses of action consistent with conserving the species or the critical habitat.

APPLICATION APPROVALS:

June ____, 2019

Application Approved By:

The Honorable _____, Governor of _____ [name of state]

Address:

City, State:

Mr./Ms. _____

U.S. Army Corps of Engineers, Dept. of the Army

Address:

Washington, D.C.

Mr./Ms. _____

U.S. Bureau of Reclamation, Dept. of Interior

U.S. Dept. of the Interior

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Bonneville Power Administration, Dept. of Energy

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CONSULTATION APPROVAL:

Mr./Ms. _____

NOAA Fisheries PNW Region

U.S. Department of Commerce

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