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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WILLAMETTE RIVERKEEPER, an Oregon
non-profit corporation and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,
an Oregon non-profit corporation,

Case No.

Plaintiffs,

COMPLAINT

v.

THE UNITED STATES ARMY CORPS OF
ENGINEERS, THE BUREAU OF
RECLAMATION, THE NATIONAL MARINE
FISHERIES SERVICE, and THE U.S. FISH
AND WILDLIFE SERVICE

Endangered Species Act
Administrative Procedure Act

Defendants.

INTRODUCTION

1. Plaintiffs Willamette Riverkeeper and Northwest Environmental Defense Center challenge the actions and omissions of federal Defendants, the U.S. Army Corps of Engineers (“the Corps”), the Bureau of Reclamation (“BOR”), the National Marine Fisheries Service (“NMFS”) and the U.S. Fish & Wildlife Service (“FWS”), for failing to comply with the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”) concerning the

operations of the dams and reservoirs, mitigation measures and water service contracts in the Willamette Basin and the effects of those actions on species protected under the ESA. Defendants initiated ESA Section 7 consultation in April, 2000, but have never completed consultation or issued any Biological Opinion. During the intervening seven years, the Corps and BOR have continued to take actions in operating the dams and reservoirs, funding and implementing mitigation measures, and maintaining water services contracts, resulting in irreversible and irretrievable commitments of resources in violation of Section 7(d) of the ESA. These actions have also resulted in the “take” of protected fish species in violation of Section 9 of the ESA. Plaintiffs seek declaratory, injunctive, and other relief for Defendants’ violations.

JURISDICTION AND VENUE

2. This action is brought pursuant to the Endangered Species Act, 16 U.S.C. §§ 1540(c) & (g), and the Administrative Procedure Act, 5 U.S.C. §§ 701–706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540 (c) (the Endangered Species Act).
3. By letters dated and postmarked March 14, 2007 and June 6, 2007, Plaintiffs notified all Defendants of their violations of the ESA and of Plaintiffs’ intent to sue for those violations in accordance with the requirements of commencing an action under the ESA, 16 U.S.C. § 1540(g).
4. This Court has the authority to grant the relief requested pursuant to 16 U.S.C. § 1540 (g) (ESA); 5 U.S.C. §§ 701-06 (APA); 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and 28 U.S.C. § 2412 (Equal Access to Justice Act).
5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g)(3)(A) because Plaintiff organizations have offices and members who reside in this

district, named Defendants also have offices that reside in this district, and a substantial part of the events or omissions occurred here. This case is properly filed in Portland, Oregon, pursuant to Local Rule 3.4 because a substantial part of the events or omissions occurred in Portland Division counties.

PARTIES

6. Plaintiff Willamette Riverkeeper is an Oregon non-profit corporation formed in 1996. Riverkeeper seeks to protect and restore the water quality and habitat of the Willamette River. Riverkeeper's mission is to make the Willamette River Watershed healthy for fish and wildlife and safe for fishing and swimming. A key goal of Riverkeeper is to insure that environmental laws are enforced, and to uphold the basic public trust on the Willamette River. Additionally, Riverkeeper has a goal of educating the public about the river and what they can do to protect it. Riverkeeper regularly takes staff and volunteers on boat trips along the river, where the effects of the Willamette Basin dams can be experienced first-hand. Riverkeeper has several hundred members who utilize the Willamette River for fishing, canoeing, swimming, aesthetic and other recreational activities all of which have been and continue to be negatively affected by the failure of the Defendants to complete consultation on the effects of the Willamette Basin dams and reservoirs.

7. Plaintiff Northwest Environmental Defense Center ("NEDC") is an Oregon non-profit corporation that has been working on and is dedicated to preserving, protecting and improving the environmental quality of the Pacific Northwest since 1969. NEDC and its members use the Willamette Basin waterways for recreational, scientific, and aesthetic purposes. Plaintiff and its members derive, or but for the threatened status of the various fish species in the Willamette

Basin, would derive, recreational, scientific, and aesthetic benefits from the existence in the wild of fish species through fishing, observation, study, and photography. The past, present, and future enjoyment of these benefits by NEDC and its members has been, is being, and will continue to be irreparably harmed by the defendant's disregard for its statutory duties to complete ESA consultation and by the unlawful injuries imposed on the fish species by the operation of the dams and reservoirs in the Willamette Basin underlying the ongoing and delayed consultation.

8. The aesthetic, conservation, recreational, and scientific interests of Plaintiffs and their members in the survival and recovery of the ESA-listed fish species in the Willamette Basin, as well as in compliance with environmental law by federal agencies, have been, are being, and unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of Defendants to comply with the law.

9. Defendant United States Army Corps of Engineers ("the Corps") is an agency of the United States and a subdivision of the United States Army. The Corps is responsible for planning, designing, building and operating water resource projects, including the federally owned and operated dams within the Willamette River Basin.

10. Defendant Bureau of Reclamation is an agency of the United States and a subdivision of the Department of the Interior. The Bureau is responsible for delivery of stored water stored in the system of federally owned and operated Willamette River Basin dams and reservoirs through water service contracts.

11. Defendant National Marine Fisheries Service ("NMFS") is an agency of the United States and a subdivision of the Department of Commerce. NMFS is responsible for the conservation of living marine resources, including some of the ESA-listed fish within the Willamette River

Basin, through consultation pursuant to the ESA.

12. Defendant U.S. Fish and Wildlife Service (“FWS”) is an agency of the United States and a subdivision of the Department of the Interior. FWS is responsible for the conservation of fish and wildlife, including some of the ESA-listed fish within the Willamette River Basin, through consultation pursuant to the ESA.

THE ENDANGERED SPECIES ACT

13. The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are “threatened” or “endangered” under specified criteria, and to designate their “critical habitat.” 16 U.S.C. § 1533.

14. The ESA requires that each federal agency utilize its authorities in furtherance of the purposes of the ESA to by carrying out programs for the conservation of endangered and threatened species. 16 U.S.C. §1536(a)(1).

15. The ESA requires each federal agency to “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 habitat of such species which is determined by the Secretary ... to be critical.” 16 U.S.C. § 1536(a)(2).

16. If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service or the National Marine Fisheries Service (“the Services”), as delegates of the Secretary. 16 U.S.C. § 1536(a)(2); 50 CFR § 402.14. The Services complete consultation, usually within 90 days, and must provide the agency with a written statement explaining how the proposed action will affect the species or

its habitat, more commonly known as the Biological Opinion. 16 U.S.C. § 1536(b). If the Service concludes that the proposed action will jeopardize the continued existence of any listed species or threatened species or result in the destruction or adverse modification of the species' critical habitat, the Biological Opinion must outline any "reasonable and prudent alternatives" that the Services believe will avoid that consequence. 16 U.S.C. § 1536(b)(3)(A). Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Services must provide the agency with a written statement (known as the Incidental Take Statement) specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions ... that must be complied with by the Federal agency ... to implement [those measures]." 16 U.S.C. § 1536(b)(4).

17. Section 7 consultation, which results in the Biological Opinion, is initiated when the action agency submits a biological assessment to the consulting agencies. 50 C.F.R. § 402.14(c). Consultation shall be concluded within the 90-day period beginning on the date on which initiated or within such other period of time as is mutually agreeable to the consulting agency and the action agency. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e). "Promptly after conclusion of consultation . . . the Secretary shall provide to the Federal agency" with a Biological Opinion. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(e) (the Service shall deliver a biological opinion to the Federal agency within 45 days after concluding formal consultation). The Services interpret the ESA to require timely completion of consultation. Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and

Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998 at page 4-7 (the consultation timeframe cannot be suspended; extensions cannot be indefinite; and extensions should specify a schedule for completing consultation).

18. After the initiation of consultation under ESA § 7(a)(2) and prior to completion of consultation, ESA section 7(d) prohibits federal agencies from making any irreversible or irretrievable commitment of resources if doing so would foreclose the formulation or implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d). This prohibition is not an exception to the section 7(a)(2) requirement; it remains in effect until the procedural requirements of § 7(a)(2) are satisfied. 50 C.F.R. § 402.09. 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. 19926, 19940 (June 3, 1986) (“section 7(d) is strictly prohibitory in nature”).

19. Section 9 of the ESA prohibits any person — including a governmental entity — from “taking” any endangered species of fish or wildlife listed under the ESA. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. Id. at § 1532(19). The Services have defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 17.3; 50 C.F.R. § 222.102. Any person who knowingly “takes” an endangered or threatened species is subject to

substantial civil and criminal penalties, including imprisonment. See § 1540(a) and (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year). As part of a consultation, the Services determine whether to authorize the incidental take of listed species through the issuance of an incidental take statement. An incidental take statement insulates the federal agency from liability for a take of a threatened or endangered species, provided the agency complies with the statement's terms and conditions. 16 U.S.C. § 1536(o)(2).

FACTUAL BACKGROUND

A. Listed Willamette Basin Fish Species.

20. In 1999, the Services listed the Upper Willamette River Chinook Salmon Evolutionary Significant Unit (ESU) and Lower Columbia Chinook Salmon ESU as threatened. 64 Fed. Reg. 41835 (Aug. 2, 1999); 64 Fed. Reg. 14308 (Mar. 24, 1999). In 2000 and again in 2005, NMFS designated critical habitat for the Upper Willamette River Chinook Salmon ESU. See 65 Fed. Reg. 7764, 7767 (Feb. 16, 2000); 70 Fed. Reg. 52630 (September 2, 2005). In a June 2005 Biological Status Review, the Biological Review Team ("BRT") selected the Upper Willamette River Chinook Salmon ESU for the "likely to become endangered" category. One issue addressed by the NMFS BRT was that although the population is relatively stable, most of the population comes from hatcheries. The BRT noted that the Oregon Department of Fish and Wildlife ("ODFW") identified only one remaining naturally producing population in this ESU, the spring-run Chinook in the McKenzie River. The BRT partially attributed the declines in spring-run Chinook in the Upper Willamette Basin to "the extensive habitat blockages caused by dam construction." Good, T.P. et al., "Updated status of federally listed ESUs of West Coast

salmon and steelhead,” U.S. Dept. Commer., NOAA Tech. Memo. NOAA-NWFSC-66, 126 (2005). This conclusion is supported by the 2006 NOAA Technical Memo 73, which demonstrates that the Chinooks' historical habitat reached far past several dams that now block access. Myers, J., C. Busack, D. Rawding, A. Marshall, D. Teel, D.M. Van Doornik, and M.T. Maher, “Historical population structure of Pacific salmonids in the Willamette River and lower Columbia River basins,” U.S. Dept. Commer., NOAA Tech. Memo. NOAA-NWFSC-73, 311, 231-38 (2006). These dams include the Blue River, Cougar, Big Cliff, Detroit, Foster, Green Peter, and Dexter dams.

21. In 1999, NMFS also listed the Upper Willamette River Steelhead ESU and Lower Columbia River Steelhead ESU as threatened under the ESA. 64 Fed. Reg. 41835 (Aug. 2, 1999); see also 63 Fed. Reg. 13347 (Mar. 19, 1998)(FWS listing). NMFS designated critical habitat for the Upper Willamette River Steelhead ESU in 2000 and 2005. See 65 Fed. Reg. 7764, 7767 (Feb. 16, 2000); 70 Fed. Reg. 52630 (September 2, 2005). According to the 1996 NOAA Technical Memo 27, historical data on the Upper Willamette River Steelhead ESU is thin, but “[n]ative winter steelhead within this ESU have been declining on average since 1971, and have exhibited large fluctuations in abundance.” Busby, J.B. et al., “Status review of West Coast Steelhead from Washington, Idaho, Oregon, and California,” U.S. Dept. Commer., NOAA Tech. Memo. NOAA-NWFSC-27, 275 (2006). In a June 2005 Biological Status Review, the BRT stated that they “considered the loss of access to historical spawning grounds because of dams to be a major risk factor.” Good et al., NOAA-NWFSC-66 at 237. Furthermore, Technical Memo 73 illustrates that a significant portion of the historical range of the Upper Willamette River Steelhead ESU is inaccessible due to Corps' dams. These dams include the Big Cliff,

Detroit, Foster, and Green Peter dams. Myers et al., NOAA-NWFSC-73 at 264-68.

22. In 1998, FWS listed the Columbia River populations of bull trout as threatened under the ESA. 63 Fed. Reg. 31647 (June 10, 1998). In 2005, FWS designated critical habitat for the Willamette Basin bull trout distinct population segment (DPS). 70 Fed. Reg. 56212 (September 26, 2005). The critical habitat includes habitat affected by the Corps' dam operations at the Dexter, Lookout Point, Hills Creek, and Blue River dams. According to the FWS draft Bull Trout Recovery Plan, Willamette River Recovery Unit, Chapter 5, “[a]t the time of listing in 1998, bull trout in the upper McKenzie River above Trail Bridge Reservoir and the South Fork McKenzie River above Cougar Reservoir were considered at high risk of extinction; bull trout in the mainstem McKenzie River were considered at moderate risk of extinction, and bull trout in the Middle Fork Willamette, Santiam and Clackamas rivers were considered extinct.” Bull Trout Recovery Plan, 2, available at, <http://www.fws.gov/pacific/bulltrout/colkla/Factsheet/chapter%205.pdf>. The draft Bull Trout Recovery Plan also stated that “[t]he construction of impassable dams and culverts is considered a major factor in the decline of bull trout.” Id. at 3.

23. In 1993, FWS listed the Oregon Chub as endangered under the ESA. 58 Fed. Reg. 53800 (October 18, 1993). The only remaining established populations of the Oregon Chub “are restricted to an 18.6 mile (30 kilometer) stretch of the Middle Fork Willamette River drainage, just 2 percent of its historic home range.” Id. According to the final rule listing the species as endangered, “[d]ecline of the Oregon Chub has been correlated with the construction of dams.” Id. at 53801. Specifically, the construction of flood control projects altered the historical flooding patterns and eliminated Oregon Chub habitat. Id. at 53800. To date, FWS has not designated critical habitat for the Oregon Chub.

B. Agency Actions

24. The Corps owns and operates thirteen major dams in the Willamette Basin: Fall Creek dam on Fall Creek; Fern Ridge dam on the Long Tom River; Cottage Grove dam on the Coast Fork Willamette River; Dorena dam on the Row River; Big Cliff and Detroit dams on the North Fork Santiam River; Green Peter and Foster dams on the South Fork Santiam River; Blue River and Cougar dams on the McKenzie River; and Dexter, Hills Creek, and Lookout Point dams on the Middle Fork Willamette River. Construction of these dams occurred between 1941 and 1969 and the Corps has maintained operational control since completion. The primary uses of the dams include the storage of water for irrigation purposes and flood control, the creation of recreation areas in the form of reservoirs, and hydropower. The Corps also stores 1.64 million acre feet of water in the reservoirs on the Willamette River and its tributaries. Willamette Basin Reservoir Study, 2 (Dec. 4, 2001), available at http://www1.wrd.state.or.us/pdfs/Res_Study_Update_2001.pdf.

25. BOR markets water stored by the Willamette Basin dams. 2000 BA at 1-11. Specifically, BOR holds permits from the Oregon Water Resources Department (OWRD) to use stored water in the Willamette Basin for irrigation. In turn, BOR issues water services contracts with irrigation districts for the withdrawal of water from the Willamette Basin.

26. Dams and reservoirs directly and indirectly cause a number of detrimental effects on fish populations, particularly salmonids, in the Willamette Basin. See generally Good, T.P et al., “Updated status of federally listed ESUs of West Coast salmon and steelhead,” U.S. Dept. Commer., NOAA Tech. Memo. NOAA-NWFSC-66, 598 (2005). For instance, the dams change water flow characteristics of rivers, potentially causing times of abnormally low or high flow that

adversely affects fish habitat. Adverse effects on fish habitat may include, but are not limited to, erosion, water quality problems such as excess turbidity, food source disruption, nutrient depletion, and the destruction of river morphological features. Additionally, the dams increase water temperature in streams by releasing heated water from reservoirs where increased surface area results in solar heating. Many salmonid species are highly sensitive to changes in water temperature. McCullough, D.A. 1999. A review and synthesis of effects of alterations to the water temperature regime on freshwater life stages of salmonids, with special reference to Chinook Salmon. U.S. Environmental Protection Agency, EPA 910-R-99-010, 279 at 1. An EPA review of thermal effects on salmonids notes: “[T]here are significant impacts to survival due to temperature regime worth considering in all life stages [of salmonids].” *Id.* at 191. Dams also block passage of fish to historical spawning grounds and potentially important feeding areas. The BRT “considered the loss of access of historical spawning grounds because of dams to be a major risk factor.” Good, T.P et al., NOAA-NWFSC-66 at 237. Finally, passage through dams and reservoirs can directly cause salmonid mortality.

C. Consultation Delay

27. _____ In April 2000, the Corps submitted a final Biological Assessment (“2000 BA”) to the Services “with respect to operation of the Willamette Project.” U.S. Army Corps of Engineers, Portland District Office, Biological Assessment of the Effects of the Willamette River Basin Flood Control Project on Listed Species, 1-1 (April 2000). The Corps defined “Willamette Project” as “the system of 13 dams and reservoirs and associated bank protection projects within the Willamette River basin in northwestern Oregon.” *Id.*

28. For purposes of the 2000 BA, the Corps served as the designated lead agency because it

oversees the operation of the Willamette River Basin dams and reservoirs. Bonneville Power Administration (“BPA”) and BOR were included in the consultation through Memoranda of Agreements (“MOAs”) with the Corps. The 2000 BA lists BPA and BOR as action agencies and describes BOR and BPA agency actions affecting ESA-listed species in the Willamette Basin.

29. Ultimately, the 2000 BA concluded that the continued operation of the Willamette Basin Project is “Likely to Adversely Affect” the Upper Willamette River Chinook salmon ESU, Upper Willamette River Steelhead trout ESU, Columbia River bull trout DPS, and Oregon chub, among other species. Id. at iii.

30. According to the Willamette Basin Reservoir Study 2001 Update, the Services made preliminary determinations that continued reservoir operations would “jeopardize” continued existence of several listed species. Willamette Basin Reservoir Study at 6. Upon information and belief, in 2003, NMFS produced a draft Willamette Biological Opinion (“BiOp”). Upon information and belief, the Corps and Bonneville Power Administration asked that continued consultation be postponed pending resolution of the judicial remand concerning the Biological Opinion on the effects of the Federal Columbia River Power System. Upon information and belief, in late 2005, the Corps notified NMFS and FWS of its intent to prepare a supplemental BA based on a revised proposed action. The Corps and BOR completed a supplemental BA on or about May 31, 2007 and submitted the supplemental BA to the Services on or about June 1, 2007.

31. To date, the action agencies have not complied with their substantive and procedural duties to insure, in consultation with the Services, that the actions are not likely to cause jeopardy to the listed species or destroy or adversely modify critical habitat. The Services have not

produced a Biological Opinion.

D. National Environmental Policy Act Analysis.

32. The most recent comprehensive environmental analysis of the effects of the maintenance and operations of the dams and reservoirs in the Willamette Basin is a Final Environmental Impact Statement completed in 1980.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of § 7(a)(2) of the ESA by the Corps and BOR

33. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

34. Section 7(a)(2) of the ESA requires that each 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 habitat of such species. 16 U.S.C. § 1536(a)(2).

35. The federal agencies have a mandatory duty to consult at the earliest time possible, 50 C.F.R. § 402.14, and complete consultation pursuant to Section 7 of the ESA. 16 U.S.C. § 1536.

36. The U.S. Army Corps of Engineers (“the Corps”) and the Bureau of Reclamation (“BOR”) are federal agencies within the meaning of the ESA. 16 U.S.C. § 1536(a)(2).

37. The Corps' ongoing operation of the Willamette Basin dam and reservoir system and the Corps' mitigation measures related to the dams constitute agency actions within the meaning of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. BOR's sale and allocation of Willamette Basin water for irrigation through water services contracts constitute agency actions within the meaning of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

38. The agencies initiated consultation on the effects on listed fish species of the Corps' and BOR's actions in operating the dams and reservoirs and maintaining contracts for water services for the withdrawal of water in the Willamette Basin in April, 2000, with the submission of the 2000 Final Biological Assessment to the National Marine Fisheries Service ("NMFS") and the U.S. Fish & Wildlife Service ("FWS").

39. More than seven years have passed since the agencies initiated consultation, yet the agencies have not completed consultation, nor have the Services issued a Biological Opinion.

40. During those seven years, the Corps has continued to operate the thirteen major dams in the Willamette Basin for purposes of water storage, irrigation, flood control, recreation and hydropower. During those seven years the BOR has issued and maintained water services contracts with irrigation districts for the withdrawal of water from the Willamette Basin.

41. As a result, the Corps and BOR have violated and continue to violate the procedural and substantive provisions of Section 7(a)(2) of the ESA by failing to complete consultation and insure through consultation with the Services that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish, or result in destruction or adverse modification of these species' critical habitat. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A). The Corps and BOR actions in the operation of the dams and reservoirs and water service contracts are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the ESA and without observance of procedure required by the ESA. 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Violation of § 7(b) of the ESA by NMFS and FWS

42. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.
43. Section 7(a)(2) of the ESA requires that each 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 habitat of such species. 16 U.S.C. § 1536(a)(2).
44. The federal agencies have a mandatory duty to consult at the earliest time possible, 50 C.F.R. § 402.14, and complete consultation pursuant to Section 7 of the ESA in a timely fashion. 16 U.S.C. § 1536.
45. The ESA imposes a 90-day period for completion of most consultations. 16 U.S.C. § 1536(b)(1).
46. NMFS and FWS have a mandatory duty to issue a Biological Opinion promptly after completion of consultation. 16 U.S.C. § 1536(b)(3). A Biological Opinion is an agency action within the meaning of the APA. 5 U.S.C. § 551(13).
47. NMFS and FWS are federal agencies within the meaning of the ESA. 16 U.S.C. § 1536(a)(2), and the Administrative Procedure Act, 5 U.S.C. §§ 551(1), 701(b)(1).
48. The Corps' ongoing operation of the Willamette Basin dam and reservoir system, and the Corps' mitigation measures related to the dams, constitute agency actions within the meaning of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. BOR's sale and allocation of Willamette Basin water for irrigation through water services contracts constitute agency actions within the meaning of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

49. The agencies initiated consultation on the effects on listed fish species of the Corps' and BOR's actions in operating the dams and reservoirs and maintaining contracts for water services for the withdrawal of water in the Willamette Basin in April, 2000, with the submission of the 2000 Final Biological Assessment to the National Marine Fisheries Service and the U.S. Fish & Wildlife Service.

50. More than seven years have passed since the agencies initiated consultation, yet the agencies have not completed consultation, nor have the Services issued a Biological Opinion.

51. During those seven years, the Corps has continued to operate the thirteen major dams in the Willamette Basin for purposes of water storage, irrigation, flood control, recreation and hydropower. During those seven years the BOR has issued and maintained water services contracts with irrigation districts for the withdrawal of water from the Willamette Basin.

52. As a result, NMFS and FWS have violated and continue to violate Section 7(b) of the ESA by failing to timely complete consultation and issue a Biological Opinion and insure through consultation that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish, or result in destruction or adverse modification of these species' critical habitat. 16 U.S.C. §§ 1536(b), 1540(g)(1)(A). The failure of NMFS and FWS to complete consultation, issue a Biological Opinion, and insure through consultation with the Services that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish or result in destruction or adverse modification of these species' critical habitat constitute agency actions unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

THIRD CLAIM FOR RELIEF
Violation of the APA by NMFS and FWS

53. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

54. The Corps and BOR initiated consultation with NMFS and FWS in April, 2000.

Despite the 90-day timeframe for completion of consultation provided in ESA § 7(b) for most consultations, the Services still have not completed consultation. The Corps and the BOR continue to take actions in the operation of the dams and reservoirs and water services contracts in the Willamette Basin. The agencies have never completed the consultation to determine the effects of those actions.

55. The APA requires that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Likewise, the APA also provides that reviewing courts “shall - (1) compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706.

56. The Services have unlawfully withheld or unreasonably delayed completion of consultation with the Corps and BOR in violation of the APA. 5 U.S.C §§ 555(b) and 706(1).

FOURTH CLAIM FOR RELIEF
Violation of § 7(d) the ESA by the Corps and BOR

57. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

58. Section 7(d) of the ESA prohibits federal agencies, after the initiation of consultation under ESA Section 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). This prohibition is not an exception to the section 7(a)(2) requirement; it

remains in effect until the procedural requirements of Section 7(a)(2) are satisfied. 50 C.F.R. § 402.09.

59. The agencies initiated consultation on the effects on listed fish species of the Corps' and BOR's actions in operating the dams and reservoirs and maintaining contracts for water services for the withdrawal of water in the Willamette Basin in April, 2000, with the submission of the Final Biological Assessment to the Services.

60. More than seven years have passed since the agencies initiated consultation, yet the agencies have not completed consultation, nor has NMFS or FWS issued a Biological Opinion.

61. During those seven years, the Corps has continued to operate the thirteen major dams in the Willamette Basin for purposes of water storage, irrigation, flood control, recreation and hydropower. The BOR has maintained water services contracts with irrigation districts for the withdrawal of water from the Willamette Basin.

62. Dams and reservoirs directly and indirectly cause a number of detrimental effects on fish populations, particularly salmonids, in the Willamette Basin, including, but not limited to, change in water flow characteristics of rivers potentially causing times of abnormally low or high flow that adversely affect fish habitat, erosion, water quality problems such as excess turbidity, food source disruption, nutrient depletion, destruction of river morphological features, increased water temperatures, and blockage of passage of fish to historical spawning grounds and potentially important feeding areas.

63. The Corps and BOR are violating section 7(d) by taking actions in the operation of the dams and reservoirs and water service contracts that could potentially foreclose implementation of measures required to avoid jeopardy, including but not limited to producing power with water

otherwise necessary to conserve fish, delivering water for irrigation, foregoing river flow levels necessary to avoid salmon and steelhead impairment, producing non-wild fish, and entering into agreements that could require such actions in the future. Moreover, these activities have been ongoing for over seven years, thereby affecting imperiled species with short life cycles. These and other actions that make irreversible or irretrievable commitments of resources are contrary to law.

64. The Corps and BOR are violating section 7(d) of the ESA by taking actions in the operation of the dams and reservoirs and water service contracts that constitute irreversible or irretrievable commitment of resources that would 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, and entering into agreements that could require such actions in the future. Moreover, these activities have been ongoing for over seven years, thereby affecting imperiled species with short life cycles. As a result, the Corps and BOR have made and continue to make irreversible or irretrievable commitments of resources in violation of the ESA. 16 U.S.C. § 1536(d). The Corps and BOR actions in the operation of the dams and reservoirs and water service contracts are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the ESA. 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF

Violation of § 9 of the ESA by the Corps and BOR

Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

65. Section 9 of the ESA prohibits any person—including a governmental entity— from

“taking” any endangered species of fish or wildlife listed under the ESA. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. Id. at § 1532(19). The Services have defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

66. “Take” occurs in a number of ways as a result of the operation of the Willamette Basin dams and reservoirs and water withdrawals pursuant to BOR water services contracts, including but not limited to mortality and injury to adult 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, impaired water quality, and loss of water necessary for all life cycles of the fish.

67. The Corps and BOR are violating section 9 of the ESA by taking actions in the operation of the dams and reservoirs that result in the take of listed fish species. 16 U.S.C. § 1538(a)(1)(B). The Corps and BOR actions in the operation of the dams and reservoirs and water service contracts are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the ESA. 5 U.S.C. § 706(2).

SIXTH CLAIM FOR RELIEF

Violation of § 7(a)(1) of the ESA by the Corps and BOR

68. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

69. Federal agencies must “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).

70. As defined in the ESA, the term “conservation” means to use all necessary methods and procedures to bring an endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary. 16 U.S.C. § 1532(3).

71. The operation of the dams and reservoir system and issuance and maintenance of water services contracts in the Willamette Basin without completion of consultation exemplifies the failure to use all necessary methods and procedures to bring the listed salmon to a healthy level.

72. The Corps and BOR have failed to carry out programs to conserve endangered species in violation of section 7(a)(1). 16 U.S.C. § 1536(a)(1). The Corps and BOR actions in the operation of the dams and reservoirs and water service contracts are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the ESA. 5 U.S.C. § 706(2).

SEVENTH CLAIM FOR RELIEF
Violation of NEPA by the Corps and BOR

73. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

74. The National Environmental Policy Act (“NEPA”) regulations require an agency to prepare a supplemental NEPA analysis when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or...[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts.” 40 C.F.R. § 1502.9(c)(1).

75. Events and information including, but not limited to, the listing of several fish stocks pursuant to the ESA and changes in the operations and maintenance of the dams and water service contracts within the Willamette River Basin, constitute significant new circumstances or

information relevant to environmental concerns regarding the proposed action.

76. The Corps' and BOR's failure to prepare a new or supplemental environmental analysis for the maintenance and operation of the system of federal dams and reservoirs in the Willamette River Basin is arbitrary, capricious, and not in accordance with NEPA, or, in the alternative agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(2)(A), 706(1).

PRAYER FOR RELIEF

A. Declare that the U.S. Army Corps of Engineers and the Bureau of Reclamation have violated and continue to violate the procedural and substantive provisions of Section 7(a)(2) of the ESA by failing to complete consultation and insure through consultation with the Services that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish, or result in destruction or adverse modification of these species' critical habitat. 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A);

B. Declare that the National Marine Fisheries Service and the U.S. Fish & Wildlife Service have violated and continue to violate Section 7(b) of the ESA and the APA by failing to complete consultation and issue a Biological Opinion and insure through consultation that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish, or result in destruction or adverse modification of these species' critical habitat, 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A), and that the failure of NMFS and FWS to complete consultation, issue a Biological Opinion, and insure through consultation with the Services that the federal agency actions in the Willamette Basin are not likely to jeopardize the continued existence of ESA-listed fish or result in destruction or adverse modification of these species' critical habitat constitute agency actions unlawfully withheld or unreasonably delayed, 5 U.S.C. §

706(1);

C. Declare that the U.S. Army Corps of Engineers and the Bureau of Reclamation are violating section 7(d) of the ESA by taking actions in the operation of the dams and reservoirs that constitute irreversible or irretrievable commitment of resources that would foreclose implementation of measures required to avoid jeopardy;

D. Declare that the U.S. Army Corps of Engineers and the Bureau of Reclamation are violating section 9 of the ESA by taking actions in the operation of the dams and reservoirs that result in the take of listed fish species;

E. Declare that the U.S. Army Corps of Engineers and the Bureau of Reclamation are violating section 7(a)(1) of the ESA by taking actions in the operation of the dams and reservoirs that do not conserve listed fish species;

F. Declare that the U.S. Army Corps of Engineers and the Bureau of Reclamation are violating the NEPA and its regulations by failing to prepare new or supplemental environmental analysis for the maintenance and operation of the system of federal dams in the Willamette River Basin;

G. Enjoin the U.S. Army Corps of Engineers and the Bureau of Reclamation to comply with Section 7 of the ESA by completing consultation by a date certain;

H. Compel the National Marine Fisheries Service and the U.S. Fish & Wildlife Service to complete consultation and issue Biological Opinions by a date certain;

I. Enjoin the U.S. Army Corps of Engineers and the Bureau of Reclamation from violating Section 7(d) of the ESA;

J. Enjoin the U.S. Army Corps of Engineers and the Bureau of Reclamation from

violating Section 9 of the ESA;

K. Enjoin and/or compel the U.S. Army Corps of Engineers and the Bureau of Reclamation to prepare new or supplemental environmental analysis for the maintenance and operation of the system of federal dams in the Willamette River Basin;

L. Award Plaintiffs their costs of litigation, including reasonable attorneys' and experts fees, as provided by the ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

M. Award such other relief as this Court deems just and proper.

Respectfully submitted this 20th day of September, 2007,

/s/ Stephanie M. Parent
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CORPORATE DISCLOSURE STATEMENT

Pursuant to LR 83.16, Plaintiffs disclose that they do not have parent corporations, nor do the Plaintiff organizations have stock.

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