No. 04-

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION, WASHINGTON WILDLIFE FEDERATION, SIERRA CLUB, TROUT UNLIMITED, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, IDAHO RIVERS UNITED, IDAHO STEELHEAD AND SALMON UNITED, NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, FRIENDS OF THE EARTH, SALMON FOR ALL, and COLUMBIA RIVERKEEPER,

Plaintiffs-Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, and UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants-Appellants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC POWER COUNCIL, WASHINGTON STATE FARM BUREAU FEDERATION, FRANKLIN COUNTY FARM BUREAU FEDERATION, GRANT COUNTY FARM BUREAU FEDERATION, and INLAND PORTS AND NAVIGATION GROUP,

Defendants-Intervenors.

On Appeal from the United States District Court for the District of Oregon
Judge James A. Redden, CV 01-640-RE

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 OF THE FEDERAL APPELLANTS FOR A STAY PENDING APPEAL

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(2) Facts Showing Existence and Nature of Emergency

On July 28, 2004, the district court entered a preliminary injunction preventing the United States Corps of Engineers (Corps) from implementing a spill decision made in coordination with the Bonneville Power Administration (BPA) that provides, in part, for summer spill to be curtailed at the Bonneville and Dalles dams from August 1, 2004 through August 31, 2004, and at the Ice Harbor and John Day dams from August 26, 2004 through August 31, 2004. Opinion and Order (Attachment A); U.S. Army Corps of Engineers Statement of Decision (SOD), July 6, 2004 (Attachment B) at 3. The spill decision offset the August curtailment with increased flows in July at a cost of $4 million to BPA. *Id.* Second Dec. of Stephen J. Wright, Administrator and Chief Executive Officer, BPA at ¶ 5 (Attachment D).[1/] An emergency stay of the injunction is critical because every day that it is in effect, BPA is needlessly prevented from generating additional electric power that would save ratepayers $1 million in electricity costs

[1/] Attached in support of this motion are, in addition to documents submitted to the district court, three new declarations: (1) a July 30, 2004 declaration of Stephen J. Wright, Administrator and Chief Executive Officer, BPA; (2) an August 2, 2004 declaration of William P. Connor, a fishery biologist for the United States Fish and Wildlife Service; and (3) a July 30, 2004 declaration of Gregory K. Delwiche, Vice President, Environment, Fish and Wildlife, BPA. Declarations of each of these persons were filed in the district court; the new ones provide updated information.

that day alone. *Id*. at ¶ 7. In the last six days of August, the spill curtailment would save ratepayers $1.5 million *per day*. *Id*. Furthermore, if BPA is unable to generate the additional power, this may affect FY 2005 rates. *Id*. at ¶ 8. Once water is passed through a dam as spill instead of directed to turbines for the generation of power, it cannot be recovered, and consequently, the savings cannot be regained. *Id*. at ¶ 9. Accordingly, the Appellants ask the Court to grant a stay as soon as possible, but no later than August 9, 2004. Pursuant to Federal Rule of Appellate Procedure 8(a), the Appellants moved for a stay in the district court. The district court denied this motion. Clerk's Record (CR) 503.

(3) Notification and Service of Motion on Counsel

On August 3, 2004, the United States filed the Notice of Appeal in the district court. On August 4, 2004, the United States filed this Rule 27-3 and served the parties by overnight Federal Express and electronic mail, and the amici by regular mail and electronic mail. Counsel for all parties were notified of the filing of this motion on August 4, 2003 by electronic mail, and counsel for the Plaintiffs-Appellees were also notified by telephone.

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EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

FOR STAY PENDING APPEAL

Pursuant to Fed.R.App.P. 8(a) and Circuit Rule 27-3, appellants, the United States Army Corps of Engineers (Corps) and the National Marine Fisheries Service (NMFS),[1/] respectfully move this Court to stay the preliminary injunction entered by the district court on July 28, 2004 in *National Wildlife Federation et al. v. National Marine Fisheries Service et al.*, CV 01-640-RE, pending appeal. The injunction prevents the Corps from implementing a spill decision that would confer substantial benefits on ratepayers in the Northwest region and, after extensive analysis, was determined by NMFS to be equally if not more protective of the threatened Snake River Fall (SRF) chinook salmon than the spill operations presumed under the Reasonable and Prudent Alternative (RPA) contained in the 2000 Biological Opinion (2000 BiOp) for the Federal Columbia River Power System (FCRPS).

The district court denied the Appellants' oral motion for a stay on July 28, 2004. Clerk's Record (CR) 503. A Notice of Appeal was filed on August 3,

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[2/] NMFS is occasionally also referred to as "NOAA Fisheries."

2004. For the reasons set forth below, the Appellants respectfully request that this Court stay the district court's preliminary injunction pending appeal on or before August 9, 2004. All grounds advanced in support of this motion were presented to the district court.

INTRODUCTION

The plaintiffs commenced this action to challenge actions of the Corps and NMFS regarding a Statement of Decision (SOD) issued by the Corps on July 6, 2004. SOD (Attachment B). In this SOD, the Corps announced that it would modify, for this year only, the "summer spill" component of the RPA contained in the 2000 BiOp. SOD at 3. After extensive public comment, regional outreach and environmental analysis, the Corps, in coordination with BPA, decided to curtail summer spill one month early at the Dalles and Bonneville dams, and six days early at the Ice Harbor and John Day dams. *Id*. BPA, in turn, committed to offset the August curtailment by securing 100,000 acre-feet (100 kaf) of water from the Idaho Power Company's Brownlee Reservoir to augment river flows in July. *Id*. After NMFS conducted its own review of the proposal as required by the RPA, NMFS issued written findings that the proposal would provide the *same or greater biological benefits* to SRF chinook salmon than the presumed operations under the RPA. NOAA Fisheries' Findings Report of July 1, 2004 (Attachment C) at 6, 9.

Notably, NMFS determined that the greatest biological benefits would be conferred if this year's migration occurred early relative to previous years, Appendix 1 to Findings Report, page 10, Table 5, and data presented to the district court indicated that this year's migration is occurring early. First Dec. of William P. Connor, Fishery Biologist, U.S. Fish and Wildlife Service, July 20, 2004, at ¶ 12 (Attachment E) (estimating that passage of wild SRF chinook subyearlings at the Lower Granite Dam was 72% complete as of July 2, 2004). More recent forecast data indicates that the passage of wild SRF chinook subyearlings was near 100% complete at the Lower Granite Dam as of July 26, 2004 and decreasing on a daily basis at the Little Goose and Lower Monumental dams. Second Connor Dec., August 2, 2004, at ¶ 8 (Attachment F).[1/]

[3/] The data presented in the Second Conner Declaration confirms that the SRF chinook migration is occurring early this year. Thus, the impacts from curtailing spill are at or near the low end of the range predicted by NOAA Fisheries. For clarity, we do not aver that all SRF chinook juveniles have completed their migration. As the Second Connor Declaration explains, juveniles are still making

their way downstream, but nearly all that have migrated have now passed Lower Granite Dam, and appear to have largely passed Little Goose and Lower Monumental Dams on the Lower Snake River. Second Connor Dec. at ¶ 8 and Figure 1. A subset of the SRF chinook ESU that originates from the Clearwater River are not included in this data, because they tend to migrate later (September or the following April). *Id*. at ¶ 8.

The decision to curtail spill was made after several proposals (each more conservative in favor of fish than the previous one), the review of more than 1000 comments, and thorough environmental analysis of the impacts of the proposal on fish, including the threatened SRF chinook. The agencies' analysis predicted that, even assuming the worst case scenario (which did not materialize), a mere 930, or 0.25% of the juveniles expected to arrive below the Bonneville Dam this year, would be impacted by the spill curtailment, and that these impacts would be fully mitigated by the July flow augmentation, which has been implemented at as cost of $4 million to BPA. SOD at 4, 5; Findings Report at Appendix 1, page 10 (Table 5), 9; Second Wright Dec. at ¶ 5. Under the early migration scenario that *did* materialize, NMFS's analysis predicted that the August spill curtailment would result in a loss of between 110 and 270 juveniles, and that the July augmentation would result in a gain of between 710 and 740 juveniles, a net benefit. Table 5; *see also* First Connor Dec. at ¶ 12. Indeed, a net benefit was predicted under *every scenario considered*, even the worst case scenario. *See* Findings Report at 6 and Appendix 1. Despite this considered judgment of the expert agencies, the district court enjoined the Corps from implementing the spill decision.

BACKGROUND

A. Statutory Background

Section 7 of the ESA requires each federal agency to ensure that any action authorized, funded, or carried out by that 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 designated critical habitat. 16 U.S.C. § 1536(a)(2). To achieve the objective of Section 7(a)(2), the agency proposing the action (the action agency) is required to consult with either the Fish and Wildlife Service or, in this case, NMFS, whenever a federal action "may affect" a threatened or endangered species within the jurisdiction of the agency. 50 C.F.R. § 402.14(a).

Formal consultation under Section 7 typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and concludes with the issuance of a biological opinion (BiOp) by the consulting agency. 50 C.F.R. § 402.14(l)(1). The BiOp assesses the likelihood of jeopardy to the species and whether the proposed action will result in destruction or modification of habitat that has been designated as critical. *See* C.F.R. § 402.14(g). If the consulting agency determines that the proposed action, either as originally proposed or as modified by a "reasonable and prudent alternative" (RPA), is not likely to jeopardize the continued existence of the

species but may result in the incidental "take" of individual members, the consulting agency provides an "incidental take statement" (ITS) along with the biological opinion. 16 U.S.C. § 1556(b)(4)(i)-(ii). While compliance with the ITS is voluntary, "any taking that is in compliance with the terms and conditions specified in a written [incidental take] statement . . . shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. §1536(o)(2). "The agency is not required to adopt the alternatives suggested in the biological opinion; however, '[i]f [the Secretary] deviates from them, he does so subject to the risk that he has not satisfied the standard of Section 7(a)(2).'" *Tribal Village of Akutan v. Hodel*, 859 F.2d 651 (9th Cir. 1988), *superseded on other grounds*, 859 F.2d 662 (9th Cir. 1988) (internal citation omitted).

B. Factual Background

1. The 2000 BiOp

The 2000 BiOp is the culmination of a Section 7 consultation on the effects of the continued operation and maintenance of the FCRPS, a system of fourteen sets of dams, powerhouses and reservoirs, on twelve listed species of Columbia River Basin salmonids.[1/] The RPA provides for

[4/] Limited excerpts of the 2000 BiOp are attached as Attachment G. It is also online at http://www.nwr.noaa.gov/1hydrop/hydroweb/docs/Final/2000Biop.html.

the Action Agencies (the Corps, BPA and the Bureau of Reclamation) to attain, by 2010, specific performance standards, including adult and juvenile survival levels, that are "derived from the biological requirements of the listed populations as a whole." 2000 BiOp at 9-1, 9-23 to 9-25.

A key aspect of the RPA is its adaptive management element, which means that it "allows for revision of the specific actions throughout its term, as long as the Action Agencies make steady progress toward meeting the performance standards and remain on track for full attainment of the hydro standards by 2010." 2000 BiOp at 9-10. RPA Action 1 provides for NMFS to annually review 1-and 5-year implementation plans proposed by the Action Agencies to determine whether they would, if implemented, make satisfactory progress. The BiOp anticipates that further research and analysis will refine and improve the RPA, subject to NMFS's approval. "The RPA anticipates that these research and planning actions, together with future decisions made through the 1- and 5-year planning process, will amend the RPA measures. [NMFS] will explicitly define and approve all such amendments in its written findings." 2000 BiOp at 9-26.

RPA Action 54 sets forth the summer spill component of the RPA; the annual spill program is to be based on the best available monitoring and

evaluation data concerning project passage, spill, and system survival research. 2000 BiOp at 9-88 to 9-92. It also establishes "planning dates," that run through August 31 for each of the four dams, but makes it explicit that "specific annual spill levels and dates at each project are to be determined in consultation with the TMT and NMFS. *Id*. at 9-88. Finally, it contains a table of "initial estimates of project spill levels" which must be viewed as "approximate" because of the range of variables that can influence gas levels. *Id*.

2. The 2004 Spill Decision

The final spill decision was made after the Corps and BPA considered two less conservative spill modifications. The now-completed Brownlee offset was first proposed in the second iteration, and is consistent with comments received from the Washington Department of Fish and Wildlife, the Columbia River Inter-Tribal Fish Commission, and the joint technical staff of State, Federal and Tribal fishery agencies, all of which indicated that increased flows in the lower Snake River could provide real benefits to fish. Amended Proposal for FCRPS Summer Juvenile Bypass Operations, 2004 Corps A.R. 1184 at 5.

3. NMFS's Analysis and Findings Report

On July 1, 2004, prior to the issuance of the SOD, NMFS issued its written findings, which state:

> NOAA Fisheries finds that the flow and spill modifications contained in the Amended 2004 [implementation plan] *provide the same or greater biological benefits to Snake River fall chinook salmon as the Opinion's RPA*. Hence, the Amended 2004 [implementation plan], including the spill and flow modifications, is consistent with the determinations, assumptions, and analyses of the Opinion's RPA when NOAA concluded that it would satisfy the ESA Section 7(a)(2) standards.

Findings Report at 4 (emphasis added). NMFS also recognized its obligation to use the best available science in reaching this conclusion and complied. *Id*. at 3. Specifically, using the SIMPAS model, NMFS predicted impacts in six different scenarios depending on the timing of this year's migration (early, middle or late) and the level of the impacts (low or high). This analysis revealed that in the worst case scenario, which assumed a late migration year that *did not* materialize, 930 SRF juveniles, or a mere 0.25% of the number expected to arrive below the Bonneville Dam this year, would be impacted. SOD at 4, 5; Findings Report, Appendix 1, page 10 (Table 5). The negligible level of expected impacts is due, in part, to the fact that under the RPA, 90% of the fish are transported by barge. *See* Declaration of George W. Anderson at ¶¶ 48-49 (Attachment H).

Furthermore, using the peer-reviewed Connor regression model, NMFS predicted that the:

> 100 kaf of additional flow augmentation volume drafted from IPC's Brownlee Reservoir during the month of July would benefit listed juvenile [SRF] chinook salmon that are present in the Lower Granite Reservoir in July to a level sufficient to offset the adverse effect of the reduced spill operation at four FCRPS mainstem dams during August.

Findings Report at 7.

C. Procedural Background

The plaintiffs moved to supplement their complaint on July 9, 2004. Clerk's Record (CR) 500. On July 16, 2004, the district court granted this motion and the plaintiffs moved for a preliminary injunction preventing the Corps from "eliminating" summer spill and requiring NMFS to withdraw its July 1, 2004 Findings Report. CR 503. The district court held a hearing on July 28, 2004, after which it enjoined the Corps from curtailing August spill but did not require NMFS to withdraw its Findings Report. CR 503. Pursuant to Federal Rule of Appellate Procedure 8(a), the Appellants moved for a stay at this hearing, which the district court denied. *Id*. The court issued a written opinion and order on July 29, 2004. CR 504.

In its opinion, the court first rejected the government's argument that

it lacked jurisdiction because the plaintiffs failed to comply with the ESA's 60-day notice requirement, stating that "[i]n general, the court does not subscribe to this formalistic argument for why plaintiffs should not be able to bring their claim under the ESA." Opinion at 5. The court determined in the alternative that even if the ESA did not provide a basis for jurisdiction, the Administrative Procedure Act (APA) did, and that both actions constituted final agency action. *Id*.

On the merits, the court determined that much of the Brownlee Reservoir "offset" was not in fact "new" water because, in its view, the 2000 BiOp contemplates that significant releases would continue and be secured by the Action Agencies. The court was also critical of discrepancies between assumptions used for purposes of NMFS's analysis and actual conditions, including the timing and the rate of flow. For these reasons, the court concluded that the plaintiffs had "prevailed on the merits." *Id*. at 7. On the issue of harm, the court reasoned that the plaintiffs had met their burden for two reasons: (1) the agencies' own analysis recognized that a curtailment of spill "will kill many listed fish;" and (2) the 2000 BiOp concludes that the salmon would be jeopardized if the RPA is not implemented, the spill proposal, in the court's view, is not consistent with

the RPA (though NMFS found it was), and therefore the "prospect of jeopardy would again arise" if the decision were to be implemented. *Id*. at 8.

STANDARD FOR GRANTING A STAY

The Ninth Circuit evaluates requests for injunctions pending appeal under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). "[A] party must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citation omitted). These interrelated tests are applied on a sliding scale, in which the required probability of success on the merits decreases as the degree of harm increases. *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 459 (9th Cir. 1994). Additionally, if the public interest is involved, a court must determine whether the balance of public interests supports the issuance or denial of an injunction. *Caribbean Marine Services v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

In ESA cases, while Congress has altered the traditional balance-of-harms calculus, ensuring that species be afforded "the highest of priorities," *TVA v. Hill*, 437 U.S. 153, 193-95 (1978), this does not mean that injunctive relief may be granted without a demonstration that there is a likelihood of future harm to the species. *National Wildlfe Fed'n v. Burlington Northern RR*, 23 F.3d 1508, 1511 (9th Cir. 1994). Courts are not "mechanically obligated to grant an injunction for every violation of the law." *Id*. at 1512. To the contrary, the movant must show that there is a reasonable likelihood of future harm to the species. *Id*. at 1511.

In reviewing the district court's issuance of a preliminary injunction, "an appellate court must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard." *Caribbean Marine Services*, 844 F.2d. at 673. "An injunction may also be set aside if the district court misapprehended the law in its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact." *Id. See also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING

THE PRELIMINARY INJUNCTION

A. The District Court Erred by Failing to Afford Deference to NMFS's Interpretation of the 2000 BiOp and Evaluation of the Technical Data.

The district court based its conclusion that the spill decision was arbitrary and capricious, and therefore that the plaintiffs "prevailed on the merits," primarily on two significant erroneous factual conclusions regarding scientific analysis used by the agencies to evaluate the impacts and benefits of the spill decision. First, the district court construed the 2000 BiOp to be premised on the assumption that significant water releases from Brownlee Reservoir would continue and be secured by the action agencies, and therefore determined that a significant portion of the 100 kaf Brownlee release was not in fact "new" water and could not be considered an "offset." Opinion at 6. Second, the district court faulted NMFS' scientific analysis as unreasonably and incorrectly assuming that the Brownlee water would

be released at a uniform rate over a 21-day period. *Id*. at 7.[1/]

The district court abused its discretion in basing its decision on these conclusions. NMFS is clearly entitled to deference in its interpretation of its own biological opinion. *See* *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1154 (9th Cir. 1998) (deferring to Forest Service's interpretation of the requirements of its land management plan). Moreover, the court's factual conclusions are clearly erroneous and easily refuted by the record. RPA Action 32 provides for the Action Agencies to acquire water from the Hells Canyon Complex

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[5/] In fact, the Brownlee Reservoir was drafted over the entire 21-day period. *See* Second Dec. of Gregory K. Delwiche, July 30, 2004 (Attachment I), at ¶¶ 4-5. The court made other factual errors in addition to these two. For instance, the court faulted NMFS for failing to take into account the later migrating Clearwater portion of the ESU. Opinion at 7. The Findings Report makes it explicit, however that the Agency "separated the Clearwater Basin Production (29%) from the remaining Snake River and other tributaries' production (71%) because Clearwater River fish tend to migrate later in the summer, on average, than Snake River Fish." Appendix 1 to Findings Report at 8. The court also erroneously found fault in the Agency's use of 2003 juvenile population and Lower Granite Pool Survival estimates. Second Delwiche Dec. at ¶ 8.

(which includes the Brownlee Reservoir) *only after* the completion of an ESA Section 7 consultation with the Federal Energy Regulatory Commission and IPC, which has not occurred. *See* Findings Report at 4-5; 2000 BiOp at 9-70 to 9-71. NMFS's interpretation is further supported by the fact that the 2000 BiOp's jeopardy analysis was premised on a hydro-regulation study that assumed *no* releases from Brownlee reservoir. *See* 2000 BiOp at 9-188 through 9-192 (analysis of RPA on water regulation and impoundments); A.R. C-12 at 661 (assuming that Brownlee remains full through the month of July).

NMFS is also clearly entitled to deference in its technical judgment as to the impacts and benefits of the spill decision on listed species, as this is an area within its expertise. Deference is particularly important "when the agency is 'making predictions, within its area of special expertise, at the frontiers of science.'" *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (internal citation omitted). "Therefore, the reviewing court may set aside only those conclusions that do not have a basis in fact, not those with which it disagrees." *Id*. In particular, courts have repeatedly recognized that the deference to the agency mandated under the APA extends especially to the choice of scientific models. *See, e.g., Davis v. EPA*, 348 F.3d 772,

781 (9th Cir. 2003) (noting in the Clean Air Act context that acceptance or rejection of a particular scientific model and the results obtained from it are interpretations of scientific evidence to which the court must reasonably defer); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C.Cir. 1998). The fact that a particular model necessarily makes assumptions that are not perfectly consistent with natural conditions or reality does not render the reliance on the model arbitrary. *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir.1997). Rather, an agency's reliance on a model will be upheld unless there is "'simply no rational relationship' between the model chosen and the situation to which it is applied." *Id*. (citations omitted). Here, NMFS determined that the SIMPAS and Connor regression models were the best available analytical tools, and that the differences between the assumptions made for its purposes and actual conditions were not so serious as to impugn the reliability of the conclusions it yielded. Declaration of Brian J. Brown, Assistant Regional Administrator for the Hydropower Division of the Northwest Region, National Marine Fisheries Service, July 21, 2004, at ¶¶ 11-13 (Attachment J).[1/] This is precisely the sort of technical judgment to which judicial

[6/] The attachments to this motion have not been included.

deference must be afforded.

B. The District Court Abused its Discretion by Ignoring Relevant Evidence Concerning this Year's Migration

The district court also abused its discretion by failing to consider evidence that this year's migration is occurring early relative to other years. First Connor Dec. at ¶ 12 (estimating that the passage of wild SRF chinook subyearlings at the Lower Granite Dam was 72% complete as of July 2, 2004). This evidence is important because NMFS's analysis reveals that the August spill curtailment would have the least impacts (a loss of between 110 and 270 juveniles) and the July augmentation would have the greatest benefits (a gain of between 710 and 740 juveniles) in an early migration year. Appendix 1 to Findings Report, page 10, Table 5; *see also* Brown Declaration at ¶ 5; Connor Declaration at ¶ 12. More recent forecast data indicates that passage of wild SRF chinook[1/] at the Lower Granite Dam was near 100% complete as of July 26, 2004 and is decreasing on a daily basis at the Little Goose and Lower Monumental dams. Second Connor Dec. at ¶¶ 5-8.

C. The District Court Abused its Discretion by Entering a Preliminary Injunction When the Plaintiffs Failed to Show a Reasonable Likelihood of Future Harm to the SRF chinook.

[7/] *See supra* page 2 at fn 3.

In *National Wildlife Federation v. Burlington Northern R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994), this Court explained that *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) "do[es] not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA." Courts are not "mechanically obligated to grant an injunction for every violation of the law." *Id*. at 1512. To the contrary, the movant must show that there is a reasonable likelihood of future harm to the species. *Id*. at 1511. "[W]hat we require is a definitive threat of future harm to the protected species, not mere speculation." *Id*. at 1512.

The district court abused its discretion by failing to apply this standard. The court concluded that the requisite showing of harm had been made for two reasons: (1) the agencies' own analysis revealed that the spill decision "will kill many listed juvenile fish" and, in the court's opinion, provided no offset; and (2) in the court's opinion, the spill decision was not within the parameters of the 2000 BiOp's RPA. "Given that the government has failed to demonstrate that the proposed modifications to summer spill operations are consistent with the RPA, the prospect of jeopardy would again arise if the proposed curtailment of spill were to occur." Opinion at 8.

The court's statements are based on inaccurate assumptions and do not

support its conclusion that the requisite showing of harm had been made. The agencies' analysis reveals that even assuming the worst-case scenario, which did not materialize, a mere 0.25% of the juveniles expected to arrive below the Bonneville dam this summer would be impacted if the Brownlee offset did not apply. Under any standard, this level of impact does not demonstrate a definitive threat of harm to the *species*. *See Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) ("In the absence of a more concrete showing of probable deaths during the interim period *and of how these deaths may impact the species*, the district court's conclusion that Water Keeper has failed to show potential for irreparable harm was not an abuse of discretion.") (emphasis added).

With respect to the second statement, the court's conclusory logic on this point would mean that every demonstration of an agency's failure to comply with an RPA would give rise to an entitlement to preliminary injunctive relief. Under the ESA, however, compliance with an RPA is not mandatory, much less a *de facto* harm to the species warranting injunctive relief. Action agencies are free to deviate from RPAs if they so choose. "The agency is not required to adopt the alternatives suggested in the biological opinion; however, '[i]f [the Secretary] deviates from them, he does so subject to the risk that he has not satisfied the

standard of Section 7(a)(2).'" *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 659 (9th Cir. 1988), *superseded on other grounds*, 859 F.2d 662 (9th Cir. 1988) (internal citation omitted). Here, the court impermissibly based its finding on harm on mere speculation.

D. The District Court Abused its Discretion in Failing to Accord Proper Weight to the Public Interest.

The district court also abused its discretion in failing to accord proper weight to the public interest which, when implicated, is an "element that deserves separate attention." *Sammartano v. First Judicial District*, 303 F.3d 959, 974 (9th Cir. 2002). "Our cases have emphasized, however, that when the public interest is involved, it must be a necessary factor in the district court's consideration of whether to grant preliminary injunctive relief." *Caribbean Marine Services v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). In this case, where the agencies have determined after extensive analysis that they can provide benefits to the fish resource that are equal to or greater than those that would have been provided under the RPA *and* increase power generation capability, the district court should have determined that the public interest weighs against a preliminary injunction. Presently, electricity rates are 46% higher than they were three years ago, and the Spill Decision, if implemented in its entirety, would save ratepayers $1 million

dollars per day or more in energy costs in the month of August, 2004. Second Wright Dec. at ¶ 7.

II. THE BALANCE OF HARDSHIPS TIPS IN FAVOR OF A STAY

The preliminary injunction entered by the district court will needlessly cost consumers of electric power in the Northwest region approximately $30 million in electricity cost savings in the month of August, 2004. These savings, once lost, cannot be recovered and furthermore, will impact BPA's ratemaking decisions for FY 2005. Second Wright Dec. at ¶¶ 8-9. Moreover, BPA has already expended $5.6 million on the implementation of the spill decision that it cannot recover. *Id*. at ¶ 5. While the Appellants recognize that Congress afforded species the "highest of priorities" in the ESA, *TVA v. Hill*, 437 U.S. 153, 193-95 (1978), the spill decision at issue in this case is fully consistent with this ordering of priorities. As set forth above, the agencies' analysis reveals that as compared to the presumed spill operations under the RPA, the spill decision confers a net benefit on the SRF chinook *and* maximizes benefits to ratepayers in the Northwest region. Under these facts, the balance of hardships clearly tips in favor of lifting the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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