



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

FREEDOM OF INFORMATION ACT PROGRAM

November 5, 2020

In reply refer to: FOIA #BPA-2021-00099-F

James Buchal
Murphy & Buchal LLP
3425 SE Yamhill St Ste 100
Portland, OR 97214
Email: jbuchal@mblp.com

Dear Mr. Buchal,

Thank you for your interest in the Bonneville Power Administration (BPA). The agency received your request for records made under the Freedom of Information Act, 5 U.S.C. § 552, (FOIA) on November 2, 2020. Your request was assigned Department of Energy (DOE) tracking number BPA-2021-00099-F. Please use that number in any correspondence with the agency concerning your request. This communication is the agency's formal acknowledgment and final response to your request.

Request

"...all sixty-day notices of intent to sue under the Endangered Species Act concerning the Joint Record of Decision for Columbia River System Operations dated September 28, 2020 (other than the October 22nd letter issued by Earthjustice, which requester already has)."

Acknowledgement

BPA has reviewed your request and has determined that it fulfills all of the criteria of a proper request under the FOIA and DOE regulations at Title 10, Code of Federal Regulations, Part 1004.

Response

The agency's Office of General Counsel searched for records responsive to your request and located seven pages. BPA is herein releasing the seven responsive pages, in full, with no redactions applied.

Fees

There are no fees associated with processing your FOIA request.

Certification

Pursuant to 10 C.F.R. § 1004.7(b)(2), I am the individual responsible for the search and records release described above. Your FOIA request BPA-2021-00099-F is now closed with all responsive agency records provided.

Appeal

The adequacy of the search may be appealed within 90 calendar days from your receipt of this letter pursuant to 10 C.F.R. § 1004.8. Appeals should be addressed to:

Director, Office of Hearings and Appeals
HG-1, L'Enfant Plaza
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585-1615

The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. You may also submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. (The Office of Hearings and Appeals prefers to receive appeals by email.) The appeal must contain all the elements required by 10 C.F.R. § 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where DOE's records are situated, or (4) in the District of Columbia.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

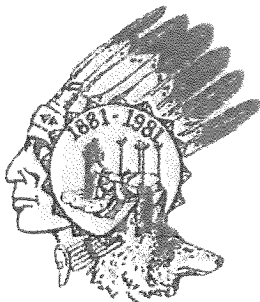
Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
E-mail: ogis@nara.gov
Phone: 202-741-5770
Toll-free: 1-877-684-6448
Fax: 202-741-5769

You may contact BPA's FOIA Public Liaison, Jason Taylor, at 503-230-3537 or at jetaylor@bpa.gov for further assistance and to discuss any aspect of your request.

Sincerely,



Candice D. Palen
Freedom of Information/Privacy Act Officer



Spokane Tribe of Indians
OFFICE OF THE SPOKANE TRIBAL ATTORNEY
P.O. BOX 100, Wellpinit, WA 99040
(509) 458-6521 / fax (509) 458-6596

Received by BPA
Administrators
OFC-LOG# ECO-2020-0604
Receipt Date:
10/26/2020

October 23, 2020

By Via USPS Priority Mail Express

Dan Brouillette
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Wilbur Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Due Date:
12/22/2020

John Hairston
Acting Administrator
Bonneville Power Administration
905 N.E. 11th Avenue
Portland, OR 97232

Barry Thom
Regional Administrator
National Marine Fisheries Service
Northwest Regional Office
7600 Sand Point Way N.E.
Seattle, WA 98115-0070

David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Robyn Thorson
Regional Director
U.S. Fish and Wildlife Service
911 NE 11th Avenue
Portland, OR 97232-4181

RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act Regarding Impacts of the Federal Columbia River Power System on Threatened and Endangered Salmon and Steelhead

Dear Sirs and Madam:

This letter provides notice of the Spokane Tribe of Indians' ("Tribe") intent to sue the Bonneville Power Administration¹ ("BPA") for violations of Section 7 and Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1536, 1538. These violations arise from BPA's failure to comply with the substantive and procedural requirements imposed by ESA Section 7, 16 U.S.C. § 1536, as well as the prohibition on "take" of listed species in ESA Section 9, 16 U.S.C. § 1538, in its coordination operation and maintenance, along with other federal agencies, of federal dams, reservoirs, and related facilities and actions in the Columbia River basin. This notice is provided pursuant to § 11(g) of the ESA, 16

¹ A separate notice is being sent to the Bureau of Reclamation and the U.S. Army Corps of Engineers.

U.S.C. § 1540(g). This notice challenges BPA's Record of Decision "to implement its part of the Preferred Alternative identified in the CRSO EIS (DOE/EIS-0529, July 2020), which constitutes the proposed action reviewed in the 2020 NMFS and USFWS CRS Biological Opinions."²

Legal Framework

Under the ESA Section 7 (a)(2) "[e]ach federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2)(emphasis added). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by § 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 Fn. 26 (9th Cir. 1988).

The ESA's substantive protections are implemented in part through the consultation process, which Congress designed explicitly "to ensure compliance with the [ESA's] substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated, "[i]f a project is allowed to proceed without substantial compliance with these procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Id.* To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency (NOAA in the case of anadromous fish) and, if appropriate, obtain a biological opinion evaluating the effects of any federal agency action on listed species and their critical habitat. *Id.* If NOAA and/or USFWS conclude that a proposed action is likely to jeopardize a listed salmon species or result in adverse modification of its critical habitat, NOAA and USFWS must propose reasonable and prudent alternatives ("RPAs"). If available, RPAs are designed so that they will mitigate the proposed action to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995).

Compliance with the procedural requirements of the ESA – making the determination of the effects of the actions through the consultation process – is integral to compliance with the substantive requirements of the ESA. Under this statutory framework, federal actions that "may affect" a listed species or critical habitat may not proceed unless and until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pac Coast Fed'n of Fishermen's Ass'n v. U.S.*

² Columbia River System Operations Environmental Impact Statement Record of Decision ("CRSO ROD"), issued September 28, 2020, *available at* https://www.nwd.usace.army.mil/Portals/25/docs/CRSO/CRSO_EIS_RecordOfDecision.pdf

Bureau of Reclamation, 138 F. Supp.2d 1228 (N.D. Cal. 2001)(enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 106 F.Supp.2d 1066 (W.D. 2000)(enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Commer v. Burford*, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); *Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992)(“individual sales cannot go forward until consultation process is complete on the underlying plans which BLM uses to drive their development.”).

Even after the procedural requirements of consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize listed species lies with the action agency. And Action Agency's reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. See, e.g. *Stop H-3 Ass'n. v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984). Thus, the substantive duty not to jeopardize listed species (or adversely modify critical habitat) remains in effect regardless of the status of the consultation. While this substantive duty is most readily fulfilled by implementing a federal action that properly has been determined not to cause jeopardy, or by implementing a valid RPA that results from a properly completed consultation, an action agency is “technically free” to choose another alternative course of action if it can independently ensure that the alternative will avoid jeopardy. See *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

In addition, ESA's Section 7(a)(1) requires federal agencies to “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed” under the Act. 16 U.S.C. § 1536(a)(1). Like the duty to avoid jeopardy, this conservation duty is discharged, in part, in consultation with NOAA/USFWS. *Id.* A program of “conservation” is one that brings the species to the point of recovery and delisting. *Id.* § 1532(3).

Separately, ESA section 7(d) 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); *Natural Resource Defense Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998)(section 7(d) violated where BOR executed water service contracts prior to completion of formal consultation); *Marsh*, 816 F.2d at 1389 (construction of highway outside species habitat barred by section 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of section 7(a)(2); it remains in effect until the procedural requirements of section 7(a)(2) are satisfied, 50 C.F.R. § 402.09; and it ensures that section 7(a)(2)'s substantive mandate is met. See, e.g., *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Greenpeace v. National Marine Fisheries Service*, 80 F. Supp.2d 1137 (W.D. Wash. 2000). Harm to a protected resource itself is considered a violation of Section 7(d). *Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d at 295.

Finally, section 9 of the ESA prohibits all activities that cause a “take” of an endangered species. 16 U.S.C. § 1538(a)(1)(B), (C). “Take” is defined by the ESA to encompass

killing, injuring, harming, or harassing a listed species. 16 U.S.C. § 1532(19). The regulations further define “harm” as: “Harm in the definition of “take” in the Act means an act which actually kills or injures fish or wildlife. Such an act may 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.

Federal actions that have completed a legally valid section 7(a)(2) consultation and have a biological opinion generally obtain an incidental take statement (“ITS”). 50 C.F.R. § 402.14(i). The ITS authorizes the agency, if in compliance with the terms and conditions of the ITS, to “take” listed species without facing section 9 liability. 50 C.F.R. § 402.14(i)(5). However, if a biological opinion is legally flawed, the ITS cannot shield the action agency from liability.

2020 Columbia River System Biological Opinions and ROD

BPA’s ROD relies on the 2020 Columbia River System Biological Opinions (“BiOps”) prepared by NOAA and the U.S. Fish and Wildlife Service (“USFWS”) to conclude that the actions it will take over the next fifteen-year period in implementing its part of the preferred alternative described in the CRSO ROD and EIS will not jeopardize any of the listed species of salmon and steelhead, destroy or adversely modify any designated critical habitat, or be likely to negatively affect the endangered Southern Resident Killer Whales (“SRKW”). The BiOps and ROD contain numerous legal flaws and errors in at least, but not limited to, the following ways, and are arbitrary and capricious and violate the ESA:

- Ignore the harm/take that will result from continued failure to control the spread of Northern Pike (*Esox lucius*) throughout the project area on the listed species, in particular the Upper Columbia River Spring Chinook (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*);
- Ignore the recent data for Upper Columbia River Spring Chinook and Upper Columbia River Steelhead presented via the 2020 Five Year Status Review of these populations;
- Rely on a thirteen year old ineffective Upper Columbia River Spring Chinook Salmon and Steelhead Recovery Plan as justification for numerous conclusions: including the continued reliance on unproven tributary habitat actions, completely failing to consider the role of reintroducing the species into the areas above Chief Joseph Dam, and ignoring reintroductions’ potential to significantly benefit the continued existence of Upper Columbia River Spring Chinook and Steelhead;
- Ignore the significant habitat opportunities for Upper Columbia River Spring Chinook and Steelhead that are forgone by the Action Agencies decision to manage both Chief Joseph and Grand Coulee Dams without anadromous passage, such as truck and haul facilities or juvenile passage facilities utilized throughout the Columbia River System and the Northwest Region generally;
- Ignore the Action Agencies’ failure to eradicate and/or meaningfully control Northern Pike that are allowed to flourish, likely expand in range, and abundance due to the proposed action that will continue to result in unaccounted for take of

Bull Trout (*Salvelinus confluentus*) and further damage and degrade Bull Trout habitat;

- Ignore the Action Agencies failure to eradicate and/or meaningfully control Northern Pike that are allowed to flourish and will likely expand in range and abundance due to the proposed action that will further negatively impact Columbia River Redband Trout (*O. mykiss gairdneri*) populations, and will negatively impact the downstream gene flow that benefits the genetic diversity of UCR Steelhead below Chief Joseph Dam;
- Ignore the impacts of climate change and other habitat limitations below Chief Joseph Dam over the next 15-year period, and how managing Chief Joseph Dam and Grand Coulee Dam with fish passage facilities to allow for UCR Spring Chinook and Steelhead access to the habitat upstream of these facilities “would substantially reduce the overall risk faced by the Upper Columbia spring chinook [and steelhead] ESU”³;
- The Northwest Power Act, 16 U.S.C. Section 839b(h)(11)(A) requires the federal agencies responsible for managing, operating, or **regulating** Federal or non-federal facilities exercise those regulatory responsibilities consistent with the purposes of the Northwest Power Act and exercise those regulatory responsibilities “taking into account at each relevant stage of the decision making processes to the fullest extent practicable, the [Northwest Power and Conservation Council’s Fish and Wildlife Program]. . . .” Both NOAA and the USFWS failed to follow these statutory mandates while fulfilling their regulatory responsibilities when regulating the federal management and operation of the federal hydroelectric facilities, and the proposed actions considered in the agencies’ BiOps;
- NOAA failed to analyze the Action Agencies decision to manage Chief Joseph and Grand Coulee Dams without adult and juvenile salmon passage facilities that could be utilized by Chinook and other salmon populations, and how that negatively impacts the long-term prey availability for the SRKW;
- The BiOps and ROD relied on a comparative jeopardy standard that is arbitrary and capricious and contrary to the requirements of the ESA; and
- NOAA and USFWS failed to meaningfully consult with the Tribe during the development of the BiOps.

BPA’s Violations of the ESA

BPA has failed to ensure that its actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat.

BPA has a duty to ensure its actions “authorized, funded, or carried out” by it are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. *See* 16 U.S.C. § 1536(a)(2). For the reasons stated above, but not limited to, the 2020 BiOps issued by USFWS and NOAA incorrectly apply ESA Section 7(a)(2) and its

³ Interior Columbia Technical Recovery Team, Memorandum. *Role of large extirpated areas in recovery*, January 8, 2007, pages 16 and 19.

implementing regulations to determine that the proposed action, the CRSO ROD, will avoid jeopardy of listed species. BPA has an independent duty to ensure that its actions avoid jeopardy. This is especially true here because BPA and the other action agencies were intimately involved in the development and drafting of the analyses and data employed by NOAA and the USFWS in the 2020 BiOps, and can reasonably be expected to know that the Opinions are arbitrary and capricious and contrary to law. *See, e.g. Res. Ltd. v. Robertson*, 35 F3d 1300, 1304-05 (9th Cir. 1993). BPA through its continuing actions adopting and acting pursuant to the CRSO ROD and BiOps is knowingly violating ESA Section 7(a)(2).

BPA has failed to comply with ESA Section 7(a)(1).

BPA has additional requirements under Section 7(a)(1) to develop a plan for recovery of listed species, in consultation with NOAA and USFWS. *See Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998). In neither the 2020 BiOps, nor any other document has BPA identified steps it will take to recover the listed species impacted by its actions to the point where they can be removed from ESA protection.

BPA is making irretrievable and irreversible commitments of resources, in violation of ESA Section 7(d).

ESA Section 7(d) prevents federal agencies from making irretrievable and irreversible commitments of resources “which [have] the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives.” 50 C.F.R. § 402.09. Section 7(d) imposes the additional restriction on BPA because the initiation of consultation process has not been lawfully completed with the issuance of valid BiOps as discussed above.

BPA is “taking” listed species without a valid ITS in violation of ESA Section 9.

In their operation of the Columbia River System and in particular BPA’s implementation of the preferred alternative with the CRSO EIS as described in the CRSO ROD are taking or causing the take of endangered and threatened salmon, steelhead and bull trout. This take occurs in numerous ways for example but not limited to when the endangered and threatened species interact with the hydroelectric facilities directly, are taken by non-native and invasive species that have been allowed to survive and flourish due to management decisions of BPA and the Action Agencies, and have lost access to substantial quantities of available habitat due to the management decisions of BPA and the other action agencies.

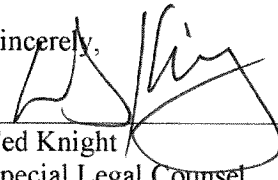
The 2020 BiOps are arbitrary, capricious, and contrary to law. Accordingly, the ITS contained in the BiOps are invalid, and any take caused by BPA is in violation of ESA Section 9.

Conclusion

If BPA does not cure the violations described above immediately, upon expiration of the sixty-(60) days the Tribe intends to file suit against BPA pursuant to the citizen suit

provisions of the ESA, 16 U.S.C. § 1540(g), and other applicable laws. In the meantime, the Tribe remains available to discuss resolution of these issues. Please feel free to contact the undersigned regarding any such discussions.

Sincerely,



Ted Knight
Special Legal Counsel
Office of the Spokane Tribal Attorney
P.O. Box 100
Wellpinit, WA 99040
tedk@spokanetribe.com
(509) 953-1908

Cc: Carol Evans, Chairwoman, Spokane Tribe of Indians
B.J. Kieffer, Director, Spokane Tribe of Indians, Department of Natural
Resources