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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, **WILDEARTH GUARDIANS**, and **NATIVE FISH SOCIETY**,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS and **NATIONAL MARINE FISHERIES SERVICE**,

Defendants,

and

CITY OF SALEM and **MARION COUNTY**,

Defendant-Intervenors,

Case No. 3:18-cv-00437-HZ

PLAINTIFFS' REPLY BRIEF ON REMEDY

PLAINTIFFS' REPLY BRIEF ON REMEDY

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INTRODUCTION

After violating the Endangered Species Act ("ESA") for more than a decade with its operation of the Willamette Project, resulting in substantial harm to Upper Willamette River ("UWR") Chinook salmon and steelhead, Federal Defendant Army Corps of Engineers ("Corps") now wants the Court to accept its baby-step measures as a remedy rather than adopt Plaintiffs' proposal to take more aggressive actions to help these species. Once again, the Corps has failed to provide any declarations from co-defendant and expert fishery agency the National Marine Fisheries Service ("NMFS") to support its argument, and in fact NMFS, the Oregon Department of Fish and Wildlife ("ODFW"), and Plaintiffs' experts all support key measures in Plaintiffs' proposal aimed at improving downstream fish passage and water quality.

The Corps' legal arguments in response to Plaintiffs' remedy proposal, which are filled with hyperbole and mischaracterizations, are unconvincing and fail to negate the need for an injunction and appropriateness of Plaintiffs' proposal. Notably, the Corps' expert declarations do not assert that Plaintiffs' proposed measures will impair flood control nor do they raise concerns about dam safety issues. Instead, the Corps' biologists focus on the tradeoffs between the benefits of Plaintiffs' measures and potential impacts to other parameters like water temperatures, total dissolved gas ("TDG") levels, or water flows. Yet, NMFS and ODFW have been arguing for many of these measures for years, and Plaintiffs' experts also support them despite the tradeoffs. Indeed, some of Plaintiffs' proposed measures are similar to the Corps' interim measures, and thus the Corps is essentially arguing against itself when disputing them.

Because of the Corps' long history of neglecting its duties under the ESA to favor other uses of the Project, the Court should defer to outside fisheries experts who prioritize the needs of the fish to determine which measures will most benefit these species. And the Court must

incorporate *all* required measures into an injunction order to ensure the Corps actually and fully implements them in a timely manner.

ARGUMENT

I. SUMMARY OF KEY DIFFERENCES BETWEEN PLAINTIFFS' AND THE CORPS' MEASURES.

To assist the Court with this complex matter, Plaintiffs will first identify the key differences between their proposed measures and the Corps' interim measures. As noted above, a number of the measures Plaintiffs propose are similar to the Corps' measures but there are a few key differences in each sub-basin. Many of the parties' measures aimed at improving water temperatures or TDG problems are similar, with a couple exceptions. The more significant differences involve downstream passage, with Plaintiffs proposing more aggressive actions. Plaintiffs provide a more detailed comparison later in this brief, but identify here the measures they propose that have no similar counterpart in the Corps' plan.

North Santiam:	—Detroit Reservoir drawdown by Nov. 1 for temperature control —Detroit spring spill operation for downstream passage —Structural solution for TDG problems at Big Cliff
South Santiam:	—Outplanting adult fish above Green Peter —Spill operation for downstream passage at Green Peter —Delayed refill of Foster Reservoir for downstream passage
McKenzie:	—Deep drawdown of Cougar Reservoir for downstream passage —Structural changes to Cougar Dam regulating outlet chute to reduce fish injury during downstream passage
Middle Fork:	—Deep drawdown of Lookout Point Reservoir for downstream passage —Use of lower regulating outlet at Lookout Point Dam for temperature control
Fall Creek:	—Longer duration for fall drawdown of Fall Creek Reservoir for downstream passage —Keeping reservoir at low elevation from mid-Feb. to mid-April for early spring downstream passage

The Corps' lengthy and oftentimes confusing discussion of Plaintiffs' measures in its brief and declarations obfuscates these key differences, which are important to identify because they include the most significant downstream passage measures.

II. PLAINTIFFS HAVE MET THE STANDARDS FOR AN ESA INJUNCTION.

In arguing against an injunction, the Corps in essence wants the Court to ignore its own summary judgment ruling that held the Corps' operations are causing jeopardy of UWR Chinook salmon and steelhead and unlawfully "taking" members of both species. When courts find such substantive violations of the ESA, they routinely issue injunctions to prevent further violations. An injunction is needed here because the Corps' operations will unquestionably continue to jeopardize both species and "take" many members of both species, causing further irreparable harm, largely due to lack of access to and from high quality spawning habitat above the dams.

A. An Injunction is Proper to Remedy the Corps' ESA Violations and Reduce Future Harm from the Corps' Ongoing Operations.

The Corps makes several incorrect arguments to assert that an injunction is not warranted. It claims that "take" of a few fish does not suffice to establish the need for an injunction, that Plaintiffs must show further degradation of the species' status to prove irreparable harm—impairing recovery of the species is not enough—and that the Corps' interim measures will prevent irreparable harm. These arguments are legally and factually wrong.

The Corps' assertions that "take" of fish is not enough to support an injunction, and that Plaintiffs must show degradation of the species' status, are contradicted by the cases cited in Plaintiffs' opening brief, which the Corps conveniently ignores. Fed. Def. Br. at 5-10 (ECF No. 130); Pl. Opening Br. at 4-5 (ECF No. 118). As Plaintiffs noted, the Ninth Circuit has issued injunctions specifically to prevent unlawful take of individual animals. *Marbled Murrelet v. Babbitt,* 83 F.3d 1060, 1066 (9th Cir. 1996); *Forest Conservation Council v. Rosboro Lumber*

Co., 50 F.3d 781, 783 (9th Cir. 1995); *Palila v. Haw. Dep't of Land & Nat. Res.*, 639 F.2d 495, 496 (9th Cir. 1981).

The Ninth Circuit has also explained that only non-jeopardizing actions can continue while ESA consultation is being completed. *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1034–35 (9th Cir. 2005), *abrogated on other grounds by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1088–92 (9th Cir. 2015). In *Defenders of Wildlife v. Martin*, the court held that Forest Service actions were jeopardizing the survival and recovery of endangered woodland caribou, and also had caused past take and were likely to cause future take of caribou. 2007 WL 641439, at *7–8 (E.D. Wash. Feb. 26, 2007). In order "to insure no jeopardy and to prevent future take" of caribou, the court enjoined the Forest Service from continuing its actions until a new ESA consultation was completed. *Id.* at *9–10; *see also All. for the Wild Rockies v. Bradford*, 2010 WL 11468411, at *2 (D. Mont. Aug. 5, 2010) (unlawful "take" within small population of grizzly bear warranted injunction). This Court previously explained that the ESA citizen suit provision allows a court to enjoin any agency that is "in violation" of the Act, and injunctive relief "is often used to remedy past or present harms" because "the term 'in violation' connotes past, present, or future violations of the ESA." *Stout v. U.S. Forest Serv.,* 869 F. Supp. 2d 1271, 1280-81 (D. Or. 2012).

Recent cases have likewise held that, where past harm from a defendant's unlawful actions has reduced a species' population, an injunction is warranted to prevent future harm from further impairing the species' recovery. *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1137–39 (N.D. Cal. 2017); *Cal. Nat. Res. Agency v Ross,* 2020 WL 2404853, at *15, 17–19 (E.D. Cal. May 11, 2020); *Wishtoyo Found. v. United Water Conservation Dist.*, 2018 WL 6265099, at *65–66 (C.D. Cal. Sept. 23, 2018) *aff'd* 795 F. App'x 541 (9th Cir. Feb.

26, 2020); *Or. Nat. Desert Ass'n v. Tidwell,* 2010 WL 5464269, at *6 (D. Or. Dec. 30, 2010). In other words, actions that maintain the status quo for a species in poor shape cause irreparable harm; further degradation of the species' status is not necessary. This was the circumstance in the Federal Columbia River Power System ("FCRPS") cases, where this court has issued several injunctions because operation of those dams had caused the species to decline, and further operations would inflict similar harm that would keep the species in a precarious state. *NWF v. NMFS*, 886 F.3d 803, 820–22 (9th Cir. 2018) (*NWF VIII)*; *NWF v. NMFS*, 839 F. Supp. 2d 1117, 1131 (D. Or. 2011) (*NWF V)*; *NWF v. NMFS*, 422 F.3d 782, 796–99 (9th Cir. 2005) (*NWF II*).

This standard makes sense considering that the showing for irreparable harm ultimately applies to Plaintiffs. Harm to the species must result in irreparable harm to the plaintiffs. *NWF VIII*, 886 F.3d at 822. If a species remains at a low level, it will remain difficult for Plaintiffs' members to see and enjoy fish of that species in areas where they recreate. Plaintiffs' members have already described how their interests in seeing, photographing, fishing for, and otherwise enjoying these fish have been harmed by the Corps' operations that reduced the abundance and distribution of the species. Second Thomas Decl. ¶¶ 10-19; Fairbrother Decl. ¶¶ 9-25; Anuta Decl. ¶¶ 5-19 (ECF Nos. 121–23). A further degradation of the species' status is not necessary to show irreparable harm to Plaintiffs; simply maintaining the species' low abundance and reduced distribution will perpetuate the difficulty for Plaintiffs' members to enjoy these fish. *See NWF VIII*, 886 F.3d at 822 (finding irreparable harm where a plaintiff claimed injury due to "the greatly diminished levels or even absence of salmon and steelhead from their historic habitat"). And every season that Plaintiffs' members recreate without experiencing wild salmon and steelhead is a lost opportunity that can never be replaced—i.e. an irreparable injury.

Finally, courts have also ruled that injunctive relief is an appropriate remedy for a

"substantial procedural violation" of the ESA where ongoing actions will continue to harm species. *Hoopa Valley Tribe,* 230 F. Supp. 3d at 1134 (citing *Wash. Toxics Coal.*, 413 F.3d at 1034); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. BOR,* 138 F. Supp. 2d 1228, 1247–50 (N.D. Cal. 2001) (enjoining water deliveries where BOR failed to complete ESA consultation for annual operations); *Pac. Coast Fed'n of Fishermen's Ass'ns v. BOR*, 2006 WL 798920, at *6–8 (N.D. Cal. Mar. 27, 2006) (enjoining water deliveries after finding biological opinion unlawful); *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 416 F. Supp. 3d 909, 940–41 (D. Ariz. 2019) (enjoining timber management activities due to reliance on unlawful biological opinion).

The situation here satisfies the legal standards for an injunction under the ESA. The Court found the Corps' operations have been jeopardizing the survival and recovery of UWR Chinook and steelhead and causing take of both species for years. Opinion at 10–30 (ECF No. 112). These violations led to a decline in the species. *Id.* at 18. The Court also found the Corps and NMFS had caused a substantial procedural violation of the ESA by delaying reinitiation of consultation for 4–5 years. *Id.* at 36. These are the precise circumstances under which courts regularly issue injunctions to ensure future ESA violations do not occur.

A showing of irreparable harm to support the need for an injunction is not difficult where an agency's actions are jeopardizing the survival and recovery of species and causing take in excess of the level authorized in a biological opinion, as is the case here. The Corps claims Plaintiffs have offered no evidence of irreparable harm from the Corps' actions, but Plaintiffs' opening brief spends eight pages discussing the continuing harm to UWR Chinook and steelhead from the Corps' ongoing actions—even with its new interim measures. Pl. Opening Br. at 6–13. Indeed, Plaintiffs have filed numerous expert declarations discussing the harm to the species from the Corps' operation of the Willamette Project. *See* Declarations of Kirk Schroeder,

Richard Domingue, John Johnson (ECF Nos. 37–39, 76, 97–99, 119–20). The substantial evidence in the case proving jeopardy of the species and high levels of take, which have led to the species' decline and perilous status, is certainly evidence of irreparable harm to the species caused by the Corps' operation of the Project.

As NMFS and Plaintiffs' experts explained, and this Court agreed, the primary cause of jeopardy is lack of passage past dams that impairs access to and from important habitat above the dams, and unlawful take is occurring because of the high mortality of juvenile fish trying to pass through the reservoirs and dams on their way downriver. Without improved access to and from that upstream habitat, the species have little chance of improving their status and certainly will not reach recovery. Water quality issues also continue to be a problem below dams, harming fish that attempt to reproduce in that habitat. Plaintiffs do not need to show future dam operations will *further* degrade the species' status; continuing the actions that cause high mortality and impair the survival and recovery of species that are already at low levels constitutes irreparable harm, even if it is just for a few years or less while the agencies finish consultation. *NWF VIII*, 886 F.3d at 818–24; *NWF V,* 839 F. Supp. 2d at 1130–31; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1137–39, 1146; *Ross,* 2020 WL 2404853, at *17–19; *Wishtoyo Found.*, 2018 WL 6265099, at *65–66; *Tidwell,* 2010 WL 5464269, at *3–4, 6; *South Yuba River Citizens League v. NMFS*, 804 F. Supp. 2d 1045, 1049, 1054-68 (E.D. Cal. 2011).

The Corps next attempts to argue irreparable harm will not occur by focusing on the wrong action. The Corps claims that Plaintiffs focus "myopically" on downstream passage and water quality impacts for their irreparable harm argument—the two primary harms to the species identified by NMFS, Plaintiffs' experts, and this Court. Fed. Def. Br. at 10. Yet it is the Corps that "myopically" looks at its interim measures as the subject of the analysis, claiming its

measures will benefit the fish. *Id.* at 8–11. The relevant action, however, is not the Corps' interim measures, it is the ongoing operation of the Project. *See NWF VIII*, 886 F.3d at 819–20 (must look at harm from the operation of the FCRPS dams as a whole, rather than from only the spill operation during the remand period). The applicable question is whether ongoing operation of the Project will continue to harm the species by maintaining their low abundance, productivity, distribution, and genetic diversity over the next few years. The answer to this question is Yes because there will still be significant harm to juvenile fish trying to migrate through reservoirs and dams, impairing use of upstream spawning habitat; and water temperatures and high TDG levels will continue to impact downstream habitat, impairing successful spawning and rearing below the dams. The inquiry for the Court is which measures—the Corps' or Plaintiffs'—will most likely reduce the harm from these continuing operations. *See id.* at 823 (injunction need not prevent all the harm the court identified).

As Plaintiffs explained in their opening brief and in more detail below, their measures are more likely to reduce harm to the fish from continuing operations largely because they address downstream fish passage with much more substantial actions. The Corps' measures offer minimal improvement to downstream migration through reservoirs and dams in the North Santiam, McKenzie, and Middle Fork while putting off for years any actions to access habitat above Green Peter Dam in the South Santiam. Plaintiffs' proposal offers more aggressive passage measures for each sub-basin, which are the crux of improving the status of these species. Although these passage measures may have side effects to water quality and flows, Plaintiffs' experts, ODFW, and NMFS support them because of the critical need to improve access to and from habitat above the dams, as explained below. Thus, the Corps' measures will do far less to

reduce the continuing irreparable harm to the species caused by the operation of the dams.[1] As the Ninth Circuit has explained, the Court owes no deference to the opinions of the Corps' experts, *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1186 (9th Cir. 2011), particularly when those experts have routinely argued against measures that could help the fish.

Lastly, the Corps' argument that the operation of the dams is not causing irreparable harm because the species are doing better and will continue to trend up based on good ocean conditions is unavailing and contradicted by Plaintiffs' expert Mr. Schroeder. Fed. Def. Br. at 9–10. Mr. Schroeder again thoroughly explains that UWR salmon and steelhead have both declined dramatically from historic levels, with continued declines in the past decade, and each species remains in a precarious state. Fifth Schroeder Decl. ¶¶ 7, 12-21, 99. Not only do they remain at low abundance and productivity, they also have diminished diversity and spatial structure, largely due to the impacts of the Willamette Project. *Id.* ¶¶ 25-28. The Corps' biologist, Mr. Piaskowski, errs in his use of abundance data and low extinction trigger, and also incorrectly claims that a one-year bump in the number of returning fish is a meaningful upward trend. *Id.* ¶¶ 8-11, 24, 98. As Mr. Schroeder explains, good ocean conditions may create a slight temporary improvement in fish numbers but it will not negate the continuing negative impacts of the Project that have caused the overall decline of the species and will prevent their recovery without significant adjustments to operations. *Id.* ¶¶ 21-23, 29-36, 99.

The Corps has been violating the ESA for more than a decade by operating the Willamette Project in a way that jeopardizes the survival and recovery of UWR Chinook and

[1] The Corps claims that it collaborated with NMFS on interim measures to use during the reinitiated consultation process. Fed. Def. Br. at 8. Notably, it has filed no declarations from NMFS biologists supporting its interim measures. It also waited more than 2 years after reinitiating consultation to complete an interim measures plan, issuing the plan only after recognizing it was likely to lose on summary judgment. *See* Pl. Ex. 41 (April 2018 reinitiation letter); Pl. Ex. 67 (June 2020 interim measures plan).

steelhead and causes excessive mortality of juvenile fish migration downriver, leading to the species' continued decline. Further violations will occur, causing continued irreparable harm to the species, and to Plaintiffs' members, until significant changes to operations occur to improve the two biggest limiting factors for the fish—downstream passage and water quality. An injunction is needed to remedy the Corps' past violations, prevent future violations, and reduce the irreparable harm that will occur from continuing operation of the Project.

B. The Balance of Hardships and Public Interest Clearly Favor the Species.

The Corps argues that the balance of hardships and public interest do not tip in favor of UWR Chinook salmon and steelhead with regard to Plaintiffs' proposed injunction. Fed. Def. Br. at 32–35. The Corps first argues that Plaintiffs' proposal "contravenes" and "circumvents" the ESA by violating 2008 Reasonable and Prudent Alternative ("RPA") measures and causing take of species. *Id.* at 32–33. This argument is quite ironic coming from the agency that violated the ESA for a decade by failing to implement critical RPA measures from the 2008 biological opinion ("2008 BiOp"), thereby causing jeopardy to the species, and by causing take of the species due to excessive mortality of juvenile fish. In fact, most of Plaintiffs' proposed measures mirror the RPA actions the Corps was supposed to take years ago, such as outplanting fish above Green Peter Dam; reservoir drawdown, delayed refill, and spill operations to assist juvenile passage; operations to improve water temperatures and TDG levels; and research and monitoring. 2008 BiOp at 9-33, 9-42 to 9-43, 9-61 to 9-63, 9-66, 9-83 to 9-88. And Plaintiffs' measures better address the lethal take that occurs during juvenile migration by including more substantial actions to improve downstream passage compared to the Corps' measures.

Next, the Corps complains that Plaintiffs' injunction will cost too much and divert resources from other ESA-compliance actions. Fed. Def. Br. at 33–34. Yet the reason Plaintiffs

must seek this injunction is because the Corps has diverted money and resources away from its ESA duties for years. The Corps has repeatedly delayed actions needed to improve conditions for salmon and steelhead, instead using its resources and funding to prioritize other uses of the Project, and claimed it had no funding for important tasks, such as monitoring, fixing the Foster Fish Weir and Foster Fish Trap, and downstream passage structures. *See* Pl. SJ Br. at 14–22 (ECF No. 96) (delays in RPA actions); Domingue Decl. ¶¶ 32, 73 (ECF No. 38) (prioritizing other uses); Pl. Ex. 68 at 1–2 (lack of funding for fish weir and downstream passage structures); Second Piaskowski Decl. ¶ 75 (lack of funding for Foster fish trap); Fourth Schroeder Decl. ¶¶ 77–78 (ECF No. 119) (not funding monitoring). Plaintiffs' requested measures are simply things the 2008 RPA required. The Corps should not be able to use a lack of funding and resources to avoid actions it should have completed during the last ten years.

Indeed, defendants frequently try to escape injunctive relief by claiming a lack of funding or diversion of resources, and courts usually reject those excuses. *See Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (upholding injunction that county claimed would "force[] it to cut other important programs"); *Calvillo Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1108 (N.D. Cal. 2018) (issuing injunction despite the government's argument that it would "divert resources" from other programs, explaining that "[s]aving money does not justify a violation of the law"); *Goldammer v. Veneman*, 2007 WL 1748665, at *7 (D. Or. June 14, 2007) (finding that claimed funding issues were insufficient to tip the equitable scales in the agency's favor). In ESA cases, such excuses are even less availing, because the ESA reflects Congress's judgment that "expense and inconvenience to the public . . . cannot equal the potential loss from extinction." *Sierra Club v, Marsh*, 816 F.2d 1376, 1386 n.13 (9th Cir. 1987), *abrogated on other grounds as recognized in Cottonwood Envtl. Law Ctr.*, 789 F.3d at 1088–91.

For that reason, agencies are regularly required "to abide by court-ordered compliance with the ESA, despite insufficient funds with which to do so." *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1179 (D. Ariz. 2003).

Moreover, many of the measures in Plaintiffs' proposed remedy are operational changes, which will not require significant funding. The Corps already has processes in place to make temporary adjustments to operations and does so regularly based on hydrologic conditions, flood control operations, power production, and fish needs. Askelson Decl. ¶¶ 16, 21-25, 31-32 (ECF No. 132). The 2008 RPA included provisions for monitoring and adjusting operations on a regular basis. 2008 BiOp at 9-38, 9-64. Most of the structural changes requested by Plaintiffs are things the Corps has known about and should have requested adequate funding to complete. Pl. Ex. 50 at 3–4 (Foster fish weir); Fourth Schroeder Decl. ¶ 61 (Foster fish trap); Pl. Exs. 79, 80, 81 at 1, 82 at 1 (TDG structural solution needed at Big Cliff). The Corps' lack of funding is largely its own doing by failing to request and appropriately prioritize money for its ESA duties. This Court should not allow this practice to continue by making clear the Corps *must* fund actions needed to comply with the ESA, including the measures in Plaintiffs' remedy proposal.

Finally, the Corps discusses impacts to other uses of the Project, primarily power production and recreation, but courts have routinely held that such uses do not outweigh hardship to species. Fed. Def. Br. at 34–35. As this Court held when issuing its spill injunction for the Columbia River dams, "the Court does not weigh the public interest or balance the equities, for example by weighing any potential implications on the power system or costs to the Federal Defendants." *NWF v. NMFS* (*NWF VII*), 2017 WL 1829588, at *6 (D. Or. Apr. 3, 2017), *aff'd* 886 F.3d at 817*; see also NWF II,* 422 F.3d at 794 (rejecting argument that district court erred by failing to weigh economic harm to the public in its preliminary injunction analysis). Thus,

impacts on power production or increased costs to the public are irrelevant here. Moreover, a reduction in power production would have a small effect on the overall power supply from the BPA system as the Willamette dams provide less than 4% of that power. Connolly Decl. ¶ 18 (ECF No. 66).

Likewise, reduced recreation use or economic harm to local communities also do not outweigh protection of species in an ESA injunction analysis. *Defenders of Wildlife*, 2007 WL 641439, at *7 (enjoining snowmobile use to protect endangered species); *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1141 (acknowledging injunction might cause hardship to farmers, ranchers, and their communities but "courts are not permitted to favor economic interests over potential harm to endangered species"); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (ESA fish had priority over water deliveries to irrigators).

Notably, the Corps has not raised any argument that Plaintiffs' proposal will impair its flood control operations, and the concern about the City of Salem's drinking water supply is gone because Plaintiffs removed the Detroit deep drawdown operation from their proposal. Indeed, the City of Salem and Marion County Intervenors did not even file a response remedy brief, clearly indicating they are not concerned with Plaintiffs' current proposal. The Corps mentions potential sediment impacts from the Lookout Point drawdown to the City of Lowell's water supply for 1,100 people, but that system has several contingencies in place to address high sediment levels, and the drawdown could be stopped if problems did arise. Fed. Def. Br. at 35; Askelson Decl. ¶ 160; Fourth Domingue Decl. ¶ 49. In sum, the Corps has raised no significant human health or safety issues with Plaintiffs' proposal, and impacts to power production, recreation, and local economies do not outweigh protection of threatened species.

III. THE CORPS HAS LEGAL AUTHORITY TO IMPLEMENT PLAINTIFFS' PROPOSED REMEDY.

A. The Flood Control Acts Do Not Preclude Deep Drawdown Operations.

The Corps' argument that Plaintiffs' remedy violates the Flood Control Acts is based on hyperbole and mischaracterizations. It rests on exaggerated assertions that Plaintiffs claim the Corps has "unfettered discretion to revise WVP operations," can completely "eliminate a Project purpose," and can "write off HD 531, pretend that no power pool exists, and use the exclusive power storage solely for fish and wildlife purposes." Fed. Def. Br. at 14-18. Plaintiffs make no such arguments. Instead, Plaintiffs argue that the Corps can modify its operations in ways that reduce, but not eliminate, other uses of the Project to benefit ESA-listed fish—a position well-supported by courts.

The Corps points to two operations proposed by Plaintiffs that are relevant to its argument—the deep drawdowns at Cougar Reservoir and Lookout Point Reservoir. Fed Def. Br. at 16. As described in Plaintiffs' remedy proposal, the deep drawdowns would occur for only one month, from November 15 to December 15. Pl. Ex. 97 at 3. The reservoirs would also be below the maximum power pool elevation for a short time before and after the one-month period as they lower to and rise from the drawdown elevation. Based on statements made by the Corps in their preliminary injunction filings, the Cougar drawdown would preclude power generation for six to eight weeks while the Lookout Point drawdown would preclude power generation for three to four months. Wells Decl. ¶¶ 60, 83 (ECF No. 69). Thus, neither of these operations would completely eliminate power production nor even eliminate it for the entire six-month "critical power-production period" of October through March. Fed. Def. Br. at 15–16 (citing HD 531, App. J at 2054). Simply reducing power production by using the power pool for two to four months to assist ESA-listed fish would not violate the Flood Control Acts.

The Corps tries to dismiss cases interpreting the Flood Control Acts and their intersection with the ESA and other laws, particularly cases pertaining to the FCRPS system, because of the specific language in HD 531 Appendix J relevant to the Willamette Project. Fed. Def. Br. at 16–17.[2] That argument is flawed because HD 531 Appendix J is not an independent legal authority separate and distinct from the Flood Control Acts; it is subsumed within the 1950 Flood Control Act. The Flood Control Act of 1950 stated that the Columbia and Willamette basin dams were authorized for flood control "and other purposes," and were to be implemented "substantially" in accordance with the plans recommended in HD 531. Pub. L. No. 81-516, 64 Stat. 163, 179 (1950). Thus, cases interpreting the 1950 Flood Control Act necessarily apply to HD 531. And by using the word "substantially," Congress made clear that the Corps was not required to act completely in accordance with HD 531 but, rather, had discretion to deviate from those plans.

Because HD 531 was part and parcel of the 1950 Flood Control Act, it too must be harmonized with other subsequent laws such as the Fish and Wildlife Coordination Act of 1958, the Northwest Power Act of 1980, and the ESA. *NWF v. NMFS* (*NWF I*), 2005 WL 1278878, at *9–10 (D. Or. May 26, 2005); *NWF v. NMFS* (*NWF IV*), 524 F.3d 917, 928–29 & n.8 (9th Cir. 2008). The broad goals of the Flood Control Act, including the goal to act "substantially" in accordance with HD 531, gave the Corps discretion in its administration of the dams, allowing it to adjust operations to fulfill multiple purposes even though some conflict among purposes may

[2] The Corps' brief cites to a separate legal memo prepared by the agency November 20, 2020, just ten days before its response brief was due. This Court should give no deference to that memo as it is clearly a post hoc rationale just to support its litigation position. *Humane Soc'y v. Locke*, 626 F.3d 1040, 1049–50 (9th Cir. 2010) (rejecting post hoc rationale offered by defendants during litigation); *Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 975–76 (9th Cir. 2018) (no deference to agency interpretation that was "merely a convenient litigation position and a post hoc rationalization"). Furthermore, the Corps' legal analysis should be contained within the brief, not in a single-spaced, twenty-page memo attached as an exhibit.

exist. *Id.* The Ninth Circuit noted that Congress did not specify in the Flood Control Act—which incorporated HD 531—the manner in which the agencies must fulfill their various obligations. *NWF IV*, 524 F.3d at 928. Because of that discretion, the Corps must operate the dams in compliance with the ESA's no-jeopardy mandate regardless of the expense or burden. *Id.* at 929. In fact, this Court has repeatedly ordered the Corps to conduct operations to benefit fish at the expense of power production. *NWF v. NMFS* (*NWF II*), 422 F.3d 788 (9th Cir. 2005); *NWF V*, 839 F. Supp. 2d at 1131; *NWF VII*, 2017 WL 1829588, at *6, *aff'd,* 886 F.3d 803.

Other courts have similarly interpreted these Flood Control Acts, recognizing they impose broad goals that give the Corps broad discretion when balancing multiple uses of dams, requiring compliance with the ESA even at the expense of other project purposes. *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 252–53 (D.D.C. 2003), *appeal dismissed*, 2003 WL 22890061 (D.C. Cir. Dec. 4, 2003); *In re Operation of the Mo. River System Litig.*, 363 F. Supp. 2d 1145, 1153 (D. Minn. 2004), *aff'd in part, vacated in part*, 421 F.3d 618, 630–31 (8th Cir. 2005); *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs*, 716 F.3d 535, 541–45 (11th Cir. 2013). It may be true that the Flood Control Acts do not provide discretion for the Corps to entirely abandon or eliminate a Project purpose, but curtailing or reducing a use to comply with the ESA—such as the case here—is certainly within its discretion. *See In re: Operation of the Mo. River System*, 421 F.3d at 631 n.9 (speculating that the ESA would not apply if it forced the agency to abandon a project purpose, but finding that reducing a use did not rise to the level of abandonment). Indeed, where Congress wanted to completely remove the Corps' discretion, it specifically stated so. *See WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 947 F.3d 635, 639-41 (10th Cir. 2020) (finding Corps lacked discretion to comply with ESA in operation of Rio Grande dams where Flood Control Act stated that the dams "shall be

operated solely for flood control" and "at all times all project works shall be operated in conformity with the Rio Grande Compact . . . .").

To further establish the Corps' discretion to modify its operations, numerous courts have held that the Corps need not strictly comply with the plans recommended in House Documents, which were written decades ago based on limited and outdated information. The Corps tries to distinguish several of these cases on their facts, Fed. Def. Br. at 17, but the courts' interpretations of the House Documents are what is relevant here. As one court noted, "[i]t has long been the custom of Congress to approve projects of this nature on the basis of such preliminary plans and to authorize the Chief of Engineers to make such modifications as later studies indicate are necessary." *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1292 (5th Cir. 1970), *cert. denied*, 402 U.S. 916 (1971). Those plans are "never intended to be the final plans for the … project." *Id*. Another case explained:

> It imparts both stupidity and impracticality to Congress to conclude that the statute impliedly forbids any change in a project once approved, and thus prevents the agency official from providing for the unforeseen or the unforeseeable, from accommodating newly discovered facts, or from adjusting for changes in physical or legal conditions. Any change must, however, serve the original purpose of the project.

Creppel v. U.S. Army Corps of Eng'rs, 670 F.2d 564, 572–73 (5th Cir. 1982) (finding the Corps had discretion to make a "major change" to a small flood control project).

This interpretation of House Documents is repeated in multiple cases. It "would be unreasonable to impute to Congress the intent to preclude the Chief of Engineers from making reasonable modifications in the project to accommodate intervening developments in the economic, social, ecological, or political climate." *Britt v. U.S. Army Corps of Eng'rs*, 769 F.2d 84, 89 (2d Cir. 1985) (finding Corps had "considerable discretion to approve modifications to the project" that deviated from House Document); *see also U.S. ex rel Chapman v. Fed. Power*

Comm'n, 191 F.2d 796, 807 (4th Cir. 1951) (upholding deviations from a House Document's description of the location, hydropower operations, and size of a project), *aff'd*, 345 U.S. 153 (1953); *Mo. ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1301 (8th Cir. 1982) (holding that Congress gave the Corps "broad discretion in making changes in the preliminary plan for a project"). Accordingly, the Corps has discretion to modify its plans in HD 531, which were created more than fifty years ago, to adjust how it balances the multiple uses of the Project. Here, Plaintiffs would re-balance those uses by reducing—not eliminating—power production and recreation to improve fish and wildlife use.

Even the plain language of HD 531 affirms the Corps' plans can be modified to accommodate changed circumstances like new laws, new science, and new circumstances for the fish. The Corps cites two sentences from the 2000+ page HD 531 to argue that the power pool is used exclusively for power production and thus cannot ever be used for fish and wildlife purposes. Fed. Def. Br. at 15–16. But language in HD 531 itself makes clear that its plans were just a "general guide" for management of the dams in the Columbia and Willamette basins, which could be adjusted later as conditions changed or more information about the dams' effects became known—including effects on fish. HD 531 at 15–16, 19-21, 253, 324, 334, 342, App. P. In fact, the very beginning of the document stated that the dams were to be operated "generally" in accordance with the plans outlined in HD 531, with such "modifications" as the Chief of Engineers may find to be advisable. *Id.* at 5, 21.

Appendix J, which applies to the Willamette Basin, contained extensive detail about Project dams as well as numerous studies related to regulating uses of the dams. *See id.* at 1661–82 (Appendix J Table of Contents). When the dams were first built, no fish were able to access habitat above them, and the Corps relied on downstream flow requirements to protect fish

downriver. *Id.* at 2056. Indeed, the Corps thought that the dams might actually benefit the species by regulating water flows. *Id.* at 1852. Appendix J stated that "maintenance of adequate stream flows for the perpetuation of this valuable resource was a prime consideration in scheduling the regulation of reservoirs on tributaries experiencing runs of anadromous fish." *Id.* at 2056. Other passages in Appendix J made clear that preservation of fish was an important consideration. *Id.* at 2058 (when refilling reservoirs, "only sufficient water would be released . . . to produce prime power or maintain fish life, whichever was the greater requirement"); *id.* at 2040 (considering preservation of fish life when deciding reservoir levels). During fall and winter months, power was the prime consideration only because flows needed for power generation were always greater than flows needed to meet downstream fish requirements at that time of year. *Id.* at 2239.

Appendix J also recognized the need for fish research, including studying how to pass fish over high dams, as well as the ability to adjust flood control regulation in the future based on increased knowledge. *Id.* at 1824, 2037, 2283–84. The report stated that "[a]dditional investigations and studies are required in order satisfactorily to solve the problem of maintaining fish life" in the Willamette Basin, and that hatcheries would be relied upon "[u]ntil positive means for passing migratory fish over high dams are developed." *Id.* at 2284, 1866.

To support its argument, the Corps relies on a single statement from Appendix J that states the power pool is reserved *exclusively* for power generation from October through March. Fed. Def. Br. at 15, 16 (citing Appendix J at 2239, 2054). This section of Appendix J established the rule curves developed as part of the "reservoir regulation study," which estimated water requirements for each authorized use and developed a coordinated plan where each use would get maximum benefit based on an average year. *Id.* at 2052. The study included regulating

storage water for power but adequate stream flows for preservation of anadromous fish was also a prime consideration. *Id.* at 2056–58. Notably, Appendix J concluded that:

> The study of reservoir regulation presented in this appendix has been based upon the best information presently available as to conservation requirements and reservoir regulation policy. However, the schedules and rule curves developed *should not be considered final if future development in the basin should alter the concept of any of the conservation requirements, or should research indicate that a change in reservoir regulation policy would be beneficial*.

Id. at 2064 (emphasis added).

Thus, HD 531 and Appendix J not only recognized the need to learn more about the dams' impacts to fish and how to pass fish upstream, they explicitly stated that the plans developed in Appendix J were not final and could be modified if future conditions and information indicated a change would be beneficial. Since 1950, significant changes in conservation requirements have occurred (including the listing of UWR Chinook and steelhead as threatened species), news laws apply, and significant information has emerged about the needs of the fish and impacts of the dams. HD 531, and Appendix J in particular, give the Corps authority to alter its operation plans and priorities in light of such developments. Because the Corps has the discretion to make these changes, it can authorize the one-month deep drawdowns requested by Plaintiffs to fulfill its ESA duties and improve survival during downstream passage.

B. The Corps' Other Arguments Are Unavailing.

The Corps argues the "Technical Advisory Team" ("TAT") proposed in Plaintiffs' remedy is unlawful and inappropriate, and other measures will impermissibly violate the Clean Water Act ("CWA"). Fed. Def. Br. at 12-14, 18-19. These arguments ignore the fact that other courts have allowed similar measures as part of injunction orders, and the Corps is simply trying to retain as much control over Project operations as possible.

Plaintiffs' proposal for the TAT stems from a need to reduce the Corps' ability to ignore

the advice of outside fisheries experts. The Corps touts the WATER team process that was established in the 2008 RPA, Fed. Def. Br. at 14, but that process has been dysfunctional and has not successfully improved conditions for Chinook and steelhead because the Corps routinely rejects advice from other biologists. Kelley Decl. ¶¶ 25-27 (ECF No. 139) (ODFW biologist discussing problems with WATER process); Third Domingue Decl. ¶ 92 (noting Corps dominates WATER process and rejects recommendations of advisory groups); Pl. Exs. 91, 92, 93 at 1-2 (rating WATER process less than "fine" for most categories in 2017 and continuing disputes into 2019–2020).[3]

The 2008 RPA stated that the Corps must submit all proposed operations, structural changes, and studies to NMFS and U.S. Fish and Wildlife Service ("USFWS") for review, and either modify its proposals to address concerns of the Services, elevate the issue to higher level managers, or reinitiate consultation. 2008 BiOp at 9-8 to 9-9. The purpose of the RPA provisions was to ensure that RPA measures "are carried out effectively and in a timely manner" and that decisions are consistent with the 2008 BiOp. *Id.* at 9-9. Yet, the Corps repeatedly rejected NMFS's recommendations to implement RPA measures, such as downstream passage operations and outplanting fish above Green Peter Dam. Pl. Exs. 4, 9, 10 at 2-3, 11, 16 at 3, 21 at 3, 22, 28 at 2, 29, 30, 31, 46, 47, 51, 53-55, 56 at 5, 63 at 2-3, 66 at 5, 75 at 2, 85. Therefore, the WATER process has not worked as the 2008 RPA envisioned.

Under Plaintiffs' proposal, the TAT is a technical "advisory" team of biologists that would advise the Corps. Plaintiffs' proposal states that the Corps must follow the direction of the TAT *unless* the direction "is unattainable or must be refined due to hydrologic conditions, flood control needs, or dam safety issues." Pl. Ex. 97 at 5. Accordingly, the Corps is the

[3] Pl. Exs. 1-90 were filed in previous stages of this case, Pl. Exs. 91-97 accompany this brief.

ultimate decision-maker as to whether the TAT's advice is possible to implement and will not impair flood control or dam safety. If the Corps determines the TAT's direction falls within those criteria, then it must follow that direction and cannot continue to ignore the advice of fisheries experts to prioritize other uses of the Project. Furthermore, the Court may retain jurisdiction to oversee compliance with its injunction order and Plaintiffs propose that the Corps submit biannual status reports to the Court to ensure proper compliance. *Id.*; *Wishtoyo*, 2018 WL 6265099, at *75 (retaining jurisdiction over injunction); *Tidwell*, 2010 WL 5464269, at *8 (same). Therefore, the Court would not be delegating judicial function to the TAT as the Corps claims. Fed. Def. Br. at 13.

The need for an expert advisory team is particularly great for this type of injunction, where operations must be continually adjusted based on current hydrologic conditions, and various impacts to fish must be weighed to determine which operations will be most beneficial to the species at that particular time. This type of adaptive management approach calls for a team of experts to weigh the tradeoffs and select the operations that will be most helpful for the species based on the current data and their professional expertise. Indeed, it would be impossible for the Court to order the precise actions the Corps must take under all circumstances when hydrologic conditions and the needs of the fish vary within and between years.

In other cases involving complex injunctions that may require adjustments, courts have allowed adaptive management approaches and participation of experts. *See Hoopa Valley Tribe v. BOR*, 2017 WL 6055456, at *2–4 (N.D. Cal. March 24, 2017) (laying out processes for injunction over BOR water deliveries); *Melendres v. Arpaio,* 2013 WL 5498218, at *4, 7–8, 30–37 (D. Ariz. Oct. 2, 2013), *aff'd in part and vacated in part,* 784 F.3d 1254, 1266–67 (9th Cir. 2015) (assigning expert "monitor" broad powers to review and approve/disapprove actions and

report to court on compliance with injunction); *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 891–93 (N.D. Cal. 2009) (discussing injunction that included expert review and modifying terms). This Court previously considered but denied a request for a new system of adaptive management for the FCRPS spill injunction because there was no evidence the existing system was not working, but it left open the possibility of granting that request if such evidence arose. *NWF VII*, 2017 WL 1829588, at *10. Here, ample evidence exists that the current system is not working because the Corps routinely rejects advice of the expert agencies, to the detriment of the species, and thus a new system must be established to prioritize the needs of the fish.

The Corps' argument concerning the Clean Water Act is similarly unavailing. The Corps claims that Plaintiffs' remedy measures "could" violate the Clean Water Act by exceeding the 110% TDG standard, Fed. Def. Br. at 18, but the Corps' operations already violate that standard on a regular basis. Flood control operations and other spill operations often exceed 110% TDG, particularly at Big Cliff Dam. Second Piaskowski Decl. ¶ 21 ("TDG exceedences above the Oregon state water quality standard most often occur as a result of flood risk management operations."); Askelson Decl. ¶ 67 (discussing TDG exceedences in North Santiam); Kelley Decl. ¶ 10 (noting regular exceedences of standard at Big Cliff); Fourth Domingue Decl. ¶ 13 (describing high TDG levels from Corps' normal operations); Second Domingue Decl. ¶¶ 15–16 (same); Pl. Exs. 23 at 7, 34 at 25-28 & 41-42, 35, 36 at 27-29 & 44, 37, 38, 79, 80, 81 at 1, 82 at 1 (all discussing high TDG levels at Big Cliff and Foster dams).

Furthermore, many of Plaintiffs' measures that may result in high TDG are similar to measures proposed by the Corps, such as prioritizing use of regulating outlets over turbines at Detroit Dam, prioritizing spill over turbines at Foster Dam, prioritizing regulating outlets over turbines at Cougar Dam, spring spill at Lookout Point Dam, and using spill over turbines at

Dexter Dam. Second Piaskowski Decl. ¶¶ 20, 26, 35–36, 45. And Plaintiffs have proposed numerous measures to address TDG problems caused by the Corps' standard operations as well as their own remedy proposal. *See* Measures 7, 8, 11, 12, 13, 22, 24, 43, 44 in Second Piaskowski Decl. Ex. 4 (ECF No. 134-4). Indeed, this Court's injunctions in the FCRPS cases allowed for spill that exceeded the 110% TDG standard to increase juvenile survival during downstream migration. *NWF VII,* 2017 WL 1829588, at *7, 9 (noting prior injunction allowed 115–120% TDG and allowing up to 125% TDG in new injunction). The Corps' frequent violations of the state TDG standard under existing operations, its interim measures that may also violate standards, and this Court's ordering of injunction measures that would exceed 110% TDG all undermine the Corps' argument on this point.

IV. PLAINTIFFS' MEASURES BETTER ADDRESS KEY HARMS TO THE SPECIES CAUSED BY THE CORPS' ESA VIOLATIONS.

Plaintiffs have proposed a suite of measures to remedy the Corps' ongoing ESA violations and resulting harm to UWR Chinook and steelhead found by this Court in its summary judgment ruling. Importantly, the Corps makes no assertion that Plaintiffs' measures will impair flood control operations, and offers only one potential concern about dam safety that relates to the longer fall drawdown at Fall Creek Dam. Similarly, because Plaintiffs are not asking for a deep drawdown at Detroit Dam, like they did in their preliminary injunction motion, neither the Corps nor Intervenors have raised concerns about the City of Salem's drinking water supply.

Instead, the Corps' arguments about Plaintiffs' measures revolve almost exclusively around tradeoffs between the benefits of Plaintiffs' measures and potential impacts to water temperatures, TDG levels, and water flows. Despite these potential tradeoffs, Plaintiffs' experts, ODFW, and NMFS all support Plaintiffs' measures because of the need for aggressive actions to try and improve access to and from high quality spawning habitat above the dams. *See* Fourth

Domingue Decl. ¶¶ 10–23, 62-63; Fifth Schroeder Decl. ¶¶ 53-58, 100-05. Even the Corps presumably agrees the tradeoffs are worth it for a number of Plaintiffs' measures because it has proposed similar measures. [4]

A. The Weight of Evidence Supports Plaintiffs' Measures to Reduce the Harms Found by this Court on Summary Judgment.

Plaintiffs explained the need for their injunction measures in their opening remedy brief and accompanying expert declarations. Pl. Remedy Br. at 15–32; Fourth Schroeder Decl.; Third Domingue Decl. Below, Plaintiffs explain that the Corps' response does not alter those conclusions, either because the Corps is proposing similar measures or Plaintiffs' measures are worth doing despite potential tradeoffs. Plaintiffs also note a few adjustments to their measures based on information in the Corps' response.

1. North Santiam

A number of Plaintiffs' measures for the North Santiam are similar to the Corps' measures. Plaintiffs' measure 5, which prioritizes RO use over turbine use from November 1 through February 1, is almost identical to the Corps' measure 5, except Plaintiffs propose doing it sunset to sunrise to assist fish migrating during all nighttime hours, similar to the proposal at Foster Dam. Second Piaskowksi Decl. ¶ 20 (Corps measure 5); Second Piaskowski Decl. Ex. 4 (Plaintiffs' measures 5, 22). Plaintiffs also propose several operations to address TDG below Big Cliff Dam (measures 7, 8, 11, 12), which are just more detailed versions of the Corps'

[4] Mr. Piaskowski's diatribe about the flaws of hatchery practices are irrelevant. Second Piaskowski Decl. ¶¶ 120-26. First, the scope of this injunction must be tailored to the harms found by the Court, and the Court did not address hatchery practices in its summary judgment ruling. Second, NMFS has recently issued Hatchery Genetic Management Plans that cover these hatcheries and prescribe best management practices. Fifth Schroeder Decl. ¶¶ 37-38. Lastly, as explained by Mr. Schroeder, the Corps must first improve passage at these dams so wild fish can spawn above them and migrate to and from the ocean before the agency can stop relying on hatchery fish. *Id.* ¶ 42. Improving hatchery practices is undoubtedly important but should not be prioritized over improving passage and water quality. *Id.* ¶ 41.

measures 5 and 6 that address the same problem (Second Piaskowski Decl. ¶ 21).

The key disputes in the North Santiam involve Plaintiffs' measures 4, 6, and 13. Plaintiffs clarify that under measure 4 (use of lower ROs for temperature control in November), the Corps would begin the reservoir drawdown earlier rather than start at the normal time and increase flows through Detroit Dam. Taylor Decl. ¶ 17 (ECF No. 133). The Corps claims an earlier drawdown would reduce its ability to do water temperature control operations in summer and early fall. *Id.* ¶ 19; Second Piaskowksi Decl. ¶ 50. Currently, temperatures are too warm from mid-October to early December and use of the lower ROs could provide cooler water in November. Pl. Remedy Br. at 26. The Corps has been conducting its temperature control operations for years, which have resulted in some improvements, but early emergence of juvenile fish due to warm temperatures still occurs and varies year to year. Fifth Schroeder Decl. ¶ 62. It is worthwhile to test Plaintiffs' operation and monitor whether the impacts to temperature result in an overall benefit to salmon and steelhead. *Id.* ¶ 63; Fourth Domingue Decl. ¶¶ 24-29; Pl. Exs. 70 at 7, 73 at 2 (also recommended by NMFS and ODFW).

The Corps also claims that Plaintiffs' proposal to prioritize use of upper ROs over turbines November 1 to February 1 for passage would conflict with use of the lower ROs for temperature control. Second Piaskowski Decl. ¶ 52; Taylor Decl. ¶ 21. Yet, the Corps is proposing almost the same upper RO-over-turbine measure. Second Piaskowski Decl. ¶ 20. Under the Corps' measures, there would be no use of the lower ROs to counter the "much warmer water" passed through the upper ROs. *See* Taylor Decl. ¶ 21 (upper ROs would draw in warmer water in Nov.-Dec.). Thus, Plaintiffs' measures would do more to reduce water temperatures in late fall. Fourth Domingue Decl. ¶ 28.

Next, the Corps claims Plaintiffs' spill operation under measure 6 would occur earlier

than normal spill at Detroit Dam, before juvenile fish are near the dam. Taylor Decl. ¶ 22; Second Piaskowski Decl. ¶¶ 54–56. Plaintiffs' experts explain that earlier spill in spring would likely pass more juvenile fish. First, they note that the data does not appear to support the claim that most juveniles stay in the upper reservoir until June. Fifth Schroeder Decl. ¶¶ 45, 65; Fourth Domingue Decl. ¶ 31. Furthermore, the aim of Plaintiffs' proposal is to create a downstream flow signal by spilling a large amount of water all night for 30 days, helping fish navigate through the reservoir to the dam rather than getting stuck in the upper part of a stagnant reservoir. Fourth Domingue Decl. ¶ 20. Earlier spring spill would also more closely match the normal migration timing for the fish and pass them when water downstream is cooler. Fifth Schroeder Decl. ¶ 46. For these reasons, it is worth testing this operation to see if it improves passage survival as spill is currently the primary passage method at Detroit Dam. *Id.* ¶¶ 65-66.

Last, Plaintiffs propose a structural solution for the recurring TDG problems at Big Cliff Dam in measure 13. Pl. Remedy Br. at 27–28. The Corps' engineer does not dispute a structural solution is possible but asserts more time would be needed than what Plaintiffs propose. Askelson Decl. ¶¶ 81–83. Plaintiffs believe the Corps' recommended timeline of 4.5 years to complete the three-step process is excessive given how long this problem has been occurring and how much information is already known, but are willing to agree to one year per step for a total of three years for the whole process. Fourth Domingue Decl. ¶ 34.

2. South Santiam

Many of Plaintiffs' measures for the South Santiam are similar to the Corps' measures. At Foster, Plaintiffs' measure 22 to prioritize use of spill over turbines is similar to the Corps' measure 9 but with slightly different seasons and hours. Second Piaskowski Decl. ¶¶ 26, 73–74. Based on information in the Corps' declarations, Plaintiffs are willing to adjust their fall

operation so that it starts October 15 like the Corps'. *Id.* ¶ 26; Taylor Decl. ¶ 32. But Plaintiffs believe the hours of 4 pm to 8 am for the fall operation are more beneficial so it occurs from sunset to sunrise at that time of year (as opposed to the Corps' hours of 7 pm to 7 am). Third Domingue Decl. ¶ 54; Fourth Schroeder Decl. ¶ 60. Plaintiffs' water quality measures at Foster and Green Peter are also similar but more comprehensive than the Corps' measures. *Compare* Second Piaskowski Decl. Ex. 4 at 2-3 (Plaintiffs' measures 19, 22, 24, 25) *with* Second Piaskowski Decl. ¶¶ 27, 29, 72, 75.

With regard to fixing the Foster fish weir and Foster adult fish trap and ladder (Plaintiffs' measures 21 & 27), the Corps is well aware of the problems but has not committed to completing the fixes. *See* Second Piaskowski Decl. ¶¶ 61, 74 (passage operations will occur at Foster "until improvements can be made to the redesigned Foster Fish Weir"); ¶ 75 (stating that Corps has developed a structural solution to improve the Foster Fish Facility and fish ladder but "funding is necessary for construction"). Given the Corps' repeated delays in completing projects, Plaintiffs seek an order for the Corps to complete these two actions within Plaintiffs' requested deadlines.

The South Santiam measures that are in dispute all relate to fish passage: outplanting adult fish above Green Peter Dam and measures for downstream passage, and delayed refill of Foster Reservoir. Second Piaskowski Decl. Ex. 4 at 2-3 (Plaintiffs' measures 14-18, 23). The Corps goes to great lengths to dispute Plaintiffs' proposal to outplant adult fish above Green Peter Dam and pass juvenile fish through the dam. Second Piaskowski Decl. ¶¶ 62–71; Taylor Decl. ¶¶ 26–30. This position is not surprising given that the Corps has resisted NMFS's recommendations to conduct this activity for years. 2008 BiOp at 9-33; Pl. Exs. 10 at 2-3, 30, 31, 85; Kelley Decl. ¶ 16. The Corps expresses concerns about uncertainties and tradeoffs but that is the whole point of conducting the operation—to test it and monitor the results and then

make adjustments. Plaintiffs' experts and ODFW have expressed the urgent need to begin this action given the extreme importance of habitat above Green Peter Dam. *See* Fifth Schroeder Decl. ¶¶ 26, 67, 73-75; Pl. Remedy Br. at 18-19; Kelley Decl. ¶¶ 14-20.

The Corps' concerns do not outweigh the need to test this operation. First, the concern that outplanting adult fish above Green Peter would adversely affect "locally-adapted, natural-origin populations" of UWR Chinook is soundly refuted by Mr. Schroeder. Taylor Decl. ¶ 26; Second Piaskowski Decl. ¶¶ 62, 67-68; Fifth Schroeder Decl. ¶¶ 68-72. Second, the tradeoffs on Plaintiffs' proposed downstream migration operations do not outweigh the potential benefits. Taylor Decl. ¶¶ 27-30; Second Piaskowski Decl. ¶¶ 63-66. One intent of the spill operation is to create a downstream flow signal to encourage movement of juvenile fish toward the dam and reduce the likelihood the fish will perish in the reservoir. Fourth Domingue Decl. ¶¶ 20, 36. The use of the fish horns is not critical to this operation as most fish will use spill to pass the dam. *Id.* ¶ 35. And improving access to and from high quality habitat above dams will often outweigh meeting downstream flow targets. Taylor Decl. ¶ 27; Fourth Domingue Decl. ¶¶ 14-19, 37. In sum, the Corps' litany of excuses for not outplanting fish above Green Peter are refuted by Plaintiffs' experts and do not rebut the great need to begin the process of accessing that habitat.

With regard to Foster Reservoir, Mr. Piaskowski admits that maintaining the reservoir at minimum conservation pool until May 15 (Plaintiffs' measure 23) "could increase the passage survival of juvenile UWR Chinook salmon and UWR steelhead." Second Piaskowski Decl. ¶ 74. Keeping the reservoir at a low level in spring will assist juvenile migration through the reservoir during a prime migration time, and would still allow spill to occur at Foster Dam to pass the fish downriver. Fourth Domingue Decl. ¶ 39. Mr. Taylor contends that the Corps would need to use water from Green Peter to refill Foster Reservoir after May 15, which could affect spill

operations at Green Peter. Taylor Decl. ¶ 33. As Plaintiffs' expert explains, however, filling Foster Reservoir in summer is not necessary for UWR salmon and steelhead and therefore extra storage water from Green Peter would not be required. Fourth Domingue Decl. ¶ 39.

3. South Fork McKenzie

Interestingly, the Corps spends significant time discussing problems with Plaintiffs' measures 28, 29, 31, and 32 related to downstream passage at Cougar Dam. Second Piaskowski Decl. ¶¶ 77–82; Taylor Decl. ¶¶ 38–42. But these measures are the same, or very similar, to measures in the Corps' interim plan. Second Piaskowski Decl. ¶¶ 35–36, 82. The Corps itself clearly determined it was worth testing these measures despite the potential impacts to downstream flows, water temperatures, and reservoir rearing. *Id.* Thus, the Corps' statements about Plaintiffs' similar measures essentially argue against its own plan. But Plaintiffs' experts agree that testing these passage operations are worth the tradeoffs. Fourth Domingue Decl. ¶¶ 41-45; Fifth Schroeder Decl. ¶¶ 76-80.

The key term of Plaintiffs' measures that diverges from the Corps' is the deep drawdown of Cougar Reservoir from November 15 to December 15 (Plaintiffs' measure 30). The Corps admits that "[t]he number of juvenile UWR Chinook salmon passing downstream at Cougar Dam could increase significantly in fall when the reservoir is drawdown (sic) to elevation 1505 feet as proposed by the Plaintiffs, potentially leading to a future increase in population abundance." Second Piaskowski Decl. ¶ 76; *see also id.* ¶ 80 (noting more juveniles would pass under these conditions compared to current operations); Taylor Decl. ¶ 43 (drawdown has the potential to improve the survival of juvenile UWR Chinook migrating downstream). The only reason the Corps has not proposed this measure is because it claims it does not have authority but, as discussed above, that claim is incorrect. Second Piaskowski Decl. ¶ 76.; *supra* pp. 14-20.

The other of Plaintiffs' measures not included in the Corps' plan is changes to the Cougar Dam RO spillway to reduce injury to fish passing through those outlets (Plaintiffs' measure 35). *See* Ziller Decl. ¶ 16 (ECF No. 138); Fourth Domingue Decl. ¶ 46; Pl. Ex. 94. The Corps' engineer does not object to coating the RO chute, but notes that a flip lip at the lower end of the chute may present problems. Askelson Decl. ¶¶ 147–49. Yet he acknowledges that "several different structures may be required to achieve favorable fish passage conditions while maintaining appropriate energy dissipation qualities to prevent downstream damage." *Id.* ¶ 149. If structures other than a flip lip can reduce fish injury and also prevent damage to the downstream channel, Plaintiffs are certainly agreeable to that solution. But a court order is necessary to ensure that a substitute solution is implemented within a four-year timeframe.

4. Middle Fork Willamette

As with the other sub-basins, some of Plaintiffs' proposed measures for the Middle Fork Willamette match up with similar measures in the Corps' plan. In particular, Plaintiffs' spring spill operation at Lookout Point Dam and prioritizing spill over turbine use at Dexter Dam are similar to the Corps' measure 21. *Compare* Second Piaskowski Decl. ¶ 45, *with* Second Piaskowski Decl. Ex. 4 at 3-4 (measures 39 and 43). Plaintiffs tailored their Lookout Point spill operation to match what NMFS proposed in June 2019. Pl. Ex. 89 at 5. They increased the hours of the Dexter spill operation over what the Corps proposed to capture all hours from sunset to sunrise, similar to the proposals for Detroit and Foster dams (Plaintiffs' measures 5 & 22).

Mr. Piaskowksi goes into detail about problems with hatchery practices and adult pre-spawn mortality in the Middle Fork sub-basin, arguing that fixing those problems must occur before attempting to improve downstream juvenile migration. Second Piaskowski Decl. ¶¶ 84–86. Mr. Schroeder refutes that contention, explaining that addressing the downstream passage

problem is at least as high, if not higher, priority. Fifth Schroeder Decl. ¶¶ 82-85. The Corps cannot escape its own ESA duties by passing the buck to another agency.

Like with Cougar Dam, Plaintiffs propose a deep drawdown for Lookout Point from November 15 to December 15 to pass fish through the ROs instead of the turbines (measures 36 & 38), with no corresponding measure from the Corps. Again, the Corps admits this operation "could significantly increase juvenile passage rates" but cannot conduct it because it lacks authority. Second Piaskowki Decl. ¶ 85; Fed. Def. Br. at 16. As explained above, the Corps does have authority for this operation and should finally fulfill this long-awaited action. *See* Pl. Remedy Br. at 23 (discussing prior planning and repeated recommendations for this operation); Fourth Domingue Decl. ¶¶ 51-52 (supporting measure).

In conjunction with the Lookout Point deep drawdown, Plaintiffs propose using the RO for temperature control beginning August 15. Second Piaskowksi Decl. Ex. 4 at 3 (measure 37). Although this measure is "technically feasible," the Corps' biologists claim it likely will not provide much benefit. Taylor Decl. ¶ 45; Second Piaskowksi Decl. ¶ 87. Yet the Corps has never tried it and is relying on modeling to assert it will not help. *Id.* (citing a report on "simulated dam operations"); Exs. 76 at 61, 77 at 63. Given high water temperatures in late summer and fall, the Corps has offered no legitimate reason not to test this operation. Fourth Domingue Decl. ¶¶ 53-54.

Plaintiffs have also called for plans to reduce predators in Lookout Point Reservoir but the Corps has not proposed anything similar. Second Piaskowski Decl. Ex. 4 at 4 (measure 42); Fifth Schroeder Decl. ¶ 88; Ziller Decl. ¶ 18. Likewise, the Corps still has not committed to improving the Dexter adult fish facility despite a 2014 deadline in the 2008 RPA for that action. 2008 BiOp at 9-40. The Corps tries to deflect blame by pointing at poor hatchery management

practices, but the failure to upgrade the fish facility is a big part of the problem. Second Piaskowski Decl. ¶ 94; Fifth Schroeder Decl. ¶ 86; Pl. Exs. 66 at 5, 70 at 10, 73 at 3 (NMFS and ODFW recommendations to improve or rebuild fish facility). Plaintiffs seek a deadline of two years to complete this long-delayed action (measure 46).

5. Fall Creek

Plaintiffs proposed two passage measures for Fall Creek Dam: an extended fall deep drawdown and maintaining a low reservoir level from April 1 to June 30. Second Piaskowski Decl. Ex. 4 at 4 (measures 47–48). Plaintiffs maintain their extended fall drawdown proposal but adjust the spring operation due to potential effects to the adult fish trap.

Plaintiffs are proposing to extend the fall drawdown to six weeks rather than the normal 1–2 weeks. The Corps claims that it is not necessary to extend the drawdown because the juveniles that were in the reservoir all pass within the first week. Second Piaskowski Decl. ¶ 95; Taylor Decl. ¶ 48. Plaintiffs' expert explains that, while the fish that were in the reservoir may pass during the first week, other fish may be migrating downriver during the next five weeks and could continue their journey uninterrupted past Fall Creek Dam. Fourth Domingue Decl. ¶ 56. This would allow those later-arriving juveniles to follow their natural migration timing. Furthermore, a longer drawdown could move more material downstream, such as sediment and woody debris, that provides substrate for fish habitat below the dam. *Id.*

Mr. Taylor asserts that the longer drawdown could create unnecessary risk to the dam structure, Taylor Decl. ¶ 49, but the Corps' engineer explains that it would not present an immediate dam safety issue and the Corps would monitor and then suspend the operation if problems arose with erosion. Askelson Decl. ¶ 193. Similarly, cultural resource sites could be monitored and the drawdown terminated if impacts occurred. Taylor Decl. ¶ 49.

Given the Corps' concerns about impacts to the adult fish facility from Plaintiffs' proposal to keep the Fall Creek reservoir at 728' from April 1 to June 30, Plaintiffs are willing to adjust their proposal so that the reservoir would be kept at that level from mid-February to mid - April. Taylor Decl. ¶ 53. This would allow juvenile fish that enter the reservoir in early spring to move downriver during their normal migration timing but should not curtail operation of the adult fish trap. Fourth Domingue Decl. ¶¶ 60-61. Plaintiffs' experts explain that maintaining diversity of juvenile migration timing is highly important, and they refute Mr. Taylor's assertion that rearing to a large size in reservoirs before moving downriver results in better overall survival. Fifth Schroeder Decl. ¶¶ 44-52; Fourth Domingue Decl. ¶¶ 21-22, 61.

B. The Court Should Order the Corps to Fund Important Monitoring and Follow Advice of the Technical Advisory Team.

As part of their remedy proposal, Plaintiffs seek an order requiring the Corps to fund certain types of monitoring and to incorporate a technical advisory team into the decision-making process. Each of these provisions is critical due to the Corps' past efforts to avoid paying for research and monitoring and its rejection of expert agency recommendations.

The Corps has often been at odds with NMFS and ODFW over paying for important monitoring studies. *See* Pl. Ex. 95 (2016 meeting notes discussing monitoring issues and conflicts); Ex. 96 at 1 (noting studies NMFS recommended but Corps was not planning to conduct).[5] The types of monitoring sought here have two critical purposes: (1) assessing the effectiveness of the remedy measures; and (2) providing information for the new biological opinion. Both types of monitoring are tied to the harm found by this Court because they seek information to assess measures aimed at avoiding jeopardy and take, as well as information on

[5] Given the Corps' past refusal to fund many recommended studies, it is unsurprising that Mr. Piaskowksi criticizes Plaintiffs' remedy proposal. Second Piaskowski Decl. ¶¶ 97–106.

the status of the species that has resulted from the Corps' neglect of its ESA duties. Mr. Schroeder explains the need for these types of monitoring, particularly the pit-tag monitoring that should occur in place of the limited-value screw trap monitoring proposed by the Corps to evaluate the effectiveness of operational measures. Fifth Schroeder Decl. ¶¶ 89-97. All of this information is critically important to inform a new long-term plan for the species in the upcoming biological opinion. Contrary to the Corps' assertion that Plaintiffs are trying to dictate the substance of the new opinion, Fed Def. Br. at 29-30, Plaintiffs are merely trying to force the Corps to collect information that will be valuable to NMFS's analysis, and which the Corps should have been collecting for years.

As explained above, the use of a TAT is important to restrain the Corps' tendency to ignore advice of the expert agencies. *Supra* pp. 20-23. Plaintiffs recognize the complexity involved with the operation of these dams, and the need to make continuous management adjustments based on changing hydrology and various Project purposes. However, the Corps has failed to properly prioritize the needs of UWR salmon and steelhead in its management decisions. The TAT constitutes an outside expert team that will prioritize fish over other uses when assessing Project operations and making adjustments to those operations. Fourth Domingue Decl. ¶ 9. The Corps must follow the TAT's advice unless there are conflicts with human health and safety in order to comply with its duties under the ESA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court order their proposed injunction to remedy the Corps' ESA violations and reduce future harm to the species. [6]

[6] Pl. Ex. 97 is a revised remedy proposal that contains the few changes discussed in this brief.

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Respectfully submitted,

/s/Lauren M. Rule

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EXHIBITS

The following exhibits are public documents obtained from NMFS, the Corps, or ODFW.

Exhibit 91: DRAFT list of Willamette BiOp Implementation Disputes (April 15, 2019)

Exhibit 92: NMFS internal email re WATER Guidelines during reinitiation (May 14, 2020)

Exhibit 93: WATER Manager's Forum Meeting Notes (April 25, 2017)

Exhibit 94: NMFS email to Corps re: Special Ops Request for Cougar Dam (Dec. 26, 2018)

Exhibit 95: WATER RM&E Team Meeting Notes (Aug. 25, 2016)

Exhibit 96: Memo from NMFS to Corps re: review of draft proposals for RM&E (Nov. 2, 2018)

Exhibit 97: Plaintiffs' revised remedy proposal