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Effect of ESA Listings on the Operation of FERC-Licensed Projects: The Hells Canyon Example and Beyond

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EFFECT OF ESA LISTINGS ON THE OPERATION OF FERC-LICENSED PROJECTS: THE HELLS CANYON EXAMPLE AND BEYOND

*James M. Lynch**

INTRODUCTION

Hydropower development has drastically altered natural hydrologic conditions and aquatic habitat in the Columbia River Basin, resulting in substantial reductions in salmonid abundance. The Northwest Power Planning Council estimates that current annual salmon and steelhead production in the Columbia River Basin is 10 million fish below historical levels, with 8 million of the annual loss attributable to hydropower development and operation.[1] Approximately half of this 8 million fish loss is attributable to the loss of spawning and rearing habitat blocked by Grand Coulee and Hells Canyon dams in the upper Columbia and middle Snake Rivers.[2] Aside from simply blocking habitat, hydropower development has adversely affected fish populations in a variety of other ways including migration delay resulting from insufficient flows or habitat blockages, stranding of fish resulting from rapid flow fluctuations, entrainment of juveniles into poorly screened or unscreened diversions, and increased mortality re-

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1. *See* NORTHWEST POWER PLANNING COUNCIL, SEVENTH ANNUAL REPORT OF THE PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL 8 (1987).

2. *See* SNAKE RIVER SALMON RECOVERY TEAM, NATIONAL MARINE FISHERIES SERVICE, FINAL RECOMMENDATIONS TO NATIONAL MARINE FISHERIES SERVICE II-11 (1994).

sulting from alterations in ambient water temperatures.[3]

The full impacts of hydropower development on salmonid populations are now evident in several proposed and final listings of Pacific salmonids under the Endangered Species Act (ESA).[4] At present, 14 evolutionarily significant units (ESUs)[5] of Pacific salmon and trout are listed by the National Marine Fisheries Service (NMFS)[6] as threatened or endangered species under the ESA.[7] These listings include Snake River sockeye

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3. *See* J. Palmisano, et al., Washington Forest Protection Association and the State of Washington Department of Natural Resources, The Impact of Environmental and Management Factors on Washington's Wild Anadromous Salmon and Trout (1993).

4. *See* 16 U.S.C. §§ 1531 *et seq.* (West Supp. 1998).

5. The National Marine Fisheries Service (NMFS) considers a Pacific salmonid population (or group of populations) to constitute a species under the ESA if it represents an evolutionarily significant unit (or ESU) of the biological species. NMFS defines an ESU as a salmonid population that 1) is substantially reproductively isolated from nonspecific populations and 2) represents an important component of the evolutionary legacy of the species. *See* 56 Fed. Reg. 58,612 (1991) (NMFS policy on the application of the term "species" to Pacific salmonids).

6. A 1974 Memorandum of Understanding between NMFS and FWS establishes that NMFS retains ESA jurisdiction over fish species that spend a majority of their lives in the marine environment, including anadromous salmonids. *See* Memorandum of Understanding Between the U.S. Fish and Wildlife Service, United States Department of Interior, and the National Oceanic and Atmospheric Administration, United States Department of Commerce, Regarding Jurisdictional Responsibilities and Listing Procedures under the Endangered Species Act of 1973 (1974).

7. *See* 56 Fed. Reg. 58,619 (1991) (Snake River sockeye); 57 Fed. Reg. 14,653 (1992) (Snake River spring/summer and fall chinook); 59 Fed. Reg. 440 (1994) (Sacramento winter-run chinook); 61 Fed. Reg. 41,514 (1996) (Umpqua River cutthroat trout); 61 Fed. Reg. 56,138 (1996) (Central California coastal coho); 62 Fed. Reg. 24,588 (1997) (Southern Oregon/Northern California coho); 62 Fed. Reg. 43,937 (1997) (Snake River, Southern California, South Central California coastal, Central California coastal, and Upper Columbia River steelhead); 63 Fed. Reg. 13,347 (1998) (Lower Columbia River and Central Valley steelhead); 63 Fed. Reg. 42,587 (1998) (Oregon coastal coho); 64 Fed. Reg 14,308 (March 24, 1999) (Puget Sound, Lower Columbia River, Upper Willamette River, and Upper Columbia River chinook); 64 Fed. Reg. 14,508 (March 25, 1999) (Hood Canal Summer-run and

salmon (*Oncorhynchus nerka*), Snake River spring/summer and fall chinook salmon (*O. tshawytscha*), and Snake River steelhead (*O. mykiss*).[8] In each of these listings, NMFS identified impacts associated with hydropower development as factors of decline for these species.[9]

The recent ESA listings discussed above provide powerful legal protections for these species, such as those contained in section 7 of the ESA. Section 7 requires federal agencies to insure any action they authorize, fund, or carry out is not likely to jeopardize a listed species or adversely modify its critical habitat.[10] Federal agencies comply with the requirements of section 7 through a consultation process with the NMFS or the U.S. Fish and Wildlife Service (FWS).[11] The courts have interpreted section 7's con-

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Columbia River chum); 64 Fed. Reg 14,517 (March 25, 1999) (Upper Willemette River and Middle Columbia River steelhead); 64 Fed. Reg. 14,528 (March 25, 1999) (Ozette Lake sockeye).

8. *See* 56 Fed. Reg. 58,619 (1991) (Snake River sockeye listed as endangered); 57 Fed. Reg. 14,653 (1992) (Snake River spring/summer and fall chinook listed as threatened); 62 Fed. Reg. 43,937 (1997) (Snake River steelhead listed as threatened). The NMFS designated critical habitat for Snake River sockeye and chinook salmon as well in 1993. *See* 58 Fed. Reg. 68,543 (1993).

9. *See, e.g.*, 62 Fed. Reg. 43,937, 43,942 (1997); G. Bryant and J. Lynch, National Marine Fisheries Service, Factors for Decline: A Supplement to the Notice of Determination for West Coast Steelhead (1996).

10. *See* 16 U.S.C. § 1536(a)(2) (1988).

11. *See* 50 C.F.R. § 402.14 (1998) (joint NMFS/FWS regulations for conducting formal section 7 consultations). If a federal agency determines its action may affect a listed species, it must prepare a biological assessment (BA), analyzing the effects of the action on the species. If the agency determines, with the written concurrence of NMFS, the action is not likely to adversely affect the listed species, it need not initiate formal consultation. However, if the action may adversely affect the listed species, the agency must initiate formal consultation with NMFS and submit its BA to NMFS for its consideration. The NMFS then considers this BA and issues a biological opinion which may conclude (1) the action will not likely jeopardize the species; (2) the action jeopardizes the species, but reasonable and prudent alternatives exist which if implemented, will result in the action avoiding jeopardy; or (3) the action jeopardizes the listed species and no reasonable and prudent alternatives exist to avoid jeopardy.

sultation requirements broadly, recognizing that the procedural safeguards contained in section 7 help ensure that federal agencies achieve the goals of the ESA.[12] These interpretations are likewise consistent with the legislative history of the ESA, which indicates that Congress intended federal agencies to cooperate in the implementation of the goals of the Act.[13]

In the face of seemingly clear congressional intent and judicial interpretation of the ESA, the Federal Energy Regulatory Commission (FERC), the federal entity responsible for licensing and regulating private hydropower projects in the United States,[14] has resisted ESA consultation even where it possesses clear authority to modify project operations to conserve fish and wildlife.[15] A notable example is the Hells Canyon Hydropower Project, a series of dams and facilities located on the Snake River in Idaho. Historically, the Snake River was the most important drainage in the Columbia River system for producing anadromous fish,[16] but the construction of the Hells Canyon Project substantially reduced this river's production of chinook salmon, blocking over 80 percent of its historic spawning and rearing habitat.[17] Attempts to trap and transport fish above and below the project proved unsuccessful,[18] and upon completion of the last dam in 1967, middle Snake River salmon runs were extinguished.[19] Despite the well-documented adverse effects of this project on listed chinook salmon and steelhead, and despite the fact that FERC has retained discretion in the project's license to modify operations to

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12. *See* Conner v. Burford, 848 F.2d 1441, 1458 (9th Cir. 1986).

13. *See* S. Rep. No. 93-307, at 3 (1973) (stating "[a]ll agencies, departments, and other instrumentalities of the Federal government are directed to cooperate in the implementation of the goals of this Act").

14. FERC is an independent agency within the Department of Energy which has jurisdiction over non-federal hydropower development under the Federal Power Act (FPA), 16 U.S.C. §§ 791(a)-828(c) (1988).

15. *See infra* Section I.

16. *See* NMFS, PROPOSED RECOVERY PLAN FOR SNAKE RIVER SALMON II-9 (1995).

17. *See* Scott Sonner, *Critics: FERC Failing to Protect Salmon,* COLUMBIAN, Dec. 3, 1997, at B1.

18. *See infra* Section I.A.

19. *See* Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future,* 28 IDAHO L. REV. 667, 675 (1992).

conserve these species,[20] FERC has failed to initiate formal consultation with NMFS as required by the ESA, even after specifically requested by NMFS to do so.[21]

This paper examines FERC's obligations under the ESA in light of the discretion it retains in the project's license. Part I begins by examining the regulatory history of the Hells Canyon Project and NMFS' attempts at initiating formal consultation with FERC. Part II examines federal agencies' duties under section 7, as indicated by the Supreme Court in *Tennessee Valley Authority v. Hill*[22] and explained by the Ninth Circuit in *Pacific Rivers Council v. Thomas*,[23] and also discusses the implications of a formal request for consultation by the Secretary of Commerce. Part III discusses the importance of reserved agency discretion in determining the need for consultation and analyzes prior court decisions establishing the limitations of federal duties under section 7. Part IV analyzes a 1980 settlement agreement between Idaho Power Company (IPC)[24] and state and federal resource agencies, which IPC claims obviates the need for FERC's consultation with NMFS, but which in fact does not eliminate FERC's independent duty to implement the ESA. Part V discusses the relationship between sections 7 and 9 of the ESA and considers the importance of section 9 liability absent consultation under section 7. Part VI discusses the potential implications of requiring FERC to consult on the ongoing operations of projects which it licenses, and provides an approach to solving the biological, legal, and practical challenges facing all agencies involved. The paper concludes that, despite the 1980 agreement, FERC is required to initiate formal consultation with NMFS under section 7 of the ESA for the ongoing operations of the Hells Canyon Project, because it retains discretion to modify project operations. Moreover, a comprehensive approach to consultation is needed at this point for all hydropower projects under FERC's jurisdiction to avoid species extinction.

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20. *See infra* Section I.C.

21. *See infra* Section II.B.

22. 437 U.S. 153 (1978).

23. 30 F.3d 1050 (9th Cir. 1994), cert. denied, 514 U.S. 1082 (1995).

24. IPC is the FERC-licensed operator of the Hells Canyon Project.

I. THE REGULATORY HISTORY OF THE HELLS CANYON PROJECT

A. *Pre-ESA Regulation: Resource Agencies Seek Compromise*

On August 4, 1955, the Federal Power Commission (FPC)[25] issued a fifty-year license to IPC, authorizing construction and operation of the Hells Canyon Project.[26] The project consists of three dams that were constructed in succession down the river. IPC first completed construction of Brownlee Dam in 1958; then it completed construction of the second dam, Oxbow, in 1962. IPC completed construction of the third and final project, Hells Canyon Dam, in 1967. The entire project, consisting of these three dams, produces about 1.16 megawatts of electric power per year, accounting for about 70 percent of IPC's total annual hydroelectric energy output.[27]

At the time of the initial licensing, FERC recognized that additional fish passage measures may be required at some point in the future. This intent is reflected in Article 35 of the license, which provides for fish protection as follows:

> The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance and operation of such fish ladders, fish traps or other fish handling facilities or fish protective devices and provide fish hatchery facilities for the purpose of conserving the fishery resources and comply with such reasonable modifications of the project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon its own motion or upon the recommendations of the Secretary of Interior and the conservation agencies of the States of Idaho and Oregon.[28]

The open-ended nature of this license article enabled state and federal resource agencies to successfully petition FERC on several occasions to require a variety of mitigation measures to conserve salmonids.

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25. The FPC was subsequently succeeded by FERC in 1978 with the passage of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (codified as amended at 42 U.S.C. §§ 7101-7352 (1988) and scattered sections of Title 3, 5, 7, 12 & 15).

26. *See* 14 F.P.C. 55 (1955).

27. *See* FEDERAL ENERGY REGULATORY COMMISSION, HYDROELECTRIC PROJECTS PRESENTLY UNDER COMMISSION LICENSE (1998).

28. 14 F.P.C. 55, 80 (1955).

During the period of the late 1950s through the mid-1970s, FPC issued several orders prescribing and modifying the requirements for fish passage facilities at the project.[29] One measure that proved unsuccessful was a trap and haul program designed to pass fish around the project dams.[30] After this failure to reestablish passage, IPC and the fishery agencies agreed to a hatchery compensation program.[31] However, this compensation program proved inadequate due to low numbers of returning fish. In 1976 NMFS and state agencies petitioned the FPC for a hearing and a determination of IPC's obligations under Article 35 of its 1955 license.[32] An administrative law judge conducted hearings in 1978 after which the parties entered into settlement negotiations.

On February 27, 1980 FERC approved a settlement agreement between the states of Idaho, Oregon, Washington, and NMFS and IPC which required IPC to "provide, operate, and maintain fish traps, fish hatchery facilities, and fish handling and transportation facilities that will provide annual production levels of fall chinook, spring chinook, and steelhead smolts."[33] In this settlement agreement, the state agencies, without NMFS' concurrence,[34] stipulated that IPC's commitments constituted "full satis-

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29. *See, e.g.*, 19 F.P.C. 237 (1958); 29 F.P.C. 478 (1963); 30 F.P.C. 1471 (1963); 33 F.P.C. 51 (1965); 35 F.P.C. 162 (1966); 37 F.P.C. 290 (1967); 49 F.P.C. 707 (1973).

30. The passage program consisted of trapping adult salmonids at Oxbow Dam and transporting them for release in the Brownlee pool. Juveniles were to be captured at Brownlee Dam and released downstream from the project. In 1965, the FPC approved a stipulation between IPC and the fishery agencies authorizing the abandonment of this trap and haul program. This program was abandoned because few juveniles were captured at the Dam due to poor migration conditions in the Brownlee reservoir. *See* 33 F.P.C. 51 (1965).

31. *See* Blumm, *supra* note 19, at 675.

32. *See* 56 F.P.C. 946, 948 (1976).

33. 10 F.E.R.C. ¶ 61,190 (1980) (order approving uncontested offer of settlement).

34. NMFS failed to stipulate to section II of the settlement agreement which provides that IPC's commitments in the agreement constitute full satisfaction of its duties under Article 35 of its license. While the agreement does not state why NMFS did not stipulate to this section, the logical answer is that NMFS disagreed with this provision and intended to resolve this issue in future proceedings. However, given that NMFS stipulated to other sections of this agreement, the significance of its failure to stipulate to section II is unclear.

faction" of its responsibilities to mitigate for numerical losses of salmon and steelhead at the project.[35] However, all agencies, including NMFS, stipulated to the following provision:

> The Petitioners agree that they will not for the duration of the current Project No. 1971 (Hells Canyon Project) license seek relief from the Federal Energy Regulatory Commission on any matter concerning Licensee's responsibility to compensate for salmon and steelhead losses under the Fish and Wildlife Coordination Act or the Federal Power Act nor seek changes in the operation of Project No. 1971 . . . [36]

This provision is followed by two exceptions. One exception is that IPC may provide additional flows at the request of the fishery agencies for the out-migration of fall chinook hatchery smolts released by IPC at Hells Canyon Dam.[37] The second exception provides for setting conditions for the release of water purchased by the fishery agencies.[38]

B. *Post-ESA Regulation: NMFS Asserts its Authority over Project Operations*

During the past eighteen years, several events occurred which call into question the biological and legal adequacy of this settlement agreement. In 1990, the Shonshone-Bannock Tribes and environmental groups petitioned NMFS to list Snake River sockeye and chinook salmon as threatened or endangered species under the ESA.[39] Both of these species were later, in fact, listed as endangered and threatened under the ESA.[40] A third species, Snake River steelhead, was recently listed as a threatened species

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35. Settlement Agreement between Idaho Power Company and the Idaho Department of Fish and Game, the Oregon Department of Fish and Wildlife, the Washington Departments of Fisheries and Game, and the National Marine Fisheries Service at § II (1980).

36. *Id.* at § III. While the states and NMFS stipulated to this section of the settlement agreement, no Indian Tribes were a party to this agreement. Consequently, this agreement should not foreclose tribal claims for lost or diminished tribal resources.

37. *See id.*

38. *See id.*

39. *See* 55 Fed. Reg. 22,942 (1990); 55 Fed. Reg. 37,342 (1990) (listing notices of receipt and acceptance of petitions to list Snake River sockeye and chinook salmon).

40. *See supra* note 8.

under the ESA.[41] These listings indicate that the provisions of the 1980 settlement agreement have failed to mitigate the impacts of the project and also show that the agreement's commitment to hatchery production likely contributed to the continued decline of these species.[42]

The precarious status of these species recently led NMFS to request that FERC initiate formal consultation concerning the ongoing effects of project operations on listed salmonids. In letters to FERC dated May 19, 1997, and October 17, 1997, NMFS requested that FERC conduct formal consultation under section 7(a)(2) of the ESA regarding operations at the Hells Canyon Project.[43] In these letters, NMFS claimed project operations were likely to adversely affect listed salmon and their critical habitat, and that FERC, with discretion to adjust project operations, should consult with NMFS as required by section 7.[44] In its October 17, 1997 letter, NMFS stated that informal discussions between NMFS and IPC regarding the Hells Canyon Project had to date focused on partial mitigation strategies and had not addressed the full range of project effects.[45] Absent a broader evaluation of project impacts on listed salmonids, NMFS concluded that project operations were likely to adversely affect listed Snake River species, requiring formal consultation under section 7(a)(2).[46] NMFS further recommended that FERC prepare a biological assessment (BA) to evaluate the current likely impacts of operation of the Hells Canyon Project on listed salmon and their

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41. *See supra* note 8.

42. In its final listing of Snake River steelhead as threatened, NMFS stated that the impacts associated with hatchery production have contributed to the decline of this species. *See* 62 Fed. Reg. 43,937, 43,944 (1997). Therefore, the very program that was intended to mitigate for the impacts of project construction likely exacerbated existing conditions. *See also* Blumm, *supra* note 19, at 679-680.

43. Letter from William W. Stelle, Jr., Regional Administrator, NMFS, to Elizabeth Anne Moler, Chairman, FERC (May 19, 1997); Letter from William W. Stelle, Jr., Regional Administrator, NMFS, to James J. Hoecker, Chair, FERC (October 17, 1997).

44. *Id.*

45. Letter from William W. Stelle, Jr., Regional Administrator, NMFS, to James J. Hoecker, Chair, FERC at 2 (October 17, 1997).

46. *See id.*

critical habitat.[47]

On December 3, 1997 FERC responded to NMFS' October 17, 1997 letter regarding consultation on the Hells Canyon Project.[48] FERC acknowledged the need to discuss the impacts of the project on listed species and requested a meeting with NMFS and IPC representatives to initiate these discussions.[49] In a letter dated February 6, 1998 FERC stated that it had designated IPC as its non-federal representative for conducting consultation with NMFS for the interim operation of the Hells Canyon Project,[50] and that it had directed IPC to prepare a draft BA evaluating the potential effects of the project operations on the listed Snake River species and their critical habitat.[51] On October 29, 1998 IPC filed a draft BA with FERC that was subsequently provided to NMFS.[52] By letters dated November 17 and November 20, 1998, NMFS presented its comments on the draft BA to FERC and requested that IPC collect more detailed information regard-

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47. *See id.*

48. Letter from James J. Hoecker, Chairman, FERC, to William Stelle, Jr., Regional Administrator, NMFS (December 3, 1997).

49. *See id.*

50. NMFS' implementing regulations for the ESA provide that federal agencies may designate a non-federal representative to conduct informal consultation or prepare a BA by giving written notice to NMFS of such designation, and providing guidance and supervision in the preparation of the BA. The ultimate responsibility for compliance with section 7 remains, however, with the federal action agency. *See* 50 C.F.R § 402.08 (1998).

51. Letter from Kevin Madden, Acting Director, Office of Hydropower Licensing, FERC, to William Stelle, Jr., Regional Administrator, NMFS (February 6, 1998). In this letter FERC summarized discussions occurring at a meeting held between FERC, NMFS, and IPC on January 22, 1998, regarding the project.

52. Letter from Nathan F. Gardiner, IPC, to David P. Boergers, Secretary, FERC (October 29, 1998). The draft BA states that IPC developed it to provide a technical basis for consultation, under section 7(a)(2) of the ESA, between FERC and NMFS and the U.S. Fish and Wildlife Service, for the relicensing and continued operation of the Hells Canyon Project. Idaho Power Company, Draft Biological Assessment of Hells Canyon Complex Operations for the Protection of ESA-Listed Fish Species at 1 (October 26, 1998). This statement indicates IPC's belief that FERC has an obligation under section 7(a)(2) to consult with NMFS regarding ongoing project operations.

ing operations at the Hells Canyon Project to satisfy the information requirements of section 7.[53] On November 24, 1998 IPC responded that collection of the additional data would require additional time and that such a delay would likely affect FERC's ability to submit a final BA to NMFS by the target date of December 1, 1998.[54] On February 19, 1999, FERC provided NMFS with a final biological assessment that had been completed by IPC, and adopted by FERC with minor changes.[55] On March 24, 1999, NMFS acknowledged receipt of the BA and stated it expected to complete a biological opinion by August 4, 1999.[56] As of August 10, 1999, NMFS had not completed this biological opinion nor had it indicated when it intends to do so.

C. *Continuing Project Operations and the Threat of Litigation*

On March 24, 1998 environmental groups filed a petition[57] for review in the Ninth Circuit, claiming that FERC violated the ESA because it had not initiated formal consultation regarding the

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53. Letter from Brian J. Brown, Director, Hydro Program, NMFS, to John Blair, Snake River Relicensing Environmental Coordinator, FERC (November 17, 1998); Letter from Brian J. Brown, Director, Hydro Program, NMFS, to David Boergers, Secretary, FERC (November 20, 1998).

54. Letter from James C. Tucker, Counsel for IPC, to David Boergers, Secretary, FERC (November 24, 1998).

55. Letter from J. Mark Robinson, Director, Division of Licensing and Compliance, FERC, to William Stelle, Jr., Regional Administrator, NMFS (February 19, 1999). FERC concludes in this letter and the associated BA that operation of the Hells Canyon Complex is not likely to adversely affect Snake River salmon and steelhead or their critical habitat.

56. Letter from William Stelle, Jr., Regional Administrator, NMFS, to J. Mark Robinson, Director, Division of Licensing and Compliance, FERC (March 24, 1999). NMFS states in this letter that it does not concur with FERC's determination that project operations are not likely to adversely affect listed species or their critical habitat and therefore will prepare a biological opinion analyzing the proposed action.

57. Petitioners include American Rivers, Northwest Environmental Defense Center, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Association, Trout Unlimited, Institute for Fisheries Resources, Federation of Fly Fishers, and the Sierra Club.

ongoing operations of the Hells Canyon Project.[58] FERC filed a motion for summary judgment on May 11, 1998, stating the petition for review was moot because they had fully complied with NMFS' request to initiate consultation under the ESA.[59] On March 16, 1999, the Ninth Circuit dismissed the case for lack of jurisdiction.[60]

In its brief concerning this case, FERC did not state whether it intends its ongoing dialogue with NMFS regarding project operations to constitute formal consultation under section 7(a)(2) of the ESA. Instead, FERC apparently intends its present consulta-

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58. Motion of Respondent Federal Energy Regulatory Commission to Dismiss Petition for Review at 11, *American Rivers v. FERC,* 170 F.3d 896 (9th Cir. 1999) (No. 98-70347). FERC also raised jurisdictional arguments in its motion; specifically, whether the petitioners had properly invoked the jurisdiction of the Ninth Circuit in this case.

59. *American Rivers et al. v. FERC,* 170 F.3d 896. In a one page opinion, the Ninth Circuit rejected the plaintiffs' attempt to obtain jurisdiction over FERC by petitioning FERC to consult with NMFS, and then deeming FERC's inaction on its petition to constitute a final, appealable order. Section 313 of the FPA provides that jurisdiction to "affirm, modify, or set aside in whole or in part: the orders of the Commission lies exclusively with the United States Court of Appeals." 16 U.S.C. § 8251(b) (1998). To seek relief in the courts of appeal, a party must be aggrieved by the Commission in a proceeding under the FPA. *See id.* An aggrieved party must, within 30 days of the issuance of a Commission order, apply to the Commission for rehearing or reconsideration raising all issues then brought on appeal. *See* 16 U.S.C. 8251(a) & (b) (1998). However, no statutory deadline exists in the FPA to require FERC to act on a petition or issue an order. FERC uses this procedural loophole in the FPA to avoid judicial review of its failure to consult under the ESA. *See id.*; *see also Southwest Center for Biological Diversity v. FERC,* 967 F. Supp. 1166, 1172-1175 (D. Ariz. 1997) (holding that a suit challenging FERC's failure to formally consult under section 7 at the district court level could not be brought under the ESA but instead must be brought in the court of appeals after complying with the jurisdictional requirements of the FPA). Consequently, plaintiffs seeking to compel FERC's action on petitions may be relegated to provisions of the Administrative Procedures Act which enables courts to compel agency action that is unreasonably delayed. *See* 5 U.S.C. § 706 (1999); *see also U.S. v. Popovich,* 820 F.2d 134, 137 (5th Cir. 1987) (discussing the legislative history of the APA).

60. *See American Rivers et al. v. FERC,* 170 F.3d 896.

tion to satisfy its obligations under section 7(a)(1),[61] the requirement for federal agencies to review programs administered by them and use their authorities to further the purposes of the ESA.[62] NMFS contends that FERC retains discretion to modify ongoing project operations and that those operations are likely to adversely affect listed species;[63] as a result, the agency has a duty to conduct formal consultation under section 7(a)(2).[64] The federal government's inability to resolve this internal conflict indicates the significance of the issue at hand: how expansively

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61. *See supra* note 52 and accompanying text. While FERC does not interpret its ongoing discussions with NMFS as section 7(a)(2) consultation, IPC does construe these discussions to constitute ESA consultation between federal agencies.

62. *See* 16 U.S.C. § 1536(a)(1) (1988). The distinction between an agency's duties under sections 7(a)(1) and 7(a)(2) is an important one. Section 7(a)(1) requires agencies to use their authorities to further the purposes of the ESA; however, the manner in which agencies accomplish this is discretionary, and the provision contains no procedural or substantive requirements. Section 7(a)(2) requires agencies to avoid jeopardy through consultation with NMFS - a substantive requirement that is mandatory. Furthermore, section 7(a)(2) contains procedural safeguards that help insure agencies consider the impacts of their actions on listed species as well as the recommendations of NMFS to avoid jeopardy to such species. The procedural aspects of section 7(a)(2) insure that the substantive provisions of the ESA are realized. The findings of NMFS under section 7(a)(2) are entitled to deference by a reviewing court, giving them substantial weight. *See* Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990). Consequently, while section 7(a)(1) encourages federal agencies to review their programs for consistency with the purposes of the ESA, section 7(a)(2) contains procedural and substantive safeguards that insure agencies adequately analyze their actions and give appropriate weight to conservation recommendations made by NMFS in reviewing such actions. Furthermore, the Fifth Circuit recently held that section 7(a)(1) imposes an affirmative obligation on each federal agency to conserve listed species. *See* Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998). To achieve this objective, the agencies must consult with the Secretary, not just undertake generalized consultation. *See id.*

63. *See infra* Section II.A.

64. *See* 50 C.F.R. § 402.14 (1998) (defining the NMFS regulation requirements for formal consultation).

should the courts interpret the procedural requirements of the ESA in light of its substantive goals?

II. FEDERAL ACTIONS AND AGENCY DUTIES UNDER SECTION 7

A. *Defining What Constitutes an Agency Action Under Section 7*

NMFS' ESA implementing regulations define a federal action broadly as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States upon the high seas."[65] The courts have likewise supported a broad interpretation of federal actions requiring consultation, including both proposed and ongoing actions.[66] For example, in *Tennessee Valley Authority*, the now famous ESA case concerning the Tellico dam, the Court held that even though construction of the dam began prior to passage of the ESA, dam operation could not continue because it would jeopardize, and likely extirpate, the listed species.[67] The Court went on to state that "it is clear Congress foresaw that section 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act."[68] This statement by the Court indicates that after a species is listed, federal agencies have an ongoing duty to review the effects of previously authorized project operations, and to modify those operations if they might have an adverse affect on a listed species.[69]

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65. 50 C.F.R. § 402.02 (1998).

66. *See* Village of False Pass v. Clark, 733 F.2d 605, 611 (9th Cir. 1984) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 n.18 (1978)). In this footnote, the Court stated the term "actions" contained in section 7 includes "all actions that an agency can ever take," including those taking place beyond the mere planning stage. Also, the Court held a more narrow reading of the term "actions" would be inconsistent with congressional intent.

67. 437 U.S. at 173-174.

68. *Id.* at 186.

69. Aside from an ongoing duty to review the effects of previously authorized actions, federal agencies and applicants must avoid making irreversible or irretrievable commitments of resources with respect to an agency action which has the effect of foreclosing the formulation or implementation of reasonable and prudent measures. *See* 16 U.S.C § 1536(d) (1988). This duty only exists, however, after the initiation of formal consultation under section 7(a)(2). *Id.*

Building upon *Tennessee Valley Authority*, the Ninth Circuit recently held that comprehensive federal land management plans that guide a multitude of individual projects constitute "ongoing agency actions" requiring consultation.[70] In *Pacific Rivers Council*, at issue was whether the U.S. Forest Service's (USFS) failure to consult over its land and resource management plans (LRMPs) violated its ESA obligations.[71] The LRMPs established forest-wide and area-specific standards and guidelines detailing every resource plan, permit, contract, or any other document pertaining to the forest.[72] The USFS argued in this case that the LRMPs did not constitute ongoing agency actions, and therefore were subject to consultation requirements only when initially adopted, revised, or amended.[73] However, the Ninth Circuit held that the LRMPs do represent an ongoing agency action since they are comprehensive plans which govern individual forest projects, and therefore have an ongoing and lasting effect even after adoption.[74]

The situation in the *Pacific Rivers Council* case and the case of the Hells Canyon Project are similar in a variety of ways. First, the FERC license in this case guides all aspects of the project, including construction, maintenance, and operation.[75] This pervasive control by the license is even more direct and influential than the forest plans in *Pacific Rivers Council*. Second, the project must operate in compliance with its license or risk sanctions from FERC,[76] a fact underscoring the importance of license conditions on project operations. Finally, the license at issue retains ongoing, lasting effects after adoption, similar to the LRMPs, because the license directs project operations for a period of up to 50 years.[77] These similarities indicate that, under the *Pacific Rivers Council* standard, FERC licenses constitute a federal action under

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70. Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994).

71. *Id.*

72. *See id.* at 1052.

73. *See id.* at 1053.

74. *See id.*

75. *See generally* 14 F.P.C. 55 (1955).

76. *See* 16 U.S.C. § 799 (1998) (listing conditions of FERC licenses).

77. *See* 16 U.S.C. § 799(4) (1998) (stating the duration of licenses).

section 7 because they guide the implementation of every individual aspect of the project and have an ongoing and lasting effect on project operations.[78]

B. *Interpretation of the "May Affect" Trigger Contained in Section 7*

Under NMFS' ESA implementing regulations, federal agencies must review their actions at the earliest possible time to determine if they "may affect" listed species or their critical habitat.[79] If such a determination is made, formal consultation is required unless the agency undertakes an informal consultation or preparation of a biological assessment which, along with written concurrence of NMFS, indicates that the action is not likely to adversely affect the listed species or its critical habitat.[80] NMFS may request consultation when it believes agency actions may affect listed species, but such a consultation cannot be compelled.[81] Consequently, an agency's own determination of whether their action "may affect" is an important threshold step in assessing the need for formal consultation.

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78. In many ways, FERC licenses are more directly related to ongoing actions affecting the environment than those guided by LRMPs. For example, while LRMPs contain standards that guide both present and future actions, a FERC license contains explicit criteria that control project construction and operation (e.g., project schematics, minimum flow levels, generation capacity). In this sense, the link between a FERC license and the ultimate action is less remote than an LRMP, which only contains standards for activities as opposed to explicit criteria for operation.

79. 50 C.F.R. § 402.14(a) (1998).

80. *See id. See also* 51 Fed. Reg. 19,926, 19,949 (1986). As the preamble to the section 7 regulations states, the threshold for formal consultation must be set sufficiently low to allow federal agencies to satisfy their duty to "insure" under section 7(a)(2). Therefore, the burden is on the federal action agency to show the absence of likely, adverse effects to listed species or critical habitat as a result of the proposed action to be excepted from its formal consultation obligation. Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.

81. *See* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2140-42 (1992).

In the case of the Hells Canyon project, FERC has indicated that ongoing project operations may affect listed chinook salmon and steelhead.[82] Under NMFS' implementing regulations, FERC bears the duty to prove adverse effects to listed species or their critical habitat would be unlikely.[83] Therefore, given the sensitivity of the section 7 trigger,[84] FERC must initiate formal consultation or articulate rational reasons why such consultation is not required.

C. *The Duty to Consult when Requested to do so by the Secretary*

The ESA does not give NMFS the power to order other agencies to comply with its requests or to veto their decisions.[85] Instead, section 7 imposes a duty of consultation on all federal agencies.[86] In most cases federal agencies initiate consultation with NMFS when they determine their activity may affect listed species. However, provisions exist in NMFS' regulations for it to request formal consultation when deemed necessary.[87] The Ninth Circuit has held that the Secretary's request for consultation is an interpretation of its own regulations entitling it to substantial deference.[88]

On two separate occasions, NMFS made written requests for a formal consultation with FERC regarding the ongoing operations of the Hells Canyon Project.[89] In so doing, NMFS reasonably interpreted its own regulations and determined that hydroelectric project operations constitute a discretionary FERC action that

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82. *See supra* Section I.B. (Correspondence between FERC, IPC, and NMFS).

83. *See supra* note 79.

84. *See supra* note 79.

85. *See* Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 371 (5th Cir. 1976).

86. *See* 16 U.S.C. §§ 1536(a)(2)-(a)(3) (1998).

87. *See* 50 C.F.R § 402.14(a) (1998) (formal consultation requirements). NMFS' ESA implementing regulations provide that in requesting consultation, "the Director shall forward to the Federal agency a written explanation of the basis for the request." *Id.*

88. *See* Sierra Club v. Marsh, 816 F.2d 1376, 1384-85 (9th Cir. 1987).

89. *See supra* note 43-47 and accompanying text.

may affect listed species or their critical habitat.[90] Because NMFS' consultation request is an interpretation of its own regulations, it should be accorded deference by a reviewing court.[91] Such deference is particularly appropriate in evaluating the procedure NMFS uses to enforce the ESA.[92]

III. FACTORS CONSIDERED IN DETERMINING THE NEED FOR CONSULTATION

A. *The Importance of Agency Involvement and Retained Discretion*

Following the Supreme Court's ruling in *Tennessee Valley Authority v. Hill*, the Ninth Circuit in *Pacific Rivers Council v. Thomas* held that Congress intended to enact a broad definition of the phrase "agency actions" contained in section 7(a)(2) of the ESA.[93] Consistent with this holding, NMFS' ESA implementing regulation states that "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."[94] The Ninth Circuit has given substantial deference to these regulations.[95] Therefore, in determining if section 7 consultation is required, one must evaluate the amount of discretion or involvement retained by the federal agency in

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90. *See* 50 C.F.R. § 402.14(a) (1998) (requirements for formal consultation); 50 C.F.R. § 402.03 (1998) (applicability of section 7 to federal actions); 50 C.F.R. § 402.02 (1998) (defining the term "action").

91. *See* Sierra Club v. Marsh, 816 F.2d at 1388. *See also* Babbitt v. Sweet Home Chapter of Comms. for a Great Or., 515 U.S. 687, 703 (1995), *citing, inter alia,* Breyer, *Judicial Review of Questions of Law and Policy,* 38 ADMIN. L. REV. 363, 373 (1986) (stating "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation").

92. *See* The Hawksbill Sea Turtle v. FEMA, 11 F. Supp. 2d 529, 546 (D. Va. 1998) (citing Chevron, Inc. v. Natural Resource Defense, 467 U.S. 837 (1984)) (establishing the guidelines for courts to follow when reviewing an agency's construction of a statute).

93. 30 F.3d at 1054.

94. 50 C.F.R. § 402.03 (1998).

95. *See* Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996); Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (citing 50 C.F.R. §§ 402.03 & 402.16).

the authorized action. In the context of the Hells Canyon Project, and FERC licenses in general, courts will likely examine the amount of discretion retained by FERC in the project license, or FERC discretion reserved by other areas of the FPA, to determine its need for ESA consultation regarding ongoing project operations.

The courts have considered the question of agency discretion and the need for ESA consultation on several occasions. In *Sierra Club v. Babbitt*, the Ninth Circuit held that where a federal agency lacks the discretion to influence private action, as in contractual obligations, consultation is not required.[96] In this case, the U.S. Bureau of Land Management ("BLM") granted a right-of-way to a private logging company that permitted construction of a logging road across federal land prior to passage of the ESA.[97] The Sierra Club challenged BLM's approval of the right-of-way, claiming that BLM had violated section 7 for failing to consult with FWS regarding potential impacts to listed spotted owls.[98] However, the Ninth Circuit held that since the right-of-way was granted prior to passage of the ESA, and BLM presently lacked discretion to influence the private action, consultation would be a meaningless exercise.[99]

More recently, in *NRDC v. Houston*, the Ninth Circuit affirmed the need for agency discretion before making consultation mandatory.[100] In this case, environmental groups challenged BLM's failure to consult regarding its renewal of irrigation con-

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96. 65 F.3d at 1509 n.10; *see also* Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998).

97. *See id.* at 1509-10. (As a result of constructing the logging road across federal lands, the private logging company gained access to timberlands containing listed spotted owl habitat. Therefore, environmental groups feared that logging operations carried out in these areas may have harmed the listed species by destroying its habitat).

98. *See id.*

99. *See id.* The right-of-way agreement, signed prior to passage of the ESA, permitted BLM to object to certain private activities in three limited instances; however, the court found that this limited control did not provide sufficient agency discretion to require consultation because none of the instances were related to the protection of protected species. *See id.* at n.10.

100. 146 F.3d 1118 (9th Cir. 1998).

tracts at Friant Dam, located in California.[101] In holding for the environmental groups in this case, the Ninth Circuit concluded that because the reclamation laws require BLM to renew such contracts on "mutually agreeable" terms, it possessed discretion to negotiate the terms of renewed irrigation contracts.[102] This discretion triggered consultation requirements prior to the renewal of the water supply contracts.[103]

B. *Consultation Requirements During the FERC Relicensing Process*

Courts have recognized the importance that FERC retain discretion regarding its licenses before requiring a section 7 consultation.[104] For example, in *Platte River I,* at issue was FERC's failure to incorporate license articles into annual licenses[105] to protect a number of listed migratory bird species. FERC ultimately incorporated protective license articles into the license for one project, but declined to do so for another, because it determined it did not have the authority to do so because the license lacked an express reservation of authority to modify project operations for conservation purposes.[106] The plaintiffs claimed that FERC did, in fact, possess authority to modify the license, arguing that (1) the license contained a reopener clause, or (2) the ESA expanded FERC's authority to modify the license.[107] In response to the first argument, the court deferred to FERC's interpretation of hydroelectric licenses, holding that FERC's interpretation of

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101. *See id.* at 1125.

102. *Id.* at 1126.

103. *See id.* at 1127.

104. *See, e.g.,* Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992) (Platte River II); Southwest Center for Biological Diversity v. FERC, 967 F. Supp 1166 (D. Ariz. 1997) (dismissed on jurisdictional grounds).

105. FERC interprets the FPA as requiring the issuance of an annual license, and that issuance of an annual license is a nondiscretionary act. *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC, 510 F.2d 198, 203-210 (D.C. Cir. 1975).

106. *See* Platte River II at 32. FERC interprets the FPA as precluding it from amending annual licenses, absent an express reservation of authority, or "reopener clause" in the original license.

107. *See id.* at 33.

the license was reasonable.[108] Regarding the second argument, the court held the ESA does not expand the powers conferred on an agency by its enabling act.[109] Therefore, absent an express reservation of authority under the FPA in a particular license to modify the license in the future, FERC would not possess, nor would the ESA provide, the discretion necessary to require section 7 consultation.[110] While the holdings in *Platte River* have

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108. *See id.*

109. *See id.* at 34. This holding of the D.C. Circuit seems in conflict with the express provisions of section 7(a)(1) of the ESA. Section 7(a)(1) requires federal agencies to use their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of listed species. 16 U.S.C. § 1536(a) (1988). Some commentators argue that this broad mandate to conserve species expands federal agencies' duties beyond that contained in their enabling statutes. *See* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of the Federal Agencies' Duty to Conserve Species,* 25 ENVTL. 1107 (1995). A recent Fifth Circuit case interpreting the requirements of section 7(a)(1) supports this broader reading. In Sierra Club v. Glickman, the Sierra Club challenged the U.S. Department of Agriculture's (USDA) failure to consult with FWS over USDA programs associated with management of the Edwards Aquifer, located in Texas. Heavy pumping of the aquifer for irrigation purposes has lead to the decline of numerous listed species. In analyzing the USDA's duties under the ESA, the Fifth Circuit held that section 7(a)(1) "imposes a duty on all federal agencies to consult and develop programs for the conservation of each endangered and threatened species." Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998). The holding in Sierra Club v. Glickman indicates that section 7(a)(1) in fact expands agencies' duties under the ESA requiring them to affirmatively conserve listed species, an interpretation that is in conflict with the Platte River cases, but seemingly more consistent with the Supreme Court's broad reading of the ESA in Tenn. Valley Auth. v. Hill. *See supra* Section II.A.

110. *See* Platte River II at n.2. In this footnote the D.C. Circuit essentially stated that it could see no practical value in requiring FERC to formally consult when informal consultations had already taken place. This view of section 7 fails to recognize the important procedural protections afforded by formal consultation that have been recognized by the Ninth Circuit. *See, e.g.*, Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (stating "[t]he ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compli-

been criticized as not providing enough protection for listed species,[111] several courts support the principle that an agency must retain discretion to modify a proposed or ongoing action as a prerequisite to requiring consultation.[112]

The situations in *Sierra Club v. Babbitt* and the *Platte River* cases are similar to that which now exists in the case of the Hells Canyon Project, with one important exception: FERC has indicated on several occasions that Article 35 contained in IPC's existing FPA license reserves its authority to modify project operations to conserve fish and wildlife.[113] FERC's interpretation of this license article is reflected in several actions it has taken to require IPC to provide for fish passage and hatchery supplementation.[114] Such an interpretation is entitled to judicial deference.[115]

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ance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible").

111. *See, e.g.*, David Paul Sharo, *Regulatory Inertia: FERC's Failure to Consider Endangered Species' Protection in the Issuance of Hydroelectric Annual Licenses: Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 4 ADMIN. L. J. 321 (1990).

112. *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995); Marbled Murrelet v. Babbitt, 83 F.3d at 1073; *but c.f. supra* note 106 (indicating that section 7(a)(1) may expand agencies' duties under the ESA absent an express reservation of discretion for conservation purposes).

113. FERC may also possess general discretion under its statutory authorities to require project modifications in certain instances. For example, FERC retains authority in all licenses to require project alterations to protect health, safety, navigation, or property. *See, e.g.*, 16 U.S.C. § 803(b)-(c) (1988). Further, many new licenses contain broad provisions authorizing FERC oversight, to the point of reserving authority to require project decommissioning in certain cases. *See, e.g.*, 66 F.E.R.C. ¶ 61,316 (March 18, 1994) (license order for Reusens Hydropower Project). The presence of such broad reserved discretion should enable FERC to modify project operations to ensure they do not jeopardize listed species.

114. *See supra* note 29.

115. *See Platte River II* at 33.

IV. THE EFFECT OF THE 1980 SETTLEMENT AGREEMENT ON FERC'S DUTY TO CONSULT

A. *The Licensee's Interpretation of the Agreement*

In 1980 IPC entered into a settlement agreement with NMFS and state resource agencies; this agreement subsequently adopted by FERC through a license order.[116] IPC now claims the 1980 settlement agreement "effectively closed the license for the remainder of its term," thereby eliminating FERC's discretion to change project operations as well as the agency's need to consult with NMFS under section 7 of the ESA.[117] However, this view is flawed because it ignores the scope, purpose, and plain meaning of the agreement.

B. *The Present Day Meaning of the Agreement*

1. The Agreement's Scope and Purpose

The scope and purpose of the 1980 agreement indicate that neither IPC nor NMFS intended the agreement to foreclose either parties' duties or responsibilities under the ESA. At the time the agreement was signed, none of the species in question were listed; therefore, there were no statutory requirements for parties to avoid jeopardizing or taking the species under sections 7 or 9 of the ESA. In fact, the agreement nowhere mentions the ESA or the potential duties of any of the parties, should species become listed. Instead, the sole purpose of the 1980 agreement was to settle IPC's duties to resource agencies under the FPA to mitigate project impacts on fishery resources.[118]

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116. *See* 10 F.E.R.C. ¶ 61,190 (1980).

117. Letter from Robert W. Stahman, Vice President, IPC, to Lois D. Cashell, Secretary, FERC, at 2 (June 26, 1997).

118. Article 35 of IPC's license permits the Secretary of Interior and the conservation agencies of the States of Idaho and Oregon to prescribe reasonable modifications to the project to conserve fishery resources. *See supra* Section I.A. This duty was created by the FPA and IPC's acceptance of the license conditions, and was the duty IPC sought to eliminate in the 1980 agreement. *See id.*; *see also* 16 U.S.C. § 799 (1998) (conditioning licenses on acceptance of their terms). The 1980 agreement in no way limits or alters the parties' duties under the ESA; rather, it only seeks to eliminate IPC's duty under the FPA.

2. The Agreement's Plain Meaning

The plain language of the 1980 agreement supports the interpretation that the statutory requirements of the ESA apply to FERC and may require modification of project operations. In the 1980 settlement agreement, NMFS agreed not to seek relief from FERC nor seek changes in project operations under Article 35 of the license.[119] By its own terms, the agreement does not relieve FERC from its statutory duty under the ESA to insure its own actions do not jeopardize listed species. Instead, the agreement attempts only to limit NMFS' ability to pursue changes to project operations under the FPA. The agreement does not foreclose NMFS from recommending modifications to project operations after FERC initiates consultation under section 7 or if compelled to do so by a citizen suit.

3. The Agreement's Limitations

The 1980 settlement agreement stipulated that it would constitute full and complete mitigation for all numerical losses of salmon and steelhead under the existing license.[120] A hatchery supplementation program was intended to mitigate for numerical losses; however, hatchery supplementation has in fact proven a threat to chinook salmon and steelhead in the Snake River Basin.[121] Consequently, while the agreement may compensate for numerical losses of salmon, it does not address the quality of naturally spawned salmonids, that is, those biological characteristics necessary to sustain a distinct, naturally producing population segment through time.[122] Therefore, even if the agreement fore-

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119. *See* Idaho Power Company, *supra* note 35, § III.

120. *See id.*

121. *See* 57 Fed. Reg. 14,653, 14,660 (1992) (final rule listing Snake River chinook salmon as threatened and identifying hatchery production as a factor of decline for the species); 62 Fed. Reg. 43,937, 43,950 (1997) (final rule listing Snake River steelhead as threatened and identifying hatchery production as a factor of decline for the species).

122. The ESA mandates the restoration of threatened and endangered species in their natural habitats to a level at which they can sustain themselves naturally without further legal protection. *See, e.g.*, 16 U.S.C. § 1531(b) (1988) (purposes of the ESA); 16 U.S.C. § 1533(f) (1988) (provisions for recovery plans). For Pacific salmon, the ESA's fo-

closed additional measures to increase population sizes, it does not foreclose additional measures necessary to protect important biological characteristics and functions that are essential to the survival of listed salmonids.[123]

V. LIABILITY UNDER SECTION 9 AND THE DUTY TO AVOID "TAKING" LISTED SPECIES

A. *Defining Take under Section 9 of the ESA*

Aside from the federal duty to consult and avoid jeopardy under section 7, both federal and non-federal entities possess a duty under section 9 to avoid taking listed species.[124] The ESA defines "take" broadly under the ESA as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct."[125] NMFS regulations interpret the term "harm" broadly to mean "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, and sheltering."[126] The Supreme Court upheld this definition as a permissible interpretation of the term, consistent with the overall purposes of the ESA.[127]

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cus is, therefore, on natural populations (the progeny of naturally spawning fish) and the ecosystems upon which they depend. *See* 58 Fed. Reg. 17,573 (1993) (NMFS' policy on artificial propagation).

123. Such biological characteristics would include the maintenance of wild stocks and the protection of wild stocks from the impacts of hatchery production. Consequently, it may be necessary to limit hatchery production to protect listed species to avoid genetic introgression and decreased fitness.

124. 16 U.S.C. § 1538 (1988).

125. 16 U.S.C. § 1532(19) (1988).

126. 63 Fed. Reg. 24,148 (1998) (proposed definition of the term "harm").

127. *See* Babbitt v. Sweet Home Chapter of Comms. for a Great Or., 515 U.S. 687 (1995).

B. *Provisions for Incidental Take Authorization*

1. Incidental Take Authorization through Section 7

Sections 7 and 9 contain independent duties; therefore, prior to the ESA's 1982 amendment, federal agencies would remain liable for taking even after complying with the terms of section 7. In 1982 Congress amended the ESA to provide that as a result of a section 7 consultation, federal agencies could obtain an incidental take statement (ITS),[128] which permitted the action to proceed without liability under section 9, so long as the amount of incidental take contained in the ITS is not exceeded.[129] Without an ITS authorizing incidental take, parties must obtain a section 10 permit[130] if their activity may take listed species. Absent incidental take authorization, parties risk substantial liability, in-

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128. *See* H.R. Rep. No. 567, at 6 (1982); 16 U.S.C. § 1536(b)(4) (1988).

129. If the amount of incidental take provided in the ITS is exceeded, agencies must reinitiate consultation. *See* 50 C.F.R. § 402.16 (1998).

130. To obtain an incidental take permit pursuant to section 10, parties must submit an acceptable conservation plan to NMFS for its review and approval. *See* 16 U.S.C. § 1539(a) (1988). Such a conservation plan must specify (1) the impact which will result from the taking; (2) the steps taken to minimize such taking; (3) alternative actions to such taking considered and the reasons they are not used; and (4) such measures as NMFS may require as being necessary or appropriate for purposes of the plan. *See* 50 C.F.R. § 222.22(b) (1998) (listing permit application procedures). NMFS and FWS have enacted policies pursuant to section 10 to encourage private landowners to formulate conservation plans (i.e., Habitat Conservation Plans) in exchange for long-term assurances that no additional land use restrictions or financial compensation will be required for their activities. *See* 62 Fed. Reg. 8859 (1998) (Joint FWS/NMFS "no surprises" policy). The "no surprises" policy may encourage private parties (such as IPC) to pursue a section 10 permit instead of encouraging section 7 consultation because a section 10 permit and the requirements contained in it will theoretically remain unchanged for a long period of time. *See* Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L. Q. 707 (1997). Conversely, federal parties must reinitiate consultation if new information reveals effects to species not previously considered. *See* 50 C.F.R. § 402.16 (1998). Therefore, section 7 consultation does not possess the long-term certainty of a section 10 permit, making consultation less desirable for parties financing long-term obligations.

cluding injunctive relief and civil or criminal penalties, from citizen suits for violating section 9.[131]

2. Private Party Duties Absent Section 7 Consultation

While the question of whether a FERC-licensee has an independent duty to obtain a section 10 permit absent section 7 consultation is yet unresolved, case law in the Ninth Circuit indicates that such a duty exists. For example, in *Forest Conservation Council v. Rosboro Lumber Company*, the BLM, in authorizing an access road across federal lands, advised the defendant lumber company that its timber harvest on private lands may result in an incidental take of listed spotted owls and recommended it seek an incidental take permit from FWS.[132] While the Ninth Circuit found that BLM's authorization of an access road did not constitute an action requiring consultation under section 7(a)(2), since BLM had not retained discretion to condition the private actions, it nonetheless found that private logging activities made possible by the federally-authorized right-of-way were subject to the requirements of section 9.[133] The Ninth Circuit went on to hold that such private activities could be enjoined by private citizens through the citizen suit provisions of the ESA.[134]

Presently, the Hells Canyon Project, and many FERC-licensed hydropower projects like it, do not possess incidental take authorization under sections 7 and 10. As *Rosboro* demonstrates, even if FERC need not consult over project operations due to its lack of discretion to require changes, Ninth Circuit case law indicates that FERC licensees remain independently liable under the citizen suit provisions of the ESA if project operations are reasonably certain to harm listed species.[135] Such potential liability

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131. *See, e.g.*, Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995); 16 U.S.C. § 1540 (1988) (stating penalties and enforcement provisions of the ESA).

132. *Id.* at 783.

133. *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1508-09 (9th Cir. 1995).

134. *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d at 785.

135. To prove that project operations constitute a taking of listed salmonids, petitioners need to assert that project operations are actu-

should motivate IPC and other FERC licensees to either encourage federal consultation to secure an ITS, or seek incidental take authorization through section 10.[136]

VI. THE IMPLICATIONS OF REQUIRING ESA CONSULTATION FOR FERC-LICENSED PROJECTS

A. *Defining the Scope of the Problem*

Based on the analysis above, coupled with FERC's own admissions regarding the project's impacts on listed species,[137] the ESA requires FERC to formally consult with NMFS over the ongoing operations of the Hells Canyon Project. It is important to consider why FERC, a federal agency entrusted with an obligation to preserve listed species, would resist ESA consultation in a case such as this. One reason may be that FERC is concerned with the potential workload implications, particularly if it were held to a stricter standard when ESA consultations are required for hydropower projects under its jurisdiction.[138] Another potential rea-

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ally killing or injuring listed species or significantly impairing essential behavioral patterns. Such proof includes, breeding, spawning, rearing, migrating, feeding, and sheltering. *See supra* Section V.A. Given the documented effects of Hells Canyon project operations on listed salmonids, petitioners could likely prove "actual harm" with relative ease. *See, e.g.*, 57 Fed. Reg. 14,653 (1992) (Snake River spring/summer and fall chinook listed as threatened); 10 F.E.R.C. ¶ 61,190 (1980) (order approving uncontested offer of settlement). Further, petitioners may bring such an ESA takings claim directly against IPC in district court under the citizen suit provisions of the ESA. *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d at 781. By bringing an ESA takings claim directly against IPC, petitioners may avoid jurisdictional problems associated with bringing claims directly against FERC. *See, e.g.*, Southwest Center for Biological Diversity v. FERC, 967 F. Supp. 1166 (D. Ariz. 1997).

136. Advantages may exist for IPC to seek an incidental take permit through section 10, given recent policy developments regarding such permits. *See supra* note 130 and accompanying text.

137. *See supra* Section I.B.

138. *See supra* note 113. As suggested in this note, a searching court could conclude that FERC possesses discretion to modify project operations for safety or monitoring purposes, even absent express reservation in a license article. Such reserved discretion could provide the basis for requiring FERC's consultation on conservation matters to the

son for FERC's reluctance to initiate formal consultation may be due to provisions in the ESA that limit the commitment of resources once formal consultation commences.[139]

Currently, on the West Coast alone, 14 ESUs of Pacific salmon and trout are listed under the ESA.[140] In addition to Hells Canyon, several hundred FERC-licensed hydropower projects also exist within this area and are likely to adversely affect or take these species.[141] These facts are staggering not only from biological and legal standpoints, but also from a practical workload standpoint. Section 7 consultations are typically resource-intensive exercises, requiring substantial time commitments on behalf of the authorizing agency and NMFS to complete. Consequently, if FERC were required to initiate ESA consultations on every hydropower project potentially affecting listed salmonids, both FERC and NMFS would quickly become overwhelmed by consultation obligations.[142]

While ESA consultation may seriously affect FERC's ability to implement the FPA, FERC's reluctance in addressing its ESA obligations poses even greater threats to at-risk species. For example, under FERC's current interpretation of the FPA, when hydropower project licenses expire, projects are free to continue

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extent project operations affect listed species.

139. *See supra* note 69. As discussed in this note, section 7(d) of the ESA limits irreversible or irretrievable commitment of resources by federal action once formal consultation commences. Consequently, if FERC commenced consultation on project operations, it must insure section 7(d) was not violated. This could entail restricting project operations during the interim period until formal consultations were complete and an ITS issued.

140. *See supra* note 7.

141. *See supra* note 27.

142. Practical considerations such as these, however, should not weigh heavily in a court's analysis of FERC's duties under the ESA. When faced with such practical constraints, federal agencies may formulate plans to carry out their statutory duties in an orderly fashion. For example, where federal agencies face an enormous backlog of requests under the Freedom of Information Act, 5 U.S.C. § 552 (1998), courts have recognized the impossibility of ordering agencies to comply in a particular time and have accepted reasonable agency plans for action. *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

operating under the original license terms until relicensing is completed.[143] Absent some intervening factor, projects may therefore continue to operate for decades even after their licenses expire under requirements that are outdated and no longer suited to existing environmental conditions.[144]

B. *Addressing the Need for Consultation: A Comprehensive Approach*

Given the practical and legal problems facing the federal government and its licensees, coupled with the declining status of listed species, it is important that the federal government consider a programmatic approach to FERC relicensing and ESA consultation which can more effectively address the agencies' practical limitations and statutory duties. Such an approach would entail FERC, NMFS, and FWS entering into an agreement to devise a comprehensive plan for consulting on hydropower projects that affect listed salmonids and other species. To address the goals of the ESA and FPA, such a plan should take into account a variety of factors, including: (1) the magnitude of project impacts on listed species; (2) the status of the particular species affected and the need for immediate modifications to project operations to protect that species; (3) the status of the project license and when relicensing will occur; and (4) the willingness of licensees to take voluntary measures prior to relicensing to limit project impacts on listed species. Ultimately, such a plan would necessarily establish time frames for completing prioritized consultations, while avoiding lengthy delays often associated with the relicensing process.

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143. *See Platte River II* at 32.

144. *See, e.g.*, PACIFIC STATES MARINE FISHERIES COMMISSION, HABITAT HOTLINE, NO. 38, Cushman License 6-7 (1998). This article states that in the case of the Cushman Hydropower Project, located on the North Fork Skokomish River in Washington, the licensee (Tacoma Power) operated this project on annual licenses for over 24 years while relicensing proceedings occurred. During this period, salmon runs in the Skokomish River basin were reduced to critically low numbers. Project operations contributed to this decline because the project eliminated about 84 percent of the North Fork Skokomish watershed from salmon production.

Several benefits would follow from this approach. First, it would establish an orderly consultation schedule that would enable the agencies to better manage their current and future workloads, allowing for a more efficient use of available resources. Second, licensees would receive more certainty regarding when project operations may change as a result of ESA obligations. This would provide licensees with an opportunity to plan for their future needs and financial liabilities. Third, a comprehensive approach such as this should receive judicial deference in the event that third party lawsuits are brought to compel ESA consultation, since the agencies are making reasonable attempts to comply with the law.[145] Finally, by agreeing to a prioritized schedule such as this, it would be possible to avoid years of delay associated with the relicensing process; such delays may result in species extinction.

CONCLUSION

The Supreme Court and the Ninth Circuit have interpreted the requirement for section 7 consultation broadly, noting that the procedural requirements of section 7 ensure that federal agencies achieve the ESA's substantive goals.[146] If a federal action proceeds without substantial compliance with these procedural requirements, there can be no assurance of ESA compliance.[147] When evaluating agency actions requiring consultation, the courts have deferred to NMFS' implementing regulations which state that an agency must consult over a proposed or ongoing action if it has retained discretionary involvement or authority to act.[148] In the case of the Hells Canyon Project, FERC itself has demonstrated that it retains discretion to modify project operations under Article 35 of the project's license,[149] a key factor in a court's analysis of FERC's duty to consult under the ESA.[150] Yet,

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145. *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d at 615-616.

146. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 186 (1978); Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054 (9th Cir. 1994).

147. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985).

148. Sierra Club v. Marsh, 816 F.2d 1376, 1388 (9th Cir. 1987).

149. *See supra* Section I.A.

150. *See* Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995);

despite two separate NMFS requests for FERC to initiate formal consultations on the operation of the Hells Canyon Project, FERC has not done so.[151] These requests by NMFS should be afforded substantial deference by the courts because they are NMFS' interpretation of the ESA and it's implementing regulations.[152] A 1980 settlement agreement between IPC and the resource agencies, adopted by FERC order, does not limit FERC's discretion to modify project operations, nor does it limit FERC's statutory duty to avoid jeopardizing listed species through consultation with NMFS.[153] The scope and purpose of this agreement are quite narrow, and the agreement does not attempt to affect the parties' obligations under the ESA.[154] As a result, absent formal consultation, IPC must obtain an incidental take permit from NMFS to avoid liability for taking listed chinook or steelhead.[155]

FERC's need to initiate formal consultation for the Hells Canyon Project raises the thorny issue of its need to consult over the ongoing operations of every hydropower project in the United States that is affecting listed species, irrespective of its licensing status. Such a precedent could prove onerous to FERC from a practical standpoint, but this burden does not permit FERC to escape its duty under the ESA to ensure that its actions do not jeopardize listed species. A programmatic approach to FERC's consultations would provide it and its licensees with greater predictability regarding their ESA obligations. Such an approach would also result in quicker action on the part of FERC in modifying project operations that are devastating listed salmonids and threatening their continued existence. Finally, FERC's use of its authorities to conserve listed species in this manner is more con-

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Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998); *Platte River II* at 32.

151. *See supra* Section I.B.

152. *See Sierra Club v. Marsh,* 816 F.2d at 1388; Babbitt v. Sweet Home Chapter of Comms. for a Great Or., 515 U.S. 687, 703 (1995); The Hawksbill Sea Turtle v. FEMA, 11 F. Supp. 2d 529, 546 (D. Va. 1998).

153. *See supra* Section VI.

154. *Id.*

155. *Id.*

sistent with its duties under section 7(a)(1) to consult and develop programs for the conservation of each endangered and threatened species.[156]

156. *See supra* note 110 and accompanying text.