SUMMARY OF ALJ'S RULINGS OF FACT IN KLAMATH RIVER ENVIRONMENTAL POLICY ACT HEARINGS

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by

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ULTIMATE FINDINGS OF FACT AND CONCLUSIONS of LAW

1. Under Daubert, the Miller Radio-Telemetry study is scientifically unreliable.

2. The effectiveness of volitional passage is not at issue in this case because those issues were withdrawn/dismissed following the initial prehearing conference conducted under 50 C.F.R. Part 221.

3. USFWS/ISSUE 2(A): Stocks of anadromous fish suitable to conditions above Iron Gate Dam are available to use prescribed fishways.

4. USFWS/NMFS ISSUE 2(B): Facilitating the movement of anadromous fish via prescribed fishways presents a relatively low risk of introducing pathogens to resident fish above Iron Gate Dam. Many of the pathogens (such as *C. Shasta, F. Columnaris, P. minibicornis, and Ich*) present below Iron Gate Dam, are also present above the dam. The evidence is inconclusive as to whether *IHN* exists either above or below Iron Gate Dam. The evidence is also inconclusive as to whether *R. salmoniranrum* exists above Iron Gate Dam.

5. USFWS/NMFS ISSUE 2(C): Facilitating the movement of wild anadromous steelhead trout above Iron Gate Dam via prescribed fishways presents a low risk of residualization (a phenomenon most common among hatchery steelhead trout). Moreover, while resident trout have the genetic capacity to adopt anadromy, the risk of residualizing can be minimized through use of adaptive management.

6. USFWS/NMFS ISSUE 3: Project operations have and continue to adversely affect the resident trout fishery by, among other things: a) confining the resident trout between the Project dams and associated reservoir thereby impairing their utilization of the full range of life history strategies and spawning productivity; b) unscreened flow through Project turbines result in mortality of juvenile and adult trout migrating down stream; and the inability

to effectively migrate adversely affects the genetic health and long term survival of the resident species.

7. USFWS/NMFS ISSUE 4: Entrainment at Project facilities have and continue to adversely affect the resident fishery resources.

8. USFWS/NMFS ISSUE 6: While the exact miles of habitat for use by anadromous fish within the Project reach is unknown, 58 miles is a reasonable estimate based on the evidence contained in the record.

9. USFWS/NMFS ISSUE 7: Access to habitat within the Project would benefit Coho salmon by: a) extending the range and distribution of the species thereby increasing the Coho salmon's reproductive potential; b) increasing genetic diversity in the Coho stocks; c) reducing the species vulnerability to the impacts of degradation; and d) increasing the abundance of the Coho population.

10. USFWS/NMFS ISSUE 8: Although the evidence is inconclusive as to whether Pacific lamprey were historically present above Iron Gate Dam, the record evidence shows that access to habitat would benefit that species of fish by providing it with additional spawning and rearing grounds.

11. BLM ISSUE 10: The seasonal high flows will contribute to improving the quality of riparian habitat in the J.C. Boyle bypass reach by increasing the sediment deposit within the channel and decreasing reed canary grass. However, the extent of any improvement on riparian-focal bird species is indeterminate since an increase of woody riparian vegetation is not expected.

12. BLM ISSUE 11: Project operations have adversely affected riparian resources in both the bypass and peaking reaches by supporting the perpetuation of reed canary grass and by affecting the structure, size, and nature of depositional features. However, the extent of any loss to riparian-focal bird species is indeterminate, based upon evidence that woody riparian vegetation has not decreased noticeably

13. BLM ISSUE 14: The BLM seasonal high flows will assist in the creation of redband trout spawning habitat, decrease fine sediment embedment in spawning gravel, and improve redband trout migration. These benefits provide for a net positive effect to redband trout spawning; overcoming the possible scouring effects high flows will have on spawning trout.

14. BLM ISSUE 16: Current Project operations, particularly sediment blockage at the J.C. Boyle Dam, the flow regime, and peaking operations, negatively affect the redband trout fishery. The proposed River Corridor Management Conditions would improve fishery resources.

15. BLM ISSUE 17: The BLM's proposed upramp rate will improve conditions for fish resources and other aquatic organisms by reducing adverse effects caused by the existing nine inch/hour upramp rate.

16. BLM ISSUE 19: The BLM's proposed flows will substantially reduce the frequency and quality of whitewater boating in the J.C. Boyle peaking reach. The ability to fly-fish in the J.C. Boyle peaking reach will be reduced; the extent of this reduction has not been established.