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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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NATIONAL WILDLIFE FEDERATION, *et al.*

Civil No. 01-640-RE

Plaintiffs,

v.

**FEDERAL DEFENDANTS'  
NOTICE OF 2008 OPERATIONS  
AND PROPOSED ORDER**

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*

Defendants.

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At the December 12, 2007, status conference, Plaintiffs, National Wildlife Federation et

al., threatened to file another motion for preliminary injunctive relief seeking significant changes to operations for the Federal Columbia River Power System (“FCRPS”) for the 2008 migration season. NWF v. NMFS, 01-CV-640-RE (D. Or.), December 12, 2007 Hearing Transcript at 47-48. Federal Defendants, through past experience, have learned that briefing a motion for preliminary injunctive relief expends considerable resources – resources that are currently best spent preparing the final biological opinions. As a result of this resource concern, Federal Defendants offered to essentially continue the *status quo* by repeating operations that were agreed upon in 2007 with slight modifications to account for structural changes and essential research. This offer was conditioned on Plaintiffs not seeking preliminary injunctive relief. Id. at 55-56.

After this offer was made, the Court noted that it thought Federal Defendants’ position was “a pretty good offer.” Id. at 56. With this guidance and after initial discussions as to the modifications that would be made in 2008, both Plaintiffs and the State of Oregon accepted Federal Defendants’ offer. See January 11, 2008, NWF Letter (“After reviewing this issue with our clients, discussing it further with counsel for the State of Oregon and counsel for the federal agencies, rather than filing a motion for further injunctive relief, we will work with the parties to reach an agreement for 2008 operations that would essentially continue – subject to discussion of limited changes to accommodate new structures and perform essential research – the court-ordered operations from 2007.”).

Since that time Federal Defendants have shared drafts of the “2008 Fish Operations Plan” with the regional managers and all of the parties to compile an operational document that would essentially continue 2007 operations with slight modifications for new structures and essential

research.<sup>1</sup> This process involved two meetings with the Technical Management Team (“TMT”) on January 16 and 23, 2008, (meetings open to the public); as well as a collaboration meeting with the Policy Work Group (“PWG”) on January 24, 2008. During these meetings, Federal Defendants listened to various concerns and made changes to the 2008 Fish Operations Plan that were consistent with a repeat of 2007 operations as well as the representations that were made in Court and in the Plaintiffs’ January 11, 2008 letter.

A number of parties also advocated for additional operational changes that they believe are optimal for fish. Some of the suggested operational changes, however, drew criticisms from other parties and/or were not consistent with the representations that were made to the Court regarding a repeat of 2007 operations.<sup>2</sup> While others were not consistent with the principle of a repeat of the operations that were in place for 2007.<sup>3</sup> As a result, Federal Defendants declined to incorporate these operational suggestions. These parties have indicated that if they do not achieve their suggested operational changes, they may seek relief from the Court.

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<sup>1</sup> To the extent hydro-operations are not specified in the 2008 Fish Operation Plan, those operations will be consistent with the 2004 FCRPS biological opinion and other operative documents, or any other in-season adjustments through the regional forum process as reflected in the proposed order.

<sup>2</sup> More specifically, the State of Oregon has indicated that it seeks to discontinue the use of the Camas-Washougal gauge below Bonneville Dam, which implicates total dissolved gas levels below Bonneville dam. This suggestion would represent a change from 2007 operations that are not attributable to structural modifications or essential research and therefore fall outside the representations made previously to the Court. Moreover, this change does not enjoy consensus within the region. On February 5, 2008, Plaintiffs notified Federal Defendants that they also seek additional changes to operations similar to those requested by the State of Oregon.

<sup>3</sup> The State of Montana has indicated that they seek the summer operations at Libby and Hungry Horse dams contained in the Northwest Power and Conservation Council’s Mainstem Amendments.

When Federal Defendants offered to essentially repeat 2007 operations for the 2008 migration season, it was our hope that this proposal would discourage parties from seeking injunctive relief so that the National Marine Fisheries Service (“NMFS”) and the action agencies could focus their attention on completing the biological opinion instead of responding to declarations and motions. Because we very much believe that the operations provided in the draft biological opinions are more than sufficient to avoid jeopardy or adversely modify critical habitat, this offer represented a significant compromise on our part. Moreover, while we recognize that certain parties desire to change various aspects of this operation to suit their interests, opening up that discussion beyond modifications for structural changes and essential research would effectively embroil all of the parties in lengthy negotiations and invariably the parties would never agree as evidenced by the recent discussions within TMT and PWG meetings. This would defeat the purpose of allowing NMFS and the action agencies to direct their resources toward completing the final biological opinions. Because Federal Defendants cannot satisfy every parties’ unique interest, we therefore believe the *status quo* for this season is the most appropriate operation. See Exhibit 1 (2008 Fish Operations Plan)

Federal Defendants have also engaged Plaintiffs and the State of Oregon in an attempt to reach agreement as to the form of a proposed order for 2008 operations. After conferring with counsel, it appears that these parties have reached agreement on some aspects of the form and language of the proposed order, but have not reached complete agreement. See Fed. Defs.’ Exhibit 2 (Proposed Order). In addition, as indicated above, it also appears there may still be issues involving actual operations. While Federal Defendants believe further adjustments are unwarranted and urge the Court to accept this proposed order and operational plan, it is our understanding that Plaintiffs, the State of Oregon, and the State of Montana may seek injunctive

relief.

In light of this understanding, Federal Defendants respectfully request a status conference with the Court to discuss moving forward. Counsel for the State of Montana has also indicated that he supports this request for a status conference.

Respectfully submitted: February 8, 2008.

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*/s/ Coby Howell*

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## CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on February 8, 2008, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

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