KENT S. ROBINSON
Acting United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney
BRIDGET McNEIL, Trial Attorney
MICHAEL R. EITEL, Trial Attorney
Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*,

Defendants.

Civil No. 01-CV-640-RE

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

During the November 23, 2009 hearing, Federal Defendants and those States and Tribes that support the Biological Opinion ("BiOp") and Adaptive Management Implementation Plan ("AMIP") reiterated their strong desire to end the district court litigation and focus their attentions on implementing actions for salmon and steelhead. The Plaintiffs, equally strong in their convictions, also sought a decision from this Court, but one that would force the agencies to utilize a new jeopardy standard and begin the consultation process anew. Perhaps recognizing the parties' impasse, the Court seemed to join in the sentiment that it was time for the district court litigation to come to a close and recognized that further settlement discussions would be unproductive. Although it is now necessary for the Court to decide the pending cross-motions for summary judgment, before doing so the Court has asked for additional briefing on whether the AMIP is properly before the Court. In accordance with this instruction, Federal Defendants provide two alternative courses of action to address the Court's concern.

As the Court is aware, considerable thought was given to this issue by the Administration prior to presenting the Court with the AMIP on September 15, 2009. To Federal Defendants, this Court effectively, yet informally, remanded the 2008 FCRPS BiOp to the Obama Administration at the April 2, 2009 hearing. With the active encouragement and support of the Plaintiffs, the Court allowed the Administration to review the BiOp, and the agencies, well within their authority and discretion, reviewed the BiOp and presented its response to the Court. While Federal Defendants believe that this process fits within the 2008 BiOp's adaptive management framework, it is equally true that this process beginning in April and the Court's subsequent letter in May can be characterized as the equivalent of a remand and thus the Administration's review and development of the AMIP was the substantive completion of this informal process. The task before us now is to formalize the completion of this process and Federal Defendants believe the Court can do so under either of the two alternatives presented

below.

DISCUSSION

As set forth in prior briefing and stated at the November 23, 2009 hearing, the AMIP is part of the BiOp. This BiOp always contemplated that future implementation throughout the 10-year life of the BiOp would be accomplished through adaptive management. Using adaptive management, the agencies will take incoming data and make adjustments in order to have the best implementation of the BiOp's RPA actions. The AMIP is just one of many implementation plans that provide future specificity for operating a system as complex as FCRPS. As such, Federal Defendants believe this Court can consider the AMIP and would be well within its discretion to allow supplementation of the administrative record with the AMIP in accordance with the Ninth Circuit's exceptions to record review principles. This we believe is sufficient to formalize the six-month review process and most promptly leads to resolution of the district court litigation. However, we understand the Court indicated that the AMIP "needs to be identified in the BiOp for public and judicial review." November 23, 2009 Transcript ("Tr.") at 17, lines 2-3. Accordingly, below we present two alternatives to address this procedural issue.

A. Further Supplementation of the Administrative Records

The Court requested that we "flesh out [the] proposal to supplement the administrative record as an alternative and how that would comply with the APA." Tr. at 95, lines 16-18. Before discussing the Administrative Procedure Act ("APA") principles that would support such a solution, Federal Defendants wish to clarify that the proposal discussed in this brief is more expansive than the proposal made in Court on November 23, 2009, or in Federal Defendants' previous briefing. Upon the Court's approval of such a proposal, Federal Defendants would supplement each of their administrative records with all material from the Administration's

review and development of the AMIP, subject to applicable privileges.[1/] The bookend dates for these materials would be April 2, 2009, the date of the in-chambers meeting, and September 14, 2009, the date of the letter from Dr. Lubchenco concluding that review process.[2/] The Court could then allow Federal Defendants to supplement the administrative records in accordance with the Ninth Circuit's exceptions to record review principles.

This proposal is consistent with the APA because it fulfills the statutory purpose. The overriding purpose of the judicial review provisions of the APA, reflected in both the statutory scheme and the arguments at the November 23, 2009 hearing, is to allow litigants an opportunity to challenge an agency decision and to have a court review that decision on the basis of the documents which informed the agency decisionmaking. 5 U.S.C. § 704. By supplementing the administrative record, the parties would have the ability to review the underlying support for the Administration's determination – that the 2008 BiOp, as implemented through the AMIP, satisfies ESA Section 7(a)(2) – and the Court would have the entire record on which to conduct its review. While the parties have already extensively briefed the merits of both the BiOP and the AMIP, if the Plaintiffs or other parties find additional material in the supplemental documents relevant to the Court's judicial review, the Court could allow additional briefing to ensure the purposes of the APA judicial review provisions are satisfied. Although we believe

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[1/] Unlike the many other implementation plans that are issued annually or semi-annually under the BiOp, the circumstances here involving the Court's request for the Administration's review of the FCRPS BiOp combined with the Plaintiffs' contentions that they have not had an adequate opportunity to challenge the AMIP with an adequate record, make this situation distinct. Supplementation of an administrative record is not necessary for each and every implementation plan under the BiOp, but because of the present circumstances Federal Defendants are willing to consider this alternative.

[2/] This is much broader than the proposal to supplement the administrative record with the *in camera* documents provided to the Court previously. As indicated at the November 23, 2009 hearing, Federal Defendants have already provided the parties with copies of these *in camera* documents.

that further briefing could be minimized and accelerated, such a process would ensure that Plaintiffs are not prejudiced in any manner. In doing so, this proposal satisfies the purposes of the APA and its judicial review provisions and would be sufficient to formalize the Administration's six-month review process.[3/] *See* 5 U.S.C. § 706 (in reviewing agency actions, a court "shall review the whole record or those parts of it cited by a party.").

Further, supplementation of the administrative record with these additional materials and an allowance for additional briefing is well within the Court's equitable authority. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (district courts have "inherent power" to control their dockets). Considering the extensive work and resources that have been expended to achieve a near-consensus position on the BiOp and in light of the length and complexity of the litigation, the Court would be well-grounded in finding good cause to allow supplementation. *Sheet Metal Workers' Intern. Association Local Union No. 359 v. Madison Industries, Inc. of Arizona*, 84 F.3d 1186, 1192 (9th Cir. 1996) (district court's decision to allow supplementation is reviewed for abuse of discretion). As the Court recognized in denying Federal Defendants' motion to strike, supplementation in certain circumstances is consistent with the APA because it allows the parties and Court effective judicial review of the agency action and would ultimately be reviewed under an abuse of discretion standard. *See Midwater Trawlers Cooperative v. Department of Commerce,* 393 F.3d 994, 1007 -1008 (9th Cir. 2004) ("the Fisheries Service's

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[3/] The Court also indicated that in addition to supplementing the record, it would be appropriate for the government to "provide the required public notice." Tr. at 94, line 24. While NMFS did provide a draft biological opinion for public comment as a special circumstance of the remand, the consultation procedures of ESA Section 7 do not include a public notice or involvement process. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 660 n.6 (2007) (citing 51 Fed.Reg. 19928 (1986) ("Nothing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the 'interagency' consultation process")). Accordingly, the ESA would not require further notice or public involvement as part of either of the government's proposals to address the perceived procedural problems before the Court.

supplement to the record permitted it to more fully explain both its rejection of the biomass methodology and its adoption of the sliding scale methodology. Because supplementation is permitted 'if necessary to determine whether the agency has considered all relevant factors and has explained its decision,' we conclude that the district court did not abuse its discretion by permitting the Fisheries Service to supplement the record.") (citations omitted)

Nor would these materials be a post-hoc rationalization. As explained at the November 23, 2009 hearing, the AMIP and any supporting documentation sets forth the decisionmakers' reasoning, as opposed to argument from counsel. As explained by the D.C. Circuit:

> Here we are not confronted by a hypothetical explanation by appellate counsel of why an agency might have done something. Rather, the decisionmaker himself, faced with the knowledge gleaned from a formal opinion of this Court that his decision would likely not withstand appellate review, reconsidered the matter and arrived at the same result but expanded on his rationale. A court's normal refusal to consider counsel's post hoc rationalizations for administrative action is simply inapplicable.

Population Institute v. McPherson, 797 F.2d 1062, 1073 (D.C. Cir. 1986). Just as in that case, the AMIP and the supplementing materials are from the decisionmakers themselves and are not arguments of counsel. Moreover, the response and presentation of the Administration's position to the Court on September 15, 2009, is fully supported by the existing rational in the existing administrative record. *See National Oilseed Processors Ass'n v. Browner*, 924 F.Supp. 1193, 1205 (D.D.C. 1996); *see also Sierra Club v. Marsh*, 976 F.2d 763, 774-75 (1st Cir.1992) (holding that "the district court properly accepted the post-hoc explanations of the decisionmakers' action" because the agencies' explanations were supported by evidence in the administrative record) (relying on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)).

The Court has the equitable authority under the Ninth Circuit's exceptions to record review principles to allow the agencies to supplement their administrative records with the AMIP and underlying documentation. If the agencies are allowed to supplement, the Plaintiffs

could not claim that they have been prejudiced and this would allow for effective judicial review. Supplementation is consistent with the APA and would be sufficient to formalize the completion of the Administration's six month review process.

B. Alternatively, The Court Can Allow a Limited Voluntary Remand.

While we believe that supplementation of the record addresses the Court's concerns and the purpose behind the APA, there is another option available. If the Court believes that Federal Defendants should formally integrate the AMIP and its record into the administrative record for the 2008 BiOp, it has the authority to allow Federal Defendants to take a limited, voluntary remand.

To be clear, the Court cannot dictate the substance of a BiOp, but it could allow the agencies to voluntarily evaluate this procedural issue in light of the Court's reservations. If allowed permission to do so, NOAA could integrate the AMIP and its record into the administrative record for the BiOp and the action agencies could correspondingly integrate this determination into their respective administrative records for their Records of Decision ("RODs"). The agencies would then complete this task and present the Court with a notice of completion of remand. If the Court is interested in following such a procedure, Federal Defendants estimate that such a limited remand process could be completed quickly and would commit to doing so within ten days of the Court's order. Consistent with the supplementation proposal discussed above, during this remand the agencies would supplement their administrative records and the Court could allow further, limited briefing on the merits of the 2008 BiOp as implemented through the AMIP before ruling on the pending cross-motions for summary judgment.[4/] And, as discussed below, the 2008 BiOp would remain in place during the brief remand period.

[4/] The agencies have already begun the process of compiling their supplemental administrative records and anticipate that they would be in position to comply with any court order by February 26, 2010.

1. The Court Has Authority to Grant An Agency's Request for Voluntary Remand.

A "voluntary remand" is a request by an agency for "remand without [judicial] consideration of the merits," while "a court-generated remand" is "a remand after consideration of the merits." *Central Power & Light Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980). According to the Supreme Court, the power to remand a decision without judicial consideration is vested in a court's equitable powers:

> The jurisdiction to review the orders of [the agency] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.

Ford Motor Co. v. Nat'l Labor Relations Bd., 305 U.S. 364, 373 (1939); *Asarco, Inc. v. OSHA*, 647 F.2d 1, 2 (9th Cir. 1981) (same); *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983) (reviewing court has inherent power to remand a matter to an administrative agency).

A voluntary remand is consistent with the principle that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). It also serves the interests of judicial economy by allowing an agency to reconsider and rectify an erroneous decision without further expenditure of judicial resources. *See, e.g., Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting EPA's opposed motion for voluntary remand to consider newly developed evidence) ("We commonly grant such motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."); *id.* at 524 n.3 (collecting cases). Moreover, agency reconsideration

through a voluntary remand does not automatically divest a court of jurisdiction.[5/] The Court has the authority to grant a voluntary remand here and allow the agencies to address the perceived procedural issues with the AMIP while retaining jurisdiction during the pendency of the remand.

Plaintiffs will likely argue that there must be some recognition of deficiency before the Court can grant a voluntary remand. This is not the case. As explained by the Federal Circuit:

> [E]ven if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position. It might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies. Here, the reviewing court has discretion over whether to remand.

SKF USA, Inc. v. United States, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *see also Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004); *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006); *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009). Here, the agencies' request is based upon the desire to address the perceived procedural issues with the AMIP, which falls well within the recognized rationales supporting a permissible voluntary remand.

2. A Voluntary Remand May Be Limited in Scope

If the Court permits a voluntary remand, the agency has the authority to limit the scope of that remand. The Ninth Circuit has itself issued remands limited in scope and rejected arguments that the agency should have reopened the entire decisionmaking process during such a

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[5/] Indeed, the D.C. Circuit's Local Rule 41(b) codifies this practice by making a distinction between a remand of the *record*, where the court retains jurisdiction, and a remand of the *case*, where the court does not retain jurisdiction. *See* D.C. Cir. L. R. 41(b) ("Remand. If the record in any case is remanded to the district court or to an agency, this court retains jurisdiction over the case. If the case is remanded, this court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand.").

remand. In *Asarco, Inc. v. Occupational Safety and Health Admin*, 746 F.2d 483 (9th Cir. 1984), the Court remanded for the limited purpose of examining the action in light of an intervening Supreme Court decision. On remand, the Secretary reopened the record for the limited purpose of receiving evidence and making the required findings, even though the petitioners also requested that the record be reopened on other issues. Upon completion of remand, the matter was resubmitted to court and rebriefed. Among several issues, the Court rejected the argument that the agency should have reopened the record to consider new data on feasibility, stating:

> We are concerned that agency consideration of new evidence relevant to agency decisionmaking should not be excluded merely because the agency wishes to bring a long rulemaking or other administrative proceeding to a close. Nonetheless, we are also mindful of the limitations that we specifically placed on this remand as well as of petitioners' failure to ask us to modify the scope of that remand. The Secretary would have arguably violated the terms of our remand had he reopened the record on feasibility issues without our consent. We therefore find that the Secretary did not abuse his discretion in refusing to reopen the record.

Id. at 502. While the present litigation presents the issue of a voluntary remand, *Asarco* nonetheless demonstrates the appropriateness of either the Court or the agency limiting the scope of the remand to address a particular issue.

Nor is this course of action unusual. As discussed at the November 23, 2009 hearing, the Ninth Circuit recently approved of such a limited remand. *Native Ecosystems Council et al. v. Kimbell*, 304 Fed.Appx. 537 (9th Cir. 2008).[6/] In that case challenging a Forest Service hazardous fuels reduction project, the district court found a flaw an Environmental Impact Statement ("EIS") with respect to the soil analysis and remanded the matter to the agency to conduct the required analysis. After supplementing the EIS, the agency successfully moved the Court to dissolve the interim injunction against the project and resolve the case. Rejecting the plaintiffs' arguments that a new EIS was required, the Ninth Circuit held that the remand orders

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[6/] Although unpublished, this memorandum may be cited pursuant to Ninth Circuit Court of Appeals Rule 36-3(b).

were within the scope of the district court's broad equitable powers to shape the relief to match "the exigencies of the case." *Id.*, *1; *see also Central Freight Lines v. I.C.C.*, 899 F.2d 413, 417 (5th Cir. 1990) ("we granted the ICC's motion for voluntary remand of Steere's petitions for review to permit the agency to reconsider one aspect of its prior decisions"); *American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1155 (D.Colo. 2000), *aff'd* 260 F.3d 1192 (10th Cir. 2001) (" the EPA completed its review on remand, again approving Montana's mixing zone provisions. Following the approval on remand, EPA and American Wildlands filed supplemental briefs.") (citations omitted); *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 945 (9th Cir. 2008); *Taian Ziyang Food Co., Ltd. v. U.S.*, 637 F.Supp.2d 1093, 1135 (CIT 2009).

A voluntary remand is an appropriate method to address any perceived procedural issues with this Court's consideration of the AMIP. Limiting that remand to consideration of whether the 2008 BiOp and the agencies' RODs should integrate the AMIP into their respective administrative records is a permissible way to address any procedural issue and could be done in an expedited manner. *See e.g.* Tr. at 86, lines 19-21 ("Everybody here wants to resolve this matter without another two years or four years of remand."); *id.* at 95, lines 8-11 ("I do not think this task is as time-consuming or complicated as the Government contends. It is clear that the federal defendants have discretion to substantially limit the scope of reinitiation.").[7/] Accordingly, if the Court is interested in proceeding in this manner, the Court should grant the

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[7/] While the Court had initially requested Federal Defendants to brief "whether they will voluntarily reinitiate consultation for the limited purpose of integrating the BiOp and the AMIP," Tr. at 95, lines 14-15, the voluntary remand process described above is preferable to reinitiation. In the first instance, we re-emphasize Dr. Lubchenco's finding that the AMIP does not require reinitiation of consultation. *See* September 14, 2009, Letter from Dr. Jane Lubchenco to Action Agencies at 2. Additionally, it is possible that a reinitiation process would need to be much broader and thus would correspondingly take much more time. Reinitiation is not necessary, nor advisable, in light of the region-wide consensus in getting out of the courtroom in order to start implementing the many beneficial aspects of the 2008 BiOp and the AMIP.

proposed order which the agencies have filed concurrently with this memorandum.

3. The 2008 BiOp Should Remain In Effect During Any Such Remand.

While vacatur of a challenged action is a typical remedy accompanying a remand order, it is not required, especially in the context of a limited, voluntary remand which this Court would be entering. This Court in the past has allowed BiOps to remain in place during the pendency of a remand, and there is no reason to alter this practice now, especially with the short duration under consideration.[8/] The harm that would result in vacatur of the 2008 BiOp and its corresponding take coverage, even for such a short period, would be disastrous for the agencies, and courts have declined to vacate agency decisions which would result in such serious disruptions. *See Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 949-50 (D.C. Cir. 2004). Here, the balancing of the equities counsels in favor of leaving the 2008 BiOp in effect during any limited remand period.

4. Federal Defendants' Proposed Limited, Voluntary Remand Order.

Federal Defendants believe that the Court may utilize any of the alternatives set forth above or in our previous briefing, but if the Court is inclined to choose a limited, voluntary remand, we have compiled and attached a proposed order. *See* Fed. Defs.' Attachment A. The attached proposed order will allow the agencies to consider whether to integrate the AMIP and its administrative record into the existing administrative records for the FCRPS biological opinion. *Id.* The scope of this remand would be limited to this specific issue and as a result the time-

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[8/] Even for substantive violations, this Court and others have allowed biological opinions to remain in place during remand. *National Wildlife Fed'n v. NMFS*, 254 F. Supp.2d 1196, 1215-16 (D. Or. 2003) (remanding biological opinion without vacatur, "in order to give [NMFS] the opportunity to consult [on defects the court had identified in the biological opinion]"); *Bennett v. Spear*, 5 F. Supp.2d 882, 886-887 (D. Or. 1998) (during remand "all challenged RPAs and regulations shall remain in effect").

frame would be very accelerated and could be completed within ten days of entry of the order. *Id.* This order would be interlocutory in nature and the Court would retain jurisdiction while the biological opinion remains in place. *Id.* Finally, the agencies could also complete this process by supplementing the existing administrative records with documentation from the Administration's review and development of the AMIP, and this could be completed by February 26, 2010. *Id.* It is likely that Plaintiffs will seek yet another round of briefing on the adequacy of the AMIP and while Federal Defendants believe this briefing would be redundant, they would not oppose an accelerated schedule where the case would be fully briefed for the Court's consideration by the end of March, 2010.

The Plaintiffs will almost certainly argue that this proposed order is not permissible or that the Court should take this opportunity to broaden the scope of any remand order to endorse their legal arguments. Obviously, Federal Defendants disagree with such arguments, but we also urge the Court to carefully consider the differences between a voluntary and involuntary remand order, as the Federal Defendants' request for a voluntary remand only extends to the conditions identified in the proposed order. A broader scope negates the voluntary remand request and this Court would have to enter an involuntary remand order to accomplish any broader remand. Although the Court can choose to issue any type of remand order it determines necessary, with an involuntary remand order it must make a number of findings on the merits of the biological opinion and explain why there are deficiencies. *Central Power & Light Co.*, 634 F.2d at 145. In contrast, with a voluntary remand the Court is not required to make any of these otherwise necessary findings and may allow the agencies to consider the limited issue of integrating the AMIP. *SKF USA, Inc.*, 254 F.3d at 1029. The Plaintiffs are likely, at minimum, to suggest broadening the scope of any remand to address their issues, but this desired expansion will convert any voluntary remand order to an involuntary remand order. If the Court is inclined to choose the alternative of a limited, voluntary remand order, Federal Defendants urge the Court to

enter the attached proposed order.

CONCLUSION

The process that began in April of 2009 and the Plaintiffs' active encouragement to have the Administration review the FCRPS BiOp is best characterized as the equivalent of an informal remand. The development of the AMIP, informed by the Court's May 2009 letter, is likewise the completion of that informal remand process, and now Federal Defendants seek to formalize this process. Federal Defendants believe that they can do so through any of the procedural mechanisms explained in previous briefing or those above and the Court would be well within its equitable authority to utilize any of the alternatives and it would not be an abuse of discretion. The case law is relatively clear that agencies may reconsider their decisions in the midst of litigation without depriving a court of jurisdiction and there is authority in the Ninth Circuit that if an agency decides to reconsider such a decision, it may present this information to the Court for its review. The alternatives above allow for the orderly formalization of this process and by providing the underlying documentation in the form of a supplemental administrative record, the Plaintiffs can in no way claim they have been prejudiced. The APA was not enacted to procedurally hamstring agencies or to present obstacles to implementation, but rather is an act that provides a mechanism for interested parties to seek and obtain judicial review of agency actions that they believe are unlawful. Whether the Court chooses to have the agencies supplement the administrative record or chooses to issue a voluntary limited remand order, the end-result will largely be the same – the Plaintiffs and public will have access to the documents detailing the decisionmaking process and this Court will have more than an adequate record on which to decide whether the agencies have complied with Section 7(a)(2) of the ESA. That is, and should remain, the relevant inquiry.

Respectfully submitted: December 21, 2009.

IGNACIA S. MORENO
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney

/s/ Bridget Kennedy McNeil
BRIDGET KENNEDY McNEIL, Trial Attorney
MICHAEL R. EITEL, Trial Attorney
Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on December 21, 2009, 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:

Dr. Howard F. Horton, Ph.D.
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, Oregon, 97331-3803
FAX: (541)-737-3590
(hortonho@onid.orst.edu)

Walter H. Evans, III
Schwabe Williamson Wyatt, P.C.
1211 S.W. Fifth Ave
1600-1800 Pacwest Center
Portland, OR 97204
(wevans@schwabe.com)

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83051

/s/ Bridget Kennedy McNeil