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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

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

At the hearing on November 23, 2009, the Court requested supplemental briefing on whether the Adaptive Management Implementation Plan ("AMIP") was properly before the Court. Federal Defendants have presented the Court with three legal options for achieving this task. The first option requires no further process. The Court can review the pending cross motions for summary judgment and if it believes it is necessary to recognize or rely on the AMIP, it could do so by identifying one of the Ninth Circuit's exceptions to record review, consistent with its previous order denying Federal Defendants' motion to strike the Plaintiffs' extra-record materials. Docket No. 1619. Under this option it is important to note that the AMIP is already part of the judicial record in this case. Docket No. 1712. And, regardless of whether the Court relies on the AMIP or not, the commitments made by each of the four agencies will remain – the AMIP is the Obama Administration's implementation plan for Federal Columbia River Power System Biological Opinion ("FCRPS BiOp"). Under the second option, Federal Defendants would proceed to file a Notice of Filing Supplemental Administrative Records on February 26, 2010. The Court could proceed to review these records and decide the pending summary judgment motions, or allow for further briefing if necessary. The third option would involve the Court entering the proposed order for a limited voluntary remand; Federal Defendants would comply with the terms of that proposed order, including supplementing the administrative records, and present the Court with a notice of completion of remand within ten days. The Court could proceed to decide the summary judgment motions, or allow further briefing as necessary. As demonstrated previously and herein, each of these options is legally supported, well within the Court's discretion, and allow for the Court's proper consideration of the Obama Administration's review of the FCRPS BiOp.

The National Wildlife Federation plaintiffs, State of Oregon, and *amicus*, the Nez Perce

Tribe (collectively "Plaintiffs") take a different position on these options.[1] Plaintiffs fully recognize the Court's discretion to issue the proposed voluntary remand order or allow supplementation of the administrative records, but urge the Court not to exercise that discretion for a number of reasons. They propose instead that the Administration request a "real" or "genuine" voluntary remand and analyze all of methodologies and analyses underlying the FCRPS BiOp. According to Plaintiffs, this reconsideration would evaluate the jeopardy standard, the habitat methodologies, the underlying data analysis, and make a determination as to whether the RPA, as implemented in accordance with the commitments that have been made by all the agencies, is likely to jeopardize these species or adversely modify critical habitat. Evidently the Plaintiffs would not be adverse to Federal Defendants presenting the Court with the results of this "genuine" voluntary remand because, after all, that would be the point of reconsidering or re-evaluating the merits of the FCRPS BiOp.

Quite simply, the substantive entirety of Plaintiffs' "new" proposal has already occurred. There has never been any dispute that: (1) Federal Defendants sought a stay of proceedings in this case to allow for reconsideration of the merits of the FCRPS BiOp; (2) Plaintiffs acquiesced in this process; and (3) the Administration conducted an exhaustive review of all of the issues. Yet, the Plaintiffs' proposal seeks to duplicate these efforts and have the Administration recreate this process all over again. Nor do they explain how or why the end-result would be any different by subjecting all of the same issues to an identical process or how they would be prejudiced by formalizing the completion of the Administration's reconsideration. Instead, and tellingly, they acknowledge that re-engaging in this process would be the lengthy, *see* NWF Resp. at 5, would likely result in additional litigation, *see* OR Resp. at 18-19, and the Nez Perce Tribe even goes as far as suggesting that "this might be a disappointing process for the Court." NPT Resp. at 6. Instead of allowing a timely resolution to the current case, the Plaintiffs' proposals would plunge the parties back into

[1] The Spokane Tribe also appears to join in some of the Plaintiffs' arguments.

arguing about the parameters of involuntary remand order, *see* NWF Resp. at 3 n.5, additional injunctive relief proceedings, *see* NWF Resp. at 26 n.20, and more and more discussion on Plaintiffs' preferred, yet ultimately rejected, jeopardy/recovery construct. *See* OR Resp. at 15. The Plaintiffs' dogged refusal to acknowledge all of the work by the new Administration over the last nine months is nothing less than remarkable.

This Administration, including some of the top political leadership from each of the agencies, made reviewing and reconsidering the merits of the FCRPS BiOp a priority. They consulted with some of the top scientists in the world and where there were recommendations, those were heeded. They spent a considerable amount of time, money, and made a very public and genuine commitment to implementing this BiOp in a protective and aggressive manner through the development of the AMIP. This Court has heard this Administration, joined by nine other sovereigns, repeatedly state their desire to end the litigation, and instead focus their considerable energies on implementing actions for salmon and steelhead. While often repeated, it is not an empty refrain. We agree with the Plaintiffs that this Court can choose any number of possible outcomes, but we disagree that re-engaging in a similar process with all of the same participants expressing all of the same views would be a productive use of this region's time. And just as importantly, it is not legally required. More analysis, more data computations, and more litigation is a step backwards.

The parties have approached this procedural issue from very different perspectives. The Plaintiffs construe Federal Defendants' proposal in a vacuum, apparently asking this Court to ignore the last nine months. In contrast, Federal Defendants and other regional sovereigns believe that this Court should acknowledge the factual circumstances of the Administration's review, most critically that a reconsideration of the merits of the FCRPS BiOp has already taken place, and allow Federal Defendants to supplement the administrative records with the results of that reconsideration. These two different perspectives on the same procedural issue are largely driven by the parties' diverging goals. The parties have identified all of the relevant case law and there is agreement that the Court

has the discretion to exercise its equitable authority to enter the proposed remand order or allow supplementation, if it chooses to do so. There is no doubt that if the Plaintiffs receive an adverse ruling they will appeal to the Ninth Circuit (as they have done already against BPA), but the Federal Defendants, as well the other sovereigns, are confident that the discretionary nature of such an order paired with the factual circumstances of the last nine months, including Plaintiffs' active participation in this process, make such an order legally sound and eminently appropriate. Federal Defendants urge the Court to utilize one of their three proposed options.

DISCUSSION

The AMIP is this Administration's implementation and adaptive management plan for the FCRPS BiOp. It is a plan, arrived at after a thorough review of the analyses and science, that implements the existing commitments in NOAA's RPA and one that will ensure that the operation of FCRPS is not likely to jeopardize the listed species or adversely modify designated critical habitat. *See* AMIP at 14. ("For each component of the AMIP, the applicable RPA action is identified and the adaptive management application is described. The provisions of this AMIP inform the measures of the 2008 RPA with greater detail and specificity, and the agencies intend the AMIP to be consistent with the objectives and requirements of the RPA."). Federal Defendants have previously explained their position as to how the AMIP is consistent with the existing RPA and how it may be properly recognized under the adaptive management mechanism in the BiOp and the Ninth Circuit's exceptions to record review. *See* Fed. Defs.' Resp. to the Court's May 18, 2009, Letter at 7-8; *see also* Fed. Defs.' Comb. Reply to Pls.' Resp. to the AMIP at 33-36. Federal Defendants have also fully explained how the Court may exercise its discretion to allow for the supplementation of the administrative records without entering a voluntary remand order. *See* Fed. Defs.' Supp. Br. at 2-5. The Plaintiffs do not meaningfully address these positions, but instead largely focus their briefing on the propriety of Federal Defendants' proposed voluntary remand order. Although Federal Defendants' briefing below is

responsive to the Plaintiffs' most recent filings on the voluntary remand issue, it bears noting at the outset that Federal Defendants' two other proposals are equally valid, legally supported, and may allow for the most expeditious resolution of this case.

I. THE PROPOSED VOLUNTARY REMAND ALLOWS FOR THE ORDERLY FORMALIZATION AND CONCLUSION OF THE ADMINISTRATION'S REVIEW PROCESS.

There is one significant point of agreement among all of the parties to this litigation – this Court has ample discretion to grant a request for a voluntary remand. *See e.g.*, NWF Resp. at 12 ("courts have recognized that they may exercise their discretion in some circumstances to allow a voluntary remand . . . ."); OR Resp. at 16 ("there may be ample authority for the simple proposition that courts may issue limited voluntary remand orders . . . "); Def. Intv, Amici Resp. at 3 ("Ample authority exists for the principle that federal administrative agencies have authority to reconsider their decisions."). Even the Plaintiffs acknowledge, as they must, that courts throughout the Ninth Circuit routinely grant requests for voluntary remand which allow agencies to reconsider previous determinations. *See* NWF Resp. at 12-14. The Plaintiffs further acknowledge that through voluntary remand, a court may allow an agency to reconsider a previous decision without confessing error. NWF Resp. at 26 ("[The Court] doesn't have to decide if the challenged agency decision has a flaw sufficient to render it arbitrary or unlawful, nor does the court need to address where any such flaw might lie."). Nevertheless, they argue that this Court should not exercise its discretion in this instance because: (1) the proposed timeframe of ten days will not allow for a full (or genuine) reconsideration of all of the underlying legal and biological issues; (2) the Plaintiffs do not acquiesce; and (3) the end-product of a remand must be an entirely new agency decision. These objections do not find any support in the case law.

The Plaintiffs artificially cabin their analysis to a fictional situation where the Court is considering the request for voluntary remand without acknowledging what has actually transpired. Importantly, Federal Defendants are not seeking a voluntary remand of ten days to conduct some

new process, but rather to formalize and conclude an exhaustive review that was inclusive of all of the underlying biological and legal issues, just as Plaintiffs request. As explained previously, this Administration sought a stay of proceedings from the Court so that it could review the FCRPS BiOp. *See* May 1, 2009, Letter to The Honorable James A. Redden from Coby Howell, ("The administration leadership is asking for an additional 30 to 60 days to more fully understand all aspects of the BiOp.") (Docket No. 1697-1). The Plaintiffs did not object at that time or any other point during that process, and in fact encouraged the Administration's review:

> [NWF, the State of Oregon, and the Nez Perce Tribe] are *pleased* that the leadership of the new administration has decided to take time to 'more fully understand all aspects of the [2008 FCRPS] BiOp.' We believe such an effort could lead to important and necessary changes to the BiOp. . . .Our clients *look forward* to the opportunity to meet with agency leaders in the near future to assist them in their review.

See May 1, 2009, Letter to The Honorable James A. Redden from Todd True (emphasis added) (Docket No. 1697-8). Hearing no objection from the Plaintiffs or any of the other parties, the Court granted the stay in proceedings. *See* May 4, 2009, Letter to Counsel from The Honorable James A. Redden ("The court is encouraged that the parties have already conducted initial discussions, and believes that an additional 30 to 60 days is both appropriate and reasonable in order to allow the new administration to better understand the complex issues presented by this case.") (Docket No. 1697-4). Following receipt of the Court's May 18, 2009, guidance memorandum, the Administration requested two additional extensions of time for 45 and 30 days respectively to evaluate the Court's concerns and finalize its review. *See* Docket Nos. 1705 and 1708. Once again, the Plaintiffs did not object to these requests. *See* Letter to The Honorable James A. Redden from Todd True ("We write not to express concern about the additional review time but to emphasize the need for actual substantive engagement by the new administration and federal agencies . . . ."); *see also* Pls.' Joint Request for a Status Conference ("Pls.' Jt. Req.") (presenting Plaintiffs' perspectives on the review process, but stopping short of an objection) (Docket No. 1709).

The Plaintiffs cannot dispute that they agreed with a stay of proceedings and in fact welcomed the Administration's reconsideration of the merits of the FCRPS BiOp. Obviously, the Plaintiffs had hoped for a different outcome and their frustration that the new Administration determined it was unnecessary to throw out the BiOp and start all over is evident. But this does not change the fact that they actively supported the stay, encouraged the new political leadership to review the merits of the BiOp, and participated in the review. The fact that the Court did not enter a formal remand order prior to the Plaintiffs' participation in this process, as opposed to granting extensions of time, makes no difference; to credit such an argument would elevate form over substance. *See Anchor Line Ltd. v. Federal Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("when an agency seeks to reconsider its action, it should move the court to remand *or to hold the case in abeyance pending reconsideration* by the agency") (emphasis added). Morever, many courts have recognized that administrative proceedings should not devolve into a game of lying in the weeds, only to surprise an agency when the end-result differs from the litigants' desired goal. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-54 (1978). The time for a credible objection to the Administration's review, or this Court's consideration of that process, has long passed.

A. The Scope of the Limited Remand Is Permissible Because It Simply Formalizes The Result of the Administration's Review Process.

The inherent inconsistency in the Plaintiffs' position is even more evident in their half-hearted contention that Federal Defendants' proposed voluntary remand is improperly limited in scope. They assert that a "genuine" remand "would require the government to address rationally and in a legally adequate way any issues fairly presented during the course of such a remand." NWF Resp. at 4 (emphasis in the original). Oregon takes this a step further by contending that the proposed order is *per se* illegal because "federal defendants are unwilling to reconsider the 'no jeopardy' conclusion at the center of this controversy." OR Resp. at 15. These facial objections

never acknowledge, much less explain, how the Administration's exhaustive review, spanning over five months, is different from what they propose. For example, the Administration reviewed the underlying biology and all of the contested legal issues. AMIP at 7 ("the Obama Administration has engaged in a thorough and substantive consideration of the 2008 BiOp and RPA, the science on which they are based, issues raised by litigants, and Federal District Court Judge Redden's perspectives in his May 18, 2009, letter.); *see also* Fed. Defs.' Sept. 15, 2009, Brief at 4-7 (explaining all of the different facets of this review). The Administration evaluated all of the Court's concerns and although this did not result in the substantive changes the Plaintiffs desired, it nevertheless considered each issue and provided its reasoning and conclusions. *See* AMIP, Appendix 1 at 7-23 (discussing spring and summer spill; summer flow augmentation, habitat methodologies). The AMIP was the culmination of careful and intensive consideration of these issues with the assistance of both independent and agency experts. Plaintiffs cannot pretend that a thorough reconsideration of the issues did not already occur.

What makes the Plaintiffs' assertions even more remarkable is the refusal to acknowledge their own participation in this process – providing them with the very opportunity which they complain is lacking from the voluntary limited remand now under consideration. During the review process, Administration officials received extensive written comments from all of the Plaintiffs detailing the various ways that they believe the Administration could improve the FCRPS BiOp. *See* Pls.' Jt. Req., Ex. B (Letter from Todd True to Dr. Jane Lubchenco); Pls.' Jt. Req., Ex. C (Letter from Governor Kulongoski to Dr. Jane Lubchenco); Pls.' Jt. Req., Ex. D (Letter from Nez Perce Chairman to Dr. Jane Lubchenco); Pls.' Jt. Req., Ex. E (Letter from Nicole Cordan to Dr. Jane Lubchenco). The Plaintiffs also had the opportunity to meet with the Administration's political leadership in a number of different forums, presenting their perspectives in order to inform the

Administration's review.[2] AMIP, Appendix 1 at 3-4. In fact, these written comments, meetings, and presentations ultimately informed some of the features in the AMIP, for example juvenile status and trend monitoring, *see* AMIP at 23-24 and long-term contingencies, *see id.* at 34-39, and while not all of the Plaintiffs' suggestions were incorporated, they nevertheless were thoroughly considered throughout this review process.[3] *Id.* at AMIP, Appendix 1 at 2-5. Suggesting that the Plaintiffs were not allowed to participate, or that certain issues were not addressed, is not credible.

1. Plaintiffs' Acquiescence Is Not Required to Grant the Limited Voluntary Remand.

Even if the Administration had not engaged in the very reconsideration the Plaintiffs suggest should be required, their discussion of the case law on this point only confirms Federal Defendants' point that a Court may limit the scope of a voluntary remand. As discussed below, Plaintiffs' attempts to distinguish the case law are unsuccessful.

Plaintiffs place great stock in the proposition that they must acquiesce in the scope of any remand process. While it is true that the Ninth Circuit in *Asarco, Inc. v. Occupational Safety and Health Admin.*, 746 F.2d 483 (9th Cir. 1984) recognized that the litigants had failed to "to ask to modify the scope of the remand," the Ninth Circuit did not make this a precondition for limiting the scope of a remand. *Id.* at 502. Rather, the Ninth Circuit noted that it must take account of the

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[2] The new Administration provided these opportunities even though, contrary to Plaintiffs' suggestion (NWF Resp. at 2, n.3), there is no "independent right to public comment with regard to consultations conducted under § 7(a)(2)." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 660 n. 6 (2007).

[3] In their brief, NWF suggests that the Plaintiffs would be interested in settling this case if Federal Defendants are willing to accept their interpretation of the ESA. NWF Resp. at 22 n.16 ("negotiate a settlement that provides an agreed-upon structure and path for complying with the law . . ."). Even if Federal Defendants agreed with the Plaintiffs' interpretation of the ESA – which they do not – the agencies cannot simply turn over the Section 7(a)(2) decisionmaking process under the auspices of settlement to a select few individuals that are significantly out of step with the vast majority of scientists in this region. *See id.* ("opportunity for creative problem-solving . . ."). Doing so would inevitably, and rightly, draw challenges for failing to use the "best available science."

factual circumstances underlying the situation, "we are also mindful of the limitations that we specifically placed on this remand" and ultimately found that the "Secretary did not abuse his discretion" in limiting the scope of the remand. *Id.* Just as in *Asarco*, the Court here should look to the factual circumstances, which demonstrate, among other things, that the Plaintiffs *have already acquiesced* to the reconsideration process and now are merely objecting to the orderly formalization of that process when they disagree with the results of the Administration's review and that a full reconsideration of the merits has already taken place.

Morever, even if Federal Defendants' request is construed narrowly and without the attendant facts, courts have routinely granted remands over the objections of plaintiffs. *See, e.g., Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417-18 (6th Cir. 2004) (reversing denial of motion for voluntary remand over plaintiff's objection and noting such remands may be appropriate even where there has been no new evidence or intervening change in law); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir.1993) (granting voluntary remand over plaintiff's objection); *Alliance for the Wild Rockies v. Allen*, 2009 WL 2015407, *2 (D. Or. July 1, 2009) (same); *Natural Resources Defense Council, Inc. v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1136 (C.D. Cal. 2002) (same). It would not be an abuse of discretion to order a limited voluntary remand over the Plaintiffs' objection.

2. Voluntary Remands Do Not Require the Agency to Reach a New Decision.

Plaintiffs' other tactic is to rely on an artificially-narrow view of a permissible remand - an end-result interpretation driven by the assumption that the result of any remand must be an entirely new agency decision. This is simply not true. *See Asarco*, 746 F.2d at 502 (recognizing the limited reconsideration of a discrete aspect of the previous decision). No court has ever held that an agency must make a new decision as precondition for granting a request for voluntary remand. Admittedly, many remands do result in a new decision, but insisting that an agency must effectively vacate its

previous decision in order to engage in reconsideration, defeats the very purpose of a voluntary remand. *See, e.g., Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) (Corps reconsidered and reissued the permits on voluntary remand). Indeed, if Plaintiffs' theory is followed to its logical end, there would be no reason for the agency to reconsider its previous position because it would be required to vacate the previous decision and start the decisionmaking process from scratch. There would be no reason, or even ability, for a court to retain jurisdiction, as the result of such a remand would simply be the start of a new legal challenge to a different agency action. Such an interpretation of a permissible remand also runs counter to the many cases that allow for the possibility that an agency may affirm its previous decision. *See, e.g., Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 25 (D.D.C. 2008) (recognizing that the Corps may choose to "*affirm*, modify, or revoke the permit" on a voluntary remand) (emphasis added). Not only does the case law reject the Plaintiffs' proffered interpretation by recognizing that during remand the agency may choose to affirm or modify the agency action in question, but this is precisely the distinction the D.C. Circuit sought to codify with its Local Rule 41(b). *See* D.C. Cir. L. R. 41(b) ("If the record in any case is remanded to . . . an agency, this court retains jurisdiction over the case.").

The Plaintiffs' additional theory – that the agencies must reinitiate consultation in order to seek a voluntary remand – is just an extension of their faulty reasoning above.[4] Requiring

[4] Reinitiation is not required every time the agencies adjust an adaptive management plan or provide further implementation detail, as they have done with the AMIP, as courts have upheld BiOps reliant upon adaptive management. *See, e.g., In re: Operation of the Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005). By regulation, only four types of situations trigger reinitiation, 50 C.F.R. § 402.16, and NOAA has already determined that none of them are met here. *See* September 14, 2009, Letter to the Action Agencies from Dr. Jane Lubchecno at 2 ("[Over the last five months the new political leadership at NOAA and your agencies invested substantial time and effort to reach a sufficiently robust understanding of the 2008 BiOp to develop this Plan. I agree that the [AMIP] is consistent with the RPA and that reinitiation of consultation is therefore not required."). This is further confirmed by the statutory structure of Section 7 in that once an agency reinitiates consultation, the action agencies'

reinitiation of consultation as a condition of voluntary remand would always result in an entirely new agency action (usually a new biological opinion), thereby depriving the reviewing court of jurisdiction. *See American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123-24 (9th Cir. 1997) (issuance of a new BiOp moots the underlying challenge).[5] There is no reason to seek reconsideration if the only possible outcome is a new BiOp.

Even the Plaintiffs' citation to *Alliance for the Wild Rockies v. Allen*, 2009 WL 2015407 (D. Or. July 1, 2009) overreaches. *See* NWF Resp. at 13-14. Plaintiffs first gloss over the fact that Judge Jones had previously granted a partial remand allowing the agency to examine discrete aspects of the bull trout critical habitat decision without reconsidering the entire rule. *See Alliance* at *1 ("After plaintiffs filed their complaint, FWS moved for a voluntary *partial* remand of the final rule

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substantive commitment would be dictated by an entirely different statutory provision – Section 7(d) rather than Section 7(a)(2). *Compare* 16 U.S.C. § 1536(d) ("After initiation of consultation . . . the Federal agency . . . shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."); *with* 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall . . . insure that any action authorized funded or carried out . . . is not likely to jeopardize. . . ."); *see also* 50 C.F.R. §402.09.

[5] The Plaintiffs vastly underestimate the significant delay reinitiating consultation is likely to engender. Because the Supplemental Comprehensive Analysis ("SCA") underlies not just the FCRPS BiOp, but also the Upper Snake and the *U.S. v. Oregon* harvest BiOps, reinitiating consultation would likely not be limited to just one BiOp. All four agencies would reinitiate and NOAA would be required to prepare three new BiOps. As this Court knows, the comprehensive analysis is massive in size; simply re-evaluating all of the data analyses and making new computations will take considerable time. If more collaboration among the sovereigns and possible additional proceedings in Judge King's courtroom are added to that, NOAA estimates that this effort would take approximately the same amount of time the last remand took. And, while the outcome cannot be predetermined, Defendants can say that any future consultation process would not employ Plaintiffs' theoretical recovery/ jeopardy construct. Thus, after issuance of the three new BiOps, all of the litigants would likely be right back in the same position as we are now. While often repeated, this new Administration would very much like to spend its energies ensuring the implementation of mitigation rather than reformulating a decision they believe is already biologically and legally sound.

to reconsider *certain exclusions.*") (emphasis added). Second, Plaintiffs also neglect to acknowledge that the remand was entered into after summary judgment had been fully briefed and oral argument heard. *Id.* Finally, contrary to Plaintiffs' conclusory statement that "a new decision necessarily would result from a remand", NWF Resp. at 14, Judge Jones merely recognized, in accordance with the government's motion, that any end-product would need to be published in the Federal Register in accordance with the statutory directives in Section 4.[6] Here, no such requirement exists for NOAA to publish a BiOp in the Federal Register under Section 7(a)(2), 16 U.S.C. § 1536(a)(2), and therefore the sideboards on *Alliance* are inapposite.

The point here is that a voluntary remand must at least allow for the possibility that after reconsideration, an agency may find that the existing decision is legally valid and choose to maintain that position in litigation. Otherwise, the outcome would already be predetermined, *i.e.*, forcing the creation of an entirely new agency action no matter the outcome of the reconsideration. Under that fact pattern, there would be no reason for a court to retain jurisdiction over the case during the pendency of a remand if the only possible outcome is that the case is moot upon issuance of a new agency action; it would simply dismiss and ask Plaintiffs to file a new complaint or petition once that process was complete. *American Rivers*, 126 F.3d at 1123-24; *see also* D.C. Cir. L. R. 41(b)("If the case [as opposed to the record] 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.").

Plaintiffs' theory that the only possible outcome is a predetermined withdrawal of the previous action and issuance of an entirely new decision also goes against the body of case law to

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[6] The designation of bull trout critical habitat involved FWS' determination under Section 4 of the ESA, 16 U.S.C. § 1533, where FWS is required to publish its all proposed and final determinations in the Federal Register. *See* 16 U.S.C. §§ 1533(b)(5), 1533(b)(6)(A) ("the Secretary shall publish in the Federal Register – if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat is involved . . . .")

recognize that an agency need not confess error in order to seek a voluntary remand. *SKF USA Inc. v. United States*, 254 F.3d 1002 (Fed. Cir. 2001); *Natural Resources Defense Council, Inc. v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1136, 1145 (C.D. Cal. 2002) (recognizing that a voluntary remand does not automatically result in vacatur of the agency action). If Plaintiffs' theory were correct, there would be no remands, as a court would simply find error, dismiss, and plaintiffs would file a new complaint or petition once that process was complete. This would effectively preclude an agency from reconsidering its position once in litigation. *But see, Trujillo v. General Elc. Co.*, 621 F.2d 1084, 1086 (10th Cir 1980) ("administrative 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."); *United States v. Benmar Transport and Leasing Corp.*, 444 U.S. 4, 7 (1979) (reversing Court of Appeals refusal to consider subsequent agency decisions on the matter under review, as all parties consented to further agency proceedings and agreed to hold judicial review in abeyance).

Had Federal Defendants come to this Court without any intention of reconsidering the merits of the FCRPS BiOp and with the sole purpose of "padding" the administrative record, the Plaintiffs' objections may have a modicum of credence. But that ignores reality. All the hallmarks of a remand are present here: (1) permission sought and obtained from the Court; (2) acquiescence by Plaintiffs; and (3) a full and fair evaluation of the merits of the agencies' decision. Without question, Federal Defendants proceeded in good faith throughout this process, diligently pursued the review in a timely manner, and ultimately, the results of this process reflect the measured consideration of the new Administration. Ignoring these facts, as the Plaintiffs suggest, ignores the articulated rationale of the agencies' compliance with ESA Section 7(a)(2) - the very issue under judicial review. Under these factual circumstances, the Court would be fully justified in exercising its discretion to allow the agencies to formalize the Administration's review process by entering the proposed limited, voluntary remand order.

II. RECOGNITION OF THE AMIP AND FORMALIZATION OF THE

ADMINISTRATION'S REVIEW PROCESS THROUGH SUPPLEMENTATION IS NOT A POST-HOC RATIONALIZATION.

The Plaintiffs spend a great deal of time attempting to convince the Court that any documentation developed after May 4, 2008, amounts to a post-hoc rationalization and therefore must be ignored in its entirety. Not once in the Plaintiffs' extensive briefing do they explain how they would be prejudiced if the Court granted the proposed voluntary remand or how Federal Defendants' proposal offends the underlying purpose of the APA. Nor do they explain why their position changes depending on what extra-record evidence they wish the Court to review. Instead, despite actively encouraging the Administration's lengthy review, urging the Court to issue detailed guidance that would inform that review, and repeatedly seeking much of the underlying documentation through the Freedom of Information Act and discovery methods (as well as selectively presenting such information to the Court, see Pls.' Jt. Req. at 8-13; *id.* at Exhibits A, F, G, I-L), Plaintiffs now ask this Court to ignore factual information that is extremely relevant to the underlying question of whether the agencies have complied with their substantive duties under Section 7(a)(2), information which is already part of the judicial record. Federal Defendants realize that Plaintiffs are frustrated that the Administration did not subscribe to their particular views, but characterizing the results of months of careful consideration by some of the top political officials, with the aid of some of the country's top scientists, as a post-hoc rationalization is merely a litigation position constructed to foreclose meaningful review. *See Sierra Club v. Van Antwerp*, 560 F. Supp. 2d at 25 (D.D.C. 2008) (granting a voluntary remand in part because if a judicial decision were limited to the initial agency record "the Court would effectively be issuing an advisory opinion on the validity of an action taken based on a factual record that excludes evidence that may now be relevant"). It is axiomatic that if an agency is allowed to reconsider its decision, it must be allowed to present that information to a reviewing court.

A. <u>The Structure and Judicial Sanction of the Review Process Distinguishes This Case</u>.

Unlike a typical case where there is no structured reconsideration or formalized response from the decisionmakers, here we have a lengthy and structured process sanctioned through multiple unopposed requests for a stay of proceedings. It is this structured process that renders Plaintiffs' reliance on *Arizona Cattle Growers Ass'n v. FWS*, 273 F.3d 1229, 1245 (9th Cir. 2001) and *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1067 n.5 (9th Cir. 2004), misplaced. In *Arizona Cattle Growers*, the FWS issued a BiOp and ITS for a species that did not exist in that geographical area and on appeal attempted to support its conclusion by introducing surveys that purportedly demonstrated that the species did in fact exist in that geographical location. *Id.* at 1245. Unlike *Arizona Cattle Growers*, the agencies here are not attempting to shore-up a critical and glaring deficiency by appending isolated studies to an appellate brief at the last minute, but rather seek to formalize the completion of an extensive review that evaluated all of the merits of the BiOp, through procedurally-appropriate supplementation of the administrative records in accordance with a voluntary remand order.

Similarly in *Gifford Pinchot*, the FWS sought to bolster its position by amending the challenged BiOps with newly-collected data that supported its conclusions. 378 F.3d at 1077. The Ninth Circuit found that "the FWS did not change its mind, but simply piled on more evidence." *Id.* In other words, FWS did not enter into that process with an open mind to reconsider the merits of its decision; the amended BiOps were done merely to sustain a litigation position. *Id.* at 1067 n.5 ("The purported amendments . . .were designed to show that the projects were in compliance with the [Northwest Forest Plan], perhaps in response to *Pacific Coast Federation of Fishermen's Ass'n, Inc v. NMFS* . . . ."). Our circumstances here present a different situation.

The difference lies in the fact that the agencies are not just "piling on evidence" for the sole purpose of bolstering a litigation position, but rather seek for the Court to recognize the end-product of a structured process in which the new Administration sought, with an open-mind, to determine whether the Action Agencies had sufficiently fulfilled their substantive obligations under Section

7(a)(2). Had the Administration reached a different result, that information would have been presented equally to this Court. That is the distinguishing point. This was not done to bolster a litigation position, but instead was good faith reconsideration by eminently qualified, yet admittedly new, decisionmakers.

It is this structure and the scope of the review process that distinguishes these cases. For example, in a recent case involving the Corps' issuance of Clean Water Act permits, the Fourth Circuit reversed the district court's conclusion that new information included in a supplemental administrative record was a post hoc rationalization and therefore should be ignored. *See Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009). In this case, the Corps sought a voluntary remand and the district court obliged by staying proceedings while the Corps reconsidered the issuance of its permits. *Id.* at 188. During this time, the Corps incorporated their interpretation of a "waste treatment exception" into the newly-issued permits, which was supported by a letter from EPA to the Corps (issued after the litigation had begun). *Id.* at 213. Approximately one month after seeking voluntary remand, "the Corps reissued the permits, but this time with a supplemented administrative record that incorporated new comments from the public and the parties." *Id.* at 188; *see also id.* at 213 ("[none of] the four challenged permits included any reference to the 'waste treatment' exception when originally issued; only when the permits were reissued after voluntary remand to the Corps did the waste treatment language appear."). In the district court, the court ruled in favor of the plaintiffs based on their argument that this information could not be considered because it constituted a post-hoc rationalization. The Fourth Circuit, however, reversed and found: "Even if the Corps' 'waste treatment system' argument was a post hoc rationalization when it was first raised, once the Corps reconsidered and reissued the permits on voluntary remand, the justification was no longer post hoc and it is entitled to deference. When a court reviews an agency action, the agency is entitled to seek remand 'without confessing error, to reconsider its previous position.'" *Id.* at 215 (citing *SKF USA Inc.*, 254 F.3d at 1028). Just

as in the present case, the Corps in *Ohio Valley Environmental Coalition* introduced new information through a structured voluntary remand and formalized this process by supplementing the administrative record. This is precisely what Federal Defendants propose to do here.

B. Plaintiffs' Current View Is In Stark Contrast to Their Prior Position.

An additional fault with Plaintiffs' argument is the failure to reconcile their constantly changing and inconsistent positions throughout this litigation. For years, Plaintiffs have repeatedly sought to introduce extra-record and post-decisional information with each round of summary judgment briefing. *See e.g.*, Declarations of Fredrick E. Olney; Patty Glick; Jack Williams; Steve Orzack. Indeed, most recently the Plaintiffs emphatically stated: "Consideration of extra-record material is especially appropriate in this case." NWF Opp'n Fed. Defs.' Motion to Strike at 8. And, that the "court necessarily must look beyond the record to determine whether the agency conducted the proper analysis" *Id.* (emphasis in the original) (citing *Asarco*, 616 F.3d at 1160). Plaintiffs never attempt to explain why they should be able to present evidence in the form of declarations for the purpose of "determin[ing] whether the agency's course of inquiry was sufficient or adequate", NWF Opp'n Fed. Defs.' Motion to Strike at 8 (quoting *Hells Canyon Preservation Council v. Jacoby*, 9 F. Supp 2d at 1233), while the actual decisionmakers, who are eminently more qualified than the Plaintiffs, are barred from doing the same. The Plaintiffs cannot credibly maintain that they alone can present information on whether the course of inquiry was sufficient and a few short months later take the exact opposite position. Supplementation is not a one-way street. *Midwaters Trawlers Cooperative v. Dept. of Commerce*, 393 F.3d 994, 1007-08 (9th Cir. 2004) (allowing NOAA to supplement its record with additional evidence).

C. Plaintiffs will Bear No Prejudice From Supplementation

Finally, the Plaintiffs make no effort to explain how they could be prejudiced by supplementation of the administrative records, either through a notice or by voluntary remand. Notably, the Plaintiffs do not take issue with Federal Defendants' statements that the basic statutory

purpose of the APA is to allow for judicial review. Fed. Defs. Supp. Br. at 3-4. In fact, at the last hearing, counsel for NWF confirmed this overriding principle while discussing the purpose of the APA, "if I could, I will start about 150 years before the APA was actually adopted by Congress with the statement by Chief Justice John Marshall in 1803, opinion in a case called *Marbury v. Madison*, who said that the ability of the individual, of the citizen, to hold the Government accountable under the law is 'the very essence of civil liberty.' The APA is an implementation for that very important principle." *NWF v. NMFS*, 01-CV-640, Transcript at 11-12 (Nov. 23, 2009). Yet, not once do the Plaintiffs explain how Federal Defendants' proposal of supplementing the administrative records, allowing Plaintiffs to review all of the new information, and filing additional briefing if they choose, offends the basic statutory principle of fostering a full and fair judicial review. It would seem after attempting to seek all of this documentation through discovery, not once but twice, the Plaintiffs would welcome the opportunity to review the underlying documentation of the Administration's review process and voice any concerns to the Court. But instead, Plaintiffs want to "hold the Government accountable" without allowing the Government a full explanation. This cannot possibly be a reasonable interpretation of the APA. Supplementation of the administrative records ensures that all parties and the Court can fairly consider the Administration's review process in accordance with the judicial review provisions of the APA.

CONCLUSION

The Court is well aware that this case and its proceedings are unlike any other. It is unusual for any number of reasons, but this is largely a reflection of how complex this system really is and the thousands of different ways it affects the sovereigns and all of those that live in the Pacific Northwest. Like many of our other issues in this case, Federal Defendants recognize that the current procedural posture does not necessarily fit neatly into one box or the other. That is why it is even more important for the Court to step back and look at the totality of the circumstances involving the Administration's review and reconsideration of the merits of the FCRPS BiOp. There is no dispute,

or even a question, that this new political leadership engaged in this process in good faith and brought a tremendous of amount expertise and insight to bear on each aspect of its review. The fact that this Administration chose not to withdraw this BiOp, is precisely the reason the Plaintiffs urge this Court to ignore the results of that process. But dissatisfaction with the Administration's review is not a legitimate procedural ground for objection. This Court can of course choose to chart any course it believes appropriate, but we urge the Court to recognize the legal soundness and results of this review process and ensure that the tremendous effort and involvement by this new Administration was not in vain.

Respectfully submitted: January 29, 2010.

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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 January 29, 2010, 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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