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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.

Case No. CV 01-00640-RE (Lead Case)
Case No. CV 05-00023-RE
(Consolidated Cases)

**JOINT UNOPPOSED MOTION
OF WASHINGTON, IDAHO,
AND MONTANA SEEKING
LEAVE TO FILE A RESPONSE
TO PLAINTIFFS' COMMENTS
ON THE 2010 PROGRESS
REPORT**

I. MOTION

Intervenor-Defendants – States of Washington, Idaho and Montana (Three States) – respectfully move the Court for leave to file the accompanying Response to the Plaintiffs’ Comments on the 2010 Progress Report. In accordance with Local Rule 7-1(a), Counsel for the Three States have conferred with the other parties. No party objects to this motion.

DATED this 16th day of November, 2011.

ROBERT M. MCKENNA
Attorney General

/s/ Michael S. Grossmann
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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed. R. Civ. P. 5(d), I certify that on November 16, 2011, the foregoing *Joint Unopposed Motion of Washington, Idaho and Montana Seeking Leave to File a Response to Plaintiffs' Comments on the 2010 Progress Report* will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon all parties enrolled to receive such notice. The following will be manually served by first class United States mail:

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Portland, Oregon 97205-3070

I, Dominique Starnes, declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of November, 2011, at Olympia, Washington.

/s/ Dominique Starnes
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Plaintiffs,

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Defendants.

Case No. CV 01-00640-RE (Lead Case)
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(Consolidated Cases)

WASHINGTON'S, IDAHO'S
AND MONTANA'S JOINT
MEMORANDUM AND
RESPONSE TO PLAINTIFFS'
COMMENTS ON THE 2010
PROGRESS REPORT

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I. BASIS FOR THE MOTION

On October 25, 2010, Plaintiffs National Wildlife Federation (NWF) and the State of Oregon, together with amicus curiae Nez Perce Tribe, filed comments to the 2010 Progress Report. In addition to their comments on the report, NWF suggested the appointment of a settlement judge and implementation of independent science review to assist with the remand of the 2008-2010 BiOp. These suggestions would presumably be implemented as an adjustment to the existing remand order. Oregon and the Nez Perce joined in this request.

On October 26, 2011, this Court provided the federal defendants with an opportunity to respond to the various Plaintiffs' comments on the 2010 Progress Report no later than November 16, 2011.

The Three States, along with other state and tribal sovereigns, were intimately involved in the regional collaboration with the federal action agencies and National Marine Fisheries Service (NMFS) that produced the 2008-2010 Biological Opinion for the Federal Columbia River Power System. The remand order specifically identifies the sovereign entities that are to be involved in the remand to correct deficiencies in that BiOp, including the Three States. Because the BiOp relies upon non-federal habitat mitigation, portions of which will be undertaken in consultation and cooperation with the Three States, any amendments to the remand order will likely have an impact on their collaboration and mitigation commitments. On that basis, the Three States seek leave to file the accompanying five-page set of comments focusing solely upon the suggested changes to the remand order.

II. THREE STATES' COMMENTS

For the reasons discussed below, the Three States do not support the appointment of a settlement judge in connection with the collaborative remand of the BiOp. If the parties conclude that separate settlement discussion make sense, that issue can be addressed by the parties as a separate procedural matter. The Three States also oppose the imposition of

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1 additional layers of independent science review as part of the remand. The collaborating
2 sovereigns have an abundance of independent scientific expertise. Adding new layers of
3 review, along with new non-sovereign parties, would be time consuming and corrosive to the
4 existing mechanisms for regional collaboration.

5 **A. Initial Observations Regarding the Remand Efforts of NMFS and the Federal**
6 **Action Agencies**

7 Plaintiffs' comments on the Progress Report reprise a familiar theme in the litigation –
8 that the federal action agencies and NMFS cannot be trusted to develop a proposed action and
9 undertake a jeopardy analysis consistent with the requirements of the ESA and this Court's
10 orders. While the 2004 BiOp and associated collaboration left many feeling pessimistic, and
11 led this Court to decry it as a cynical effort, the same cannot be said for the collaboration that
12 produced the 2008-2010 BiOp. Ultimately, this Court felt it had to strike down the most recent
13 BiOp, but this Court also complimented the federal government and the collaborating
14 sovereigns on a hard effort to take the ESA and this Court's remand orders seriously.

15 The parties are now ready to address this Court's concerns and the remand order is
16 clear about what needs to be done – by January 2014, the federal government must produce a
17 “new or supplemental BiOp that corrects this BiOp's reliance on mitigation measures that are
18 unidentified, and not reasonably certain to occur.” Dkt. 1855 at 23.

19 While it may be good litigation strategy for Plaintiffs and allied parties to continue
20 painting the federal government as uncooperative and unprepared to do anything more than
21 “kick the can down the road,” those allegations do not stand up to scrutiny as applied to the
22 federal government's actions taken in the last remand or with regard to its efforts in the new
23 remand that has just started. Moreover, that characterization implicitly suggests that the other
24 sovereigns in the remand are complicit in efforts to marginalize the development of a robust
25 planned action and BiOp under the ESA. The facts demonstrate otherwise. We have had
26 legitimate disputes over tough legal and scientific issues, but there is no basis to claim the

1 Three States and the Columbia River Basin tribes have countenanced a half-hearted effort to
2 develop the 2008-2010 BiOp.

3 The Three States remain confident that the federal government is committed to a
4 serious and substantive remand effort. Indeed, our continued support of that effort depends
5 upon that continued commitment. For reasons abundantly clear to this Court, the various
6 sovereigns are heavily invested in the development of a viable federal action and a sound
7 BiOp. It is in their own best interests to ensure a robust federal effort.

8 It is also apparent that Plaintiffs would like to broaden the scope of the ordered remand
9 beyond the specific elements identified on pages 23 and 24. This reflects their continuing
10 concern over the jeopardy framework and the scientific issues that formulated the basis for
11 their summary judgment motions, but that were not a part of this Court's ruling or remand
12 order. While the federal government plainly has *discretion* to revisit those issues in the course
13 of the remand, it is not a *mandated* part of the remand. Accordingly, it is entirely inappropriate
14 to suggest that the government's past position on these disputed issues (shared in many
15 respects by various intervenor-defendants) reflects a less than committed approach to the
16 ordered remand.¹ If Plaintiffs were not satisfied with the scope of the remand order, their
17 option was to move for reconsideration rather than floating suggestions in response to a
18 progress report.

19 **B. Settlement Judge**

20 Plaintiffs suggest the appointment of "a settlement Judge or Magistrate Judge to meet
21 with plaintiffs and federal defendants to work to resolve the scope of, and issues that NOAA
22 will address in developing, a revised biological opinion by January 1, 2014." As noted above,
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24 ¹ To the extent this Court's Opinion expressed continuing concern over certain science issues and/or the
25 jeopardy framework, the parties to the remand have no interest in ignoring those observations. Indeed, they
26 continue to provide serious points of discussion because all of the remand collaboration participants are invested
in a successful outcome. However, we presume that the Court made a reasoned decision to distinguish between
areas that remain contentious and areas that require invalidation of the BiOp and must be cured on remand.

1 the remand order is very clear on what is required. The details on how to develop specific
2 mitigation that is reasonably certain to occur are matters that will be taken up by all of the
3 collaborating sovereigns that are identified in the remand order. There is no reason to believe
4 that a settlement judge will enhance the regional collaboration, and every reason to believe that
5 it will add more process and additional layers of review. This will likely burden the regional
6 collaboration and result in delay as decisions made by the sovereigns are then vetted in the
7 context of “settlement” with NWF, who is not a participant to the remand collaboration.²

8 The Three States do not oppose the pursuit of serious settlement discussions. However,
9 what Plaintiffs really suggest is a revision to this Court’s remand order – an additional set of
10 mediated discussions layered on top of the established regional collaboration, together with the
11 addition of new participants outside the regional sovereigns identified in the remand order.
12 This suggestion confuses the remand with potential settlement of the litigation. It promises to
13 be a time consuming burden with a corrosive effect on the already well-developed mechanisms
14 for regional collaboration among the sovereigns actually responsible for the development and
15 implementation of a workable BiOp.

16 To the extent that Plaintiffs have specific *settlement* proposals, including proposals
17 addressed to matters outside the remand order and that remain points of disagreement
18 animating their past litigation efforts, it makes more sense for Plaintiffs to circulate those
19 settlement proposals for Defendants to consider. If those settlement ideas have some attraction
20 (they have not in the past) the parties can explore them alongside the remand effort. If those
21 separate settlement discussions are partially fruitful, but sticking points remain, the appropriate
22 procedural framework for continuing settlement discussions can be assessed at that time.
23 Appointment of a settlement judge at the parties’ mutual request might be one option.
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² Oregon and the Nez Perce are participants in the regional remand collaboration.

1 **C. Independent Science Review**

2 Plaintiffs also suggest appointment of “a panel of independent scientific experts to
3 review RPA implementation to date and any other information these experts determine is
4 relevant.” This panel would consider whether there is a reliable and objective way to measure
5 mitigation benefits, whether the action agencies have provided verifiable and independently
6 reviewable information about RPA implementation, and whether RPA implementation is
7 achieving the survival improvements necessary to avoid jeopardy.

8 Aside from the legally suspect issue of invading the expertise Congress has assigned to
9 NMFS,³ this suggestion is impractical and duplicative of existing components of the regional
10 collaboration that is envisioned. Independent science review takes time. The federal
11 government has two years to complete the remand and the addition of more layers of
12 independent review beyond the review provided by the multiple sovereigns with independent
13 expertise is unwarranted. Furthermore, to the extent review of the work of the regional
14 sovereigns is desirable, the Northwest Power and Conservation Council has a recognized
15 process for providing independent scientific review of specific mitigation projects to be
16 funded.

17 **III. CONCLUSION**

18 Plaintiffs’ suggested modifications to the remand order reflect a desire to broaden the
19 scope of the remand and add new layers of review. The suggestions are based upon erroneous
20 claims that the federal government and the collaborating sovereigns are unwilling and/or
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23 ³ As discussed above, Plaintiffs’ suggestion also proceeds on the improper assumption that the federal
24 government has no capacity or willingness to give RPA development and implementation the hard look required,
25 and that the independent expertise that biologists from the states and tribes will bring to bear will be of little or no
26 value as part of the continuing collaboration to develop and implement a successful BiOp. This Court has also
recognized that “[i]n the absence of ‘substantial justification,’ . . . a court should not dictate to an administrative
agency ‘the methods, procedures, and time dimension’ of the remand.” Dkt. 1855 at 18. Here, the Court found
“substantial justification” to impose a deadline for completing the remand—a requirement that it has used in prior
remands—but did not interpose itself into the substantive processes to be used by the federal government in
carrying out the remand. Plaintiffs effectively ask this Court to modify that critical element of its remand order.

1 incapable of addressing this Court's unambiguous remand order requiring the federal
2 government to identify useful mitigation measures that are specific and reasonably certain to
3 occur. Because the Three States remain confident that the regional collaboration of sovereigns
4 is committed to a scientifically and legally sound BiOp, and because Plaintiffs' suggestions
5 would duplicate parts of the remand, would add unnecessary layers of review with attendant
6 delay, and would be corrosive to the regional collaboration that has already developed, we
7 oppose the suggested procedural modifications to the remand order.

8 DATED this 16th day of November, 2011.

9 ROBERT M. MCKENNA
10 Attorney General

11 /s/ Michael S. Grossmann
12 MICHAEL S. GROSSMANN, WSBA #15293
13 Senior Counsel
14 Attorneys for *Intervenor-Defendant*
15 State of Washington

16 STATE OF IDAHO
17 OFFICE OF THE ATTORNEY GENERAL

18 /s/ Clay R. Smith
19 CLAY R. SMITH, ISB # 6385
20 Attorneys for *Intervenor-Defendant* State of Idaho

21 CROWLEY FLECK PLLP

22 /s/ Mark L. Stermitz
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24 Attorneys for *Intervenor-Defendant* State of
25 Montana
26

CERTIFICATE OF SERVICE

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I, Dominique Starnes, declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of November, 2011, at Olympia, Washington.

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