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MICHAEL MOSMAN
United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

THOMAS L. SANSONETTI
Assistant Attorney General
FRED R. DISHEROON
Special Litigation Counsel
SAMUEL D. RAUCH, III
Assistant Section Chief
Wildlife & Marine Resources Section
U.S. Department of Justice
Environment & Natural Resources Division
Benjamin Franklin Station, P.O. Box 7397
Washington, D.C. 20044-7397
(202) 305-0220 (ph)
(202) 305-0275 (fx)

Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.)
Plaintiffs,)
v.)
NATIONAL MARINE FISHERIES)
SERVICE,)
Defendant.)

Civ. No. 01-00640-KI
**FEDERAL DEFENDANT'S
FIRST QUARTERLY
STATUS REPORT**

Pursuant to this Court's Supplemental Order of July 3, 2003, the Federal Defendant hereby submits the following report on the status of the remand at the end of the first quarter.

OVERVIEW OF REMAND ACTIVITIES

The National Marine Fisheries Service (hereinafter "NOAA Fisheries" or "NOAA") and the federal agencies responsible for operation of the Federal Columbia River Power

1 System (FCRPS)^{1/} (hereafter “the FCRPS action agencies”) are making substantial progress
2 toward completing the objectives of this remand by June 2, 2004. This report will inform the
3 Court and the parties of the details of this progress. In addition, this report will display the
4 Federal agencies’ current plan for successfully completing these remand proceedings within
5 one year. At the July 21, 2003, Status Conference, the Government described the remand
6 process as taking two related tracks: 1) addressing the Court’s concerns about NOAA’s
7 reliance on future federal actions that have not yet completed ESA §7(a)(2) consultation and
8 cumulative effects that may not be “reasonably certain to occur;” and 2) refreshing the jeop-
9 ardy analysis for the FCRPS by updating the scientific information on which it relies and by
10 conforming it to the Court’s interpretation of the consultation regulations. Accordingly,
11 NOAA, working with the FCRPS action agencies, must revise its approach taken in the 2000
12 FCRPS Biological Opinion (2000 BiOp) to accurately define the action area, to identify non-
13 federal actions with “cumulative effects”, and to identify future actions by non-FCRPS federal
14 agencies that are properly part of the environmental baseline. In addition, NOAA and the act-
15 ion agencies must capture the current description of the RPA actions, further developed since
16 2000, and take into account new biological information available since 2000. On the basis of
17 this record, and consistent with current judicial and administrative guidance, NOAA must then
18 reconsider its 2000 application of the jeopardy standard (ESA § 7(a)(2)) to the effects of the
19 action proposed for consideration in the 2000 BiOp and any resulting Reasonable and Prudent
20 Alternative (RPA). If NOAA concludes that the proposed action or RPA does not insure that
21 it is not likely to jeopardize the continued existence of the listed species as required by
22 §7(a)(2), then NOAA and the FCRPS action agencies must reinitiate consultation to consider
23 alternative reasonable and prudent actions that may be available.

24

25 ^{1/} U.S. Army Corps of Engineers, U.S. Bureau of Reclamation and the Bonneville Power
26 Administration (responsible for marketing hydroelectric power produced by the FCRPS).

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1 To organize these remand tasks, NOAA and the FCRPS action agencies have prepared
2 a **Workplan and Timeline** a copy of which is attached as Exhibit A. This remand occurs at
3 the same time as several other tasks related to the conservation of the same Columbia Basin
4 salmon stocks affected by the FCRPS. Consistent with this Court's decision to leave the 2000
5 FCRPS BiOp in place during the remand, the FCRPS action agencies continue to implement
6 the RPA for which work products are also due. The 2003 Check-in Report,^{1/} discussed later
7 in this report, is one such RPA work product. Because the RPA relies on annual imple-
8 mentation plans to define and adjust specific hydro and offsite measures, the Action Agencies
9 will shortly be preparing and releasing their 2004-2008 Implementation Plan. Similarly,
10 NOAA continues to develop ESU-specific recovery plans and is conducting status review
11 updates for all ESUs. To this end, products are available from the Biological Review Team
12 and the Technical Review Teams working on recovery planning. The attached **Workplan**
13 **and Timeline** integrate these related products with the remand activities.

14 The federal agencies are also participating in other activities related to these listed
15 salmon and steelhead ESUs that have not yet reached a stage where their relevance to the
16 remand is sufficiently known to be incorporated into the Workplan. The Northwest Power
17 Planning and Conservation Council recently adopted its Mainstem Amendment to its Fish and
18 Wildlife Program under the Northwest Power Act. This Program may lead to consideration of
19 additional studies of operations for the FCRPS during the pendency of this remand. If these
20 related activities become clearly relevant, the federal agencies will address them in future
21 quarterly status reports.

22 As an ongoing effort to afford all parties prompt access to documents relevant to the
23 remand activities, and as requested by the Attorneys' Steering Committee, the federal agencies

24 ^{2/} All Documents referred to in this report may be found on the Remand Website and
25 unless otherwise noted will not be attached to this report. Copies of the 2003 Check-in
26 Report are being provided to the Court for its convenience with this filing but are not
being sent to other parties.

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1 have established a site on the Internet where documents relevant to the remand can be viewed
2 and downloaded as they become available. The address of the remand web site, known as the
3 BiOp Remand Website is:

4 <http://www.salmonrecovery.gov/remand.shtml>

5 In addition, the designated contacts for the parties on the official service list for this case
6 will receive prompt notification by electronic mail (email) that a new document has been
7 posted on the remand web site. NOAA General Counsel recently sent a letter to the parties
8 requesting that they notify that office as to who should to receive this notification for the
9 particular party. Until NOAA is notified otherwise, the notification will be sent to the party's
10 attorney using the email address currently utilized by the Court for notification of its minute
11 orders in this matter. The current email list for participants in this remand is posted with this
12 Quarterly Status Report on the Remand Web site as Exhibit B.^{1/}

13 **BIOLOGICAL INFORMATION UPDATE SINCE 2000**

14 Salmon and steelhead are, of course, not a static resource. Each year additional data
15 becomes available about their productivity, abundance, diversity and distribution. This inform-
16 ation is relevant to NOAA's judgment about whether the FCRPS action agencies have insured
17 that their implementation of the proposed action as modified by the RPA is not likely to
18 jeopardize the listed ESUs. The remand necessarily will lead to a determination as to whether

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20 ^{3/} Many of the exhibits for this Quarterly Status Report are lengthy and are most
21 efficiently distributed to the parties by using the BiOp Remand Website. At the Court's
22 direction, NOAA will provide any or all of these attachments as paper attachments for the
23 Court's convenience. NOAA will also maintain a complete set of the exhibits to this
24 Status Report, in printed format, in its offices in Portland, Oregon, currently at 525 N.E.
25 Oregon Street. See the List of Documents attached to this report as Exhibit C.

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1 the originally proposed FCRPS action and any resulting Reasonable and Prudent Alternative
2 (RPA) is or is not likely to avoid jeopardy now and throughout its term. In preparation for this
3 analysis, to occur after the Court-identified deficiencies have been addressed, NOAA is col-
4 lecting the information, including new data and newly available analyses of data, that must be
5 utilized in this analysis.

6 Several documents concerning recent biological information are relevant to this remand.
7 Document D, ^{1/}“Preliminary Estimates of Updated ‘Indicator Metrics’ Applied in the 2000
8 FCRPS Biological Opinion”, September 29, 2003, contains additional biological data, most of
9 which has been gathered or collated since 2000, relevant to the status of the salmon and
10 steelhead stocks affected by the FCRPS. That document also provides a list of reference ma-
11 terial from which its analysis is derived. Document E is a recent draft of a report on stock
12 status that the Biological Review Team has posted for public review on the Internet, “Draft
13 Report of Updated Status of Listed ESUs of Salmon and Steelhead”, (February 19, 2003).
14 Document F is a recent product of the Interior Columbia Basin Technical Review Team,
15 “Independent populations of chinook, steelhead, and sockeye for listed evolutionarily signif-
16 icant units within the Interior Columbia River domain”, draft, July 2003; Documents G and H
17 are recent products of the Willamette and Lower Columbia Basin Technical Review Team,
18 “Historical population structure of Willamette and Lower Columbia River Basin Pacific
19 salmonids”, and “Interim Report on Viability Criteria For Willamette and Lower Columbia
20 Basin Pacific Salmonids” (March 2003).

21 **EXTENT OF “ACTION AREA”**

22 The term “action area” is defined by the ESA Consultation regulations, 50 C.F.R.
23 §402.02, to mean “all areas to be affected directly or indirectly by the Federal action and not
24 merely the immediate area involved in the action.” The Court found that NOAA had improv-

25 ^{4/} All items designated herein as “Document ___” will be found on the Remand
26 Website. Exhibit C for a current list of such Documents.

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1 erly applied this regulation in the 2000 BiOp. NOAA intends to correct this problem by redef-
2 ining the “action area” as not only the areas directly and indirectly affected by the FCRPS but
3 also any watersheds in which off-site mitigation activities required by the RPA may occur.
4 Off-site mitigation was an important component of both the proposed action in the 1999 Bio-
5 logical Assessment and the RPA in the 2000 BiOp and continues to be an important component
6 of the FCRPS agencies’ overall salmon operations. Accordingly, expanding the “action area”
7 to include areas where off-site mitigation activities are either currently planned or in develop-
8 ment pursuant to the RPA will necessarily mean that the “action area” will cover most, if not
9 all, of the freshwater habitat of the affected ESUs discussed in the 2000 RPA.

10 “CUMULATIVE EFFECTS”

11 One of the primary concerns expressed in the Court’s Opinion of May 7, 2003, focused
12 on NOAA’s consideration of the future activities of States and private entities when evaluating
13 the ESU’s likelihood of survival and recovery. The Court held that NOAA’s consideration of
14 such future non-federal activities should have been restricted by the ESA regulatory definition
15 of “cumulative effects”. That definition^{1/} narrows the scope of the analysis to include only the
16 effects of those actions that are “reasonably certain to occur” within the action area.^{1/}

17 With this holding in mind, NOAA must first review the information available concern-
18 ing the prospective activities of State and private parties within the action area using a greater
19 degree of detail about individual projects and activities than was employed by NOAA in the
20 2000 BiOp when it considered these activities for purposes of determining the status of the

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22 ^{5/} “‘Cumulative effects’ are those effects of future State or private activities, not involving
23 Federal activities, that are reasonably certain to occur within the action area of the Federal action
subject to the consultation.” 50 C.F.R. §402.02

24 ^{6/} Pursuant to Section 9 of the ESA, state or private activity that may cause a “take” of a listed
25 species is illegal without a federal ESA Section 10(a)(1)(B) take permit. The Ninth Circuit has made
26 clear that NOAA does not have to consider future illegal actions in the context of a Section 7
consultation. Tribal Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988).

1 ESUs. Also, the ESA requires that NOAA use the best information currently available in its
2 analysis of application of the Section 7(a)(2) standards to the FCRPS RPA. Thus, in addition
3 to gathering the detail necessary for reconsidering the actions available for consideration in
4 2000, NOAA must also gather information about projects that may have become “reasonably
5 certain to occur” since 2000.

6 The regulations specify no criteria for determining what projects are “reasonably certain
7 to occur.” However the Preamble to the 1986 Final Rule adopting the consultation regulations
8 illuminates this definition in the following passage:

9 “One commenter thought that the ‘reasonably certain’ to occur standard was far
10 too narrow and that it should be amended to cover actions where proposals have
11 been made, and implementation schedules have been established. This
12 suggestion would open the door to speculative actions to be factored into the
13 ‘cumulative effects’ analysis adding needless complexity into the consultation
14 process and *threatening potential Federal actions which pose minimal adverse
15 impacts of their own with possible “jeopardy” opinions due to speculative, State
16 or private projects that may never be implemented.* For State and private actions
17 to be considered in the cumulative effects analysis, there must exist more than a
18 mere possibility that the action may proceed. On the other hand, “reasonably
19 certain to occur” does not mean that there is a guarantee that the action will
20 occur. The Federal agency and the Service will consider the cumulative effects
21 of those actions that are likely to occur, bearing in mind the economic,
22 administrative, or legal hurdles which remain to be cleared.”

23 51 Fed.Reg. 19926,19933 (June 3, 1986) (italics added).

24 The ESA Consultation Handbook prepared by NOAA Fisheries and the US Fish &
25 Wildlife Service provides the following guidance:

26 Indicators of actions "reasonably certain to occur" may include, but are not limited to:
27 approval of the action by State, tribal or local agencies or governments (e.g., permits,
28 grants); indications by State, tribal or local agencies or governments that granting
authority for the action is imminent; project sponsors' assurance the action will
proceed; obligation of venture capital; or initiation of contracts. The more State, tribal
or local administrative discretion remaining to be exercised before a proposed non-
Federal action can proceed, the less there is a reasonable certainty the project will be
authorized.

Consultation Handbook, page 4-31.

In addition to this administrative guidance, the Court’s May 7th Opinion indicates an ex-
pectation that there must be a record of binding commitments by the States, Treaty Tribes and

1 private parties that eligible non-federal actions will be funded and are within the implementing
2 entities' authority before they may be considered "reasonably certain to occur." Of course, any
3 such binding commitments or funding would not be from federal sources since "federal involv-
4 ement" is a factor of the regulatory definition that would preclude an action from consideration
5 as a "cumulative effect."

6 Finally, the "reasonable certainty" test is not a one-way street - it must be equally ap-
7 plied to both future potential beneficial and future harmful actions. As the preamble to the
8 consultation regulations make clear, one of the primary purposes behind the "reasonable
9 certainty" test is to ensure that federal actions are not forced to mitigate for "speculative State
10 or private projects that may never be implemented." 51 Fed.Reg. 19944 (June 3, 1986). Ac-
11 cordingly, NOAA will have to reevaluate the way in which future harmful effects of state and
12 private activities were addressed in the 2000 BiOp to ensure that only those future harmful ef-
13 fects which can meet the "reasonable certainty" standard are considered.

14 Consistent with this guidance, NOAA and the FCRPS action agencies are requesting the
15 assistance of the States and tribes for the purpose of identifying projects that can be considered
16 as contributing cumulative effects for purposes of NOAA's reevaluation of the 2000 FCRPS
17 BiOp. Necessarily, as "cumulative effects," these are actions that are not part of the RPA.
18 Exhibit I to this report is a letter from NOAA Fisheries to the four Governors and tribal
19 chairmen that requests this help starting with the assignment of State and tribal technical
20 representatives for this purpose. In October, working with the states and tribes, the federal
21 agencies expect to establish a streamlined mechanism for creating this inventory "cumulative
22 effects."

23 **FUTURE FEDERAL ACTIONS IN THE ENVIRONMENTAL BASELINE**

24 An additional holding of this Court was that NOAA improperly considered future fed-
25 eral actions in its jeopardy analysis. The Court held that NOAA may not, consistent with
26 applicable regulations, consider future federal actions occurring within the action area unless
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1 they have completed a formal consultation or early consultation pursuant to ESA § 7(a)(2).^{1/}
2 NOAA had considered likely future beneficial and harmful federal actions anticipated when it
3 evaluated the likelihood of survival and recovery of the affected ESUs. The Court faulted
4 NOAA specifically for considering the effects of the Mid-Columbia Habitat Conservation Plan
5 (“HCP”) and for considering the effects of a proposed Interior Columbia Basin Management
6 Plan on federal forests even though neither had yet been finalized.

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18 ^{1/} “‘Effects of the action’ refers to the direct and indirect effects of an action on the species or
19 critical habitat, together with the effects of other activities that are interrelated and interdependent
20 with that action, that will be added to the environmental baseline. *The environmental baseline*
21 *includes* the past and present impacts of all Federal, State, or private actions and other human
22 activities in the action area, *the anticipated impacts of all proposed Federal projects in the action*
23 *area that have already undergone formal or early section 7 consultation*, and the impact of State or
24 private actions which are contemporaneous with the consultations in process. . . . “ 50 C.F.R.
25 §402.02 (emphasis added).

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1 Consistent with the Court’s holding, a necessary task of this remand is to properly iden-
2 tify the content of the environmental baseline to which the direct and indirect effects of the
3 proposed action or RPA will be added. During the pendency of the remand, NOAA continues
4 to complete consultations with other federal agencies (and with itself for its issuance of ESA
5 §10(a)(1)(B) incidental take permits for Habitat Conservation Plans) concerning proposed fed-
6 eral actions in the relevant action area of the RPA. As these §7 consultations are completed
7 the effects of these federal actions will be considered as part of the environmental baseline for
8 this remand. Generally, NOAA makes any biological opinions it completes available publicly
9 on the Internet at: <http://www.nwr.noaa.gov/1publcat/allbiops.htm>. The effects of these on-
10 going federal actions, and others issued by NOAA and listed on its web site, are now part of
11 the environmental baseline to which the effects of the RPA would be added, provided they are
12 located within the RPA action area.^{1/} The task for this remand, as it is for any §7 consultation,
13 will be to identify the eligible actions and evaluate their effects on listed salmon.^{1/}

14 Several biological opinions issued since the 2000 FCRPS BiOp are relevant to the re-

15 _____
16 ^{8/} Programmatic actions are a special case because they often contemplate
17 subsequent site-specific actions, consistent with the programmatic action, but which will
18 require future ESA consultation pursuant to § 7(a)(2) especially for the purpose of
19 authorizing any incidental take. The effects of the programmatic action are added to the
20 environmental baseline to the extent effects are identified in their biological opinion and
21 are not subject to future ESA § 7(a)(2) consultation. The effects of the future site specific
actions will await the completion of their consultation before they can be added to the
environmental baseline. See, for example, consultations on Forest Service Land and
Resource Management Plans.

22 ^{9/} NOAA understands that federal actions that are intended to be part of the RPA must be
23 considered, notwithstanding this limitation on other future federal actions, since the RPA is itself the
24 subject of consultation. There was some confusion in the consultation documents as to whether
25 certain actions within the Basin-wide Salmon Recovery Strategy were either federal actions (e.g., by
26 virtue of federal funding) or were part of the RPA as opposed to a more generalized recovery
strategy. As part of its reanalysis, NOAA will only consider future federal actions that are part of
the RPA itself or that are part of the environmental baseline because they have undergone their own
Section 7 consultation.

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1 mand because they arose out of unfinished consultations that NOAA referred to as part of its
2 ‘likelihood of recovery’ analysis in the 2000 FCRPS BiOp. These include three BiOps for
3 Habitat Conservation Plans prepared by Chelan and Douglas Public Utility Districts for their
4 hydroelectric projects on the mainstem Columbia River upstream of its confluence with the
5 Snake River. See Documents J (Rocky Reach Hydroelectric Project HCP BiOp), K (Rock
6 Island Hydroelectric Project HCP BiOp) and L (Wells Hydroelectric Project HCP). Also,
7 NOAA has completed a biological opinion for Forest Service Land and Resource Management
8 Plans in southern Idaho which incorporated scientific analysis prepared for the Interior Colum-
9 bia Basin Ecosystem Management Project (ICBEMP). See Document M, “Land Resource
10 Management Plan Revisions for the Boise, Payette, and Sawtooth National Forests - Biological
11 Opinion” (June 9, 2003).

12 Also relevant to a comprehensive evaluation of the environmental baseline, in addition
13 to the future federal actions by agencies other than the FCRPS action agencies, NOAA must
14 consider the effects of “the past and present impacts of all Federal, State, or private actions and
15 other human activities in the action area” as well as “the impact of State or private actions
16 which are contemporaneous with the consultation in progress.” 50 C.F.R. 402.02 (from
17 definition of “effects of the action”) Therefore, another part of the federal agencies’ outreach
18 to the states and tribes is to inventory additional non-federal actions that have occurred in the
19 RPA action area or which are contemporaneous. As such, the effects of these, together with
20 any past or present Federal actions, will be part of the environmental baseline, again, to which
21 the effects of the RPA would be added.

22 CERTAINTY OF RPA

23 Consultations involving RPAs occur in two phases. In the first phase, NOAA evaluates
24 the action as originally proposed (*i.e.*, as proposed in the 1999 Biological Assessment in this
25 case) to determine whether it is likely to jeopardize the continued existence of any listed
26 species. Since the purpose of the ESA is to provide guidance to agencies in the planning
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1 phases of projects, NOAA assumes that the proposed action will occur and does not apply any
2 “reasonably certain to occur” test. It would defeat the proactive purposes of the ESA for
3 NOAA to deny consultation based on NOAA’s belief that the project would not ultimately go
4 forward.

5 If a jeopardy finding is made, then a second phase begins in which NOAA sets forth an
6 RPA to the originally proposed agency action and must then evaluate the RPA to determine
7 whether it is likely to jeopardize the continued existence of the species. For analytical
8 purposes, the RPA now stands in exactly the same position that the original action did. As
9 with the original action, NOAA’s responsibility is not to evaluate whether the RPA will occur
10 but whether, if the action agency chose to adopt the RPA, the RPA would avoid jeopardy.

11 In this case, the 2000 RPA is a combination of (1) dam operations and structural
12 modifications by the Corps of Engineers (the Corps) and Bureau of Reclamation (the Bureau)
13 and (2) salmon habitat protection and improvement projects funded by the Bonneville Power
14 Administration and (to a lesser extent) the Corps and the Bureau. The purpose of the 2000
15 consultation was to evaluate the effects of the FCRPS action as modified by the RPA (*i.e.*, the
16 effects of dam operations and the projects funded by these FCRPS action agencies) for the
17 purpose of adding those effects to the environmental baseline and cumulative effects, as
18 described above, and thereby providing the basis for the application of the jeopardy standard.
19 Since the RPA was the “action” under consultation, its effects were not yet part of the
20 environmental baseline by definition. Therefore, the actions that made up the RPA could be
21 considered even though they were still undergoing §7(a)(2) consultation. For the same reason,
22 the actions that made up the RPA were not subject to the “reasonably certain to occur” test that
23 applies to future State and private activities considered for their cumulative effects. Neither
24 can they be cumulative effects, since they were *federal* actions. As the new proposed “action,”
25 the effects of the RPA actions are separate from, and are added to, those of the environmental
26 baseline and cumulative effects.

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1 Although the effects of the RPA are not part of the environmental baseline or
2 cumulative effects, the RPA or a proposed action must be sufficiently defined so that its effects
3 may be predicted and evaluated. This Court’s May 7th Opinion distinguished this case from the
4 9th Circuit decision in Southwest Center for Biological Diversity v. U.S. Bureau of
5 Reclamation, 143 F.3d 515 (9th Cir. 1998), where a biological opinion issued by the U.S. Fish
6 & Wildlife Service relied upon future federal mitigation for the effects of dam operations.
7 Although the specific details of the action in that case were not identified when that RPA was
8 formulated, it was found to be sufficiently certain to occur by the Court of Appeals. NOAA
9 understands this Court to have found that Lake Mead cannot be relied upon in the instant case
10 to shore up its jeopardy analysis by relying upon certain range-wide off-site harvest, hatchery
11 and habitat measures that are not part of the RPA. NOAA also understands that the Ninth
12 Circuit found a level of certainty for the RPA in Lake Mead sufficient to conclude that it was
13 reasonable to expect that the action agencies will carry out the RPA to which they are
14 committed.

15 Thus, in the course of this remand, NOAA and the FCRPS action agencies are also
16 working to add specificity to the RPA actions the action agencies have committed to
17 implement. Relevant to this endeavor, NOAA has recently completed a supplemental
18 programmatic consultation with Bonneville Power Administration refining the expected effects
19 of the actions it will fund to protect and improve salmon habitat in the tributary watersheds of
20 the Columbia and Snake Rivers. See Document N, “Programmatic Biological Opinion and
21 Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consul-
22 tation for the Bonneville Power Administration Habitat Improvement Program (HIP) in the
23 Columbia River Basin” (August 1, 2003) . It presents additional specificity about the mit-
24 igation program Bonneville committed to implement in 2000.

25 **2003 CHECK-IN REPORT**

26 The Court directed NOAA, in its Supplemental Order of July 3rd, to submit the 2003
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1 Annual Progress Report by October 1, if available, or by December 31 at the latest. This re-
2 port is a product called for by the RPA. The full 2003 Check-In evaluation established by the
3 RPA consists of the 2003 Progress Report prepared by the FCRPS action agencies and
4 NOAA's Findings Letter, which evaluates that Progress Report. The federal agencies are
5 providing the FCRPS action agencies' Progress Report to the Court with this quarterly status
6 report and making it available to all parties on the Remand Website. (See Document O).
7 NOAA's Findings Letter will be submitted to the Court with the Second Quarterly Status
8 Report, due January 1, 2004.

9 **HYDROPOWER MITIGATION OPTIONS**

10 The Court also directed that this status report include "the government's consideration
11 of hydropower mitigation action options should the habitat and hatchery options falter." As a
12 starting point for this consideration, and as referenced by the Court in its Supplemental Order,
13 the RPA provides for the series of check-ins of which the 2003 Progress Report is the first.
14 Chapter 9.5 of the Biological Opinion discusses the expected procedure and consequences for
15 this check-in. The Check-in Progress Report and NOAA's Findings Letter provide the basis
16 for consideration of any additional measures, including any available hydropower mitigation
17 options, that may be necessary if the RPA's implementation "falters." It is the nature of the
18 implementation inadequacy itself which dictates the response by the action agencies. If NOAA
19 determines that the RPA's implementation has fallen short, NOAA will evaluate whether the
20 action agencies can rectify the particular failing of the implementation within their existing
21 authority using the RPA's annual planning processes. If so, NOAA would characterize the
22 implementation as being in the "yellow zone." If additional authority is needed to avoid
23 jeopardy (a "red zone" characterization), then different consequences apply, as described in
24 Section 9.5.5 of the BiOp.

25 NOAA has conducted annual reviews of the FCRPS action agencies' implementation of
26 the RPA in 2001 and 2002, for which it has issued separate findings letters. See Documents P

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1 and Q. Based on this evaluation of the implementation to date, though subject to NOAA's
2 Findings Letter due by the Second Quarterly Status Report, the federal agencies currently
3 expect that any RPA implementation shortfall can be addressed through the annual planning
4 process and that such corrective actions are within their existing authorities.

5 This planning process draws upon a suite of evaluations implemented by the FCRPS
6 action agencies designed to assess the effectiveness of hydrosystem actions and their contri-
7 bution toward achieving the hydrosystem survival performance standards. To the extent hydro-
8 system actions are found to be less effective than anticipated, the action agencies modify those
9 actions through their 1- and 5-year implementation plans. The BiOp already includes the full
10 range of hydrosystem actions to improve salmon survival that the action agencies and NOAA
11 determined biologically and technically feasible, and that are within the authority of the action
12 agencies. To determine additional hydrosystem mitigation options, the action agencies would
13 assess the status of performance relative to the hydrosystem survival standards, evaluate factors
14 limiting achievement of those standards, and seek additional actions that would address those
15 identified factors. Hydrosystem mitigation options could include measures in any of the "H's"
16 - hydro, habitat, hatchery or harvest.

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CONCLUSION

NOAA and the FCRPS action agencies have organized these remand proceedings to address the concerns raised in the Court’s Opinion of May 7, 2003, and are making progress to accomplish the remand objectives by June 2, 2004. The remand will develop and implement corrections to the Court-identified deficiencies of the 2000 FCRPS BiOp. The federal agencies will apply these corrections to the biological data and analysis that is current as of 2004, while recognizing the current status of the species.

Respectfully submitted this 1st day of October, 2003.

MICHAEL MOSMAN
United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

THOMAS L. SANSONETTI
Assistant Attorney General
FRED R. DISHEROON

Special Litigation Counsel
U.S. Department of Justice
Environment & Natural Resources
Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
(202) 305-0220
(202) 305-0275 (fax)