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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*

Defendants.

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Civil No. 01-640-RE

**FEDERAL DEFENDANTS'  
THIRD REMAND REPORT**

**FED. DEFS' FOURTH  
REMAND REPORT**

Federal Defendants hereby submit their Third Remand Report. This Report consists of the Remand Collaboration Status Update prepared by the Policy Work Group and three attachments: (1) a calendar of meetings in the collaborative process that have taken place since the last status report; (2) an agenda for the PWG meeting held in Boise on August 7 through 9; and (3) an agenda for the PWG meeting held in Spokane on August 23 through 25.

As with the previous remand reports, the views reflected in this Report are preliminary and subject to change, either in response to discussions in the collaboration process, because of decisions made by the agencies, or changes in the relevant substantive law. The discussions regarding the analytical framework and the proposed action/RPA reflect only the range of issues and approaches considered in the collaborative process with the sovereigns, and the final proposed action/RPA and analytical framework for the jeopardy analysis in the biological opinion may not necessarily reflect a particular issue or approach under discussion. However, as we have stated previously, these discussions reflect potential compromises that may be agreed to if a long-term solution for the operation of the hydrosystem and the sharing of responsibility for non-hydro measures related to habitat, harvest, and hatcheries can be achieved.

Further, Federal Defendants will continue to make a good faith effort through collaboration with the sovereign entities to achieve the goals set out in this Court's Remand Order of (1) developing items to be included in the proposed action; and (2) clarifying policy issues and reaching agreement or narrowing the areas of disagreement on scientific and technical information. However, the Federal Defendants alone are the entities charged by Congress with making all decisions under the Endangered Species Act ("ESA") and any other applicable federal statute. Accordingly, Federal Defendants reserve the right to make those decisions which are committed to their discretion as a matter of law even if the other sovereigns do not agree with

those decisions. Moreover, Federal Defendants do not waive any argument that the legal analyses or actions described in the Conceptual Framework are not required by the ESA or agree that the approach under consideration is one that will be, or should be, applied outside the FCRPS remand process.

Likewise, the Federal Defendants do not bind, or suggest agreement of, any other Federal agency not involved in this case regarding the proper jeopardy analysis or the appropriateness of the Conceptual Framework. Federal Defendants also do not commit any other Federal agency other than NOAA, the Bureau of Reclamation, the United States Army Corps of Engineers, and the Bonneville Power Administration to participate in the collaborative process or to contribute to the proposed action. Finally, we note that the executive branch agencies of the United States cannot bind Congress to make future appropriations of money for any given federal action or to effect the recovery of listed species.

Dated: October 3, 2006

Respectfully Submitted,

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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 October 3, 2006, the foregoing Fourth Remand Report, with exhibits, will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all Parties enrolled to receive such notice. The following will be manually served by first class U.S. mail, as noted:

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*/s Robert L. Gulley*

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