

## **2004 FCRPS BiOp Remand Collaborative Process**

### **December 22, 2005**

In October 2005, the U.S. District Court, District of Oregon, ordered the 2004 Biological Opinion (BiOp) remanded to the National Marine Fisheries Service (NMFS) for revisions that comply with the Endangered Species Act (ESA) consistent with the Court's opinions and orders issued on May 7, 2003, and May 26, 2005. During the remand period, NMFS, the U.S. Army Corps of Engineers, and the U.S. Bureau of Reclamation were directed by the Court to collaborate with the sovereign entities, the States and Tribes, participating in the litigation. In response, the Federal, State, and Tribal representatives have developed the Collaborative Process that will be followed during the remand period.

The goal of the Collaborative Process is preparation of a 2006 BiOp by October 2006 that is consistent with the rulings of the District Court. Building from the 2000 BiOp, the 2006 BiOp will use a full life-cycle analysis, passage modeling, and an All-H approach. It will incorporate new information related to recovery planning and life-cycle analysis. In addition to a suite of hydro actions, it will consider hatchery, habitat, and harvest actions. It will provide better detail on the proposed actions and any reasonable and prudent alternatives (RPAs), other Federal actions on which the new BiOp relies, non-Federal actions that are "reasonably certain to occur" and that will be part of the BiOp cumulative effects analysis, and a new assessment of critical habitat for the 2006 BiOp.

The collaboration responds to the District Court and includes: developing issues to be included in the proposed action, clarifying policy issues, and reaching agreement or narrowing the areas of disagreement. Specifically, collaboration will address the following elements: 1) the nature and scope of the proposed action (tasked to a Policy Working Group [PWG] with input from the Technical Subcommittees), 2) the framework for the recovery and jeopardy analysis, 3) analytic tools for performing the analysis and appropriate scientific peer review (tasked to Technical Subcommittees with PWG input), 4) the identification of All-H Proposed Actions or RPAs, 5) reasonably certain to occur All-H actions relied on in the cumulative effects analysis, and 6) other Federal All-H actions (tasked to PWG with input from the Technical Subcommittees).

The Collaborative Process will also identify and address impacts of the proposed action and any RPA on the ability of Federal Columbia River Power System (FCRPS) operations to comply with other statutory obligations, as well as consider adverse impacts of items included in the proposed action on the rights and interests of other parties. The Collaborative Process will identify, address, and avoid such impacts where possible while meeting ESA responsibilities and will identify strategies to minimize and mitigate for such impacts if they are unavoidable.

In conducting its work, the Collaborative Process will utilize a committee structure similar to that used in the *U.S. v. Oregon*. The PWG will include representatives from each of the participating Sovereign Principals and will be overseen by the Sovereign Principals (Tribal chairs, governors, and Federal executives). The PWG will define and oversee the assignments given to subcommittees for technical and legal matters. The Technical Subcommittees consist of Federal, State, and Tribal representatives. The Federal representatives to the Legal

Subcommittee will handle quarterly report filings with the Court. From time to time, the PWG may refer questions to the Legal Subcommittee. The attached diagram displays this structure.

Collaboration requires consideration of the contributions of all the parties.<sup>1</sup> The Collaborative Process is designed to be an open and transparent process among the Sovereign Parties. The operating principle is that adequate notice of all collaborative sessions will be provided to the Sovereign Parties in advance and will include a list of agenda items, as well as any background materials and technical data that will be discussed. Analyses and deliberations will be coherent, and decisions reached will be accompanied by a rationale and explanation of the supporting evidence. Certain decisions made by the Collaborative Process may be memorialized.

In the event that an issue cannot be resolved through the PWG deliberation, the Collaborative Process may utilize a “fact sheet” approach similar to that used in *U.S. v. Oregon* that involves a consensus-based description of the issue(s) and positions of disputing participants. Disputes that arise within the Technical Subcommittees or the PWG are documented through fact sheets and addressed for resolution in the PWG. If the PWG is unable to resolve an issue(s) in dispute, it may be referred to the Sovereign Principals for consideration.

The Collaborative Process will conduct regularly scheduled monthly meetings, in a mutually agreed to format with non-Sovereign Parties to the litigation and Sovereign Tribes who are not participating in the PWG. At these meetings, the progress and materials developed by the PWG will be discussed, questions will be answered, and opportunities for comments will be provided. Information on the Collaborative Process may also be provided for the general public from time to time for the duration of this remand process. Prior to both meetings with the other Parties or with the public at large, the PWG will agree on the content developed under the Collaborative Process that will be shared at such meetings. The participants in the Collaborative Process will work together to develop materials and information to be presented to the non-Sovereigns and the public. The PWG will continue to work on ways to improve communications with the non-Sovereign Parties to the litigation and the Sovereign Tribes who are not participating in the PWG.

As directed by the Court, the Federal agencies will provide quarterly progress reports to the Court and the Parties. These reports are not, strictly speaking, part of the Collaborative Process, but they will be discussed with the PWG and will, to the extent possible, reflect the products of the collaboration.

By participating in this Collaborative Process, no entity in any way waives, alters, diminishes, or enhances any right that it may have under the Court’s October 7, 2005, Remand Order.

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<sup>1</sup>Judge Redden stated that, “The parties must confer and collaborate if we are to reach the goal of a valid biological opinion.” Opinion and Order of Remand, October 7, 2005, p. 8.

### Issue Identified for Further Discussion

In developing the Collaborative Process, some of the Sovereign Parties have raised concerns about the consequences of the pending termination of funding for the Fish Passage Center (FPC).<sup>2</sup> Specifically, Oregon and the four lower river Tribes have elevated this issue for discussion in the Collaborative Process and believe that the data analysis to support the Collaborative Process and its demanding timelines is compromised by the uncertainty of the upcoming transfer of FPC functions. The Bonneville Power Administration issued a Request for Proposals on December 8, 2005, to solicit proposals for continued FPC functions and remains open to a proposal that will address the Conference Report language, address other Congressional direction, and meet the region's needs. While the Federal agencies are willing to discuss this issue further, they believe that the issue should be resolved independent of the Remand process and litigation. Pending resolution of this issue, the lower river Tribes believe they cannot in good faith endorse the Collaborative Process. Oregon is supportive of the collaborative process and will participate, however Oregon also believes that it will be difficult to meet the rigorous technical demands associated with the development of the new 2006 BiOp if important, independent data-analysis functions are not kept intact. Thus, Oregon advocates for an interim solution that ensures there is no interruption or diminution of those functions during or resulting from the transfer of the FPC while the new BiOp is in preparation. Further, Oregon believes that a long-term solution to FPC functions should be structured by the research, monitoring, and evaluation requirements developed as an essential part of the new BiOp.

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<sup>2</sup>Language in the 2006 Energy and Water Appropriations Conference Report directs Bonneville Power Administration to make "no new obligations" for the FPC and to ensure "an orderly transfer of the FPC functions...to other existing and capable entities" within 120 days so that there is "seamless continuity of activities" when FPC funding expires on March 20, 2006. Also, direction from Subcommittee Chair Senator Domenici includes the following: "we do not intend this language to supercede the Northwest Power Act or the Northwest Power and Conservation Council's Fish and Wildlife Program. Certainly both BPA and NWPPCC are expected to work closely with the state and tribal fishery managers in determining a suitable entity that could take over these functions so that the state and tribal fishery managers continue to receive independent analysis as they have in the past."

## Diagram of BiOp Remand Collaboration Structure

