



On October 7, 2005, this Court issued its Opinion and Order of Remand (“Order”). The Order directed NOAA to file detailed status reports regarding progress made on remand every 90 days. The Order further directed that NOAA’s first status report include “preliminary information from which the court, the parties, and *amici* are able to gain some understanding of (1) the legal framework NOAA intends to use in its jeopardy analysis; (2) the nature and scope of any proposed agency action and/or RPA; and (3) NOAA’s plan for collaboration with the sovereign entities.” Order at 12.

Since the issuance of the Order, Federal Defendants have met regularly with the sovereigns to develop a collaboration plan for the remand process.<sup>1</sup> Those discussions have included the framework for the remand, the legal framework for the jeopardy analysis, and the development of the new proposed action. The current status of these discussions is memorialized in three documents which are the collective product of the participants in the collaborative process convened by NOAA and the Action Agencies. These documents include: (1) 2006 BiOp: Conceptual Framework for the Remand Process Including the Jeopardy Analysis; (2) Update on the Nature and Scope of the Proposed Action; and (3) 2004 BiOp Remand Collaborative Process. NOAA submits these documents as its first quarterly report as they indicate the progress of the Federal Defendants with respect to the three areas required for that report. *See* Exhibits 3, 4, and 5 hereto.

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<sup>1</sup> Lists of the meetings and the representatives from the sovereigns on the Policy Management Group are attached hereto as Exhibits 1 and 2 respectively. In addition, two meetings have been held with the other parties and *amici* to discuss the status of the collaboration with the sovereigns.

Consistent with the Court's Order, the attached documents reflect the Federal Defendants' preliminary views. Those views are only preliminary and subject to change, either in response to discussions in the collaboration process, because of decisions made by the agencies, or subsequent decisions from the Ninth Circuit on their appeal of the Court's May 26 Order. In particular, the attached "Conceptual Framework for the Remand Process" and discussion of the proposed action reflect the status of the collaborative process with the sovereigns. Accordingly, they contain 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.

Federal Defendants will make a good faith effort through the collaboration process to work within the attached conceptual framework and to reach consensus decisions. However, the Federal Defendants 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, they do not waive any argument that the legal analyses or actions described in the Conceptual Framework are not required by the ESA<sup>2</sup> or agree that the approach described in the Conceptual Framework is one that will be, or should be, applied outside the FCRPS remand process. In

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<sup>2</sup> By the same token, the United States acknowledges that the other parties are not, in going forward with this conceptual framework, conceding any of their legal positions or rights in this litigation, nor legally obligating themselves to fund, carryout, or authorize future non-federal activities which will assist in the recovery of the listed ESUs.

determining jeopardy in the remand, Federal Defendants will apply the ESA, its implementing regulations and this Court's rulings of May 7, 2003 and May 26, 2005.

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, Bureau of Reclamation, Army Corps of Engineers, and 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 the Congress to make future appropriations of money for any given federal action or to effect the recovery of listed species.

Respectfully Submitted,

Dated: January 3, 2006

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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 January 3, 2006, the foregoing "Federal Defendants' First Remand Report" 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, with courtesy copies by e-mail, as noted:

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