

KARIN J. IMMERGUT, OSB #96314
United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
SETH M. BARSKY, Assistant Chief
ROBERT L. GULLEY, Senior Trial Attorney
(202) 305-0500 (ph)
(202) 305-0275 (fx)
COBY HOWELL, Trial Attorney
(503) 727-1023 (ph)
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*

Defendants.

Civil No. 01-640-RE

**FEDERAL DEFENDANTS'
THIRD REMAND REPORT**

**FED. DEFS' THIRD
REMAND REPORT**

Federal Defendants hereby submit their Third Remand Report. This Report consists of the Remand Collaboration Status Update and two attachments, (1) a calendar of meetings in the collaborative process that have taken place since the last status report and (2) a Table of Key Hydro Issues.

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 discussion of the analytical framework and the proposed action under development reflects the status of the ongoing collaborative process with the sovereigns and, accordingly contains 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 ESA¹ 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: July 3, 2006

Respectfully Submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

SETH M. BARSKY
Assistant Chief

s/ Robert L. Gulley

ROBERT L. GULLEY, Senior Trial
Attorney
(202) 305-0500 (ph)
COBY HOWELL, Trial Attorney
(503) 727-1023 (ph)
Wildlife & Marine Resources Section

¹ By the same token, the United States acknowledges that the other parties are not conceding any of their legal positions or rights in this litigation, nor legally obligating themselves to fund, carry out, or authorize future non-federal activities which will assist in the recovery of the listed ESUs.

Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed. R. Civ. P. 5(d), I certify that on July 3, 2006, the foregoing Third 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:

Walter H. Evans, III
Schwabe Williamson Wyatt, P.C.
1211 S.W. Fifth Avebye
1600-1800 Pacwest Center
Portland, Oregon 97204
(wevans@schwabe.com)

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83051

/s Robert L. Gulley
