

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

KELLY A. JOHNSON
Acting Assistant Attorney General
ROBERT L. GULLEY, Senior Trial Attorney
robert.gulley@usdoj.gov
RUTH ANN LOWERY, Trial Attorney
Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
(202) 305-0500 (ph)
(202) 305-0275 (fx)

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

**DEFENDANTS' PROPOSAL
FOR REMAND ORDER**

This Court directed the Parties to submit any proposal for structuring the remand of the 2004 Biological Opinion regarding the Federal Columbia River Power System (“FCRPS”). Initially, Defendants believe proceeding with a remand at this time is inappropriate. The May 26, 2005 Opinion and Order goes to very fundamental issues of Endangered Species Act (“ESA”) interpretation that could dramatically affect the framework of the consultation. Accordingly, pursuing the remand while these issues are the subject of any appeal that may follow runs the substantial risk that considerable resources will be wasted if the National Marine Fisheries Service (“NMFS”) and the Action Agencies^{1/} prepare a biological opinion only to have the results of an appeal alter the framework dictated by this Court’s decision.

Should the Court, however, choose to enter a remand order, as it indicated that it will do, *see* June 10, 2005 Opinion and Order at 6, Defendants propose that the order remanding the 2004 Biological Opinion direct NMFS: (1) to prepare a new biological opinion consistent with this Court’s May 26, 2005 Opinion and Order;^{2/} (2) to provide the Court and the parties a report on progress of the remand on a quarterly basis, the first report being due 90 days after the date of the remand order; and (3) if requested, to meet with the parties promptly after the quarterly report is filed to discuss any concerns raised by the report. Defendants urge the Court not to set

^{1/} The Action Agencies are the U.S. Army Corps of Engineers (the “Corps”), Bureau of Reclamation (“BoR”), and Bonneville Power Administration (“BPA”).

^{2/} Defendants reserve the right, if appropriate, to withdraw and amend any such biological opinion, if subsequent to its issuance, the Ninth Circuit clarifies the applicable legal standards. *Bell v. Wolfish*, 441 U.S. 520, 542 n. 25 (1979) (compliance with court order does not moot an appeal); *Tidwell v. Schweiker*, 677 F.2d 560, 565 (7th Cir. 1982) (*en banc*) (“A party does not lose the right to appeal simply because it complies with an order of the court.”).

a schedule for completing the biological opinion.³⁷ If the Court were to set a schedule, the schedule itself would shape and constrain the agencies' decisionmaking, limit opportunities for meaningful public involvement, and likely exclude coordination with the on-going recovery planning process. Moreover, under Defendants' proposed remand order, NMFS will provide the Court quarterly reports on its progress that the Court can use to insure that Defendants are making acceptable progress in completing the new biological opinion.

If, however, the Court feels compelled to set a specific deadline, for the reasons set out below, Defendants ask the Court not to set a deadline for completing the biological opinion any earlier than two years after the entry of any remand order.

I. ASSUMING THAT THE COURT DIRECTS A REMAND, THE LENGTH OF THE REMAND SHOULD BE BASED ON THE TIME REQUIRED TO PREPARE A BIOLOGICAL OPINION CONSISTENT WITH THE COURT'S MAY 26, 2005 OPINION.

The goal for the Court in the remand process should be for NMFS to prepare a biological opinion that satisfies the requirements of the ESA. The Court should not shackle NMFS with an arbitrary deadline that puts that goal at risk by constraining NMFS and the Action Agencies from having an opportunity to obtain and evaluate all of the information necessary to achieve that goal and to allow for public involvement. If, however, the Court were to set a deadline for completing a new consultation it should allow NMFS two years to complete the biological

³⁷ For the Court to decline to set a deadline would be consistent with governing law of the limits on remedies under the Administrative Procedure Act ("APA"). Where as here, the Court has found an agency action to be arbitrary and capricious, its authority is limited to remanding to the agency to correct the error. *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he appropriate judicial remedy when an agency exceeds its discretion is a remand to the agency for further proceedings consistent with the court's opinion."); *Bridge v. United States Parole Comm'n*, 981 F.2d 97, 105 (3rd Cir. 1992); *Heartland Hospital v. Thompson*, 328 F. Supp. 2d 8, 14 (D.D.C. 2004).

opinion. As discussed below, a two-year deadline would allow adequate time for the following objectives:

- (1) Action Agencies' definition of a proposed action to be consulted on - - the hydro operations and other actions they propose to implement to avoid jeopardy;
- (2) NMFS' assessment of the proposed action and identification of any "gaps" that need to be filled by additional mitigation measures to avoid jeopardy;
- (3) NMFS' and the Action Agencies' consideration of available measures to fill any such gaps and to determine that non-federal conservation measures relied upon will be reasonably certain to occur;
- (4) Action Agencies' and NMFS' implementation of these processes through public discussions in collaboration with the affected States and Tribes;
- (5) Incorporation of recovery planning and outside scientific input into its biological opinion; and
- (6) NMFS' preparation of reports informing the Court and the parties to the litigation of the progress of the Action Agencies and NMFS in completing the remand.

A. The Action Agencies Need Time To Prepare A New Proposed Action.

To complete a biological opinion regarding something as large and complex as the FCRPS is an ambitious undertaking under normal circumstances. Declaration of J. William McDonald ("McDonald Decl.") (submitted herewith), ¶ 8-11. Such a consultation must address the effects of the coordinated, systemwide operation of the 14 FCRPS dams and powerplants. In addition, BoR would again expect to include in this consultation the Columbia River mainstem hydrologic effects of the operation of the same 19 irrigation projects that were consulted upon as part of the 2000 and 2004 Biological Opinions. *Id.* ¶ 10. Here, the consultation will also have to take into account the Court's view of the scope of the action. That scope will require the Action Agencies to reevaluate the 2004 updated proposed action ("2004 UPA") to assess if

modifications to it are necessary, and, if they are, to determine what those modifications should be. *Id.* The Action Agencies will also need to evaluate any additional non-hydro FCRPS mitigation measures and their relationship to priority actions identified in recovery plans being developed over the next year. The Action Agencies and NMFS will also need to address the Court's concern that any non-federal measures which are accounted for as cumulative effects are reasonably certain to occur. While this re-evaluation will proceed on a parallel track with the development of the biological opinion, NMFS cannot make significant progress in formulating its biological opinion until the Action Agencies identify all of the components of a new proposed action to replace the 2004 UPA.

Further, modifications to the action could have region-wide implications, such as the potential for impairment of reservoir refill that may necessitate consideration of regional trade-offs, including possible increased flood risk in populous areas such as Portland/Vancouver and significant interruption of commercial barge navigation. The public needs to be aware of those consequences, and the affected sovereign States and Tribes need to participate in evaluating the policy choices to be made. Accordingly, to assist in the development of a new action, the agencies intend to have collaborative, public discussions involving the States and the Upper and Lower River Tribes.⁴ Declaration of Col. Gregg F. Martin ("Martin Decl.") (submitted herewith), ¶ 8. These discussions will consider the relevant building blocks of the hydropower

⁴ Similar collaborative efforts have been employed regarding the effects of operating complex systems such as the Missouri River main stem reservoir system, *see In re: Operation of the Missouri River Sys. Lit.*, (Civ. No. 04-2737), - - F.3d - -, 2005 WL 1949989 (8th Cir. Aug. 16, 2005), and dredging the Columbia River, *see Northwest Environmental Advocates v. National Marine Fisheries Service*, (Civ. No. 04-0666 RSM), 2005 WL 1427696 (W.D. Wash. June 15, 2005).

operations including flow, spill, transportation, removable spillway weirs, and other system configuration improvements and, possibly, off-site measures related to habitat, hatcheries, and harvest. *Id.* ¶ 8. This exchange of views will occur through a series of approximately four public roundtables held throughout the region. *Id.* Sovereign involvement prior to the Action Agencies’ development of the components of the proposed action and public participation will add time to the schedule, but in the end will lead to the Action Agencies being able to select^{5/} a comprehensive action that addresses the needs of the fish, is informed by regional input, and is more transparent and better understood by the region.^{6/} *Id.* ¶ 12.

Finally, if NMFS finds that the new proposed action is likely to jeopardize the continued existence of the species, NMFS, with input from the Action Agencies, will have to develop a reasonable and prudent alternative (“RPA”). 50 C.F.R. § 402.14(g)(5). The development of an RPA would require further modification of the action and/or off-site measures. In developing any RPA, the agencies also will engage in collaborative discussion with the States and Tribes. This exchange of information should ensure that actions selected for inclusion in the RPA are consistent with recovery plans and that any non-federal measures relied on in the biological opinion are reasonably certain to occur. Martin Decl., ¶ 11; Declaration of D. Robert Lohn (“Lohn Decl.”) (submitted herewith), ¶ 5.

^{5/} The Action Agencies, of course, must be the final decisionmakers regarding the components of the new action, just as NMFS, despite the collaborative process, retains the ultimate responsibility for the biological opinion. *See, e.g.*, 16 U.S.C. § 1536(b)(3)(A) (directing the “Secretary” to provide the biological opinion).

^{6/} Under Defendants’ proposed remand order set out below, NMFS will summarize these discussions in their quarterly reports to the Court and will be prepared to discuss them with the parties in the litigation at any requested meetings following submission of the quarterly reports.

B. NMFS Needs Time To Evaluate The Effects Of Any New Action And To Ensure That It is Utilizing The Best Available Science.

NMFS will need time to evaluate fully the effects of any new action proposed by the Action Agencies. The time required in this analysis will be significant. If NMFS were to decide to use the life-cycle approach employed in preparing the 2000 Biological Opinion, a significant effort will be required to update the method because the complexity of information available is greater today than in 2000. Lohn Decl. ¶ 5. In 2000, the approach focused on the effects of the action on productivity of the ESUs. Since 2000 the Biological Review Team and the Technical Recovery Teams have incorporated analyses of additional viability factors (abundance, genetic diversity, and spatial distribution) that may have to be considered in analyzing the new action.

Id.

In addition, NMFS intends to create a process to promote a discussion among federal scientists, regional scientists, and other experts to ensure that NMFS uses the best available data and the appropriate methodologies for evaluating that data in the context of the entire salmonid life cycle. Lohn Decl. ¶ 9. NMFS has already initiated informal discussions with state and tribal scientists to revise the Simulated Passage (“SIMPAS”) model used in the 2004 FCRPS Biological Opinion to estimate the survival of juveniles passing through the hydro corridor. *Id.* NMFS anticipates that it will use similar collaborative efforts to evaluate scientific issues related to the consequences of habitat degradation on life cycle and migratory patterns. *Id.*

C. Added Time Will Allow NMFS To Utilize Information Currently Being Developed In The Recovery Planning Processes.

In 2000, the federal agencies issued a Basinwide Salmon Recovery Strategy which called for the development of subbasin plans to serve as building blocks for ESU-specific recovery

plans. Lohn Decl. ¶ 7. The subbasin plans were completed with the oversight of the Northwest Power and Conservation Council. NMFS currently is using the subbasin plans to develop draft ESU-specific plans. 70 Fed. Reg. 39,231 (July 7, 2005). NMFS intends to issue the draft plans for public comment in December 2005, *id.*, and to issue final plans by December 2006. Lohn Decl. ¶ 7. These plans will include the management actions that may be necessary to achieve the plans' goals as well as measurable biological criteria for determining when each ESU has reached the state of "recovery" so that it may be delisted. 70 Fed. Reg. at 39,231; Lohn Decl. ¶ 7. The recovery planning process will play an important role in informing NMFS in its evaluation of the effects of any proposed mitigation. *Id.* Accordingly, any schedule should take into account that the final plans will not be available until December 2006 and allow time for consideration of information generated through public comment regarding the plans and integrating this information into the new biological opinion.

D. NMFS Will Require 24 Months To Complete A Biological Opinion That Is Consistent With This Court's May 26, 2005 Opinion And Order.

Robert Lohn, Regional Administrator of the Northwest Region of NMFS, has reviewed carefully the Court's May 2003 and May 2005 Opinions, consulted with executives from the Action Agencies, and had numerous, lengthy discussions with his staff. Lohn Decl. ¶ 3-5. It is his view that it will take at least 24 months to complete a new biological opinion using the process described above. *Id.* ¶ 3, 7, 10; Martin Decl. ¶ 12; McDonald Decl. ¶ 13.

II. THE 2004 BIOLOGICAL OPINION SHOULD BE LEFT IN PLACE TO AFFORD INCIDENTAL TAKE PROTECTION TO THE CONTINUED OPERATION OF THE FCRPS DURING THE REMAND.

This Court has the equitable authority to leave the 2004 Biological Opinion in place during the remand. *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (recognizing that court has discretion to shape an equitable remedy in leaving a Clean Air Act regulation in place during remand); *ASARCO, Inc. v. Occupational Safety and Health Admin.*, 647 F.2d 1, 2 (9th Cir. 1981) (“[W]hile (we) must act within the bounds of the statute and without intruding upon the administrative province, (we) may adjust (our) relief to the exigencies of the case in accordance with the equitable principles governing judicial action.”) (citing *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (leaving an ESA listing determination in place, despite significant errors in the determination because “when equity demands, the regulation can be left in place while the agency follows the necessary procedures”).

Here, we respectfully request the Court to exercise that discretion to leave the 2004 Biological Opinion in place to afford the agencies protection from suits alleging violation of the prohibition against take in § 9 of the ESA. Section 9 of the ESA prohibits any entity, including the Federal government and Federal employees, from taking members of a listed species unless such a take is authorized either through an incidental take permit issued pursuant to § 10 of the ESA or an incidental take statement issued as part of a § 7 consultation. 16 U.S.C. § 1538(a)(1). If this Court were to vacate the 2004 Biological Opinion, the Action Agencies arguably could be subject to criminal or civil penalties or injunctive relief under § 9 with respect to the operation of the FCRPS. Further, if left in place, the 2004 Biological Opinion, important salmonid research

and monitoring specified by the 2004 UPA would continue uninterrupted during the remand. A.R. C.289 at 88-103 (UPA) (from administrative record for 2004 Biological Opinion, on compact disc).

Leaving the 2004 Biological Opinion in place will not interfere with the Court's ability to order modifications of the operations of the FCRPS during the remand if necessary to avoid irreparable harm stemming from violations of the ESA alleged in Plaintiffs Third Amended Complaint. A biological opinion does not authorize or direct the Corps' and BoR's operation of the FCRPS. Therefore, any order with respect to such relief would have to be addressed to the Action Agencies, not NMFS. Accordingly, this Court can use its equitable powers to afford the agencies protection against lawsuits to enjoin alleged incidental take while retaining the ability to hear Plaintiffs' anticipated claim for injunctive relief.

III. THE COURT DOES NOT HAVE TO ADDRESS INTERIM OPERATIONS IN THE REMAND ORDER.

The operation of the FCRPS is authorized by enabling statutes and governed by the respective Corps' and BoR's records of decision, not by the 2004 Biological Opinion. Thus, the Court does not have to address the interim operations in its remand order. The Court has not granted summary judgment on the § 7(a)(2) claims against the Corps and BoR and, thus, in the case's current posture, lacks the ability to vacate these decisions. Plaintiffs, however, have told the Court that they intend to ask the Court to enter an injunction regarding the operations of the FCRPS during remand.

The Action Agencies will need adequate time to plan for and implement any changes to the UPA that may be ordered. Accordingly, Defendants urge the Court to require that any such

motion for further injunctive relief be filed by October 31, 2005, and to set a reasonable but aggressive briefing schedule. Further, to ensure that the Court has an adequate record upon which to base its decision and that any injunction is tailored to the alleged violation found by this Court, Defendants ask the Court to set an evidentiary hearing promptly after the close of briefing to allow cross-examination of persons submitting declarations regarding the injunction. Defendants will be prepared at the September 30, 2005 conference to discuss a proposed schedule for such a hearing, as well as measures that could be used to streamline the evidentiary hearing. The issues that will be placed before the Court are of such regional importance, and such complexity, that it is essential that the Court's consideration be informed by more than just the untested written declarations.

In conclusion, if the Court decides to enter a remand order containing a schedule Defendants propose that the order direct NMFS: (1) to prepare a new biological opinion consistent with this Court's May 26, 2005 Opinion and Order within twenty-four months of the issuance of the remand order; (2) to provide the Court and the parties a report on progress of the remand on a quarterly basis, the first report being due 90 days after the date of the issuance of the remand order; and (3) if requested, to meet with the parties promptly after the quarterly report is filed to discuss concerns raised by the report.

RESPECTFULLY SUBMITTED,

KELLY A. JOHNSON
Acting Assistant Attorney General

/s/ Robert L. Gulley

ROBERT L. GULLEY
Senior Trial Attorney
RUTH ANN LOWERY
Trial Attorney

Wildlife & Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
(202) 305-0217 (ph)
(202) 305-0275 (fx)

Attorneys for Defendant

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on September 20, 2005, the foregoing "Defendants' Proposal for Remand Order" will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on 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:

Dr. Howard F. Horton, Ph.D.
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, Oregon, 97331-3803
FAX: (541)-737-3590
(hortonho@onid.orst.edu)

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

s/ Robert L. Gulley