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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

_____	)	
NATIONAL WILDLIFE FEDERATION, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 01-640-RE
	)	
NATIONAL MARINE FISHERIES	)	
SERVICE, <i>et al.</i>	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' UNOPPOSED MOTION FOR ENTRY OF FINAL JUDGMENT  
AGAINST NATIONAL MARINE FISHERIES SERVICE PURSUANT TO RULE 54(b)  
OF FED. R. CIV. P. AND TO STAY ANY FURTHER LITIGATION OF THE MERITS  
OF THE CLAIMS AGAINST THE ACTION AGENCIES**

Plaintiffs National Wildlife Federation's ("NWF's") Third Amended Complaint asserts one claim against the National Marine Fisheries Service ("NMFS") and two claims against the agencies who operate the Federal Columbia River Power System ("FCRPS"), the Army Corps of Engineers (the "Corps") and Bureau of Reclamation ("BoR") (collectively the "Action Agencies"). Plaintiffs asserted Count One challenging the 2004 Biological Opinion under the Administrative Procedure Act only against NMFS.

Plaintiff-Intervenor the State of Oregon brought a similar count against NMFS for review of the 2004 Biological Opinion in its Complaint-in-Intervention, and no other claims.

The Court addressed the merits of the claims against NMFS, and granted summary judgment to Plaintiffs NWF and Oregon, in its Opinion and Order, dated May 26, 2005. Counts 2 and 3 of NWF's Third Amended Complaint are brought pursuant to the Endangered Species Act ("ESA") citizens' suit provision alleging violations of §§ 7 and 9 of the ESA by the Corps and BoR. The Court found that Plaintiffs were likely to succeed on the merits of their § 7 claim in the context of a preliminary injunction, but declined to address the merits of the § 9 claim. June 10, 2005 Opinion and Order at 3-4.

In circumstances, such as exist in this case, when more than one claim for relief is presented and multiple parties are involved, Rule 54(b) of the Fed. R. Civ. P. allows the Court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties." Fed. R. Civ. P. 54(b). To do so, the Court must expressly direct the entry of judgment and make "an express determination that there is no just reason for delay." *See Frank Brisco Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9<sup>th</sup> Cir. 1985).

Upon resolution of the issue regarding the remand of the Biological Opinion, which is concurrently being presented today for resolution, the Court will have completed adjudication of all claims against NMFS. No further proceedings on the claims against NMFS are necessary. Moreover, the resolution of the pending claims (of NWF's Third Amended Complaint) against the Action Agencies is unlikely to shed new light or alter the summary judgment decision against NMFS.

Nor would entry of final judgment against NMFS deprive the Court of the ability to order interim relief during the remand of the Biological Opinion if it deem it to be appropriate because the Court will have before it NWF's claims against the Corps and BoR. Moreover, even after entry of judgment the Court retains jurisdiction over NMFS to enforce any remand order should the need arise. Thus, no reason exists to delay the entry of judgment against NMFS to permit prompt appellate review of the fundamental legal issues of ESA interpretation raised by the Court's May 26, 2005 Opinion. Accordingly, Defendants ask the Court to direct the entry of judgment against NMFS and to include an express finding that "there is no just reason for delay."<sup>1/</sup>

Defendants request the Court to stay further litigation of the merits of Plaintiffs NWF's claims against the Corps and BoR (Counts 2 and 3) pending any appeal, subject to any

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<sup>1/</sup> A remand order is generally not a final appealable order, but an exception to that rule is generally made where the government agency against whom an adverse order is rendered seeks an immediate appeal. *E.g., Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 454, 457 (9<sup>th</sup> Cir. 1980). However, the instant case is more complex than those in which that exception has been applied; for example, here there are multiple federal defendants, multiple parties, and multiple claims. A Rule 54(b) judgment is appropriate in this circumstance and would remove any doubt about the availability of appellate review.

subsequent request by a party to lift the stay for good cause shown. Such a stay would not preclude Plaintiffs from seeking interim injunctive relief against the Corps and BoR.

A copy of a proposed order is attached. Defendants have conferred with the parties and no one objected to the entry of the requested final judgment or the requested stay.

Respectfully submitted

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## 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 “Unopposed Motion for Entry of Final Judgment Against NMFS Pursuant to FRCP 54(b) and to Stay Any Further Litigation of the Merits of the Claims Against the Action Agencies” 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:

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