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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Civil No. 01-640-RE

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*

Defendants.

DEFENDANTS' RESPONSE TO CROSS-PROPOSALS FOR REMAND ORDER

In addition to Defendants' proposal, this Court received three other proposals regarding how the Court should structure a remand.[1/] The Four Basin States agree with Defendants that two years are required for the National Marine Fisheries Service ("NMFS") to prepare a new biological opinion. Plaintiffs and the Treaty Tribes, however, ask the Court to order that the new biological opinion be completed within one year. Further, Plaintiffs and the Treaty Tribes urge the Court to order a process during the remand that effectively entangles the Court in the deliberative process related to the preparation of the new biological opinion.

As discussed more fully below, a one-year schedule does not provide adequate time to prepare a technically-sound biological opinion or to have adequate discussions with the States and Tribes and unduly constrains the agencies' discretion in preparing the new biological opinion. Further, Plaintiffs' attempt to have the Court "referee" the development of the new proposed action and biological opinion ignores the proper separation of judicial and executive functions and, thus, is improper.

Accordingly, Defendants urge the Court to reject Plaintiffs' proposed order in its entirety and, if the Court intends to issue a remand order, *see* Defs' Proposal at 2, to enter an order that would, without setting a schedule, direct NMFS: (1) to prepare a new biological opinion consistent with this Court's May 26, 2005 Opinion and 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

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[1/] Proposals regarding the remand were submitted by the Plaintiffs, the Treaty Tribes, and the Four Basin States. In addition, the State of Montana and proposed Intervenor-Defendant Kootenai Tribe of Idaho submitted a proposal for a process to resolve the issue of interim operations.

promptly after the quarterly report is filed to discuss any concerns raised by the report. The Court also should include a determination that the 2004 Biological Opinion will remain in place. Finally, if the Court intends to enter a deadline for completing the new biological opinion, the Court should allow NMFS two years to complete the remand.

1. The Court Should Not Order NMFS To Complete The New Biological Opinion Within One Year.

Plaintiffs and the Treaty Tribes ask the Court to order the Defendants to prepare a new Biological Opinion within one year.[2/] Pls' Proposal at 4. The central argument they advance to support their proposal is that, in their view, NMFS' task on remand will be no more complex or time-consuming than the task presented after this Court's 2003 ruling. *Id.* at 5.

A one year schedule to complete a new biological opinion effectively constrains the agencies' discretion. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 544 (1978) (holding that following remand "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.'") (quoting *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976)). As demonstrated in Defendants' Proposal, completing a new biological opinion will be a significant, complex undertaking. Defs' Proposal at 3-8; Declarations of D. Robert Lohn ("Lohn Decl."), J. William McDonald ("McDonald Decl."), and Colonel Gregg F. Martin ("Martin Decl."). Further, to allow

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[2/] The Treaty Tribes join the Plaintiffs in this proposal. Treaty Tribes Proposal at 5. NMFS issued the 2004 Biological Opinion that this Court found to be unlawful. Accordingly, the Court should direct its remand order to NMFS alone.

less than 24 months would compromise the agencies' ability to incorporate important information developed since the release of the 2000 Biological Opinion, and hamper the ability of the Action Agencies to exchange information with the State and Tribal sovereigns of the region regarding the development of a new proposed action and "reasonable and prudent alternative ("RPA")," if one is necessary. Lohn Decl. ¶ 10. It would also constrain NMFS' ability to utilize the best available science and methodologies and to exchange views with other experts in the region, and, quite significantly, prevent any meaningful use of the information generated in the on-going recovery planning process. *Id.*

Plaintiffs' argument regarding the complexity of the task facing Defendants clearly is wrong. Plaintiffs themselves expressly recognize that the Action Agencies likely will have to develop a new proposed action before NMFS can prepare the new biological opinion. Pls' Proposal at 4. To accomplish this, the Action Agencies will have to reconsider the mix of operational changes and/or offsite mitigation measures that they propose to avoid jeopardy and adverse modification. Defs' Proposal at 4-6; McDonald Decl. ¶ 10; Martin Decl. ¶ 8. This will require examining the circumstances as they exist today, not as they existed in 2000 or 2004. It is not possible to simply build on past analyses. Further, the agencies must be certain, if they include any non-federal measures in their jeopardy analyses, that those measures will be "reasonably certain to occur," a determination that requires a complex series of steps to evaluate. *Id.* ¶ 11; Lohn Decl. ¶ 5. Perhaps most important, Defendants believe that the development of the proposed action should be informed by discussions with affected sovereigns, including

discussions of operational constraints and regional trade offs.[3/] Martin Decl. ¶ 9. To accomplish these tasks, the agencies believe that the development of the new action will take until the spring of 2006 to complete. *Id.* ¶ 9.

Nor is NMFS' task a matter of simply "going back" to what was done in the 2000 Biological Opinion. As demonstrated in Defendants' Proposal, much new information and improved understanding of the needs of the salmonids has been generated that will need to be considered in preparing a new biological opinion and that will add complexity to the jeopardy and critical habitat analyses. Defs' Proposal at 7; Lohn Dec.¶ 5. As with the development of the proposed action, time is necessary to have discussions with regional scientists and State and Tribal sovereigns. Lohn Decl. ¶ 9.

Further, Plaintiffs' argument overlooks that at least one thing is dramatically different between the issuance of the Court's 2003 decision and now; NMFS is actively engaged, with States, Tribes, and local entities, to complete recovery plans for the affected species. Both the Defendants and the Four Basin States agree it is important for the results of the recovery planning process to be reflected in the new biological opinion. Defs' Proposal at 4; Four Basin States Proposal at 7, 10. Most of the draft plans are not expected to be complete before December 2005. 70 Fed. Reg. 39,231 (July 7, 2005). Public comment will have to be received and analyzed before the plans can be finalized. But at the end of the day, those plans will have identified key elements, especially habitat improvements, that are needed for recovery, and what criteria would

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[3/] The one-year period proposed by Plaintiffs also ignores that NMFS and the Action Agencies will have to reevaluate those determinations regarding available mitigation measures if they have to develop an RPA. Martin Decl. ¶ 11.

apply for determining that a listed species has recovered. *Id.* Such information is clearly relevant and critical to a robust analysis of whether the proposed action reduces the likelihood of recovery of the species such as the Court indicated is required in its May 26, 2005 Opinion. In addition, such information is essential to the development of an effective RPA should the need for one arise. Section 7(a)(2) of the ESA requires the agencies to use the best available science in the consultation. 16 U.S.C. § 1536(a)(2). Considering this important information regarding recovery is clearly consistent with this requirement.

This Court should not constrain the agencies' inherent discretion to develop a proposed action or comply with the framework set out by the Court in the manner that they deem best in order to meet the abbreviated deadline proposed by the Plaintiffs. Too much is at stake for the species and the region to rush through the process to satisfy an arbitrary time line. Accordingly, this Court should not set a deadline for completing the new biological opinion, but rather should monitor the agencies' progress to ensure that they are proceeding expeditiously. If the Court intends to enter a deadline for completing the new biological opinion, the Court should accord deference to the informed estimates of the regional heads of the agencies responsible for getting the work done and allow two years to complete the remand. Lohn Decl. ¶ 10; Martin Decl. ¶ 12; McDonald Decl. ¶ 13.

2. The Court Should Remand The Biological Opinion With A Straightforward Instruction To Prepare A New Opinion Consistent With The Court's Decision.

a. No Need Or Basis Exists To Impose Detailed Prescriptions On The Remand Process.

Plaintiffs and the Tribes urge the Court to issue specific, intrusive instructions to NMFS on how to carry out the remand. Pls' Proposal at 5-7. Plaintiffs propose a remand process that

would effectively insert the Court in the deliberative process attendant to the preparation of the biological opinion. *Id.* at 6-7. Plaintiffs' proposed process would require NMFS to file quarterly reports with the Court. Plaintiffs do not seek a report containing a "comprehensive and cumulative assessment" of the government's progress in preparing the new biological opinion as the Court ordered on the remand of the 2000 Biological Opinion. Dkt. 444. Plaintiffs instead seek to have this Court order NMFS, within 90 days, to produce a report containing such things as the framework it "will use" in its analysis, the "specific criteria" that "will be used" to determine whether the proposed action meets the survival and recovery prongs of the jeopardy standard, and the contingency plans for hydrosystem management should NMFS make a jeopardy determination. Pls' Proposal at 6-7. In short, Plaintiffs do not want to know what the Defendants have done but what the Defendants *will do* in preparing the new biological opinion.

Plaintiffs also ask the Court to order briefing and hearings regarding the information in the report. Under their proposal, within a week of issuance of the report, any party would be able to file a "written" response (*i.e.*, a brief) with the Court which would be followed by a "status conference" (*i.e.*, hearing) with the Court. Pls' Proposal at 6-7. Such a process inextricably involves the Court in the agencies' deliberative processes before the remand process is complete. Congress delegated the development of the biological opinion to administrative agencies, and created jurisdiction in the courts to review those actions only when they are final. Plaintiffs, however, would have the Court positioned to pass judgment on the agencies' strategies, policy decisions, and factual determinations well before any action is final. Such a process unlawfully inserts the Court to the deliberative process and should be soundly rejected by the Court.

In asking the Court to involve itself in the function of the administrative agency, Plaintiffs ignore the clear direction of the Supreme Court that "the function of the reviewing court ends when the error is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. at 20; *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 2381 (2004) (courts should not assume a supervisory role in agency action and inject themselves into day-to-day agency management). Thus, Plaintiffs' attempt to set the Court up to "referee" the development of the new biological opinion ignores the proper separation of judicial and executive function and, thus, is improper.[4/]

In *County of Los Angeles v. Shalala*, the Court of Appeals for the District of Columbia, after finding that a decision of the Department of Health and Human Services was arbitrary and capricious under § 706(2) of the Administrative Procedure Act, held that the district court lacked jurisdiction to devise a specific remedy because "'under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.'" 192 F.3d 1005, 1011 (D.C. Cir. 1999) (quoting *PPG Indus. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)). The Court held that "[n]ot only was it unnecessary for the Court to retain jurisdiction to devise a specific remedy for the Secretary to follow, but it was an error to do so." *Id.* Applying this settled principle of administrative law, in *Hawaii Longline Ass'n v. NMFS*, the district court found a NMFS biological opinion to be arbitrary and capricious but refused to do anything more than remand the biological opinion to the

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[4/] *See also* Four Basin States' Proposal at 10 (recognizing that the separation of powers doctrine limits role that the Court can play in the remand process).

agency for further action because "it is up to the agency to determine how to proceed next - - not for the court to decide or monitor." 281 F. Supp. 2d 1, 38 (D.D.C. 2003). In short, the Court simply lacks the authority to referee the preparation of the biological opinion as Plaintiffs ask the Court to do.

Plaintiffs seek to superimpose their time-consuming process on an abbreviated schedule that already constrains the agencies' discretion in preparing the biological opinion. Moreover, they ask the Court to order Defendants to prepare a "specific plan" for "collaboration" in preparing the biological opinion. Pls' Proposal at 7. They cite no authority that allows the Court to order an agency to collaborate. Congress vested the authority to prepare biological opinions in NMFS and the United States Fish and Wildlife Service. 16 U.S.C. 1536(b)(3)(A). Congress did not call for public participation in that process. The Court simply cannot order a "collaboration" that Congress did not authorize. *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1258 (E.D. Cal. 1999) (refusing to develop an oversight committee because an agency's APA violation is not "sufficient cause for the court to impose a managerial structure where no such imposition is authorized by law."). That being said, as part of a two-year remand, Defendants intend to have discussions with the States and Tribes regarding the proposed action and any RPA, if one is necessary, to ensure that the region is informed about the process and the implications of any operational changes at federal dams, and to ensure that scientific discussions lead to a biological opinion that is based on the best available science.[5/]

[5/] The Treaty Tribes suggest that the Court should "impress upon the parties the value of . . . process commitments" among the co-managers similar to the process agreed to as part of the now-expired 1988 Columbia River Fish Management Plan, which was approved by this Court in *United States v. Oregon*. *See United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988). Treaty Tribes Proposal at 4-5 and n.2. Tellingly, the Tribes stop short of asking the Court to impose such a process in its remand order,

No need or basis exists for the Court to provide specific instructions on the remand. The Court's opinion already sets out the law it believes governs the consultation. Although Defendants disagree with the Court's view of that law, they have made clear that they will produce a new biological opinion consistent with the Court's decision and its 2003 Order. Defs' Proposal at 2; Lohn Decl. ¶ 4; McDonald Decl. ¶ 11; Martin Decl. ¶ 6. Defendants also will engage in voluntary discussions with the sovereigns regarding the development of the action and the preparation of the biological opinion. Further, Defendants have made clear that they will provide quarterly reports[6/] on their progress towards complying with the Court's order. When decisions have been made about the new proposed action, the framework for the § 7(a)(2) analysis, or the need for an RPA, that information will be included in the report. If any party requests it, the agencies will meet with the parties to discuss those reports. These measures

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and note that the Court must act only "within the limits of its jurisdiction." *Id.* at 5. The Court in *United states v. Oregon* ordered the Parties to attempt to develop an agreed-upon harvest allocation plan to avoid the need for the Court to resolve those issues itself. 699 F. Supp. at 1459. This Court is not similarly positioned. Unlike in *United States v. Oregon* (where the Court was empowered to resolve the underlying substantive issue of how catch should be allocated if the parties failed to do so), here the Court can only determine if a final agency action was arbitrary and capricious. Further, under the ESA, *NMFS* is charged with preparing the Biological Opinion, and its responsibility may not be delegated to outside parties. This further distinguishes the current case from *United States v. Oregon*, where each of the parties to the Technical Advisory Committee has some authority to make decisions with respect to harvest management, and voluntarily agreed to a formal process and structure to assist them in coordinating on the underlying data for such decisions. Here, while the federal agencies may voluntarily agree to collaborative discussions, as Defendants have indicated they will, it would be improper for the Court to order any binding process for resolving the scientific or technical issues that may arise during the course of preparing a new biological opinion.

[6/] The Four Basin States have proposed that NMFS be directed to file bi-monthly reports. Four Basin States Proposal at 7. On this issue, Defendants agree with Plaintiffs that the reports should be quarterly. Pls' Proposal at 6. The preparation of the new biological opinion in two years will require a tremendous commitment of resources. Without diminishing the value of the reports, the more time spent preparing them and preparing for and participating in status conferences, the less time that can be spent working on the biological opinion.

already go beyond what is required of NMFS under the ESA for preparing a biological opinion.

b. The Court Should Not Delay A Ruling That The 2004 Biological Opinion Should Remain In Place.

The Four Basin States agree with Defendants that the Court should leave the 2004 Biological Opinion in place. Four Basin States Proposal at 8. Plaintiffs ask the Court to leave the 2004 Biological Opinion in place for now; however, they ask the Court to delay any final determination until the Court resolves their motion for interim relief. Pls' Proposal at 8. As Defendants pointed out in their proposal, no linkage exists between the Court's ability to direct the Action Agencies to modify their operations and whether the 2004 Biological Opinion remains in place for the period of the remand. Defs' Proposal at 9-10. Thus, no reason exists to defer a determination that the 2004 Biological Opinion should remain in place. In fact, the Treaty Tribes' request that the decision regarding whether to leave the 2004 Biological Opinion in place should not be allowed to interfere with the decision regarding interim operations supports resolving the issue now. Treaty Tribes Proposal at 7. Further, a determination on this issue will add clarity to the Court's certification of a final judgment against NMFS for purposes of Fed. R. Civ. P. 54(b).

3. The Court Should Set A Schedule To Resolve The Issue Of Interim Relief.

No party has contended that the Court must resolve the issue of interim relief before ordering the remand. *See* Defs' Proposal at 10-11. Defendants, however, agree with Plaintiffs that, if they are going to seek such relief, the issue should be heard soon. Pls' Proposal at 9. As Plaintiffs recognize, there is a significant lead-time involved in shifting operations to implement any modified flow or spill regime for 2006. *Id.* Moreover, an expeditious resolution of this issue

will allow the Defendants and State and Tribal sovereigns to focus discussions on a sustainable long-term operating plan.

The parties have not scheduled any negotiations regarding interim operations. As we discussed at the last telephonic status conference on September 2, 2005, the parties are having a meeting to exchange information on flow issues on September 29, 2005. It is possible that further discussions may lead to some narrowing of the issues, but the time for doing so is short, the issues are very complex, and the gulf between the parties' positions is wide. Accordingly, the Plaintiffs are likely to have to file a motion seeking whatever interim operations they believe are appropriate. Thus, with respect to interim operations, Defendants believe that the emphasis now needs to be placed on setting an expeditious schedule for resolving Plaintiffs' request for injunctive relief.

Plaintiffs and Defendants are actually not far apart on how to proceed to brief the issue of injunctive relief regarding interim operations. The schedule proposed by Plaintiffs for briefing their anticipated motion for injunctive relief is generally acceptable. We, however, propose the following modifications:

- Parties seeking injunctive relief regarding interim operations shall file their motions on October 28, 2005;
- All other parties and *amici* shall file any response by November 18, 2005;
- Plaintiffs file any reply brief on November 30, 2005;
- The Court will conduct a three-day evidentiary hearing beginning on December 7, 2005;
- The Court will hold oral argument on the motions for injunctive relief on December 15; and

- Parties and *amici* may file a short post-evidentiary hearing brief (limited to ten pages) no later than December 13, 2005.

Plaintiffs argue that it would not be an abuse of discretion for the Court to decline to hold an evidentiary hearing, provided there is an opportunity to submit written testimony and oral argument.[7] Pls' Proposal at 9-10; s*ee also* Treaty Tribes Proposal at 8. That may be true; however, that possibility does not have any relevance to whether the Court should allow an evidentiary hearing in this case. *See, e.g., Int'l Molders' and Allied Workers' Local Union No. 164 v. Nelson,* 799 F.2d 547, 555 (9th Cir. 1986) ("Where sharply disputed []facts are simple and little time would be required for an evidentiary hearing, proceeding on affidavits alone might be inappropriate."); *Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779, 781 (9th Cir. 1976) ("There is no apparent reason to deny petitioner an opportunity to present his witnesses where, as in this case, there is a sharp factual conflict, resolution of that conflict would determine the outcome. . . ."). The Ninth Circuit has recognized that procedures for resolving motions for injunctive relief should be based on "general concepts of fairness, . . . the nature of the relief requested, and the circumstances of the particular case[]." *Int'l Molders*, 799 F.2d at 555 (quoting 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65.04[3] (2d ed. 1986)). *See also* 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65.21[6] (3d ed. 1997) ("Since a preliminary injunction hearing requires an adequate presentation of the facts, the *courts should be reluctant to decide disputed factual issues without a hearing on the basis of the affidavits alone*.") (emphasis added) (footnotes omitted).

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[7] *See* Pls' Proposal at 9-10 (citing *NWF v. NMFS*, 418 F.3d 971 (9th Cir. 2005) and *Stanley v. University of Southern California*, 13 F.3d 1313, 1326 (9th Cir. 1994)).

The question, therefore, is whether an evidentiary hearing would *assist* the Court in organizing the evidence and ensuring a fair result. In this case, the opinions among experts are likely to differ sharply on the need for and/or relative value of different operating strategies; and the assumptions underlying the respective experts' opinions are essential to the validity of the differing views. Further, allowing the parties to explore the boundaries of the witnesses' views will better enable the Court to ensure that any relief it does grant is narrowly tailored to avoid any irreparable harm stemming from violations of the ESA alleged in Plaintiffs' Third Amended Complaint as the Ninth Circuit's recent order confirmed is essential. *National Wildlife Fed'n v. NMFS*, - - F.3d - -, 2005 WL 2100448 (9th Cir. Sept. 1, 2005). Accordingly, the Court should hear the evidence rather than rely on the written testimony of untested witnesses with untested assumptions.

Moreover, Plaintiffs in this case will not be prejudiced if the evidentiary hearing proposed by Defendants is held. Although in some preliminary injunction situations, the complexity of issues would weigh against a hearing because of the time involved to hold the hearing, the rationale for such a result is not present here. Defendants proposed only a three day hearing that can be structured to ensure that the evidence is effectively and efficiently presented, as is detailed below. Further, Plaintiffs have been aware that they would want to seek relief for Spring 2006 for many months, and yet have chosen, without explanation, to wait until November 1 to file. Given that choice, and the limited nature of the hearing proposed, no reason exists to deny Defendants' proposal for an evidentiary hearing. Further, in a case as important as the current case, and with such far-reaching impacts on the economy and species, there is no reason not to fully air these controversial issues prior to a determination by the Court.

To ensure that the evidentiary hearing is structured to ensure that it facilitates the Court's ability to reach a timely resolution of any request for modification of interim operations, Defendants propose the following:

- The evidentiary hearing shall be limited to no more than three days;
- The hearing shall be limited to the cross-examination of persons submitting declarations in support of or opposing injunctive relief;
- Plaintiffs and Defendants shall, after conferring with the parties supporting their respective positions, select the opposing declarants for cross-examination;
- The aggregate time allotted by the Court for the three days of the hearing shall be split equally between the Parties supporting the injunction and the parties opposing the injunction; and
- The examination of the witnesses shall be limited to the counsel for Plaintiffs and Defendants, one liaison counsel for all other parties supporting the injunction, and one liaison counsel for all other parties opposing the injunction.

In contrast to this streamlined proposal for an evidentiary hearing, the evidentiary process proposed by the State of Montana and the Kootenai Tribe of Idaho ("Joint Remand Proposal") as proposed does not appear to be workable in terms of resolving the interim operations issue in a timely fashion. While Defendants share the State of Montana's and the Kootenai Tribe of Idaho's goal of ensuring a full ventilation of the issues regarding interim relief, for the process to be able to be effective and efficient, it should be based on a specific, concrete request for relief regarding interim operations rather than on the abstract question of what operational changes, if any, should be implemented. Moreover, the State of Montana and the Kootenai Tribe of Idaho fail to explain

how the proposed evidentiary process can be completed in just 60 days when significant time will be required to make the referral, to obtain an expert, and to allow the master and expert to get up-to-speed on the complex issues in this case. In addition, the Joint Remand Proposal offers no reason why any complexities related to the interim relief constitute an "exceptional condition" as is required for the non-consensual appointment of a special master. *See* Fed. R. Civ. P. 53(a)(1)(B)(i).

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 27, 2005, the foregoing "Defendants' Response To Proposals 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:

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