

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  
RUTH ANN LOWERY, 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'  
SECOND REMAND REPORT**

**FED. DEFS.' SECOND  
REMAND REPORT**

On January 3, 2006, Federal Defendants filed their First Remand Report. As directed in the October 7, 2005 Opinion and Order of Remand, that Report and its attachments<sup>1</sup> presented preliminary information regarding “the legal framework NOAA intends to use in its jeopardy analysis”; “the nature and scope of any proposed agency action and/or RPA”; and “NOAA’s plan for collaboration with the sovereign entities.” Order at 12.

This Second Remand Report will (1) generally update the information provided in the First Remand Report in order to inform the Court of the progress that has been made by the sovereign collaborating Parties in the collaboration on remand, including briefly describing the resolution reached by the collaborating Parties and the other Parties regarding Plaintiffs’ request for “observer status” at certain meetings of the collaborating entities; (2) set forth the Federal Defendants’ views as to the appropriate manner for resolving the question whether to extend the current remand schedule; and (3) summarize the current status of events regarding the expiration of the contract between the Bonneville Power Administration (“BPA”) and the Fish Passage Center (“FPC”).

---

<sup>1</sup> Exhibit 1 to the First Remand Report was the “FCRPS BiOp Remand Collaboration Process Record of Meetings 2005”; Exhibit 2 was the “FCRPS Biological Opinion Remand, Collaboration Policy Working Group” member list; Exhibit 3 was “2006 BiOp: Conceptual Framework for the Remand Process Including the Jeopardy Analysis”; Exhibit 4 was “Update on the Nature and Scope of the Proposed Action”; and Exhibit 5 was “2004 BiOp Remand Collaborative Process.”

**Preliminary Note:**

As with the materials presented with the First Remand Report, the views reflected in this Report and the Exhibits hereto are 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. The discussion of the analytical approach under discussion, the proposed action under development, *etc.*, reflects the status of the 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.

As was also noted in the First Remand Report, Federal Defendants will continue to make a good faith effort through the collaboration process to work within the conceptual framework for the remand to reach consensus decisions. However, the Federal Defendants are mindful, as is the Court, that they and they 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 ESA<sup>2</sup> or agree that the approach under consideration is one that will be, or should be, applied outside the FCRPS

---

<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, carry out, or authorize future non-federal activities which will assist in the recovery of the listed ESUs.

remand process. In analyzing whether the proposed action would jeopardize the continued existence of any listed species, NMFS 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, 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.

#### **1. Update Regarding Collaboration on Remand**

Since the filing of the First Remand Report, the participants in the collaborative process<sup>3</sup> have continued to diligently work toward completion of the remand on the time schedule ordered by the Court. The substantive progress that has been made is summarized in **Exhibit A** hereto, "Remand Collaboration Status Update for the FCRPS 2006 Biological Opinion." Attachment 1 to that document shows the schedule of meetings for January through April, 2006. The members of the Policy Working Group ("PWG"), comprised of representatives of the collaborating sovereigns, and the various Workgroups it oversees, have continued to meet for the purpose of

---

<sup>3</sup>NMFS, the Bureau of Reclamation, the Bonneville Power Administration, the U.S. Army Corps of Engineers, the States of Oregon, Washington, Idaho, and Montana, the Nez Perce Tribe, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Kootenai Tribe of Idaho, the Spokane Tribe of Indians, and the Confederated Tribes of the Colville Reservation.

refining their views on what should be included in the proposed action for consultation. The PWG and its various sub-entities are also working to develop recommended criteria and principles to inform the analytical components for the ESA Section 7(a)(2)<sup>4</sup> analysis that NMFS will conduct for the Biological Opinion, using a 10-step framework. Significantly, the PWG recognizes that this consultation effort on this particular federal action is but one part of “a broader salmon recovery effort that is needed for the Columbia Basin,” Exhibit A at 1, and are taking this opportunity to collaboratively discuss and identify opportunities to be considered as part of that broader effort.

As can be seen from a review of Exhibit A, the collaboration process has been rigorous. There are currently 12 technical workgroups and, as the schedule reflects, there are meetings on a nearly daily basis. In addition, NOAA and the other Federal Agencies have made available scores of documents, studies and data to the collaboration parties. While the Federal Agencies believe that the collaboration to date has been constructive and that progress has been made, the Agencies also recognize that there have been areas of disagreement to date and that there are a number of tough issues and areas of disagreement coming up that the sovereigns will be working on together (and that may not be resolved at the technical level). The Federal Agencies and other sovereigns intend to openly discuss all such areas of disagreement as they arise, and there is a process in place within the PWG to elevate those disputes that the group believes need to be elevated to their principals, and to accomplish the task the Court directed in its remand order: “clarifying policy issues and reaching agreement or narrowing the areas of disagreement on scientific and technical information.”

---

<sup>4</sup>See 16 U.S.C. § 1536(a)(2).

In addition to the progress on these substantive issues, the Parties involved in the collaboration also have been able to resolve a key procedural issue that was raised in Plaintiffs' filing preceding the First Remand Status Conference (on January 20, 2006). Specifically, in keeping with the Court's suggestions at the Status Conference, the PWG members discussed the issue of whether and in what manner non-sovereign Parties would be allowed to observe the meetings of the collaboration Workgroups. Although many of the sovereign Parties felt very strongly that allowing Plaintiffs or others to attend any of the collaboration meetings as observers would chill the free discussions that are essential to the collaboration, a compromise was reached. By agreement of counsel for Plaintiffs and counsel for Federal Defendants, after discussion among the counsel of all interested Parties, the Parties developed a set of conditions to allow Plaintiffs to have observers present at those meetings that have been designated as "technical" (rather than "policy") in nature. The details of the agreement are set forth in a letter from Seth Barsky to Todd True, dated February 23, 2006, which was previously submitted to the Court as an attachment to Plaintiffs' recent Reply regarding the motion for an extension of time. See Docket No. 1249, Attachment 1 thereto.

In addition, the collaborating entities have continued to hold "Tier II" meetings to specifically provide updates to the non-sovereign entities, and to answer questions. These have occurred generally on a monthly or "as needed" basis, and additional meetings are scheduled.

Finally, in keeping with the Federal Defendants' earlier indication that input from outside scientific bodies would potentially be incorporated into the remand process and included in the record as to certain key issues, NOAA Fisheries' Northwest Science Center has sought input from the Independent Science Advisory Board ("ISAB") regarding development of a new analytical model for fish passage. Specifically, a new comprehensive fish passage model

(COMPASS) is under development to replace the simulated passage model (SIMPASS) that has been used in the past. Because the new model is expected to be extensively relied upon for this BiOp, NOAA Fisheries and the other collaborating entities determined that the model's development will benefit from thorough and transparent scientific review. See letter from Usha Varanasi, Science and Research Director, Northwest Fisheries Science Center, to Mr. Erik Merrill, Coordinator, ISAB (January 12, 2006) (**Exhibit B** hereto). The ISAB has released an initial report of its review of the partially complete model, and their findings are available at <http://www.nwcouncil.org/library/isab/isab2006-2.htm>. They will continue their review when the model has been fully developed.

## **2. Extension of Time Issue**

In connection with Plaintiffs' recent motion for a five-month extension of the current remand due date, several Parties (including Federal Defendants) urged the Court to allow the question of any eventual extension of time to be thoroughly discussed among the sovereigns in the collaborative process before the Court would modify the current deadline of October 9, 2006. See, e.g., Docket Nos. 1244 (Federal Defendants' response), 1245 (Defendant-Intervenor Idaho's response); 1248 (response of the Regional Coalition); and 1246 (response of Plaintiff-Intervenor Oregon).

In keeping with the guidance of the Court at the March 17 telephonic status conference, the Federal Agencies are now working with the other collaborating entities to develop an informed view of how much additional time might be needed to accommodate the tasks remaining in the remand process, or, alternatively, what kind of mechanism should be in place to trigger extensions of time to the extent they become necessary. Once the PWG has arrived at its consensus view, the Parties expect that discussion with Plaintiffs will occur to see if all Parties

could agree to the PWG proposal. This issue was placed on the formal agenda for the Tier II meeting on March 29. The Parties will conclude these discussions prior to the April 21 status conference, as the Court has directed, and will report to the Court on this issue at or before the conference.

### **3. Fish Passage Center Update**

Although the resolution of the issues surrounding the transfer of functions from the Fish Passage Center (“FPC”) pursuant to Congressional direction is not within the scope of this case or the Court’s jurisdiction, Federal Defendants realize that some Parties, and the Court, are interested in this issue. We thus provide a brief overview here of the status of the administrative and litigation processes.

As previously reported, consistent with a recent Congressional Conference Committee Report, BPA implemented steps to obtain new contracts to carry out the essential functions of the FPC, upon expiration of the then-existing contract by its own terms on March 19, 2006. These steps, and the basis for them, are outlined in a declaration provided for that litigation by BPA’s Vice President for Environment, Fish and Wildlife, Gregory K. Delwiche. We attach that declaration here, for the Court’s background information, as **Exhibit C** hereto (Second Declaration of Gregory K. Delwiche).

As the Court is aware, two petitions for review of the BPA transfer of functions have been filed in the Ninth Circuit Court of Appeals, which has exclusive jurisdiction to review final decisions of BPA taken under the Northwest Power Planning and Conservation Act. On March 17, 2006, the Ninth Circuit granted emergency stays pending review in those cases, requiring the contractual relationship with the FPC to be continued past the expiration of the contract’s terms. See Confederated Tribes & Bands of the Yakama Indian Nation v. BPA, No. 06-71182, Order

(March 17, 2006); Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, et al., v. BPA, No. 06-70430, Order (March 17, 2006). In compliance with the Ninth Circuit's stay orders, BPA immediately issued a 30-day extension of the Pacific States Marine Fishery Commission's cooperative agreement covering the FPC using the same terms and conditions of the expiring agreement. This initial extension period will allow BPA to determine the appropriate next steps, and the duration for any further extensions.

A briefing schedule previously had been set in each of these cases that called for briefing throughout the Spring. However, the issues of potential consolidation and expediting of the petitions have been referred to the Circuit Mediator, who has set a case management conference in both cases for April 4. A new briefing schedule is expected to be set at that time, and the previously set schedules have been vacated.

Separately, a suit was brought in district court by individual employees of the FPC against Bonneville Power Administration for injunctive relief and Administrator Stephen Wright for monetary damages. The district court (Haggerty, J.) denied the motion for a temporary restraining order on March 17. See Dehart et al v. Bonneville Power Administration, et al., Civ. No. 06-00369 HU. As a result of the Ninth Circuit orders issued later the same day, the plaintiffs have agreed not to seek a preliminary injunction in the district court.

In keeping with the Court's requirement for quarterly status reports, Federal Defendants intend to file a Third Remand Report no later than July 3, 2006.

Dated: April 3, 2006

Respectfully Submitted,

SUE ELLEN WOOLDRIDGE  
Assistant Attorney General

SETH M. BARSKY  
Assistant Chief

*s/ Ruth Ann Lowery*

RUTH ANN LOWERY, Trial Attorney  
(202) 305-0210 (ph)  
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*

## CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed. R. Civ. P. 5(d), I certify that on April 3, 2006, the foregoing Second 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 Ruth Ann Lowery*

---