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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES

**FED. DEFS' FIFTH
REMAND REPORT**

Civil No. 01-640-RE

**FEDERAL DEFENDANTS'
FIFTH REMAND REPORT**

SERVICE, *et al.*

Defendants.

Federal Defendants hereby submit their Fifth Remand Report. This Report consists of the Remand Collaboration Status Update prepared by the Policy Work Group (Exhibit 1) with two attachments: (1) a calendar of meetings in the collaborative process that have taken place since the last status report; (2) an agenda for the PWG meeting held in Kah-Nee-Tah on November 1 through 3, 2006.

1. The Status Of Collaboration

This Court's Opinion and Order of remand directed NOAA to prepare a new Biological Opinion for the FCRPS and also directed the Federal Defendants to collaborate with the sovereign entities to achieve the goals of developing items to be included in a proposed action and of clarifying policy issues and narrowing areas of scientific disagreement. As the Court is aware, consistent with this directive, the Federal Defendants have been working diligently on the remand and, in collaboration with the sovereigns, are making progress in towards the new proposed action and/or reasonable and prudent alternative ("RPA") and preparation of a new Biological Opinion. Consistent with the Court's directive, the Action Agencies have commenced drafting a Biological Assessment that will set out the proposed action and/or RPA.

Some sovereigns involved the collaboration have expressed dissatisfaction with the Federal Defendants' view that the proposed action and biological opinion are ultimately the work products of the responsible Federal Agencies. These entities have suggested that everything in the remand, including the drafting of the BA and BiOp, must be done collectively

and reflect a consensus. The Federal Defendants do not believe that this is what the Court's remand order contemplates, nor is it called for by the ESA or its implementing regulations.

As importantly, just because the Action Agencies are drafting the BA does not mean that the collaboration has stopped or the Federal Defendants have "gone dark." Indeed, the Federal Defendants have been using the collaboration to guide the BA's development through the sharing of initial drafts and pieces of drafts to get input and refine the product. This iterative process will continue. The collaboration has not been perfect, but it has been open and transparent. The collaboration continues to provide a "common table" around which the sovereigns can discuss issues as well as the products that are being prepared and as this Court directed to clarify and narrow areas of disagreement.

Unlike earlier remand status reports, the current report does not strive to achieve consensus. Instead, we have invited all of the sovereigns to summarize their respective concerns - - in effect to preview their comments for the Court. In their comments, the Lower River Tribes concede that collaboration has procedurally followed the 10 step process, but express "grave concerns" that the initial products do not capture the discussions that have occurred in that process. They, however, acknowledge that this problem "may be rectified in future drafts."

The PA/RPA and BA products are not complete. They will not be complete until mid-March and even then will be subject to adjustment based on PWG discussion before being delivered to NOAA Fisheries. Given the long and often acrimonious debate that has occurred over many of these issues, the fact that skepticism exists in the Lower Tribes and, perhaps others, at this juncture is not surprising. **However, the issues of concern will continue to be discussed and debated.** We cannot, of course, assure the Court that the outcome of those

discussions will be acceptable to everyone in the collaboration. But we can, and do, assure the Court that the issues will be thoroughly vetted.

The Spokane Tribe expresses concern that the draft products received thus far “do not reflect key information derived from and work products of the collaboration.” The Spokanes, through one of their representatives, have submitted a complex mathematical approach for consideration by the PWG. That approach has been shared among all the sovereigns and thoroughly discussed on at least three occasions. Thus far, it has not received support among the PWG as the approach for going forward. Therefore, it has not been reflected or incorporated in any of the products to date. The Spokane’s representatives continue to strongly advocate this approach. We are open to further discussion the Spokane’s approach, particularly if it gains support among the other sovereigns.

Finally, the Federal Defendants have started working with the various sovereigns to discuss how collaboration and oversight might continue as the implementation of the new proposed action/RPA proceeds and to define the roles and responsibilities of sovereigns in that implementation, and ensure regional cooperation on salmon recovery.

2. Caveats

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 as a result of changes in the relevant substantive law. The discussions regarding the analytical framework and the proposed action/RPA reflect only the range of issues and approaches considered in the collaborative process with the sovereigns, and the final proposed action/RPA and analytical framework for the jeopardy analysis in the biological opinion may not necessarily reflect a particular issue or approach under discussion.

However, as we have stated previously, these discussions reflect 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 should 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 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 in this case. 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: February 2, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed. R. Civ. P. 5(d), I certify that on February 2, 2007, the foregoing Fifth 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:

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