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MEMORANDUM

TO: Regional Coordinating Group

FROM: John Ogan, Senior Counsel

SUBJECT: Update on FCRPS Biological Opinion legal proceedings

On July 1st, Judge Redden of the Federal District Court of Oregon issued an Opinion and Order ruling that the FCRPS Biological Opinion that had he had previously ruled did not meet requirements of the Endangered Species Act would remain in place during a one-year remand period. The judge's main conclusion in support of leaving the BiOp in place is that he found that the plaintiffs did not make a persuasive case that vacating the BiOp was necessary to enhance the survivability or recovery of listed salmon, making it "inappropriate and unnecessary to vacate or set aside the 2000 BiOp in its entirety while the parties address the deficiencies in the 2000 BiOp on remand." The judge also noted that while the flaws in the BiOp that led to the remand order were serious, still the court "has not yet ruled on the issue of the science supporting the 2000 BiOp."

On July 3rd, Judge Redden then issued a Supplemental Order. In the Supplemental Order, the judge first set a status conference for Monday, July 21, at 1:30 pm. The purpose of the conference will be "to outline the court's expectations and consider the parties' recommendations to ensure that the issues to be dealt with on remand will be concluded within the one-year period allotted." He also stated that he "wishes to hear the parties' views" on a set of issues that he goes on to describe, as well as "suggestions of what the parties can do to assist and expedite the federal government's task".

The July 3rd Order then states an expectation for the initial status conference on July 21st, directly related to the grounds on which it faulted the 2000 BiOp: "The court expects the government to update it on the efforts it is undertaking, and then plans to continue, to ensure that federal mitigation actions have undergone the required consultation and that the range-wide off-site non-federal mitigation actions that it earlier relied on, for at least eight salmon species, will be reasonably certain to occur."

The July 3rd Order then sets the dates for quarterly status reports -- October 1, 2003 and January 1 and April 1, 2004 -- and seeks in each of those to receive a "comprehensive and cumulative

assessment of the government's progress" in addressing the flaws noted in the Court's original ruling where he found the BiOp deficient. The court will hold a status conference to discuss each report about a week after the filing of the report.

The Supplemental Order also includes a few other requirements for the status reports:

- The federal government is to submit to the court the 2003 Annual Progress Report called for in the BiOp by October 1, 2003, if it is available, and by December 31, 2003 at the latest (this is the "2003 Check-In" that is called for in the BiOp). Judge Redden noted that the BiOp requires the 2003 Annual Progress Report to include a "failure report" if "key actions" in the RPAs are insufficiently implemented, and that the BiOp provides that the "consequences of insufficient implementation include hydropower mitigation actions, up to and including the breaching of Snake River dams." Thus, the October 2003 status report "shall include the government's consideration of hydropower mitigation actions should the habitat and hatchery options falter."
- In the January 2004 status report, "[i]f meaningful and specific progress has not been made, the second report must identify specific plans for hydropower mitigation actions available to the government, up to and including those referred to in the aforementioned section of the 2000 Biological Opinion."
- The third report (in April 2004) must "provide a specific timetable for implementation of the planned hydropower mitigation actions that the government has identified in its earlier progress reports," if meaningful and specific progress again has not been made."
- The final report, at the conclusion of the remand period, shall summarize what progress has been made (or not made) to bring the BiOp into compliance with the requirements of the ESA, and "identify all mitigation actions, including hydropower, hatchery, and habitat actions, that will be undertaken to ensure that compliance."

A copy of Judge Redden's July 1st Opinion and Order, and July 3rd Supplemental Order is attached. At this meeting, representatives of NOAA and the Action Agencies will update the Regional Coordinating Group members on the activities of the federal government with respect to the Orders of the federal district court.