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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, U.S.  
ARMY CORPS OF ENGINEERS, and U.S. BUREAU  
OF RECLAMATION,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC  
POWER COUNCIL, WASHINGTON STATE FARM  
BUREAU FEDERATION, FRANKLIN COUNTY  
FARM BUREAU FEDERATION, GRANT COUNTY

Civ. No. 01-0640-RE (Lead Case)  
CV 05-0023-RE  
(Consolidated Cases)

NWF'S REPLY TO FEDERAL  
DEFENDANTS' RESPONSE TO  
REQUEST FOR A STATUS  
CONFERENCE

FARM BUREAU FEDERATION, STATE OF  
IDAHO, INLAND PORTS AND NAVIGATION  
GROUP, and KOOTENAI TRIBE OF IDAHO,

Intervenor-Defendants.

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COLUMBIA SNAKE RIVER IRRIGATORS  
ASSOCIATION, and EASTERN OREGON  
IRRIGATORS ASSOCIATION,

Plaintiffs,

v.

CARLOS M. GUTIERREZ, in his official capacity as  
Secretary of Commerce, NOAA FISHERIES, and D.  
ROBERT LOHN, in his official capacity as Regional  
Director of NOAA Fisheries,

Defendants.

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Plaintiffs, National Wildlife Federation, et al., (“NWF”), respectfully offer this short reply to the federal defendants’ response to plaintiffs’ request for a status conference because federal defendants both misconstrue that request and devote most of their attention to issues that are not relevant to it.

First, in requesting a status conference, NWF does not seek to undermine the proposed schedule for proceedings on the 2008 FCRPS BiOp but to integrate into that schedule as effectively as possible other issues that could arise but that the parties could not resolve by agreement. See Plaintiffs’ Status Conference Request at 2. In addition, whether or not the Court ultimately chooses to appoint an expert or a panel of experts under Fed. R. Evid. 706 in this case, NWF has not asked the Court to appoint such an individual or panel to generally review “the merits of the 2008 BiOp,” Fed. Response at 1, or to depart in any way from the scope of review of final agency action prescribed by the Administrative Procedure Act (“APA”) and the relevant case law.<sup>1</sup> Rather, NWF simply has suggested that a status conference would be an appropriate mechanism to address whether and how to employ such experts in this case consistent with the

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<sup>1</sup> Federal defendants also mischaracterize the Ninth Circuit’s recent *en banc* decision in The Lands Council v. McNair, -- F.3d -- 2008 WL 2640001 (9<sup>th</sup> Cir. Jul. 2, 2008), as “requir[ing]” courts to “defer to an agency’s determinations.” Fed Response at 2 (citing and quoting McNair). In fact, McNair simply reaffirms long-standing principles of court review of final agency action and concludes that one or two prior decisions of the Circuit had strayed beyond these principles. See id. at \*9 (affirming that in APA review, the Court will “look to the evidence the Forest Service has provided to support its conclusions, along with other materials in the record, to ensure that the Service has not, for instance, ‘relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”) (quoting Motor Vehicle Mfrs. Assn., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983)); id. at \*10 (holding that an agency “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.”). NWF has made clear that any use of experts under Fed. R. Evid. 706 in this case that it proposes would be structured to conform to these and other principles of judicial review. See Plaintiffs’ Status Conference Request at 2.

governing law, and that it would likely benefit both the parties and the Court to do so early on.

Second, to the extent that the only issue the Court would need to address at such a status conference is the question of whether and how to employ experts under Fed. R. Evid. 706,<sup>2</sup> NWF is inclined to agree with federal defendants that such a step would benefit from briefing from the parties. Accordingly, NWF respectfully suggests that the Court set a date in approximately two weeks for any party wishing to submit a brief on this issue to do so. NWF would further suggest that such briefs should address the following subjects to make them as useful as possible:

- Whether to employ experts under Rule 706 in the summary judgment phase of the case and, if so, how to structure that participation to be consistent with APA review and the proposed schedule; and,
- Whether to employ experts under Rule 706 in any injunction proceedings regarding the 2008 FCRPS BiOp and, if so, how to structure that participation to be consistent with the Court's role in deciding issues of injunctive relief and the proposed schedule.

Because there would be both legal and practical issues to address in such a brief, NWF would further suggest that the Court set a page limit for such briefs of not more than 20 pages from the principal parties.<sup>3</sup> The Court could also schedule a hearing/status conference on this issue

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<sup>2</sup> At the time plaintiffs and federal defendants made their joint schedule proposal, we explained that we had not secured the agreement of all parties to the schedule nor did we determine whether any other party had any issue they wished to raise with the Court. At this time there do not appear to be any objections to the schedule and the Court has adopted it. Nor has any other issue that needs to be addressed been raised by any party. Thus, the issue of the use of experts under Fed. R. Evid. 706 may be the only outstanding issue that the Court would need to address at a hearing/status conference.

<sup>3</sup> For example, such briefs may need to review the contours of Rule 706 and how experts have been employed under the Rule in other cases, including those that do not involve APA review of final agency action. One mechanism courts have used in other cases that NWF believes may be appropriate here is to have the parties submit to the Court proposed questions for expert review and then have the Court propound a limited number of precise questions, based on those submissions and the Court's concerns, to the expert(s) for a response. This approach could help

shortly after submission of the briefs, at the Court's convenience, and take up any other matters that may arise at that time.

Finally, the bulk of federal defendants' response to plaintiffs' request for a status conference is taken up with a self-congratulatory description of parts of the remand process that produced the 2008 FCRPS BiOp. NWF would respectfully suggest that the issue before the Court is whether that Opinion complies with the requirements of the applicable laws. The extent and nature of the federal defendants' "collaborative" effort on remand and the various reviews of some sub-issues regarding certain aspects of the analysis are relevant, if at all, only to the extent that they eventually provide a record that demonstrates compliance with these laws. That question must be resolved by the Court; it cannot be resolved by federal defendants characterizing and touting their own procedures.

By contrast, determining whether and how the Court may employ experts under Fed. R. Evid. 706 in carrying out its review responsibilities is a relevant concern in this case and one that NWF believes should be addressed and decided early in the case in order to be incorporated into the schedule going forward as efficiently as possible.

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address concerns about Rule 706 expert involvement straying beyond the proper scope of review and could be integrated into the existing briefing schedule by having the parties propose questions as part of their opening summary judgment or injunction briefs.

Respectfully submitted this 28<sup>th</sup> day of July, 2008.

/s/ Stephen D. Mashuda

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On July 28, 2008, I served a true and correct copy of the following documents on the parties listed below:

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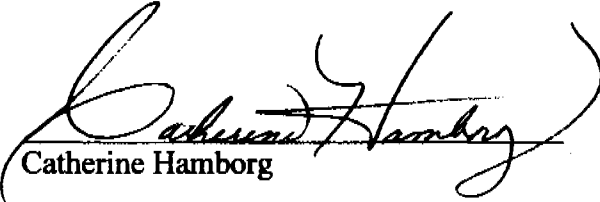
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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 28<sup>th</sup> day of July, 2008, at Seattle, Washington.

  
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