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DOJ-WILDLIFE SECTION

001/012



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DATE: March 4, 2002

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 12



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March 8, 2002

Nancy Mayer-Whittington
U.S. District Court
3rd & Constitution Avenue, NW
Room 1825
Washington, DC 20001


Re: National Association of Home Builders, et al. v.
Evans, et al., Civ. No. 00-2799 (D.D.C.)

Dear Ms. Mayer-Whittington:

Enclosed for filing are the original and one copy of the Joint Motion for Entry of Consent Order and Consent Decree in the above captioned case.

Thank you for your assistance with this filing.

Sincerely,


Wayne Hettenbach
Trial Attorney
(202) 305-0213

Enclosure

cc: All counsel of record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)
 et al.)
)
 Plaintiffs,)
)
 vs.)
)
 DONALD L. EVANS, et al.,)
)
 Defendants.)

Case No. 1:00-CV-02799
(CKK)

JOINT MOTION FOR ENTRY OF CONSENT ORDER
AND MEMORANDUM IN SUPPORT

The parties hereby request that the Court enter the contemporaneously filed Consent Order. The parties have reached agreement resolving all issues and claims raised in the instant action, as set forth in greater detail in the Consent Order.

The parties note for the Court that there are parties that have applied for but have not been granted intervention. The government did not and does not object to these parties' intervention, while the plaintiffs have objected and continue to do so.

WHEREFORE, for all of the foregoing reasons, the parties respectfully request that this Court enter the attached Consent Order.

Respectfully submitted March, 8, 2002,

THOMAS SANSONETTI,
Assistant Attorney General
Environment and Natural Resources Division
JEAN WILLIAMS, Chief

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,
et al.,

Plaintiffs,

vs.

DONALD L. EVANS, et al.,

Defendants.

Case No. 1:00-CV-02799
(CKK)

CONSENT DECREE

WHEREAS, the National Association of Home Builders, Oregon Building Industry Association, Home builders Association of Kitsap County, and Tice Ranch I.P., American Forest Resource council, Building Industry Association of Washington, California Building Industry Association, Coos County, Grant County, Home Builders Association of Tri-Cities, Idaho County, Intermountain Forest Association, Kittitas County, Okanogan County, Skagit County, Skamania County, and Valley County (collectively "Plaintiffs"), commenced this action for declaratory and injunctive relief ("this Action") on or about November 20, 2000, against the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, the Secretary of Commerce (then Norman Mineta, now Donald L Evans), (collectively "NMFS");

WHEREAS, Plaintiffs allege that NMFS has unlawfully designated critical habitat for nineteen evolutionarily significant units of salmonids more specifically set forth at 50 C.F.R. § 226.212, in violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1533(b)(2), the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq., and The Regulatory

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D.O.I.-WILDLIFE SECTION

Flexibility Act ("RFA"), 5 U.S.C. § 601-612;

WHEREAS, Plaintiffs allege that NMFS has unlawfully designated essential fish habitat for Pacific coast salmonids, in violation of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or "MSA"), 16 U.S.C. § 1801 *et seq.*, and RFA;

WHEREAS, the Tenth Circuit Court of Appeals has issued a decision addressing the scope of the analysis of economic impacts under ESA section 4(b)(2) in designating critical habitat. New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. May 11, 2001);

WHEREAS, the approach to economic analysis used by NMFS when promulgating 50 C.F.R. § 226.212 is similar to the approach ruled to be insufficient by the court in New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277;

WHEREAS, NMFS has previously determined for the designation of critical habitat at 50 C.F.R. § 226.212 that:

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements . . . beyond those which already accrue from section 7 of the ESA, which is triggered by the species' listing. Section 7 requires Federal agencies to ensure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat determined to be critical. The consultation requirements of section 7 are nondiscretionary and are effective at the time of species' listing. Therefore, federal agencies must consult with NMFS and ensure their actions do not jeopardize a listed species regardless of whether critical habitat is designated.

65 Fed. Reg. at 7765-66.

WHEREAS, NMFS has previously determined for the designation of critical habitat at 50 C.F.R. § 226.212 that, "NMFS does not anticipate that the designation will result in

significant additional requirements for non-Federal interests." 65 Fed. Reg at 7766;

WHEREAS, Plaintiffs and NMFS have agreed to a settlement of this Action, without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this Action;

WHEREAS, by entering into this Consent Decree, Plaintiffs and NMFS do not waive or limit any claim or defense, on any grounds, related to any agency action that may ensue from NMFS' performance of its obligations as a result of this Consent Decree;

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the claims in this lawsuit without protracted litigation;

THEREFORE, the Parties agree AND IT IS HEREBY ORDERED as follows:

1. The critical habitat regulations for salmon and steelhead adopted by the United States on February 16, 2000, 50 C.F.R. § 226.212 (65 Fed. Reg. 7764) (Feb. 16, 2000) (the "Rules") are hereby vacated and remanded to NMFS for new rulemaking consistent with all applicable federal laws.
2. Pursuant to Fed. R. Civ. P. 41(a)(1), the Plaintiffs hereby dismiss without prejudice all claims and causes of action asserting that the Rules were adopted in violation of the Endangered Species Act, Regulatory Flexibility Act, and National Environmental Policy Act, specifically the First, Second, and Third causes of action alleged in the Second Amended Complaint in this Action.
3. Pursuant to Fed. R. Civ. P. 41(a)(1), the Plaintiffs hereby dismiss without prejudice all claims and causes of action by the Plaintiffs asserting that the Essential Fish Habitat ("EFH") designations for Pacific Salmon were adopted in violation of the Magnuson-

Stevens Act, Regulatory Flexibility Act, and Administrative Procedure Act, specifically the Fourth and Fifth causes of action in the Second Amended Complaint in this Action.

4. Nothing in this Consent Decree shall be construed to limit or modify the discretion accorded NMFS by the ESA, NEPA, the MSA, the RFA, the APA or general principles of administrative law.

5. Nothing in this Consent Decree shall be interpreted as or constitute a commitment or requirement that NMFS obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take any action in contravention of the ESA, NEPA, the MSA, the RFA, the APA, or any other law or regulation, either substantive or procedural.

6. Plaintiffs do not waive any right they may have to bring suit against NMFS in the future for any violations of law which have arisen or may arise, including but not limited to violations of the ESA for any future designation of critical habitat at issue in this Action and violations of the MSA for designation of EFH for Pacific Salmon.

7. Upon entry of this Consent Decree by this Court, the Plaintiffs intend to seek from NMFS reimbursement for attorneys fees and costs expended in this matter related to their pursuit of claims related to the designation of critical habitat as set for at 50 C.F.R. § 226.212. NMFS agrees that plaintiffs are entitled to an award of reasonable attorney's fees and costs incurred for pursuit of claims related to the designation of critical habitat as set for at 50 C.F.R. § 226.212, subject to a showing that such fees and costs are reasonable and appropriate. NMFS reserves all its defenses, the right to challenge the reasonableness and appropriateness of any attorneys fees and costs expended in this matter, and the right to litigate this issue before the court, if necessary. Plaintiffs agree that they are not entitled to reimbursement for attorneys

fees and costs expended in this matter related to their pursuit of claims related to the designation of essential fish habitat, and agree not to seek such fees. The Parties agree that the Court shall retain jurisdiction over the case for the sole purpose of resolving any dispute between the parties regarding Plaintiffs' future claims for attorney fees.

8. Each undersigned representative of the Parties to this Consent Decree certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such Party to this Consent Decree. By the signatures below, the Parties consent to entry of this Consent Decree.

Presented by and Agreed to by:

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Dated: *3/8/02*

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Dated: 3/8/02

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Of Counsel for Federal Defendant

ENTERED this ___ day of _____, 20002

Judge Colleen Kollar-Kotelly,
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,
 et al.,

 Plaintiffs,

 vs.

 DONALD EVANS, et al.,

 Defendants.

Case No. 1:00-CV-02799
(CKK)

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2002, copies of Joint Motion for Entry of Consent Order and Memorandum in Support and Consent Decree were sent via facsimile and U.S. Mail, postage paid to the following:

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