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

Intervenor-Defendants.

COLUMBIA SNAKE RIVER IRRIGATORS
ASSOCIATION and EASTERN OREGON
IRRIGATORS ASSOCIATION,

Plaintiffs,

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

RESPONSE OF SOVEREIGNS TO
FEDERAL DEFENDANT'S
SEPTEMBER 15, 2009, FILING

v.

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

Defendants.

INTRODUCTION

This submission marks the first time in the long-running history of this litigation that these parties have come together to impress upon the Court the historic opportunity presented by the 2008 Biological Opinion and the Federal Adaptive Management Implementation Plan ("AMIP") filed on September 15, 2009. This memorandum is supported by the Confederated Tribes of the Warm Springs Reservation of Oregon, the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Colville Reservation, the Kootenai Tribe of Idaho, the Confederated Salish and Kootenai Tribes (together, "the Tribes"); and the State of Washington, State of Montana and State of Idaho (together, the "States"). These Sovereigns, who at times have opposed each other in this litigation, seek to end it as allies to implement the 2008 Biological Opinion, to collaboratively supply the necessary oversight and rigor to the AMIP that will be necessary to not only protect salmon and steelhead from jeopardy, but to take unprecedented steps toward habitat restoration throughout their range.

Because of intensive investment in time and resources by all the parties to this lawsuit, including the Federal Government and its new administration, a more trusting attitude is justified -- cautious optimism that the pieces are in place to bring the management and operation of federal hydropower in line with 21st Century technology and environmental values.

DISCUSSION

There can be no legitimate doubt that the Tribes in particular, whose abiding interest in salmon and steelhead, lamprey, and all native fish species of the Columbia Basin extends to time immemorial, have played an important role in keeping the federal government honest in carrying

out its obligations under the Endangered Species Act. Although steps taken to preserve and protect some runs of salmon and steelhead have at times caused impacts to species of cultural importance to the Tribes who reside in the upper reaches of the Columbia River system, the aforementioned upriver and downriver Tribes share the goal of moving from litigation over the FCRPS Biological Opinion, to working together to implement it. The Tribes and States believe that success has no chance without a comprehensive, action-based restoration effort. Such actions are included in the Biological Opinion and AMIP. An honest and objective evaluation, which we believe the Obama Administration did accomplish, confirms we now have concrete and measurable actions to:

- Rebuild self-sustaining, harvestable populations
- Apply consistent scientific criteria across all the "Hs"
- Evaluate and implement measures in partnership with the Sovereigns
- Favor best available science over political expediency or unachievable consensus
- Create many new habitat projects through the MOA Accords

This Court has diligently pressed all Parties with respect to the law. But this Court, both recently and in the past, has also made its mind well-known that, in the end, only *actions* for salmon protection would end the litigation. And we are struck by how this BiOp and AMIP plan has become so much of what we've heard *this Court* insisting upon for years. The Court has demanded the use of best available science; this plan is overwhelmingly supported by federal, tribal, and state scientists, has had the critical analytics reviewed by the Regional ISRP or ISAB, and now enjoys the support of Oregon's top scientist, Dr. Lubchenco. This Court has urged that we look first and hard at the hydrosystem measures and heard the science and debate regarding spills and flows. This BiOp's spill and flow measures are based on what has been specifically ordered by this Court. In 2000, when the habitat mitigation was originally conceived and was primarily a subbasin planning concept, this Court gathered the Parties and told us that a planning process would not suffice, that there must be firm commitments of funding to move from

planning to on the ground actions. This new BiOp and the Fish Accords bring unprecedented financial resources forward to implement an aggressive habitat component of an All-H plan. And with respect to Snake River ESUs, many of us believe that this Court has been saying that major configuration changes for Lower Snake River dams – the possibility of breaching – should remain in the salmon recovery vocabulary. With this Administration’s 2008 BiOp and AMIP, Snake River dam configuration issues remain on the table. We respectfully submit that NOAA and the Obama Administration have finally delivered on the actions this Court has been seeking for years.

The minority has leveled criticism at the value of the habitat measures in the Biological Opinion and AMIP, and at the manner in which they will be evaluated. The arguments against the measurement or achievability of habitat restoration are suspect. For several decades, and to this day, Oregon and the Nez Perce Tribe have passionately pursued and spent millions of BPA and other state and federal dollars annually on the type of habitat projects required by this BiOp, and the environmental plaintiffs have time and again stood before this Court and effusively stated their support for habitat restoration and protection and the Fish Accord habitat funding commitments. We applaud and support each of the plaintiff’s efforts to make habitat protection a cornerstone of salmon recovery in their management actions. The lack of consistency between their management and policy actions and their legal tactics on the issue of habitat is curious. The fact is that these key habitat components of the Biological Opinion were designed in cooperation with the federal government by the biologists employed by the Sovereigns. *See Comprehensive Analysis, Attach. C-1-8 – 14.* The Tribal and State biologists are on the ground, know the streams, the rivers and creeks that are targeted for restoration efforts, and take their stewardship role seriously. Many dedicated, apolitical scientific professionals worked countless hours to define the role of specific, accountable habitat actions in achieving success with the new Biological Opinion. We believe that these actions will be successful and it is our intention to

hold the federal government accountable under the Biological Opinion and its adaptive management plan.¹

A cautionary note, however, is in order. While funding for projects under the FCRPS Biological Opinion does come from the federal government, the Tribes and States also invest significant time and resources in habitat projects and those resources are not limitless, nor are they committed without great sensitivity to seeing real return benefit for the species. Imposing unachievable or overly - quantitative metrics as the only way to measure success of habitat restoration will pose significant logistical barriers to implementing such projects.

Not all Sovereigns in the Columbia River System have entered agreements with the federal government for habitat projects under this Biological Opinion. In fact, not all Tribes who join in this submission have done so. However, all the undersigned Tribes and States are pursuing additional habitat projects for fish species that they are funding in whole or in part, with or without the federal government; their support for habitat restoration generally is a scientific and value judgment that has nothing to do with this litigation. These Tribes and States believe they offer, especially in unison, a credible voice for the importance of the habitat aspects of the Biological Opinion, and the pressing need to move forward in implementing them. With respect to the Tribes, who have given voice to the natural world for thousands of years, there is no greater goal than creating habitat to restore sustainable salmon and steelhead populations and as well as other fish species, listed or unlisted, of critical importance to the Tribes. That the Tribes and States would join together to convey that voice to the Court shows the level of trust and confidence these Sovereigns have in the AMIP, a good faith effort by the Obama Administration that deserves support.

¹ The Three-Treaty Tribe Fish Accord identifies specific habitat projects to be implemented through Fiscal Year 2018, and further, calculates the estimated biological benefits for each listed ESU and population within the ESU (in terms of increased egg-to-smolt productivity) at 10 and 25 year periods. See Three-Treaty Tribe Fish Accord, Appendix G, *Estimated Habitat Quality Improvement and Survival Benefits of MOA Projects on Populations of Listed Salmon and Steelhead*. AR 33072 at 005413 through 005483.

CONCLUSION

Criticism of the AMIP and in particular its treatment of habitat projects is unjustified and designed to set an unachievable standard that will guarantee failure and enduring litigation. These Tribes and States keenly look forward to the day in which all the parties to this lawsuit can move from argument to action. Until that day arrives, however, the Tribes and States ask that the Court take the necessary actions to allow these parties to move forward in implementing a Biological Opinion that has survived the intense scrutiny of the both the Court and the new federal administration.

DATED: October 23, 2009

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I hereby certify that I served the foregoing RESPONSE OF SOVEREIGNS TO FEDERAL DEFENDANT'S SEPTEMBER 15, 2009, FILING on the following parties listed below:

by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

- by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Bend, Oregon.
- by hand delivery.
- by sending via overnight courier in a sealed envelope.
- by faxing to the attorney at the fax number that is the last-known fax number for the attorney's office.
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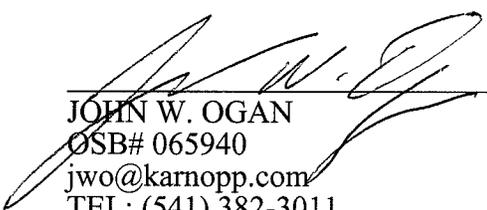
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