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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

**NATIONAL WILDLIFE FEDERATION, et  
al.**

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES  
SERVICE, et al.**

Defendants.

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

**JOINT MEMORANDUM OF  
DEFENDANT-INTERVENORS  
KOOTENAI TRIBE OF IDAHO AND  
CONFEDERATED SALISH AND  
KOOTENAI TRIBES IN SUPPORT  
OF CROSS MOTION FOR  
SUMMARY JUDGMENT AND IN  
RESPONSE TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

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**TABLE OF CONTENTS**

I. INTRODUCTION. . . . . 1

II. OVERVIEW OF THE TRIBES AND THEIR INTERESTS IN THIS CASE. . . . . 3

    A. Kootenai Tribe of Idaho. . . . . 3

        1. A brief history of the KTOI. . . . . 3

        2. The KTOI’s interest in this case. . . . . 4

        3. Recent settlement of the lawsuit involving Libby Dam operations. . . . . 6

    B. Confederated Salish and Kootenai Tribes. . . . . 7

        1. A brief history of the CSKT. . . . . 7

        2. The CSKT’s interest in this case. . . . . 8

    C. Why the Tribes Support the 2008 BiOp’s Montana Operation. . . . . 11

III. LEGAL STANDARDS . . . . . 13

    A. Administrative Procedures Act Standard of Review. . . . . 13

    B. Effect of the Ninth Circuit’s en banc McNair decision. . . . . 14

    C. Review should be limited to the administrative records. . . . . 14

IV. ARGUMENT. . . . . 15

    A. NOAA’s Jeopardy Analysis is Consistent with the ESA. . . . . 15

        1. Plaintiffs improperly seek to impose on NOAA a jeopardy methodology of their own creation. . . . . 15

        2. NOAA’s jeopardy analysis meets or exceeds the ESA’s requirements. . 18

    B. The Tribes Take No Position on Plaintiffs’ Clean Water Act Claim. . . . . 21

V. CONCLUSION. . . . . 22

**TABLE OF AUTHORITIES**

FEDERAL CASES

Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001) ..... 13

Bennett v. Spear, 520 U.S. 154 (1997) ..... 13

Cherokee Nation v. Georgia, 30 U.S. 1 (1831). ..... 7

Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) ..... 10

Confederated Salish and Kootenai Tribes v. United States,  
16 Ind. Cl. Com. 1 (Sept. 29, 1965) ..... 7

Defenders of Wildlife v. U.S. Dep't of the Interior, 354 F.Supp.2d 1156 (D. Or. 2005) ..... 16

Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) ..... 14

Joint Board of Control v. United States, 832 F.2d 1127 (9th Cir. 1987) ..... 10

Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032  
(9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985) ..... 11

Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) (en banc) ..... 13, 14, 17

Montana v. EPA and Confederated Salish and Kootenai Tribes, 137 F.3d 1135  
(9th Cir. 1998), cert. denied, 525 U.S. 921 (1998) ..... 9, 10

Montana Power Company, 32 FERC ¶ 161,070 (July 17, 1985) ..... 10

National Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) ..... 13, 14

National Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917  
(9th Cir. 2008) ..... 16, 18, 19, 21

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) ..... 14

Protect Our Water v. Flowers, 377 F.Supp.2d 844 (E.D. Cal. 2004) ..... 16

United States v. Adair, 478 F.Supp. 336 (D.Or. 1979) ..... 11

<u>United States v. Anderson</u> , 736 F.2d 1358 (9th Cir. 1984) .....	11
<u>United States v. Washington</u> , 759 F.2d 1353 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985) .....	7

FEDERAL STATUTES

16 U.S.C. § 1533(f) .....	17, 18
16 U.S.C. § 1536(a) .....	16, 17
33 U.S.C. §1341(a)(1) .....	8
12 Stat. 975 .....	4
24 Stat. 388, <u>as amended</u> , 25 U.S.C. § 331 .....	5

FEDERAL REGULATIONS AND OTHER FEDERAL AUTHORITY

50 C.F.R. § 402.02 .....	16
51 Fed. Reg. 19,926 (June 3, 1986) .....	16, 17
59 Fed. Reg. 45,989 (Sept. 6, 1994) .....	5

## **I. INTRODUCTION.**

Three years ago, after having found legal flaws necessitating remand of the 2004 biological opinion (BiOp) for operations of the Federal Columbia River Power System (FCRPS), this Court started the parties down an unprecedented and historic collaborative remand path. Warning that the “preparation or revision of NOAA’s biological opinion on remand must not be a secret process with a disastrous surprise ending,” Opinion and Order of Remand (Oct. 7, 2005) at 8, the Court rightly concluded that “[c]ollaboration with the sovereign parties is necessary and must occur.” *Id.* at 4. See also id. at 11-12 (ordering NOAA and the action agencies to collaborate with the sovereign states and Tribes in developing the proposed action, refining policy issues and “reaching agreement or narrowing the areas of disagreement on scientific and technical information”). Although some may have followed the collaborative remand path more willingly than others, in the end, the parties heeded the Court’s stern admonitions for an open and transparent path to a lawful and “fish first” biological opinion.

The result of the Court’s collaborative remand process was an extraordinary effort among the sovereigns to truly vet the complex and often contentious FCRPS operations issues facing the Columbia River Basin. For perhaps the first time, and certainly to a greater degree than seen in recent history, NOAA and the action agencies sat at a common table with state and Tribal fish and wildlife managers to critically examine river operations and the effects of those operations on a host of biological, chemical and physical variables, including populations of Endangered Species Act (ESA)-listed fish. Ultimately, after devoting considerable time and talent to the issues, including seeking input from the Independent Scientific Advisory Board (ISAB) for certain particularly thorny issues, NOAA in May 2008 issued the 2008 FCRPS BiOp. At about the same time, and as a direct outgrowth of the Court’s collaborative remand process, the Bonneville Power Administration (BPA) issued a Record of Decision (ROD) on the so-called Fish Accords, a series of unprecedented agreements with regional sovereigns (including two states and four Tribes) through which “BPA commits funding on a long-term basis to tribal and state fish and wildlife

managers to implement projects for the benefit of fish in the Basin, recognizing their role as co-managers of the fishery resource.” COE AR 007781.<sup>1</sup> The Fish Accords reflect a new paradigm in the Basin, that of a “collaborative partnership [among regional sovereigns] rather than continuing with an adversarial relationship.” *Id.* As a result of the new paradigm, plaintiffs’ inevitable challenge to the 2008 FCRPS BiOp and the action agencies’ RODs finds itself enjoying substantially less support than in the last round of FCRPS litigation. And so it should.

Defendant-intervenors the Kootenai Tribe of Idaho (KTOI) and the Confederated Salish and Kootenai Tribes (CSKT) urge the Court to uphold the 2008 FCRPS BiOp along with the RODS issued by the U.S. Army Corps of Engineers and the Bureau of Reclamation for FCRPS operations. As set forth below, the KTOI and the CSKT are upper Basin Tribes affected by river operations in ways no less substantial, though perhaps less familiar to the Court, than those experienced by the lower Basin Tribes. Rather than address all of the issues before the Court on summary judgment, the Tribes will focus this brief on select issues and join in argument of other parties where appropriate. As the briefing and record will demonstrate, at the end of the day, the Court should grant summary judgment in favor of the federal defendants and defendant-intervenors, thereby allowing full implementation of the planned FCRPS operations for the next ten years.

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<sup>1</sup> Three administrative records (ARs) have been filed in this case – one by NOAA Fisheries in support of the 2008 FCRPS BiOp, a second by the U.S. Army Corps of Engineers (COE or Corps) in support of its 2008 ROD for FCRPS operations, and a third by the Bureau of Reclamation (BOR) in support of its 2008 ROD for FCRPS operations. This brief cites to the record by identifying the relevant agency and page number – for example, COE AR 007781 refers to page 7781 of the Corps’ AR. Where a document’s individual pages were not renumbered in the record but the document itself was assigned an identifying number, the brief refers to the relevant agency, the relevant document number and the page(s) according to original pagination – for example, NOAA AR Doc. B0089 at B.2.1-3 refers to page B.2.1-3 of document B0089 in NOAA’s AR.

## **II. OVERVIEW OF THE TRIBES AND THEIR INTERESTS IN THIS CASE.**

### **A. Kootenai Tribe of Idaho.**

#### **1. A brief history of the KTOI.**

The Kootenai Tribe of Idaho is a federally-recognized Tribe headquartered near Bonners Ferry in northern Idaho's Kootenai River Valley. To appreciate the KTOI's perspective in this case, it helps to understand a bit of the Tribe's history. The Kootenai Tribe as a whole consists of seven modern bands, including two in the United States (the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes of the Flathead Reservation) and five in Canada. These bands have inhabited portions of Idaho, Montana, Washington, British Columbia and Alberta since time immemorial and are divided into Lower and Upper Kootenai groups. The Lower and Upper Kootenai groups interacted and intermarried on a regular basis, although the Upper Kootenai generally resided along the Kootenai River and its drainages and tributaries above Kootenai Falls. The KTOI belongs to the Lower Kootenai group, which inhabited the area along the River from above the Falls to Kootenay Lake.

In 1855, the Kootenai, Salish and Flathead were called to a treaty session at Hellgate, Montana for the purpose of ceding territory to the U.S. government. The Salish and Upper Kootenai tribes entered into the Hellgate Treaty with the United States, thereby ceding the majority of the Kootenai territory and creating a reservation near Flathead Lake for the newly created Confederated Salish and Kootenai Tribes. Although the Kootenai Tribe of Idaho did not participate in the negotiations or sign the Treaty, the treaty-ceded territory included the Idaho Kootenai's aboriginal lands. Years later, upon recognizing that the KTOI was separate and distinct from the Kootenai of the Flathead, U.S. government representatives traveled to the Bonners Ferry area to discuss the impact of the Treaty with Tribal members. With limited success, the government's Indian agents tried to persuade the Kootenai living in and around Bonners Ferry to leave their aboriginal homeland and take allotments on the Flathead Reservation. The U.S. government eventually gave up and allowed the remaining members of the KTOI to stay in the

Bonnors Ferry area. These members later received allotments under Section 4 of the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq.

Although Tribal members continued to hunt, fish and gather throughout their aboriginal territory, this became increasingly more difficult over the years. Through numerous fraudulent actions and surveying errors, many of the Tribal allotments were lost to non-Indians. Private ownership of property throughout the valley and dwindling harvest opportunities further decreased the hunting and fishing in the area. By 1974, the Tribe consisted of a mere 67 members and was tired after years of struggle. Thus, on September 20, 1974, the KTOI declared war on the United States – a peaceful war, that is. Having finally gotten the U.S. government’s attention, the KTOI was deeded 12.5 acres of land and began the work of rebuilding itself. By 1986, the KTOI was the proud owner of the Kootenai River Inn, a business venture that put the Tribe on the road to economic independence and allowed it to focus its formidable energies and determination on keeping the Creator-Spirit’s Covenant to guard and keep the land.

**2. The KTOI’s interest in this case.**

Tribal identity for the KTOI depends in large part on caring for the many native fish and wildlife species in the Kootenai River Valley, whether for cultural, subsistence or ceremonial purposes. KTOI Tribal elders continue to pass down the history of the beginning of time, which tells that the Kootenai people were created and placed on earth by Quilxka Nupika, the Supreme Being, to keep the Creator-Spirit’s Covenant – to guard and keep the land forever. The KTOI has never lost sight of its original purpose as guardian of the land, and the Creator-Spirit’s Covenant is the foundation upon which all Tribal activities are based. FCRPS operations affect this Tribal foundation, because the Kootenai River system includes Libby Dam, part of the FCRPS.<sup>2</sup> As with

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<sup>2</sup> The Kootenai River originates in British Columbia, flows into northwestern Montana and through Libby Dam, crosses the border into northern Idaho and through Bonnors Ferry, and then flows north back into British Columbia before entering the Columbia River at Castlegar. See COE AR 000001 (overview map showing the course of the Columbia River system and the location of the various FCRPS projects).

FCRPS operations on the mainstem of the Columbia River, FCRPS operations involving water storage and releases at Libby Dam affect downstream Kootenai River conditions.

The KTOI has been playing an active role in protecting and recovering Kootenai River Valley species for many years, although in recent years fish declines have forced the Tribe to make hard choices regarding its use of natural resources. This is true for a number of species, but it is particularly true with regards to the Kootenai River white sturgeon, *Acipenser transmontanus*. During the early 1990s, prior to the Kootenai River white sturgeon's listing under the ESA, the KTOI voluntarily agreed to forego harvest of sturgeon for any purpose and initiated an innovative and collaborative conservation aquaculture program to preserve genetic variability and prevent the species' extinction. See generally COE AR 001729-40 (American Fisheries Society Symposium publication describing the conservation aquaculture program). The Tribe forged partnerships with many similar-minded entities, including the Idaho Department of Fish and Game, the Montana Department of Fish, Wildlife and Parks, the British Columbia Ministry of Environment, the U.S. Fish and Wildlife Service (FWS), the Corps, BPA and B.C. Hydro, and with fisheries scientists throughout the Northwest, all in a concerted effort to improve the Kootenai River white sturgeon's future. Although the conservation program did not prevent the sturgeon's listing as an endangered species, see 59 Fed. Reg. 45,989-46,002 (Sept. 6, 1994), the fish's 1994 listing did not cause the KTOI to abandon its cooperative efforts on the sturgeon's behalf.

The KTOI participated throughout the collaborative remand process in this case to be a voice for upriver species like the sturgeon and to remind fish and wildlife managers to consider the needs of the Basin as a whole. The Tribe now supports the 2008 BiOp and the action agencies' RODs, which comply fully with all applicable laws and are supported by their underlying records. The KTOI particularly supports the agencies' adoption of hydropower operations that more closely approximate the natural hydrograph below Libby Dam. See, e.g., NOAA AR Doc. B0089 at B.2.1-3 to B.2.1-4 (describing operations for FCRPS storage projects, which includes Libby Dam, in the

action agencies' biological assessment). This support for the so-called Montana Operation is discussed more fully below in part II.C.

**3. Recent settlement of the lawsuit involving Libby Dam operations.**

On September 2, 2008, after months of difficult discussions and a settlement session in Missoula, Montana before Judge Lynch, the parties to Center for Biological Diversity v. U.S. Fish and Wildlife Serv., Case No. CV 03-29 DWM (D. Mont), settled the longstanding lawsuit involving operations of Libby Dam and its effects on the Kootenai River white sturgeon. The KTOI was a party to that lawsuit, having intervened on the side of the federal defendants to defend the challenged BiOp, which it believed provided the necessary flexibility through adaptive management to protect the sturgeon and its habitat. The State of Montana also intervened, although as a plaintiff-intervenor, in contrast with its defendant-intervenor alignment in this case.

Under the terms of their stipulated settlement agreement, a copy of which was filed with the court, the parties in the Libby Dam lawsuit agreed to work collaboratively towards a common goal for the benefit of fish – similar to the collaboration that has developed in this case. For example, the Corps has agreed to begin the process for making structural modifications at Libby Dam to update the cumbersome selective withdrawal system for better management of water temperatures below the dam. Both the Corps and FWS have agreed to cooperate in good faith with and support the KTOI's ambitious efforts to implement the Kootenai River Restoration Project Master Plan, which seeks a more holistic approach to restoring healthy river functions. Montana has agreed that under certain carefully-defined conditions designed to prevent inadvertent harm to other species, it will provide a limited waiver of its water quality standard for total dissolved gas so that spill can be implemented for the possible benefit of sturgeon.

The parties reached agreement on a number of other contentious issues, but the central point is that they invested significant time and energy in crafting a collaborative path forward for the benefit of the Kootenai River white sturgeon and other upper Basin species. River operations assessed in the 2008 FCRPS BiOp before this Court are consistent with the parties' agreed-upon

path forward for sturgeon. See BOR AR 000054 (discussing the Corps' ESA consultations with FWS over the interplay between the Libby Dam BiOp and the FCRPS BiOp). Now what is needed is time – time for the parties to continue implementing actions expected to benefit fish, time for the parties to assess the biological effects of those operations, and, most importantly, time and resources not spent in a courtroom but instead focused directly on Columbia River Basin fish and wildlife species.

**B. Confederated Salish and Kootenai Tribes.**

**1. A brief history of the CSKT.**

Until 1871, the United States conducted its official relations with the sovereign tribal nations comprising the “domestic dependent nations”<sup>3</sup> within its territories by treaty negotiated by the executive branch and ratified by Congress. CSKT Tribal chiefs signed the Hellgate Treaty on July 16, 1855.<sup>4</sup> The Hellgate Treaty establishes the scope of CSKT rights in this case. Under it, the Tribes retained certain rights on ceded aboriginal territory, including, *inter alia*, the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory. This includes the fishery and all natural resources in and appurtenant to significant reaches of the Upper Columbia watershed, including the reservoirs operated as part of the FCRPS.

By the terms of the Hellgate Treaty, the CSKT agreed to cede vast areas of their aboriginal territory to the United States, including certain waters that are included in this litigation.

Confederated Salish and Kootenai Tribes v. United States, 16 Ind. Cl. Com.1 (Sept. 29, 1965). In return, the United States promised to provide specified goods and services and guaranteed that the CSKT could continue their traditional way of life. See Treaty of Hellgate, Arts. IV and V, 12 Stat. 975; see also United States v. Washington (“Appeal of Phase II”), 759 F.2d 1353, 1366, n. 2 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985). To effectuate this guarantee, the CSKT retained

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<sup>3</sup> Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

<sup>4</sup> 12 Stat. 975, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859.

exclusive possession of a delineated homeland (i.e. the Flathead Indian Reservation) and expressly reserved in perpetuity hunting, fishing, gathering and grazing rights in the ceded lands. See Treaty of Hellgate, Arts. II and III. The fishing rights were reserved by Article III language that provides in relevant part:

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty of Hellgate, 12 Stat. 975, 976.

Thus, for most or all Columbia River tributary streams located in the State of Montana, the CSKT retain either an exclusive or shared right to manage and utilize the fishery. Id. The CSKT have effectuated this right directly by Tribal members individually and continuously performing their traditional fishing activities since time immemorial throughout the CSKT aboriginal territory and by having developed significant CSKT governmental natural resource programs to manage and protect the sensitive fish species within the Flathead Reservation. The CSKT have effectuated this right indirectly by consulting and coordinating with state and federal fish management agencies about fish management and protection issues throughout the CSKT aboriginal territory.

## **2. The CSKT's interest in this case.**

The CSKT have recognized Treaty rights and interests within and to waters and lands that coincide with hydropower facilities and reservoirs of the FCRPS. Specifically, the Kootenai River and the Flathead River systems include Libby Dam and Hungry Horse Dam, respectively, and associated reservoirs - Lake Koocanusa and Hungry Horse Reservoir - all or most of which are part of the CSKT's aboriginal lands and waters and subject to Treaty protections. All changes or mandates in hydropower operations that result from this litigation over the FCRPS, such as flow augmentation, will call for water that is stored behind, and that will flow through or over, Libby Dam or Hungry Horse Dam. See, e.g., NOAA AR Doc. A0001, Appendix Table (Reasonable and

Prudent Alternative Table) at 5, 6-7 (describing operations for Libby Dam and Hungry Horse Dam); BOR AR BR000049 (operations addressed in the 2008 FCRPS BiOp include Corps' operations at Libby Dam and Bureau of Reclamation's operations at Hungry Horse Dam).

Both the Kootenai River and the Flathead River systems, and their associated reservoirs, are home to sensitive fish and listed species including the Kootenai River white sturgeon (*Acipenser transmontanus*), bull trout (*Salvelinus confluentus*), burbot (*Lota lota*) and resident populations of the native westslope cutthroat trout. It is important to note that this litigation focuses on salmon populations, which have needs that are not the same as the needs of resident fish in CSKT aboriginal territory. The life-cycles and biological demands asserted for downriver salmon populations are not necessarily consistent with the life-cycles and biological demands of the CSKT's resident fish, and the challenged BiOp appropriately balances the needs of all listed fish species, contrary to what some would have this Court believe.

The CSKT have developed federally-approved water quality standards for the Flathead Indian Reservation. Montana v. EPA and Confederated Salish and Kootenai Tribes, 137 F.3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998). The CSKT are continuously working to protect and improve the water quality in Reservation waters, including Flathead Lake, by various means, including: membership in the Flathead Basin Commission; negotiating with trans-boundary interests regarding coal development in the North Fork Flathead River; participating in FERC-relicensing workgroups; implementing Kerr Project environmental mitigation requirements; and operating a certified Tribal water quality laboratory.

Libby Dam, Hungry Horse Dam, and their associated reservoirs inflicted many other serious impacts on the culture, resources and economy of the CSKT. They caused the inundation of traditional use sites, cultural sites, and archaeological sites. Bank erosion continues to threaten and destroy these sites. The inundation also eliminated riparian ecosystems that produced traditional plant foods and medicines for CSKT tribal people. The Corps and Bureau of Reclamation are aware of these impacts and have made progress in mitigating them, but there is

much left to do, and reservoir drawdowns will significantly impact the agencies' ability to protect and preserve these resources.

The CSKT also have significant interests in energy resources impacted by hydropower generation. First, the CSKT are a co-licensee for the Kerr Project, a 180 megawatt hydroelectric facility located on the Flathead River that is operated pursuant to a license issued by the Federal Energy Regulatory Commission. See Montana Power Company, 32 FERC ¶ 161,070 (July 17, 1985). The CSKT have the unilateral right to take over the Kerr Project as exclusive owner/operator in the near future and intend to do so. Second, the CSKT operate Mission Valley Power ("MVP"), a federal electrical distribution utility, pursuant to a contract with the United States. The utility acquires the majority of its power from BPA. As a result, the CSKT and its members have an economic stake in hydropower decisions that may precipitate major rate increases for MVP's share of BPA power.

The CSKT have affirmative interests in both water quality and water quantity within the borders of the Flathead Reservation and external to the Reservation in their aboriginal territory. Relevant waters of the FCRPS are unitary resources. Thus, there is a direct relationship between the right to take fish, protected to the Tribes by Treaty, and the right to sufficient water to provide sufficient habitat necessary for the fishery to exist. The Ninth Circuit recognized that the Tribes have reserved the quantity of water needed to support their exclusive use of the Flathead Reservation fishery.<sup>5</sup> Joint Board of Control v. United States, 832 F.2d 1127 (9th Cir. 1987) (irrigation project must release sufficient water to support Hellgate Treaty fishery before equitably allocating remainder to qualified irrigators); see also Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986). The Ninth Circuit recognized that

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<sup>5</sup> "[C]onduct that involves the tribe's water rights" was deemed to be of sufficient threat to Tribal health and welfare to require Tribal jurisdiction over setting water quality standards for all Reservation waters pursuant to the Clean Water Act. Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998) (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981)).

the Steven's treaty language guaranteed fishery waters in streams outside of a reservation sufficient to provide necessary spawning habitat. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985). The Ninth Circuit also has recognized that tribal aboriginal fishing rights generally include a right to sufficient flows of water in streams bordering and outside of reservations to support the fishery. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (Tribe's reserved fishing right required sufficient instream flow in stream bordering reservation to ensure appropriate water temperatures to guarantee survival of native fish); United States v. Adair, 478 F.Supp. 336 (D.Or. 1979), aff'd as modified, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) (Tribe's reserved fishing right allowed it to prevent other appropriators from depleting off-reservation stream water level below quantity necessary for fish survival). By analogy, in this case, the CSKT have a Treaty reserved right to sufficient flow in the upper portions of the FCRPS that are within the Flathead Reservation and CSKT aboriginal territory in parts of western Montana.

**C. Why the Tribes Support the 2008 BiOp's Montana Operation.**

Under previous BiOps, Libby Dam was drafted in July and August to meet downriver salmon flow objectives – giving little consideration to detrimental effects on upriver species – with the goal being a 20 foot draft by August 31. NOAA Supplemental AR Doc. S.77 (Issue Summaries) at 9. That 20 foot draft by August 31 unnaturally truncated an already short growing season in the upper Basin, causing unnecessary harm to species in the Tribes' aboriginal territories. Id. (explaining that river productivity is at its highest from July through September). In contrast, the 2008 FCRPS BiOp finally adopts (albeit on an ongoing experimental basis) longstanding scientific recommendations to extend the summer drawdown of Libby Dam into September, thereby providing a more natural drawdown that extends the period of in-river biological productivity in the upper Basin. See, e.g., NOAA AR A0001, Appendix Table (Reasonable and Prudent Alternative Table) at 5. Implementation of this more gradual drawdown has been sought for a number of years – as early as 2003, the Northwest Power and Conservation Council's

Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program recommended implementation and evaluation of a more natural draft of 10 feet from full pool by the end of September in all but drought years. NOAA AR Doc. B0385 at 25-26 (Northwest Power and Conservation Council's 2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program. See also NOAA Supplemental AR Doc. S.77 (Issue Summaries) at 9-11 (discussing development of the so-called "Montana Operation" for hydropower operations at Libby Dam and Hungry Horse Dam to better balance the biological needs of upper and lower Columbia River Basin listed fish).

Significantly, implementation of the Montana Operation for the biological benefit of Kootenai River species will not translate into functionally significant changes for Columbia River salmon. NOAA AR Doc. B0207 at 13-14 (ISAB Findings from the 2004 Reservoir Operations/Flow Survival Symposium). Indeed, the former 20 foot draft by the end of August not only harmed upriver ESA-listed resident fish, it also did not "provide substantial benefits to Snake River fall Chinook," NOAA Supplemental AR Doc. S.77 (Issue Summaries) at 11, the only ESA-listed salmon species migrating in the river during the relevant time period. NOAA AR Doc. B0207 at 1.

The lack of discernable effect on lower river listed fish species from the Montana Operation, coupled with the agencies' ongoing commitment to review the Montana Operation's effects for biological soundness, NOAA AR Doc. B0089 at B.2.1-7, makes it all the more troubling that the State of Oregon continues to advocate for the hurtful 20 foot draft by August 31, which truncates productivity in the upper Basin by literally leaving organisms high and dry. See NOAA Supplemental AR Doc. S.77 (Issue Summaries) at 10 (reporting that the State of Oregon emphasize[s] the importance of meeting summer flow objectives at McNary over any other operation for listed resident fish," even though "the benefits of flows to survival may not be practically measurable"). The State of Oregon's summary judgment brief asserts – curiously without any supporting citations – that the 2008 BiOp "dramatically reduces the amount of water

available for flow augmentation in the summer.” State of Oregon’s Summ. J. Mem. at 21-22. Even if we were to assume the truthfulness of that assertion, Oregon makes no effort whatsoever to tie flow levels to the biological status of any particular fish species, rendering Oregon’s argument a blunt force “water for the sake of water” approach. This stands in sharp contrast with the federal agencies’ careful “population by population, ESU by ESU” approach to assessing the biological needs of fish and putting those needs at the foundation of the 2008 BiOp, which the KTOI and the CSKT support.

### **III. LEGAL STANDARDS.**

The legal standards governing the Court’s review in this case are set forth in the briefs of a number of parties – the Tribes particularly refer the Court to the joint brief filed by the sovereign states of Idaho, Montana and Washington. Still, the Tribes write separately regarding the Administrative Procedures Act’s (APA) standard of review because its application in cases like this – where agencies are making decisions at the forefront of science – was recently clarified by the Ninth Circuit’s en banc opinion in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008).

#### **A. Administrative Procedures Act Standard of Review.**

The APA’s “arbitrary and capricious” standard of review governs judicial review of challenges to the 2008 FCRPS BiOp. Bennett v. Spear, 520 U.S. 154, 178-79 (1997), and of other final agency action made pursuant to the ESA. Ariz. Cattle Growers’ Ass’n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1235-36 (9th Cir. 2001). Under the arbitrary and capricious standard, an agency’s decision should be upheld unless the agency “relied on factors Congress did not intend it to consider, ‘entirely failed to consider an important aspect of the problem,’ or offered an explanation ‘that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc, citation omitted).

The arbitrary and capricious standard is a narrow one that precludes a reviewing court from substituting its own judgment for that of the agency. See, e.g., National Ass’n of Home Builders v.

Defenders of Wildlife, 127 S. Ct. 2518, 2529 (2007) (“Home Builders”). Consistent with this deferential standard of review, the Supreme Court reiterated in Home Builders that a court should uphold an agency decision even of “less than ideal clarity if the agency’s path may reasonably be discerned.” Id. at 2530. The APA’s limitation on judicial review is a reasonable limit meant “to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both the expertise and information to resolve.” Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66 (2004).

**B. Effect of the Ninth Circuit’s en banc McNair decision.**

Deference to an agency’s decision is particularly appropriate where, as here, questions of scientific methodology or technical expertise are involved. McNair, 537 F.3d at 993 (reiterating that a reviewing court should be at its most deferential where an agency is addressing difficult issues within its area of special expertise). As the en banc McNair panel recently concluded, a reviewing court should not step into the role of scientist in reviewing final agency action by second-guessing how an agency validates scientific hypotheses, evaluates scientific studies or explains scientific uncertainty.<sup>6</sup> Id. at 988. In so holding, the Ninth Circuit retreated from environmental precedent that had “shifted away” from the proper standard of review and reaffirmed in no uncertain terms that federal agencies are owed substantial deference by courts reviewing agency action, particularly agency action involving scientific matters. Id.

**C. Review should be limited to the administrative records.**

Under the APA, the Court’s review generally is limited to the administrative record. See, e.g., Friends of the Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986) (setting forth the rule and its limited exceptions). Amazingly, neither plaintiffs nor the State of Oregon even attempt to fit their

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<sup>6</sup> Although amicus the Nez Perce Tribe cites to a 1976 D.C. Circuit opinion for the proposition that there “is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters,” Nez Perce Tribe Summ. J. Mem. at 8, the Ninth Circuit’s 2008 en banc opinion makes clear that a reviewing court’s “involvement” should not cross the line into second-guessing agency scientific determinations.

voluminous extra-record declarations within one of the exceptions to the rule against the making of a “new” record in the district court. Accordingly, the KTOI and the CSKT join in the federal defendants’ motion to strike the extra-record declarations submitted by those parties and ask that the Court limit its review to the agencies’ administrative records.

#### **IV. ARGUMENT.**

##### **A. NOAA’s Jeopardy Analysis is Consistent with the ESA.**

Much has been written about the federal defendants’ use of the “trending toward recovery” methodology in this case, and more no doubt is forthcoming given that briefing is not yet complete. The KTOI and the CSKT join with the other parties and amici who have properly recognized that the trending toward recovery approach meets and even exceeds what is required under the ESA. The Tribes particularly refer the Court to the briefing of this issue by defendant-intervenor Northwest River Partners, which cogently explains the differences between ESA section 7(a)(2), which is directly at issue in this case, and sections 7(a)(1) and 4(f), which plaintiffs apparently seek to import into the section 7(a)(2) analysis. The Tribes also incorporate herein by reference the thorough discussion of NOAA’s jeopardy analysis found in the joint brief filed by the sovereign states of Idaho, Montana and Washington, which discusses the reasonableness of the jeopardy analysis both from a theoretical point of view and as grounded in the extensive administrative records currently before the Court.

##### **1. Plaintiffs improperly seek to impose on NOAA a jeopardy methodology of their own creation.**

At the risk of repetition, the Tribes believe the crucial distinctions between the ESA obligations to consult, to conserve and to recover warrant a short discussion in this brief as well. This is because understanding the interplay between the various statutory sections helps define the contours of the jeopardy determination which the Court is tasked with reviewing, and which plaintiffs seek to retool according to their own preferred methodology.

Section 7(a)(2) of the ESA requires the action agencies, in consultation with NOAA, to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2). This is the ESA obligation on which the Court’s review must focus,<sup>7</sup> and it requires the Court to determine whether the challenged actions “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . .” 50 C.F.R. § 402.02 (defining the phrase “[j]eopardize the continued existence of”). See also 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (stating in 1986 promulgation of final rule that the jeopardy standard is the “cornerstone” of ESA section 7(a) and the “ultimate barrier past which Federal actions may not proceed”). Notably, in affirming this Court’s decision regarding the 2004 BiOp’s invalidity, the Ninth Circuit relied on the agencies’ comments in promulgating the 1986 rule. National Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 524 F.3d 917, 932 (9th Cir. 2008) (discussing the “reasonable explanation” in the rule’s “preamble and comments on the revised regulations”).

In contrast with section 7(a)(2), ESA section 7(a)(1) obligates federal agencies to “carry[] out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). This is a separate ESA section 7 obligation that applies at the level of “agency programs, not individual agency actions.” Protect Our Water v. Flowers, 377 F.Supp.2d 844, 870 (E.D. Cal. 2004). See also Defenders of Wildlife v. U.S. Dep’t of the Interior, 354 F.Supp.2d 1156, 1174 (D. Or. 2005) (acknowledging the established rule of law that agencies are entitled to substantial deference in manner in which they fulfill their section 7(a)(1) obligations).

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<sup>7</sup> Plaintiffs’ brief acknowledges that the Court’s review should focus on ESA section 7(a)(2). See Pls.’ Summ. J. Mem. at 3 (framing the case in terms of 16 U.S.C. § 1536(a)(2)).

Here, of course, a separate section 7(a)(1) claim is not before the Court.<sup>8</sup> But a more nuanced undercurrent in plaintiffs' brief implies that ESA section 7(a)(1) bleeds over into section 7(a)(2) such that a no jeopardy determination requires more than a finding that agency action is not expected to appreciably reduce a listed species' survival and recovery. See, e.g., Pls.' Summ. J. Mem. at 9-10 (asserting that a lawful jeopardy analysis must include "(1) what population level (and growth or survival rate) is necessary to achieve recovery; (2) when that population level is expected to be achieved; and, (3) what probability (i.e., 'likelihood') of achieving the population target in the desired time frame is required to allow the agency to conclude that the action does not 'appreciably reduce' the likelihood that recovery will occur"). Nothing in the ESA or its implementing regulations requires such a methodology, and as the Colville Tribes ably point out in their amicus brief, the Court is not free to impose such specific requirements of its own volition (or at plaintiffs' behest). Indeed, as the Lands Council v. McNair en banc panel held, that is precisely one of the ways the Ninth Circuit had gone astray before being turned back to the straight and narrow path of deferential review of agency action. 37 F.3d at 991 (describing as a "key error" the court's now-overruled creation of "a requirement not found in any relevant statute or regulation"). Put simply, plaintiffs' choice of methodology would import a "conservation of listed species" requirement into section 7(a)(2) that does not exist. See 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (rejecting the argument that agency action should halt if it "failed to conserve listed species, a result clearly not intended by Congress. Congress intended that actions that do not violate section 7(a)(2) . . . be allowed to proceed").

Also in contrast with section 7(a)(2), ESA section 4(f) describes a wholly separate recovery plan process whereby NOAA and FWS are required to "develop and implement" recovery plans

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<sup>8</sup> Nor could such a claim succeed, because it is beyond dispute the agencies are engaged in conservation planning for Columbia River Basin salmonid species that discharges this obligation. Plaintiffs' many references to the work of the Interior Columbia Basin Technical Recovery Team (ICTRT or TRT) demonstrates that fact, as does the record before the Court. See, e.g., NOAA AR Doc. A0001 at 7-11 (referring to the Final Recovery Plan for Upper Columbia River Spring Chinook Salmon and Steelhead (NMFS 2007c)).

for “the conservation and survival” of ESA-listed species within their respective areas of responsibility. 16 U.S.C. § 1533(f). The requirements for a recovery plan sound strikingly similar to what plaintiffs propose for a jeopardy analysis, namely:

- (i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(B). As with section 7(a)(1), the statutory requirements of ESA section 4(f) cannot properly be imported into a section 7(a)(2) analysis. Although plaintiffs seek to muddy the line between a jeopardy determination and recovery planning, this Court previously recognized the fundamental distinction between the two. See Opinion and Order (May 26, 2005) at 35 n.14 (acknowledging that the jeopardy analysis and recovery plan provisions are governed by different statutory language).

**2. NOAA’s jeopardy analysis meets or exceeds the ESA’s requirements.**

NOAA’s jeopardy standard meets or exceeds the ESA requirement that FCRPS operations not appreciably reduce the survival and recovery of listed species.<sup>9</sup> For purposes of this case, the meaning of the statutory term “jeopardize” and its implementing regulatory phrase “appreciably reduce . . . survival and recovery” is best informed by the Ninth Circuit’s decision affirming the Court’s invalidation of the 2004 BiOp. See National Wildlife Fed’n, 524 F.3d 917 (9th Cir. 2008).

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<sup>9</sup> The Tribes do not address in this brief the “adverse modification of critical habitat” element of the section 7(a)(2) jeopardy standard but instead refer the Court to, and incorporate herein, the careful and compelling discussion of this issue in federal defendants’ summary judgment brief. See Fed’l Defs.’ Summ. J. Mem., Argument, part IV (demonstrating that NOAA reasonably concluded the RPA would not adversely modify critical habitat for listed fish species).

In National Wildlife Fed'n, the Ninth Circuit instructed that the term “jeopardize” can only be satisfied if agency action causes some decline in a listed species’ “pre-action condition.” Id. at 930. The court explained that:

To “jeopardize” – the action ESA prohibits – means to “expose to loss or injury” or to “imperil.” Either of these implies causation, and thus some new risk of harm. Likewise, the suffix “-ize” in “jeopardize” indicates some active change of status: an agency may not “cause [a species] to be or to become” in a state of jeopardy or “subject [a species] to” jeopardy.

Id. (relying on a plain-language, dictionary definition for support) (alterations in original). Because the conduct prohibited by the ESA is that which “causes some new jeopardy,” the court concluded that agency action does not run afoul of the law if it removes a species from jeopardy, lessens the degree of jeopardy experienced by a species, or does not “deepen” the jeopardy of an already-imperiled species by causing it new and additional harm. Id. The court further concluded that the prohibition against causing some new jeopardy applied in the context both of a species’ survival and its recovery. Id. at 931 (holding that NOAA must “consider both recovery and survival impacts” in its jeopardy analysis). See generally id. at 931-32 (discussing the need to focus on both of these interrelated concepts).

NOAA’s approach in this case fully conforms to the Ninth Circuit’s teaching. Plaintiffs would have the Court believe otherwise, but there simply is no merit to the assertion that the agency ignored the recovery prong of the jeopardy standard by including a “trending toward recovery” approach in its analytical method for ensuring avoidance of jeopardy. To be sure, delving into the highly-complex analytical methodology employed by agency scientists tasked with evaluating the past, present and future status and trends of the fish species at issue is not the goal of this brief. That is better left to others – like the federal defendants and the sovereign states of Idaho, Montana and Washington, the briefs of whom are commended to the Court’s careful review. Still, the hornbook version of the agency’s reasonable approach goes something like this.

NOAA employed a variety of quantitative and qualitative tools as part of a five-step approach to assessing jeopardy for the relevant species. See, e.g., NOAA AR Doc. A0001 at 7-22

to 7-26 (quantitative tools employed for the recovery prong of the jeopardy analysis included metrics of average returns-per-spawner, or R/S; median population growth rate, or lambda; and the NOAA Fisheries' West Coast Biological Review Team trend, or BRT); id. at 7-35 (qualitative tools employed for the recovery prong of the jeopardy analysis included the viable salmonid population factors of abundance, productivity, spatial structure and distribution). The five-step approach involved: (1) assessing the current status of the species; (2) assessing ongoing effects on the species from the environmental baseline and other activities having cumulative effects; (3) assessing likely effects on the species (both positive and negative) from the proposed operations; (4) assessing the likelihood of the species' survival "with an adequate potential for recovery (e.g. trending toward recovery)" in light of the picture painted by the first three steps; and (5) if necessary to avoid jeopardy, identifying reasonable and prudent alternatives to hurtful operations. See generally id. at 1-10 to 1-14. Significantly, the analysis was done on a species-specific basis, a focus necessitated by current understanding of the varying biology of listed Columbia River salmon and steelhead. Id. at 7-3. See also id. at 7-5 (explaining that the varying degrees of quantitative data existing for different species necessitated the inclusion of both quantitative and qualitative analytical tools in the agency's toolbox).

Steps one and two of the analysis provided the agency with a picture of the current biological trend for a given species, i.e. absent the actions under consultation, and employing the reasonable assumption "that, unless something affecting the survival or reproduction of the population changes in the future, the future performance can be projected from the pattern of past performance," what is the species' current status with respect to jeopardy? Id. at 7-11. Step three of the analysis provided NOAA with a picture of how (or whether) the FCRPS operations under consultation would affect the species' current biological trend – put simply, would FCRPS operations leave the species better off, worse off or unchanged compared with its current trend? See, e.g., id. at 7-8 to 7-10. At step four of the analysis, NOAA assessed the resulting information through the lens of agency expertise, quantitative and qualitative tools, and ultimately in terms of

the species' likelihood of survival and recovery, see generally id. at 8-3 to 8.14-23 (presenting detailed information for each of the 13 listed species of salmon and steelhead at issue) – determining, in the words of the Ninth Circuit, whether the FCRPS operations under consultation were likely to remove the species from jeopardy, lessen its degree of jeopardy, or at least not deepen its degree of jeopardy. See National Wildlife Fed'n, 524 F.3d at 930. And again, in the event of a jeopardy call, step five was the point at which the agency could identify additional actions to avoid causing additional harm to a species' survival and recovery. NOAA AR Doc. A0001 at 1-13.

The KTOI and CSKT are not salmon Tribes, and they leave it to others with more concrete interests in the salmon and steelhead species discussed in the BiOp's Chapter 8 to review the detailed analysis therein with the Court. See, e.g. Amicus Br. of Colville Tribes in Supp. of Defs.' Mot. for Summ. J. (including species-specific discussion and analysis); Mem. of Amici Warm Springs, Umatilla, and Yakama Tribes in Opp'n to Mots. for Summ. J. (same). See generally NOAA AR Doc. A0001 at 8-3 to 8.14-23 (detailed discussion on a species by species basis). However, given the above discussion of the statutory distinctions between ESA section 7(a)(2) and sections 7(a)(1) and 4(f), coupled with the Ninth Circuit's recognition that agency action can only jeopardize a species when it causes some new harm to the species' likelihood of survival and recovery, National Wildlife Fed'n, 524 F.3d at 930 (agency action can only "jeopardize" a species' existence if it causes some decline in a listed species' "pre-action condition"), the Tribes assert that NOAA at least met and likely exceeded its ESA obligations by employing a "trending toward recovery" approach in its analytical framework. The agency's analysis focused on ensuring that fish species are on a trend toward recovery, meaning "moving toward recovery even though full recovery of the species may not be achievable during the period" of this ten-year BiOp. NOAA AR Doc. A0001 at 7-7. The ESA likely requires less, and certainly requires no more, from the 2008 FCRPS BiOp.

**B. The Tribes Take No Position on Plaintiffs' Clean Water Act Claim.**

Plaintiffs assert that the 2008 FCRPS BiOp is invalid because the agencies failed to seek certification under Clean Water Act ("CWA") section 401(a)(1) prior to NOAA's issuance of the BiOp and resulting ITS. See 33 U.S.C. §1341(a)(1) (prohibiting the issuance of any license or permit to conduct an activity that results in a discharge unless the affected state issues a certification under CWA section 401(a)(1) that the underlying activity will not violate applicable water quality standards). Like the sovereign states of Idaho, Montana and Washington, the Tribes take no position on this claim at this time – while noting that other parties and amici are responding fully to the issue – other than to point out that Tribes also may be delegated authority to implement the CWA 401 program.

Section 401 of the CWA requires that applicants for a federal license or permit relating to any activity that may result in any discharge into navigable waters (i.e. waters of the United States) shall obtain a certification from the responsible governmental authority that such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA. The CSKT, acting through the Tribal Natural Resources Department, Environmental Protection Division, applied for and on February 27, 1995 obtained recognition of their authority by the U.S. Environmental Protection Agency to implement the CWA 401 program and to take all action necessary to meet the requirements thereof. However, the CSKT's application for that authority, and EPA's approval, were for waters within the Flathead Reservation. Therefore the CSKT's 401 certifying authority could not be triggered by any FCRPS waters subject to the instant litigation. The KTOI has not yet sought recognition of its 401 authority and thus also has no concrete interest in this claim.

**V. CONCLUSION.**

For the reasons set forth above, and based on the arguments asserted by federal defendants and other defendant-intervenors, the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes urge the Court to uphold the 2008 FCRPS BiOp in its entirety, and to conclude

that conduct of the action agencies in conformance with that BiOp fully satisfies the ESA's requirements. The KTOI and CSKT support the efforts of the lower river Tribes to preserve and protect anadromous fish species. But those efforts should not – and must not – come at the price of sacrificing endangered and threatened species in the upper Basin. Protection of Columbia River anadromous fish must be a Basin-wide effort, and the 2008 FCRPS BiOp embodies such a fish-first, collaborative Basin-wide approach. The Court thus should grant summary judgment in favor of the federal defendants and defendant-intervenors and allow the parties to turn their collective energies to on-the-ground activities for the benefit of Columbia River Basin fish and wildlife.

DATED this 24th day of October, 2008.

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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 October 24th, 2008, the foregoing **JOINT MEMORANDUM OF DEFENDANT-INTERVENORS KOOTENAI TRIBE OF IDAHO AND CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** will be electronically filed with the Court's electronic court 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:

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DATED this 24th day of October, 2008.

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