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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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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 007781.¹ 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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¹ 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.² As with

² 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

