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Reservation; *Amicus* Yakima Nation

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

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

MEMORANDUM OF AMICI WARM
SPRINGS, UMATILLA, AND
YAKAMA TRIBES IN OPPOSITION
TO MOTIONS FOR SUMMARY
JUDGMENT

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,

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.

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I. INTRODUCTION

For these treaty tribes, the goal of salmon restoration in the Columbia basin is not mere avoidance of extinction. The tribes have a much more ambitious goal -- to restore salmon and steelhead to abundant, sustainable, harvestable levels throughout their range and to their usual and accustomed fishing areas on the Columbia River and its tributaries. These tribes have taken that vision from Congress to courtrooms and everywhere in between, but most importantly they take it to heart. Nobody has fought longer or more diligently for the restoration of salmon than the treaty tribes. Their fight continues, but trying to force yet another remand of the FCRPS BiOp will not be part of that struggle.

Restoration of healthy harvestable salmon runs does not tip on the question of whether or not this or any other FCRPS BiOp contains consensus science underlying each point. That inquiry is neither practical nor legally required nor is it important in the overall scheme of things. Success or failure does not hang in the balance of whether or not this version of the FCRPS BiOp prescribes precisely the right amount of passage spill on any particular spring day at any particular dam. In fact, it's both distressing and enlightening that deeply into the second decade of litigating FCRPS BiOps the challenges of *substance* have essentially cooked down to this small point. The current dalliance with false precision, and the numerous mini-debates among "experts" over differences measured in tenths of percentage points distract from the ultimate goal of robust salmon restoration sought by the tribes. And it is absolutely clear that achieving the tribes' goal of restoring healthy harvestable salmon runs is far removed from the instant debate of whether or not "the recovery prong" of an ESA regulation was properly interpreted and applied in this BiOp or, if one of the *other* previously challenged BiOps (now in convenient and ironic retrospect) actually had it more correct. None of these questions receiving so much attention here really matter. These are the bailiwick and battleground of lawyers.

Admittedly, these tribes have fought the BiOp battles in the past – and important victories for salmon were secured. Those cases seemed to purpose – an action centered argument. The

first cases prompted huge changes in hydrosystem operations and configuration; subsequent cases added habitat restoration, predator control, and the use of supplementation to the restoration arsenal. Most recently, victories brought accountability, collaboration, and massive commitments of additional funding to the effort. For the tribes, the legal fight was always about securing meaningful *actions* to improve salmon.

These tribes believe this case is different. That next significant block of real-world salmon restoration *action* is now committed, and the institutional problems plaguing salmon restoration so glaring in the past have been replaced with collaboration and an attitude of partnership. The tribes did not join these BiOp lawsuits because they saw themselves as private attorneys general, duty bound to police NOAA's application of the ESA. Certainly not because their *real* brass ring was taking out dams, saving whales, or something apart and aside from salmon restoration¹. Again, for these tribes, challenging the FCRPS BiOps has always been about the salmon. It has been a place where they pressed their demands for a comprehensive, *action-based multi-faceted federal salmon restoration effort*. Things have changed.

We finally have a practical and comprehensive federal salmon plan. It is a plan with actions. It may not be perfect, but it's a plan based on best available science. We have never had this sort of opportunity to *act* for the salmon, and these tribes believe we must seize the moment. With this memorandum the Confederated Tribes of Warm Springs, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation respectfully ask this Court to lift its eyes from so much of what we believe is noise and minutia, and to consider the reasons that they stand behind 2008 FCRPS biological opinion and the new federal salmon plan. The tribes know from many years in these cases that the Court will carefully consider all presented; and now, in this instance, we urge a different outcome. We respectfully ask that this Court direct the energy devoted to salmon restoration and recovery away from an endless remand planning

¹ Consider the statement of Mr. Tim Weaver, counsel for the Yakama Nation, at the August 21, 2008 status conference: "We're *fish* Indians, not spill Indians!"

and courtroom cycle some seem so determined to perpetuate, and to the streams and rivers where the *salmon managers*, significantly including the tribes, can go to work for salmon restoration.

II. BACKGROUND

These three Treaty Tribes² have participated in the ESA litigation for a simple reason - the multiple efforts that constitute the federal government's Columbia River salmon restoration initiative were failing to provide enough real, practical, science-based *action* to improve the condition of depleted salmon. A disproportionate share of the conservation burden was falling on the tribes' treaty reserved right to harvest. In the early 1990's hydrosystem fish operations were embryonic, the federal commitment to salmon habitat restoration was anemic, and hatchery operations were beyond the reach of tribes, dominated by state and federal parties and managed primarily to fuel non-Indian sport and commercial fisheries in the lower Columbia, and along the west coast. The new ESA overlay in the early 1990s and the FCRPS BiOp cases put a needed focus on the hydro "H" - the tribes welcomed that. Now they had a new tool, a new forum to advocate for desperately needed improvements in hydro operations and configuration. But those forums -- that fight -- was always just a piece of their larger effort to press their long-standing demand for a *comprehensive* federal salmon restoration *action* plan.

These tribes participated in support of the challenges to the FCRPS BiOps in each subsequent round of litigation -- 1995, and 2000, and in 2004. The same assessment was made each time - the *actions* offered in the BiOp, considered in the context of the total federal salmon effort, were not adequate to promote the protection and restoration of Treaty protected fisheries. The tribes evaluated the FCRPS BiOps specifically, as well as the larger federal salmon effort on essentially the following points:

- The federal government must develop plans aimed at restoring self-sustaining harvestable salmon and steelhead populations returning to all the Tribes' usual and accustomed fishing areas of the Columbia and its tributaries;

² "Treaty Tribes" herein shall mean the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation.

- A robust gravel-to-gravel “All H” *action* plan was necessary;
- Salmon restoration efforts of the federal government must give voice to the tribal peoples and their scientists;
- These tribes must have their treaty rights and co-management jurisdiction respected, and they must be empowered in the salmon restoration effort on the ground;
- Best science and a presumption for action must replace the maddening excuse for delay – a quest for “perfect science” or “consensus science”.

These have been the points or pillars for the tribes’ analysis and legal arguments. They are the same touchstones they applied to this new 2008 FCRPS BiOp and the totality of the federal government’s salmon restoration planning. Today, and for the next 10-years, the federal government’s salmon plan passes this test. It is time to go to work.

III. ARGUMENT

A. The 2008 FCRPS BiOp is part of a larger federal salmon protection package

These tribes believe that the federal government has developed a “package” of salmon protection and restoration actions that are based on the best science, are practical, and will work. In 2008, the treaty tribes, federal government and others entered into three unprecedented, coordinated salmon rebuilding commitments.

1. Fishery reductions secured in Pacific Salmon Treaty agreement brings new benefit to Columbia River Chinook stocks.

Under the Pacific Salmon Treaty, the tribes, Alaska, Canada, Oregon, and Washington came to terms on a ten-year agreement of abundance-based Chinook harvest rate reductions. *See http://www.critfc.org/text/psc/08_agreement.html; also see 16 U.S.C. § 3631 et seq.* (Pacific Salmon Treaty Act). The agreement reduces Chinook catches in the Southeast Alaska fishery by 15% and in the West Coast Vancouver Island fishery by 30%. These reductions in northern ocean fisheries will benefit upper Columbia and Snake River fall Chinook and are a significant

