

THE HONORABLE JAMES A. REDDEN

Brian C. Gruber, WSBA No. 32210
bgruber@zcvbs.com
ZIONTZ CHESTNUT VARNELL
BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, Washington 98121
Tel. 206 448 1230
Fax 206 448 0962

*Attorneys for Amicus Curiae Confederated
Tribes of the Colville Reservation*

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION *et al.*,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE
et al.,

Defendants.

Civ. No. 01-640-RE

*AMICUS BRIEF OF COLVILLE
TRIBES IN SUPPORT OF
DEFENDANTS' SUPPLEMENTAL
CROSS MOTION FOR SUMMARY
JUDGMENT*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

 I. NOAA’s Jeopardy Analysis Is Based On Tributary Habitat Restoration and Hatchery
 Projects That Are Reasonably Certain To Occur..... 5

 A. Chief Joseph Hatchery..... 7

 B. Okanogan River Basin Tributary Habitat Projects..... 11

 C. Selective Fisheries..... 16

 II. The Spokane Tribe Overlooks Significant Progress in Recovering UCR Spring Chinook
 and Steelhead..... 17

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

<i>Ctr. for Biological Diversity v. Rumsfeld</i> , 198 F. Supp. 2d 1139 (D. Ariz. 2002)	5, 6
<i>Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.</i> , 254 F. Supp. 2d 1196 (D. Or. 2003)	5, 6
<i>Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.</i> , 524 F.3d 917 (9th Cir. 2008)	6
<i>Natural Resources Def. Council v. Kempthorne</i> , 506 F. Supp. 2d 322 (E.D. Cal. 2007).....	6
<i>Natural Resources Def. Council v. Rodgers</i> , 381 F. Supp. 2d 1212 (E. D. Cal. 2005)	14
<i>Trout Unlimited v. Lohn</i> , 559 F.3d 946 (9th Cir. 2009)	20

Federal Regulations

50 C.F.R. § 402.2	5
-------------------------	---

Other Authorities

74 Fed. Reg. 42605 (Aug. 24, 2009).....	20
---	----

INTRODUCTION

Amicus curiae Confederated Tribes of the Colville Reservation (“Colville Tribes” or “CCT”) submit this brief in support of the Federal Defendants’ supplemental cross motion for summary judgment. With a 1.4 million acre reservation bounded by the Columbia and Okanogan Rivers, the Colville Tribes are directly and significantly affected by the Federal Columbia River Power System (FCRPS) and non-federal dams located both on the Colville Reservation and downstream. Because Chief Joseph Dam blocks all fish passage upstream on the Columbia River, the Okanogan River is the only watershed on the Reservation accessible to the anadromous salmon and steelhead trout the Colville Tribes have always depended upon to sustain their ceremonial and subsistence way of life. However, the Okanogan population of upper Columbia River (UCR) spring Chinook has been extirpated, and the UCR steelhead that return to that basin are listed as threatened under the ESA.

The Colville Tribes’ vital interest in recovery of these ESUs led them to participate, initially with a fair amount of skepticism, in the historic collaboration process ordered by this Court following remand of the 2004 BiOp. From the outset, the Tribes’ objective was to focus the attention of the federal government on the needs of upper River listed ESUs, particularly in the Okanogan Basin.¹ Actively participating throughout the collaboration process, the Tribes both criticized early drafts of the proposed action and urged the action agencies to direct much needed attention and resources to UCR spring Chinook and steelhead, which had been overshadowed in previous recovery efforts by lower Columbia and Snake River listed species. The Colville Tribes evaluated the planned improvements in fish passage at the FCRPS dams and

¹ See *Amicus* Brief of Colville Tribes in Support of Defs.’ Motion for Summary Judgment at 2-6 (Dkt. No. 1558) (“CCT *Amicus* Brief”).

presented their Okanogan Anadromous Fish Recovery Initiative (“Okanogan Initiative”)² as a concrete proposal to achieve on-the-ground improvements for Chinook and steelhead through habitat restoration, safety net hatchery programs, hatchery reforms and spring Chinook reintroduction to the Okanogan River and other Reservation waters. The Okanogan Initiative eventually comprised the core of the Memorandum of Agreement between the Colville Tribes and the action agencies (“Colville MOA”), which ensured \$141 million in funding for projects benefitting ESA-listed species and formed one of several agreements constituting the Columbia Basin Fish Accords. 2008 Corps AR A.394.

The Colville MOA, the Fish Accord agreements with regional sovereigns, and other mitigation commitments resulting from the collaboration process provide the reasonable certainty required by the ESA that the 2000 BiOp could not deliver. In the Colville MOA alone, tens of millions of committed federal dollars for identified projects over a ten-year time frame, measurable goals, a clear relationship of the mitigation actions to the factors limiting steelhead and spring Chinook production in the Okanogan Basin and increased monitoring, implementation oversight and coordination ensure that significant benefits to anadromous fish will in fact occur – *if* the entire program is given the opportunity to be carried out. The Colville Tribes firmly believe that full implementation of the Fish Accord projects and the reasonable and prudent alternative (RPA) analyzed in the BiOp in conjunction with the collaboration that has become the *modus operandi* among the region’s sovereigns, will ensure that listed salmon and steelhead throughout the Columbia Basin avoid jeopardy and make progress toward recovery. The Court should give this process – which it initiated and fostered – a fair chance to succeed by granting the Defendants’ motions for summary judgment.

² 2008 Reclamation AR at BR074565-74629.

ARGUMENT

Plaintiffs, especially National Wildlife Federation et al. (“NWF”), and *amicus* Spokane Tribe have called into question the certainty of the many mitigation measures relied on by NOAA to reach its no jeopardy conclusion. They do so by selectively highlighting a few projects in a vast mitigation program, while completely ignoring others that are making good progress in achieving real, on-the-ground improvement and providing significant benefits to listed fish. The Colville Tribes submit this *amicus* brief to bring attention to the latter part of the story by describing some of the mitigation projects they are implementing. The Tribes also respond to the Spokane Tribe, which asserts that that UCR species are spiraling downward toward extinction but fails to account for the species’ current status and CCT’s work under the Fish Accords in restoring steelhead and salmon habitat in the Okanogan Basin and initiating construction of a major safety-net hatchery which will lead to reintroduction of a fourth population of UCR spring Chinook.

In its Supplemental Memorandum, NWF seizes on the supposed failures of the broad mitigation program the action agencies have undertaken to benefit listed salmon and steelhead and on which NOAA’s jeopardy analysis rests. NWF Suppl. Mem. at 4-13 (Dkt. No. 1794). The RPA at the heart of the analysis involves a mitigation program which, over the ten-year period of the BiOp, will consist of hundreds of individual projects and hundreds of millions of dollars in federal government funding commitments. It is hardly surprising that when this program is viewed at any moment in time – as the perpetual litigation surrounding the FCRPS ensures – some projects will have progressed less on schedule or as planned than others. Indeed, this is mostly likely to be true at the outset of the program, when much of the infrastructure, personnel and funding commitments are first being put into action.

NWF's argument largely ignores the substantial benefits to listed species that are reasonably certain to occur over the ten-year timeframe for implementation of the RPA and the Fish Accords. Likewise, the Spokane Tribe, while expressing concerns shared by the Colville Tribes about the health of UCR species, overlooks the positive results that have already been realized through the Fish Accords and the commitment of the Colville Tribes and the action agencies to continue that work through 2018. The Fish Accords represent ground-breaking agreements among the sovereigns in the Columbia Basin and are one of many tangible results of the unprecedented collaboration of action agencies, tribes and states. The Colville MOA, just one part of this larger mitigation program, is a firm commitment by the action agencies to fund approximately 15 ESA-related programs and projects, principally in the Okanogan Basin, over the term of the BiOp and represents a total financial commitment of over \$204 million, with more than two-thirds benefitting listed species. Declaration of William T. Towey ¶ 4.

NWF fails to acknowledge significant, on-the-ground progress in projects undertaken by the Colville Tribes – or any other sovereign – as part of the Fish Accords. The Colville MOA projects are particularly significant because they will impact UCR steelhead and spring Chinook, species which have historically received less attention than their imperiled status deserves. The Colville Tribes have designed and are currently constructing a major hatchery on the Colville Reservation at Chief Joseph Dam. The Chief Joseph Hatchery, which is expected to begin operation in 2012, will produce up to 900,000 spring Chinook smolts, many of which will be introduced into the Okanogan River in an effort to re-establish this extirpated population of the UCR spring Chinook ESU. This would create a fourth population for the ESU and extend its range, diversity, abundance and productivity. The Tribes are also taking the lead role in the restoration of UCR steelhead and spring Chinook habitat through work on the Okanogan River

and its tributaries. Recent work on Omak and Salmon Creeks has resulted in substantial habitat gains by securing in-stream flows, removing fish passage barriers and restoring other critical aspects of habitat functionality. The Colville Tribes also take pride in being the regional leader in developing selective fishing techniques that will preserve and enhance the gains in wild fish production achieved in their habitat and hatchery work. This ongoing body of work, planned and carried out in collaboration with the action agencies, confirms that as a whole the habitat and hatchery components of the RPA in conjunction with the projects funded by the Fish Accords are reasonably certain to occur and should be provided the opportunity to fulfill their potential over the course of the ten-year implementation schedule.

I. NOAA’s Jeopardy Analysis Is Based On Tributary Habitat Restoration and Hatchery Projects That Are Reasonably Certain To Occur.

As this Court made clear in its order finding the 2000 BiOp to be arbitrary and capricious, NOAA may rely on non-federal mitigation actions in its jeopardy analysis if such actions are “reasonably certain to occur.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213-15 (D. Or. 2003).³ This standard, which is incorporated in the ESA consultation regulations⁴ but is itself not defined, expressly includes a reasonableness qualification on the degree of certainty required of future mitigation actions. Thus, the ESA does not require absolute certainty and such a heightened standard should not be applied in this case.

In rejecting the 2000 BiOp, this Court relied heavily on *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Ariz. 2002), in which the NOAA’s jeopardy analysis was held to be arbitrary and capricious because the BiOp failed to “includ[e] standards and

³ The Ninth Circuit Court of Appeals later held that such reliance is also warranted if the mitigation actions “are in fact under agency control.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 n.17 (9th Cir. 2008).

⁴ See 50 C.F.R. § 402.2 (definition of “cumulative effects”).

guidelines” for necessary mitigation measures, and instead allowed the Army to defer identification of such measures to the initial period of the BiOp’s 10-year coverage. *Nat’l Wildlife Fed’n*, 254 F. Supp. 2d at 1207 (quoting *Rumsfeld*, 198 F. Supp. 2d at 1156); *see also* CCT *Amicus* Br. at 23-24, 27 (discussing *Rumsfeld*). *Rumsfeld* has also been interpreted to “stand[] for the proposition that, at a minimum, a mitigation strategy must have some form of measurable goals, action measures, and a certain implementation schedule; i.e., that mitigation measures must incorporate *some* definite and certain requirements that ensure needed mitigation measures will be implemented.” *Natural Resources Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007) (citing *Rumsfeld*, 198 F. Supp. 2d at 1153) (emphasis in original). This Court has also looked to the existence of “necessary funding” and “binding agreements” as potential criteria for evaluating the reasonable certainty of mitigation measures. *Nat’l Wildlife Fed’n*, 254 F. Supp. 2d at 1213 (quoting Oregon’s *Amicus* Memo). Finally, in affirming this Court’s order invalidating the 2004 BiOp, the Ninth Circuit determined that NOAA’s reliance on the future installation of removable spillway weirs was unavailing because “specific and binding plans” were absent and there was no “clear, definite commitment of resources for future improvements.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008).

Where NOAA fell short in relying on uncertain and unfunded mitigation actions to reach its no jeopardy conclusion in the 2000 BiOp, it has come full circle and remedied these defects in the collective analysis of the 2008 and 2010 BiOps. The Fish Accords, as evidenced by the substantial benefits already achieved under the Colville MOA, provide the measurable goals, implementation schedule, necessary funding and binding commitment that this and other courts have set forth as the criteria for evaluating the *reasonable* certainty of BiOp mitigation actions.

The Colville Tribes can attest as active participants in both the collaboration process engineered by this Court and the BiOp's ten-year mitigation program, that the projects NOAA relies upon are being undertaken and will continue to be implemented to the benefit of salmon and steelhead throughout the Columbia Basin.

A. Chief Joseph Hatchery.

Chief Joseph Hatchery, the hallmark project of the 2008 BiOp's Hatchery Strategy 2, RPA Action 42, is a clear illustration of the benefits made possible through the unprecedented collaboration embodied in the RPA and Fish Accords. 2008 BiOp, RPA Table at 60 (Table 8). This hatchery, which involves a partnership between the Colville Tribes, Bonneville Power Administration (BPA) and the U.S. Army Corps of Engineers (Corps), will be used to reintroduce a fourth population of the endangered UCR spring Chinook ESU into the Okanogan Basin through a design and operation plan which meets – and will eventually exceed – the highest scientific standards for hatchery operation, monitoring and evaluation.⁵

Planning for and construction of Chief Joseph Hatchery recently achieved a major milestone, ensuring that the promised benefits for UCR spring Chinook will be realized. In November 2010, the Colville Tribes, BPA and the Corps signed a Memorandum of Agreement (“Chief Joseph MOA”) which confirmed the long-term commitment to a safety-net hatchery operated by Tribes, funded by BPA and located just below Chief Joseph Dam on Corps land

⁵ While this *amicus* brief focuses on the spring Chinook component of the hatchery, the hatchery will also produce up to 2 million juvenile summer/fall Chinook as part of two complementary programs. Decision Memorandum from Mark Fritsch, project implementation manager, to Northwest Power & Conservation Council (“Council”) members (April 29, 2010) at 1-2 (“Council Decision Memorandum”), available at <http://www.nwcouncil.org/news/2010/05/9.pdf>. The summer/fall Chinook components of the hatchery program consist of an integrated recovery program to augment naturally spawning fish within the Okanogan Basin and an integrated harvest program which will support a tribal ceremonial and subsistence fishery and provide for increased recreational fishing by releasing juveniles at the hatchery itself. *Id.*

within the Colville Reservation. *See* Chief Joseph MOA at 3-4 (attached as Exhibit 1).⁶

Concurrently, the Tribes, BPA and Corps also executed a lease and easement with 50-year terms for construction and operation of the hatchery and supporting infrastructure on Corps property, including a water supply component that requires drilling into the dam itself to access reservoir water. *See* Chief Joseph MOA at 2-3, 8, 11 & App. B at 3-5.

These agreements, along with major funding made possible by the Fish Accords, will make this long-awaited project – and the ultimate objective of reintroducing a fourth population of UCR spring Chinook – a reality. The total design, planning, permitting and capital costs of the hatchery exceed \$50 million. Council Decision Memorandum at 3 (\$10.8 million spent through FY09 and construction of all project elements estimated at \$40 million for fiscal years 2010-2012). Of this total, BPA has committed to funding approximately \$41 million in 2010 through 2012. *See* Colville MOA (2008 Corps AR A.394), Att. A at A-2 (\$41,036,547 commitment); 2010-2013 Implementation Plan at 76 (2010 Corps AR A.5 at 454) (continued BPA funding in 2010-2013). BPA is also committed to funding the \$2.5 million annual estimated cost of operation, maintenance, monitoring and evaluation of the hatchery program. Council Decision Memorandum at 3; *see also id.* at 20 (Joe Peone, Director, CCT Fish & Wildlife Department, powerpoint presentation to Council (May 11, 2010) at Slide 10). Moreover, a significant benefit of the Fish Accords financial commitment has been the ability of the Tribes to leverage federal funding for the project into millions of dollars of additional funding by third parties with a stake in salmon recovery on the Columbia River. This past Fall, the Tribes and BPA signed a cost share agreement with Public Utility District No. 2 of Grant County in which the utility will contribute \$10 million toward the capital costs of the hatchery

⁶ Exhibit 1 contains only the Chief Joseph MOA and Appendices A & B and excludes less relevant attachments.

and 18.3% of the ongoing maintenance and operation costs. *See* BPA news release (Nov. 15, 2010);⁷ Lynne Lynch, *New Hatchery Part of Grant PUD Licensing Costs*, Columbia Basin Herald, Nov. 23, 2010.⁸ Other cost share agreements are being explored. *See* Council Decision Memorandum at 8; *id.* at 21 (Peone powerpoint at Slide 11). Without the federal commitment through the Fish Accords, this type of third-party funding substantially advancing the hatchery's objective of recovering UCR spring Chinook could not have been secured.

The Tribes will operate Chief Joseph Hatchery as a state-of-the-art facility, adopting the best available scientific information and reflecting the scientific principals and standards articulated by the Northwest Power & Conservation Council's Fish and Wildlife Program and the Hatchery Scientific Review Group (HSRG). Memorandum (ISRP 2010-1) from Eric Loudenslager, ISRP Chair, to W. Bill Booth, Chair, Northwest Power and Conservation Council (Jan. 6, 2010) ("ISRP Step-Three Review Memorandum") at 2, *available at* <http://www.nwcouncil.org/library/isrp/isrp2010-1.pdf>; Council Decision Memorandum at 5 (describing ISRP Step 2 review determination that the Tribes had refined the hatchery plan to "reflect[] the best practices of the Fish and Wildlife Program and the [HSRG]"). In particular, CCT has fully responded to scientific recommendations in developing the hatchery's monitoring and evaluation (M&E) plan to achieve the Tribes' dual salmon harvest and conservation goals. Council Decision Memorandum at 5-6; *see also id.* at 19 (program innovation will vary hatchery production with "health of wild population"); ISRP Step-Three Review Memorandum at 2 (M&E plans will determine the scale of artificial production based on the abundance of natural-origin fish with constraints to avoid overwhelming natural-origin fish on the spawning grounds).

⁷ <http://www.bpa.gov/corporate/BPANews/ArticleTemplate.cfm?ArticleId=article-20101115-01> (last visited Dec. 21, 2010).

⁸ http://www.columbiabasinherald.com/news/article_2a432fca-f756-11df-a069-001cc4c002e0.html (last visited Dec. 21, 2010).

The “complex and ambitious hatchery program” was refined in the course of seven reviews by the Council’s Independent Scientific Review Panel (ISRP) and reflected a “healthy and helpful exchange” and “trust and respect” in the Tribes’ interactions with the ISRP.⁹ ISRP Step-Three Review Memorandum at 1-2; Council Decision Memorandum at 6.

At full production, Chief Joseph Hatchery will produce up to 900,000 UCR spring Chinook smolts and 2 million summer/fall Chinook smolts. Council Decision Memorandum at 7. Reintroduction of spring Chinook into the Okanogan Basin will restore a fourth population for this ESU and will be coordinated with the Tribes’ restoration and improvement of historic habitat, including Omak Creek on the Colville Reservation and Salmon Creek, both tributaries of the Okanogan River. 2008 BiOp, RPA Table at 46; Colville MOA (2008 Corps AR A.394) at B-1 to B-4; Declaration of Stephen H. Smith ¶ 16 (Dkt. No. 1563). The Tribes take particular pride in their effort to restore the extirpated spring Chinook population to the Colville Reservation. Towey Decl. ¶ 9. This effort will increase the abundance, distribution and diversity of the ESU, beyond current recovery efforts for the three extant populations. Smith Decl. ¶ 17.

In sum, secure funding, planning approvals and the established implementation schedule for Chief Joseph Hatchery ensure that this state-of-the-art project will be completed and its predicted benefits will accrue to endangered UCR spring Chinook. The project is on-schedule, as the staff housing and acclimation ponds were built in the summer of 2010, and the remaining work on the water supply system and the main hatchery complex began in December 2010. *See*

⁹ In addition to the Council’s extensive review process, the hatchery plan was reviewed under NEPA and section 7 of the ESA. *See* Council Decision Memorandum at 7. The Final EIS was completed in November 2009 and is available at http://efw.bpa.gov/environmental_services/Document_Library/Chief_Joseph/CJHP_FEIS_CD.pdf. The biological opinion was issued by NOAA in July 2008. *See* http://efw.bpa.gov/environmental_services/Document_Library/Chief_Joseph/NOAA_Fisheries_Biological_Opinion_0708.pdf. BPA approved funding for construction, operation and maintenance of the hatchery in a Record of Decision issued on March 18, 2010.

BPA news release (Nov. 15, 2010).¹⁰ The hatchery also stands out as tangible proof that collaboration between sovereigns and stakeholders in the Columbia River Basin can achieve significant benefits for fish. As the ISRP noted in recommending the hatchery program for approval, “[f]or a project of this scope and magnitude, the efficiencies and collaboration that this project has generated is impressive.” Council Decision Memorandum at 8.

B. Okanogan River Basin Tributary Habitat Projects.

In an effort to bolster its argument that the BiOp impermissibly relies on “uncertain and unidentified future habitat actions,” NWF singles out certain tributary habitat projects in the action agencies’ 2010-2013 Implementation Plan that have experienced delays. NWF Suppl. Mem. at 5, 7-8 & n.11. However, this focus on a few individual projects misses the big picture – that the RPA includes a massive habitat mitigation program which, as it is implemented over the course of a decade, will lead to significant benefits for fish throughout the Columbia River Basin. NWF glosses over the substantial, real world accomplishments represented in the aggregate of work completed through 2008: 3,264 acres of fish habitat improved; 1,082 cfs of cumulative increase in tributary stream flows; 582 miles of spawning and rearing habitat opened; 92 miles of streams improved; and over 700 miles of riparian habitat protected through land purchase or lease. 2010 BiOp, § 2 at 83. Further gains in all of these areas were made in 2009, including opening over 260 miles of spawning and rearing habitat and improvement of close to 1,900 acres of riparian habitat. *See* FCRPS BiOp Tributary Habitat Accomplishments From the Action Agencies’ 2009 Progress Report (Nov. 2010).¹¹

¹⁰ <http://www.bpa.gov/corporate/BPANews/ArticleTemplate.cfm?ArticleId=article-20101115-01> (last visited Dec. 21, 2010).

¹¹ This summary of the forthcoming 2009 Progress Report is available at <http://www.salmonrecovery.gov/Files/FCRPS%20BiOp%20Tributary%20Habitat%20ver%201.pdf>.

In the many projects selected to implement the RPA's habitat improvement objective, it is hardly surprising that Plaintiffs are able to cherry-pick some that have encountered delays or other setbacks. Yet this argument unfairly attempts to diminish the tangible progress has been made in the two and a half years the BiOp has been in place. That progress has been bolstered by the Fish Accords, which exponentially increased the committed funding for habitat projects throughout the Basin. For example, the Colville Tribes have made steady progress in implementing projects in the Okanogan Basin to restore steelhead habitat in Omak and Salmon Creeks and in other tributaries. *See* Towey Decl. ¶¶ 8-14; *see also* Colville MOA (2008 Corps AR A.394) at B-1 to B-4; Okanogan Initiative at 1-22 (BR074565-BR074586). In Omak Creek, which is located within the Colville Reservation on the east side of the Okanogan River and historically was important UCR steelhead and spring Chinook habitat, work has focused on correcting the limiting factors of high water temperatures and fish passage barriers. Towey Decl. ¶ 9. Restoration of riparian vegetation has been successfully undertaken to reduce summer water temperatures in the lower five miles where the Tribes have increased the vegetative canopy closure from 8% to over 75%, thereby shading stream flows and restoring critical summer rearing areas for juvenile steelhead. *Id.* ¶ 10. Adding to previous fish passage improvements that corrected a complete blockage at stream mile 0.5 and provided access to 4.5 miles of spawning and rearing habitat, work will be completed in 2011 on a second partial blockage that will ease steelhead passage to 17 miles of streams. *Id.*; *see also id.* ¶ 9 (“replacement of numerous undersized-culverts (13 in 2010 alone) preventing road fill from being delivered to spawning habitat if washed-out”). As a result of these efforts, in 2010, nearly 200 naturally-produced steelhead returned to Omak Creek, a stream that had an estimated 20 steelhead return in 1997 (all of hatchery origin), when rehabilitation planning began. *Id.* ¶ 10.

On Salmon Creek, another key tributary of the Okanogan River, the Tribes have used Accord mitigation funds to improve in-channel habitat and annually lease 1,200 acre-feet of irrigation water to restore minimum spring flows in the lower 4.3 miles of the creek. Towey Decl. ¶ 11. These efforts have reconnected 11 miles of quality steelhead habitat that were previously isolated from the Okanogan River by irrigation flow diversions for nearly 90 years. *Id.* Expanding on this mitigation work, the Colville Tribes have used Accord funds to reconstruct a definitive channel downstream of the irrigation diversion, thereby maximizing the amount of leased water and providing adequate migration conditions from the confluence to beyond the irrigation diversion. *Id.* From no returning steelhead in Salmon Creek, these efforts resulted in 71 adults entering Salmon Creek to spawn in 2009 and over 200 steelhead spawning in 2010. *Id.* Efforts will continue under the Colville MOA to improve habitat through land acquisition, bank stability and water conservation so that UCR spring Chinook can be reintroduced into their historical habitat. *Id.*

A wide range of projects has also been implemented on several smaller streams that are critical to recovery of UCR steelhead. Towey Decl. ¶ 12. The Tribes applied Accord funds in 2008 to improve flows and reduce livestock damage on Wildhorse Spring and Wanacut Creeks. *Id.* In 2009, funds were used to purchase and therefore protect key steelhead habitats along tributaries to the Okanogan River such as Omak Creek and Ninemile Creek. *Id.* On Wildhorse Spring Creek, the Tribes implemented channel realignment, passage barrier removal and habitat complexity projects. *Id.* On Bonaparte Creek, the Tribes installed hardened rock crossing, exclusion fencing and alternate watering sites for livestock. *Id.* In 2010, property and surface water rights purchases continued, and major habitat improvements were undertaken along 3,500 feet of Bonaparte Creek and in Wildhorse Spring Creek. *Id.* ¶ 13. Finally, the Tribes installed a

weir in a cross channel near the confluence of the Okanogan River and its primary tributary, the Similkameen River. This structure will prevent annual dewatering of steelhead redds in the Okanogan River during certain low flow conditions. *Id.* ¶ 14.

This work on Salmon and Omak Creeks and other Okanogan River tributaries represents significant improvements in fish habitat a short time into the BiOp's mitigation program. In addition, other tribes, states and the action agencies have completed and are continuing work throughout the Basin to implement the RPA and Fish Accords. This body of work is the appropriate measure of whether the total mitigation effort is reasonably certain to occur, not the few projects singled out by NWF. While progress has not been uniform, the Court should have confidence that the mitigation obligation will be carried out over the life of the BiOp and the promised benefits to fish will be realized. *See Natural Resources Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1241 (E. D. Cal. 2005) (even though track record of agency's implementation of mitigation actions was "discouraging," court determined that documented progress on a substantial number of the proposed mitigation actions prevented a determination that they were not reasonably certain to occur).

The Colville Tribes' successful implementation of these tributary habitat projects also underscores the importance of the Fish Accords to the overall mitigation effort and highlights how NWF's effort to minimize the scope and impact of the Accords undermines its argument that the mitigation program cannot support NOAA's jeopardy analysis. NWF Suppl. Mem. at 7 n.9. The Accord projects represent a substantial addition to the RPA and provide greater certainty that a broad scope of mitigation work will in fact take place. As NOAA explained:

The RPA, as amended, includes the 2008 Columbia Basin Fish Accords (Appendix G). The Accords support and enhance the tributary habitat program by securing a number of Columbia Basin tribes and the State of Idaho as implementing partners. The Accords' habitat improvement objectives are beyond

those required by Table 5 of RPA Action 35, which adds to NOAA Fisheries' confidence that habitat improvements over the term of the BiOp will meet or exceed those expectations for the affected populations.

2010 BiOp, § 2 at 84. Moreover, the Accords represent a stable funding source which maximizes the time Tribal biologists can devote to meaningful implementation of mitigation projects rather than chasing lesser amounts of funding in the myriad of regional processes, an effort that historically consumed an inordinate amount of staff time. Towey Decl. ¶ 5.

The 2010-2013 Implementation Plan illustrates the importance of the Accords to achieving the action agencies' mitigation objectives set forth in the RPA. With respect to habitat projects in the Okanogan Basin for the UCR steelhead ESU, the habitat quality improvement target under the RPA is 14%. 2008 BiOp, RPA Table at 46 (Table 5); 2010 Corps AR A.5 at 563 (2010-2013 Implementation Plan). However, not only was the estimated gain through 2012 anticipated to be nearly double the RPA's objective (25%), but the Accord projects would add certainty that a 64% improvement in habitat quality would be achieved by 2018 - over *four times* the original gain targeted by the RPA.¹² 2010 Corps AR A.5 at 563. In contrast, one of the tributary project examples cited by NWF – Pahsimeroi Snake River spring/summer Chinook – has *no* associated Accord projects. See NWF Suppl. Mem. at 7-8 (citing BRS001518). For two other NWF examples, however, the Accord projects do add substantial certainty to achieving the measurable habitat and survival improvements required in the RPA. NWF's criticism of the progress to date on Entiat UCR spring Chinook projects fails even to mention that the habitat

¹² The estimated habitat gains for certain Accord projects were developed by tribal biologists using the same methodology applied by the expert panels reviewing the tributary habitat projects in the RPA. 2010 BiOp, § 2 at 84 n.24, App. G at 39; 2010 Corps AR A.5 at 552. Habitat improvement estimates for Colville MOA projects relied, in part, on projections in the 2007 Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, see *infra* at 18 & n.14, and the Okanogan Initiative. See Colville MOA (2008 Corps AR A.394) at B-1 (citing 2007 Recovery Plan, Table 5.11 and Figure 5.5), B-2 (citing Okanogan Initiative at 21, BR074585).
AMICUS BRIEF OF COLVILLE TRIBES IN
SUPPORT OF DEFENDANTS' SUPPLEMENTAL
CROSS MOTION FOR SUMMARY JUDGMENT 15

improvement target of the RPA would be mostly accomplished by Accord projects alone (22% and 19%, respectively). NWF Suppl. Mem. at 8 n.11 (citing BRS001520). And for the Wenatchee population of this ESU, the RPA's 2018 target of 3% would be more than doubled by the Accord estimate of 7% anticipated habitat improvement. 2010 Corps AR A.5 at 557. In the Tucannon River example, a 4% gain anticipated from Accord projects would contribute around a quarter of the 17% improvement objective in the RPA. 2010 Corps AR A.5 at 554. In short, wherever Accord habitat projects are located, they provide substantial insurance on the targeted gains in the RPA. *See* 2010 BiOp, § 2 at 84 n.24, App. G (listing the populations for which "survival benefits of [the Accord tributary habitat] actions will exceed those called out for in RAP Action 35, Table 5"). This is precisely the "margin of safety" to cushion against any uncertainty in predicted benefits that NWF claims is missing from NOAA's analysis. NWF Suppl. Mem. at 12 & n.15.

C. Selective Fisheries.

An Accord project closely related to Chief Joseph Hatchery and the objective of reintroducing spring Chinook to the Okanogan Basin is the Colville Tribes' development, testing and implementation of live-capture selective fisheries to accomplish many of the goals established for the hatchery, including ceremonial and subsistence harvest without impacting natural-origin fish and limiting hatchery-origin returns to the spawning grounds.¹³ Selective fishing offers the potential to harvest hatchery-origin Chinook and steelhead while releasing wild, or natural-origin, fish for escapement. Declaration of Michael Rayton ¶ 2. In mixed-stock fisheries, harvest of abundant wild stocks, like Okanogan sockeye, can still take place while releasing wild Chinook and steelhead captured with the selective fishing. *Id.* Such fishing in the

¹³ The Colville Tribes' selective fishing techniques can be viewed on a video at www.youtube.com/watch?v=Ir8QiLqPhjY (last visited Dec. 21, 2010).

Columbia River Basin may positively affect ESU productivities by reducing the numbers and proportion of hatchery-origin fish in the natural spawning population while simultaneously increasing the numbers and proportions of wild fish in these populations. These critical actions will allow the populations to better adapt to their habitats and become more productive. *Id.* ¶ 3.

The results of the early work on this study are very promising. The Colville Tribes are harvesting increasing numbers of hatchery-origin Chinook and natural-origin sockeye while releasing wild Chinook and steelhead with only 1% direct mortality. Rayton Decl. ¶ 4; *see also* 2010 Corps AR A.5 at 375 (2010-2013 Implementation Plan at 11); Council Decision Memorandum at 22-26 (Peone powerpoint at Slides 12-16); CCT Fish and Wildlife Department 2009 Live-Capture/Selective Harvest Summary, *available at* <http://nrd.colvilletribes.com/obmep/pdfs/2009ELCGsummary.pdf>. The immediate and significant success of the Colville Tribes' fisheries has led Washington and Oregon to accelerate similar tests of selective fishing gears in the non-treaty commercial fisheries in the lower Columbia River. Rayton Decl. ¶ 4. Furthermore, the Tribes recently purchased the purse seine vessel used in these studies for permanent deployment, thereby enabling the Tribes' work with selective fisheries and refinement of techniques for mixed-stock fisheries to continue. *Id.* ¶ 5; 2010 Corps AR A.5 at 375, 518-519.

II. The Spokane Tribe Overlooks Significant Progress in Recovering UCR Spring Chinook and Steelhead.

The Spokane Tribe's *amicus* brief (Dkt. No. 1803) focuses exclusively on UCR spring Chinook and steelhead, the two listed species in the upper Columbia River. The Colville Tribes share the concerns about avoiding jeopardy and recovering these species, and have urged the action agencies to focus on the upper Columbia River in light of clear indications that these ESUs are among the most seriously depressed in the Basin. Recovery of these species has long

been a key CCT objective, as these fish are essential to the cultural and subsistence well being of the Tribes. However, the Colville Tribes take a very different view about the progress that has been made in recent years and will continue to be achieved through the Accords.

The Spokane Tribe asserts that “there are no on-the-ground rapid response actions in sight for UCR spring Chinook and steelhead.” Spokane Br. at 3. Relying on the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan (“2007 Recovery Plan”),¹⁴ the tribe asserts that all extant populations of UCR spring Chinook and steelhead “are not viable.” *Id.* However, the Spokane Tribe ignores the substantial funding, planning and monitoring and evaluation commitment that the action agencies have made *since* the 2007 Recovery Plan to recover these species as well as the significant progress made on upper Columbia Basin mitigation projects in the past few years to carry out the objectives of the Plan. *See* Towey Decl. ¶ 6. Notably, the Spokane Tribe does not mention Chief Joseph Hatchery or the Colville Tribes’ reintroduction strategy for spring Chinook that the hatchery will make a reality. *See* 2007 Recovery Plan at xx (describing CCT’s reintroduction options); Towey Decl. ¶¶ 8, 11, 16. Indeed, the Colville Tribes have continued to move forward on this front as well and recently submitted a petition to initiate the reintroduction process consistent with ESA requirements.

Like NWF, the Spokane Tribe cites to delayed progress on UCR projects for the Entiat River without acknowledging that the estimate of habitat quality improvement under the Accord projects is alone close to the total objective of the RPA for that population. Spokane Br. at 6

¹⁴ The Spokane Tribe cites to the “2007 Northwest Salmon and Steelhead Recovery Planning and Implementation report.” Spokane Br. at 3. The quotations in the brief are actually from the Upper Columbia Salmon Recovery Plan Summary, available at <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Interior-Columbia/Upper-Columbia/upload/Upper-C-summary.pdf>, and the Federal Register notice for the 2007 Recovery Plan, 72 Fed. Reg. 57303, 57304 (Oct. 9, 2007). The full 2007 Recovery Plan, dated August 2007, is available at http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Interior-Columbia/Upper-Columbia/upload/UC_Plan.pdf.

(citing BRS001520). As discussed above, Accord projects represent a firm commitment that habitat mitigation gains will be realized in several of the UCR basins. 2010 Corps AR A.5 at 557, 562-563 (list of projects for spring Chinook and steelhead in the Entiat, Wenatchee, Methow and Okanogan basins). The Spokane Tribe's demand for "immediate action" rings hollow because it fails to consider the full scope of the 10-year mitigation program of the RPA and the work that will be accomplished through the Fish Accords. *See* 2008 BiOp, RPA Tables; 2010 Corps AR A.5 at 552-568. Given all of the complexities and challenges of implementing such a broad restoration program, it is unclear how more "immediate" the response of the action agencies and their regional partners could realistically be. Indeed, prior to the Accords, the entire Upper Columbia province (Columbia Cascade) received less than \$3 million per year for fishery programs, whereas now the Okanogan Basin alone receives between \$12 and \$15 million per year through the Colville MOA. Towey Decl. ¶ 5.

The Colville Tribes – in large part because of their substantial involvement in the collaboration process after the 2004 BiOp and commitment to carrying out their contracted Accords projects – have a far different view of the prospects of recovery of UCR species. The Colville Tribes strongly disagree that the 2008 and 2010 BiOps, in conjunction with their reliance on the RPA and Fish Accords, "fail[] to adequately protect the highly at-risk UCR species." Spokane Br. at 7. The Colville Tribes' continued assessment of the abundance and productivity metrics, trends, most recent years' adult returns, and effects of ongoing mitigation measures on fish survival and tributary fish production indicates that UCR spring Chinook and steelhead are still trending away from extinction and toward recovery. Coupled with this assessment of recent years' data is optimism that advancements in fisheries management (hatcheries and harvest reforms) as well as other collaboration-driven efforts to benefit fish that

are not accounted for in the BiOp should add to the status of wild salmon and steelhead throughout the Basin, but particularly in the upper Columbia.

Moreover, while the Spokane Tribe asserts that “NOAA did not do enough” and that the “AMIP does not comply with NOAA’s duty to ensure that mitigation actions are reasonably specific and reasonably certain to occur,” Spokane Br. at 8, it simply does not acknowledge the substantial work that has already been accomplished under the RPA and the Accords, and that these projects will continue to be implemented over the ten-year time frame of the BiOp. With respect to UCR steelhead, an ESU which was recently downlisted from endangered to threatened status following an extensive scientific, public and judicial review,¹⁵ runs of these fish, even in the most at-risk population in the Okanogan River, continue to improve through 2010. Towey Decl. ¶¶ 10-11. Ongoing Accord funding of Okanogan Basin habitat and hatchery programs will continue to add to this population’s natural-origin abundance and productivity. *See, e.g.* 2010 Corps AR A.5 at 563 (64% estimated habitat improvement from Accord projects through 2018).

In short, the Spokane Tribe’s claim that the BiOp is flawed because it relies on “habitat mitigation measures that . . . have not yielded nearly what NOAA has predicted” Spokane Br. at 9, is premature given the overall scope and implementation schedule of the RPA and Accords. In fact, the Spokane Tribe fails to acknowledge even once the work accomplished, or planned and funded, through the Fish Accords, either in the upper Columbia or anywhere else in the Basin. In reality, a broadly supported effort to recover listed salmon and steelhead using a variety of strategies throughout the Columbia River Basin is well underway. The Colville Tribes firmly believe that, given the opportunity, the RPA and Fish Accords will lead to recovery of

¹⁵ *See Trout Unlimited v. Lohn*, 559 F.3d 946 (9th Cir. 2009) (upholding NOAA’s decision to downlist UCR steelhead to threatened status); 74 Fed. Reg. 42605 (Aug. 24, 2009) (implementing court decision).

UCR spring Chinook and steelhead and other listed species. The Court should allow the mitigation program it urged the parties to develop through an unprecedented regional collaboration – and which has nonetheless been subject to relentless challenges and criticism by Plaintiffs and their supporting *amici* – to continue for its full term, thereby accruing its promised benefits to the fish that lie at the heart of this case.

CONCLUSION

For all of the reasons above and in the Colville Tribes' initial briefing on summary judgment (Dkt. Nos. 1558, 1638), as well as briefs submitted by the Federal Defendants and the other *amici* supporting the Federal Defendants, this Court should grant summary judgment in favor of the Federal Defendants and deny Plaintiffs' claims in their entirety.

Respectfully submitted, this 23rd day of December, 2010.

s/ Brian C. Gruber
Brian C. Gruber, WSBA No. 32210
bgruber@zcvbs.com
ZIONTZ CHESTNUT VARNELL
BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, Washington 98121
Tel. 206 448 1230
Fax 206 448 0962

*Attorneys for Amicus Curiae Confederated
Tribes of the Colville Reservation*

CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 100.13(c) and FRCP 5(d), I hereby certify that on the 23rd day of December, 2010, the foregoing *Amicus* Brief of Colville Tribes in Support of Defendants' Supplemental Cross Motion for Summary Judgment was filed with the Court's electronic filing system which will generate automatic service upon all parties enrolled to receive such service. In addition, a true and correct copy of the foregoing was manually served via first class U.S. mail to the following at the addresses set forth below:

Dr. Howard F. Horton
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, OR 97331-3803

Walter H. Evans, III
Schwabe, Williamson & Wyatt, PC
1600-1900 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83051

Thomas L. Sansonetti
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663

Clarkston Golf & Country Club
Hoffman, Hart & Wagner
1000 S.W. Broadway, 20th Floor
Portland, Oregon 97205

Seth M. Barsky
U.S. Department of Justice
Wildlife & Marine Resources Section
Environmental & Nat. Resources Div.
Ben Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369

s/ Brian C. Gruber
Brian C. Gruber, WSBA No. 32210
bgruber@zcvbs.com
ZIONTZ CHESTNUT VARNELL
BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, Washington 98121
Tel. 206 448 1230
Fax 206 448 0962
*Attorneys for Amicus Curiae Confederated
Tribes of the Colville Reservation*