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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civil No. 01-CV-640-RE

**FEDERAL DEFENDANTS' RESPONSE
TO PLAINTIFFS' STATEMENT OF
FACTS**

In accordance with Local Rule 56.1, Federal Defendants NOAA Fisheries (“NOAA”), the U.S. Bureau of Reclamation (“BOR”), and the U.S. Army Corps of Engineers (“Corps”), through undersigned counsel, hereby respond to Plaintiffs’ October 29, 2010 Statement of Facts (“SOF”) (Docket No. 1800) as follows:

PRELIMINARY STATEMENT

The Court’s review is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and is limited to the administrative records (“Records”) submitted and authenticated by NOAA Fisheries (“NOAA”), the Bureau of Reclamation (“BOR”), and the Army Corps of Engineers (“Corps”). *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 733-734 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.” (citation omitted)); *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Under the APA, this Court does not sit as an evidentiary fact finder or resolve alleged disputed facts. Rather, the Court sits as an appellate tribunal determining as a matter of law whether the facts found by the agency, and the agency’s decision as a whole, are supported by the Record. *See Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (in an APA action, “there are no disputed facts that the district court must resolve. The court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”).

While Federal Defendants submit this Response in compliance with the Local Rules, this statement has limited applicability here, as the Court’s decision is limited to an application of the appropriate standard of review under the APA to the Records submitted by NOAA, the Corps, and BOR. *Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008) (*en banc*).

RESPONSE TO PLAINTIFFS’ STATEMENT OF FACTS

1. Federal Defendants do not dispute that NOAA issued a biological opinion entitled “Supplemental Consultation on Remand for Operation of the Federal Columbia River Power

System, 11 Bureau of Reclamation Projects in the Columbia Basin and ESA Section 10(a)(I)(A) Permit for Juvenile Fish Transportation Program” on May 20, 2010. NOAA AA.1 (“2010 BiOp”).¹ Federal Defendants do not dispute that the Corps and BOR issued supplemental records of decision on June 11, 2010, *see* Corps 009; BRS000001, and Federal Defendants further state that the Bonneville Power Administration (“BPA”) also issued a supplemental record of decision on June 11, 2010, *see* Corps 1425. Federal Defendants dispute Plaintiffs’ characterization of the 2010 BiOp in the third sentence of paragraph 1, as the 2010 BiOp speaks for itself.

2. Federal Defendants dispute and object to Plaintiffs’ characterizations in the first sentence of paragraph 2 as unsupported by citation to evidence, Fed. R. Civ. P. 56(c); LR 56-1(c)(1). Federal Defendants dispute the remaining characterizations in paragraph 2 as unsupported by the cited documents and the Records.

3. Federal Defendants dispute Plaintiffs’ characterizations as unsupported by the cited documents and the records. Federal Defendants further dispute Plaintiffs’ characterizations of the cited documents, as the documents speak for themselves. Federal Defendants further object to characterizations in the last sentence of paragraph 3 as not relevant to the Court’s review under standards set forth in the APA, 5 U.S.C. § 706 (limiting consideration to the record before the court).

4. Federal Defendants dispute and object to Plaintiffs’ characterizations in the first sentence of paragraph 4 as unsupported by citation to evidence, Fed. R. Civ. P. 56(c); LR 56-1(c)(1). Federal Defendants dispute the remaining characterizations in paragraph 4 as unsupported by the cited documents and the records. Federal Defendants further dispute the characterizations of the cited documents, as the documents speak for themselves.

5. Federal Defendants dispute Plaintiffs’ characterizations of the Adaptive Management Implementation Plan (“AMIP”), as that document speaks for itself. Federal

¹ Federal Defendants incorporate herein by reference their Response to Plaintiffs’ Statement of Facts. *See* Docket No. 1546 (filed October 24, 2008).

Defendants dispute the characterizations in the second sentence of paragraph 5 as unsupported by the cited document and the records. Federal Defendants dispute the characterizations in the final sentence of paragraph 5 as unsupported by the cited documents and the records.

6. Federal Defendants dispute the characterizations in the first sentence of paragraph 6 as unsupported by the cited document and the records. Federal Defendants dispute the characterizations in the second sentence of paragraph 6, as the 2010 BiOp speaks for itself. Federal Defendants dispute the remaining characterizations in paragraph 6 as unsupported by the cited document and the Records, and as the cited document speaks for itself.

7. Federal Defendants dispute the characterizations in paragraph 7, as the cited documents and the records speak for themselves.

8. Federal Defendants dispute the characterizations in the first sentence of paragraph 8, as the cited document speaks for itself. Federal Defendants dispute the remaining characterizations in paragraph 8 as unsupported by the cited documents and the Records.

9. Federal Defendants dispute the characterizations in paragraph 9 as supported by the cited documents and the records.

10. Federal Defendants dispute the characterizations in paragraph 10, as the cited document speaks for itself.

11. Federal Defendants dispute the characterizations in paragraph 11 as unsupported by the cited documents and the records, as the cited documents speak for themselves.

12. Federal Defendants dispute to the characterizations in paragraph 12 as unsupported by the cited document, as the cited document speaks for itself.

13. Federal Defendants dispute the characterizations in paragraph 13 as unsupported by the cited documents and the records.

14. Federal Defendants dispute the characterizations in the first sentence of paragraph 14, as the cited document speaks for itself. Federal Defendants dispute the remaining characterizations in paragraph 14 as unsupported by the cited documents and the records.

Respectfully submitted: December 23, 2010.

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/s/ Coby Howell

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on December 23, 2010, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by regular or overnight mail:

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