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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**NATIONAL WILDLIFE FEDERATION,
et al.,**

Plaintiffs,

v.

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

Defendants.

Case 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 MOTIONS FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT**

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I. INTRODUCTION.

Once again, and hopefully for the last time, the Court is tasked with reviewing the 2008 biological opinion (BiOp) for operations of the Federal Columbia River Power System (FCRPS). The 2008 BiOp is the result of an unprecedented collaborative effort set in motion by this Court but that has now taken on a life of its own – for the most part, the eyes of Columbia River Basin stakeholders have been opened to the need to view the Basin as an integrated whole, the upriver and downriver needs of which must be balanced to benefit the unitary resource that is the Columbia River ecosystem with its many tributaries and reservoirs. Unlike the last time the parties were before the Court, the 2008 BiOp now is buttressed by the Adaptive Management Plan (AMIP) which was incorporated into the 2008 BiOp during a limited remand that produced the 2010 Supplemental BiOp. The limited remand provided an opportunity for additional scientific scrutiny of the 2008 BiOp, and for improvements (in the way of amendments) to the AMIP, offered not only by scientists employed by federal agencies but also by independent scientists. This scientific scrutiny, which includes that of Oregon's own renowned scientist and current NOAA Administrator Dr. Jane Lubchenko, rightly led to the conclusion that FCRPS operations, conducted in accordance with the reasonable and prudent alternative (RPA) set forth in the 2008 BiOp as implemented through the amended AMIP, are not likely to jeopardize the continued existence of Endangered Species Act (ESA)-listed fish species nor result in the destruction or adverse modification of such species' critical habitat.

Plaintiffs remain dissatisfied with the outcome and urge the Court to find fatal flaws in individual components of what more properly must be viewed as an integrated and coherent

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whole. The 2008 BiOp, the 2010 Supplemental BiOp, the 2009 AMIP and the amended AMIP are all rolled up into the agency action that is being actualized through FCRPS operations conducted in accordance with the amended Records of Decision (RODs) issued by the U.S. Army Corps of Engineers (Corps), the Bureau of Reclamation (BOR) and the Bonneville Power Administration (BPA). Plaintiffs surely will continue their effort to flyspeck individual components of FCRPS operations. But at the end of the day, the Court should uphold the integrated agency action referred to herein as the 2008 BiOp, or as the 2008 BiOp as implemented through the AMIP. Defendant-intervenors the Kootenai Tribe of Idaho (KTOI) and the Confederated Salish and Kootenai Tribes (CSKT), Tribes residing in the upper Columbia River Basin who are participating in this case primarily to speak on behalf of often-ignored resident species affected by FCRPS operations, urge the Court to uphold the 2008 BiOp and to allow the parties to exit the courtroom (or at least this courtroom) and focus their attention on implementing actual on-the-ground operations for the benefit of Columbia River Basin fish species and the Basin ecosystem more generally.

II. RECAP OF THE TRIBES AND THEIR INTERESTS IN THIS CASE.

The Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes previously provided the Court with a description of their respective histories and interests in this case. See Document No. 1555 (Summary Judgment Memorandum filed Oct. 24, 2008). Although the Court is referred to that document for a fuller overview of these upper-Basin Tribes, a truncated review of the Tribes' upper Basin interests, particularly as they relate to FCRPS operations, is set forth below for the Court's convenience.

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A. Kootenai Tribe of Idaho.

Current and Ancestral Homeland of the KTOI. The Kootenai Tribe of Idaho is a federally-recognized Tribe headquartered near Bonners Ferry in northern Idaho's Kootenai River Valley. The modern bands that today comprise the whole of the Kootenai Tribe include five Canadian bands plus two bands residing in the United States, i.e. the KTOI and the CSKT. Bands of the Kootenai Tribe have inhabited portions of Idaho, Montana, Washington, British Columbia and Alberta since time immemorial. The KTOI belongs to a Kootenai group which historically inhabited the area along the Kootenai River from above Kootenai Falls (located between the cities of Libby and Troy, Montana) to Kootenay Lake in what is now British Columbia. See Exhibit A (snapshot view of relevant portion of overview map found in U.S. Army Corps of Engineers Administrative Record (AR) dated September 2008).

Hellgate Treaty. In 1855, the Kootenai, Salish and Upper Pend d'Oreilles Tribes 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, which ceded the majority of Kootenai territory and created a reservation near Flathead Lake for the newly-created CSKT. Although the KTOI did not enter into the Treaty, the ceded territory included the Idaho Kootenai's aboriginal lands. After ensuing efforts (mostly unsuccessful) to convince KTOI members to move to, and take allotments on, the Flathead Reservation, U.S. government representatives abandoned their attempt to relocate the KTOI and instead allowed remaining Tribal members to remain in the Bonners Ferry, Idaho area.

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Keeping the Creator-Spirit's Covenant. Tribal identity for the KTOI is founded on caring for native fish and wildlife species in the Kootenai River Valley. Tribal elders continue to share the history of the beginning of time when the Kootenai people were created and placed on earth by Quilxka Nupika to keep the Creator-Spirit's Covenant to guard and keep the land forever. The KTOI has remained true to its original purpose as guardian of the land, and the Creator-Spirit's Covenant undergirds all Tribal activities. The Tribe's ability to keep the Creator-Spirit's Covenant is affected by FCRPS operations because the Kootenai River system includes Libby Dam, which is part of the FCRPS. See Exhibit 1. FCRPS operations implicating the storage and release of water at Libby Dam affect downstream Kootenai River conditions, which in turn affect the organisms that live in and around the River's channel.

Species and Habitat Restoration Efforts. As the KTOI has explained at various points throughout this litigation, the Tribe has been playing an active role in protecting and recovering Kootenai River Valley species for many years and in many different forums. The KTOI's efforts on behalf of the Kootenai River white sturgeon are particularly noteworthy in that the Tribe initiated and continues to implement an innovative and collaborative conservation aquaculture program designed to preserve genetic variability and stave off the species' extinction while the Tribe and its partners work to restore Kootenai River habitat to facilitate natural spawning and recruitment. Over the last two years (since the Tribe's last brief in this case), the KTOI has made great strides on the Kootenai River Habitat Restoration Project (KRHRP), an ambitious project designed to improve ecosystem health by restoring and enhancing Kootenai River habitat through, among other things, reconfiguration of river morphology. The interested reader can

review the KRHRP Master Plan by visiting the Tribe's website at www.kootenai.org/fish_restoration.html.

Libby Dam Settlement. Although the Tribe is committed to implementing the KRHRP for the inherent good of the Kootenai River ecosystem and all of its component parts, the Court is reminded that the Tribe's KRHRP also was made a component of the September 2008 settlement in Center for Biological Diversity v. U.S. Fish and Wildlife Serv., Case No. CV 03-29 (D. Mont.). That settlement brought an end to the long-running lawsuit over operations of Libby Dam – again, part of the FCRPS – and the effects of those operations on the Kootenai River white sturgeon and bull trout. Similar to the collaboration that has sprung to life in this case, the parties in the Libby Dam lawsuit agreed to work collaboratively towards a common goal for the benefit of fish species. Among other examples of collaboration, the Corps, FWS and BPA are supporting, and cooperating in good faith on, the KTOI's ambitious efforts to implement the KRHRP and restore healthy river functions in a more holistic manner than ever before attempted. The State of Montana, which also was a party to the Libby Dam lawsuit, cooperatively agreed to provide a limited waiver of its water quality standard for total dissolved gas (under defined conditions meant to prevent inadvertent harm to other species, including bull trout) so that the effects of additional spill over Libby Dam could be implemented for the possible benefit of sturgeon. Consistent with that agreement, in June 2010 additional spring-like spill was implemented for a period of days in an effort to induce sturgeon to move to, and spawn in, more appropriate spawning habitat in the Bonners Ferry area of the Kootenai River.

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Alignment Between Downriver and Upriver Operations. After the parties to the Libby Dam lawsuit reached an agreed-upon path forward for sturgeon (and other resident fish species) in the upper Basin, the 2008 BiOp finally incorporated operational parameters that are consistent with longstanding and sound scientific recommendations for upper Basin dams. The fundamental change, which has been recommended by scientists since at least 2003, involves a more natural and gradual drawdown of Libby and Hungry Horse Dams that extends into September (instead of being accomplished by the end of August) to extend the naturally short 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. The biological benefits to Kootenai River species from 2008 BiOp operations are certain and do not translate into functionally significant changes (either positive or negative) for listed fish species in the lower Basin. NOAA AR Doc. B0207 at 13-14 (ISAB Findings from the 2004 Reservoir Operations/Flow Survival Symposium). Thus, as a result of the 2008 BiOp, river operations throughout the range of the FCRPS – both in the upper Basin and in the lower Basin – finally are aligned with the agreed-upon, positive path forward for sturgeon, bull trout and other upper Basin species. See BOR AR 000054 (discussing the Corps' ESA consultations with FWS over the interplay between the Libby Dam BiOp and the FCRPS BiOp).

Voicing the Needs of Upriver Species. The KTOI intervened in this case, participated in the FCRPS collaboration and continues to participate in the Regional Implementation Oversight Group (RiOg) to be a voice for upriver species. Although regional appreciation for the needs of upper Basin species is increasing, the KTOI still seeks to remind fish and wildlife

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managers of the wisdom of resisting narrow, salmon-centric policies and instead embracing the needs of the Columbia River Basin ecosystem as a whole. The KTOI continues to support the 2008 BiOp, particularly as implemented through the 2009 AMIP which only strengthened the BiOp's species protections. 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, including Libby Dam). Additional discussion of the beneficial "Montana Operation" follows below in part IV, after revisiting the interests of the CSKT in this case.

B. Confederated Salish and Kootenai Tribes.

Hellgate Treaty. As mentioned above, the Confederated Salish and Kootenai Tribes entered into the Hellgate Treaty with the United States in 1855, on July 16 to be precise. 12 Stat. 975, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859. Under the Hellgate Treaty, which establishes the scope of the CSKT's interests in this case, the Tribes retained certain fundamental rights on ceded aboriginal territory, including the right to take fish at all usual and accustomed places. Notably, this includes the fisheries and associated natural resource components in and around significant reaches of the upper Columbia River Basin, including the Montana reservoirs operated behind Hungry Horse and Libby Dams as part of the FCRPS.

Reserved Fishing Rights. When the CSKT agreed to cede vast areas of ancestral homeland to the United States, the Tribes did so in exchange for the express promise that, among other things, the Tribes could continue their traditional way of life. To do so, the CSKT not only retained exclusive possession of the Flathead Indian Reservation but also expressly reserved in

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perpetuity hunting, fishing, gathering and grazing rights in the ceded lands. See Treaty of Hellgate, Arts. II and III (expressly reserving the Tribes' fishing rights in Article III). As a result, the CSKT possess the right (either exclusively or shared) to utilize and manage fisheries for most or all Columbia River tributary streams in Montana. The Tribes actively exercise that right through such activities as fishing, implementing Tribal natural resource programs designed to protect and manage sensitive fish species, and by consulting, coordinating and collaborating with state and federal fish managers on issues that implicate CSKT rights in the Tribes' aboriginal territory.

Overlap Between CSKT Rights and FCRPS Operations. The CSKT's undeniable rights within and to Columbia River tributary waters are directly implicated by FCRPS operations. This is because the Kootenai River and Flathead River systems include Libby Dam and Hungry Horse Dam, respectively, and the dams' associated reservoirs, i.e. Lake Koocanusa and Hungry Horse Reservoir. See Exhibit 1. For many years, the CSKT felt as though these upper Basin reservoirs were viewed by lower Basin salmon advocates as water-filled bathtubs simply waiting to be drained of their contents, including biota, regardless of the ecological needs of upriver resident species. This was no small matter given that the Kootenai and Flathead River systems, including their reservoirs, support sensitive and listed fish species – not only the Kootenai River white sturgeon, but also bull trout, burbot and resident populations of westslope cutthroat trout.

Voicing the Needs of Upriver Species. Whereas the plaintiffs focus narrowly on salmon populations, the CSKT have been participating in this case to help inform the Court – and other

interested parties throughout the Basin – that the life cycles and biological needs of resident fish in CSKT aboriginal territory are not identical to those of anadromous fish species. That does not mean that resident and anadromous fish species cannot coexist, or that actions taken to benefit one will necessarily be to the detriment of the other. Indeed, although plaintiffs may desire that the FCRPS be operated with only the needs of salmon in mind, the 2008 BiOp as implemented through the AMIP appropriately and carefully balances the needs of all listed species. That is why the CSKT support the 2008 BiOp. And that is why the CSKT urge the Court to defer to the agencies' carefully-crafted RPA and to uphold the 2008 BiOp for the good of the Basin.

III. STANDARD OF REVIEW REVISITED.

The Court is well-informed as to the legal standards governing its review in this case. The nuances of those legal standards have been carefully described for the Court by a number of parties, particularly the federal defendants and the States of Montana, Washington and Idaho in their three-State brief. The KTOI and the CSKT write on this topic only to point out that in the two years since their last joint filing, Ninth Circuit case law has further cemented the need for judicial deference to agency expertise in the context of cutting-edge scientific decision-making like that involving FCRPS operations.

At the time of the Tribes' last filing, the Ninth Circuit's en banc opinion in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008), had issued only recently.¹ The en banc McNair

¹ Although not relevant in the context of this summary judgment proceeding, the McNair decision was abrogated in part by the Supreme Court's decision in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), particularly as to the Ninth Circuit's "sliding scale"

decision returned the Ninth Circuit to a path from which it had strayed in the context of Administrative Procedures Act (APA) cases, namely that of appropriate deference to agency decision-making consistent with that applied in other Circuits and by the U.S. Supreme Court. McNair reminded reviewing courts not to step into the role of scientist by second-guessing how an agency validates scientific hypotheses, evaluates scientific studies or explains scientific uncertainty. Id. at 988. McNair also emphasized that reviewing courts should be at their most deferential where an agency is addressing difficult scientific issues within its area of special expertise. Id. at 993.

Two years into the post-McNair environment, both the Ninth Circuit and district courts within its jurisdiction have relied on McNair to afford sufficient deference to scientific agency expertise in the APA setting. For example, in League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122 (9th Cir. 2010) (Allen), the Ninth Circuit relied on McNair in reversing an Oregon District Court's decision regarding the legality of a forest restoration project involving limited thinning of eastside, Northwest Forest Plan late successional reserve forest habitat. The Allen majority acknowledged its responsibility to grant its "highest deference . . . to the Forest Service's technical analyses and judgments within its area of expertise," and it also criticized the dissenting judge's effort to second-guess the agency's technical determinations "because he does not like the Forest Service's approach to solving the problems addressed. We went en banc to foreclose precisely this type of second-guessing." Id.

test for injunctive relief that suggested a lesser standard than allowed by the Supreme Court for an injunction.

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at 1131. And in another Ninth Circuit decision, the court relied on McNair in affirming a Montana District Court's decision in an APA case, holding that "[t]hough a party may cite studies that support a conclusion different from the one the Forest Service reached, it is not our role to weigh competing scientific analyses." Ecology Center v. Castaneda, 574 F.3d 652, 659 (9th Cir. 1992) (affirming decision regarding the lawfulness of a series of timber sale and restoration projects). See also id. (declining to "second guess" the agency's technical determinations where the agency had "carefully considered the relevant scientific studies" that had issued over the many years since adoption of the governing plan); id. at 664 (affording "great deference" to the agency's "scientific prediction").

McNair does not stand for, nor are the Tribes advocating, blind deference to agency action. Rather, the Tribes are emphasizing that the APA's arbitrary and capricious standard is a narrow one that precludes the court from engaging in the type of second-guessing advocated by the plaintiffs. The APA standard requires that an agency's decision 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,' . . . 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.'" McNair, 537 F.3d at 987 (citation omitted). Consistent with the APA's deferential standard of review, the Supreme Court has stated that a court should uphold an agency decision even of "less than ideal clarity if the agency's path may reasonably be discerned." National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007).

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Respectfully, the plaintiffs in this case have not made a sufficient showing for the Court to reject the 2008 BiOp under a proper application of the APA standard of review. The Court thus should reject plaintiffs' invitation to entangle itself in policy disagreements about the manner in which FCRPS operations should be conducted during the remaining term of the BiOp. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66 (2004) (the APA limitation on judicial review is 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”).

IV. THE TRIBES CONTINUE TO SUPPORT THE 2008 BIOP'S MONTANA OPERATION.

Throughout the course of this litigation, the KTOI and the CSKT have been working diligently to improve conditions for various Columbia River Basin fish and wildlife species within the range of the Tribes' ancestral homelands. Currently, and unlike in years past, the Tribes' efforts are not being hindered by imprudent summer drawdowns of both the Libby and Hungry Horse Reservoirs as part of FCRPS operations. As the Tribes explained in their last joint filing, the more biologically-balanced operations in the upper Basin are attributable to the 2008 BiOp's inclusion of the Montana Operation for Libby and Hungry Horse dams.

The Tribes continue to support the Montana Operation, which is nicely described in the NOAA Supplemental AR at document S.77 (Issue Summaries), the relevant excerpt from which is attached as Exhibit 2. The Tribes urge the Court to remain vigilant for any effort on the part of

plaintiffs to undermine the careful balancing reflected in that component of current FCRPS operations.

The Court is reminded that prior to adoption of the Montana Operation, Libby and Hungry Horse Dams were operated to achieve a 20-foot draft by August 31, a time of prime biological productivity in a naturally-short window of upper Basin growth and reproduction. Exhibit B at 1. The August 31 drawdown was not intended to benefit upper Basin species – indeed, it harmed upper Basin species by truncating the growing season – but instead was a short-sighted operation conducted for the potential benefit of lower Basin juvenile Snake River fall Chinook salmon. Id. As early as 2003, scientists had been calling for an end to the August 31 drawdown in favor of a more natural and less hurtful drawdown into September. Id. To the Tribes' great relief, the 2008 BiOp put politics aside and wisely followed the best science by including the Montana Operation in FCRPS operations based on sound evidence that extending the drawdown into September would alleviate significant and certain harm to upper Basin fish species unaccompanied by a discernable effect on lower Basin fish species, particularly Snake River fall Chinook. Id. at 3. Put simply, the Montana Operation helps listed fish species in the upper Basin without harming listed fish species elsewhere in the Basin, which is wholly consistent with the ESA.

Inclusion of the Montana Operation is but one example of the 2008 BiOp's "follow the science" approach to balancing the needs of listed and other species, including those of Tribal importance, throughout the Columbia River Basin. Importantly, under the 2008 BiOp's adaptive

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management approach, increasing scientific knowledge about the relative needs of various species can be translated into actual on-the-river adjustments to the complex machinations which comprise FCRPS operations, whether involving the Montana Operation or some other aspect of the system. What the parties and the region need now is time and an exit from the courtroom – time for the 2008 BiOp to be implemented through the AMIP, and time for the myriad entities who are working to implement Columbia River Basin restoration projects to focus their collective efforts outside of the courthouse.

V. CONCLUSION.

The Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes urge the Court to uphold the 2008 FCRPS BiOp as implemented through the AMIP. More than two years have passed since the KTOI and the CSKT first jointly asked the Court to conclude that the conduct of the action agencies in conformance with the BiOp fully satisfied the ESA's requirements. Now, the BiOp before the Court has been buttressed by the AMIP to provide an even stronger framework for the preservation of fish species throughout the Columbia River Basin.

At the risk of sounding like a broken record, the KTOI and the CSKT reiterate that the Columbia River Basin must be managed in a holistic and integrated manner that does not elevate efforts to preserve anadromous fish species above the preservation needs of endangered and threatened upper-Basin species. Although a few entities remain reluctant to move beyond a salmon-centric viewpoint, the fact is that the Court has set the region on a path of collaborative and integrated Basin-wide ecological preservation and protection efforts that is becoming the

standard route in a formerly-fractured Basin. There should be no turning back from the reform initiated by this Court and now reflected in the BiOp. Gone are the days of viewing upper-Basin reservoirs as water-filled bathtubs devoid of life and waiting to be drained of their contents. The KTOI and CSKI thus look towards the future with the hope and expectation that the parties can exit the courtroom to focus their collective energies on meeting the ecological needs of Columbia River Basin species and the Basin ecosystem as a whole.

DATED this 23rd day of December, 2010.

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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 December 23, 2010, the foregoing Joint Summary Judgment Memorandum will be electronically filed with the Court's electronic 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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