

JOHN W. OGAN Oregon State Bar No. 065940
jwo@karnopp.com
KARNOPP PETERSEN LLP
1201 N.W. Wall Street, Suite 300
Bend, Oregon 97701-1957
TEL: (541) 382-3011
FAX: (541) 383-3073

BRENT H. HALL Oregon State Bar No. 992762
brenthall@ctuir.com
73239 Confederated Way
Pendleton, Oregon 97801-0638
TEL: (541) 276-3165
FAX: (541) 276-3095

PATRICK SPURGIN Washington State Bar No. 22316
pds@spurginlawoffice.com
411 N 2nd Street
Yakima, Washington 98901-2336
TEL: (509) 248-4282
FAX: (509) 575-5661

Attorneys for *Amicus* Confederated Tribes of the Warm Springs
Reservation of Oregon; *Amicus* Confederated Tribes of the Umatilla Indian
Reservation; *Amicus* Yakama 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

NORTHWEST IRRIGATION UTILITIES,
PUBLIC POWER COUNCIL, WASHINGTON
STATE FARM BUREAU FEDERATION,

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 SUPPLEMENTAL MOTIONS FOR
SUMMARY JUDGMENT

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.

GARY LOCKE, in his official capacity as
Secretary of Commerce, et al.,

Defendants.

Table of Contents

	Page
I. INTRODUCTION	4
II. ARGUMENT.....	5
A. The Federal Agencies are Making Good on their Commitments.....	5
B. NOAA’s Consideration of Potential Survival Benefits From Kelt Management Activities Does Not Constitute Arbitrary and Capricious Reliance on Such Benefits In Its No Jeopardy Determination.	6
1. NOAA does not unqualifiedly rely upon kelt reconditioning to determine that jeopardy will be avoided.	7
2. It is reasonable to expect some survival benefit through the development and implementation of a kelt management program as provided in RPA 33.	8
3. Consideration of a 6% survival benefit as part of RPA 33 is reasonable.	10
C. The Habitat Methodology Is Based on Best Science and the Actions Hitting the Ground and Working.	11
1. The habitat projects and their benefits are reasonably certain to occur.....	13
2. Real and valuable habitat restoration work is taking place on a grand scale.	14
3. Habitat efforts throughout the Columbia Basin are occurring at a similar pace as in the CTUI’s ceded areas.....	19
D. The Criticisms Do Not Square With Actual Deeds.	21
III. CONCLUSION.....	23

I. INTRODUCTION

In the Spring of 2008 the Warm Springs, Umatilla, and Yakama tribes joined a coalition of eleven sovereign governments of the Pacific Northwest that committed to implementing a massive new plan for salmon in the Columbia Basin. That spring a new FCRPS proposal/ BiOp, a new *U.S. v. Oregon* management agreement; and a collection of ambitious Fish Accords were joined as the three pillars of an historic new Columbia Basin salmon plan. These tribes concluded that this plan collectively contained the necessary science based actions, committed the required funding and resources, and promised a new collaborative way of doing business, opening the door to an optimistic future for the salmon they cherish and depend upon. Each of these tribes, along with nearly every other sovereign in the Pacific Northwest, decided that this new plan, and more importantly the salmon and all that have a stake in their restoration, should be given a chance to succeed--an opportunity to succeed that they believe a continuation of the litigation cycle would preclude.

The decision of these three tribes to become part of this coalition and collaboration was something of a leap of faith. After all, it is an unfortunate chronicle that is the record of federal and state respect for the treaty-reserved rights these tribes have in salmon. Not to be misunderstood, these tribes knew that these plans were *scientifically sound* – their scientists and biologists, along with those of every other party to this litigation, spent two years pouring over decades of data, literature, and analyses to craft the science foundation to the plan. The science foundation is solid.

Rather, tribal leaders understood that they were making a leap of faith because this new plan could still sputter or fail for lack of policy will on the part of its new federal and state partners. The discussions among the tribal decision makers back in 2008 centered not on if the plans were scientifically sound, but rather, would their prospective state and federal partners do what they had pledged to implement them? These tribes were urged vigorously by the minority to not support the plan. The dissenters passionately lobbied these tribes, seeking to convince

them that the federal government would renege on the robust new funding commitments in the BiOp and Accords, that the Action Agencies would ignore independent scientists' advice on spill operations, that the state and federal parties would again seek to shift the burden of conservation from dams to the Treaty harvesters, that the tributary habitat projects would not materialize after the existing 2009 commitments were fulfilled, and that the promised "collaboration" would be merely perfunctory, and the prospective input of the tribes would be ignored.

These cautions and claims did cause these tribes to think very hard about the proper course. In the end, if the gridlock were to be broken, it was clear that the correct decision was to support this plan and each of its three pillars -- *but not blindly*. In pledging their support and own action the tribes made it clear to the Action Agencies, NOAA and the states that they would tolerate no backsliding, no equivocation, and no unreasonable wavering from their commitments -- the actions must hit the ground, the funding and support resources must come rapidly, and new data and developing science must drive adaptive management. The Court may recall that the legal representatives for the these tribes stood before this Court and assured it that the tribes would be "watchdogs" for the implementation of this plan, looking over the shoulder of the federal government every step of the way hereafter. The attitude of the tribes as they started down this path over two years ago was very much "trust but verify."

II. ARGUMENT

A. The Federal Agencies are Making Good on their Commitments.

The opponents to the salmon plan wish the court to believe that we are critically behind in implementing the actions in the BiOp and Accords --primarily the habitat actions. We disagree. Notwithstanding the constant drain on resources and manpower required to respond to ill-founded claims such as this (and the other recycled arguments brought forward in this latest round), the federal, tribal and state coalition is forging ahead with implementing all three pillars of the new salmon plan and doing so with great purpose and success. The assessment of these tribes -- parties which are actually part of the on the ground effort rather than sideline critics, is

that we are in the midst of a good-faith, well-executed launch of the most aggressive salmon restoration plan in the history of the species.¹

B. NOAA's Consideration of Potential Survival Benefits From Kelt Management Activities Does Not Constitute Arbitrary and Capricious Reliance on Such Benefits In Its No Jeopardy Determination.

Plaintiffs assert that NOAA's failure to address kelt reconditioning in the 2010 BiOp is arbitrary and capricious. [Supp.Memo.in Support of NWF's Supp. MSJ RE 2010 Supp. BiOp. at 14-15]. To support this assertion, Plaintiffs characterize NOAA's no jeopardy determination as relying, in part, on the survival benefits projected for Snake River B-run steelhead as a result of kelt management activities. Plaintiffs further assert that the 6% survival benefit for the B-run steelhead expected from kelt reconditioning as shown Table 8.5.5-1 in the 2008 BiOp is what NOAA unqualifiedly relies upon in rendering the no jeopardy determination. However, contrary to Plaintiffs' assertions, NOAA does not unqualifiedly rely upon kelt reconditioning to determine that jeopardy will be avoided. Furthermore, it is reasonable to expect some improvement to population survival through the development of a kelt management program as provided in RPA 33. In addition, while there is no unqualified reliance on the actual achievement of a 6% survival benefit, the consideration of a 6% survival benefit as part of RPA 33 is not unreasonable so as to make its use arbitrary and capricious.

¹ Notwithstanding the Court's direction to focus on the new issues, the same claims regarding the legal adequacy of the jeopardy standard are presented, and the criticisms (which have been rebutted) regarding the efficacy of the habitat program come forth once again. What is *remarkable* is that at this point of the litigation the Plaintiffs' have little or nothing critical to say about how the FCRPS is *actually being operated* in terms of spills, flows or reservoir management. In fact, there has been little or no criticism or challenge from plaintiffs to actual FCRPS management for the last four migration years. This seems perverse – with the benefit of a couple of years of implementing the plan, attacks on habitat work continue, some delay in hatchery reviews is highlighted, and even whales get some more time – but there is nothing presented here criticizing how spills and flows and other hydrosystem operations have been conducted during this period.

1. *NOAA does not unqualifiedly rely upon kelt reconditioning to determine that jeopardy will be avoided.*

RPA 33 provides for the development and implementation of a kelt management plan which takes into consideration the potential for (1) increasing the in-river survival of migrating kelts, (2) collection and transport (either with or without short-term reconditioning) of kelts to areas below Bonneville Dam, and (3) long-term reconditioning as a tool to increase the number of viable females on the spawning grounds.²The RPA further provides for research necessary for the implementation of the plan, annual reviews of progress in plan implementation, and progress evaluations in 2013 and 2016.³ This research- and review-oriented planning approach is quite rigorous, and charges of “unqualified reliance” by Plaintiffs is inaccurate and unfair.

In addition, RPA 33 establishes the purpose of the kelt management plan to be the achievement of the 6% survival benefit referenced in Table 8.5.5-1. The 6% target is based on the Supplemental Comprehensive Assessment Snake River Steelhead Kelt Appendix (“SRSKA”). See 2008 BiOp at 8.5-58. The authors of the SRSKA clearly acknowledge the uncertainties associated with kelt management efforts in general and kelt reconditioning in particular. The acknowledged uncertainties include those raised by the data on long term reconditioning success raised by the Independent Scientific Review Panel (ISRP 2009-39) as noted by the Plaintiffs . See Supp.Memo.in Support of NWF’s Supp. MSJ RE 2010 Supp. BiOp. at 14.⁴ It is also clear from the SRSKA discussion that the necessity to account for these uncertainties played a direct role in shaping the survival benefit estimates that were ultimately

² 2008 BiOp RPA Table p. 39

³ Id.

⁴ Plaintiffs imply that NOAA was required to address kelt reconditioning in the 2010 Supplemental BiOp, but failed to do so. The objective of the 2010 Supplemental BiOp is to reconsider the determinations of the 2008 BiOp while integrating the AMIP into the BiOp’s RPA. To confirm these determinations NOAA Fisheries is using the best science now available ... [.]2010 Supplemental BiOp at.1-2. Since the issues raised by ISRP 2009-39 were addressed in the SCA Steelhead Kelt Appendix, and did not constitute material new scientific information, there is no basis for inclusion of an additional assessment of kelt reconditioning in the 2010 Supplemental BiOp.

used in the 2008 BiOp. Again, the record is clear that NOAA considered all facets of the kelt issue, was well informed, articulated its conclusions and was not in the least bit “arbitrary or capricious” as wrongly charged.

The development and implementation of the kelt management plan is one of the several strategies considered in aggregate by NOAA in determining that the RPA would avoid jeopardy for the B-run steelhead population. There is no suggestion in the 2008 BiOp or in any information provided by the Plaintiffs that the jeopardy determination rose or fell based on any particular strategy being successfully implemented. Use of the survival estimates based on the qualified analysis in the SRSKA as a planning target simply does not constitute “unqualified” reliance on such estimates in the application of the jeopardy standard.

2. *It is reasonable to expect some survival benefit through the development and implementation of a kelt management program as provided in RPA 33.*

Plaintiffs rely on certain excerpts from the from the 2009 ISRP recommendations⁵ opining on the status of kelt reconditioning science to support their argument that *any* consideration of Kelt reconditioning as a strategy for avoiding jeopardy is arbitrary and capricious. However, they do not in any effective way challenge the basic concept in the SRSKA analysis, which is that the various management measures considered in the RPA have a reasonable likelihood of producing survival benefits. The SRSKA analysis recounts the results of work over the past 10 years by various scientists that indicates that addressing conditions adverse to kelt survival by means such as transporting fish downstream past adverse passage and

⁵ The ISRP recommendations were made in response to the Yakama Nation’s proposal to undertake long term reconditioning of Upper Columbia River Steelhead. The proposal was an Accord project, and was provided to the Northwest Power and Conservation Council (NPCC) for review. In recommending funding for the project, NPCC staff indicated that the Yakama Nation “fully responded” to all of the issues raised by the ISRP. See Memorandum from Mark Fritsch, to Council Members re: Council decision on Project #2008-458-00, *Upper Columbia Kelt Reconditioning Program*, a Columbia Basin Fish Accord project. (January 7, 2010)

in-stream conditions or reconditioning females increases the probability of kelt returns. If the kelts return, there is a probability that they will successfully spawn, thus increasing the affected population's productivity.

Results of research conducted by Columbia River Intertribal Fish Commission scientists support the SRSKA analysis.⁶ This work acknowledges uncertainties regarding elements of kelt reconditioning, but discusses data showing survival benefits from kelt management activities and reports early results of reproductive success evaluations for reconditioned kelts in a natural setting. The ISRP 2009-39 document identifies a set of questions presented by kelt reconditioning strategies. At no time does the report indicate that the resolution of those questions is likely to indicate that kelt management strategies such as those to be planned and implemented as provided in RPA 33 will be ineffective or fruitless. It is also noteworthy that the ISRP document was not a direct analysis of the efficacy of kelt reconditioning. Rather, it was a report on the results of the ISRP's review of a specific Yakama Nation kelt reconditioning research proposal. The proposal under review relied upon data produced by an earlier Yakama Nation proposal. The ISRP's ostensible "discouragement" with the results of past kelt reconditioning research should not be construed as determination that reconditioning is unlikely to "work" in terms of promoting natural steelhead productivity. Indeed, the ISRP comments in the report regarding the likely efficacy of kelt reconditioning efforts based on the Yakama Nation's reported results is at best a second-hand analysis of the data. The report does not contain any description of the specific experimental treatments applied in the earlier Yakama

⁶ These results are reported in the Major Accomplishments section of CRITFC's proposal (Project No. 2007-40-100) provided to the NPCC as part of its categorical review of Bonneville Power Administration-funded research, monitoring and evaluation projects. Access to the on-line version of the accomplishments reporting is available at <http://www.cbfish.org/Proposal.mvc/Summary/56>.

Nation work or of the role that the experimental design played in the ISRP's characterization of the results.

The Plaintiffs offer no basis as to why the ISRP comments should be a paramount consideration in the efficacy of RPA 33. Conversely, the information and analysis in the SRSKA characterizing the opportunities for improving productivity by assisting kelt survival provides a reasonable basis for continuing to investigate kelt management options as provided in RPA 33. The ISRP comments present no analysis of the data that would reasonably constitute new scientific information that undercuts the likelihood of productivity benefits from kelt reconditioning and management presented in the SRSKA and incorporated in the RPA 33.

3. *Consideration of a 6% survival benefit as part of RPA 33 is reasonable.*

Plaintiffs rely on certain declarations they offered in support of their 2008 motion for summary judgment as support for the argument that NOAA has arbitrarily and capriciously relied on survival benefits that remain to be demonstrated. The declarations (Olney SJ Dec. and Olney SJ Reply) identify and discuss uncertainties in survival estimates generated in the SRSKA, and offer opinions as to additional considerations that should be accounted for in the estimates.⁷ As noted, the SRSKA analysis takes into account reconditioning, transport, passage, and potential for in-river improvements. The analysis employed existing data and scientific literature and methods to calculate ranges of survival benefits from the kelt management activities. The assertions in the Olney declarations do not indicate that a more precise analysis would result in survival benefit estimates falling outside the range identified in the BiOp analysis. There is, accordingly, no basis for concluding that the 6% estimate that informed the expected effects of

⁷ The Olney declarations do not constitute material new information that warrants assessment in the 2010 BiOp. See fn 4

the prospective action in the 2010 Supplemental BiOp was unreasonable. Therefore, there is no basis for concluding that the use of the survival benefit estimates was arbitrary or capricious.

C. The Habitat Methodology Is Based on Best Science and the Actions Hitting the Ground and Working.

For the most part, Plaintiffs and allied amici recycle their previous summary judgment arguments in attacking the habitat work being done pursuant to the BiOps and Fish Accords. Their primary complaints involve specificity of projects in out years, and the certainty of survival benefits generated from the projects. These complaints were largely answered in prior briefs. Accordingly, these tribes' previous comments regarding the soundness of the adaptive management approach to habitat work coupled with the Fish Accord projects, and the certainty of survival benefits generated there from apply here. *See* Memorandum of Amici Warm Springs, Umatilla and Yakama Tribes in Opposition to Motions for Summary Judgment, Docket No. 1535.

Rather than regurgitate those lengthy arguments, we stress for the Court's benefit some primary points to keep in mind, followed by an applied discussion of the on-the-ground results of habitat work being done under the Fish Accords while other parties argue the legal worth of such work in Court filings.

The Declaration of Bob Rose (Docket No. 1536) provides a succinct explanation of how habitat projects were selected and benefits assigned using best available science. Mr. Rose was an active participant in the Habitat Technical Workgroup assembled for the collaborative remand. Regarding the identification of projects, benefits assigned and certainty of implementation, Mr. Rose explains:

- The Fish Accord projects were identified by the "boots on the ground" co-managers most familiar with each subject basin, utilizing a logic path leading from "primary limiting factors" affecting salmonid habitat conditions to various restoration actions, with a description of the cumulative benefits that would flow from these actions. Declaration of Robert Rose, ¶¶ 13, 15.
- Changes to habitat functions as a result of the habitat projects were estimated using local expertise to 1) determine the current habitat function, and 2) the optimal (or intrinsic)

habitat function at the watershed scale. Once these bookends were established, the environmental changes that might occur in both a 10-year period and a 25-year period were estimated, which recognized the reality that some actions important to implement can only manifest benefits in a longer time frame. Riparian re-vegetation is such an action. Rose Decl. ¶¶18-20.

- While these estimated benefits have a subjective component, “these estimates are based on reasoned and often tedious discussion amongst resource technicians close to the ground. My observation was that estimates were typically conservative and when the work was complete, appeared to pretty well represent common understanding and expectations.” Rose Decl ¶ 24.
- In terms of project selection, there is a fine line between being overly general and overly specific. Being overly specific in terms of what project will occur at exactly what river mile implies landowner (or land manager if public land) acceptance. Rose Decl. ¶ 41.
- “Identifying actions within a more general framework can provide greater assurance that the actions will be implemented and it provides more flexibility where actions can be located due to the many technical and social considerations. [T]he tribes in general recognize that just the identification of ‘site-specific’ areas to be restored [is] only a small piece of the overall need. To gain reasonable assurance that meaningful habitat restoration will occur, the real need was an adequate funding stream and plenty of time to initiate a long-term strategic approach that brings reach-scale planning, social constraints and public outreach, engineering and permitting, and long-term monitoring into one comprehensive package.” Rose Decl. ¶ 42.

With respect to “best available science,” Mr. Rose pointedly notes:

- In terms of best available science, the terms “best” and “available” are relative. Science by its nature creates disagreement. “Best available science came in the form of experience, common sense an appreciation for what realistically can and cannot be done and ultimately, best professional judgments.” Rose Decl. ¶ 44.
- While there are concerns with relying on the Hilman Method to describe the relationship between habitat changes and biologic productivity changes, “describing this relationship with confidence is the elusive ‘Holy Grail’ of salmonid ecology. Unfortunately, a

relatively simple, scientifically robust and defensible model, applicable to many subbasins and populations within the interior Columbia Basin does not exist. It would be great if salmonid ecology was as simple and predictable as Newtonian physics, but it is not and given the circumstances, this was the best the Workgroup could do.” Rose Decl. ¶ 45.

- It is not practical to believe that one can simply identify a bunch of actions and expect salmon recovery to occur. A long-term programmatic approach is needed. One that cannot simply be defined in a table or by a model, but must be developed with adequate and long-term funding commitments....this will require time, money, cooperation and public outreach more than additional squabbling over methods, tables and unsubstantiated details.” Rose Decl. ¶ 46.
- “[T]he results of the work from the Workgroup and the additional work provided by the Tribes, i.e. estimates of increased habitat benefits and resulting salmonid survival appear to me to be reasonable and useful approximations. The Workgroup and the tribal biologists were able to derive these estimates with ‘boots-on-the-ground’ experts, using common sense, using best professional judgment and using a straight-forward methodology, within a reasonable timeframe and without significant disruption to the many biologists that would have been needed to complete a more robust technical exercise. [F]uture efforts and monitoring will help fill in data gaps and refine future estimates.” Rose Decl. ¶ 47.

1. *The habitat projects and their benefits are reasonably certain to occur.*

The funding to implement the habitat projects in the Fish Accords is secure. In the previous round of briefing a major complaint of the plaintiffs was that but for the Fish Accords, projects were not identified beyond the 2009 time period. Needless to say, that concern is no longer warranted (if ever it was). The 2010-2013 Implementation Plan is in place and identifies the appropriate projects to be identified in that time frame for the habitat component of the BiOp. The expert panels will convene as scheduled and assist in the identification of the appropriate projects after 2013. As Mr. Rose notes, what is more important than identification of

specific projects is a programmatic approach to habitat restoration anchored by a secure funding stream. Although the Fish Accords by and large identify projects through 2017, they contain the same programmatic approach. Projects will be changed or substituted as necessary dependant on the achieved results and needs in each subbasin as determined through the RM&E efforts.

The plaintiffs go to great pains to point out that some habitat projects have been delayed in ramping up implementation, and therefore the Court cannot rely on habitat projects to deliver their estimated benefits. Certainly, some projects were delayed. It would be fantasy to think that governmental fishery departments in rural areas can ramp up projects, in some cases at threefold the effort, by flipping a switch. The implementers must take the time to make sure the project is done right. That means hiring the right people, ordering supplies, and scheduling equipment to execute the projects, with the appropriate monitoring in place. The Fish Accord parties are now ramped up, and the Action Agencies have recognized the need for ensuring the projects are done the right way, and have adjusted the funding mechanisms to make sure it is there when needed in the out-years. There will be no detriment in terms of delivery of benefits from any initial delay.

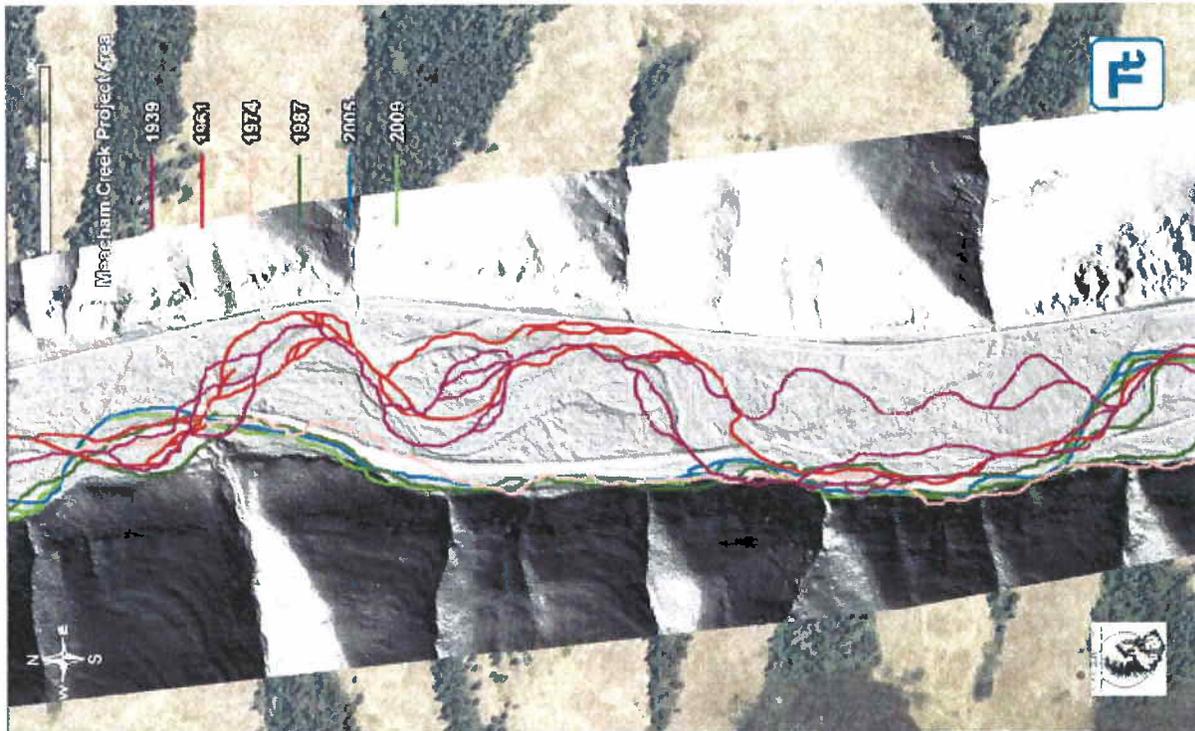
Supplemental Declaration of Gary James, ¶ 18.

2. *Real and valuable habitat restoration work is taking place on a grand scale.*

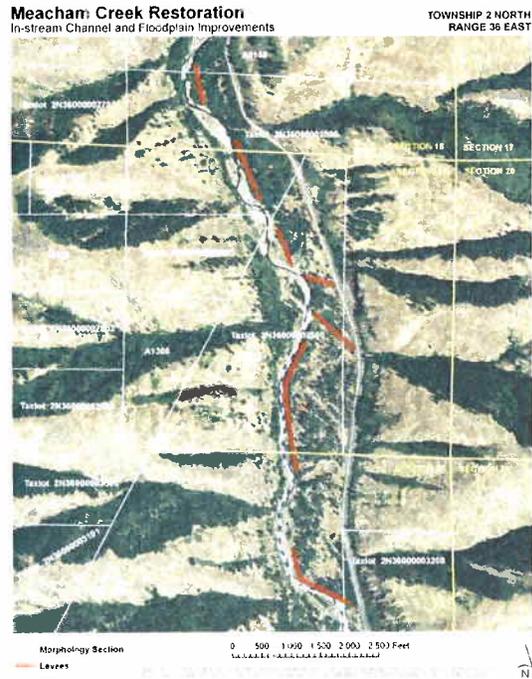
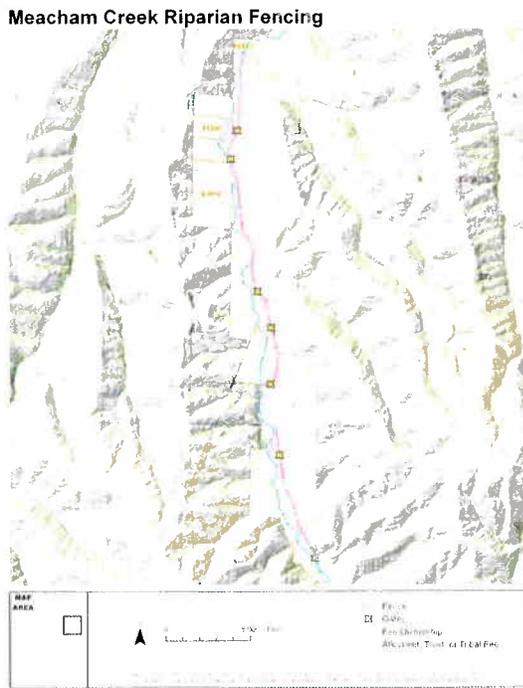
While filing their legal tomes, plaintiffs overlook that real habitat work is being done, at a pace never seen before. For example, in the Umatilla Tribes' ceded area, this work addresses those limiting factors for survival that were identified by the people with the most knowledge about each individual sub-basin. Those are the people that have been working and living with their boots on the ground – and in the flows– of these tributaries for many years. They are the experts that have participated in round after round of subbasin planning, identifying limiting

factors and prioritizing work. The Supplemental Declaration of Gary James and its attachments explain in detail the work that is taking place in the Umatilla ceded area.

A good example of the on-the-ground work made possible by the Fish Accords involves Meacham Creek, a major tributary of the Umatilla River. This creek is a major tributary to the Umatilla River, and currently supports native bull trout and summer steelhead, and restored spring Chinook salmon. The lower alluvial reaches of Meacham Creek were channelized, cleared and partially leveed beginning in the early 1900s for railroad construction. Along the lower reach runs the primary east-west artery of the Union Pacific Railroad. The picture below demonstrates the change of the natural channel from pre-RR construction in the 1930s (in which it meanders along the landscape), to its current flow (which is like a straight-shot through the canyon).



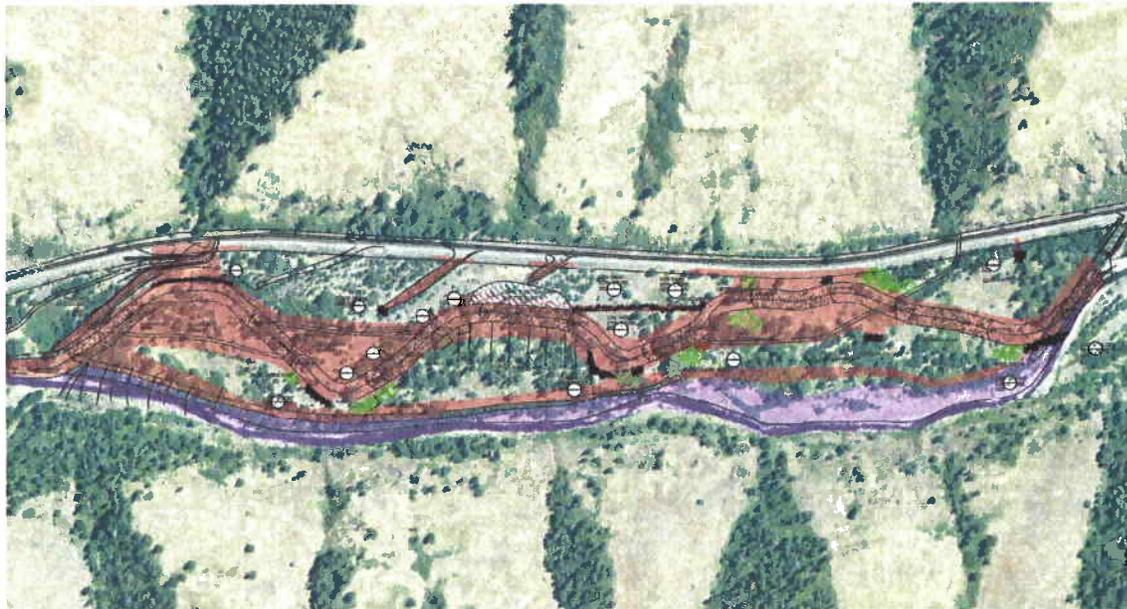
The habitat restoration work for the initial period of the Accord includes removal or modification of 4 levees, additions of woody debris, construction of about 10 miles of livestock exclusion fence and planting of 15,000 seedlings over 30 floodplain acres. Supp. James Decl. ¶12. The extent of Riparian Fencing, the In-stream Channel and Floodplain Improvement and the extensive Levee Removal work is demonstrated below:





Meacham Creek Levee Removal

As one can imagine, this project involves extensive negotiation and work with the adjacent landowners and right of way holder, the railroad. When completed, this project will develop a more sinuous and complex stream channel that occupies much more of the floodplain. Project actions are expected to result in large increases in aquatic habitat complexity hiding cover, improved water quality through decreased water temperature, and increased geomorphic stability. Supp. James Decl. ¶12. The expected result is displayed in the diagram below.



The work in Meacham Creek addresses all of the primary limiting factors identified for this tributary. They are passage barriers/entrainment, in-channel geomorphology constraints,

floodplain confinement, high temperatures, low flows and riparian vegetation constraints. *See* Attachment 2 to Supp. James Decl., CTUIR Fish Accord Habitat Projects, Limiting Factors and Accomplishments. More discussion of this project and all of the other CTUIR Fish Accord projects – including those targeting species of the most concern - is contained in Attachment 3 to the Supplemental Declaration of Gary James, the CTUIR Semi Annual Quad Reports.

If there was any doubt that the projects under the Fish Accords were proceeding apace and addressing the primary limiting factors identified through the BiOp Remand Habitat Workgroup, a quick glance at Attachment 2 to the Supplemental Declaration of Gary James will dispel that notion, at least with respect to the Umatilla Tribes' ceded area. This table shows Fish Accord habitat project accomplishments in the CTUIR's five targeted subbasins. Project description or treatments generally include floodplain/ wetland improvement, instream habitat complexity enhancement, livestock exclusion fencing, riparian planting and fish passage improvements. New Fish Accord habitat work has been completed or is ongoing in 33 streams, and this does not include streams where maintenance work is occurring under existing easements. Each project indicates habitat limiting factors that are being addressed with primary limiting factors indicated by yellow shading (PLF's identified by Remand Habitat Workgroup). In sum, this table demonstrates that CTUIR projects are effectively targeting the PLF's.

The Tribes believe the adaptive management approach that was strengthened in the AMIP and 2010 Supplemental BiOp improves the habitat restoration work under the federal package, and is consistent with tribal implementation of habitat projects. This approach to habitat restoration draws a rational connection between what is occurring in the tributaries at current and what will occur in the future. The transparent expert panels will assess the habitat work and needs every three years in consultation with the boot-on-the-ground managers, projects

will be selected appropriate to those needs and new implementation plans will be determined. This process will include the Accords projects. If the Accord projects are not delivering the expected results, the parties will meet to discuss new projects. This is consistent with the Umatilla Tribes' approach to restoring riverine ecosystems. *See* Attachment 1 to Supp. James Decl., p. 2 ("The final stage of reporting [of the Riverine Ecosystem Planning Approach] provides an opportunity to summarize monitoring and project actions and evaluate results. Project changes can be made based on the outcomes or the approach to future project work can be improved.")

3. *Habitat efforts throughout the Columbia Basin are occurring at a similar pace as in the CTUI's ceded areas.*

The efforts of the Umatilla Tribes described above are just one Tribe's example of what is taking place throughout the Columbia Basin under the new federal package. The table below is a duplicate of the one that appears in the Columbia Basin Fish and Wildlife Authority's (of which Oregon and the Nez Perce Tribe are members) annual Status of the Resource Report. http://sotr.cbfwa.org/HLI_summary.cfm?mnu=HLI . This table shows planned vs. actual accomplishments for BPA funded habitat projects for the 2009 year only. While in some cases not all planned projects were fully completed, in even more cases the "planned" accomplishments were exceeded.

BPA Funded Anadromous Fish Habitat Project Accomplishments

(FY 2009) ¹

Project-type	Planned Value *	FY 09 Accomplishment (Actual Value) *
Increase instream complexity and stabilization, remove vegetation	19.03 miles	11.7 miles stream complexity improved
Increase instream habitat complexity and stabilization	522 structures	693 structures installed
Removal/install diversion, remove/breach dam, install fish passage structure	207.7 miles	210.54 miles habitat accessed
Install well, install pipeline, install sprinkler, acquire water instream	842.9 miles	666.16 miles primary stream reach improved
Install well, install pipeline, install sprinkler, acquire water instream	1,702.4 miles	1,033.52 miles total stream reach improvement
Install well, install pipeline, install sprinkler, acquire water instream	2,611 acre-feet	2,611 acre-feet conserved
Realign connect and/or create channel	19.2 miles	19.6 miles stream added
Remove/install diversion	5 screens	5 screens addressed
Install fish screen	14.2 cfs	8.6 cfs water conserved
Install fish screen	74,697.1 acre-feet	66,336.5 acre-feet screened
Install fish screen	153.1 cfs	165.6 cfs water screened
Acquire water instream	89,447.4 acre-feet	23,045.9 acre-feet water protected
Acquire water instream	1,009.39 acre-feet	981.43 cfs water protected
Plant/remove vegetation	103.4 miles	110.71 miles vegetation improved
Purchase land, lease land	141.92 miles	128.92 miles protected
Land purchase, land lease	100,913.4 acres	100,890.5 acres protected
Conduct controlled burn, plant vegetation, practice no-till and conservation tillage, remove vegetation, upland erosion and sedimentation control, enhance floodplain, create, restore, and enhance wetland	17,904.6 acres	15,657.2 acres improved
Install fence	82.93 miles	80.7 miles fence installed
Install fence	29.48 miles	27.3 miles stream fenced
Decommission roads, relocate roads,	78.05 miles	84.22 miles road treated

improve roads		
---------------	--	--

Updated: 3/31/2010

* This table may not represent all efforts completed as data are updated on a daily basis.

Clearly, the habitat work is occurring and occurring at great pace in the Basin. It is disappointing, if not wholly disingenuous for Plaintiffs to sift through this record of action and accomplishment and point to a few delayed projects to push the proposition that the habitat effort is not on schedule. The table above (current only through this past March) and the Umatilla Tribes' examples prove that a massive habitat action plan is hitting the ground. It should be allowed to continue as it has.

D. The Criticisms Do Not Square With Actual Deeds.

As a final matter, we continue to be struck by what, to us, are unexplainable contradictions existing between the critique of the BiOp and what those critics do every day in the furtherance of their legal duties to protect and manage salmon and steelhead. When the criticisms of what, in their view, is wrong with the *actual plan* -- what the BiOp, Accords, and *U.S. v. Oregon* Management Agreement would do *on the ground* are distilled-- they press two basic points: 1) habitat restoration and protection should not be a key element of the plan if precise benefits from specific "projects" cannot be tabulated; 2) hatcheries put wild salmon in peril and major reforms or programs should be scaled back or eliminated.

As the Court considers the efficacy of those essential criticisms, we respectfully submit that it should recognize what these parties are *doing* in the world outside of the federal courthouse. First, both the State of Oregon and the Nez Perce Tribe seek and/or receive and spend tens of millions of dollars each year to protect and restore salmon and steelhead habitat in

the Columbia Basin. Those funds come from the Bonneville Power Administration, Oregon lottery proceeds, federal grants, and resource user and taxpayer collections. Moreover, they use a watershed scale approach for their habitat work (*not* the project-specific approach demanded for litigation purposes here). To illustrate this, the following is an excerpt from the narrative of a 2007 new proposal submitted by the Nez Perce Tribe to Bonneville for approximately \$2.7 million dollars for habitat restoration in the Walla Walla River Watershed:

“From the perspectives of the fisheries manager, environmentalist, industry representative, and scientist who make up the first section of this book, there is general agreement that **habitat degradation is the most important threat to the long-term recovery and preservation of exploitable fish stocks**” (Baird 1998). It is vital that resource managers restore and enhance anadromous habitat whenever possible. This is the only means in which land managers can obtain self-sustaining fisheries populations without addressing out-of-basin factors.

In order to effectively make improvements in habitat conditions, a holistic, watershed scale approach is necessary. Simply addressing single limiting factors as discrete items can not produce the results that utilizing the approaches proposed in this project will accomplish. However, in order to implement a project of this magnitude, the cooperation of a multitude of different co-managers, agencies and interest groups is necessary. Wallowa County has been working towards that goal with the foundation for this large cooperative group already in place. Further, the wide array of groups already involved with this collaborative project include, in part, the USDA-Forest Service, the National Marine Fisheries Service, the US-Fish and Wildlife Service (USFWS), the Oregon Department of Fish and Wildlife (ODFW), the Natural Resource Conservation Service (NRCS), the Wallowa County Soil & Water Conservation Service, the Wallowa County Natural Resources Advisory Committee, the Grande Ronde Model Watershed Program, Wallowa Resources, and the Oregon Watershed Enhancement Board (OWEB). (Emphasis in the original).

(See <http://www.cbfgwa.org/solicitation/components/forms/ProposalOld.cfm?PropID=417>)

It is also notable that the State of Oregon, through the ODFW, has made habitat protection and restoration the centerpiece of its “Oregon Conservation Strategy” adopted during the pendency of this litigation. The Oregon Strategy relies upon “collaboration” and watershed scale habitat measures (*not* the site-specific approach urged in litigation). We simply wish for the Court to recognize while they question the benefit and approach of the habitat component of the BiOp and Accords in the courtroom, the challengers are moving forward in what appears to

be in very much the same manner as they execute their own salmon management duties on the ground. (http://www.dfw.state.or.us/conservationstrategy/document_pdf/A_2.pdf)

We also note that while NWF takes another shot at the value of hatcheries in this latest round, the State of Oregon and the Nez Perce Tribe remain silent on this point. Even within the small coalition of challengers it appears that there is *not* agreement that sweeping hatchery “reforms” are needed, and there is *not* a united front for the proposition that hatcheries are universally threatening to wild salmon urged by NWF. The isolation of NWF on this criticism should be glaring. The fact of the matter is that the State of Oregon and the Nez Perce Tribe both operate major hatchery facilities in the Columbia Basin, and both are signatories to the *U.S. v. Oregon* Management Agreement that includes a continuation, and in some cases, possible expansion, of the existing Columbia Basin hatchery program. In summary, of the two key critiques of what the plan actually does *on the ground*, the challengers actually trumpet the benefits and apply the same habitat program strategy in their own programs, and with respect to hatcheries, NWF stands alone and at odds with the current programs and plans of Oregon and the Nez Perce Tribe.

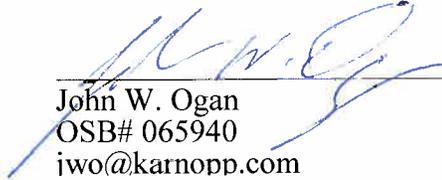
III. CONCLUSION

These tribes understand that this Court must make technical legal decisions about whether or not BiOp meets the standards of the Endangered Species Act. The federal brief(s) and others address this conclusively. We spend little time in the “lawyering” taking place around legal theory and hypothetical. Rather, we write here and now to help the Court understand what is real on the salmon recovery front— what *really* is going on in the streams and on the lands, how the collaboration is *really* working, and to share again, what the *real* boots on the ground experts have to say about what is “best science”. In short the plan is working and working well. We

have been watching very carefully and will continue to do so. We respectfully believe that the Court will see past the machinations and feints of the minority and determine that this historic collaborative effort should continue.

DATED this 23rd day of December, 2010.

KARNOPP PETERSEN LLP



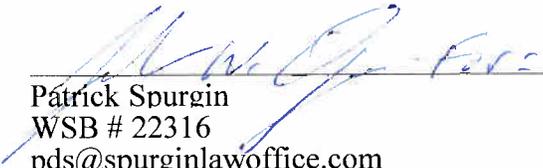
John W. Ogan
OSB# 065940
jwo@karnopp.com
TEL: (541) 382-3011
FAX: (541) 383-3073
Of Attorneys for *Amicus Confederated Tribes of the Warm Springs Reservation of Oregon*

CTUIR Department of Justice



Brent H. Hall
OSB #992762
brenthall@ctuir.com
TEL: (541) 276-3165
FAX: (541) 276-3095
Of Attorneys for *Amicus Confederated Tribes of the Umatilla Indian Reservation*

Law Office of Patrick Spurgin



Patrick Spurgin
WSB # 22316
pds@spurginlawoffice.com
TEL: (509) 248-4282
FAX: (509) 575-5661
Of Attorneys for *Amicus Yakama Nation*

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **MEMORANDUM OF AMICI WARMS SPRINGS, UMATILLA, AND YAKAMA TRIBES IN OPPOSITION TO SUPPLEMENTAL MOTIONS FOR SUMMARY JUDGMENT** on:

Todd D. True
Stephen D. Mashuda
Earthjustice Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 / Fax: (206) 343-1526
Email: ttrue@earthjustice.org;
smashuda@earthjustice.org

Daniel J. Rohlf
Lewis & Clark Law School
10015 SW Terwilliger Boulevard
Portland, OR 97219
(503) 768-6707 / Fax: 503 768-6671
Email: rohlf@lclark.edu

Roger J. DeHoog
Oregon Department of Justice
Trial Division/Special Litigation Unit
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000
Email: roger.dehoog@doj.state.or.us

David Leith
Department of Justice
Trial Division/Special Litigation Unit
1162 Court Street, NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4793
Email: david.leith@doj.state.or.us

Michael S. Grossmann
Assistant Attorney General
State of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98501 -0100
(360)586-3550 / Fax: (360) 586-3454
Email: mikeg1@atg.wa.gov

Elizabeth E. Howard
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland, OR 97204
(503) 224-6440 / Fax: (503) 224-7324
Email: eeh@dunn-carney.com

Karen J. Budd-Falen
Budd-Falen Law Offices, LLC
300 East 18th Street
P.O. Box 346
Cheyenne, WY 82003
(307) 632-5105 / Fax: (307) 637-3891
Email: karen@buddfalen.com

Mark L. Stermitz
Crowley Fleck PLLP
305 South 4th Street East, Suite 100
Missoula, MT 59801
(406) 523-3600 / Fax: 523-3636
Email: mstermitz@crowleyfleck.com

Lawrence G. Wasden
Clive Strong
Steven W. Strack
Clay Smith
State of Idaho
Natural Resources Division
700 W. Jefferson, Room 210
P.O. Box. 83720
Boise, Idaho 83720
(208) 334-2400 / (208) 854-8072 (fax)
Email: clay.smith@ag.idaho.gov;
steve.strack@ag.idaho.gov

Robert N. Lane
State of Montana
Department of Fish Wildlife & Parks
1420 East Sixth Avenue
P.O. Box 200701
Helena, MT 59620
(406) 444-4594 / Fax: (406) 444-7456
Email: blane@mt.gov;

Jeremiah D. Weiner
Montana Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-5886 / Fax: (406) 444-3549
Email: jweiner2@mt.gov

James W. Givens
1026 F Street
P.O. Box 875
Lewiston, ID 83501
(208) 746-2374 / Fax: (208) 746-6640

Rodney K. Norton
Clarkston Golf & Country Club
Hoffman Hart & Wagner, LLP
1000 SW Broadway, 20th Floor
Portland, OR 97205
(503) 222-4499 / Fax: (503) 222-2301
Email: rkn@hwh.com

Julie A. Weiss
Haglund Kelley Horngren Jones & Wilder,
LLP
101 SW Main Street, Suite 1800
Portland, OR 97204
(503) 225-0777 / Fax: (503) 225-1257
Email: jweis@hk-law.com

William K. Barquin
Kootenai Tribe of Idaho
Portland Office
1000 SW Broadway, Suite 1060
Portland, OR 97205
(503) 719-4496 / Fax: (503) 719-4493
Email: wbarquin@kootenai.org

Beth S. Ginsberg
Jason T. Morgan
Stoel Rives, LLP (Seattle)
600 University Street, Suite 3600
Seattle, WA 98101
(206)323-7581 / Fax: (206) 386-7500
Email: bsginsberg@stoel.com;
jtmorgan@stoel.com

Barbara D. Craig
Stoel Rives LLP
900 SW 5th Avenue, Suite 2600
Portland, OR 97204
(503) 294-9166 / Fax: (503) 220-2480
Email: bdcraig@stoel.com

John T Harrison
Joseph P. Hovenkotter
Stuart M. Levit
Tribe Legal Department
Confederated Salish and Kootenai Tribes
P.O. Box 278
42464 Complex Boulevard
Pablo, MT 59855
(406) 675-2700 / Fax: (406) 675-4665
Email: johnh@cskt.org; stul@cskt.org;
joeh@cskt.org

Brent H. Hall
Confederated Tribes of the Umatilla Indian
Reservation
P.O. Bo 638
73239 Confederated Way
Pendleton, OR 97801
(541) 966-2165
Email: brenthall@ctuir.com

John W. Ogan
Karnopp Petersen LLP
1201 N.W. Wall Street, Suite 300
Bend, OR 97701-1957
(541) 382-3011 / Fax: (541) 388-5410
Email: jwo@karnopp.com

Howard G. Arnett
Karnop Petersen Noteboom Hansen Arnett &
Sayeg, LLP
1201 N.W. Wall Street, Suite 300
Bend, OR 97701
(541) 381-3011 / Fax: (541) 388-5410
Email: hga@karnopp.com

Geoffrey M. Whiting
Attorney at Law
P.O. Box 591
Joseph, OR 97846
(541) 432-2015
Email: gwhiting@gmwnextperce.com

Jay T. Waldron
(Walter H. Evans, III
Carson D. Bowler
Schwabe Williamson & Wyatt, PC
1600-1900 Pacwest Center
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204
(503) 222-9981 / Fax: (503) 796-2900
Email: jwaldron@schwabe.com;
wevans@schwabe.com;
cbowler@schwabe.com

Thomas Zeilman
Law Offices of Thomas Zeilman
P.O. Box 34
402 East Yakima Avenue, Suite 710
Yakima, WA 98907
(509) 575-1500
Fax: (509) 575-1227
Email: tzeilman@qwestoffice.net

James L. Buchal
Murphy & Buchal, LLP
2000 SW First Avenue, Suite 420
Portland, OR 97201
(503) 227-1011 / Fax: (503) 227-1034
Email: jbuchal@mbllp.com

David J. Cummings
Nez Perce Tribal Executive Committee
Office of Legal Counsel
P.O. Box 305
100 Agency Road
Corner of Main Street and Beaver Grade
Lapwai, ID 83540
(208) 843-7355 / Fax: (208) 843-7377
Email: djc@nezperce.org

John Shurts
Sandra Hirotso
Northwest Power & Conservation Council
851 SW Sixth Avenue, Suite 1100
Portland, OR 97204
(503) 222-5161 / Fax: (503) 820-2370
Email: jshurts@nwcouncil.org;
shirotso@nwcouncil.org

Patrick D. Spurgin
Confederated Tribes and Bands of the Yakima
Nation
411 North 2nd Street
Yakima, WA 98901
(509) 248-4842 / Fax: (509) 575-5661
Email: pds@spurginlawoffice.com

Howard A. Funke
Funke & Work
P.O. Box 969
424 E. Sherman Avenue, Suite 308
Coeur d'Alene, ID 83816
(208) 667-5486 / Fax: (208) 667-4695
Email: hfunke@indian-law.org

Harold S. Shepherd
Center for Water Advocacy
P.O. Box 331
90 West Center Street
Moab, UT 84532
(435) 259-5640
Fax: (970) 523-1264
Email: hshepherd@uci.net

Brian C. Gruber
Ziontz Chestnut Varnell Berley & Slonim
Confederated Colville Tribes
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121-1230
(206) 448-1230 / Fax: (206) 448-0962
Email: bgruber@zcvbs.com

Coby Howell
U.S. Department of Justice
c/o U.S. Attorney's Office
1000 SW Third Avenue, Suite 600
Portland, Or 97204
503-727-1023 (Tel.)
Email: Coby.Howell@usdoj.gov

Honorable James A. Redden
United States Courthouse
1000 S.W. Third Avenue, Suite 1527
Portland, Or 97204-2902

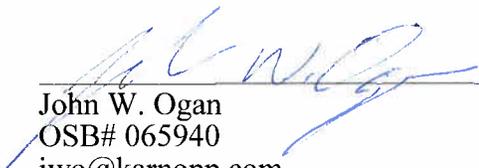
Howard F. Horton, Ph.D.
Oregon State University
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, OR 97331-3803
Fax: (541) 737-3590
Email: hortonho@onid.orst.edu

by causing a full, true, and correct copy thereof to be sent by the following indicated method or methods, on the date set forth below:

- by mailing in a sealed, first-class postage-prepaid envelope, addressed to the last-known office address of the attorney, and deposited with the United States Postal Service at Bend, Oregon.
- by hand delivery.
- by sending via overnight courier in a sealed envelope.
- by faxing to the attorney at the fax number that is the last-known fax number for the attorney's office.
- by electronic service pursuant to LR 100.7.

DATED this 23rd day of December, 2010.

KARNOPP PETERSEN LLP



 John W. Ogan
 OSB# 065940
jwo@karnopp.com
 TEL: (541) 382-3011
 FAX: (541) 383-3073
 Of Attorneys for *Amicus* Confederated Tribes of the
 Warm Springs Reservation of Oregon