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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)

SURREPLY OF AMICI WARM
SPRINGS, UMATILLA, AND
YAKAMA TRIBES IN OPPOSITION
TO PLAINTIFFS' SUPPLEMENTAL
MOTIONS FOR SUMMARY
JUDGMENT

SURREPLY OF AMICI WARM SPRINGS, UMATILLA, AND YAKAMA TRIBES IN
OPPOSITION TO PLAINTIFFS' 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.

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I. INTRODUCTION

These tribes have served as *amicus curia* for nearly three years to ensure that simple, pragmatic, critical realities regarding Columbia Basin salmon restoration are not lost in the maneuverings and minutia of this litigation. With one last opportunity to do so, we respectively submit that the following realities of Columbia Basin salmon restoration should matter:

The BiOps, Accords, US v. Oregon Agreement, and Pacific Salmon Treaty agreement are individually sound, and together, constitute a comprehensive and scientifically robust, action oriented, federal Columbia River salmon plan.

The collective policy and technical level support for the BiOps, Accords, and U.S. v. Oregon Agreement that is “the Collaboration” is historic, and must be preserved if salmon, steelhead, lamprey and other native species are to be restored to healthy, harvestable, self-sustaining levels in time.

The habitat component of the Plan is a cornerstone of the Tribes’ gravel-to-gravel management philosophy. The habitat methodology is the best science available. The process for selecting and getting the work on the ground uses the best available data and experience, and accommodates the realities of working with private landowners. The habitat program is consistent with the day-to-day actions and restoration goals of every tribal and state fish and wildlife manager in the Columbia River basin.

The Tribes will be the implementation wardens. The Tribes have not yielded any right or ability to insist on accountability for results or advocate for more or different salmon protecting actions. The Tribes will see that the federal agencies deliver what they have committed to or they will return to lead the way, through any means, to compel federal action to make good on Treaty based assurances for abundant salmon in the Columbia River and at all usual and accustomed fishing places.

Our prior written submissions, and that which we offer here, differ from that of all other parties. We have focused on a higher level, with the ideal that this controversy should do more than decide which legal team is right and which is wrong about what compliance with the Endangered Species Act means. Somehow, as we have tried to convey, this conflict must do

something much more important and lasting – it should issue a mandate on Columbia River salmon and steelhead restoration.

Some have spent their final chance to assist the Court with incredibly important decisions by digging deeper into the diamond mine of the litigator – parsing cases, regulations, and emphasizing fine points of law, selective citation of the record and this Court’s prior observations¹, taking great umbrage with this-or-that, and diligently refusing to acknowledge any explanation, clarification, or point offered to address a critique. At the risk of possibly offending those with whom we are aligned in this proceeding, the federal government and the plaintiff ESA private attorneys general each are doing their best to *win the case*.

We understand that this is litigation, that the ESA provides the legal framework, and that those parties must accept such roles. Yet, the Warm Springs, Yakama, and Umatilla tribes have purposefully selected a different role – we have endeavored to stand before the Court and give our most thoughtful, considered opinion on what is best for Columbia River salmon, steelhead and other native species. As Mr. Weaver exclaimed in open court: “we’re not *spill* Indians, we’re *salmon* Indians!” We do not seek to vindicate or police the Endangered Species Act, nor do we participate here to advance a collateral environmental objective. Clearly, the point of Mr. Weaver’s statement is that it seems the parties may have collectively become distracted from the real goal through the decades of litigation – the prescription has become more important than the cure. Perhaps these tribes’ refusal to change our point of reference from what is best for salmon, to what is best for the ESA, is why our comments receive so little response. We have a sincere hope that our refusal to abandon our focus from what is best for salmon, and join the debate on

¹ It is notable that the challengers repeatedly cite this Court’s admonishments in letters to counsel to elaborate on the basis for the habitat program to support their arguments that the habitat component of the plan is flawed, yet they press on with their arguments that the jeopardy framework is unlawful even after the most recent communication from the Court (February 10, 2010) clearly states that “the federal defendants need not ‘start over from scratch’ or develop a new jeopardy framework.” (Document 1749).

those other terms, does not require the Court to similarly set aside the tribes' thoughts, advice, and opinions.

II. ARGUMENT

A. The federal salmon plan is based in sound science, is action oriented, has a vast partnership as an implementation team and should be given a chance to succeed.

In our original amicus brief on the 2008 BiOp these tribes illuminated a point seemingly lost in the mix and discounted by challengers. That being that we should take a broader view of the federal government's new actions that have an impact on Columbia Basin salmon and steelhead. The FCRPS and Upper Snake BiOps, though important pieces, are just that – pieces of the new broader plan. A new agreement in the Pacific Salmon Treaty process that reduces ocean harvests of Columbia chinook has been developed, a new abundance based harvest management plan and comprehensive package of hatchery actions has been developed by Oregon, Idaho, Washington, the four Treaty Tribes and the federal government and made an Order of the Court by Judge King in *U.S. v. Oregon*; and new Fish Accords have locked down a decade of funding for habitat, hatcheries, research and monitoring and bolstered the standards for hydrosystem operations. These individual components work consistently together as a much broader federal Columbia River salmon plan.

Those who challenge the BiOps component of this larger plan have told the Court it may not consider any of this. That none of that is “real” legally unless it is found in the right form in the right record.² At the end of the day, we are willing to consider that the few remaining challengers might have a *legal* basis to argue that the Court must look with blinders upon the FCRPS BiOp, and ignore the Accords, *U.S v. Oregon*, the Pacific Salmon treaty, the Northwest

² NWF Plaintiff's have actually gone much further, and denigrated the Accords as “contracted for collaboration”. Their misrepresentation of Accords terms has been a continuing disappointment, gently said, to the tribes over the course of this proceeding.

Power and Conservation Council programs, etc. But having a legal basis to argue or ignore any point of fact need not exclude intellectual honesty or candor. And it is certainly not correct if the focus is on what is being done for Columbia salmon. Admitting the reality that there is a broad and aggressive salmon plan beyond the BiOp, unfortunately, may not by itself dictate the outcome of this litigation. But on the other hand, ignoring and discounting these other parts of the salmon plan may say something about the awareness or credibility of those who assert that salmon restoration motivates their participation in this case. Even more, we are concerned about the lack of regard or realization that if one key piece of this broad salmon plan is crippled, there could be impacts on other key elements of the plan – with the balance upset, piece by piece the larger All-H plan that represents a decade of challenging collaborative work might be picked apart. We do not have time to put it back together, and even if we could, in the intensifying environment of salmon funding fatigue in Washington, we surely will not match the resources that we have accumulated for putting this Columbia River salmon plan into action.

B. The Collaboration is substantive and necessary for success

For nearly two decades the sovereign governments in the region were balkanized, avoiding any critical mass of political will to confront, let alone resolve, the tremendously difficult social, economic, and scientific issues that come with truly tackling the work of protecting and restoring diminished Columbia Basin salmon runs. The history of sovereign action on salmon before the Court ordered collaboration is essentially a chronology of “who-shot-whom.” Litigation brought those sovereigns to the table in the 1990’s, and this Court was the catalyst for developing the first and only coalition in support of salmon, a coalition that cuts deep and wide across tribal, state, and federal governments, industry, and up-river and down-river interests. There is finally a policy and technical coalition organized behind a specific salmon plan coupled with the funding resources to implement it. Only continued litigation will prevent that coalition from moving forward – the lack of agreement on the plan, the lack of funding, and the science analysis paralysis is very nearly behind us. The enduring collaboration

is more than feel-good stuff. The coalition is a necessary and substantive element of Columbia Basin salmon restoration.

C. The habitat methodology and implementation processes are sound and consistent with what every salmon manager uses today.

We have heard the Court's concern in the past about the habitat methodology, and the process for ensuring that habitat projects after FY 2009 are implemented. We have heard the Court's concern in the past about the survival estimates linked to the habitat work. We have addressed these concerns in our previous two briefs, in expert declarations, and in the hearings³. We sincerely hope that our comments have alleviated the Court's concerns, as the tribes are arguably the strongest defenders and proponents of this habitat element of the BiOp. However because recent briefs from plaintiffs and aligned parties repeat misunderstandings of how the habitat program was developed and how it will be implemented, we must respond.

Oregon and the Nez Perce Tribe, like Warm Springs, Umatilla, Yakama, Washington, and Idaho, are salmon managers. Each and every one of these salmon managers has agencies or departments with expert biologists and scientists that are engaged in salmon and steelhead protection and restoration in their jurisdictions. Every one of those managers employs the strategy of protecting and restoring tributary habitats for the benefit of salmon, steelhead and other aquatic species. Not a single salmon manager in this litigation has ever said that protecting and restoring tributary habitat is not a scientifically sound strategy, or that it should not be a component of the BiOp.

1. All salmon managers developed the methodology for the habitat program used in the BiOp. The methodology is straightforward and documented in the record. It relies on the information of local biologists and scientists from every salmon manager in the remand collaboration.

³³ Again, the critics of the habitat component of the plan reference the Court's questions and requests for clarification, but refuse to acknowledge that since those questions were presented there have been meetings, briefing and hearings addressing them. We believe that it is possible that the subsequent dialogue may have addressed some or all of the Court's points. In fact, the most recent letter to counsel from the Court gives us reason to believe that is the case: "The Adaptive Management Implementation Plan ('AMIP') is a positive development. Federal Defendants deserve credit for developing additional mitigation measures, enhanced research, monitoring and evaluation actions, new biological triggers, and contingency actions to address some of the flaws in the 2008 BiOp." (Document 1749).

Soon after this Court remanded the 2004 BiOp and ordered collaboration among the sovereigns, the Remand Collaboration Habitat Work Group (HWG), consisting of expert field-level biologists and scientists from Oregon, Washington, Idaho, Montana, all Tribes and the federal agencies was organized. All of the salmon managers brought biologists with local knowledge of subbasins and their salmon/steelhead populations to the HWG. The “habitat methodology” developed by this group of experts follows a simple logic path:

- The applicable salmon manager participants identify the limiting factors at a population/subbasin scale (low flow, temperature, passage barriers, etc).
- The applicable salmon manager participants identify habitat actions or types of actions that would could be implemented by 2018 subbasin to *address* the limiting factors (flow enhancement, riparian restoration or fence, stream channel enhancement, fix blocking culverts, push up dams, etc). Technical and political feasibility is considered.
- Use field level data or the best professional judgment supplied by the applicable salmon managers to estimate the *current* habitat function for that subbasin.
- Use field level best judgment supplied by the applicable salmon managers to estimate what the habitat function *could be* in 10 years and 25 years if the actions or types of actions in the second step were implemented.
- Convert change in habitat function to changes in productivity using the Hillman Method agreed to by the HWG.

As explained in the past, there is nothing at all “arbitrary” about the method by which the survival improvements from tributary habitat improvements were predicted. The HWG was comprised of the experts in the field with the best knowledge of their area – the “best scientists” for this precise task. A clear, scientifically supportable, and documented methodology was used – a methodology that at its core has the hypothesis that salmon and steelhead survival will improve in tributary areas if degraded habitat is restored. The necessary “data” or judgment required to develop this methodology was provided by the salmon managers that have direct knowledge of the subbasin being considered. Again, the methodology is in no way “arbitrary” –

the methods and process are documented in the Supplemental Comprehensive Analysis (*See* SCA Section 7.2.2). The Declaration of Bob Rose (Docket No. 1536) confirms the above and the record of the SCA, as does the Memorandum of the Nez Perce Tribe dated April 11, 2007 (AR BR044476).⁴

2. *The population survival improvements predicted from tributary habitat improvements are beyond reproach. Best available and agreed method + Best available local data and knowledge applied to the method = Best Science.*

There has been some concern expressed that the survival improvement predictions might be overstated or implausible. We have always strongly disagreed. This is not to suggest that the tribes believe that these survival improvement estimates are precise in all cases, or that better estimates cannot be developed with more time and information. That said, the plausibility or accuracy of the survival estimates used by NOAA ties *directly* to the data and best professional judgment that the state and tribal biologists provided to the HWG. Oregon, Washington, Warm Springs, Nez Perce, and all other salmon manager biologists used their best judgment to identify the limiting factors in streams they manage; they provided the information on what the current habitat function is; these local experts decided what kinds of actions could be implemented in the streams they manage; and they used their boots on the ground knowledge to determine what future habitat function could be. There is no manual or perfect data set for this population scale information. In the end, the question on this point is simple: Is there better science to use than what the local state and tribal biologists working in that stream could supply to the HWG and

⁴ Describing how NPT worked in the collaboration to develop the habitat methodology. (“Habitat limiting factors for anadromous fish production and survival were developed for each Assessment Unit. Limiting factors were derived from data collected by the Nez Perce Tribe and partnering agencies and from the Northwest Power Conservation Council’s Subbasin Plans. Once limiting factors and current condition were identified for each assessment unit, we assigned appropriate habitat actions to improve each limiting factor. Then, we assigned a numeric value (i.e., percentage) to show improvement of the limiting factor(s) from current to post-implementation of the proposed habitat actions (10 and 25 years). The predicted change in habitat quality translates to biologic benefit estimates by assigning the percentage habitat quality change into the egg-to-smolt survival curves provided by NOAA”).

NOAA? Both Nez Perce Tribe fishery experts and a Yakama Nation biologist that contributed to the HWG speak to this:

“In order to make this exercise useful, regional project managers used data available to them through our own data collection, the surveys of partnering agencies, Subbasin Plans, and their own professional judgment based on years of experience in these drainages. Where we have active on-the-ground partners from another agency, we were able to collaborate on assigning the percent function of limiting factors in each assessment unit. In other cases, we are the primary (and only) experts on the ground, and the percentage given reflects our best professional judgment.” (AR BR044477)

“[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.

To summarize, the HWG experts agreed on the best available scientific *methodology* for estimating survival improvements from habitat work. Next, the local experts supplied the best available *data or input* for that methodology. Finally, this is all *documented* and confirmed in numerous record documents. From a legal standpoint the habitat based survival estimates are beyond reproach.

3. *The actions required to achieve the predicted population survival improvements were identified by the HWG.*

There appears to be continuing semantic or definitional confusion between “actions” that will improve habitat function and yield a survival improvement, and “projects” to improve habitat and yield survival improvements. We believe this confusion is at the root of the concerns we have heard from the Court and we will attempt provide a clarification.

As described above, local experts identified the tributary limiting factors for a populations such as John Day River (Mid-Columbia) Steelhead, and how those local experts

determined how the limiting factors added up to a characterization of the current habitat function. The next step in the analysis required the local experts in the John Day to specifically identify “actions” that could mitigate those limiting factors. “Actions” such as riparian protection, passage improvements, addition of stream flow were identified. In identifying these “actions”, the experts in the HWG considered the technical and local political feasibility as they made the list of actions to address those limiting factors. That is, if additional riparian protection was considered to be an action that would address the limiting factor of high stream temperature, they considered if they had the tools to do things like install riparian fencing. Even more, they also used their experience and best judgment to assess the willingness of private landowners in the John Day to allow salmon managers such as Warm Springs and the Oregon Department of Fish and Wildlife to install these riparian fences on their property. If the local experts’ best judgment was that the local landowner “mood” in the John Day would permit riparian fences being built in the areas where they would improve (reduce) stream temperatures, it was identified as an “action.” And the analysis proceeded such as this, with the local experts matching “actions” they believed were feasible to the limiting factors they had identified.

Considering how all of these feasible actions would mitigate limiting factors over time allowed the HWG to predict the change from current habitat function to future habitat function. Finally the methodology that had been adopted by the group that relates habitat function to survival (Hillman method) was employed to predict the resulting survival improvements for that listed population. It is beyond dispute that the “actions” that need to be deployed in the John Day and other tributary areas to secure the projected population scale survival improvements. (2008 BiOp at 7-43 through 44 (incorporating FCRPS BA Table 1-6, Attachment B.2.2-2 and CA Appendix C-1 Tables 1-5);(See also NOAA 08 AR C0262 & C0087; BR044476; BR032409).

And now to the matter of “projects.” In the vocabulary of the salmon managers working in Columbia Basin habitat restoration, a “project” is produced when an “action” (or set of

actions) is described in a proposal form, worked through an evaluation process and reduced to a *contract*. Again, we use an example that the Court is familiar with from the site visit – the John Day habitat program administered by Warm Springs. Warm Springs tribal biologists working in the basin determined some time ago that high stream temperature and passage obstructions were limiting factors for steelhead and spring chinook. Working with local landowners and partners, they determined that it would be feasible to address these issues with a collection of “actions” such as riparian fencing, culvert replacement and removing the gravel push up dams used to divert water into irrigation systems. The tribe described these “actions” in a proposal form developed by Bonneville and the Northwest Power Planning Council, and submitted those proposed actions for review by the Council and the Independent Science Review Panel. Of course, part of that proposal included a cost estimate for implementing those actions, typically, for a period of three years. When that proposal was found to meet the scientific standards of the ISRP and to also be a priority relative to other proposals, Bonneville and the tribe reduced that proposal to a statement of work and a contract. To boil it down, the “actions” to improve habitat condition become a “project” when the evaluation process determines the methods and means to implement those “actions” are scientifically sound and funding is allocated.

The habitat program of the BiOp has all of the features required to be certain to occur. First, a multitude of feasible “actions” identified by the local biologists to address limiting factors have been identified and documented for each population. A fund (primarily from Bonneville) is committed in the BiOp. A schedule and process for reviewing the scientific soundness and priority of proposed actions is established in the BiOp. Salmon managers in every tributary have the means, will, and tools to put those actions on the ground.

What we want to underscore is that it is not necessary to have the “project” – contract – in hand to estimate survival improvements from habitat work. That estimation is done when the local biologists roll up the feasible *actions*.

The essence of the charge that the habitat survival improvements are not reasonably certain to occur because “projects” have not been identified, is to assert that the ESA requires that the Action Agencies reduce the habitat *actions* in the BiOp to *contracts* from now until Fiscal Year 2018. Setting aside the fact that this goes well beyond what the ESA requires, it would be bad salmon management. Issuing contracts for all of the habitat actions identified to produce the survival improvements immediately would frustrate the ability to consider the scientific soundness and priority of the actions. It runs the risk of contractually committing funds to one set of actions for the term of the BiOp when we may come to find over the course of implementation and monitoring that those funds would be more effective in producing survival improvements if they were directed to a different set of actions, or to a different stream.⁵

We believe that the definitional confusion between “actions” and “projects” is preventing the consideration of the real question, which is this: Given that “feasible actions” to improve habitat function/increase survival are identified in the BiOp, and given that the Action Agencies have dedicated funding to implement those actions over the term of the BiOp, and given that the process for evaluating the scientific soundness and prioritizing those actions for each population is in committed to in the BiOp (and currently operating), and given that every state and tribal salmon manager has the authority, expertise and desire to implement habitat actions in their jurisdictions, are those habitat actions “reasonably certain to occur?” We believe that the answer is an unqualified “yes.”

Again, we refer the Court to the declaration of Bob Rose (Docket No. 1536):

- i 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.

⁵ It should be noted this is not inconsistent with the approach taken in the Fish Accords. While each Fish Accord identifies a number of proposed projects with allocated funding for each year, the details of the actions rolled into each project are not secured for each year until each tribe and funding entity agree upon and execute a contract for that work. The specific actions in that project are subject to change each year based upon observed conditions – and they have changed in the first 3 years – sometimes to a great extent in order to stay on track to deliver the predicted survival improvements.

- i “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.

In summary, we do not believe that any party has taken the position that habitat improvement is unrelated to improving salmon survival. Nor have we heard that for the work that was required in this collaboration that the Hillman method for translating habitat function improvement to survival improvement is not based in science or inferior to an alternative available to the HWG. The credibility of the predicted survival improvements projected for each population is linked directly to the biologists that offered their data and judgment. And finally, the question of whether or not the habitat actions are reasonably certain to occur is answered with a resounding “yes,” so long as the salmon managers with the authority, experience, tools, and desire to continue with the type of habitat work that they did in last year, this year, and have planned for years to come, will fill out proposal forms, pass science review, and execute contracts that will allocate money from the fund dedicated in the BiOp.

III. CONCLUSION

The Tribes share the optimism expressed by the Court that this unique collaborative remand exercise might have in fact led us collectively to a respite from the cycle of litigation. Our testimony that we stand behind the scientific soundness of this salmon plan remains unqualified even after careful consideration of the criticisms lodged by our co-managers that we respect and work with every day. We are gratified that Dr. Jane Lubchenco came to the same

conclusion that we did about the strength of this plan, and like this Court, we see her engineering of the AMIP as a valuable enhancement. Even as we all see tremendous recent improvements in the returns of many Columbia basin stocks, we have much work to do to bring these salmon and steelhead runs to the point where tribal fishers can enjoy the harvests that they envisioned when they secured their rights in treaties. We would like to be able to focus our energies on that work now.

DATED this 11th day of February, 2011.

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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 11th day of February, 2011.

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