Julie A. Weis, OSB No. 97432
Email: jweis@hk-law.com
HAGLUND KELLEY JONES & WILDER LLP
200 SW Market Street, Suite 1777
Portland, Oregon 97201
Phone: (503) 225-0777; Facsimile: (503) 225-1257

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

Attorneys for Defendant-Intervenor
Kootenai Tribe of Idaho

Stuart M. Levit
Email: stul@cskt.org
John Harrison
Email: johnh@cskt.org
Tribal Legal Department
Confederated Salish and Kootenai Tribes
42464 Box 278
Pablo, MT 59855
Phone: (406) 675-2700 x1199; Facsimile: (406) 675-4665

Attorneys for Defendant-Intervenor
Confederated Salish and Kootenai Tribes

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

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

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al., Plaintiffs,	Case No.: 01-0640-RE (Lead Case) CV 05-0023-RE (Consolidated Cases)

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

JOINT MOTION OF DEFENDANT-INTERVENORS KOOTENAI TRIBE OF IDAHO AND CONFEDERATED SALISH AND KOOTENAI TRIBES AND *AMICUS CURIAE* COLVILLE CONFEDERATED TRIBES FOR LEAVE TO FILE A RESPONSE TO PLAINTIFFS' COMMENTS ON THE 2010 PROGRESS REPORT

HAGLUND KELLEY HORNGREN JONES & WILDER, LLC
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777/(503) 225-1257 (fax)

Local Rule 7-1 Certification

Pursuant to Local Rule 7-1, defendant-intervenors the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes, along with *amicus curiae* Colville Confederated Tribes, conferred with the parties regarding the substance of this motion, i.e. these Tribes' desire to file the accompanying joint response to the various plaintiffs' comments on the 2010 Progress Report. The plaintiffs do not oppose this motion, nor do plaintiff-intervenor the State of Oregon or *amicus curiae* the Nez Perce Tribe. Federal defendants also do not oppose this filing, a position shared by defendant-intervenors the State of Washington, the State of Montana, the State of Idaho and Northwest River Partners, and by *amicus curiae* the Confederated Tribes of the Warm Springs Reservation of Oregon and the Inland Ports and Navigation Group. No party has indicated opposition to this filing, though not all parties have communicated a position.

Motion

The Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes, both defendant-intervenors, and *amicus curiae* Colville Confederated Tribes, respectfully move the Court for leave to file the accompanying joint response to the various plaintiffs' comments on the

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HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

2010 Progress Report.[1] This filing is being made in accordance with the November 16, 2011 deadline by which federal defendants were instructed to file any such comments.

RESPECTFULLY SUBMITTED this 16th day of November, 2011.

HAGLUND KELLEY JONES & WILDER, LLP

By:/s/ Julie A. Weis

Julie A. Weis, OSB No. 97432
Haglund Kelley Jones & Wilder LLP
200 SW Market St., Suite 1777
Portland, OR 97201
Phone: (503) 225-0777; Fax: (503) 225-1257
Email: weis@hk-law.com

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

Attorneys for Defendant-Intervenor
Kootenai Tribe of Idaho

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

[1] "Plaintiffs" refers to plaintiffs National Wildlife Federation et al., plaintiff-intervenor the State of Oregon and amicus curiae the Nez Perce Tribe. See Docket Nos. 1865-67.

Government Attorneys for Defendant-Intervenor Confederated Salish and Kootenai Tribes

s/ Brian C. Gruber
Brian C. Gruber, WSBA # 32210
ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, Washington 98121
Tel. (206) 448-1230; Fax (206) 448-0962
Email: bgruber@zcvbs.com

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

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and FRCP 5(d), I certify that on November 16, 2011, the foregoing **JOINT MOTION OF DEFENDANT-INTERVENORS KOOTENAI TRIBE OF IDAHO AND CONFEDERATED SALISH AND KOOTENAI TRIBES AND *AMICUS CURIAE* COLVILLE CONFEDERATED TRIBES FOR LEAVE TO FILE A RESPONSE TO PLAINTIFFS' COMMENTS ON THE 2010 PROGRESS REPORT** 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:

Seth Barsky
US Department of Justice
Wildlife & Marine Resources Section
ENRD
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369

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

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

Thomas L. Sansonetti
US Department of Justice
P.O. Box 663
Washington, DC 20044

Dr. Howard F. Horton, Ph.D.
US Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, OR 97331

Dated this 16th day of November, 2011.

/s/ Julie A. Weis
Julie A. Weis

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

Julie A. Weis, OSB No. 97432
Email: jweis@hk-law.com
HAGLUND KELLEY JONES & WILDER LLP
200 SW Market Street, Suite 1777
Portland, Oregon 97201
Phone: (503) 225-0777; Facsimile: (503) 225-1257

William K. Barquin
Email: wbarquin@kootenai.org
Kootenai Tribe of Idaho
Portland Office
1000 SW Broadway, Suite 1060
Portland, OR 97205
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Stuart M. Levit
Email: stul@cskt.org
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Email: johnh@cskt.org
Tribal Legal Department
Confederated Salish and Kootenai Tribes
42464 Box 278
Pablo, MT 59855
Phone: (406) 675-2700 x1199; Facsimile: (406) 675-4665

Attorneys for Defendant-Intervenor
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Brian C. Gruber, WSBA No. 32210
Email: bgruber@zcvbs.com
ZIONTZ CHESTNUT VARNELL
BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, Washington 98121
Tel. (206) 448-1230; Fax (206) 448-0962

Attorneys for *Amicus Curiae* Confederated
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JOINT RESPONSE OF DEFENDANT-INTERVENORS KOOTENAI TRIBE OF IDAHO AND CONFEDERATED SALISH AND KOOTENAI TRIBES AND *AMICUS CURIAE* COLVILLE CONFEDERATED TRIBES TO PLAINTIFFS' COMMENTS ON THE 2010 PROGRESS REPORT

HAGLUND KELLEY HORNGREN JONES & WILDER, LLC
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777/(503) 225-1257 (fax)

I. INTRODUCTION.

Defendant-intervenors the Kootenai Tribe of Idaho (KTOI) and the Confederated Salish and Kootenai Tribes (CSKT), and *amicus curiae* Colville Confederated Tribes (CCT), submit the following response to plaintiffs' October 25, 2011 comments on the 2010 Progress Report, Docket Nos. 1865-67.[1] KTOI and CSKT are tribes residing in the upper Columbia River Basin which have been participating in this case primarily to speak on behalf of upper Basin resident species affected by Federal Columbia River Power System (FCRPS) operations. CCT is also situated in the Upper Columbia Basin – at the confluence of the Columbia and Okanogan Rivers – and has a strong interest in the impacts of the FCRPS on anadromous and resident fish species. CCT is party to a Columbia Basin Fish Accord with the federal action agencies.

The KTOI, CSKT and CCT urge the Court to decline plaintiffs' invitation to reconsider its August 2, 2011 Order (Opinion and Order). In addition to granting in part and denying in part plaintiffs' motions for summary judgment and supplemental summary judgment, the Opinion and Order provided clear remand direction to federal defendants and imposed operational constraints on FCRPS operations during the remand period by way of a tailored injunction.

II. BRIEF REMINDER OF THE TRIBES' INTERESTS IN THIS CASE.

The KTOI and the CSKT previously provided the Court with descriptions of their respective histories and interests in FCRPS operations. See Docket No. 1555 (Summary Judgment Memorandum filed Oct. 24, 2008); Docket No. 1810 (Summary Judgment Memorandum filed December 23, 2010). The CCT did likewise when moving for *amicus* status

[1] "Plaintiffs" refers to plaintiffs National Wildlife Federation et al., plaintiff-intervenor the State of Oregon and amicus curiae the Nez Perce Tribe.

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

in this case. See Docket Nos. 1126-27. Respectfully, the interested reader is referred to those documents for additional information about why the Tribes are active participants in this case and intend to continue their participation in the remand process and the ongoing implementation of the 2008/2010 BiOp.

III. THE COURT SHOULD DECLINE PLAINTIFFS' INVITATION TO DRASTICALLY REVISE ITS AUGUST 2, 2011 REMAND ORDER.

The KTOI, CSKT and CCT oppose plaintiffs' suggestion that the Court divert the parties from the current remand path to a settlement judge/expert panel path. Such a wholesale revision of the remand process and jettisoning of the Court's clear and careful remand Order is unwarranted, inappropriate, and undermines the comprehensive process of independent science review and adaptive management established by the 2008/2010 Biological Opinion.

First, plaintiffs' comments on the 2010 Progress Report go far beyond the Court's limitation on additional relief based on the annual implementation reports. In the Opinion and Order, the Court stated in no uncertain terms that "[i]f there are specific disputes regarding the implementation of the BiOp, Plaintiffs may petition the court for limited relief at that time [after the filing of the annual implementation report with the Court], and that time only." Opinion and Order at 21 (emphasis added). Rather than petitioning the Court about a specific dispute and seeking limited relief, plaintiffs instead seek to have the Court entirely restructure the remand process by putting it in the hands of a settlement judge and expert panel. In essence, plaintiffs are asking the Court – via their comments on the 2010 Progress Report – to abandon the relief the Court already fashioned and replace it with plaintiffs' latest preferred version of relief, a version not even articulated in their summary judgment briefing. This request, which can fairly

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

be characterized as a motion for reconsideration of an order in which plaintiffs were the substantially prevailing party, should not be granted.

Second, the Court's Opinion and Order thoroughly discussed what it saw as flaws in the 2008/2010 BiOp, thereby providing federal defendants with clear guidance for the remand process. See, e.g., Opinion and Order at 2 ("Federal Defendants have failed . . . to identify specific mitigation plans to be implemented beyond 2013."); id. at 3 (remanding the BiOp with instructions "to reevaluate the . . . reliance on unidentified mitigation measures"); id. at 10 (holding that the BiOp "failed to adequately identify specific and verifiable mitigation plans beyond 2013"); id. at 12 (failure to identify "specific habitat projects after 2013"); id. at 13 (failure to identify "future estuary [habitat] actions"). The Court in no uncertain terms ordered federal defendants to craft "a new or supplemental BiOp that corrects this BiOp's reliance on mitigation measures that are unidentified, and not reasonably certain to occur." Id. at 23. Respectfully, federal defendants do not need a settlement judge to tackle the task at hand as ordered by this Court.

As the federal defendants, intervenors and *amici* noted throughout the summary judgment briefing, the current BiOp, which the Court ordered to remain in effect through the end of 2013, contains ample means for independent science review and adaptive management. These internal mechanisms are fully capable of achieving the objectives of the remand. Nor is a settlement judge/expert panel process consistent with the Court's recognition that the federal defendants should be allowed "to 'get out of the courtroom' and get to work for the next two and a half years." Id. at 19. Indeed, diverting effort to the plaintiffs' proposed alternative remand process

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

would diminish resources necessary to implement the extensive habitat mitigation planned through the end of 2013 and the Court's own direction on remand.

Third, the current posture of this case – remanded and enjoined – is not the appropriate point for use of a settlement judge/expert panel. In contrast, when the KTOI in 2005 joined certain other parties in advocating for a special master assisted by a court-appointed expert, the Court was fashioning an evidentiary process to inform its fashioning of injunctive relief during the remand process, not to control the remand process itself. See, e.g., Docket No. 1070 at 3 (advocating for an evidentiary hearing to assist the Court in "determin[ing] what interim operating measures . . . should be implemented in order to avoid jeopardy" during the remand period). Ultimately, the Court declined the invitation to invoke outside assistance, agreeing with federal defendants that it was fully capable of "understanding the issues." Docket No. 1111 (Opinion and Order dated November 2, 2005) at 5.

Here, the Court already has shaped an injunction to guide FRCPS operations during the period of remand. Opinion and Order at 21-24. Thus, it is patently clear that the plaintiffs seek to use a settlement judge/expert panel to do exactly what the Court was careful to avoid, i.e. wresting control of the remand process from federal defendants as guided by this Court's remand order. Id. at 18 (acknowledging that courts must take care not to overstep by "dictat[ing] to an administrative agency 'the methods, procedures, and time dimension' of the remand").

Finally, a recurring theme throughout plaintiffs' comments is the desire to create an exclusive seat at the table with federal defendants. But the Nez Perce Tribe and the State of Oregon already have a seat at the table as sovereigns, alongside the other sovereign states and Indian Tribes participating in this case. See, e.g., 2010 Progress Report (Docket No. 1859-1) at

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

37 (overviewing the multi-sovereign FCRPS Regional Implementation Oversight Group, or RIOG, along with the RIOG's subgroups like the Technical Management Team, or TMT). See also id. (overviewing the role of the Northwest Power and Conservation Council Fish and Wildlife Program, which utilizes independent science review groups, in guiding actions in the Basin).

The Court long ago set in motion the unprecedented sovereign collaboration process that makes this case truly *sui generis* and provides justifiable optimism as the remand process proceeds. Indeed, the Court reiterated to the parties in its Opinion and Order that the sovereign collaboration must continue. Opinion and Order at 3 ("Federal Defendants shall continue to collaborate with the sovereigns . . . ."); id. at 23 ("During the remand period, NOAA Fisheries shall continue to collaborate with the sovereign entities, including the States of Idaho, Montana, Oregon, and Washington, and the Tribes . . . ."). Plaintiffs' request would upend this collaboration, establishing a forum where only the plaintiffs and federal defendants would address remand issues, thereby excluding every other sovereign that has a stake in the recovery of listed species throughout the Columbia Basin, or other sovereign interests in the impacted resources, such as water management, conservation of non-listed species and treaty uses.

In sum, a mere three months into the remand process, the plaintiffs have deemed the remand effort a failure. It is puzzling that the Nez Perce Tribe and the State of Oregon take this position despite being sovereigns with whom the federal defendants have an undisputed obligation (and opportunity) to collaborate. This cynicism is flatly contrary to the repeated urgings of KTOI, CSKT and CCT to allow the BiOp to be implemented and inconsistent with this Court's own mandate that the BiOp remain in place through 2013. The BiOp is not broken;

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

rather, it must be given time to work. Effective collaboration must work both ways, and the KTOI, CSKT and CCT are committed to engaging productively in the sovereign collaboration process to realize the promise of the 2008/2010 BiOp and develop a 2014 BiOp consistent with this Court's remand order. We are confident this is the right way forward for the benefit of species throughout the Basin. The Court should resist plaintiffs' efforts to derail the parties from the task at hand.

IV. CONCLUSION.

The Kootenai Tribe of Idaho, the Confederated Salish and Kootenai Tribes, and the Colville Confederated Tribes urge the Court to decline plaintiffs' invitation to reconsider its August 2, 2011 decision in the manner suggested by plaintiffs, i.e. appointment of a settlement judge and expert panel. The Court rightfully ordered the federal defendants to continue collaborating with the sovereigns in the Columbia River Basin, which include the Nez Perce Tribe and the State of Oregon. The sovereigns have a seat at the RIOG table, and the 2008/2010 BiOp already involves independent review of FCRPS operations via such mechanisms as the RIOG, the TMT and the Northwest Power and Conservation Council Fish and Wildlife Program process. In addition, the BiOp provides for robust adaptive management during its implementation, and KTOI, CSKT and CCT submit that this is the appropriate venue for addressing issues of concern, such as avian predation.

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HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)

For all of these reasons, plaintiffs' suggestion that the Court jettison its August 2, 2011 decision and instead appoint a settlement judge and expert panel is neither appropriate nor warranted and should be rejected by this Court.

DATED this 16th day of November, 2011.

HAGLUND KELLEY JONES & WILDER, LLP

By:/s/ Julie A. Weis

Julie A. Weis, OSB No. 97432
Haglund Kelley Jones & Wilder LLP
200 SW Market St., Suite 1777
Portland, OR 97201
Phone: (503) 225-0777; Fax: (503) 225-1257
Email: weis@hk-law.com

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

Attorneys for Defendant-Intervenor Kootenai Tribe of Idaho

/s/ Stuart M. Levit

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

Government Attorneys for Defendant-Intervenor Confederated Salish and Kootenai Tribes

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

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

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and FRCP 5(d), I certify that on November 16, 2011, the foregoing **JOINT RESPONSE OF DEFENDANT-INTERVENORS KOOTENAI TRIBE OF IDAHO AND CONFEDERATED SALISH AND KOOTENAI TRIBES AND *AMICUS CURIAE* COLVILLE CONFEDERATED TRIBES TO PLAINTIFFS' COMMENTS ON THE 2010 PROGRESS REPORT** 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:

Seth Barsky
US Department of Justice
Wildlife & Marine Resources Section
ENRD
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369

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

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

Thomas L. Sansonetti
US Department of Justice
P.O. Box 663
Washington, DC 20044

Dr. Howard F. Horton, Ph.D.
US Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, OR 97331

Dated this 16th day of November, 2011.

/s/ Julie A. Weis
Julie A. Weis

HAGLUND KELLEY JONES & WILDER, LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777 (phone)/(503) 225-1257 (fax)