

JOHN W. OGAN, OSB #065940
Karnopp Petersen LLP
1201 NW Wall Street
Suite 200
Bend, Oregon 97701
Telephone: (541) 382-3011
Fax: (541) 388-5410
Attorneys for the Confederated Tribes of the Warm Springs Reservation of Oregon

THE HONORABLE MICHAEL H. SIMON

BRENT H. HALL, OSB #992762
Office of Legal Counsel
Confederated Tribes of the Umatilla Indian Reservation
46411 Timine Way
Pendleton, Oregon 97801
Telephone: (541) 429-7407
Fax: (541) 429-7407
Attorneys for the Confederated Tribes of the Umatilla Indian Reservation

PATRICK D. SPURGIN, WSB #22316
411 N 2nd Street
Yakima, Washington 98901-2336
Telephone: (509) 248-4282
Fax: (509) 575-5661
Attorney for the Yakama Nation

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Case No.: 3:01-CV-00640-SI

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE,

et al.,

Defendants,

BRIEF OF AMICI WARM SPRINGS AND
UMATILLA TRIBES AND YAKAMA
NATION IN OPPOSITION TO
PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT

and
NORTHWEST RIVERPARTNERS, *et al.*,
Intervenor-Defendants.

I. INTRODUCTION

In 1855 the *amicus* tribes entered into treaties with the United States Government, wherein they ceded tens of millions of acres of their homelands in the Columbia River Basin that had sustained them physically, culturally, and spiritually since time immemorial. The promise made by the United States was that the tribes' retention of a small fraction of their lands as a permanent home, coupled with their retained rights to fish, hunt, and gather foods and medicines from their usual and traditional places, no matter how far beyond the new reservation borders, would all forever be protected. With a land base, even if a pittance of what they had utilized for millennia, along with access to salmon and their other foods retained, the treaty signers sought to protect their culture and way of life.

Following the treaty signings, nigh 150 years of non-Indian commercialization, degradation, and exploitation of the Columbia River and its tributaries preceded the ESA listing of salmon and steelhead stocks in the Columbia River. The tribes' ability to harvest sufficient supplies of salmon, steelhead and other fishes for their ceremonies, subsistence, and economic gain were all but gone when the listings were made, and the litigation over the sufficiency of the National Marine Fisheries Service (now NOAA Fisheries) prescriptions for the operation of the Federal Columbia River Power System (FCRPS) started. These tribes joined with like-minded sovereigns and organizations in legal challenges to the NOAA/Action Agency plans for the FCRPS in 1992, 1995, 2000, and 2004. Like-minded in that the federal government must do

more, and that the object must be restoration of the depleted salmon and steelhead by addressing all of the mortality factors that caused the decline of salmon, and put them at risk of their demise.

These tribes joined in support of the various plaintiffs in those prior rounds of ESA litigation for a simple reason - the multiple efforts that had constituted the federal government's Columbia River salmon restoration initiative failed to provide enough real, practical, science-based *action* to improve the condition of depleted salmon runs. As a result, a disproportionate share of the conservation burden was falling on the tribes' treaty reserved right to harvest. In the early 1990's, hydrosystem fish operations were nascent, the federal commitment to salmon habitat restoration was anemic, and hatchery operations were beyond the reach of tribes, dominated by state and federal parties, and managed primarily to fuel non-Indian sport and commercial fisheries in the lower Columbia, and along the west coast, not treaty fisheries up-river. The new ESA overlay in the early 1990s and the FCRPS BiOp cases put a needed focus on the hydro "H" – the tribes welcomed that. Now they had a new tool, a new forum to advocate for desperately needed improvements in hydro operations and configuration. But those forums -- those fights -- were always just a *piece* of their larger effort to press their long-standing demand for a *comprehensive* federal salmon restoration *action* plan.

While most challengers to the BiOps trained their sights on the "hydro H" in those prior rounds of litigation, the tribes always lifted their voices to support a greater commitment to restoring the river and streams where the salmon actually return to spawn, and once emerged, rear as juveniles until they are ready to make their journey to the ocean. The "habitat H" would have to be addressed, lest those fish surviving their Columbia River and oceanic perils would continue to face inhospitable conditions in their natal streams, nowhere to spawn and grow, and the long journey back as adults would be for naught. These tribes participated in support of the

challenges to the FCRPS BiOps because, prior to the 2008 version, each time they made the same assessment – the *actions* offered in the BiOp, considered in the context of the total federal salmon effort, were not adequate to promote the protection and restoration of Treaty protected fisheries.

In 2008, these tribes saw a sea change in the federal government’s commitment to salmon and steelhead restoration in the Columbia Basin. This new FCRPS BiOp/RPA, coupled with other commitments of the federal government through the Columbia Basin Fish Accords (Accords), the *United States v. Oregon* Management Agreement, and in the Pacific Salmon Treaty collectively represented a broad and unified 10-year plan that deserved a chance to be implemented. It deserved a chance. It was time to go to work in the rivers and streams and on the dams and put this new federal plan into *action*. So these tribes moved across the courtroom to counsel table for the defendants, and served as *amicus curia* for three years in defense of that 2008 broad salmon plan to seek to ensure that simple, pragmatic, critical realities regarding Columbia Basin salmon restoration are not lost upon this Court in the midst of the onslaught of the maneuverings and minutia of “lawyer’s arguments” in this litigation.

The assessment that we shared with Judge Redden we repeat here, as we see the 2014 BiOp now under challenge to be an continuation of a key part of the 2008 larger, unified federal plan – we respectfully request the Court to know how these tribes evaluate the 2014 BiOp as it works with the other elements of the larger 10-year plan:

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.

Those simple but well-considered opinions of the tribes remain unfaltering today with respect to the 2014 BiOp. The federal plan, that is a *package* of commitments, coordinated one with the other and analyzed as a collective whole *deserves a chance to be implemented without further interruption*. Once fully implemented, it may then be subject to intensive, probing, and unbiased analysis. We are serving as the “wardens” to both ensure the habitat projects are being implemented, and to ensure that their benefits are being compiled and analyzed with best available science as we said we would. We respectfully request that the Court consider our views about the larger context within which the current BiOp battle is taking place.

We understand that this is litigation, that the ESA provides the legal framework, and that those primary plaintiffs and defendant parties must accept and play their roles, to expound on precedent, select supporting tidbits from a massive administrative record, and even to add to it with lengthy declarations. The Warm Springs, Yakama, and Umatilla tribes have purposefully selected a different role – we have endeavored to stand before this Court, previously in defense of the 2008 BiOp “piece” of the broad federal salmon plan, and again now in support of the 2014

BiOp cog in the larger salmon restoration machine, and give our most thoughtful, considered opinion on what is best for Columbia River salmon, steelhead and other native species. We do not seek to vindicate or police the Endangered Species Act, nor do we participate here to advance a collateral environmental objective. We will not abandon our focus from what is best for salmon, and the native peoples that believe they have a sacred obligation to protect them.

As a final point of introduction, and to explain the emphasis of our filing here, the *amicus* tribes, as the excerpt above from a submission of ours to Judge Redden states, committed to be the “wardens” and guardians of the tributary habitat element of the All-H federal salmon plan. That is, we tribes would insist that the funding committed in the Accords and BiOps would actually be translated into and spent upon on-the-ground projects within the allotted time; that these projects would target those features of the habitat that truly needed treatment because of the limiting effects on the listed populations; and finally, that the habitat projects would cause actual improvement in the habitat functionality, mitigating or eliminating the negative effects limiting productivity of listed species; and that we would diligently and intensively monitor the habitat and populations to document biological benefits. Our filing here is in service of our commitment made to this Court to pay special attention to the tributary habitat program of the former 2008 and now the 2014 BiOp.

II. ARGUMENT

A. **The federal salmon plan is larger than one BiOp and should be completed as planned without interruption, then analyzed rigorously.**

With respect to the 2008 BiOp, and now again here with the 2014 BiOp, these tribes seek to illuminate a point apparently lost or discounted once again: we should take a broader view of the federal government’s 10-year action plan that began in 2008 and will not be fully reviewable

until at least 2018. The FCRPS and Upper Snake BiOps, though important pieces are just that – pieces of the broader plan. The other components of the broader plan include a 2008 agreement in the Pacific Salmon Treaty that reduced ocean harvests of Columbia chinook; an abundance-based harvest management plan and comprehensive package of hatchery actions was developed by Oregon, Idaho, Washington, the four Treaty Tribes and the federal government that was made an Order of the Court by Judge King in *U.S. v. Oregon* in 2008; and the Columbia Basin Fish Accords also completed in 2008, that 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, unified 10-year federal Columbia River salmon plan, and enjoyed an unprecedented level of agreement in the Basin when the package was presented in 2008.

We continue to be concerned about the lack of regard or realization that if one key piece of 10-year 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 federal plan that represents a decade of challenging collaborative work might be picked apart. Through the 2008 package of agreements, the region addressed the ESA in the BiOps; treaty harvest rights, harvest and hatchery actions in the *US v. Oregon* Management Agreement and Pacific Salmon Treaty; and funding and additional commitments in hydro, habitat, harvest, and hatcheries in the Accords, all in a carefully coordinated way. We are only a few years away from being able to comprehensively evaluate the larger unified plan, and then craft another comprehensive approach that meets both ESA and Treaty rights obligations of the federal agencies. Plucking the BiOp piece out of that larger package and setting it on a different path and/or time frame frustrates the ability to continue to address the multiple obligations that the federal government must meet in a

coordinated and cohesive manner. Allowing the BiOps to complete their term along with the Accords, *United States v. Oregon* agreement/Court Order and Pacific Salmon Treaty allows for the coordinated and linked approach to addressing those multiple obligations.

B. The habitat program of the BiOp and Accords is based in sound science and is being successfully implemented.

In our filings related to the challenge to the 2008 BiOps the tribes demonstrated how survival estimates for listed stocks are linked to the habitat work. Decl. Robert Rose (ECF Doc. 1536); Decl. Gary James (ECF Doc. 1538). While Mr. Rose's prior declaration is worth full study, in short, when habitat is degraded, or loses function, the ability of the aquatic species that populate it to be fit and productive also diminishes. Degraded habitat is a "limiting factor" on the productivity of salmon and steelhead in the Columbia Basin. Decl. Robert Rose (ECF Doc. 1536).

Every federal, tribal and state sovereign are salmon managers, with agencies or departments filled 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. However, we continue to see some representations to the Court that restoring and protecting tributary habitat – the spawning and rearing areas for these listed species

– isn't significant¹. We continue to be disappointed in such representations, and disagree vehemently. A recent report of the Independent Scientific Advisory Board supports a habitat program and its significance is evident, as explained by Mr. Rose:

A recent report from the Independent Science Advisory Board of the Northwest Power and Conservation Council emphasizes the importance of habitat for productivity and life history diversity for salmon and steelhead. The ISAB found that “the capacity of some watersheds to support salmon or steelhead appears to have been exceeded at spawning abundances that are low relative to historic levels.” This would suggest that current habitat carrying capacity is not adequate to support run sizes that are naturally sustainable. Extensive and intensive habitat restoration actions are required to make the hard fought hydrosystem fixes meaningful in rebuilding sustainable adult returns. It is not enough to maintain existing abundance levels of salmon and steelhead; it is our goal (and the goal of ESA) to rebuild populations to naturally sustainable, harvestable, levels.

Extra-Record Decl. Robert Rose ¶ 33.

The scientific foundation of the habitat program of the 2008 BiOp and Accords, carried over consistently and refined in the 2014 BiOp, was developed by 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. All of the salmon managers brought biologists with local knowledge of subbasins and their salmon/steelhead

¹ For example, by crude analogy Oregon argues that habitat efforts in the Accords are futile. Notwithstanding the fish life-cycle flaws in Oregon's argument, or that it contradicts not only Oregon's prior statements in support of habitat work but also its plea to the Court regarding its own habitat work, Dkt # 1532, it also works injustice to those challenged homeless populations. Oregon hypothesizes the plight of homeless mentally ill "getting off the streets" in a fictional environment of apparently adequate housing. Oregon Br. at p. 10, fn. 3 Dkt # 1994. In fact the complexities facing Oregon's homeless populations, mentally ill and not, are multifaceted and deserve multifaceted solutions, including addressing the chronic shortage of low income housing in the Portland metropolitan area. *Our Homeless Crisis* by Anna Griffin, <http://www.oregonlive.com/portland-homeless/>. In contrast to Oregon's fictional strawman, the United States government has adopted a “Housing First” policy in its efforts to reduce homelessness. This policy recognizes that housing stability comes first, and allows case workers to establish “a trusting relationship before expecting that a person will engage in treatment or more intensive case management services.” http://usich.gov/usich_resources/solutions/explore/housing_first/.

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 habitat 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 fish productivity using the Hillman Method agreed to by the HWG.

The HWG was composed 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. Decl. Robert Rose (ECF Doc. 1536); *see also* Extra-Record Decl. Robert Rose.

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 translating habitat function improvement to survival improvement is not based in science. The credibility of predicted survival improvements is linked directly to the biologists that offered their data and judgment.

The biologists relied upon were those with the most direct knowledge of the populations and streams examined. The habitat program of the 2014 BiOp and the Accords is based on the consensus determinations of these experts and is accordingly based on the best available science.

A second fact that the *amicus* tribes want to report to this Court is that the habitat program that was built into the 2008 and then the 2014 BiOps, along with the Accords habitat additions *are in fact being implemented in the tributaries*. It is with some admitted frustration that we hearken back to the arguments of the plaintiffs in their challenge of the 2008 BiOp and recall the relentless attack on the legality of the BiOp because the habitat projects were not “reasonably certain to occur.” Time and again we explained why the BiOp and Accords did in fact outline a large-scale tributary habitat program that would in fact be implemented through 2017. (*See*, Memorandum in Support of Amici Warm Springs, Umatilla, and Yakama Tribes in Opposition to Motions for Summary Judgment (ECF Doc. 1535). We literally stood before the Court and said that we would diligently insist that the “paper” commitments made would be translated into habitat projects in the streams targeting and correcting their degraded function. We are here to report that notwithstanding the disruption of another remand process and the instant litigation, the habitat program that was committed to as part of the large federal salmon plan was, has been, and continues to be implemented as committed to in 2008. Extra-Record Decl. Robert Rose.

C. The tributary habitat program is improving habitat condition as planned and the biological benefits to listed species anticipated in 2008 remain reasonable projections.

These tribes have said that they would oversee and watchdog the tributary habitat program laid out in the 2008 BiOp, carried into the 2014 BiOp and augmented by the Accords. The first question is if the projects and funding have been translated from plans and

commitments to actual work on the ground addressing the problems identified by the local biologist experts. Our report is that the aggressive and massive tributary habitat program is on track and that the federal agencies have made good on their commitments. The brouhaha made in the last round of litigation by plaintiffs as to whether or not the projects would actually materialize – that they could not be accepted as “reasonably certain to occur” – was, as these tribes said, unfounded pessimism intertwined with a crabbed reading of the ESA implementing regulations and law. Again, Mr. Rose speaks to both the implementation of the projects, and the early results of improved habitat function in the streams that support listed salmon and steelhead:

The Yakama Nation entered into the Accords with the intent that implementation of the habitat actions was key to our efforts; that we would watch over the process carefully and provide the necessary oversight to insure the process and participants collaborated in an efficient and effective manner so that on-the-ground benefits of these actions would be maximized. Our entire focus has been and continues to be that the fisheries resources, and ultimately our own tribal fishers realize these intended restoration benefits.

Many substantial restoration actions have occurred as a result of the BiOp and the Accords funding. Actions outlined in Appendix B of the Accords (and other BiOp-related habitat actions) were intended to be implemented aggressively, and we are getting the work done. At this time, The Yakama Nation is on track to get the actions completed within the Accords time frame.

My direct observations and impressions of our progress implementing these restoration activities throughout the Yakama Nation in general, and specifically in the Upper Columbia, are not unique. This view is shared by other watershed specialists throughout the region. I attribute much of this success to the new “programmatic” funding model (10 year funding commitments needed to address the social and technical complexity of larger-scale riverine restoration) developed as a result of the Accords. It is the model that is required for the scale of restoration needed to improve our salmonid stocks. It works in both efficiency and effectiveness and allows maximum opportunities for Adaptive Management to occur, as needed.

I reference the 2013 Comprehensive Evaluation (CE) Section 3, Attachment 2, Table 1² as evidence that a significant number of restoration projects within the Upper Columbia are being completed in a relatively short time frame. To my knowledge, most – if not all

² 2014 NOAA B47:3961

of the Upper Columbia projects, prior to implementation, are subject to peer review and comments by local watershed experts, including the Upper Columbia Salmon Recovery Board and the Bureau of Reclamation. Many of those that review these projects also sit on the Expert Panel process. Due to this substantial local and professional engagement I believe these restoration projects are addressing the primary limiting factors and habitat function, to varying degrees.

Habitat restoration is a fundamental component to egg-smolt productivity and species recovery. Every salmonid biologist, and even the occasional recreational fisher, knows that more fish are found in diverse habitats with complex structure than in channelized streams lacking any complexity. Improvements in habitat quality and quantity increase fish productivity.

Extra-Record Decl. Robert Rose ¶¶ 23-26.

On the ground professional biologists for the tribes are not only verifying that the tributary habitat work that is the backbone of the habitat “H” of the comprehensive BiOp is being put “on the ground”, as discussed by Mr. Rose, but he reports that the benefits anticipated continue to be reasonable projections. Mr. Rose describes the work being done by the tribes to monitor the progress of the habitat program, the “Expert Panel Process”, and focused “Intensively Monitored Watersheds” and is of the opinion that the habitat and biological benefits of the 2014 BiOp and Accords remain sound and reasonable. Extra-Record Decl. Robert Rose ¶¶ 26-39.

D. The kelt reconditioning projects and the avian predation efforts should be allowed to continue and deliver benefits.

As in previous filings, these tribes pause to comment on selected actions that we believe have been subjected to unwarranted criticism, and that we strongly believe need to continue unfettered because the benefits they will deliver are meaningful.

1. Kelt reconditioning was pioneered by the Tribes and works.

In 1999, the Yakama Nation and the Columbia River Inter-Tribal Fish Commission (CRITFC) partnered on a project to find ways to improve the successful repeat spawning of

steelhead in the Yakima River. The Yakama Nation's steelhead (kelt) reconditioning program showed such promise that the Warm Springs, Nez Perce, and Colville tribes began similar programs. Research at the Warm Springs Tribes' Parkdale Fish Facility³ suggests that kelts are just as reproductively viable as maiden spawning fish. Hatch, 2014.⁴ This means that every steelhead kelt has the potential to be a valuable contributor to ESA-listed steelhead populations.

The 2008 BiOp and Columbia Basin Fish Accords recognized the potential ability of kelt reconditioning to contribute to steelhead populations and included funding for programs by the Yakama Nation in the Upper Columbia River and by CRITFC in the Snake River.⁵ Since then, the tribal programs have been researching best management practices and beginning implementation programs that actually return reconditioned fish to the spawning grounds.

In the Columbia, the Yakama Nation and CRITFC have worked with the Chelan Public Utility District, Douglas Public Utility District and the U.S. Fish and Wildlife Service to construct an "isolation building" at the Winthrop National Fish Hatchery in Winthrop, Washington for kelt reconditioning. Not accessible to the public, the facility reduces fish stress by keeping the surroundings quiet during their reconditioning period. Steelhead kelts are reconditioned through the summer months and returned to the Methow River near Pateros,

³ Located on the Hood River in Oregon, funded by BPA.

⁴ Hatch, Doug. 2014. Kelt Reconditioning and Reproductive Success Evaluation Research: 2013 Annual Technical Report. BPA Project #2007-401-00, pp. 3, 100-104 (available at <https://pisces.bpa.gov/release/documents/documentviewer.aspx?doc=P135743>).

⁵ 2008 Three Treaty Tribes' Columbia Basin Fish Accords, Attachment B, pp. B-10, B-11; *see also* 2013 FCRPS Comprehensive Evaluation at 107.

Washington in the fall so they can spawn again in the following spring. The goal of this program is to increase the number of wild spawners in the Methow Basin by 10%.⁶

The Snake River kelt reconditioning program released 34 reconditioned B-run steelhead in 2014; 69 in 2013; and 9 in 2012.⁷ Research on steelhead physiology is providing direction to increase future kelt releases through rematuration assessments, diet improvements, and holding “skip spawn” individuals for a longer period of time to increase their reproductive contribution (skip spawners take an extra year to recondition, but produce larger females with more eggs). Pursuant to adaptive management, additional holding tanks are being added to specifically allow for longer holding of skip spawners. Kelt collections are occurring at Lower Granite Dam where mixed groups of A- and B-run steelhead are available. Additionally, collections of strictly B-run steelhead are taking place at Fish Creek (Lochsa River) and the South Fork Clearwater River, where 35 B-run steelhead were put in the kelt reconditioning facility on March 3, 2015, following air spawning for the localized broodstock program lead by Idaho Department of Fish and Game.

A Snake River Kelt Master Plan is being developed to guide construction of a production-level kelt reconditioning facility in the Snake River to fully address RPA 33. Budget for the construction of the facility is part of the Accords agreement.

⁶ Abrahamse and Murcock. 2014. Upper Columbia River Kelt Reconditioning Project: 2013 Annual Report. BPA Project # 2008-58-00. P. 3. Available at <https://pisces.bpa.gov/release/documents/documentviewer.aspx?doc=P135747>

⁷ See annual reports available at <http://www.cbfish.org/Project.mvc/Publications/2007-401-00/Documents>

2. The estimated benefits from the updated avian predation RPAs are reasonable and the actions are essential.

The predation by Caspian Terns (CT) and Double-Crested Cormorants (DCC) has grown to unexpected high levels. They consume an unacceptable number of smolts in the estuary, including but not limited to steelhead, a species of special concern to these tribes.⁸ The actions in the updated RPA 45 and in RPA 46, and resulting targeted benefits are reasonable and realistic. They are based on science and are an example of adaptive management in action.

With respect to CT predation, the initial implementation of the 2006 Caspian Tern Management Plan did not produce the anticipated reductions in CT nesting pairs on East Sand Island. Although the nesting space was reduced from 6 acres to 1.58 acres, it turns out that CTs will nest in greater densities than previously known. The Corps has now developed (or will soon be finished with) additional alternative nesting sites outside the basin, which will allow it to further reduce the East Sand Island sites to 1 acre. Based on the further reduction, combined with attracting the CTs to the new sites, analyzed in light of past similar actions, the benefits ascribed are reasonable. *See* Corps 759:75282; Corps 576:65258, 65268, 65288, 65316; Corps 758:75238; Corps 806:79821, 79625. With respect to the unexpected increase in the number of DCC's, NOAA used adaptive management to update RPA 46 based on past monitoring, testing of hazing actions and reviewing other successful cormorant programs. 2014 BiOp at 38, 410-11; Corps 12:1789-90; *see also* Corps 721; Corps 804; Corps 1720:92655. In February of 2015, the Corps released its Final Environmental Impact Statement: Double-crested Cormorant

⁸ One example of the linkages between the BiOp and the *U.S. v. Oregon Management Agreement* and Court Order is the impact of listed B-Run steelhead on fall chinook harvest. The number of chinook that the tribes can harvest is limited by the number of wild B-Run steelhead in the river mixed with chinook. Once the tribes harvest the allowable number of B-run steelhead, they must stop gillnet fishing for plentiful Chinook prior to harvesting their full allocation, lest they incidentally catch more B-Steelhead.

Management Plan to Reduce Predation of Juvenile Salmonids in the Columbia River Estuary (FEIS), with the preferred alternative management plan discussed in the updated RPA 46. The FEIS preferred alternative calls for a range of actions, including lethal take, to reduce the number of terns to the base period estimate, regardless of current population size. Tribal staff worked with the Corps in providing comments on the (FEIS) as did other co-managers in the Basin.

Implementing avian predation measures is complicated by litigation or threatened litigation from organizations such as the Audubon Society, and the sometimes differing management priorities of the agencies responsible for the species. The additional implementation measures taken under RPA 45 to reduce the number CT nesting pairs, the updated RPA 46 and actions called for in the management plan to reduce DCCs, and the estimated decrease in predation levels, are reasonable and should be allowed to go forward. They are a part of the broader salmon plan, and NOAA's conclusion that the targeted benefits will be achieved is likely conservative since fish condition and health are improved through the hydrosystem, when compared to the base case.

III. CONCLUSION

These tribes do not believe that salmon and steelhead can be delisted, and even more importantly, do not believe that they can be returned to healthy harvestable levels that support a robust exercise of their treaty harvest rights with a focus on any single limiting or morality inducing sector encountered in their life-cycle. We, as a region of salmon managers, harvesters, river industries, and conservation organizations have worked together to make incredible improvements in all areas – hydro, harvest, hatchery use and habitat. We must continue this All-H approach. Unfortunately, we see that those challenging the 2014 BiOp find it useful to diminish the role and importance of a continued aggressive tributary habitat element, apparently

to train the Court's attention away from an All-H salmon plan. These tribes join in the effort to work collaboratively with the Action Agencies to continue to improve hydrosystem configuration and operations where our monitoring and evaluation efforts show we can secure additional significant benefits. At this time, we see the performance of those hydrosystem operations meeting the standards we agreed to as part of the 2008 "All-H" unified federal salmon plan.

Even with those targets being met, we and the Action Agencies committed to always be working in the hydro arena as partners as we implement the broad salmon plan. But we must part company with those that would seek to expand efforts in hydro improvements, or upset harvest management, or the science-based use of hatcheries to supplement depressed stocks by denigrating the value or necessity of the tributary habitat program. It took over 150 years to decimate the spawning and rearing streams with mining, timber harvests, livestock, land management, urbanization, irrigation withdrawal and other enterprises of commerce. It is this legacy of perturbation that we are working together as a region to remedy with the 2014 BiOp and Accords. That massive undertaking should be given more than 6 or 7 years of implementation before it is, in essence, called a waste of time and money. Suggestions that an aggressive tributary habitat restoration program is not a significant and credible element of the 2014 BiOp does not withstand a modicum of scrutiny in light of the consensus scientific opinion that just the opposite is true.

[signature page follows]

DATED this 6th day of March, 2014.

KARNOPP PETERSEN LLP

s/ John W. Ogan

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

s/ Brent H. Hall

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

s/ 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, on March 6, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in this matter who are registered with the court's CM/ECF filing system. The following will be served manually by U.S. Mail.

Franklin County Farm Bureau Federation
P.O. Box 311
Preston, Idaho 83263-0311

Pacific Northwest Generating Cooperative
711 NE Halsey
Portland, Oregon 97232-1268

Center for Tribal Water Advocacy
c/o Harold S. Shepherd
P.O. Box 331
Moab, Utah 84532

Confederated Tribes of the Siletz Indians
c/o Cathern Tufts
P.O. Box 549
Siletz, Oregon 97380

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

Thomas L. Sansonetti
U.S. Department of Justice
PO Box 663
Washington, DC 20044-0663

Walter H. Evans , III
Schwabe Williamson & Wyatt, PC
1211 SW Fifth Avenue, Ste. 1800
Portland, Oregon 97204

Grant County Farm Bureau Federation
c/o Jeff Thomas, President
P.O. Box 472
Kimberly, Oregon 97848-0472

DATED this 6th day of March, 2015.

KARNOPP PETERSEN LLP

s/ John W. Ogan

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*