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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

Plaintiffs,

v.

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

Defendants.

Case No.: 01-0640-RE (Lead Case)
CV 05-0023-RE
(Consolidated Cases)

**DEFENDANT-INTERVENORS
KOOTENAI TRIBE OF IDAHO AND
CONFEDERATED SALISH AND
KOOTENAI TRIBES' SUMMARY
JUDGMENT CROSS MOTION AND
MEMORANDUM IN SUPPORT**

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CROSS MOTION FOR SUMMARY JUDGMENT

Defendant-intervenors the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes (the KTOI and CSKT) hereby move the Court for summary judgment pursuant to the Court's Order dated December 4, 2014 (Doc. No. 1975) and Rule 56 of the Federal Rules of Civil Procedure. In support of this motion, the KTOI and CSKT rely upon the record herein, the authorities discussed below, and the filings of federal defendants and allied parties, all of which demonstrate that summary judgment should be granted in favor of federal defendants the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the U.S. Bureau of Reclamation.

SUPPORTING MEMORANDUM

I. INTRODUCTION AND BRIEF RELEVANT OVERVIEW OF THIS LITIGATION.

Ten years ago, after having found the need to remand the 2004 biological opinion (BiOp) for operations of the Federal Columbia River Power System (FCRPS), the Court started the parties down an unprecedented and historic collaborative path that continues to this day. 2005 Opinion and Order (Doc. No. 1087) at 4 (wisely concluding that "[c]ollaboration with the sovereign parties is necessary and must occur"). The Court ordered the National Marine Fisheries Service (an office of the National Oceanic and Atmospheric Administration, referred to herein as NMFS) and the action agencies to collaborate with the sovereign states and Tribes in developing the proposed action for FCRPS operations, refining policy issues and "reaching agreement or narrowing the areas of disagreement on scientific and technical information." *Id.* at 11-12. The Kootenai Tribe of Idaho (KTOI) and the Confederated Salish and Kootenai Tribes (CSKT), two upper Basin Tribes whose natural resource interests are affected by FCRPS

operations, welcomed the collaborative remand path and the new emphasis on the needs of species throughout the Columbia River Basin, not just downriver.

The result of the new collaborative paradigm was an extraordinary effort among the sovereigns to truly and transparently vet the complex and often contentious FCRPS operational issues while viewing the Basin as an integrated whole. NMFS and the action agencies sat at a common table with state and Tribal fish and wildlife managers to critically examine river operations and the effects of those operations on a host of biological, chemical and physical variables, including populations of Endangered Species Act (ESA)-listed fish throughout the Basin. Ultimately, NMFS in May 2008 issued the 2008 FCRPS BiOp.

Federal defendants did not stop there. In 2009, NMFS issued an FCRPS Adaptive Management Implementation Plan (AMIP) which was incorporated into the 2008 BiOp during a limited remand that produced a 2010 Supplemental BiOp. The limited remand provided an opportunity for additional scientific scrutiny of the 2008 BiOp and for improvements, by way of amendments, to the AMIP, including improvements offered by independent scientists who had been tasked with reviewing the 2008 BiOp as implemented through the AMIP. See generally 2011 Opinion and Order (Doc. No. 1855) at 8. The 2008 BiOp (as implemented through the amended AMIP) then came before the Court, which set the stage for the current proceedings.

On August 2, 2011, the Court found fault with the 2008 BiOp. But it is important to acknowledge the specific nature of the Court's concerns, namely the Court's conclusion that the 2008 BiOp relied on "unidentified habitat mitigation measures that are not reasonably certain to occur" in the latter half of the ten-year BiOp, i.e., the out years from 2013-18. 2011 Opinion and Order (Doc. No. 1855) at 10. The Court pointed to the established principle that "[m]itigation

measures may be relied upon only where they involve 'specific and binding plans' and 'a clear,
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definite commitment of resources to implement those measures," *id.* at 11 (citation omitted), and it held that federal defendants had not satisfied that requirement for the 2013-18 time period.

In contrast, regarding the *effects* of mitigation measures, the Court acknowledged "the inherent uncertainty in making predictions about the effects of future actions." *Id.* at 20. Unlike the requirement that mitigation actions be reasonably certain to occur, the Court recognized that the accrued benefits from such mitigation actions need not be so stringently judged. *Id.* ("If NOAA Fisheries [NMFS] cannot rely on benefits from habitat improvement simply because they cannot conclusively quantify those benefits, they have no incentive to continue to fund these vital habitat improvements."). The Court then instructed NMFS to "produce 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. In addition, addressing an issue of utmost importance to the KTOI and CSKT, the Court rightly held that the flow augmentation requested by plaintiffs (to the detriment of upriver species) was not warranted and would not be ordered. *Id.* This issue is discussed further below in connection with the KTOI and CSKT's support for the FCRPS' so-called "Montana Operation," which is providing biological benefits to upper Basin species without impairing Columbia River salmonids downstream.

Federal defendants heeded the Court's admonitions and turned their attention to preparing a supplemental BiOp, i.e., the 2014 Supplemental BiOp now criticized by plaintiffs. Federal defendants specifically returned to the consultation drawing table with an eye towards identifying mitigation projects that were reasonably certain to occur during the latter half of the 2008 BiOp's duration. 2014 NMFS Administrative Record (2014 NMFS AR) at NMFS000033 ("[T]his Supplemental Opinion addresses the Court's concern for the certainty of habitat mitigation to be implemented in 2014 through 2018."). But much to the surprise of the KTOI

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and CSKT, NMFS on its own initiative raised the bar established by the Court. Not only did NMFS task itself with ensuring that the relied upon mitigation *actions* be reasonably certain to occur, but it also set its sights on determining that the projected *effects* of habitat mitigation projects for the 2014 through 2018 time period be reasonably likely to occur. See, e.g., 2014 NMFS AR at NMFS000033 (describing as a "principal question . . . [w]hether the effects of the habitat RPA actions, including those from the newly developed projects, are reasonably certain to occur").

To be sure, the Court in 2011 plainly and repeatedly directed NMFS to develop a more detailed implementation plan for habitat mitigation projects that were reasonably certain to occur during the latter years of the 2008 BiOp. The KTOI and CSKT join federal defendants and allied parties in asserting that the Court's direction has been fully satisfied by the 2014 Supplemental BiOp, which the action agencies have adopted and are implementing. See generally 2014 U.S. Army Corps of Engineers Administrative Record (2014 ACE AR) at ACE 00001-75 (2014 U.S. Army Corps of Engineers Supplemental Record of Consultation and Statement of Decision); 2014 Bureau of Reclamation Administrative Record (2014 BR AR) at BR00000001-80 (Bureau of Reclamation Pacific Northwest Region's 2014 Supplemental Decision Document). But neither the Court nor the ESA required NMFS to demonstrate that the effects of such mitigation projects are reasonably certain to occur, although that is certainly everyone's hope and expectation. Indeed, the Court in 2011 observed that "requiring certainty with respect to the effects of a mitigation plan would effectively prohibit NMFS from using any novel approach" to comply with the ESA, thereby having an undesirable chilling effect on agency efforts to conserve listed species. 2011 Opinion and Order (Doc. No. 1855) at 20. Plaintiffs, in contrast, demand certainty and criticize NMFS for allegedly falling short of that goal. See, e.g., Pls.'

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Summ. J. Mot. and Mem. (Doc. No. 1976) at 24 (stating pejoratively that "NOAA [NMFS] acknowledges that many of the hoped-for survival increases will not accrue for years or even decades").

Regardless, with issuance of the 2014 Supplemental BiOp, NMFS exceeded the requirements established by this Court and by the ESA. Yet plaintiffs want more. With their resumption of this FCRPS litigation, plaintiffs criticize not only the 2014 Supplemental BiOp and the agencies' identification and implementation of reasonably certain mitigation projects for the last few years of the 2008 BiOp's duration, but they also start afresh by renewing their challenge to NMFS' frameworks for determining jeopardy and adverse modification of critical habitat, and by asserting once again that the best available science has been ignored. Further, plaintiffs raise a new argument not asserted in their prior challenges to the 2008 BiOp (and hence likely waived) by criticizing the action agencies for allegedly violating the National Environmental Policy Act.

Admittedly, the FCRPS litigation has been a moving target over its lifetime. But now, as the 2008 BiOp nears the end of its duration and the federal defendants gear up for preparation of the next generation FCRPS BiOp, the KTOI and CSKT urge the Court to acknowledge the good work that has been and continues to be done for listed species throughout the Columbia River Basin. The Court should uphold the 2008 BiOp – as implemented through the amended AMIP and as supplemented by the 2014 Supplemental BiOp – along with the action agencies' implementation of same. And because of their role in this case as defendant-intervenor Tribes who reside in the upper Columbia River Basin, the KTOI and CSKT particularly urge the Court to recognize that the collaborative approach endorsed by the Court ten years ago has led to a better balanced and more transparent approach to FCRPS operations that recognizes the

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biological needs of upper Basin resident species, including those listed under the ESA. The KTOI and CSKT remain firm in their belief that the federal defendants' time and resources are best spent not on litigation efforts but rather on planning and implementing operations that benefit Columbia River Basin fish species and the Basin ecosystem as a whole. Summary judgment should be granted in favor of federal defendants and allied parties, including the KTOI and CSKT.

II. OVERVIEW OF THE KOOTENAI TRIBE OF IDAHO AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES, AND THEIR INTERESTS IN THIS CASE.¹

A. Kootenai Tribe of Idaho.

1. A brief history of the KTOI.²

The Kootenai Tribe of Idaho is a federally-recognized Tribe with headquarters near Bonners Ferry in northern Idaho's Kootenai River Valley. The Ktunaxa (Kootenai) Nation as a whole consists of seven modern communities, including two in the United States, represented by the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and five in British Columbia, Canada, most of whom are represented by the Ktunaxa Nation Council. The Ktunaxa Nation, divided into Lower and Upper Kootenai groups, has inhabited Ktunaxa Territory in what is now known as Idaho, Montana, Washington, British Columbia and Alberta since time immemorial. The KTOI belongs to the Lower Kootenai group and inhabited the area along the Kootenai River from above Kootenai Falls in present-day Montana downstream to Kootenay Lake in present-day British Columbia.

¹ Although much of this information has been set forth in prior filings by the KTOI and CSKT, it is included here for the Court's convenience and updated as appropriate.

² See generally <http://kootenai.org/history.html> (last visited March 4, 2015).

In 1855, the Kootenai, Salish and Flathead were called to a treaty session at Hellgate, Montana for the purpose of ceding territory to the U.S. government. The Salish and Upper Kootenai tribes entered into the Hellgate Treaty with the United States, thereby ceding the majority of Ktunaxa Territory in the United States and creating a reservation near Flathead Lake for the newly created Confederated Salish and Kootenai Tribes. Although the Kootenai Tribe of Idaho did not participate in the negotiations or sign the Treaty, the treaty-ceded territory included the KTOI's aboriginal lands. Kootenai Tribe or Band of Indians of the State of Idaho v. United States, Indian Claims Commission Docket 154. Years later, upon recognizing that the KTOI was separate and distinct from the Kootenai of the Flathead, U.S. government representatives traveled to the Bonners Ferry area to discuss the impact of the Treaty with Tribal members. With limited success, the government's Indian agents tried to persuade the Kootenai living in and around Bonners Ferry to leave their aboriginal homeland and take allotments on the Flathead Reservation. The U.S. government eventually gave up, and the remaining members of the KTOI stayed in the Bonners Ferry area. These members later received land allotments under Section 4 of the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq.

Although Tribal members continued to hunt, fish and gather throughout their aboriginal territory, this became increasingly more difficult over the years. Through numerous fraudulent actions and surveying errors, many of the Tribal allotments were lost to non-Indians, an outcome unfortunately not unique to the KTOI. Private ownership of property throughout the valley and dwindling harvest opportunities led to decreased hunting and fishing in the area. By 1974, the Tribe had dwindled to a mere 67 members. In order to demand the United States fulfill its obligations to the Tribe, on September 20, 1974 the KTOI declared war on the United States – a peaceful war, that is. Having finally gotten the U.S. government's attention, the KTOI was

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deeded 12.5 acres of land and began the work of rebuilding itself. By 1986, the KTOI was the owner of the Kootenai River Inn, a business venture that put the Tribe on the road to economic independence and allowed the Tribe to focus its formidable energies and determination on guarding and safekeeping the land in accordance with the Tribe's creation story.

2. The KTOI's interest in this case.

Tribal identity for the KTOI depends in large part on caring for the many native fish and wildlife species in Ktunaxa Territory, whether for cultural, subsistence or ceremonial purposes. KTOI Tribal elders continue to pass down the history of the beginning of time, which tells that the Kootenai people were created and placed on earth by Quilxka Nupika, the Supreme Being, to keep the Creator-Spirit's Covenant, i.e., to guard and keep the land forever. The KTOI has never lost sight of its original purpose as guardian of the land, which is the foundation upon which all Tribal activities are based. FCRPS operations affect this Tribal foundation, because the Kootenai River system includes Libby Dam, which is operated by the Corps as part of the FCRPS. 2014 ACE AR at ACE 0000015. As with FCRPS operations on the mainstem of the Columbia River, FCRPS operations involving water storage and releases at Libby Dam affect downstream Kootenai River conditions. See, e.g., 2014 ACE AR at ACE 0000020 (acknowledging that the "Corps has also engaged in ESA consultation . . . on the effects of the FCRPS projects on listed bull trout and Kootenai River white sturgeon and will continue to implement actions in the . . . USFWS 2006 Libby Dam Biological Opinion").

The KTOI has been playing an active role in protecting and recovering Ktunaxa species for many years, although fish declines have forced the Tribe to make hard choices regarding its use of natural resources. This is true for a number of species, but it is particularly true with regards to the Kootenai River white sturgeon, Acipenser transmontanus. During the early 1990s,

prior to the Kootenai River white sturgeon's listing under the ESA, the KTOI voluntarily agreed to forego harvest of sturgeon for any purpose and initiated an innovative and collaborative conservation aquaculture program to preserve genetic variability and prevent the species' extinction. See, e.g., 2008 ACE AR 001729-40 (American Fisheries Society Symposium publication describing the conservation aquaculture program). The Tribe forged partnerships with many similar-minded entities, including the Idaho Department of Fish and Game, the Montana Department of Fish, Wildlife and Parks, the British Columbia Ministry of Environment (now known as Forests, Lands and Natural Resource Operations), the U.S. Fish and Wildlife Service (FWS), the Corps, BPA and B.C. Hydro, and with fisheries scientists throughout the Northwest, all in a concerted effort to improve the Kootenai River white sturgeon's future.

The conservation program unfortunately did not prevent the sturgeon's listing under the ESA, see 59 Fed. Reg. 45,989-46,002 (Sept. 6, 1994), but that did not cause the KTOI to abandon its cooperative efforts on the sturgeon's behalf. See, e.g., 2014 ACE AR at ACE 0050682-84 (describing the "ongoing BPA-funded research, monitoring, and evaluation activities led by the Kootenai Tribe of Idaho" in the FWS Libby Dam Biological Opinion for the Kootenai River white sturgeon and its critical habitat). More recently, the KTOI's strong leadership on behalf of natural resources in the upper Basin has resulted in the Tribe's ambitious implementation of a long-term, ecosystem-based river restoration project called the Kootenai River Habitat Restoration Program, which seeks a more holistic approach to restoring healthy river functions for the benefit of all concerned. The interested reader can learn more about the Tribe's innovative Kootenai River Habitat Restoration Program by visiting <http://restoringthekootenai.org/> (last visited March 4, 2015).

The KTOI is an ongoing participant in the collaborative FCRPS process initiated by this Court to be a voice for upriver species like the Kootenai River white sturgeon, and more generally to remind fish and wildlife managers to consider the needs of the Basin as a whole. The Tribe supports the 2008 BiOp as implemented through the amended AMIP and as supplemented by the 2014 Supplemental BiOp, along with the action agencies' corresponding implementation activities, all of which comply fully with applicable laws and which are supported by their voluminous underlying records. The KTOI particularly supports the agencies' adoption of hydropower operations that more closely approximate the natural hydrograph below Libby Dam. See, e.g., 2008 NMFS AR Doc. B0089 at B.2.1-3 to B.2.1-4 (describing operations for FCRPS storage projects, which includes Libby Dam). The Tribe's support for the Montana Operation, which also is supported by the CSKT, is discussed more fully below in part II.C.

B. Confederated Salish and Kootenai Tribes.

1. A brief history of the CSKT.

Until 1871, the United States conducted its official relations with the sovereign tribal nations comprising the "domestic dependent nations" within its territories by treaty negotiated by the executive branch and ratified by Congress. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). CSKT Tribal chiefs signed the Hellgate Treaty on July 16, 1855. 12 Stat. 975, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859. The Hellgate Treaty establishes the scope of CSKT rights in this case. Under the Treaty, the Tribes retained certain rights on ceded aboriginal territory, including, inter alia, the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory. This includes the fishery and all natural resources in and appurtenant to significant reaches of the Upper Columbia watershed, including the reservoirs operated as part of the FCRPS.

By the terms of the Hellgate Treaty, the CSKT agreed to cede vast areas of their aboriginal territory to the United States, including certain waters that are included in this litigation. Confederated Salish and Kootenai Tribes v. United States, 16 Ind. Cl. Com.1 (Sept. 29, 1965). In return, the United States promised to provide specified goods and services and guaranteed that the CSKT could continue their traditional way of life. See Treaty of Hellgate, Arts. IV and V, 12 Stat. 975; see also United States v. Washington ("Appeal of Phase II"), 759 F.2d 1353, 1366, n. 2 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985). To effectuate this guarantee, the CSKT retained exclusive possession of a delineated homeland (i.e., the Flathead Indian Reservation) and expressly reserved in perpetuity hunting, fishing, gathering and grazing rights in the ceded lands. See Treaty of Hellgate, Arts. II and III. The fishing rights were reserved by Article III language that provides in relevant part:

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty of Hellgate, 12 Stat. 975, 976.

Thus, for most or all Columbia River tributary streams located in the State of Montana, the CSKT retain either an exclusive or shared right to manage and utilize the fishery. Id. The CSKT have effectuated this right directly by Tribal members individually and continuously performing their traditional fishing activities since time immemorial throughout the CSKT aboriginal territory, and by having developed significant CSKT governmental natural resource programs to manage and protect the sensitive fish species within the Flathead Reservation. The CSKT have effectuated this right indirectly by consulting and coordinating with state and federal

fish management agencies about fish management and protection issues throughout the CSKT aboriginal territory.

2. The CSKT's interest in this case.

The CSKT have recognized Treaty rights and interests within and to waters and lands that coincide with hydropower facilities and reservoirs of the FCRPS. Specifically, the Kootenai River and the Flathead River systems include Libby Dam and Hungry Horse Dam,³ respectively, and their associated reservoirs – Lake Koocanusa and Hungry Horse Reservoir – all or most of which are part of the CSKT's aboriginal lands and waters and are subject to Treaty protections. Thus if plaintiffs were to seek changes or mandates in hydropower operations in this litigation, such as flow augmentation which they have sought in the past, plaintiffs would be calling for water that is stored behind, and that will flow through or over, Libby Dam or Hungry Horse Dam. See, e.g., 2008 NMFS AR Doc. A0001, Appendix Table (Reasonable and Prudent Alternative Table) at 5, 6-7 (describing operations for Libby Dam and Hungry Horse Dam).

Both the Kootenai River and the Flathead River systems, and their associated reservoirs, are home to sensitive fish and listed species including the Kootenai River white sturgeon (Acipenser transmontanus), bull trout (Salvelinus confluentus), burbot (Lota lota) and resident populations of the native westslope cutthroat trout. Whereas plaintiffs in this case focus on salmon populations, the needs of salmon are not the same as the needs of resident fish in CSKT aboriginal territory. Although the life cycles and biological demands asserted for downriver salmon populations are not necessarily consistent with the life cycles and biological demands of

³ In contrast with Libby Dam, which is operated by the Corps, the Hungry Horse Project is operated by the Bureau of Reclamation. 2014 ACE AR at ACE 0000004.

the CSKT's resident fish, the BiOp at issue in this case appropriately balances the needs of all listed fish species, contrary to what some would have this Court believe.

The CSKT have developed federally-approved water quality standards for the Flathead Indian Reservation. Montana v. EPA and Confederated Salish and Kootenai Tribes, 137 F.3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998). The CSKT are continuously working to protect and improve the water quality in Reservation waters, including Flathead Lake, by various means, including: membership in the Flathead Basin Commission; negotiating with trans-boundary interests regarding coal development in the North Fork Flathead River; participating in FERC-relicensing workgroups; implementing Kerr Project environmental mitigation requirements; and operating a certified Tribal water quality laboratory.

Libby Dam, Hungry Horse Dam, and their associated reservoirs inflicted serious impacts on the culture, resources and economy of the CSKT. For example, they caused the inundation of traditional use sites, cultural sites, and archaeological sites. Bank erosion continues to threaten and destroy these sites. The inundation also eliminated riparian ecosystems that produced traditional plant foods and medicines for CSKT tribal people. The Corps and Bureau of Reclamation are aware of these impacts and have made progress in mitigating them, but there is much left to do, and reservoir drawdowns (including those that would be associated with flow augmentation) impede the agencies' ability to protect and preserve these resources.

The CSKT also have significant interests in energy resources impacted by hydropower generation. First, the CSKT are a co-licensee for the Kerr Project, a 180 megawatt hydroelectric facility located on the Flathead River that is operated pursuant to a license issued by the Federal Energy Regulatory Commission. See Montana Power Company, 32 FERC ¶ 161,070 (July 17, 1985). The CSKT have the unilateral right to take over the Kerr Project as exclusive

owner/operator in the near future and intend to do so, particularly now that a 2014 arbitration decision established the Project's conveyance price. See

generally <http://energykeepersinc.com/resources/arbitration/> (last visited March 4, 2015).

Second, the CSKT operate Mission Valley Power (MVP), a federal electrical distribution utility, pursuant to a contract with the United States. The utility acquires the majority of its power from BPA. As a result, the CSKT and its members have an economic stake in hydropower decisions that may precipitate major rate increases for MVP's share of BPA power.

The CSKT have affirmative interests in both water quality and water quantity within the borders of the Flathead Reservation and external to the Reservation in their aboriginal territory. Relevant waters of the FCRPS are unitary resources. Thus, there is a direct relationship between the right to take fish, protected to the Tribes by Treaty, and the right to sufficient water to provide sufficient habitat necessary for the fishery to exist. The Ninth Circuit recognized that the Tribes have reserved the quantity of water needed to support their exclusive use of the Flathead Reservation fishery. Joint Board of Control v. United States, 832 F.2d 1127 (9th Cir. 1987) (irrigation project must release sufficient water to support Hellgate Treaty fishery before equitably allocating remainder to qualified irrigators), cert. denied, 486 U.S. 1007 (1988). The Ninth Circuit also has recognized that the Steven's treaty language guaranteed fishery waters in streams outside of a reservation sufficient to provide necessary spawning habitat. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985). And the Ninth Circuit has recognized that tribal aboriginal fishing rights generally include a right to sufficient flows of water in streams bordering and outside of reservations to support the fishery. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (Tribe's reserved fishing right required sufficient instream flow in stream bordering

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reservation to ensure appropriate water temperatures to guarantee survival of native fish); United States v. Adair, 478 F. Supp. 336 (D. Or. 1979), aff'd as modified, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984) (Tribe's reserved fishing right allowed it to prevent other appropriators from depleting off-reservation stream water level below quantity necessary for fish survival). By analogy, in this case, the CSKT have a Treaty reserved right to sufficient flow in the upper portions of the FCRPS that are within the Flathead Reservation and CSKT aboriginal territory in parts of western Montana. Again, the BiOp at issue in this case appropriately and carefully balances all of these competing needs.

C. Why the Tribes Support the 2008 BiOp's Montana Operation.

Under previous BiOps, Libby Dam and Hungry Horse Dam were drafted in July and August to meet downriver salmon flow objectives – giving little consideration to detrimental effects on upriver species – with the goal being a 20 foot draft by August 31. 2008 NMFS Supplemental AR Doc. S.77 (Issue Summaries) at 9. That 20 foot draft by August 31 unnaturally truncated an already short growing season in the upper Basin, causing unnecessary harm to species in the Tribes' aboriginal territories. Id. (explaining that river productivity is at its highest from July through September). In contrast, the 2008 BiOp finally adopted (on an ongoing experimental basis) longstanding scientific recommendations to extend the summer drawdown of Libby Dam and Hungry Horse Dam into September, thereby providing a more natural drawdown that extends the period of in-river biological productivity in the upper Basin. See, e.g., 2008 NMFS AR A0001, Appendix Table (Reasonable and Prudent Alternative Table) at 5 (Libby Dam); id. at 6-7 (Hungry Horse Dam).

Implementation of this more gradual drawdown had been sought for a number of years but was resisted by entities who sought to retain every drop of water flowing downstream,

regardless of whether that water was beneficial to lower Basin species and regardless too of whether upper Basin species were harmed as a result. As early as 2003, the Northwest Power and Conservation Council's Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program recommended implementation and evaluation of a more natural draft of 10 feet from full pool by the end of September in all but drought years. 2008 NMFS AR Doc. B0385 at 25-26. See also 2008 NMFS Supplemental AR Doc. S.77 (Issue Summaries) at 9-11 (discussing the development and unanimous recommendation of the Montana Operation for hydropower operations at Libby Dam and Hungry Horse Dam to better balance the biological needs of upper and lower Columbia River Basin listed fish).

Significantly, implementation of the Montana Operation for the biological benefit of upper Basin species does not translate into functionally significant changes for Columbia River salmon. 2008 NMFS AR Doc. B0207 at 13-14 (ISAB Findings from the 2004 Reservoir Operations/Flow Survival Symposium). In reality, the former 20 foot draft by the end of August not only harmed upriver ESA-listed resident fish, but it also did not "provide substantial benefits to Snake River fall Chinook," 2008 NMFS Supplemental AR Doc. S.77 (Issue Summaries) at 11, the only ESA-listed salmon species migrating in the river during the relevant time period. 2008 NMFS AR Doc. B0207 at 1.

Perhaps because of the lack of discernable effect on lower river listed fish species from the Montana Operation, coupled with the agencies' ongoing commitment to review the Montana Operation's effects for biological soundness, 2008 NMFS AR Doc. B0089 at B.2.1-7, the plaintiffs appear to have moved away from their unsupported calls for flow augmentation. Indeed, it would be troubling for anyone to continue to advocate for the hurtful 20 foot draft by

August 31 at Libby Dam and Hungry Horse Dam, which would truncate productivity in the

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upper Basin by literally leaving organisms high and dry. But see 2008 NMFS Supplemental AR Doc. S.77 (Issue Summaries) at 10 (reporting the State of Oregon's historical emphasis on "the importance of meeting summer flow objectives at McNary over any other operation for listed resident fish," even though "the benefits of flows to survival may not be practically measurable"). Even if one were to advocate such a position, a "water for the sake of water" argument untethered to the biological status of any particular fish species would be untenable. It also would stand in sharp contrast to the federal agencies' careful approach to assessing the biological needs of fish populations and putting those needs at the foundation of the 2008 BiOp, which the KTOI and the CSKT support and urge the Court to uphold.

III. NMFS' JEOPARDY STANDARD MORE THAN SATISFIES THE REQUIREMENTS OF THE ESA.

As in prior briefs, the KTOI and CSKT join in the argument of federal defendants and allied parties and write separately to address only certain issues, as set forth above and as discussed below. Unlike in prior briefs, the KTOI and CSKT will not revisit the deferential Administrative Procedure Act (APA) standard of review that governs the claims in this case. The Court is well-versed in the APA standard of review and has assured the parties that it is "cognizant of the limited use for which [the proffered extra-record] declarations are permissible" 2015 Opinion and Order (Doc. No. 1955) at 6. Instead, the KTOI and CSKT will focus on NMFS' jeopardy standard, which more than satisfies the requirements of the ESA.

The KTOI and the CSKT join with federal defendants and allied parties in recognizing that federal defendants' use of the "trending toward recovery" approach to assessing jeopardy meets and even exceeds what is required under the ESA. At the risk of repetition, the crucial distinctions between the ESA obligations to consult (ESA section 7(a)(2)), to conserve (ESA

section 7(a)(1)) and to recover (ESA section 4(f)) warrant a short discussion. See 16 U.S.C. §§ 1536(a)(2), 1536(a)(1), and 1533(f), respectively. This is because understanding the interplay between the statutory sections helps define the contours of the jeopardy determination, which plaintiffs impermissibly seek to reshape according to their own preferred method.

Section 7(a)(2) of the ESA requires the action agencies, in consultation with NFMS, to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *Id.* § 1536(a)(2). This is the ESA obligation on which the Court's jeopardy review must focus, and it requires the Court to determine whether the challenged actions "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species" 50 C.F.R. § 402.02 (defining the phrase "[j]eopardize the continued existence of"). See also 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (stating in 1986 promulgation of final rule that the jeopardy standard is the "ultimate barrier past which Federal actions may not proceed").

In contrast, ESA section 7(a)(1) obligates federal agencies to "carry[] out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). This is a separate ESA obligation that applies at the level of "agency programs, not individual agency actions." Protect Our Water v. Flowers, 377 F. Supp. 2d 844, 870 (E.D. Cal. 2004). Further, agencies are entitled to deference regarding the manner in which they fulfill their section 7(a)(1) obligations. Defenders of Wildlife v. U.S. Dep't of the Interior, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005). Although plaintiff-intervenor the State of Oregon (Oregon) gave lip service to a section 7(a)(1) claim in its complaint, Doc. No. 1973 at 41-42, Oregon waived any such claim by failing to address it in Oregon's opening summary judgment brief. See generally Doc. No.

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1985. See also Graves v. Arpaio, 623 F.3d 1043, 1048 (9th Cir. 2010) ("[A]rguments [not raised in an opening summary judgment brief but] raised for the first time in a reply brief are waived.").

But a more nuanced undercurrent in the opening summary judgment briefing implies that ESA section 7(a)(1) bleeds over into section 7(a)(2) such that a no jeopardy determination requires more than a finding that agency action is not expected to appreciably reduce a listed species' survival and recovery. See, e.g., Pls.' Summ. J. Mot. and Mem. (Doc. No. 1976) at 6-7 (asserting that a lawful jeopardy analysis must include "consideration of what would constitute a species that is recovered [plus] some consideration of when the species is expected to achieve this recovered state [plus] articulation of a level of risk to achieving recovery that would be 'appreciable'"). Nothing in the ESA or its implementing regulations requires such a methodology, and the Court should decline plaintiffs' invitation to impose such specific requirements of its own accord. Lands Council v. McNair, 537 F.3d 981, 991 (9th Cir. 2008) (en banc) (describing as a "key error" a court's creation and imposition of "a requirement not found in any relevant statute or regulation"), overruled on other grounds by Winter v. NRDC, 555 U.S. 7 (2008). See also 51 Fed. Reg. 19,926, 19,934 (June 3, 1986) (rejecting the argument that agency action should halt if it "failed to conserve listed species, a result clearly not intended by Congress. Congress intended that actions that do not violate section 7(a)(2) . . . be allowed to proceed"); Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv., 616 F.3d 983, 989 (9th Cir. 2010) (holding, in the context of a critical habitat designation, that "there is no reason why FWS cannot determine what elements are necessary for conservation without determining exactly when conservation will be complete"), cert. denied, 131 S. Ct. 1475 (2011).

Also in contrast with section 7(a)(2), ESA section 4(f) describes a wholly separate recovery plan process whereby a consulting agency like NMFS is required to "develop and implement" recovery plans for "the conservation and survival" of ESA-listed species. 16 U.S.C. § 1533(f). The requirements for a recovery plan, which sound strikingly similar to the above-quoted language describing plaintiffs' proposal for a jeopardy analysis, are:

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f)(1)(B). As with section 7(a)(1), the statutory requirements of ESA section 4(f) should not be imported into a section 7(a)(2) analysis, no matter how fervently plaintiffs seek to blur the line between a jeopardy analysis and recovery planning.

Despite plaintiffs' bluster, NMFS' jeopardy standard meets or exceeds the ESA requirement that FCRPS operations not appreciably reduce the survival and recovery of listed species. For purposes of this case, the meaning of the statutory term "jeopardize" and its implementing regulatory phrase "appreciably reduce . . . survival and recovery" is perhaps best informed by the Ninth Circuit's decision affirming invalidation of the 2004 FCRPS BiOp, National Wildlife Fed'n v. NMFS, 524 F.3d 917 (9th Cir. 2008) (NWF). In NWE, the Ninth Circuit instructed that the term "jeopardize" can only be satisfied if agency action causes some decline in a listed species' "pre-action condition." Id. at 930. The court explained that:

To "jeopardize" – the action ESA prohibits – means to "expose to loss or injury" or to "imperil." Either of these implies causation, and thus some new risk of harm. Likewise, the suffix "-ize" in "jeopardize" indicates some active change of

status: an agency may not "cause [a species] to be or to become" in a state of jeopardy or "subject [a species] to" jeopardy.

Id. (alterations in original). See also Oceana, Inc. v. Pritzker, ___ F. Supp. 3d ___, 2014 WL 7174875, at *11 (D.D.C. Dec. 17, 2014) ("The Ninth Circuit [in NWF] was explaining that the word 'jeopardize' indicates an element of causation . . ."). Because the conduct prohibited by the ESA is that which "causes some new jeopardy," the Ninth Circuit in NWF concluded that agency action does not run afoul of the law if it removes a species from jeopardy, lessens the degree of jeopardy experienced by a species, or does not "deepen" the jeopardy of an already-imperiled species by causing it new and additional harm. NWF, 524 F.3d at 930.

NMFS' approach in this case fully conforms to the Ninth Circuit's teaching. Plaintiffs would have the Court believe otherwise, but there simply is no merit to the assertion that the agency ignored the recovery prong of the jeopardy standard by including a "trending toward recovery" approach in its analytical method for ensuring avoidance of jeopardy. The KTOI and CSKT, which again are upper Basin Tribes, will leave it to others with more concrete interests in the salmon and steelhead species discussed in the 2008 BiOp, including federal defendants and allied parties, to get down in the weeds of the highly-complex analytical methodology employed by agency scientists tasked with evaluating the past, present and future status and trends of the fish species at issue. See generally 2008 NMFS AR Doc. A0001 at 8-3 to 8.14-23 (detailed discussion on a species by species basis).

However, given the above discussion of the statutory distinctions between ESA section 7(a)(2) and sections 7(a)(1) and 4(f), coupled with the Ninth Circuit's recognition that agency action can only jeopardize a species when it causes some new harm to the species' likelihood of survival and recovery, NWF, 524 F.3d at 930 (agency action can only "jeopardize" a species'

existence if it causes some decline in a listed species' "pre-action condition"), the Tribes assert that NMFS at least met and likely exceeded its ESA obligations by employing a "trending toward recovery" approach in its analytical framework. 2008 NMFS AR Doc. A0001 at 7-7 (ESA analysis focused on ensuring that fish species are on a trend toward recovery, meaning "moving toward recovery even though full recovery of the species may not be achievable during the [limited] period" of this BiOp). The ESA certainly requires no more, and likely requires less. See Oceana, supra, 2014 WL 7174875, at *11 (rejecting the argument, which was not at issue in NWF, that the ESA unambiguously "equate[s] 'jeopardize the continued existence' with any degree of reduction in the likelihood of a species' survival and recovery"). See also Northwest Env'tl. Defense Ctr. v. U.S. Army Corps of Eng'rs, 2013 WL 1294647, at *22 (D. Or. March 27, 2013) (challenged salmon BiOp for an in-stream gravel mining operation fully addressed the recovery prong of the jeopardy standard "[b]y identifying river conditions and habitat features necessary for population recovery, analyzing the impact of the [project] on those conditions, and determining that improved habitat conditions under the [project] would facilitate population growth," even though the action would cause a "slight delay" in recovery).

On a final note, a recurrent theme in plaintiffs' brief is the misguided assertion that the 2008 BiOp "impermissibly shifts the burden of risk to the species from the action." Pls.' Summ. J. Mot. and Mem. (Doc. No. 1976) at 17. See, e.g., id. at 18, 19, 23 (just a few more examples of this theme). In Oceana, the plaintiff similarly argued without success that NMFS was shifting the burden of risk to the species, and away from the action, in its effort to convince the reviewing court that NMFS had erred by "consider[ing] the extent of any such deterioration [in a species' pre-action condition caused by the challenged agency action] in" making a jeopardy

determination. Oceana, supra, 2014 WL 7174875, at *11. The court was not persuaded by the

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rhetoric. Instead, it noted that "just because Oceana's approach may be more protective than the agency's does not mean that NMFS' interpretation of 50 C.F.R. § 402.02" is wrong. Id. Rather, "NMFS, as an expert agency charged with administering the ESA, may reasonably conclude that a given agency action, although likely to reduce the likelihood of a species' survival and recovery to some degree, would not be likely to jeopardize the continued existence of the species." Id. The plaintiffs in this case likewise are touting their preferred approach as more protective of salmon species. But the question in this case is not whose approach is more protective. Rather, the question is whether federal defendants' carefully balanced approach, which exhaustively considered the needs of the Basin as a whole, satisfies the requirements of the ESA. The answer to that question is yes, particularly given the reasonable degree of discretion NMFS enjoys "to make this determination on the basis of its own expertise." Id.

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IV. CONCLUSION.

For the reasons set forth above, and based on the record herein and the arguments set forth by federal defendants and allied parties, the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes urge the Court to uphold the 2008 FCRPS BiOp, as implemented through the amended AMIP and as supplemented by the 2014 Supplemental BiOp, and to conclude that the conduct of the action agencies in conformance with that BiOp fully satisfies all legal requirements. The parties should focus their energies on implementing this BiOp during the final years of its ten-year term, which concludes at the end of 2018, and on reinitiating consultation in the relatively near future. The Court should grant summary judgment in favor of federal defendants and allied parties, including the KTOI and the CSKT, and bring this matter to an end.

DATED this 6th day of March, 2015.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c) and Fed.R.Civ.P. 5(d), I certify that on March 6, 2015, I caused the foregoing to 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:

Dr. Howard F. Horton, Ph.D.
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Dated this 6th day of March, 2015.

/s/ Julie A. Weis

Julie A. Weis