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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et*
al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE,

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

REPLY OF AMICI WARM SPRINGS
AND UMATILLA TRIBES AND
YAKAMA NATION TO PLAINTIFFS'
RESPONSES TO CROSS MOTIONS FOR
SUMMARY JUDGMENT

<i>et al.,</i>
Defendants,
and
NORTHWEST RIVERPARTNERS, <i>et al.,</i>
Intervenor-Defendants.

I. INTRODUCTION

As these tribes noted in earlier briefing, the manner in which the challenges to the FCRPS BiOp are resolved bears directly on the success of a *comprehensive* federal salmon restoration plan, of which the BiOp is one piece. With the reply briefs filed by Plaintiffs and associated parties, we again note that “the onslaught of the maneuverings and minutia of ‘lawyer’s arguments’ in this litigation” amount to a grand attempt to obscure the realities of Columbia Basin salmon restoration. We maintain our focus on what is best for the salmon and the most practical use of available tools for salmon restoration. This focus includes specific habitat projects that target those features of tributary habitat that truly need treatment and cause actual improvement in the habitat functionality, mitigating or eliminating the negative conditions that limit productivity of listed species.

II. ARGUMENT

At this point in the proceedings, certain parties are chasing their tails in filing voluminous briefs with the Court. Not much new is being said. Rather than burden the Court with another cascade of words, we merely highlight the following points from our previous briefs that the Plaintiffs have not materially addressed.

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

One hundred fifty years of non-Indian commercialization, degradation, and exploitation of the Columbia River and its tributaries preceded the Endangered Species Act (ESA) listing of salmon and steelhead stocks in the Columbia River. The *actions* offered in the FCRPS BiOp/RPA, coupled with federal commitments in the Columbia Basin Fish Accords, the *United States v. Oregon* Management Agreement, and in the Pacific Salmon Treaty collectively represent a beneficial 10-year step in responding to this 150-year legacy. This broad, unified federal Columbia River salmon plan reflects an unprecedented level of agreement among salmon managers in the Basin. It responds over its duration to the need for multiple efforts for Columbia River salmon restoration by providing real, practical, science-based *actions*. These actions began in 2008 and continue to this day. The results of the RPA, taken together with the other actions, will not be ready for a full review until 2018.

The replies of Plaintiffs and aligned parties do not acknowledge that if one key piece of the ten-year salmon plan is crippled, there will be a piece-by-piece upset to the balance the carefully coordinated plan represents, built on a decade of challenging collaborative effort. By design, and buttressed by adaptive management concepts built into the component part of the regional plan, sovereigns and fisheries managers will within a few years comprehensively evaluate the larger unified plan. This comprehensive evaluation provides a sound basis for then crafting a successor comprehensive approach that meets both ESA and Treaty rights obligations of the federal agencies.

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

The Plaintiffs' reply belittles both the science and effectiveness of the tributary habitat restoration being conducted by the tribes. This Court has recognized that, with respect to predicting specific future biological responses to habitat projects, as with all predictions, uncertainty goes with the territory. *National Wildlife Federation v. National Marine Fisheries Service*, 839 F.Supp.2d 1117, 1130 (D.Or. 2011). But there is no scientific dispute regarding the vital importance of habitat to salmon life histories. Habitat restoration is a fundamental component of egg-to-smolt productivity and species recovery. 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. Decl. Robert Rose (ECF Doc.1536) at ¶ 26.

The amicus tribes have described the scientific basis for habitat project selection and rational inference of survival benefit Joint Brief of Amicus Tribes (JBAT) (ECF Doc. 2007) at 8-10; Extra-Record Rose Declaration (ECF Doc. 2008) at ¶ 33. The habitat program is based on the on-the-ground knowledge and experience of the tributary reaches in which the projects are being installed and monitored. The technical experts involved in the habitat program were fully aware of the uncertainties inherent in calculating a numerical survival benefit from habitat projects. JBAT at 10.¹

¹ The conclusions of these scientists may be presumed to be more credible than NWF's speculations about the "best available science" necessary for a credible discussion of time travel. See NWF Reply on MSJ at 15.

Additionally, there is no uncertainty with respect to future habitat action implementation. The habitat program that was built into the 2008 and then the 2014 BiOps, and the Fish Accords habitat additions, rather than being merely “reasonably likely to occur,” *are in fact being implemented*, and the amicus tribes are actively participating in the implementation process. On the ground professional biologists for the tribes are not only verifying that the tributary work that is the backbone of the habitat “H” of the comprehensive BiOp is being put “on the ground”, but that the benefits anticipated continue to be reasonable projections. (Extra-Record Rose Dec.¶¶ 26-39).

C. Other management tools, such as kelt reconditioning and avian predation management rationally deliver survival benefits.

Plaintiffs continue to direct unwarranted criticism at the use of management tools, such as bird predation controls and kelt reconditioning, arguing that they do not yield benefits with mathematical precision and certainty. As a qualitative matter, given the increases in predation on juvenile salmonids from Caspian terns and double-crested cormorants, successful efforts to reduce predation rationally relate to projected increases in juvenile salmon abundance. JBAT at 16-17. Similarly, every steelhead kelt has the potential to be a valuable contributor to ESA-listed steelhead populations, based on the ongoing research Id. at 14. These management tools are appropriate means for providing survival benefits to listed species and should not be dismissed as ineffectual for purposes of avoiding jeopardy.

III. CONCLUSION

These tribes do not believe the efficacy of salmon and steelhead conservation depends on committing the region’s energies to any single limiting or mortality inducing sector in the salmon

life-cycle. We, as a region, must continue the All-H approach. This approach includes implementation of an aggressive tributary habitat element consistent with the RPA and the Accords. It is the 150-year legacy of perturbation that we are working together as a region to remedy with these BiOps, Agreements and Accords. Those efforts, including the aggressive tributary habitat restoration program should be continued and evaluated as planned.

DATED this 6th day of May, 2015.

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