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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION,
et al.,

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

Plaintiffs,

v.

REPLY BRIEF OF *AMICUS CURIAE*
CONFEDERATED TRIBES OF THE
COLVILLE RESERVATION

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

Defendants.

REPLY BRIEF OF *AMICUS CURIAE* CONFEDERATED
TRIBES OF THE COLVILLE RESERVATION

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INTRODUCTION

A decade ago this Court remanded the 2004 BiOp and directed the action agencies and NOAA to work with the region to develop a comprehensive approach to protecting and restoring listed salmon and steelhead in the Columbia basin. Almost to the day seven years ago, the 2008 BiOp was completed, along with historic agreements known as the Fish Accords which committed nearly a billion dollars toward improvements in salmonid habitat, hatchery management, and other actions to be implemented by the action agencies' partners throughout the region. Tangible improvements and benefits for fish have followed and will continue through 2018 and beyond.

The 2014 supplement to that BiOp is now ready for its day in court. While the plaintiffs attempt to paint a false picture of the action agencies and NOAA as incompetent caretakers of imperiled salmon and steelhead, they ignore too much good work, disregard a substantial portion of the Columbia basin, and rest their arguments almost exclusively on micro-scale analyses that are inconsistent with the appropriate standard of review under the Administrative Procedure Act (APA). The action agencies are not the Three Stooges bungling the survival of an iconic resource which they must protect by law, and NOAA is not a modern-day version of the Keystone Cops. Instead, these agencies and their tribal, state and other partners throughout the Columbia basin are working diligently, in good faith, and in accordance with the mandates of the Endangered Species Act to ensure that our future includes a robust and enduring presence of these remarkable fish.

The BiOp may not answer every question posed or theory hypothesized in a manner that satisfies the plaintiffs, but it rationally evaluates and applies the best available – yet admittedly

imperfect – scientific information and provides a reasoned explanation for its no jeopardy and no adverse modification conclusions. Accordingly, the Court should uphold the BiOp and allow the agencies and their partners to continue implementing the collaborative effort begun at the Court’s direction in 2005 to protect and restore the salmon and steelhead of the Columbia basin.

ARGUMENT

I. The Appropriate Degree of Deference in the Court’s Review of the 2014 FCRPS Biological Opinion.

NOAA’s preparation of the 2008 BiOp and the 2010 and 2014 supplements required it to identify, generate and evaluate an immense body of information regarding the status of 13 species of listed salmonids and a wide range of federal, state, tribal and private actions having direct and indirect effects on these fish over an expansive area from the Columbia River estuary to inland tributaries hundreds of miles from the ocean. The agency compiled information from hundreds if not thousands of scientists studying every aspect of these iconic creatures and their habitat – past, present and future – much of which was coordinated and funded by the three action agencies for the specific purpose of informing the analysis in the BiOp. NOAA and the action agencies then took the available scientific information and with the use of computer models developed reasoned predictions about the effects of FCRPS operations on listed salmonids, the comprehensive suite of reasonable and prudent alternatives (RPAs), and myriad other actions throughout one of the largest river basins on the continent. The enormity of this task is reflected in the sheer volume of the 2008, 2010, and 2014 BiOps and their associated administrative records. While the size alone of these documents is notable, what counts for purposes of this Court’s review is the thoroughness of NOAA’s (and the action agencies’)

analysis and the explanations provided for the BiOp's central conclusion that the proposed action is not likely to jeopardize the continued existence of 13 ESA-listed species of salmon and steelhead or destroy or adversely modify their designated critical habitat.

The information on which NOAA based its "no jeopardy" and "no adverse modification" opinions reflects what was reasonably available to the agency. Despite decades of research on Columbia basin salmonids, some of the desired information was simply not available and perhaps not even knowable given the complexities of fisheries science and management. On this imperfect foundation, the agency rendered judgments on the likely effects of the proposed FCRPS operations, leading to predictions that inherently contain some degree of uncertainty. However, under the APA review principles applicable in this case, perfection is not the standard. It is well established that the Court's review of the BiOp is limited; thus, the Court may not pass judgment on the correctness of the agency's scientific conclusions but instead must evaluate whether NOAA considered the relevant factors, conducted a thorough analysis and provided a reasoned explanation for its conclusions. The Court, in reviewing the BiOp, must consider that the ESA requires NOAA to apply the best available science, not perfect science (and in doing so the agency has substantial discretion to rely on the opinion of its experts), that leeway is afforded to an expert agency's scientific predictions about future effects and outcomes for fish, that it is the agency's prerogative to select among possible RPAs, that NOAA has discretion to interpret the available science and choose from competing scientific analyses in rendering its opinion, and that agencies have discretion to make an informed choice of methodology. In sum, as the Ninth Circuit recently underscored, substantial deference must permeate this Court's review of the information, conclusions and analysis in the BiOp. *See San Luis & Delta-Mendota Water*

Authority v. Jewell, 747 F.3d 581, 602, 610 (9th Cir. 2014) (determination of “best available science” is a matter of the agency’s special expertise; occasional imperfections to not violate this standard absent superior data; declining to insist on perfection where data not readily available; “best available science” standard is not a question of possibility but rather availability; deference at its greatest when agency choosing between scientific models); *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 995, 1002 (9th Cir. 2014) (agency not required to make decisions on data that does not exist; judgment regarding what constitutes best available science deserves deference; agency flexibility to choose among appropriate RPAs as long as decision is supported by the record); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (agency reliance on the “reasonable opinions of its own qualified experts”); *Lands Council v. McNair*, 537 F.3d 981, 993, 997-98 (9th Cir. 2008) (en banc) (deference required where agency decision involves a high level of expertise; deference to agency’s informed selection of scientific methodology); *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) (predictive judgments such as assessing a species’ likelihood of extinction are entitled to particularly deferential review; conflicting science does not render a decision arbitrary and capricious under the “best available science” standard); *Nw Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1150 (9th Cir. 2007) (agency’s discretion to interpret complex scientific data); *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (deference to agency’s scientific prediction when within the scope of its technical expertise).

Colville recognizes that this case does not begin and end with the application of judicial deference and that the Court must thoroughly evaluate NOAA’s reasoning and opinions. *See* Dkt. 1995 at 4 (“the deference a reviewing court owes to an agency is not unlimited”). However,

Colville is concerned that this litigation has drifted toward a track where the appropriate APA-based review will be inundated by a tsunami of battling expert opinions and plaintiffs' post hoc nit-picking of minor flaws in available information, predicted effects, and agency explanations connecting the available science and those effects, which are inevitable in any analysis with the breadth of this BiOp, will become the focus of the case. At the outset of this round of the litigation, the Court authorized the plaintiffs to submit three expert declarations with their opening briefs, explaining the handful of exceptions to record review and citing the limited role of such extra-record information pursuant to *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004). Dkt. 1995 at 4. Uncertain whether any response or reply declarations would be offered, the Court noted that its order granting the motion to admit extra-record materials would apply to any other declarations filed provided that they were limited to the "narrow purposes permitted in *Lands Council*." Dkt. 1995 at 3 n.2. Perhaps the Court did not envision that admitting the "small number of extra-record declarations" (98 pages excluding attachments) would spawn nearly 330 pages of defendants' response and plaintiffs' reply declarations (excluding hundreds more pages of attachments) prior to the final round of briefing. These materials appear to openly debate many aspects of the BiOp and question the wisdom of the agency's decisionmaking, particularly on many scientific determinations at the heart of the BiOp. For example, on the issue of avian predation (involving Caspian terns and double-crested cormorants), NWF's declarant Frederick Olney and federal defendants' declarant Richie Graves engage in a mano-a-mano debate about the details of RPAs 45 and 46, reaching a pitched disagreement over the appropriate use of compensatory mortality when analyzing the effects of such predation on juvenile salmonids. *See* Declaration of Frederick E. Olney (Dkt. 1982) ¶¶ 38-

50; Declaration of Ritchie J. Graves (Dkt. 2005) ¶¶ 47-61; Second Declaration of Frederick E. Olney (Dkt. 2018) ¶¶ 33-52. As a second example, Oregon submits the declaration of Kathryn Kostow (Dkt. 2021) to continue the scientific debate begun by its first declarant, Anthony Nigro (Dkt. 1986), regarding the merits of “smolt-to-adult return ratios,” or SAR, as a metric for measuring delayed juvenile mortality. Both declarations are packed with many charts and graphs, each of which takes a jab at the wisdom of NOAA’s reasoned choice of metrics for the BiOp’s analysis rather than serve the limited purposes envisioned by this Court for extra-record materials.

These declarations, while ostensibly offered to assist the Court with explaining technical information and describing factors that plaintiffs allege were not adequately considered in the BiOp, could easily be seen as the type of post hoc expert debate on the wisdom of an agency’s judgments that the Ninth Circuit found impermissible in *Jewell* and *Locke*. At a minimum, this volume of extremely technical material – on top of a record of some 700,000 pages – would appear to require the Court to examine and weigh competing arguments about highly technical information as it renders its decision as to whether the BiOp is arbitrary and capricious. *See McNair*, 537 at 988 (noting that it is improper for a court to act as a panel of scientists and, *inter alia*, choose among scientific studies or direct an agency how to validate its hypotheses). Accordingly, while the boundary between conducting a “sufficiently probing” analysis and straying into forbidden territory, *i.e.*, *de novo* review, has been blurred by the pile of extra-record declarations, the Court must continue to be guided by the APA’s framework requiring full yet deferential review of the BiOp.

II. The BiOp’s Jeopardy Analysis Is Based In Significant Part On Tributary Habitat Restoration By Colville And Numerous Other Entities Throughout The Columbia Basin That Is Reasonably Certain To Occur.

In its opening brief, Colville described the immense importance of restoring salmon in the upper Columbia basin to its culture and subsistence and the significant accomplishments Colville has achieved in recent years under the historic Colville MOA (commonly referred to as one of the “Fish Accords”) in restoring Upper Columbia River (UCR) steelhead habitat in the Okanogan River subbasin and the 2013 completion of Chief Joseph Hatchery (followed shortly by initiation of the Tribes’ effort to reintroduce a locally adapted population of spring Chinook in the Okanogan).¹ See Dkt. 2011 at 3-7, 23-29 (Brief of *Amicus Curiae* Confederated Tribes of the Colville Reservation in Support of Defendants’ Motion for Summary Judgment) (“Colville Br.”). The purpose of describing the efforts of Colville and its federal agency partners in detail was to provide concrete examples of how the basin-wide effort to mitigate for the effects of FCRPS operations is truly a regional effort comparable in scope to the FCRPS itself, addressing habitat, hatchery, hydro and harvest in a manner corresponding to the needs of the fish. The Colville part of this story also provides a compelling counter-narrative to the plaintiffs’ gloom and doom description of the RPA implementation as a program that simply cannot get its act together.

Plaintiffs provide no response to the demonstrated progress and benefits to listed salmonids achieved by Colville in its part of the basin. Indeed, one has to strain to find any

¹ As noted in Colville’s opening brief, we anticipated that NOAA would post online the biological opinion for the Tribes’ Section 10(a)(1)(A) permit required to handle endangered Methow Composite stock spring Chinook at Chief Joseph Hatchery. Colville Br. at 29 n.19. That BiOp can now be found at the following website: http://www.westcoast.fisheries.noaa.gov/publications/hatchery/current/okanogan_hatchery_18928_opinion.pdf.

reference to the upper Columbia or UCR steelhead and UCR spring Chinook in the plaintiffs' briefs. *See, e.g.*, Dkt 2016 at 10-11, 18 n.16, 21 (describing various issues with Snake River populations) (NWF Reply Br.); Dkt 2020 at 13, 21-23 (same in Oregon's Reply Brief). Colville has demonstrated that its work in the Okanogan is on track to achieve greater than the requisite 14% HQI for UCR steelhead by 2018. *See* Declaration of William T. Towey (Dkt. 2012) ¶ 15 (Colville projects on track and expected to achieve 120% of the required HQI by 2018). Across the basin, similar accomplishments have been documented as the program to implement the 10-year BiOp hits full stride *See, e.g.*, Extra-Record Declaration of Robert Rose (Dkt. 2008) ¶ 24 (Yakama Nation on schedule to complete Accord projects). In short, there is clear evidence that significant RPA actions are reasonably certain to occur (or have occurred already). However, plaintiffs prefer instead to draw attention to populations, particularly in portions of the Snake River where progress has not met expectations.² This is consistent with plaintiffs' overall approach in this case – a single-minded fixation on the Snake River, the four dams in its lower reach, and tributary habitat in designated wilderness. But this ignores the breadth of the BiOp which addresses listed salmon and steelhead in all parts of the Columbia basin. Just as the federal agencies once placed little emphasis on the upper Columbia, *see* Colville Br. at 3-4, 6, the plaintiffs would now have the Court place its sole focus on the Snake River. Yet the BiOp necessarily includes far more than this narrow, litigation-driven view and the Court should keep

² The 2014 BiOp identifies seven populations that are not projected to meet HQI performance standards based on the 2012 expert panel review. Six of the populations are in the Snake River, while only one (Entiat UCR spring Chinook) is in the upper Columbia. 2014 BiOp at 281-83. The action agencies and their regional partners identified supplemental tributary habitat projects that would assist in making up the deficit. *Id.*; Declaration of Michael Tehan (Dkt. 2006) ¶¶ 53-54.

in mind the document's basin-wide perspective in its review. To evaluate the BiOp through a microscope rather than as the all-encompassing whole that it has been since the Court-ordered remand a decade ago unfairly discounts Colville priorities and the importance of the two listed UCR species. A ruling based on a subset of the actions in a portion of the basin could also seriously undermine the foundation of all the crucial work in the upper Columbia. *See* Colville Br. at 25 n.14 (describing how the Colville MOA could be affected by a Court order materially affecting FCRPS operations).

III. NOAA's Explanation of Observed Changes in R/S Considers All Relevant Factors and Is Based on the Best Available Science.

Plaintiffs' focus in this case is overly narrow in another respect. Nearly all of their emphasis is on hydro operations and comes at the expense of crediting the substantial non-hydro-related mitigation that is a cornerstone of the broad, all-H approach long followed by the agencies to comprehensively address the needs of Columbia basin salmonids. In particular, plaintiffs find fault with the significant reliance on tributary habitat restoration as a basis for the no jeopardy and no adverse modification opinions. This focus has manifested itself in multiple arguments attempting to diminish the importance of tributary habitat work and the BiOp's analysis of the anticipated benefits of these projects. One of these arguments relates to NOAA's explanation that the decline in "recruits-per-spawner," or R/S, for many populations (in the most recent time periods analyzed) reflects a density dependent effect rather than actual decreases in productivity. Relying on the Declaration of Brendan M. Connors (Dkt. 1981), NWF proposed an alternate explanation (density dependence at low abundance based on adults utilizing only a portion of the available spawning habitat) that it claims NOAA should have considered and

suggested NOAA and the action agencies emphasize mainstem improvements to the hydro system over tributary habitat restoration. NWF Br. (Dkt. 1976) at 16-17; Connors Decl. (Dkt. 1981) ¶¶ 12-18; NWF Reply Br. (Dkt. 2016) at 11.

In response, Colville argued that Connors' theory was just that – a novel idea lacking real world data – and that NOAA should not be faulted for failing to analyze it because an agency's task is to rely on the best available science, not fill every gap in knowledge that presents itself. *See* Colville Br. at 29-32 (citing *Jewell*, 747 F.3d at 633 and Declaration of Casey M. Baldwin (Dkt. 2013) ¶¶ 5-11). Colville further explained that tributary habitat restoration was a particularly valuable form of mitigation in the Okanogan River subbasin, which has been severely degraded from over a century of intensive agriculture, timber harvest and other activities. *Id.* at 31. NWF's reply brief relies on another declaration from Dr. Connors, which fails to address squarely any of Mr. Baldwin's opinions. *See* Second Declaration of Brendan M. Connors (Dkt. 2017) ("Connors Reply Decl."). Responding to criticism by Federal Defendants' that Dr. Connors' spatial contraction theory is unsupported by empirical evidence, *see* Declaration of Richard W. Zabel (Dkt. 2004) ¶¶ 10-11, Dr. Connors points to a study of steelhead on the Keogh River, a small coastal river on Vancouver Island, British Columbia. Connors Reply Decl. ¶ 14. Yet with respect to a paper he initially cited for his central opinion that many populations, "despite their low abundance, have clear evidence of density dependent juvenile survival in tributary habitat," Dr. Connors is silent. *See id.* (emphasis added); Connors Reply Decl. (no citation to or discussion of Walters et al. 2013); *see* Baldwin Decl. ¶ 6 (discussing Walters et al. 2013). A single out-of-basin study is insufficient to demonstrate NOAA failed to consider a relevant factor, particularly when contrasted with the widely accepted

observation of density dependent effects in the Columbia Basin – and the Snake River subbasin. *See, e.g.*, ISAB Report re Density Dependence;³ 2014 BiOp at Appendix C. Dr. Connors is also silent in his second declaration on Mr. Baldwin’s explanation of the degraded status of the Okanogan Basin and the importance this fact imparts to Colville’s habitat restoration in that watershed. *See* Baldwin Decl. ¶¶ 9-16.

In sum, NOAA’s explanation for the decrease in observed R/S is thorough, rational and considered all relevant factors. The strained attempt to identify other factors that the agency did not analyze fails because NWF cannot identify a single study providing empirical support for Dr. Connor’s spatial contraction theory amid all the salmonid research in the Columbia basin.

IV. A Single EIS for the Basin-Wide Suite of RPA Actions is Impractical.

Colville’s opening brief explained some of the practical challenges that would arise if a single EIS were required for the action agencies’ adoption of the BiOp’s reasonable and prudent alternatives, using the three avian predation RPAs as an illustration. Colville Br. at 32-35. While NWF acknowledges the Tribes’ argument, it does not dispute or even attempt to address the point that such an EIS would be impractical and unwieldy, or that it would give rise to new legal challenges by parties which heretofore have had no interest in the FCRPS BiOp. NWF Reply Br. at 46-47. Downplaying – or disregarding altogether – these issues is perhaps unsurprising given the potential bonanza that a single basin-wide EIS could represent for prospective plaintiffs who disagree with NOAA’s jeopardy analysis or any RPAs adopted by the action agencies to avoid jeopardy from FCRPS operations. *See Jewell*, 747 F.3d at 644 (noting

³ ISAB, *Density Dependence and its Implications for Fish Management and Restoration Programs in the Columbia River Basin* at 135-36. Feb. 25, 2015, available at <http://www.nwcouncil.org/media/7148891/isab2015-1.pdf>.

the Ninth Circuit’s condemnation of the use of NEPA as an “obstructionist tactic”). For the Court, this issue should raise serious questions as to the purpose a single EIS would serve and where any benefits of such a requirement would flow.

Since Colville filed its opening brief, the Corps has finalized its management plan for double-crested cormorants in the estuary.⁴ This plan and the associated EIS were promptly challenged, with a motion for preliminary injunction pending in this Court that seeks to halt implementation of the first year of the plan.⁵ The *Audubon Society* litigation brings five new plaintiffs (represented by one of NWF’s co-counsel) before this Court in a case which appears to be as much a collateral attack on the Corps’ adoption of the RPAs in their entirety as a challenge to the cormorant management plan called for in one of the RPAs. If the cormorant EIS had been prepared as part of a single EIS approach to the RPAs for the BiOp, all of these claims – and new defendants such as the U.S. Fish and Wildlife Service and the Agriculture Department’s Wildlife Services – would certainly be part of the ensuing court challenge, ensuring greater complexity, size and scope of future BiOp litigation, but not necessarily better outcomes for fish.

However, in contemplating a greatly expanded litigation future for this BiOp, one has to wonder whether such a combined ESA and NEPA process could ever be completed in the first place given the breadth and scope of the 70-plus agency actions (and alternatives to those actions) that would have to be considered in a single EIS if plaintiffs prevail on this claim.

While this may serve the interests of those who would prefer that the Court (rather than the

⁴ U.S. Army Corps of Engineers, *Double-Crested Cormorant Management Plan to Reduce Predation of Juvenile Salmonids in the Columbia River Estuary*, available at http://www.nwp.usace.army.mil/Portals/24/docs/environment/EIS/Cormorants/Final_EIS_Cormorant_Feb2015.pdf.

⁵ *Audubon Soc’y of Portland v. U.S. Army Corps of Eng’rs*, No. 3:15-cv-00665-SI.

action agencies) manage the FCRPS, it would appear to have little benefit to listed salmon and steelhead and does not advance the purposes of the ESA or NEPA. Indeed, NEPA's mandate is being fully satisfied through the Corps' multi-year preparation of a separate EIS for the cormorant plan. There, the body of scientific information and impacts analysis stands on its own and is receiving the scrutiny it is due in the *Audubon Society* litigation without the need to roll it into the FCRPS BiOp process. Just as the birds and the fish now have their separate days in court, they also deserve their separate environmental review and consultation processes.

CONCLUSION

For all of the reasons above and in Colville's opening brief, the Court should grant federal defendants' and allied parties' cross-motions for summary judgment and deny the plaintiffs' motions.

Respectfully submitted this 6th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 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.

s/ Cara Hazzard
Legal Assistant