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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, U.S.  
ARMY CORPS OF ENGINEERS, and U.S. BUREAU  
OF RECLAMATION,

Defendants,

and

No. 3:01-cv-00640-SI

JOINT RESPONSE TO CSRIA'S  
RULE 60 MOTION

NORTHWEST RIVERPARTNERS, INLAND PORTS  
AND NAVIGATION GROUP, STATE OF IDAHO,  
STATE OF MONTANA, STATE OF WASHINGTON,  
KOOTENAI TRIBE OF IDAHO, CONFEDERATED  
SALISH AND KOOTENAI TRIBES, and  
NORTHWEST POWER AND CONSERVATION  
COUNCIL,

Intervenor-Defendants.

Plaintiffs National Wildlife Federation, *et al.* (“NWF”), intervenor-plaintiff State of Oregon, and *amicus* Nez Perce Tribe, make this joint response to the Columbia Snake River Irrigators Association’s (“CSRIA”) Rule 60 Motion.

The Court should deny CSRIA’s motion. While the motion does not indicate whether it is made under Fed. R. Civ. P. 60(a) or 60(b), in either case, it is without merit.<sup>1</sup> “Under Rule 60(a), a court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. In determining whether a mistake may be corrected under Rule 60(a), our circuit focuses on what the court originally intended to do. Thus, the basic distinction between ‘clerical mistakes’ and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of ‘blunders in execution’ whereas the latter consist of instances where the court changes its mind.” *Tattersalls, Ltd. v. DeHaven*, 745 F.3d 1294, 1297 (9th Cir. 2014) (citations and internal quotation marks omitted).<sup>2</sup>

CSRIA apparently is asking the Court to change its mind and so its motion is necessarily one under Rule 60(b). Yet, it offers no basis for relief under this Rule. The Court has reviewed thousands of pages of briefing and supporting documentation, heard a full day of oral argument,

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<sup>1</sup> The Court also may deny the motion for failure to comply with Local Civil Rule 7-1(a).

<sup>2</sup> The Court listed CSRIA as *amicus* in identifying the parties and their counsel but the Court’s listing of counsel does not affect the Court’s Order granting CSRIA’s motion to intervene. *See NWF v. NMFS*, Order (Aug. 20, 2008) (ECF No. 1477).

conducted two site visits to dams, and issued a well-reasoned 149-page Opinion and Order that found federal defendants have violated both the Endangered Species Act and the National Environmental Policy Act. CSRIA fails to identify any mistake in the Court’s Opinion, let alone one that conceivably could lead the Court to change its mind. The Court correctly stated that Judge Redden repeatedly urged federal defendants to consider dam removal. Opinion and Order at 18 (quoted in CSRIA’s Motion at 2).<sup>3</sup> The Court also correctly stated that the federal agencies have uniformly failed to adequately consider dam removal. Instead, dam removal has always been set aside without full consideration, CSRIA Motion at 2-3 (noting that a 1992 EIS by the Corps and BPA “deferred” consideration of this action), addressed in a narrow (and now out-dated) fashion, Opinion and Order at 126, 131-132,<sup>4</sup> dismissed pre-emptively as beyond federal agency authority,<sup>5</sup> or treated as unnecessary to avoid jeopardy under NOAA’s interpretation of

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<sup>3</sup> CSRIA, however, omitted the Court’s citation to *NWF v. NMFS*, 2005 WL 2488447, at \*3 & n. 38, which is an example of Judge Redden’s efforts. Among the other examples is *NWF v. NMFS*, Supplemental Order at 2-3 (July 3, 2003) (ECF No. 444).

<sup>4</sup> Contrary to CSRIA’s claim, the Ninth Circuit did not find that dam removal would cause harmful water temperatures in the Snake River. *See* CSRIA Motion at 3 (selectively citing *NWF v. Corps*, 384 F.3d 1163, 1176 (9th Cir. 2004)). Instead, the studies discussed in the Court’s opinion found the opposite – that dam removal would *lower* both the magnitude and duration of high water temperatures. *See id.* at 1176 (discussing EPA study finding that “the presence of the dams played a significant role in increasing the magnitude and duration of water temperature exceedences in the Snake River” and that removal would decrease both). Indeed, in that case, the Court agreed with “the Corps’ contention that it is the existence of the dams that is causing temperature exceedences.” *Id.* at 1177.

<sup>5</sup> *See, e.g.*, NOAA Fisheries, 2008 BiOp Issue Summaries at 37 (“Authorization and funding for dam breaching would also have to be provided by Congress.”).

the jeopardy inquiry.<sup>6</sup>

Dated: May 16, 2016

Respectfully submitted,

/s/ Todd D. True

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<sup>6</sup> See, e.g., NOAA Fisheries, 2008 BiOp Comments and Responses Memo, Response 20-A at 39 (AR C1155) (NOAA “did not include lower Snake River dam breaching in its reasonable and prudent alternative for the FCRPS and did not conclude that this action or other actions beyond those in the RPA were necessary to avoid jeopardy and adverse modification of critical habitat”); see also Federal Defendants’ 2009 Adaptive Management Implementation Plan (AMIP) at 37 (ECF No. 1712-2) (“It is reasonable to study breaching of lower Snake River dam(s) as a contingency of last resort because the status of Snake River species is improving and the 2008 BiOp analysis concluded that breaching is not necessary to avoid jeopardy.”). The 2010 and 2014 BiOps simply incorporated the AMIP without questioning whether the 2008 BiOp actually contained such an analysis and without questioning the underlying premises asserted in the 2008 BiOp and 2009 AMIP.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2016, I electronically filed the foregoing *Joint Response to CSRIA's Rule 60 Motion* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants. I further certify that the following additional counsel were served via method(s) indicated:

First Class U.S. Mail and CM/ECF system to:

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