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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.: 3:01-cv-00640-SI

**DEFENDANT-INTERVENORS
KOOTENAI TRIBE OF IDAHO AND
CONFEDERATED SALISH AND
KOOTENAI TRIBES' JOINT REPLY IN
SUPPORT OF FEDERAL DEFENDANTS'
REMAND SCHEDULE**

Defendant-intervenors the Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes (the KTOI and CSKT, or the Tribes) offer the following support for federal defendants the National Marine Fisheries Service, the U.S. Army Corps of Engineers, and the U.S. Bureau of Reclamation's proposed schedule on remand. *See* Dkt. No. 2070. Although plaintiffs (joined by amicus curiae the Nez Perce Tribe) advocate that the Court rather than federal defendants should determine what constitutes a workable schedule for completing new environmental analyses on remand, Dkt. No. 2074 (Pls.' Br.) at 4, in actuality plaintiffs are urging the Court to allow *them* to set the schedule.¹ *Id.* (describing plaintiffs' preferred schedule which in plaintiffs' estimation is "a schedule the agencies could meet – and should be required to meet"). Respectfully, the KTOI and CSKT urge the Court to set a reasonable deadline, informed by federal defendants' evidence regarding a workable timeline for a robust process, for a remand process which if not unduly compressed or truncated "may finally be able to break through any bureaucratic logjam that maintains the status quo." Dkt. No. 2065 (2016 Opinion and Order) at 145.

The KTOI and CSKT are federally-recognized upper Columbia River Basin Tribes with natural resource interests affected by operations of the Federal Columbia River Power System (FCRPS). After many years of having their voices drowned out, over the last decade or so the KTOI and CSKT have witnessed a far better recognition of the needs of species throughout the

¹ In an effort to convince the Court that expediency is more important than a comprehensive and robust environmental process, plaintiffs point to the timelines leading up to the development of things like the Northwest Forest Plan and the Roadless Rule. Pls.' Br. at 6. Respectfully, both the Northwest Forest Plan and the Roadless Rule processes led to protracted litigation, which is *not* the Tribes' hope for this long-running case.

Columbia River Basin, not just downriver and not just salmonids, with respect to FCRPS operations.

The Tribes have been participants in the collaborative FCRPS process, and will remain so during the remand process, to be a voice for upriver fish and wildlife species affected by FCRPS operations and to continue reminding fish and wildlife managers to consider the needs of the Basin as a whole. The KTOI and CSKT believe that only by conducting a holistic ecosystem-focused, Basin-wide environmental analysis on remand will a successful "new approach" to FCRPS operations be achieved. 2016 Opinion and Order at 145. Although a theme running through plaintiffs' brief is that the agencies' environmental analyses on remand will focus primarily on salmonid fish passage, that is not the case. For example, the upper Basin is home to many species affected by FCRPS operations, including Endangered Species Act (ESA)-listed and sensitive species, as a result of which the new environmental documents will necessarily include analyses for species like the Kootenai River white sturgeon, bull trout, burbot and resident populations of the native westslope cutthroat trout, not to mention consideration of a wide array of additional public, governmental, tribal, and commercial interests. Fully considering the impacts on these interests as part of a robust Basin-wide alternatives analysis will take time – that is the reality of the situation, not a "fail[ure] to reflect an appropriate sense of urgency." Pls.' Br. at 2.

Ironically, after criticizing federal defendants for relying on environmental analyses that plaintiffs viewed as stale, plaintiffs now point to a 20+ year old administrative record document to suggest that federal defendants might look to that analysis as a basis for "increasing river flows." Pls.' Br. at 15 (citing to Attachment 1 to the 1995 BiOp found in the 2014 NOAA Administrative Record as Doc. B273). Flows are an issue of utmost importance to the KTOI and

**PAGE 2 – KTOI/CSKT REPLY REGARDING SCHEDULE,
Case No. 01-640**

CSKT because of the historical tendency of downriver interests to consider upper Basin reservoirs as nothing more than bathtubs to be called upon for water without consideration of the ecological impacts of such releases. Notably, Judge Redden previously recognized that the flow augmentation requested by plaintiffs (to the detriment of upriver species) was not warranted and would not be ordered. Dkt. No. 1855 (2011 Opinion and Order) at 23 (correctly holding "that there is a potential for unintended harm to some listed species from flow augmentation").

FCRPS operations affect the KTOI because the Kootenai River system includes Libby Dam, which is operated by the U.S. Army Corps of Engineers as part of the FCRPS, and its associated reservoir Lake Koocanusa. FCRPS operations affect the CSKT for a similar reason and also because the Flathead River system includes Hungry Horse Dam, which is operated by the U.S. Bureau of Reclamation, and its associated reservoir Hungry Horse Reservoir. These facilities are located within the Tribes' ancestral territories and impact the ecosystems on which the Tribes rely for a variety of purposes. The potential for detrimental upper Basin impacts from FCRPS operations is why the KTOI and CSKT have long supported the FCRPS' so-called "Montana Operation," which is providing biological benefits to upper Basin species without impacting Columbia River salmonids downstream. Starting with the 2008 Biological Opinion for operations of the FCRPS, the summer drawdowns of Libby Dam and Hungry Horse Dam have been extended into September, thereby providing a more natural drawdown that extends the period of in-river biological productivity in the upper Basin. This approach is consistent with longstanding scientific recommendations to avoid unnecessarily truncating an already short growing season in the upper Basin without having measurable impacts on lower Basin salmonid species. This is another aspect of FCRPS operations that will be included in the environmental analyses on remand.

**PAGE 3 – KTOI/CSKT REPLY REGARDING SCHEDULE,
Case No. 01-640**

The KTOI and CSKT appreciate that they are not alone in being impacted by FCRPS operations – they simply offer their Tribal input to emphasize that the environmental analyses on remand will not be limited to updating existing analyses for salmonid fish passage. Thus, for the reasons set forth above, and based on the information put before the Court by federal defendants, the KTOI and CSKT urge the Court to carefully consider federal defendants' evidence regarding a workable timeline for a robust process when setting a reasonable schedule for the complicated remand process that is underway. Given sufficient time to do it right with ample opportunity for public and governmental partner input into the process, the Tribes believe the remand will bring this long-running case to an end.

DATED this 5th day of July, 2016.

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**PAGE 4 – KTOI/CSKT REPLY REGARDING SCHEDULE,
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CERTIFICATE OF SERVICE

I certify that on July 5, 2016, 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 5th day of July, 2016.

/s/ Julie A. Weis
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