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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

and

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

STATE OF OREGON,

Intervenor-Plaintiff,

v.

TREATY TRIBES' RESPONSE
TO THE FEDERAL
DEFENDANTS' THIRD
REMAND REPORT

NATIONAL MARINE FISHERIES SERVICE,
U.S. ARMY CORPS OF ENGINEERS, and
U.S. BUREAU OF RECLAMATION,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC
POWER COUNCIL, WASHINGTON STATE FARM
BUREAU FEDERATION, FRANKLIN COUNTY
FARM BUREAU FEDERATION, GRANT COUNTY
FARM BUREAU FEDERATION, and STATE OF
IDAHO,

Intervenor-Defendants.

The Columbia River Treaty Tribes appreciate this opportunity to respond to the Federal

Defendants' 3rd Remand Report, and address several matters it raises:

Treaty Tribes' Response to
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- * **Jeopardy standard and analysis.** The Tribes urge the Federal Defendants to reaffirm their commitment to the “Conceptual Jeopardy Framework” identified in their 1st Remand Report, Exhibit 3a. (Docket # 1222, Jan. 3, 2006). This Framework provides that “The purpose of Step 5 is to identify and array a list of Federal actions...and non-Federal ...activities which have or can be relied on to fill the gap identified in Step 4.” The Federal Defendants’ 3rd Remand Report, pp.1-2, refers to “long-term recovery goals and estimates of gaps” and “[p]rogress over the shorter term of the BiOp within the time frame for recovery.” The Ninth Circuit has previously held that simply improving conditions is not a substitute for filling the gap to avoid jeopardy. ALCOA v. BPA, 175 F.3d 1156, 1162 & n. 6 (9th Cir. 1999). The Tribes believe that it is appropriate for NOAA to clearly articulate the jeopardy standard and analysis it will use in this consultation.

- * **Significance of the gaps.** Information derived from the Interior Columbia Basin Technical Recovery Team indicates, not surprisingly, that for many ESA-listed salmon populations the gaps between current status and viability are very large. Information also indicates that the hydrosystem is primarily responsible for creating these gaps. See [www.nwfsc.noaa.gov/trt/col_docs/IC TRT Memo Survival Changes 5-17-06.pdf](http://www.nwfsc.noaa.gov/trt/col_docs/IC_TRT_Memo_Survival_Changes_5-17-06.pdf).

- * **Lack of a “major overhaul” of the FCRPS.** In words that this Court has echoed, Judge Marsh in 1994 indicated that the Federal Defendants were looking for what the hydrosystem could tolerate rather than the “major overhaul” that the system was literally crying out for. IDFG v. NMFS, 850 F. Supp. 886, 900 (D.Or. 1994). The “remand hydro key issues” identified in the Federal Defendants’ 3rd Remand Report (attachment 2) represent minor alterations of the status quo (*see, e.g.*, the issues identified under the topics “Flood Control & URC Ops,” “Canadian Operations,” “Flow Management”) or even *less* than the status quo (*see, e.g.* the issue identified under the topic “Juvenile Dam Passage” lists “early curtailment of summer spill”). Given the large gaps, the Tribes urge the Federal Defendants to evaluate a “major overhaul” of the hydrosystem. Moreover, as the Nez Perce Tribe argued in the Upper Snake BiOp case, and as this Court recently acknowledged, “Rebuilding salmon to healthy, harvestable levels will come in large part from addressing the impact of down-river dam operations that do the most harm to salmon.” American Rivers v. NOAA, Civ. No. 04-61, Dkt #263, at 25.

- * **Failure to model “aggressive non-breach” scenarios.** The Umatilla and Yakama Tribes have requested explicitly and repeatedly that the Federal Defendants model an “aggressive non-breach” scenario for purposes of analyses. (Exhibit A). The Treaty Tribes have also supported the Plaintiffs’ request for modeling a lower Snake River dam breaching scenario for purposes of analyses. The Federal Defendants have responded that these scenarios arguably could conflict with authorized project purposes. Exh. A. Previously, the federal government has analyzed such scenarios in the Lower Snake River Juvenile Salmon Migration Feasibility Study, the System Operation Review, and the Lower Granite Dam Drawdown test, the 2000 BiOp, and other processes.

- * **“Lowest common political denominator” adversely affecting meaningful collaboration.** The Federal Defendants’ response to the modeling requests also illustrates that there is a serious flaw in the remand collaboration. (Exh. A). Contentious issues inevitably result in a lack of consensus among parties with vastly different interests. Apparently, some parties believe that the Policy Work Group operates only by consensus and thus a lack of consensus on issues (e.g. modeling various scenarios) effectively vetoes any further discussion. This is not meaningful collaboration. In light of the significant gaps, the Tribes urge the Federal Defendants to model an “aggressive non-breach approach”¹ and breaching the four lower Snake River dams.
- * **Concern about truncating technical analyses.** This Court, in invalidating and remanding the 2004 FCRPS BiOp, posed the question of “[w]hat if the biologists were to get together and write a plan?,” emphasizing the significance of the technical underpinning of a legitimate FCRPS BiOp. The Tribes are concerned that some parties view the upcoming PWG “retreat” sessions as an exercise in political horse-trading for a political compromise unrelated to the requirements of the District Court’s rulings. (Exh. B). The Tribes urge the Federal Defendants to ensure that the technical analyses necessary for a biologically sound BiOp are not truncated and the technical work products described in the remand framework are completed.
- * **Concerns with funding.** BPA and the Northwest Power and Conservation Council have decided to reallocate \$11 million per year in FY 2007 through FY 2009 away from salmon actions—this is a 25% reduction in the current habitat, production, and mainstem measures. *See* Rebecca Miles Testimony, Field Hearing, “Electricity Costs and Salmon,” July 7, 2006 (Exh. C and <http://resourcescommittee.house.gov/archives/109/testimony/2006/rebeccamiles.htm>). The Tribes believe that the remand process will demonstrate the need for additional efforts at the same time that existing salmon efforts are being reduced. BPA must keep its options open to do what is needed to fill the gaps. The Tribes provided un rebutted testimony in BPA’s rate case that BPA’s flawed rate proposal would not allow BPA to increase funding for salmon recovery and still meet its goal to repay the US Treasury; BPA has nothing in the record demonstrating that its revised proposal will address this problem. <https://secure.bpa.gov/RateCase/Uploads/Motion/WP-07-M-69.pdf>; <https://secure.bpa.gov/RateCase/Uploads/Motion/Tribes%20Brief%20on%20Exception%20WP-07-M-771.pdf>
- * **Concerns regarding delay and deferral of Northeast Oregon Hatchery (NEOH).** NEOH, contemplated in the 2000 and 2004 FCRPS BiOp and fully supported by NOAA, has been deferred and delayed by BPA’s desire for “ESA crediting.” This is a barrier that no other existing or contemplated project has been subjected to. The Tribes believe that NEOH, an important “safety net” hatchery, must not be held hostage in the remand and must be funded and implemented. (Exh. B, Exh. D)

¹ The Nez Perce Tribe supports this request to the extent it is not inconsistent with the SRBA Agreement.
Treaty Tribes’ Response to
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DATED this 13th day of July, 2006.

Respectfully submitted,



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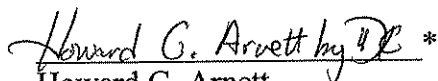
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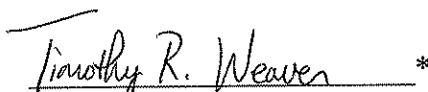
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* per authorization

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CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on July 13, 2006, the foregoing document "Treaty Tribes Response to Federal Defendants' Second Remand Report" will be electronically filed with the Court's electronic court 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:

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