IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-35439

SALMON SPAWNING & RECOVERY ALLIANCE,
Plaintiff,
WILD FISH CONSERVANCY, NATIVE FISH SOCIETY,
and CLARK-SKAMANIA FLYFISHERS,
Plaintiffs-Appellants,

v.

D. ROBERT LOHN, in his official capacity, NATIONAL MARINE FISHERIES SERVICE, CARLOS M. GUTIERREZ, in his official capacity, UNITED STATES DEPARTMENT OF COMMERCE, REN. R. LOHOEFENER, in his official capacity, UNITED STATES FISH & WILDLIFE SERVICE, DIRK KEMPTHORNE, in his official capacity, UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF *AMICI CURIAE* INDIAN TRIBES AND WASHINGTON DEPARTMENT OF FISH AND WILDLIFE IN SUPPORT OF FEDERAL APPELLEES AND AFFIRMANCE

Additional counsel
listed inside.

MARC D. SLONIM
Ziontz, Chestnut, Varnell,
Berley & Slonim
Attorneys for Makah Indian Tribe
2101 Fourth Ave., Ste. 1230
Seattle, WA 98121
(206) 448-1230
mslonim@zcvbs.com

Additional Counsel for *Amici Curiae*

Lauren P. Rasmussen
1904 3rd Ave., Ste. 1030
Seattle, WA 98101-1170
Tel.: (206) 623-0900
Fax: (206) 623-1432
lauren@rasmussen-law.com
Counsel for the Jamestown & Port Gamble S'Klallam Indian Tribes

Stephen H. Suagee
2851 Lower Elwha Road
Port Angeles, WA 98363
Tel: (360) 452 8471 ext. 117
Fax: (360) 452 3428
steve.suagee@elwha.nsn.us
Counsel for the Lower Elwha Klallam Tribe

Daniel A. Raas
1503 E Street, PO Box 5746
Bellingham, WA 98227-5746
Tel.: (360) 647-0234
Fax: (360) 733-1851
danraas@comcast.net
Counsel for the Lummi Nation

Alan C. Stay
39015 172nd Ave., S.E.
Auburn, WA 98092
Tel.: (253) 939-3311
Fax: (253) 939-5311
alan.stay@muckleshoot.nsn.us
Counsel for the Muckelshoot Tribe

Bill Tobin
PO Box 1425
Vashon, WA 98070
Tel.: (206) 463-1728
Fax: (206) 463-1729
billtobinattorney@comcast.net
Counsel for the Nisqually Indian Tribe

Edward J. Wurtz
5048 Mount Baker Hwy.
PO Box 157
Deming, WA 98244-0157
Tel.: (360) 592-4158
Fax: (360) 592-5721
ewurtz@nooksack-tribe.org
Counsel for the Nooksack Indian Tribe

Samuel Stiltner
3009 E. Portland Ave.
Tacoma, WA 98404
Tel.: (253) 573-7875
Fax: (253) 680-5998
sams@puyalluptribe.com
Counsel for the Puyallup Tribe of Indians

Regina Hovet
5318 Chief Brown Ln.
Darrington, WA 98241-9420
Tel.: (360) 436-0139
Fax: (360) 436-0471
RegelizH@aol.com
Counsel for the Sauk-Suiattle Indian Tribe

Additional Counsel for *Amici Curiae* (continued)

Lori E. Nies
North 80 Tribal Center Rd.
Skokomish Nation, WA 98584
Tel.: (360) 877-2100
Fax: (369) 877-2104
lnies@skokomish.org
Counsel for the Skokomish
Indian Nation

Alix Foster
PO Box 817
LaConner, WA 98257
Tel.: (360) 466-7220
Fax: (360) 466-5309
afoster@swinomish.nsn.us
Counsel for the Swinomish
Indian Tribal Community

Mason Morisset
MORISSET, SCHLOSSER &
JOZWIAK
1115 Norton Building
801 Second Ave.
Seattle, WA 98104-1509
Tel.: (206) 386-5200
Fax: (206) 386-7322
m.morisset@msaj.com
Counsel for the Tulalip Tribes

ROBERT M. McKENNA
Attorney General
Michael S. Grossmann
Senior Counsel for Washington State
Department of Fish & Wildlife
PO Box 40100
1125 Washington Street, SE
Olympia, WA 98501-2283
Tel.: (360) 586-3550
Fax: (360) 586-3454
mikeg1@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

GLOSSARY

EIS	Environmental Impact Statement
ER	[Appellants'] Excerpts of Record
ERD	Evaluation and Recommended Determination
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
MSY	Maximum Sustained Yield
NMFS	National Marine Fisheries Service
RAP	Risk Assessment Procedure
RER	Recovery or Rebuilding Exploitation Rate
RMP	Resource Management Plan
SER	[Appellees'] Supplemental Excerpts of Record
SUS	Southern United States
TRT	Technical Recovery Team
UMT	Upper Management Threshold
VSP	Viable Salmonid Population
WDFW	Washington Department of Fish and Wildlife

I. IDENTITY AND INTEREST OF *AMICI CURIAE*; AUTHORITY TO FILE BRIEF.

Amici curiae are 13 Indian tribes ("Tribes")[1] and the Washington Department of Fish and Wildlife ("WDFW"). Each Tribe has a treaty right to take fish. *See United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The Tribes and WDFW co-manage salmon fisheries under court orders in *United States v. Washington. See, e.g., United States v. Washington,* 626 F. Supp. 1405, 1527 (W.D. Wash. 1985).

As co-managers, *amici* jointly developed and are implementing a six-year Resource Management Plan ("RMP") for Puget Sound fisheries impacting chinook salmon. The RMP is "intentionally . . . conservative" to facilitate recovery of Puget Sound chinook. Appellees' Supplemental Excerpts of Record ("SER") 84.

Appellants challenge: (1) National Marine Fisheries Service's ("NMFS") approval of the RMP; and (2) NMFS' biological opinion regarding that decision. *Amici* have a direct stake in this case and thorough knowledge of the record.

All parties consented to filing of this brief.

---

[1] Jamestown S'Klallam; Lower Elwha Klallam; Lummi; Makah; Muckleshoot; Nisqually; Nooksack; Port Gamble S'Klallam; Puyallup; Sauk-Suiattle; Skokomish; Swinomish; and Tulalip.

II. SUMMARY OF ARGUMENT.

NMFS determined the RMP would not appreciably reduce the likelihood of Puget Sound chinook recovery. Utilizing the best available science, NMFS analyzed the RMP's management measures, and properly concluded they had contributed to stable or increasing spawning escapements and would provide natural rebuilding potential as habitat conditions improved.

In challenging NMFS' determination, appellants disregard constraints on recovery imposed by severely degraded habitat. As a result, appellants confuse target abundance levels for populations under *fully recovered* habitat conditions with appropriate fisheries management measures under *current* conditions. Appellants also disregard significant reductions in exploitation rates achieved by the co-managers, and provide no support for their claims that, despite those reductions, the RMP will simply perpetuate the status quo.

III. BACKGROUND.

A. Regulatory Framework.

1. Listing Decision.

In 1999, NMFS listed the Puget Sound chinook salmon evolutionarily significant unit ("ESU") as a threatened species under the Endangered

Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. 64 Fed. Reg. 14308 (Mar. 24, 1999). NMFS based its decision on "risks associated with population trends and productivity" and "[d]egradation and loss of freshwater and estuarine habitat throughout the range of the ESU." *Id.* at 14319.[2]

According to NMFS, harvest impacts had been "quite high in the past," with "total exploitation rates averag[ing] 68-83 percent for the 1982-89 brood years." *Id.* Although "[h]istorically high harvest rates in ocean and Puget Sound fisheries were likely . . . a significant source of risk in the past," NMFS was hopeful "recently established lower harvest targets for Puget Sound stocks will reduce threats to the persistence of the ESU . . . ." *Id.*

"[A]mple evidence" suggested degradation of freshwater habitats contributed to the decline. *Id.* at 14310. "[A] substantial amount of habitat throughout the Puget Sound region has been degraded or blocked by dams and other barriers." *Id.* at 14318. "Diking for flood control, draining and filling of freshwater and estuarine wetlands, and sedimentation due to forest practices and urban development are cited as problems throughout the ESU." *Id.* at 14318-19. "Blockages by dams, water diversions, and shifts in flow regime due to hydroelectric development and flood control projects are major habitat problems in several basins." *Id.* at 14319. Increasing

[2] A population's "productivity" can be measured as the ratio of the number of juvenile or adult progeny to the number of parent spawners.

percentages of land "are composed of impermeable surfaces, and the reductions in habitat quality due to point- and non-point source pollutants have been widespread . . . ." *Id.*

2. 4(d) Rule.

ESA § 4(d), 16 U.S.C. § 1533(d), directs the appropriate Secretary to adopt necessary regulations for conservation of threatened species. In July 2000, NMFS adopted a "4(d) Rule" for threatened salmonid ESUs. 65 Fed. Reg. 42422 (July 10, 2000) (codified as amended at 50 C.F.R. § 223.203). In general, the Rule extended prohibitions in ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1), to threatened ESUs. *Id.* at 42422. However, NMFS did not find it necessary to extend those prohibitions to activities "governed by a program that adequately limits impacts on listed salmonids." *Id.*

Under Limit 6 the prohibitions do not apply to "actions undertaken in compliance with a resource management plan developed jointly by the State[] of Washington . . . and the Tribes . . . within the continuing jurisdiction of United States v. Washington . . . ," on specified conditions. 50 C.F.R. § 223.203(b)(6). The primary condition is a determination that implementing the plan "will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs." *Id.* § 223.203(b)(6)(i). NMFS must make that determination "pursuant to 50 CFR 223.209," and

must "take[] comment" on how the plan "addresses the criteria in § 223.203(b)(4)." *Id.* §§ 223.203(b)(6)(i) & (iii).

Section 223.209 (now codified at § 223.204) was promulgated concurrently with the 4(d) Rule. It created a limitation on the Rule's prohibitions for activities undertaken pursuant to tribal plans where NMFS determined the plan would "not appreciably reduce the likelihood of survival and recovery for the listed species." 65 Fed. Reg. 42481, 42481-82 (July 10, 2000). NMFS stated there were "legitimate concerns about disproportionate conservation requirements being placed on the tribes when surrounding non-Indian lands are in extremely degraded conditions." *Id.* at 42483. Accordingly, "[a] determination that an action may or may not reduce the likelihood of survival or recovery will be made in the context of the operative environmental conditions at the local (site-specific) and ESU levels." *Id.*

Section 223.203(b)(4) provided a limitation (Limit 4) on the Rule's prohibitions for fisheries managed under a NMFS-approved Fishery Management and Evaluation Plan. 50 C.F.R. § 223.203(b)(4)(i). To be approved, such a plan must "adequately address" nine criteria (of which appellants address three). *Id.*

Criterion B provides for utilization of "the concepts of 'viable' and 'critical' salmonid population thresholds, consistent with the concepts contained in" a Viable Salmonid Populations ("VSP") paper. *Id.* § 223.203(b)(4)(i)(B). It requires that harvest management recognize differences in risk depending on a population's status and respond accordingly to minimize long-term risks to population persistence. *Id.* Criterion B does not prohibit harvest of populations between their critical and viable thresholds, but requires such harvests not "appreciably slow" achievement of viable function. *Id.*

Criterion C requires that a plan set escapement objectives or maximum exploitation rates for each management unit or population based on its status. *Id.* § 223.203(b)(4)(C). Criterion D requires the display of a biologically based rationale demonstrating the harvest management strategy "will not appreciably reduce the likelihood of survival and recovery of the [ESU] in the wild." *Id.* § 223.203(b)(4)(D).

3. Viable Salmonid Populations and NMFS' Risk Assessment Procedure.

The VSP "concept attempts to describe population level attributes of viable salmonid populations" but "does not prescribe how to recover populations." 65 Fed. Reg. at 42430. The VSP Paper defines a "viable" salmonid population as one with a negligible risk of extinction due to threats

from demographic and local environmental variation and genetic diversity changes over a 100-year time frame. SER 186.

Although it is not possible "to predict with great precision a population's status that far into the future," the VSP Paper identifies four attributes – abundance, productivity, spatial structure, and diversity – necessary for long-term persistence, and provides guidelines for each attribute in a viable population. SER 187-200. These attributes are "concerned with extinction risks, not with setting harvest levels." SER 201.

In May 2000, NMFS prepared "A Risk Assessment Procedure ["RAP"] for Evaluating Harvest Mortality on Pacific Salmonids." Appellants Excerpts of Record ("ER") 2:1-12. The RAP provided a management tool that linked "available biological data about the listed species with quantified standards of acceptable risk to survival *and recovery*." ER 2:2 (emphasis added). NMFS explained that the VSP Paper identified attributes of viable populations, but did "not provide quantified risk standards, or a framework for assessing risk." *Id.* In developing the RAP, NMFS "sought to use an approach that was consistent with the concepts developed" in the VSP Paper. ER 2:4.

NMFS designed the RAP to assess harvest management actions "utilizing the concepts of the VSP [Paper]." ER 2:4. Using a simulation

model, the RAP identifies "maximum exploitation rates (Recovery Exploitation Rates, or RERs) for individual populations which are projected to result in a low risk to survival *and a moderately high to high probability of recovery of the population in the long term.*" *Id.* (emphasis added). "Risk is measured in terms of the frequency that [simulated] escapements are above or below previously defined benchmark thresholds of abundance." *Id.*

In prior biological opinions, NMFS used two methods to establish these abundance thresholds. ER 2:6-7. For purposes of viable thresholds, the first method used guideline ranges in the VSP Paper for abundance levels that presented a low risk of extinction due to genetic or environmental factors. *Id.* The second method required population-specific information and was based on the level of escapement required to achieve maximum sustainable yield ("MSY") under *current* habitat conditions. *Id.* NMFS explained: "As applied in RAP to date, the MSY level represents a maximum sustainable level *given current productivity and capacity restraints on the population, and is not intended to represent a potential recovery level for the population.*" *Id.* (emphasis added).[3]

[3] According to the VSP Paper, a "wild population harvested at MSY is, by definition, sustainable (VSP)," provided the same time horizon is used and all factors affecting viability are considered. SER 201.

This approach allowed NMFS to identify exploitation rates that, compared to ***no fishing***, would not appreciably reduce the likelihood of survival or recovery of the affected populations given current habitat conditions. Considering its past decisions and accepted scientific standards, NMFS required: (1) applying the RER, the percentage of simulated escapements below the critical threshold must differ by no more than 5% from that under no-fishing conditions over a 25-year period; and (2) applying the RER, either the viable threshold must be met 80% of the time or the percentage of escapements less than the viable threshold must differ no more than 10% from that under no-fishing conditions at the end of the 25-year period. ER 2:9-10. "Said another way, these criteria seek to identify an exploitation rate that will not appreciably increase the number of times a population will fall below the critical threshold *and also not appreciably reduce the prospects of achieving recovery*." ER 2:10 (emphasis added).

4. Recovery Planning Targets.

NMFS formed a Technical Recovery Team ("TRT") to work with the Shared Salmon Strategy, a regional forum developing a recovery plan for listed Puget Sound salmonids. *See* ER 2:29; SER 204-05. The Shared

Salmon Strategy agreed to a five-step process to develop a recovery plan. ER 2:29.

In 2002, the TRT issued "draft targets for recovery" of individual populations and "general guidelines for how to add up recovery efforts across individual populations" to determine whether they are sufficient for recovery of the ESU. *Id.*[4] The individual targets "were designed to be used in Step 3 of the Shared Strategy process," in which "watershed groups around Puget Sound conduct necessary analyses to determine what magnitude of effort (*in habitat actions*) is needed to achieve their population-specific targets for recovery." *Id.* (emphasis added). Although the "effects of hatchery and harvest management on achieving planning targets in watersheds must also be accounted for in Step 3," the TRT did not suggest its targets be used to manage fisheries under current habitat conditions. *Id.*

The TRT targets were the product of four analyses, none of which sought to identify abundance levels achievable under current habitat conditions. ER 2:30-32. Instead, the TRT estimated abundance levels associated with more pristine historical conditions and levels that might be

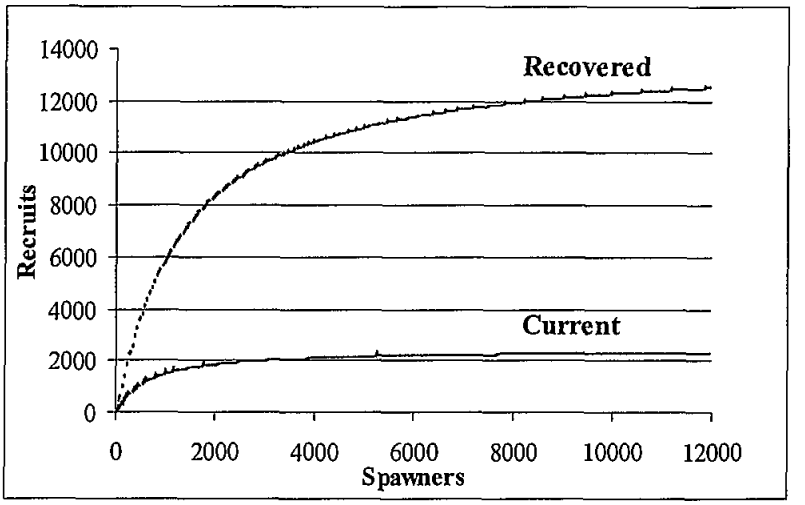
[4] The TRT recommended that an ESU-wide recovery scenario include at least two-to-four viable chinook populations in each of five geographic regions. ER 2:40.

achieved under hypothetical, improved habitat conditions in the future (what NMFS refers to as "Properly Functioning Conditions"). *Id.*

To compare results of its primary analyses, the TRT used "a single reference point that is conceptually common to both analyses: the equilibrium spawner abundance." ER 2:31. This is "the number of fish required for a viable population when one spawner produces only one spawner in the subsequent generation (i.e., the population is just replacing itself)." *Id.* The TRT noted "[a]lternative combinations of spawner abundance and productivity with the same viability level from the [TRT] analyses are available, but are not presented here." ER 2:36.

In its Recovery Plan, the Shared Salmon Strategy presented "the planning ranges developed by the TRT, as well as the planning targets at low productivity and at the maximum productivity thought to be sustainable." *See* SER 207-08 & Fig. 4.1. These numbers "represent different points along a population's performance curve[;] . . . the planning targets seek to achieve the curve as average population performance over time." SER 207.

This is illustrated by the following figure from NMFS' Evaluation and Recommended Determination, which presents spawner-recruit curves for the North Fork Stillaguamish population under current and recovered habitat conditions:



ER 2:141 (Fig. 3).[5] The planning targets for a recovered population (the upper curve) range from 4,000 spawners at high productivity (MSY escapement) to 18,000 – 24,000 at low productivity (equilibrium spawner abundance). SER 208 (Fig. 4.1). These numbers are simply different points along the same spawner-recruit curve. SER 207. As the figure illustrates, these recovery targets cannot be achieved under current conditions (the lower curve), even with ***no fishing***. *See* Parts III.B.3 and III.C.1 below.

The Recovery Plan "relies on the work of individual watershed planning areas" to achieve its population goals. SER 207. It accounts for the effects of harvest management, relying on the RMP to ensure sufficient

[5] In this figure, the number of "recruits" is the number of adult progeny produced by a given number of parent spawners. In both curves, productivity – the ratio of recruits to spawners – declines as the number of spawners increases, reflecting habitat limitations. However, productivity is much higher under recovered habitat conditions.

spawners to "maintain population stability, given current habitat productivity"; set maximum limits on exploitation rates during recovery; and allow populations to expand as habitat improves. SER 211-13.

B. The Resource Management Plan.

The RMP guides development of annual harvest regimes for management years 2004 through 2009. SER 84-85. Management has evolved since the early 1990s in response to the decline of Puget Sound chinook. SER 88. Major changes include managing for impacts on natural stocks, using weak-stock management, and eliminating almost all fisheries directed at depressed stocks. *See* SER 85-88. For management units comprising native stocks that are either predominantly naturally produced or enhanced by hatcheries that rear indigenous stock, fisheries management reduced total exploitation rates between *44 and 64 percent* from the 1983-1987 average to the 1998-2000 average. SER 89, 95-96, 103.[6] The lower rates of the late 1990s resulted in stable or increasing spawning escapement.

---

[6] 1998-2000 average exploitation rates for these units ranged from 16 to 38 percent, a substantial reduction from rates in the mid-1980s (43 to 76 percent). SER 103. For Nooksack River populations – a particular focus of appellants' case – total exploitation rates declined from 43 percent in 1983-1987 to 16 percent in 1998-2000, *id.*, and exploitation rates in Washington fisheries (*i.e.*, fisheries subject to the co-managers' jurisdiction) were only *1 and 3 percent*, respectively, in 2003 and 2004. SER 209.

SER 91. Pre-season modeling indicated total exploitation rates remained at these lower rates from 2001 through 2003. SER 103.

1. Elimination of Most Directed Fisheries.

The RMP prohibits almost all directed fisheries (those in which more than 50 percent of total fishery-related mortality is composed of listed chinook). SER 86-87, 92, 97. With the exception of small tribal ceremonial-and-subsistence fisheries, directed fisheries can take place only if: (1) projected escapement in a management unit exceeds the co-managers' Upper Management Threshold ("UMT"),[7] *after* accounting for anticipated Alaskan and Canadian catches and incidental, test, and tribal ceremonial-and-subsistence catches in Washington waters;[8] and (2) the anticipated exploitation rate does not exceed a ceiling established by the co-managers.

---

[7] Where sufficient data were available, the UMT was based on current productivity and capacity of the management unit. SER 90. For some units, the UMT was considerably higher than the MSY escapement level. *See* SER 116 (UMT for Skagit management units approximately double MSY escapement level).

Where such data were not available, the UMT was based on the current escapement goal. SER 90. In some cases this was the best estimate of current MSY escapement, while in others it was substantially higher than MSY escapement. *Id.*

[8] A significant portion of the fishing mortality on many Puget Sound stocks occurs in Canadian and, in some cases, Alaskan fisheries outside the co-managers' jurisdiction. *See, e.g.,* SER 95 (*more than half* the total mortality of Stillaguamish summer, Nooksack early and Skagit spring chinook occurs in Canada and Alaska).

SER 98. The RMP states these provisions will be applied conservatively; directed fisheries will be allowed only where there are "[*c*]*onsistent* forecasts of high abundance, *substantially* above the [UMT], and preferably corroborated by post-season assessment." *Id.* (emphasis added). As a result, the co-managers did not anticipate any directed fisheries other than small tribal ceremonial-and-subsistence fisheries. *Id.*

2. Constraints on Remaining Fisheries.

All fisheries conducted under the plan are constrained by rebuilding exploitation rate ("RER") ceilings, low abundance thresholds and/or critical exploitation rate ceilings. *Id.*

a. Rebuilding Exploitation Rate Ceilings.

The co-managers' RER ceilings constrain all fisheries impacting populations above their low abundance threshold (including any directed fisheries), and were designed to "assure[] stable or increasing escapement." SER 90-91, 97-99. Where sufficient data were available, the ceilings were derived in a manner similar to NMFS' Risk Assessment Procedure. *See* SER 90-91. In particular, they were designed to ensure "[a] high probability (at least 80%) of the spawning escapement increasing to a specified [rebuilding escapement] threshold . . . , **or** the probability of escapements

falling below this threshold level differs from a zero harvest regime by less than 10 percentage points." SER 91.

The co-managers emphasized two aspects of this approach for recovery purposes. First, it "is extremely important to recognize that the [rebuilding escapement threshold] is not an escapement goal but rather a level that is expected to be exceeded most of the time (≥80%)." SER 117; *see also* SER 118. Second, because the RER ceilings were based on current habitat conditions, if habitat and productivity improved, the ceilings would allow escapements to increase *above* the rebuilding escapement threshold. SER 108 (*majority* of increase accrues to escapement), 115, 117-18. For Skagit River management units, the RER ceilings were low enough to permit escapements to increase to levels 60 to 100 percent above the MSY escapement level even under current habitat conditions. SER 99-102.

Moreover, many *actual* exploitation rate targets would fall "well below" the RER ceilings. SER 84, 91, 97. This was due to weak-stock management; to meet conservation needs of the least productive units, annual target rates for most units would be below their RER ceiling. *Id.* That annual exploitation rate targets were expected to be "substantially lower" than the ceilings further improved the probability that escapements would increase or remain at optimum levels. SER 107.

For management units without sufficient data to calculate RER ceilings based on current productivity, the ceilings were based on observed minimum rates or harvest ceilings in the Pacific Salmon Treaty. SER 91. For these units, total or southern U.S. ("SUS") RER ceilings were generally set at the low level of the late 1990s, which had resulted in stable or increasing spawning escapement. *Id.*

b. Low Abundance Thresholds and Critical Exploitation Rate Ceilings.

A low abundance threshold was established for each population at a point generally well above the point of biological instability. SER 91-92. For populations below their low threshold, the RMP imposes extraordinary conservation measures to constrain harvest mortality, severely if necessary, to prevent populations from becoming unstable. SER 92-94. Under such circumstances, a critical exploitation rate ceiling places an upper limit on impacts from all SUS fisheries. SER 94.

3. Relationship to Recovery Goals.

The co-managers recognized that, despite the use of RER ceilings that would stabilize or increase escapements under current habitat conditions, their upper management objectives were below the recovery planning targets for most populations. SER 103-04. This was because constraints placed on productivity by current habitat conditions severely limited population

abundance compared to what could be achieved under properly functioning conditions. SER 104.

Data from several populations provided empirical evidence of these habitat constraints. Due to the significant reduction in harvest rates in the 1990s and increased marine survival, the number of returning *hatchery-origin* fish had increased but the number of returning *natural-origin* fish had not. SER 105. Since natural production had not increased under reduced harvest pressure, it was evidently "constrained primarily by the condition of freshwater habitat." *Id.*

Under these circumstances, the RMP's conservative RER ceilings were designed to test productivity at higher escapement levels and capitalize on favorable freshwater survival conditions that may occur. SER 106, 108. However, significant habitat improvement remains necessary for most populations to achieve the recovery planning targets. *Id.; see also* SER 109-114.

C. NMFS' Determination.

Applying Limit 6 in the 4(d) Rule, NMFS determined implementation of the RMP "would not appreciably decrease the likelihood of survival and recovery" of the ESU. SER 19. NMFS' determination rested on an Environmental Impact Statement, Biological Opinion, and Evaluation and

Recommended Determination ("ERD"). *Id.* NMFS took and responded in detail to comments on its analysis of each Limit 4 criterion before making its determination. *See* SER 7-15, 20, 46-49.

1. Threshold Levels.

To evaluate the RMP, NMFS "completed a comprehensive analysis to derive viable and critical thresholds for a subset of Puget Sound chinook salmon populations under current habitat and environmental conditions." ER 2:128; *see also* SER 9. The viable thresholds were derived using three methods: (1) guideline levels from the VSP Paper; (2) the level of spawning escapement required to achieve MSY under current environmental conditions; or (3) other information related to a watershed's productivity and capacity. ER 2:50, 129.

These thresholds represented "a level of spawning escapement associated with rebuilding to recovery, consistent with current environmental conditions." ER 2:128. NMFS explained:

> For most populations, these thresholds are well below the escapement levels associated with recovery, but achieving these goals under current conditions is a necessary step to eventual recovery *when habitat and other conditions are more favorable.* Survival and recovery of the . . . ESU will depend, over the long term, on necessary actions in other sectors, *especially habitat actions,* and not on harvest actions alone.

Id. (emphasis added).

NMFS noted the TRT had "derived preliminary recovery goals for most populations" and that those goals "provide a useful contrast between current productivity and the level of potential productivity associated with recovery." ER 2:140. According to NMFS, "an increase in productivity (recruitment)" is necessary to achieve the TRT's recovery goals. *Id.* And, while "[p]ast harvest constraints have contributed to stable or increasing escapements," the available evidence from several systems suggests "*marine, freshwater, and estuary habitat quality and quantity is the primary constraint on productivity.*" *Id.* (emphasis added); *see also* ER 2:138 (productivity primarily driven by habitat quantity, quality, and reproductive fitness).

NMFS illustrated this with the figure reproduced on page 12 above comparing North Fork Stillaguamish abundance and productivity under current and recovered habitat conditions. According to NMFS, "[f]urther harvest constraint will not, by itself, effect an increase above the asymptote associated with current productivity, until habitat conditions improve." ER 2:141. Put another way, harvest constraint alone will not transform the population's abundance and productivity from the levels reflected in the spawner-recruit curve under current conditions to those reflected in the

spawner-recruit curve under recovered conditions; habitat improvements are essential to achieve that goal.

2. Exploitation Rates.

NMFS used its thresholds to develop RERs that, compared to no fishing, would not appreciably increase the number of years in which escapements were below critical levels and would not appreciably reduce the likelihood that escapements would be above viable levels at the end of a 25-year period. ER 2:128. According to NMFS, these criteria addressed "*both* survival *and* recovery." *Id.* (emphasis added). In particular, NMFS found that, for individual populations, "exploitation rates at or below NMFS-derived rebuilding rates will not appreciably reduce the likelihood of rebuilding that population, assuming current environmental conditions based on specific risk criteria." ER 2:110; *see also* ER 2:151.

Three factors supported this conclusion. First, because the RERs "were set so that escapement would meet or exceed the viable threshold at least 80% of the time at the end of 25 years," escapement would, on average, be "greater than MSY." SER 9-10.

Second, NMFS assumed low marine survival, "which is conservative and risk averse." ER 2:153; SER 9-10. If marine, freshwater or estuary survival rates were to increase, the RMP's use of exploitation rates as its

primary management tool would mean escapements would also increase. *See, e.g.,* SER 47. NMFS explained:

> A major objective of the [RMP] is to pass 'additional' spawners to the spawning grounds in high-abundance years . . . . These additional spawners can take advantage of newly-restored and expanded habitat provided through recovery actions in the other "H" sectors and favorable environmental conditions. Because the [RMP] provides for additional spawners, over the long term, the managers' [RER] ceilings provide *a natural rebuilding potential as habitat conditions and capacity improve* . . . .

SER 48-49 (emphasis added).

Third, the RMP's RER ceilings may be modified in response to more current information about the productivity and status of populations, or in response to better information about management error, and in any event are set only for the six-year duration of the plan. ER 2:153; SER 10. Because "[t]he NMFS-derived [RERs] are based on simulations over a more conservative 25-year period . . . , NMFS' approach in evaluating the RMP is conservative and considers the uncertainty of the data and simulation outcomes." SER 10-11; *see also* ER 2:153; SER 49 n.2.

3. Limit 4 Criteria.

NMFS separately analyzed the RMP's compliance with each Limit 4 criterion. *See* ER 2:106 (Table 1). Under Criterion B, NMFS found the RMP "takes into account the different risks facing a population depending on the status of the population" (whether it is above or below its upper

management and low abundance thresholds). ER 2:127. To determine whether the RMP's response to such risks was adequate, NMFS undertook a risk analysis for each population, in which it separately considered each attribute of a viable population identified in the VSP Paper. ER 2:133-150.

NMFS' analysis of Criterion C focused on whether anticipated exploitation rates under the RMP would pose any risk to survival or recovery of individual populations. ER 2:151. In applying Criterion D, NMFS addressed survival and recovery of the ESU as a whole. ER 2:169. It found changes in harvest alone could not recover the ESU, but used the TRT recommendation (that ESU recovery include at least two-to-four viable populations in each region) to evaluate whether the RMP would impede recovery. ER 2:171.

IV. ARGUMENT.

A. NMFS Properly Considered Recovery Impacts.

Under ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2), NMFS must insure actions it authorizes are "not likely to jeopardize the continued existence of" a listed species. ESA regulations interpret this to prohibit actions that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. The 4(d) Rule incorporates the same standard: to

approve the RMP, NMFS had to determine it would not "appreciably reduce the likelihood of survival and recovery of" the ESU. *Id.* § 223.203(b)(6)(i).

These regulations required NMFS to consider both survival and recovery impacts. *See Nat'l Wildlife Fed'n v. NMFS,* 524 F.3d 917, 931 (9th Cir. 2008). Absent "'exceptional circumstances,'" injury to recovery alone does not warrant a jeopardy finding, but NMFS must analyze recovery impacts to determine whether such circumstances are present. *Id.* at 932 (quoting 51 Fed. Reg. 19934 (June 3, 1986)).

NMFS developed the RAP and analyzed the RMP to evaluate effects on both survival *and* recovery. *See, e.g.,* Parts III.A.3 & III.C above. Appellants challenge the *manner* in which NMFS analyzed recovery impacts, focusing on the threshold levels NMFS used to set rebuilding exploitation rates and its analysis of impacts in two geographic regions. For the reasons discussed below, these technical challenges to NMFS' methodology fail to demonstrate NMFS made a "clear error of judgment" that would render its decision arbitrary and capricious. *See The Lands Council v. McNair,* 537 F.3d 981, 983 (9th Cir. 2008) (en banc).

1. Threshold Levels.

Appellants argue NMFS' analysis was flawed because: (1) NMFS' upper or "viable" thresholds were below the TRT's recovery planning

ranges; and (2) not using the TRT ranges was a failure to use the best available science. Br. at 24-28, 34-38. This argument confuses the very different functions of the TRT planning ranges and NMFS' thresholds. The VSP Paper provided guidelines for four attributes of populations with a low risk of extinction, but did not prescribe how to recover populations. *See* Part III.A.3 above. The TRT planning ranges quantified one of those attributes – abundance – in recovered populations at equilibrium spawner abundance, but did not suggest such levels could be achieved today or should be used in managing fisheries under current conditions. *See* Part III.A.4 above.

NMFS developed the RAP to evaluate the effect of fisheries on survival and recovery of salmonids under current conditions. *See* Part III.A.3 above. For purposes of recovery, the RAP was designed to calculate exploitation rates that either: (1) would exceed a threshold level of abundance in 80% of simulations; or (2) would be less than the threshold no more than 10% more often than if there were no fishing at all. *Id.* In prior biological opinions, NMFS set the threshold levels based on VSP guideline ranges or, when population specific information was available, MSY escapement levels. *Id.* It was NMFS' scientific judgment that exploitation rates meeting this test "would not appreciably reduce the prospects of achieving recovery." *Id.*

In following the same approach in this case, NMFS explained that, for most populations, the TRT planning ranges *cannot* be achieved under current habitat conditions; to the contrary, it will take significant habitat improvements to achieve the capacity and productivity necessary to reach those levels. *See* Part III.C.1 above. NMFS believed exploitation rates meeting the RAP criteria would allow for recovery because, on average, they would result in escapements above the MSY level, and they would pass "additional" spawners to the spawning grounds in high-abundance years, creating "a natural rebuilding potential." *See* Part III.C.2 above. NMFS believed its exploitation rates were "conservative and risk averse" because they assumed low marine survival rates and were fixed over a 25-year simulation period, whereas actual exploitation rates would change in response to new information. *Id.* The co-managers reached similar conclusions. *See* Part III.B.2.a above.

NMFS' analysis of recovery impacts was consistent with the ESA jeopardy standard and the 4(d) Rule.[9] In both cases, the issue is whether implementation of the RMP will *cause* an appreciable reduction in the

[9] NMFS followed a longstanding approach developed in biological opinions in the 1990s and formalized in the RAP in 2000. *See* Part III.A.3 above. *Cf. Nat'l Wildlife Fed'n,* 524 F.3d at 932-33 (NMFS departed suddenly from prior biological opinions).

likelihood of recovery. *See Nat'l Wildlife Fed'n,* 524 F.3d at 930. To the extent recovery is limited by current habitat conditions – and not by fishing – it cannot be said implementation of the RMP is *causing* an appreciable reduction in the likelihood of recovery.[10]

NMFS did not disregard the definition of viability in the VSP Paper, redefine "viability" as achieving current carrying capacity, or equate "survival" with "recovery," as appellants claim (Br. at 24-28). To the contrary, NMFS carefully distinguished its threshold levels from recovery levels for viable populations. *See* Parts III.A.3 & III.C.1 & 2 above. Its approach was grounded in the reality – recognized in the 1999 listing decision, documented in the RMP and confirmed in the ERD – that current habitat conditions severely constrain the abundance and productivity of Puget Sound populations. *See* Parts III.A.1, III.B.3 & III.C.1 above. Given these constraints, NMFS properly analyzed whether the RMP would allow populations to reach optimum levels under current conditions and allow for increased abundance as habitat conditions improve. In so doing, NMFS utilized – and did not ignore – the best available science.

---

[10] In promulgating the Tribal plan limit, pursuant to which NMFS was to make its Limit 6 determination, NMFS stated explicitly it would determine whether a plan reduced the likelihood of survival and recovery "in the context of the *operative environmental conditions* at the local (site-specific) and ESU levels." 65 Fed. Reg. at 42483 (emphasis added); *see* Part III.A.2 above.

Appellants do not address current habitat conditions or the constraints they place on recovery. They do not address, and provide no basis for questioning, NMFS' findings that its RERs are "conservative" and the RMP provides "a natural rebuilding potential" as habitat conditions improve. Although they predict NMFS' rates will "simply perpetuate[] the currently depressed population levels," allowing only "marginal increases . . . in spawner escapement," Br. at 29-30, 38, appellants cite nothing in the record to support these predictions or refute NMFS' (and the co-managers') analyses. Mere disagreement with an agency's reasoned scientific judgment provides no basis for overturning its decision. *See, e.g., The Lands Council,* 537 F.3d at 993.

Appellants assert this case involves "exactly the sort of minor, incremental change" rejected in two Columbia River habitat cases. Br. at 30-31. However, whatever might be said about efforts to improve *habitat*, changes in *fisheries* management have been substantial. Fisheries managers have (among other things) re-focused management on natural stocks, eliminated directed fisheries, adopted weak-stock management procedures, and dramatically reduced harvest rates, measures that contributed to stable or increasing escapement trends for *every* Puget Sound population. ER 2:130, 132 (Table 9).

2. Regional Impacts.

Appellants assert NMFS found anticipated harvest rates under the RMP exceed NMFS' RERs for certain populations, including both populations in the Georgia Strait region (North Fork and South Fork Nooksack River) and one of two populations in the Hood Canal region (Mid-Hood Canal Rivers). Br. at 33. Appellants claim this means the RMP will reduce the likelihood of rebuilding these populations and, given the TRT recommendation that an ESU-wide recovery scenario include two-to-four viable populations in each region, will also "appreciably reduce the likelihood of recovery [of the ESU], in violation of the ESA." *Id.* at 33-34. Appellants allege NMFS "papered over [these] shortcomings" with "empty conclusions," ignoring the best available science. *Id.* at 34, 38. We address each region in turn.

a. Georgia Strait.

NMFS found that, compared to its own "conservative and risk averse" RERs (*see* Part III.C.2 above), the total anticipated exploitation rates on Nooksack River chinook in Alaskan, Canadian and southern U.S. fisheries would decrease the probability that abundance would meet or exceed NMFS' rebuilding threshold at the end of a 25-year simulation by 6

percentage points. ER 2:154.[11] When NMFS modeled the effects of southern U.S. fisheries alone – *i.e.,* fisheries subject to the RMP – it found only a 2 percentage point decrease. ER 2:155.

NMFS did not "paper[] over" these findings. Taking into account the TRT's recommendation, NMFS relied on four factors to conclude these impacts would not "appreciably reduce the likelihood" of ESU-wide recovery. ER 2:130-33, 153-55, 171-73. Specifically, NMFS found: (1) both Nooksack River populations had exhibited increasing escapement trends since listing; (2) the Kendall Creek hatchery program buffered risks to the natural-origin North Fork population; (3) the anticipated exploitation rate in fisheries governed by the RMP was low; and (4) past harvest constraints had limited effect on increasing escapement of returning natural-origin fish when compared with the return of hatchery-origin fish. *Id.*

Appellants disregard these findings and assert NMFS relied on a "qualitative justification" that "contradicted its own scientific analysis." Br. at 38. In fact, NMFS relied on empirical, scientific evidence (escapement trends, contributions of hatchery fish, exploitation rates under the RMP and

---

[11] This does not mean abundance levels will not meet or exceed the threshold in the meantime. Noting "[i]ncreased escapement of natural-origin fish into the Nooksack River in recent years," NMFS stated escapement may "be stable or even trend upward toward or above the optimum level associated with current habitat conditions." ER 2:172.

the effects of past harvest constraints) to inform its conclusion that the small decrease in the probability of meeting or exceeding NMFS' thresholds in this region did not amount to an "appreciable reduction" in the likelihood of ESU recovery. This record does not suggest NMFS made a "clear error of judgment" that would render its decision arbitrary and capricious. *See The Lands Council,* 537 F.3d at 993.

b. Hood Canal.

Contrary to appellants' argument, NMFS did not develop an RER for the Mid-Hood Canal Rivers population, and thus did not find anticipated harvest rates under the RMP would exceed NMFS' rate. *See, e.g.,* ER 2:151. Moreover, because NMFS' upper threshold for this population was based on generic guidance from the VSP Paper, NMFS made no finding it could be achieved under current habitat conditions. *See* SER 70. The Recovery Plan discusses substantial evidence that problems in Mid-Hood Canal are the result of severely degraded habitat and Canadian harvests, not the RMP's "severely reduced fisheries." SER 209-10.

NMFS expressed concern about the low abundance and spatial distribution of this population, but did not find impacts from the RMP would appreciably reduce the likelihood of ESU recovery. ER 2:164-66, 177-79. It relied on six factors in reaching this conclusion: (1) the total abundance

status of the population, with the most likely anticipated escapement under the RMP exceeding 500 fish; (2) an increasing escapement trend since listing; (3) the likelihood that further restrictions on SUS fisheries would have limited beneficial effects, especially for the weakest spawning aggregations (only two and three fish, respectively); (4) annual monitoring and evaluation actions in the RMP; (5) hatchery-origin production on the Hamma Hamma River, which could buffer demographic risks; and (6) genetic similarity between the population and those in the Skokomish River and South Sound region, which could serve as reserves. *Id.*

Again, appellants disregard the factors on which NMFS relied, and their claim that NMFS contradicted its own exploitation rate analysis, Br. at 38, is simply wrong (since NMFS did not develop an RER for this population). Accordingly, appellants provide no basis on which to set aside NMFS' decision. *See The Lands Council,* 537 F.3d at 993.

B. NMFS Properly Applied Criterion B.

NMFS was required to (and did) take comment on the Limit 4 criteria before making its Limit 6 determination. *See* Parts III.A.2 & III.C above. Appellants argue NMFS permitted excessive harvests in violation of Criterion B because: (1) NMFS classified certain populations as above their upper thresholds, even though their current abundance is less than the TRT

planning ranges; (2) NMFS anticipated harvest rates in excess of 50% on five of these populations; and (3) such harvest rates "certainly must slow progress toward viability." Br. at 42. In the district court, appellants asserted Criterion B required the use of the TRT ranges to determine "viability" status but did not make the remainder of this argument. We address the entire argument here.

First, appellants' premise that Criterion B required fisheries management plans to define viability in terms of abundance targets for populations under vastly improved habitat conditions is not supported by the 4(d) Rule. Criterion B requires the use of the concept of viable population thresholds as defined in the VSP Paper, but does not state how that concept should be applied to populations under severely degraded habitat conditions. NMFS' contemporaneous interpretation of how to do so, as set forth in the RAP, relied on the VSP Paper (and was consistent with its statement that populations harvested at MSY are, by definition, sustainable). *See* Part III.A.3 above. NMFS' consistent interpretation of its own rule is entitled to considerable deference. *See, e.g, Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994); *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-51 (1991).

Second, for one of the populations appellants identify, Upper Skagit, the recent average escapement (10,144) was well *above* the recovery target at high productivity (5,380). ER 2:131; SER 208; *see* Part III.A.4 above. Appellants' suggestion that this population should be classified as below its viable threshold apparently rests on the TRT target for *equilibrium* spawner abundance. *See* ER 2:36; SER 208. However, that metric was used by the TRT solely as a convenient means of comparing model results. *See* Part III.A.4 above. Because it represents a point on the spawner-recruit curve at which each spawner produces only one recruit, it can only be achieved by eliminating virtually all harvest. *Id.* There is nothing in the 4(d) Rule, VSP Paper, or TRT guidance that suggests this is an appropriate threshold for fisheries management. *Id.* It would render the fisheries limits in the 4(d) Rule meaningless, since no fisheries could be authorized.[12]

---

[12] Appellants assert "the fact that there are populations above what NMFS claims is the current carrying capacity of the habitat is an indictment of NMFS' methods," because it proves "habitat is more productive than NFMS has acknowledged" and indicates "harvest is holding back recovery." Br. at 43. However, NMFS' upper thresholds are *not* estimates of current carrying capacity (*i.e.*, equilibrium spawner abundance), but of current MSY escapement (optimum productivity). *See* Part III.C.1 above. As discussed above, the central goal of the RMP is to restrain harvests so as to *exceed* MSY escapements. *See* Part III.B.2.a above. That the co-managers are succeeding is a vindication of that approach, not an indictment of it.

Third, regardless of a population's viability classification, NMFS conducted a risk analysis to determine whether implementation of the RMP would appreciably slow rebuilding for each population (the Criterion B standard for populations between their viable and critical thresholds, *i.e.,* the very standard appellants claim is applicable here). *See* ER 2:150-69; *see also* Part III.A.2 above. For the populations appellants identify, NMFS found: (1) the anticipated exploitation rate for Upper Skagit is less than NMFS' RER, ER 2:155; (2) the anticipated exploitation rate for Lower Skagit exceeds NMFS' RER and represents an elevated risk for rebuilding,[13] ER 2:155, 158, 173-74, 181; (3) the Green River escapement goal will be achieved continually under the RMP, exceeding NMFS' estimate of MSY escapement, ER 2:160-61; (4) the Nisqually escapement goal, representing optimum productivity under current conditions, also will be achieved continually, ER 2:162; and (5) the most likely anticipated escapement to the Puyallup River is well above the VSP-derived viable threshold, ER 2:168.

Based on these and related findings, NMFS found implementation of the RMP would meet its standards for rebuilding each of these populations except Lower Skagit. ER 2:155, 160-62, 168. As to Lower Skagit, NMFS found the elevated risk for rebuilding did not appreciably reduce the

[13] NMFS noted, however, that its anticipated exploitation rate for Skagit summer/fall populations was "likely [an] overestimate." ER 2:119, 121 n.2.

likelihood of ESU recovery, because: (1) the Lower Skagit population is one of ten in the North Puget Sound region; (2) the RMP would contribute to rebuilding seven of those populations; (3) the life history and run timing of the three remaining populations are similar to the other seven; and (4) two of the at-risk populations (including Lower Skagit) were above their "identified viable thresholds" (*i.e.,* current MSY escapement), and all three had increasing escapement trends. ER 2:175, 181.

Appellants again reject NMFS' conclusions, but provide no support for their position. They cite nothing in the record to support their claim that harvest rates in excess of 50 percent "certainly must slow progress toward viability." Br. at 42. And, their unsupported claim that NMFS "approved managing [these populations] to maintain an estimate of their current, at-risk levels indefinitely," *id.,* ignores NMFS' explanation that, by maintaining populations at or above their optimum productivity under current conditions, the RMP will enable populations to grow as habitat conditions and productivity improve. *See* Part III.C.1 & 2 above.

Finally, appellants claim NMFS' approach "effectively insulates fisheries from *contributing*" to recovery. Br. at 44 (emphasis added). This claim misstates the applicable legal standard and is factually incorrect. Given significant reductions in exploitation rates, which have resulted in

stable or increasing escapements, and NMFS' finding that the RMP provides additional, natural rebuilding potential, this claim provides no basis for overturning NMFS' determination that the RMP will not *appreciably reduce* the likelihood of recovery.

V. CONCLUSION.

The district court's judgment upholding NMFS' determination should be affirmed.

Respectfully submitted,

LAW OFFICES OF LAUREN P. RASMUSSEN, PLLC

Lauren Rasmussen by MDS

Lauren Rasmussen
Counsel for JAMESTOWN & PORT GAMBLE S'KLALLAM INDIAN TRIBES

LOWER ELWHA KLALLAM TRIBE

Stephen Suagee by MDS

Stephen Suagee

RAAS JOHNSON & STUEN, P.S.

Daniel Raas by MDS

Daniel Raas
Counsel for LUMMI NATION

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM

Marc Slonim

Marc Slonim
Counsel for MAKAH TRIBE

MUCKLESHOOT INDIAN TRIBE

Alan Stay by MDS

Alan Stay

NISQUALLY INDIAN TRIBE

Bill Tobin by MDS

Bill Tobin

NOOKSACK INDIAN TRIBE

Edward Wurtz by MDS

Edward Wurtz

PUYALLUP TRIBE OF INDIANS

Samuel Stiltner by MDS

Samuel Stiltner

SAUK-SUIATTLE INDIAN TRIBE

Regina Hovet by MDS

Regina Hovet

SKOKOMISH INDIAN TRIBE

Lori Nies by MDS

Lori Nies

SWINOMISH INDIAN TRIBAL COMMUNITY

Alix Foster by MDS

Alix Foster

MORISSET, SCHLOSSER, & JOZWIAK

Mason Morisset by MDS

Mason Morisset
Counsel for TULALIP TRIBES

ROBERT M. MCKENNA
ATTORNEY GENERAL

Michael Grossman by MDS

Michael Grossman
Counsel for WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

CERTIFICATE OF COMPLAINCE

CIRCUIT FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-35439.

I certify that:

4. Amicus Briefs.

Pursuant to Fed.R.App.P. 29(d) and 9th Cir.R. 32-1, the foregoing amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dec. 5, 2008
Date

Marc Slonim
Marc Slonim, Attorney for Makah Indian Tribe

CERTIFICATE OF FILING AND SERVICE

I certify that on December 8th, 2008, I filed the foregoing amicus brief by dispatching the original and 15 copies to Federal Express for delivery to the clerk within three calendar days, and served the brief by delivering two copies to the following counsel in the manner indicated:

Svend A. Brandt-Erichsen
MARTEN LAW GROUP
1191 Second Ave., Suite 2200
Seattle, WA 98101
(206) 292-2600
Via Messenger

Ronald J. Tenpas
Assistant Attorney General
Bridget McNeil
Ellen J. Durkee
Environmental & Natural Resources Division
U.S. Department of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
(202) 514-4426
Via Express Mail

Chris McNulty
Jean Rice
NOAA Office of General Counsel
7600 Sand Point Way N.E.
Seattle, WA 98115-6349
(206) 526-6077
Via First Class Mail

Dawn E. Rochon, Legal Assistant