



Department of Energy

Bonneville Power Administration
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ENVIRONMENT, FISH AND WILDLIFE

March 15, 2010

In reply refer to: KEWL-4

Michelle Walker
U.S. Army Corps of Engineers
Regulatory Branch
P.O.Box 3755
Seattle, Washington 98124

Re: The “Independent Utility” of Chief Joseph Hatchery and the Okanogan Weir Projects; Scope of NEPA Review

Dear Ms. Walker:

The Confederated Tribes of the Colville Reservation (“Colville Tribes” or “Tribes”) is proposing to install and operate a weir on the Okanogan River near Malott, WA. The U.S. Army Corps of Engineers has asked whether the Okanogan weir being proposed by the Tribes and funded by the Bonneville Power Administration (BPA) has “independent utility” on its own, or is in fact part of the Chief Joseph Hatchery Program (“CJHP”).

I. Introduction

The weir has independent utility without the hatchery, and the hatchery has independent utility without the weir. Thus, the weir is a separate, stand-alone project. The weir is an important tool that enables status/trend monitoring of fish populations, evaluating the effectiveness of mitigation actions, managing escapement of fish to the spawning grounds, and selective harvest, and as such, would proceed to construction with or without implementation of the CJHP. When the weir becomes a fully developed proposed action, BPA will examine that proposal under NEPA at that time.

II. History of the Okanogan Weir Concept

The idea of the Okanogan weir began in 2004 as part of the Colville Tribes’ Okanogan Basin Monitoring and Evaluation Program (“OBMEP”). The weir’s purpose was to allow for the collection of salmon and steelhead population assessment data and to evaluate effectiveness of mitigation actions in the Okanogan sub-basin. A consultant’s report was submitted to the Tribes in June 2006 reviewing the efficacy of the weir concept as a tool for data collection.¹

¹ Nass et al., 2006. A Conceptual Proposal for a Salmon Enumeration Facility on the Okanogan River. Prepared for the Confederated Tribes of the Colville Reservation Fish and Wildlife Department.

The purpose of the weir was expanded in 2007 as part of the Tribes' Selective Fishing Program, a separate project from the Chief Joseph Hatchery project, and subsequently included in the Tribes' Columbia Basin Fish Accord. The Colville Tribes desired to harvest Chinook salmon originating from Chelan County Public Utility District's ("Chelan PUD") Similkameen Pond hatchery mitigation program while releasing wild Chinook unharmed. Also, with sockeye salmon runs increasing dramatically in the past few years, a weir was thought to be an effective means of monitoring, evaluating, harvesting, and passing this species. Since the weir could be an effective means of achieving the Tribes' selective fishing objectives, it could be funded by BPA under the Tribes' Selective Fishing Program, separate from the CJHP. Another consultant's report was submitted to the Colville Tribes in May 2008 (Evaluation of Selective/Live Capture Gear) that evaluated the weir concept as a tool for both OBMEP data collection and selective fishing. Consultants for the Colville Tribes continued to study and refine the weir concept and design as a selective fishing tool into early 2009.

Also in 2008, the Columbia Basin Hatchery Scientific Review Group ("HSRG") evaluated Chelan PUD's Similkameen Pond Program and the Okanogan River population of summer/fall Chinook. That independent science body recommended additional selective fishing of hatchery salmon as a means to reduce the proportion of existing hatchery-origin salmon in the natural escapement in order to increase the viability of the wild population.² The HSRG also recommended that the summer/fall Chinook broodstock for the Similkameen Pond Program and the future CJHP be collected only from the local Okanogan River population and not at Wells Dam as is presently done.³ These recommendations led to consideration of the expanded utility of the weir for collecting broodstock and reducing hatchery-origin spawners in addition to the currently identified monitoring and evaluation and selective harvest purposes. The Colville Tribes plan to collect CJHP broodstock at the hatchery using other live-capture, selective fishing gears. NOAA Fisheries issued its biological opinion based on these live-capture, selective fishing gears only.⁴ While the weir would offer another option for collecting CJHP broodstock per the HSRG recommendations, the Chief Joseph Hatchery project does not need the weir to collect broodstock or monitor hatchery impacts.

Finally, the Independent Scientific Review Panel ("ISRP") and Northwest Power and Conservation Council in their 2009 final reviews of CJHP⁵ encouraged consideration of the possible use of the weir as a means for the Colville Tribes to more effectively harvest CJHP hatchery-produced summer/fall Chinook. Both the HSRG and ISRP recommendations are science-based policy *recommendations*, not strict legal *requirements* made applicable by statute or administrative rule.

III. CEQ Administrative Rules and Case Law Regarding the Scope of NEPA Review

CEQ's regulations prescribe the scope of the range of actions and alternatives to consider within a single environmental assessment or environmental impact statement ("EIS") required by the

² Hatchery Scientific Review Group, 2009. Review and Recommendations, Okanogan Summer Chinook Population and Related Hatchery Programs.

³ *Ibid.*

⁴ Available at http://www.efw.bpa.gov/environmental_services/Document_Library/Chief_Joseph/

⁵ Available at <http://www.nwcouncil.org/library/isrp/isrp2009-12.pdf> (last visited March 8, 2010).

National Environmental Policy Act (“NEPA”).⁶ Those regulations require that “[t]o determine the scope of environmental impact statements, agencies shall consider 3 types of actions;” connected actions, cumulative actions, and similar actions.⁷ Accordingly, agencies must consider multiple actions in a single NEPA review if the actions are either “connected” or “cumulative.” Likewise, an agency must consider “similar actions” in a single NEPA review “when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives is to treat them in a single [EIS].”⁸ For the reasons stated below, the Okanogan weir and CJHP projects need not be considered together in one EIS. Moreover, both an “independent utility analysis” and related Ninth Circuit case law support this conclusion.

CEQ says connected actions “[a]utomatically trigger other actions which may require an [EIS];” “[c]annot or will not proceed unless other actions are taken previously or simultaneously;” or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.”⁹ As the history of and conceptual proposal for the Okanogan weir demonstrate, the weir was originally conceived as a monitoring and evaluation tool and later as selective harvest tool completely separate from and independent of the CJHP. Later, the weir was considered a useful tool for managing the proportion of hatchery fish currently in production onto the natural environment. Likewise, the CJHP was proposed independently of the weir with subsequent suggestion that the weir could be complementary to other tools associated with the CJHP. There has never been any suggestion that the CJHP triggers or otherwise necessitates construction of the weir. Instead, there have been only science-based policy recommendations that the weir be used as a “best-practices” tool for the CJHP—in addition to the weir’s other (independent) functions. As a result, the CJHP and Okanogan weir are not “connected” actions under NEPA.

Likewise, the Okanogan weir and CJHP are not “cumulative actions” within the meaning of the CEQ rules. To be “cumulative,” actions must “have cumulatively significant impacts...”¹⁰ The term “significantly” require agencies to consider both “context” and “intensity.”¹¹

Regarding the “context” prong of the significance inquiry, the hatchery and weir share context in locality: both could affect fish migrating in the Okanogan River because each will capture fish for monitoring, broodstock, or harvest. If the weir gets built, it may replace or supplement one of the other live capture methods the Tribes use for hatchery purposes, but only if using the weir provides greater benefits—or fewer adverse impacts over currently planned live capture methods. Consequently, BPA and the Tribes expect that cumulative impacts from the hatchery and weir will probably be equal to or less than the impacts of the hatchery alone. In any event the NEPA analysis for the weir will disclose the full extent of the cumulative effects once they are reasonably foreseeable.

⁶ See 40 C.F.R. § 1508.25.

⁷ *Ibid.*

⁸ 40 C.F.R. § 1508.25(a)(3).

⁹ 40 C.F.R. §§ 1508.25(a)(1)(i)–(iii).

¹⁰ 40 C.F.R. § 1508.25(a)(2).

¹¹ 40 C.F.R. § 1508.27.

Regarding the “intensity” prong of the significance inquiry, CEQ considers “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” Here, the EIS shows the overall effects from operating the hatchery will benefit the targeted salmon species and likely have few adverse effects on non-targeted resources.¹² Moreover, any cumulative impacts are unlikely because in its record of decision for the hatchery BPA has committed to appropriate mitigation actions that avoid and mitigate the adverse impacts from live capture, if any. While the possible impacts of the Okanogan weir remain largely unknown, given that both it and the and the CJHP project are intended to benefit the environment, BPA and the Tribe think the two projects cannot reasonably be said to be “individually insignificant but cumulatively significant” and therefore would not trigger the need to analyze them together in one NEPA process.

Finally, the Okanogan weir and CJHP are not “similar actions” under CEQ regulations. At the time the CJHP NEPA analysis was conducted, and for that matter even today, the Okanogan weir was not sufficiently developed in either concept or planning to be considered a “reasonably foreseeable” proposed agency action. Moreover, CEQ requires agencies to consider such projects only “when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives is to treat them in a single [EIS].” As mentioned above, because the environmental impacts of the proposed Okanogan weir are largely still unknown and likely very different in character, there is nothing to recommend or require treating the two projects together in a single NEPA process.

Case law also supports BPA and the Colville Tribes’ position that the CJHP and Okanogan weir are independent for the purpose of NEPA analysis. First, the U.S. Supreme Court has stated that “determination of the extent and effect of [cumulative impact] factors...is a task assigned to the special competency of the appropriate agencies” and is therefore entitled to considerable deference.¹³ The Ninth Circuit has recognized that “NEPA does not require the government to do the impractical.”¹⁴ Here because the final EIS for the CJHP was completed in November of 2009 and the Okanogan weir is still in the process of conceptual development, consolidation of both projects into a single NEPA process would be impractical and unnecessarily burdensome. In addition, if and when the weir finally ripens to a full-fledged proposed action, the NEPA analysis for it will consider the cumulative impacts of the weir with the hatchery. At this time, BPA lacks the information needed to meaningfully anticipate what cumulative impacts, if any, would arise with the weir.

¹² Cite appropriate sections in the FEIS.

¹³ *Kleppe v. Sierra Club*, 427 U.S. 390, 414, 96 S.Ct. 2718, 2732, 49 L.Ed.2d 576 (1976) (holding that the Department of Interior did not need to complete a region-wide EIS for all potential mining projects in the northern Great Plains area). *See also Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985).

¹⁴ *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 764 (9th Cir. 1996).

Perhaps most significantly, the Ninth Circuit has developed an “independent utility” test to assess whether an agency must consider multiple actions in a single NEPA review process.¹⁵ Under this test, where “two projects would have taken place with or without the other,” each project has “independent utility” and need not be consolidated into a single NEPA review.¹⁶ Here, the history of the Okanogan weir concept and the CJHP show that each project would take place without the other and need not be consolidated in a single NEPA analysis. Accordingly, BPA and the Colville Tribes continue to pursue the multi-purpose weir concept as distinct, independent project for which a separate NEPA analysis would be performed when the weir proposal is fully developed.

IV. Conclusion

In summary, applying CEQ NEPA regulations and case law to the present circumstances shows that the CJHP and Okanogan weir each serve distinct purposes and function independently of one another. As a result, each may undergo independent NEPA analysis, and the CJHP final EIS need not speculate about potential impacts from the weir should it be developed. BPA and the Colville Tribes consider the Okanogan weir and the CJHP distinct and independent for the purposes of project planning and NEPA, budgeting, contracting, and permitting processes. Should you have any further questions or concerns, please do not hesitate to contact either of us for further discussion.

Sincerely,

/s/ William C. Maslen

/s/ Joe Peone

William C. Maslen
Director, Fish & Wildlife Division
Bonneville Power Administration

Joe Peone
Fish and Wildlife Department
Confederated Tribes of the Colville Reservation

Enclosures: Nass et al., 2006. A Conceptual Proposal for a Salmon Enumeration Facility on the Okanogan River. Prepared for the Confederated Tribes of the Colville Reservation Fish and Wildlife Department; Hatchery Scientific Review Group, 2009. Review and Recommendations, Okanogan Summer Chinook Population and Related Hatchery Programs.

¹⁵ See e.g. *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) (holding that the Corps was not required to consider the environmental effects of all three phases of a development project in a single NEPA process).

¹⁶ *Id.* at 1118 quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998).