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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civil No. 01-CV-640-RE

**STATEMENT OF FACTS IN SUPPORT
OF FEDERAL DEFENDANTS'
SUPPLEMENTAL CROSS MOTION
FOR SUMMARY JUDGMENT¹**

¹ The Court's review is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and is limited to the administrative records submitted and authenticated by NOAA, the Bureau of Reclamation, and the Army Corps of Engineers. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 733-734 (1985). While Federal Defendants submit this Statement of Facts in compliance with the Local Rules, this statement has limited applicability here, as the Court's decision is limited to an application of the appropriate standard of review under the APA to the administrative records. *Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008).

In accordance with Local Rule 56.1, Federal Defendants submit this Statement of Facts in Support of Federal Defendants' Supplemental Cross Motion for Summary Judgment, as follows:

1. Following issuance of the 2008 Biological Opinion ("BiOp"), State, Tribal, local, and federal parties have continued to work in partnership to protect and restore stocks of salmon and steelhead throughout the Columbia River basin. NOAA BB.376 at 1. For example, Bonneville Power Administration ("BPA") funded 20-year agreements to reopen ten miles of high-quality spring-fed creek habitat previously impassable to fish in the Pahsimeroi River basin in central Idaho. *Id.* at 14. Nearly 30 cfs of stream flows were restored, and biologists already are reporting increased adult returns and redds to this newly available habitat. *Id.* at 14; BRS015615 (before and after diagrams); Figure 1.



2. BPA, the Fish and Wildlife Service ("FWS"), Oregon Department of Transportation ("ODT"), Oregon Department of Fish and Wildlife ("ODFW"), Oregon Watershed Enhancement Board ("OWEB"), the Nature Conservancy, and the Confederated Tribes of the Warm Springs Reservation worked in partnership, at a cost of approximately \$300,000, to reroute Big Boulder Creek back to its historic stream channel and installed large woody debris to improve fish habitat, thereby restoring stream function and increasing habitat connectivity, flood plain connection, and riparian growth potential. BRS006622 at 6627; Figure 2 (before); Figure 3 (after).

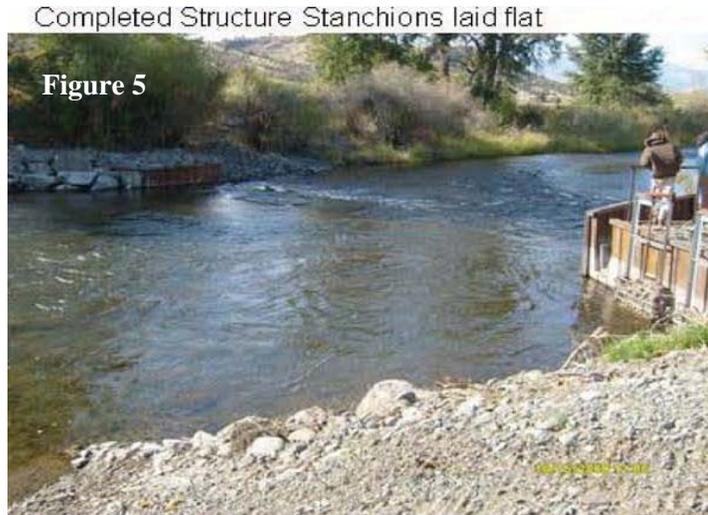
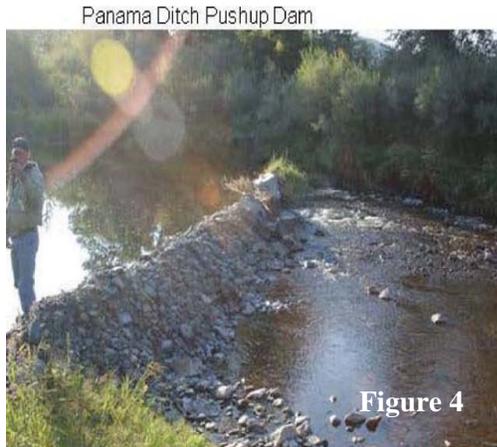
Existing Channel eroding steep hillside



New channel Spring 2009



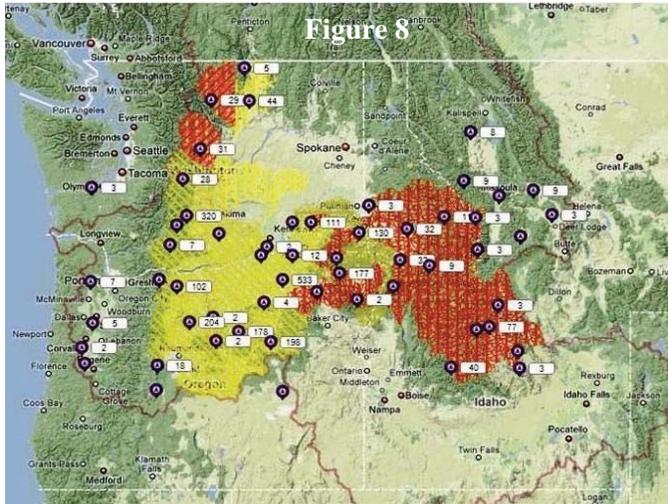
3. In 2008, the Grant Soil and Water Conservation District, FWS, BPA, and OWEB worked in partnership, at a cost of nearly \$131,000, to complete Panama Ditch Diversion project on the Upper John Day River. See BRS006622 at 6643 (project description). This project replaced a push-up dam with a lay-flat-stanchion dam and a dedicated fish passage channel through the dam, and the project improves passage for all life stages of salmonid populations. See Figure 4 (before); Figure 5 (after).



4. The North Fork Spruce Creek Bridge on the Lochsa River narrowed the stream channel and restricted access to upstream habitat. A bridge replacement project was funded by BPA and the U.S. Forest Service and implemented through contracts with the Nez Perce Tribe, and this project replaced the bridge with abutments placed well outside of the active stream channel in order to provide access to three miles of habitat for all life stages of fish. BB.376 at 15-16; Figure 6 (before); Figure 7 (after).



5. In combination, the Action Agencies have engaged in extensive tributary habitat restoration activities throughout the Columbia and Snake River Basins. See Figure 8 (NOAA



BB.367 at 12, depicting action agency funded habitat projects between 2005 and 2008). The historic Columbia Basin Fish

Accords bring even more funding and actions into the ambit of the tributary habitat restoration and rehabilitation program, see Figure 9 (Corps 181 at 5227, Accord project locations), increasing NOAA’s “confidence that habitat improvements over the term of the BiOp will meet or exceed [the RPA’s] expectations for the affected populations,” 2010 BiOp, § 2, at 84; Appendix G.

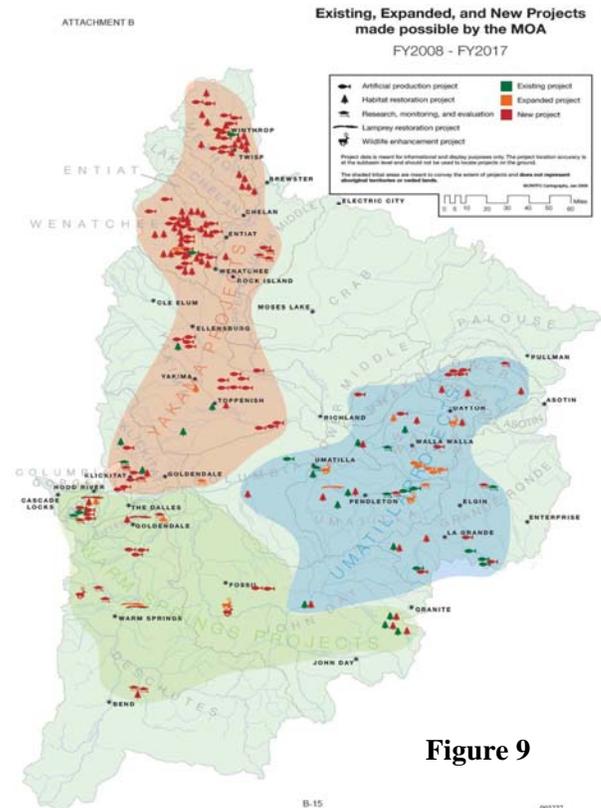


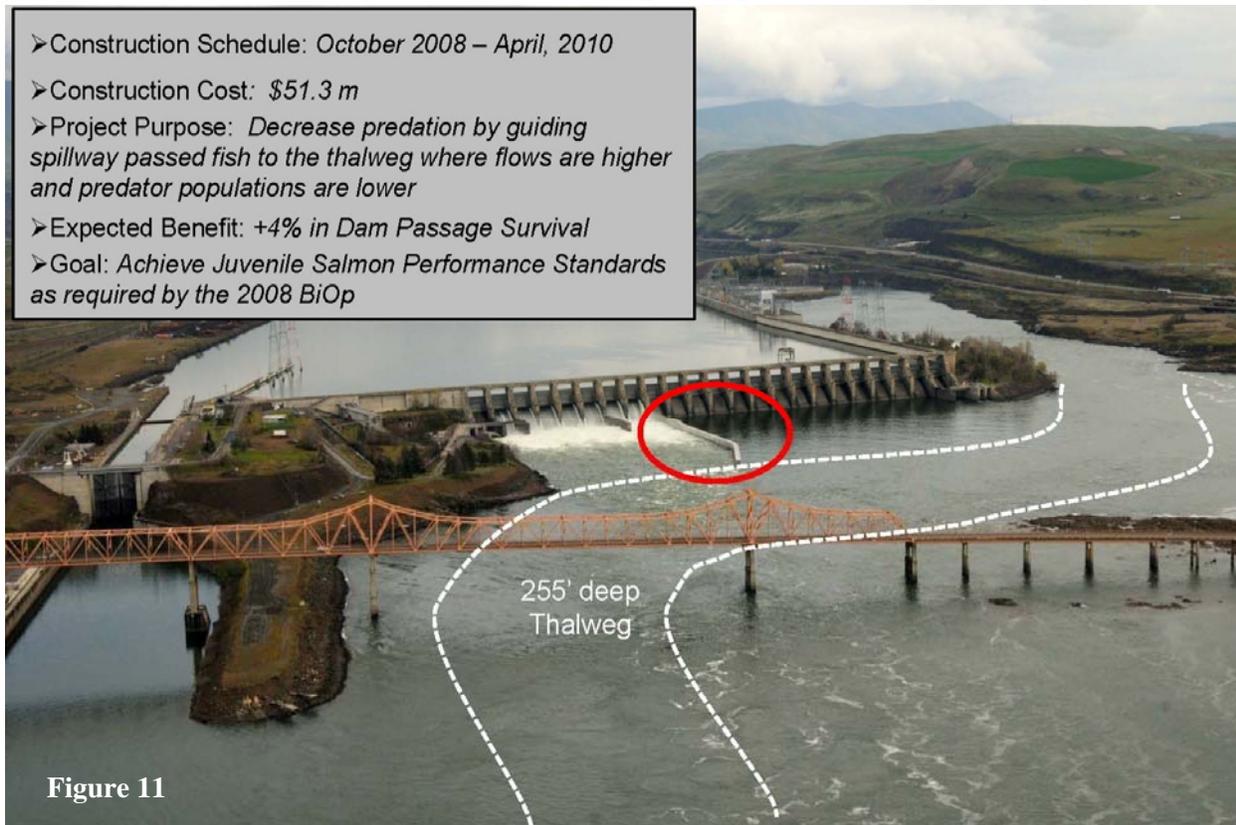
Figure 9

6. In the estuary, the Action Agencies expanded funding to implement on-the-ground projects to address biological priorities and key factors that limit fish survival in the estuary, including protecting high-quality, off-channel habitats, reducing invasive plants, and protecting and restoring riparian and wetland areas. NOAA BB.376 at 16 (completing eight projects, with another



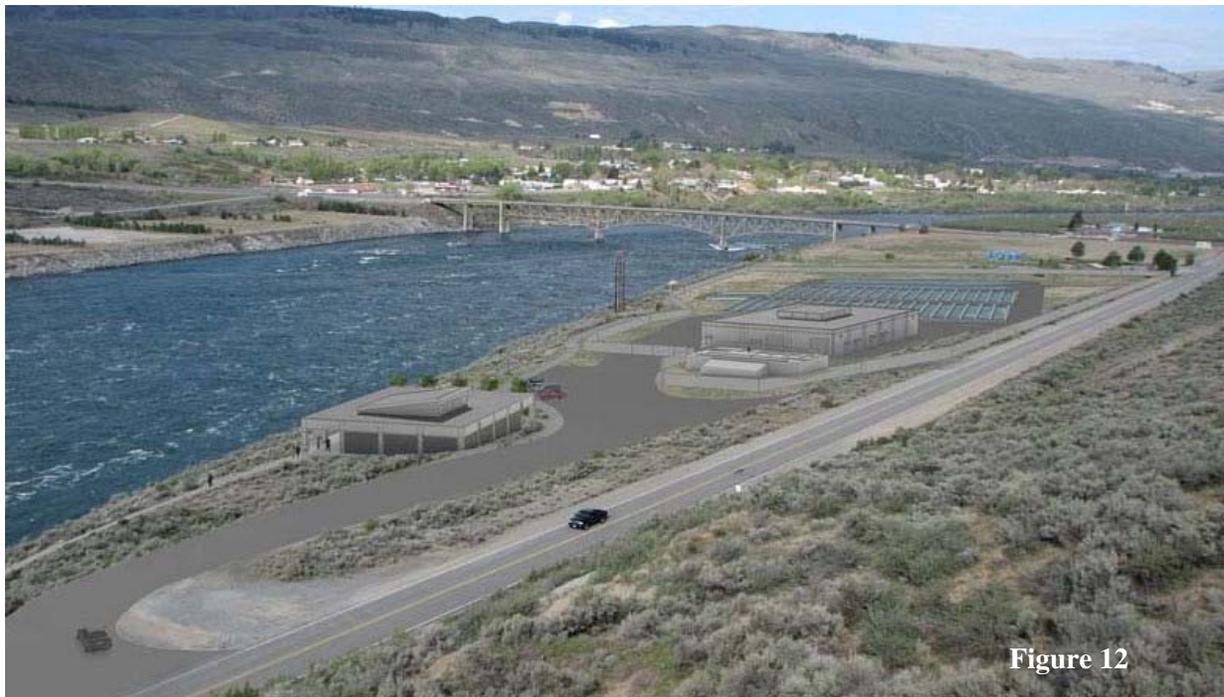
three in the planning and development phase). For example, the Action Agencies acquired Willow Grove, *see* Figure 10, thereby permanently protecting 304 acres of intertidal wetland habitat adjacent to the Columbia River downstream of Longview, Washington. NOAA BB.376 at 16. This property constitutes a critical intertidal wetland within the reach of the Columbia River and provides important rearing habitat for juvenile steelhead. *Id.* Long-term management of the site includes implementing a management plan to maintain and restore the habitat, including, *inter alia*, vegetation enhancement, control of invasive species, placement of large wood material, and enhancing fish access to the wetland complex. *Id.*

7. Like the tributary and estuary habitat projects, the agencies also are committed to ensuring that hydro performance standards are achieved. *See e.g.* Corps 009 at 1073. One recent example includes the Corps' construction of a \$51.3 million spillway at The Dalles Dam. *See* Figure 11; *see also* RPA 19 at 21-22 (specifying completion by 2010); Corps 1927 at 38228-38323 (Dalles Configuration and Operation Plan ("COP")). As explained in the COP, unless juveniles remain in the deepest channel (Thalweg), the probability of predator/prey encounters



increase. *Id.* at 38239. The Corps constructed a wall to channel spill from bays 8 and 9 so that juveniles will be directed into Thalweg and away from predators. *See id.* at 38383 (Fig. 2-2 graphic of The Dalles bathymetry); *id.* at 38244 (Fig. 3-2 pikeminnow distribution below The Dalles Dam). This recent construction, in combination with the other technological advancements such as Removable Spillway Weirs (“RSWs”), contributes significantly to achieving juvenile survival performance standards of 96% and 93% at the mainstem dams and has significantly decreased juvenile travel time to the estuary.

8. The Action Agencies also have partnered with the Colville Tribe to construct the Chief Joseph Hatchery. Under the Fish Accords, the Action Agencies have provided \$43 million to fund this new safety net hatchery that will ensure survival and recovery of Upper Columbia River (“UCR”) spring Chinook and UCR steelhead. 2008 Corps 394; Corps 005 at 454. This investment will allow for the reintroduction of UCR spring Chinook into the Okanogan Basin. Corps 1813 at 33855; Figure 12 (artist’s rendering of the Chief Joseph Hatchery).



Respectfully submitted: December 23, 2010.

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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 December 23, 2010, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by regular or overnight mail:

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