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Of Attorneys for Intervenor-Defendant, INLAND PORTS
AND NAVIGATION GROUP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION,
et al.,

Plaintiffs,

v.

**NATIONAL MARINE FISHERIES
SERVICE, et al.,**

Defendants.

And consolidated cases.

CIVIL NO. 01-0640-RE (Lead case)
CV 05-0023-RE
(Consolidated cases)

IPNG'S MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT

I. Introduction.

The Inland Ports and Navigation Group (IPNG) consists of public ports in Washington, Idaho and Oregon and members of the towboat and grain industries. IPNG represents the interests of commerce and navigation on the Columbia-Snake River system.

IPNG and its members recognize that throughout the long history of this case, every party has demonstrated a sincere interest in ensuring a healthy, sustainable and viable Columbia-Snake

River system. IPNG and its member ports and towboat and grain companies consistently have supported collaborative efforts that address all these interests through careful, science-based analysis that adheres to the Endangered Species Act and the cases interpreting this seminal law.

This collaboration is a credit to all parties involved, including those parties with which IPNG has not always agreed. The process employed in this case is becoming a model for other regions of the United States where multi-pronged species recovery affects federal, state, tribal and multiple-use stakeholders. This 2010 Biological Opinion (“BiOp”) and Adaptive Management Implementation Plan (“AMIP”) has been reviewed and supported by the nation’s top scientist, Dr. Jane Lubchenco, and creates a framework and structure which will lead to a healthier and more productive Columbia River System in which salmon returns continue to strengthen. Approving and implementing the 2010 BiOp will protect and enhance salmon in and along the Columbia-Snake Rivers and tributaries. And the BiOp’s adaptive management strategies are designed to resolve issues that arise over the life of the BiOp — including issues not contemplated today.

IPNG files this brief to oppose Plaintiffs’ and Intervenors’ dwindling points of contention with a sound and clearly defensible biological opinion—a biological opinion that not only meets, but exceeds in an unprecedented fashion, the important federal safeguards designed to protect species and navigation along the Columbia-Snake Rivers.

IPNG also joins the briefs and arguments filed by the Defendants and Defendant-Intervenors on this summary judgment.

II. The 2010 Biological Opinion Does Not Contravene the Flood Control Act of 1962.

Before addressing the Plaintiffs’ most recent motions, IPNG reiterates that its members’ interests are integrally tied to preserving the navigation channel in the Columbia and Snake Rivers. On October 24, 2008, IPNG responded to Plaintiffs’ earlier motion for summary judgment, and the points and authorities of that brief are incorporated herein. *See* Docket. No. 1552.

In that filing, IPNG reviewed the history for the original construction of the Columbia

and Snake River system to Lewiston, Idaho. In sum, while the Endangered Species Act has remained the central focus of the Court's evaluation of the Columbia River system, the Columbia and Snake Rivers are subject to a 14 foot deep by 250 foot wide navigational channel "at a minimum flow" that falls under the jurisdiction of the United States Army Corps of Engineers. *See* Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1193 (1962) (Flood Control Act of 1962).

As proposed, the 2010 BiOp will operate within the sideboards of this Congressionally mandated navigational channel. *See e.g., Am. Rivers, Inc. v. United States Army Corps of Engineers*, 421 F.3d 618, 630 (8th Cir. 2005) (recognizing the primacy of the Corps' non-discretionary statutory purpose to maintain operation of reservoir system consistent with ESA concerns). This is another example of how this BiOp successfully accounts for the many overlapping legal interests that are involved with this matter.

III. Dam Breaching is Neither a Rational nor Feasible Option for This Biological Opinion.

In its summary judgment motion, the Nez Perce again raise dam breaching as a "rational, feasible" option to include in the 2010 Biological Opinion. This "option," however, is neither rational nor feasible.

While IPNG acknowledges the historic and spiritual commitment to healthy and abundant salmon runs held by the Nez Perce Tribe, any assertions of legal and jurisdictional authority to breach the four lower Snake River is misplaced. Congress established and has funded the Snake River dams for decades. In fact, as of the date of the filing of this brief, the Corps, with funds appropriated by Congress, is replacing downstream gates to significantly extend the lives of three navigation locks, one on the Snake River and two on the Columbia River. Thus, Congress alone retains the authority to control the final destiny of the navigation channel and dams. The Biological Opinion, therefore, need not evaluate breaching as a Reasonable and Prudent Alternative because presently, it is not a viable option. *See* 50 C.F.R. § 402.02.

That aside, the Adaptive Management and Implementation Plan, at this Court's behest,

does include a reasoned and rational path for the study of dam breaching on the Columbia-Snake River. The March 2010 *Lower Snake River Fish Passage Improvement Study: Dam Breaching Update*¹ provides a firm and committed process by which the contingency of breaching the Snake River dams is to be considered. The Plan includes provisions for a full feasibility study, and studies of aquatic ecosystems including salmonids, bull trout, lamprey, resident fish and other organisms. It also contemplates engineering, hydrologic, economic, biological, cultural, and real estate studies, and compliance with related legal frameworks and public process requirements. The work is subject to a framework of analysis beyond the requirements of the ESA, and if initiated, establishes an aggressive schedule for the work. In short, the AMIP provides a comprehensive, concrete and good faith deliverable to study the impacts of dam breaching on the Columbia-Snake Rivers while accounting for the myriad technical, legal, economic and environmental contingencies associated with such a massive undertaking.²

IV. Adaptive Management is An Accepted and Reasonable Option for the Columbia-Snake Rivers.

Despite the Plaintiffs' objections to the AMIP and the Corps' plan to employ adaptive management to protect salmonid habitat, adaptive management is an established and approved method for addressing environmental conditions that are variable and organic. *See e.g., Missouri v. United States Army Corps of Engineers*, 516 F.3d 688 (8th Cir. 2008) (upholding adaptive management plan as an acceptable "process to give the Corps flexibility to adjust . . ."); *W. Org. of Res. Councils v. BLM*, 591 F. Supp. 2d 1206 (D. Wyo. 2008), *aff'd*, 608 F.3d 709 (10th Cir. 2010); *Westlands Water Dist. v. United States DOI*, 376 F.3d 853, 870 (9th Cir. 2004).

¹ The Plan can be found at:
http://www.nww.usace.army.mil/amip/lrfrfp/report/plan_of_study_final_03_30_10.pdf

² IPNG notes that the Nez Perce do not appear to support the other Plaintiffs' arguments regarding the considerations of hydropower on climate change impacts. Hydropower unquestionably provides dramatically greater carbon reduction benefits than its feasible energy alternatives. And preserving the Columbia and Snake Rivers' function as a hydropower producing channel for commerce will maintain the ability to transport cargo by barge rather than by truck and rail, reducing carbon emissions in the Region. *See* Attachment A. In short, dam breaching would seriously erode initiatives in our Region that address the importance of climate change considerations in energy and transportation.

Plaintiffs object to the lack of specificity in the federal government's adaptive management plan. The Plaintiffs, however, fail to account for the significant hard commitments found in the AMIP. The federal government squarely addressed this Court's admonition to significantly commit funds, resources and specific alternatives to confront jeopardy and adverse modification. The federal government's adaptive management plan invokes specific, certain and implementable actions which are designed to *adapt* to specific conditions as warranted. This sort of judgment is well within the discretion and expertise of the Corps, where it rightfully belongs.

V. Conclusion.

This Biological Opinion demonstrates the largest commitment of funds for fish recovery in the history of the United States. It establishes a legally sound, science-based foundation for recovery efforts that will continue to enhance the record runs of salmon that the Columbia-Snake River System has experienced in 2010. It is the product of an unprecedented collaboration of sovereigns and stakeholders working both shoulder to shoulder and across the table from each other with the mutual objective of creating a healthy and viable Columbia River system for years to come.

IPNG, along with the United States, three Lower River Treaty Tribes, the States of Washington, Idaho and Montana, and the stakeholder Defendants in this case, strongly supports the Court's approval of the 2010 Biological Opinion.

Dated this 23rd day of December, 2010.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2010, I served the foregoing

IPNG's MEMORANDUM IN OPPOSITION TO PLAINTTS' SUPPLEMENTAL MOTION

FOR SUMMARY JUDGMENT, on the following parties listed below by mail:

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