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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff

v.

NATIONAL MARINE FISHERIES SERVICE,
et al.,

Defendants,

and

NORTHWEST RIVERPARTNERS, *et al.*,

Intervenor-Defendants.

Case No. 3:01-cv-00640-SI

**INLAND PORTS & NAVIGATION
GROUP'S MEMORANDUM IN
OPPOSITION TO MOTIONS 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, grain and forest products industries. IPNG represents the interests of commerce and navigation on the Columbia-Snake River system. Throughout this litigation, IPNG has supported efforts by the Action Agencies and state and tribal governments to protect listed salmon and steelhead species, while preserving the federally-authorized channel and locks for navigation from the mouth of the Columbia River to Lewiston, Idaho.

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 has supported collaborative solutions that address varied regional interests through careful, science-based analysis in concert with the Endangered Species Act.

The 2014 Biological Opinion (“Bi-Op”) reflects the continued, unprecedented commitment by federal, state, tribal and community stakeholders to protect and enhance salmon and steelhead habitat and recovery in the Columbia Basin, in harmony with the multifarious ecological, economic and aesthetic interests that the Columbia and Snake Rivers support.

As will be shown below, the Federal Columbia River Power System (“FCRPS”) has never been more amenable to protecting fish throughout their entire life cycle. The Motions for Summary Judgment filed by Plaintiffs (and the other parties opposing the Bi-Op), however, fail to acknowledge this undeniable fact. They focus on the peripheral and ignore the fundamental. Plaintiffs criticize minutia such as the Action Agencies’ use of “confidence intervals,” but the fact is that salmon and steelhead returns since 2009 have been the highest ever recorded in the entire history of the FCRPS, as shown in the graph on the following page:

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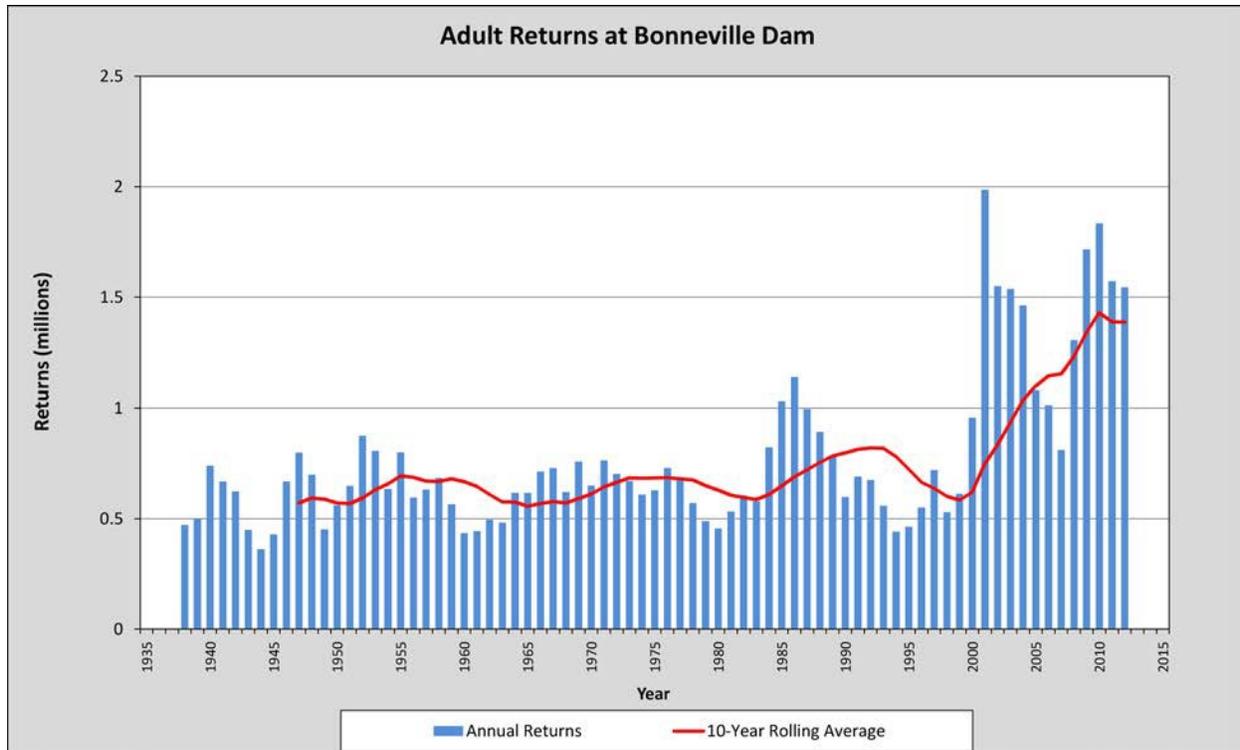


Figure 2. Adult and Jack Salmon/Steelhead Returns at Bonneville Dam, 1938 to 2012. Daytime counts only. Numbers include both ESA listed and unlisted hatchery and natural-origin fish. Harvest has varied over time. [Additional footnote material omitted.]¹

The life-cycle approach taken by the Action Agencies to protect salmon and steelhead on the Columbia and Snake Rivers is working. The 2014 Bi-Op, and the Reasonable Prudent Alternative (“RPA”) implemented by the Action Agencies, will continue the successful recovery efforts implemented thus far, while safeguarding other important uses and benefits required by law that the Columbia and Snake Rivers provide to the region.

IPNG joins the briefs and arguments filed by the Defendants and Defendant-Intervenors opposing summary judgment.

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¹ See 2013 Comprehensive Evaluation, Section 1, p. 17, Table 1 (BR00001720). IPNG recognizes that returns of some species, such as Coho, Chum and Pinks, have fluctuated in the past 10 years. See *id.*, p. 17, Table 2 (comparing 2012 returns of individual species to 10-year averages). But the aggregate returns for listed species in the FCRPS have unequivocally and substantially improved over the past 10 years, and the Bi-Op and RPA actions scheduled to continue through 2018 will continue these improvements for all species.

II. NAVIGATION AND COMMERCE ON THE COLUMBIA RIVER IS GOVERNED BY THE FLOOD CONTROL ACT OF 1962

In addition to serving as a vital corridor for salmon and steelhead migration, the Columbia and Snake Rivers also provide habitat for other fish and wildlife, water for public consumption and irrigation, and power for the Northwest. And, for more than 100 years, an efficiently functioning Columbia River channel has served as an irreplaceable navigation conduit for the export of manufactured goods and agricultural products throughout the world.

In 1899, Congress passed the Rivers and Harbors Act of 1899, which codified the importance of preserving and maintaining navigable waters in the United States for travel and commerce. That Act stated, in part, that “it shall not be lawful to . . . to alter or modify the course, location, condition, or capacity of . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.”² This law remains the same today.³

In the 1930s, Congress recognized the regional importance of protecting and expanding the Columbia and Snake Rivers for navigation. After completion of the Bonneville Lock and Dam in 1937, the United States Army Corps of Engineers (“Corps of Engineers”) issued a report addressing development of the Columbia and Snake Rivers to Lewiston, Idaho for slack water navigation, flood control and other purposes.⁴ In 1945, Congress authorized the extension of an inland navigation system on the Snake River into Idaho:

Snake River, Oregon, Washington and Idaho: The construction of such dams as are necessary, and open channel improvements **for purposes of providing slack water navigation and irrigation** in accordance with the plans submitted in House Document Numbered 704, Seventy-Fifth Congress, with such modifications as do not change the requirement to provide slack-water navigation as the Secretary of War may find advisable after consultation with the Secretary of the Interior and such other agencies as may be concerned⁵

² Rivers and Harbors Act of 1899, Section 10.

³ See 33 U.S.C. § 403.

⁴ H.R. 704, 75th Cong., 3d Sess. 8-11 (1938) (report of the Board of Engineers for Rivers and Harbors).

⁵ Rivers and Harbors Act of 1945, § 2, P.L. 14, 79th Cong., 1st Sess. (1945) (emphasis added).

Five years later, in partial response to the devastation caused by the Vanport Flood of May 1948, Congress passed the Rivers and Harbors Act of 1950. That Act authorized flood control projects throughout the Northwest, including the construction of dams at John Day and The Dalles.⁶ These projects were authorized “**for the benefit of navigation** and the control of destructive flood waters”⁷

In 1962, Congress passed the Flood Control Act of 1962 which amended all earlier acts establishing the dams on the Columbia and Snake Rivers, and specifically mandated that the Corps of Engineers establish a defined channel for navigation along the rivers:

[t]hat the depth and width of the authorized channel in the Columbia-Snake River barge navigation project shall be established as fourteen feet and two hundred and fifty feet, respectively, at minimum regulated flow.⁸

Thus, on the main stem of the Columbia and Snake Rivers, Congress has established a mandatory 14-by-250-foot channel “at minimum regulated flow” to support navigation.

IPNG’s members rely on the maintenance of this channel to ensure the unobstructed movement of commerce along the Columbia and Snake Rivers for the benefit of not only IPNG’s members, but for the entire regional economy. The 2014 BiOp continues the measures taken by the Action Agencies to operate and maintain the FRCPS for a wide variety of uses, including salmon and steelhead migration and habitat, while meeting Congress’s intent to ensure a channel for navigation on the Columbia and Snake Rivers.⁹

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⁶ See P.L. 81–516, § 204, p. 19 (1950).

⁷ *Id.* at § 204, p. 9 (emphasis added).

⁸ Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1193 (1962).

⁹ *Cf. Am. Rivers, Inc. v. United States Army Corps of Engineers*, 421 F.3d 618, 630 (8th Cir. 2005) (recognizing the primacy of the Corps of Engineers’ non-discretionary duty to maintain navigation and operate a dam and reservoir system consistent with ESA concerns under the Flood Control Act of 1944).

III. OVERHAUL OF THE FRCPS AND MAIN STEM RECOVERY ACHIEVEMENTS

Plaintiffs quote Judge Marsh from a 1994 opinion in which he commented that the FRCPS “literally cries out for a major overhaul.”¹⁰ Plaintiffs fail to acknowledge, however, that the system has, in fact, undergone a “major overhaul” since 1994. The 2014 Bi-Op and RPA reflect the unprecedented successes that have been achieved because of those overhaul efforts, and builds on them.

A. The All “H” Approach: the Problem and the Solution

The term “All H” describes the primary drivers affecting listed species in the Columbia Basin: hydro, habitat, hatcheries and harvest. For decades, the failure to balance all the “Hs” in the FRCPS resulted in serious declines in species survival rates.¹¹ Fish were harmed by the failure to manage the four Hs thoughtfully; but conscientiously incorporating the four Hs to benefit fish has reversed that problem. The 2008 FRCPS Bi-Op and its RPA relied on the four Hs as cornerstones to implement concrete actions to minimize the adverse effects of the operation of the FRCPS on listed species.¹²

The RPA actions focused on the lifecycle needs of listed salmon and steelhead¹³ while recognizing the FRCPS provides critical functions to the entire region and a serves millions of other users, both human and ecological. The Columbia-Snake River system provides flood control, habitat for fish and wildlife, power generation, water for consumption and irrigation, areas for recreational and aesthetic respite, and serve as the backbone for river commerce in the Northwest. The 2008 Bi-Op and RPA accounted for all these uses while employing a strategy

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¹⁰ Plaintiffs’ Summary Judgment Motion and Memorandum, p. 1 (*citing IDFG v. NMFS*, 850 F. Supp. 886, 900 (D. Or. 1994)).

¹¹ This is not to discount the affect that other human and environmental impediments have on fish, including overfishing, effects of non-native species, adverse ocean and climate conditions, mining, pollution, as well as impacts from outdated dams, poorly functioning levees, and water diversions. *See* 2013 Comprehensive Evaluation: Section 1, p. 16 (BR00001719). These and other factors led to the first listing of salmon under the Endangered Species Act in 1990.

¹² *See* Overview to the FRCPS CE and IP, p. 3 (BR00001275).

¹³ *See id.* at p. 6 (BR00001278).

that focused on the four Hs to protect and enhance salmon and steelhead survival and habitat. Those efforts are continued and expanded with the present Bi-Op.

B. Overhaul on the Main Stem

Pursuant to the 2008 Bi-Op, the Action Agencies have implemented hundreds of projects and strategies throughout the Columbia River basin to support listed species.¹⁴ These have included habitat protection and improvements in tributaries and estuaries, hatchery reforms, predator management and comprehensive research, monitoring and evaluations (“RME”) for every significant aspect affecting the lifecycles of salmon and steelhead (fish population status, hydro, tributary habitats, estuary and oceans, harvest, hatchery, and predation).¹⁵

IPNG’s members, however, are most familiar with the main stem. The main stem of the Columbia and Snake Rivers is the primary artery for navigation in the Northwest. Salmon and steelhead also migrate in the main stem, and navigate the system through turbines, bypass systems, spillways and weirs, or by collection and transport.¹⁶

Directing migrating fish to surface passage structures is a core strategy that has provided unprecedented success in allowing fish to safely pass by the eight main stem dams. These structures have transformed the means by which salmon and steelhead have historically navigated the system by creating more natural passage conditions, reducing passage delay, improving water quality, and making fish passage safer.¹⁷ The Action Agencies have primarily employed two types of surface passage structures to improve fish performance: spillway weirs and surface collectors.¹⁸

Spillway weirs (and other surface passage improvements) have resulted in significant benefits to fish passage in the system. The idea behind a spillway weir is simple, but has proved transformative. A spillway weir improves fish migration downriver greatly, utilizing the species’

¹⁴ 2013 Comprehensive Evaluation: Section 2 (BR00001819, *et seq.*).

¹⁵ *See generally* 2013 Comprehensive Evaluation, Section 1.

¹⁶ 2013 Comprehensive Evaluation: Section 1, p. 31 (BR00001734).

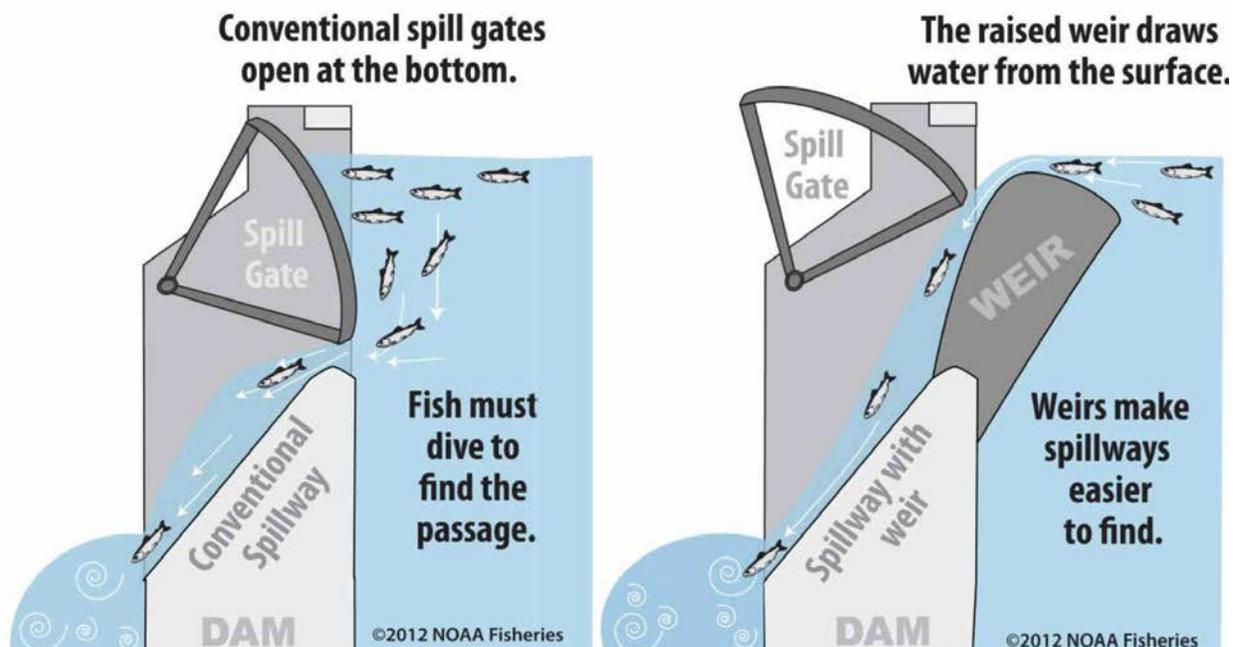
¹⁷ *Id.* at p. 41 (BR00001744).

¹⁸ *Id.*

natural passage instincts, which, in turn, improves survival, reduces passage time, and uses water more efficiently.¹⁹

Prior to the installation of the recent surface passage improvements, juvenile fish would have to dive down 40 or 50 feet from the water surface to access passage routes that would guide them through dam passage.²⁰ Juveniles typically travel in the upper 10 to 20 feet of the river,²¹ and the 40 or 50 foot descent obstructed their natural migratory pattern. But in 2001, the Corps of Engineers installed a spillway weir at the Lower Granite Dam. The weir provided easy and safe passage for migrating fish by eliminating the obstacle of having the fish search for available passage deep below the surface.

The following graphic²² demonstrates this concept:



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¹⁹ FCRPS System Improvements and Operations – A Progress Report, p. 8 (Sept. 2013) (NMFS003193).

²⁰ See 2013 Comprehensive Evaluation: Section 1, p. 41 (BR00001744).

²¹ *Id.*

²² FCRPS System Improvements and Operations – A Progress Report, p. 10, Figure 3 (Sept. 2013) (NMFS003195).

In 2003, the American Council of Engineering Companies awarded the Lower Granite Dam spillway weir the nation's top engineering achievement, the Grand Conceptor Award, describing it as an "engineering marvel."²³ Surface passage structures and related spillway operations have since been installed at all eight of the dams on the main stem.²⁴

The overhaul of the main stem dams has resulted in higher fish survival rates while using less water, and decreasing travel times.²⁵ For example, fish passage times were more than 30% faster (2.4 hours vs. 3.6 hours) at the Lower Monumental Dam the year after surface passage improvements were installed.²⁶ Passage time from the Lower Granite Dam to the Bonneville Dam has improved steadily since 2004 and, in 2011—the most recent year from which data in the record are available—were the fastest since passage improvements were installed.²⁷ At the John Day Dam, two added spillway weirs cut in half the number of juvenile salmon and steelhead passing through turbines.²⁸

The data shows that these improvements are working. The average survival rate for summer migrating fish is now 93% and spring migrating fish survive at a 96% rate.²⁹ Passage improvements at the Bonneville Dam have resulted in survival rates higher than 98%, on average. In sum, the investments in dam operations and passage facilities (along with other actions) on the main stem have overhauled and transformed the migration experience for salmon and steelhead.

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²³ FCRPS System Improvements and Operations – A Progress Report, p. 7 (Sept. 2013) (NMFS003192).

²⁴ *Id.* at p. 8 (NMFS003193); *see also* 2013 Comprehensive Evaluation: Section 1, p. 41 (BR00001744).

²⁵ 2013 Comprehensive Evaluation: Section 1, p. 41 (BR00001744).

²⁶ FCRPS System Improvements and Operations – A Progress Report, pp. 14-15 (Sept. 2013) (NMFS003199 --3200).

²⁷ *See* 2013 Comprehensive Evaluation: Section 1, p. 40, Figure 18 (BR00001743).

²⁸ *Id.* at p. 41 (BR00001744).

²⁹ *Id.* at p. 35 (BR00001738).

IV. PROCESS AND COLLABORATION ACHIEVEMENTS

A. Bi-Op and RPA Efforts Have Led to Record Fish Returns

The transformation of the migration experience for salmon and steelhead on the main stem is but one example of the system-wide efforts to improve the FRCPS for salmon and steelhead. The success of these efforts is most clearly demonstrated in overall fish returns. Since 2009, salmon and steelhead have returned to Bonneville Dam at higher numbers than at any time since 1938. *See* page 3, *supra*. While the Figure on page 3 shows collected data through 2012, the upward trend has continued. The 2013 FCRPS Bi-Op Annual Progress Report³⁰ contains an updated graph showing continued improved fish returns throughout the system, shown below for illustrative purposes:

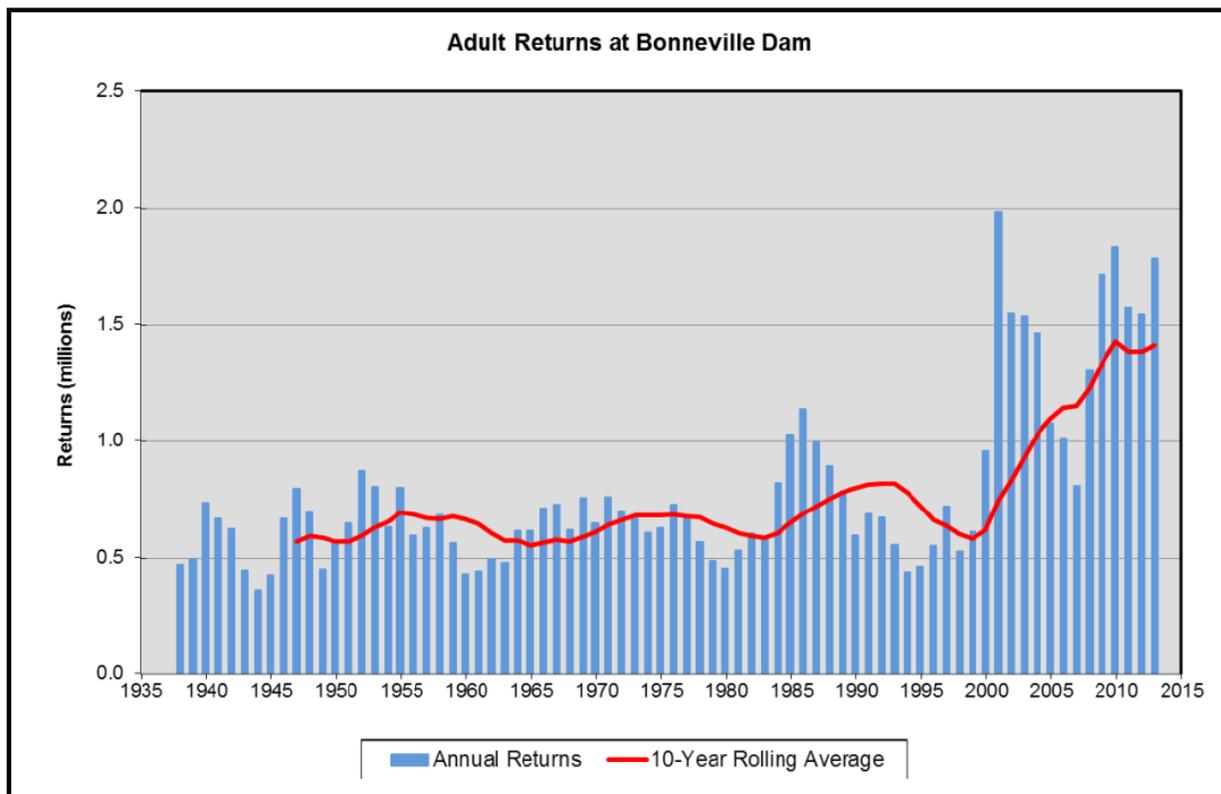


Figure 2. Salmon and steelhead returns at Bonneville Dam, 1938 to 2013. Values shown are for daytime counts, and include both hatchery and natural-origin fish, and both adults and jacks. Harvest levels have varied over time. (Data from ACOE 2014.)

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³⁰ Found at: <http://www.salmonrecovery.gov/Images/BiOp/FCRPS%20APR%202013%20Section%201.pdf>

In short, in-river survival rates are leading to increased returns, to the point where they are comparable to counts from the 1960s, when fewer dams were in place.³¹ The process is working.

B. Strengthened Collaboration Includes Regional Partnerships and Participation

Equaling the extraordinary efforts made to the FCRPS itself, is the collaboration on those efforts by the stakeholders involved in this Bi-Op. The commitment to a vital survival effort for fish on the Columbia and Snake Rivers has eclipsed partisan politics and has been supported by several successive administrations governing the Action Agencies. Four States and seven tribal sovereigns have been at the table during the development of the Bi-Op and implementation of the RPA. In 2008, Memorandums of Agreement to enhance salmon and steelhead populations in the Columbia River Basin—collectively referred to as the Columbia Basin Fish Accords—were signed with the States of Idaho and Montana, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Columbia River Inter-Tribal Fish Commission and the Shoshone-Bannock Tribes of the Fort Hall Reservation, as well as with the State of Washington (in 2009) for estuary projects.³² These Accords secured over \$900 million in funding for habitat restoration and protection projects that will directly, and permanently, benefit fish in the Columbia River basin for generations to come.³³

Further collaboration has occurred since 2011 with the Regional Implementation Oversight Group (“RIOG”). The RIOG has served as a forum to discuss policies related to actions to benefit salmon and steelhead in the Columbia River basin, including those actions included in the FCRPS Bi-Op.³⁴ This Group consists of senior policy representatives from five

³¹ See 2013 Comprehensive Evaluation: Section 1, p. 36 (BR00001739).

³² Overview to the FCRPS CE and IP, p. 4 (Jan. 2014) (BR00001276).

³³ *Id.*

³⁴ *Id.* at p. 8 (BR00001280).

federal agencies, four states, and nine tribal governments.³⁵ The RIOG has blossomed during the more recent period when the region's focus has shifted toward beneficial projects in the field, and less in the courtroom.

On the technical side, the Action Agencies also work with an Expert Panel to assist with the implementation of tributary habitat mitigation.³⁶ The Expert Panel is engaged in priority watersheds every three years and includes experts, authorities and biologists affiliated with local, state, tribal and natural resource agencies. For estuary habitat actions, a similar Expert Regional Technical Group has been empaneled to maximize the success of habitat projects.

In addition to efforts within the United States, collaboration with Canadian interests has resulted in benefits to Columbia and Snake River salmon and steelhead. Canada has agreed to allow storage of an additional 1 million acre-feet, released during spring and summer to support flow augmentation in the United States.³⁷ The Bonneville Power Administration also negotiated an agreement with BC Hydro to provide for an additional 500 acre-feet of water that can be released during dry water years.³⁸

The above examples are representative of the unprecedented collaboration, transparency and resources that support the 2014 FCRPS Bi-Op. A small minority of stakeholders such as the State of Oregon and the Nez Perce Tribe, have continued to oppose the efforts by the Action Agencies in the FRCPS. But the overwhelming majority of public and private entities throughout the Northwest, often with divergent and competing interests, have participated in the inclusive and successful process to enhance fish survival on the Columbia and Snake Rivers in harmony with the wide-ranging functions that these rivers historically provide. And this collaboration among the many partners will continue under the 2014 Bi-Op.

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³⁵ The State of Oregon and the Nez Perce Tribe regularly participate.

³⁶ *Id.* at p. 9 (BR00001281).

³⁷ 2013 Comprehensive Evaluation: Section 1, p. 32 (BR00001735).

³⁸ *Id.*

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 recent years. 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-Snake 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 support the Court's approval of the 2014 Biological Opinion. This 2014 Bi-Op is delivering a legacy of significant improvements in fish habitat and survival while allowing the Corps of Engineers to fulfill its obligation to maintain the FRCPS for all river users.

Dated this 6th day of March, 2015.

Respectfully submitted,

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