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The SHOSHONE-BANNOCK TRIBES



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FORT HALL BUSINESS COUNCIL
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William J. Clinton, President
 The White House
 1600 Pennsylvania Avenue NW
 Washington, D.C. 20500

April 28, 2000

Dear President Clinton:

Enclosed please find the comments of the Shoshone-Bannock Tribes regarding the Draft Lower Snake River Juvenile Fish Migration Feasibility Study Environmental Impact Statement. The decision for the Lower Snake River has been made despite the Shoshone-Bannock Tribes' frustration and disappointment about the lack of cooperation and upfront dialogue.

In 1988 the Bonneville Power Administration drafted a Finding of No Significant Impact to the operation of the Federal Columbia River Power System for requirements of the National Environmental Policy Act for renegotiation of the Pacific Northwest Coordination Agreement and Canadian Entitlement Allocation Agreement. The Shoshone-Bannock Tribes initiated an appeal to that finding, which resulted in the System Operation Review and the companion process (System Configuration Study).

The outcome of the SOR and SCS was the preferred alternative that was borne by the 1995 Biological Opinion, which stated that: "Engineering and design work should be completed by December 1998, followed by completion of the NEPA process and the quest for congressional authorization, to ensure that implementation of drawdown or surface collectors in the Snake River may begin by 2000." The engineering and design work and NEPA process referred to in the 1995 Biological Opinion articulates a "1999 Decision".

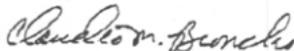
Since June, 1995 the Shoshone-Bannock Tribes have attempted to be a cooperating agency for the EIS, and have consistently provided comments on the document as it progressed. The Shoshone-Bannock Tribes actively participated in the Drawdown Regional Economic Workgroup and System Configuration Team in order to provide constructive and meaningful comments to the 1999 Decision. The Shoshone-Bannock Tribes have consistently warned the federal agencies that their refusal to incorporate the Shoshone-Bannock Tribes' comments will result in a predetermination of outcome and will preclude viable alternatives in the NEPA process.

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- 2 | The Shoshone-Bannock Tribes have also consistently warned the federal government of their failure to adhere to the solemn promises agreed to in the Fort Bridger Treaty of 1868 (15 Stat. 673)
- 3 | The Corps of Engineers have consistently failed to consider the input of the Shoshone-Bannock Tribes during the development of the DEIS. The input of the Shoshone-Bannock Tribes has simply attempted to identify the effects of the lower Snake River projects on the Shoshone-Bannock Tribes' culture, society, economy and language and the associated material, psychological, sociological, economic, and spiritual well-being of the Shoshone-Bannock Tribes.
- 4 | The Corps of Engineers have failed to consult with the Shoshone-Bannock Tribes on a government-to-government basis. Further, the "Federal Caucus" has failed to consult with the Shoshone-Bannock Tribes.
- 5 | The Federal Administration, through the Council on Environmental Quality or more direct avenues have also failed to satisfy recent Secretarial and Executive Orders regarding Tribal/Federal relations on Snake River salmon issues.

The bottom line is that the anadromous fish resources of the Snake River basin continue to disappear as the Administration and Federal Agencies wrangle over their fate. The Shoshone-Bannock Tribes demand that the anadromous fish resources and the habitats upon which those resources depend are restored to sustainable and harvestable levels immediately.

Sincerely,



Claudio Broncho, Acting Chair
Fort Hall Business Council

Cc: George Frampton, Chairman, CEQ
Brigadier General Carl Strock, Commander, Northwestern Division, COE
William E. Bulen, Jr., Lt. Col., COE, District Engineer
William Stelle, Regional Director, NMFS
Anne Badgley, Regional Director, USFWS
Chuck Clark, Regional Director, EPA
Judith Johansen, Administrator, BPA
Stan Speaks, Area Director, BIA
J. William McDonald, Regional Director, BOR
Elaine Zielinski, State Director (Oregon/Washington), BLM
Martha Hahn, State Director (Idaho), BLM
Larry Hamilton, State Director (Montana), BLM
Harv Forsgren, Regional Forester, Region 6, USFS

SHOSHONE-BANNOCK INDIAN TRIBES
Fort Hall, Idaho

SHOSHONE-BANNOCK COMMENTS ON THE DRAFT LOWER SNAKE
RIVER JUVENILE SALMON MIGRATION FEASIBILITY REPORT EIS

APRIL 30, 2000

SUBMITTED TO THE FEDERAL CAUCUS

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1. EXECUTIVE SUMMARY:

The Federal Caucus includes those Federal agencies responsible for operating Federal facilities in the Snake River so as to recover endangered fish. The Federal agencies which make up the Federal Caucus also have a concurrent duty to protect Indian Trust Assets and address Environmental Justice concerns. At the heart of the Federal Caucus responsibility is the duty to carry on the protections secured in the United States-Shoshone-Bannock 1868 Fort Bridger Treaty which secured for the Shoshone-Bannock Tribes (Tribes) and their members the right to fish and hunt on unoccupied lands. Because salmon were among the most important food sources which were relied upon by the Shoshone-Bannock in 1868, salmon recovery in the year 2000 is required both under the Northwest Power Act, the Endangered Species Act and in order to give life to the United States Treaty commitment made in 1868.

2. THE FEDERAL CAUCUS HAS A DUTY TO IMPLEMENT ESA AND SHOSHONE-BANNOCK TREATY PROTECTIONS BY ADOPTING POLICIES WHICH MAXIMIZE THE OPPORTUNITY FOR SALMON RESTORATION IN THE SNAKE RIVER:

Under the Endangered Species Act, the Federal Caucus must utilize best available science to assist in the recovery and restoration of endangered fish. Pursuant to Federal Endangered Species Act policies, the Federal Caucus is obligated to consult with and work to protect Tribal assets - both on Reservation and those off Reservation secured by Treaty. See e.g., Secretary of Interior Orders No. 3175 and 3206.

Among these duties are the protection of Indian Trust Assets. Below is an ITA version adopted by the Bureau of Reclamation. It sets forth clearly a general duty applicable to all Federal agencies:

Reclamation will carry out its activities in a manner that protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

Reclamation will ensure that Indian Tribes have the opportunity to learn about, participate fully in, and receive the benefits of the Reclamation program.

The Corps of Engineers articulation of this policy is as follows:

The U.S. Army Corps of Engineers recognizes that Tribal Government are sovereign entities, with rights to set their own priorities, develop and manage

Tribal and Trust resources, and be involved in Federal decisions or activities which have the potential to affect these rights.

The U.S. Army Corps of Engineers will work to meet Trust obligations, protect Trust resources, and obtain Tribal review of Trust and Treaty responsibilities or actions related to the Corps, in accordance with provisions of Treaties, laws and executive orders, as well as principles lodged in the Constitution of the United States.

The U.S. Army Corps of Engineers will ensure that Tribal Chairs/Leaders meet with Corps Commanders/Leaders and recognize that, as Government, Tribes have the right to be treated with appropriate respect and dignity, in accordance with principles of self determination.¹

The National Marine Fisheries statement respecting concurrent ESA and Tribal duties states:

We understand the importance of the Federal Government's efforts to allocate the conservation burdens for salmonid listed under the ESA in a way that, among other things, does not discriminate against Tribal fishing rights and is implemented in the least restrictive manner. Accordingly, the Tribes may reasonably expect, as a matter of policy, that Tribal fishing rights will be given priority over the interests of other entities, Federal and non-Federal, that do not stand in a trust relationship with the United States.²

All Federal agencies are required to implement the Executive Order of February 11, 1994, setting forth principles of Environmental Justice.

Each Federal agency shall make achieving Environmental Justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low income populations in the United States.

¹U.S. Army Corps of Engineers Tribal Policy Principles. See also 2-18-98 COE Memorandum on ITA's.

²July 21, 1998 correspondence from the Assistant Secretary for Oceans and Atmosphere, U.S. Department of Commerce

Aside from these specific Federal agency guidelines, the courts have acknowledged the requirement of Federal agencies to "concurrently" administer Federal programs and their duty to protect Tribal ITA's. Nevada vs. United States, 464 U.S. 875 (1983). When such concurrent responsibilities emerge, the Federal Government must:

Resolve conflicting claims in a precise manner that indicates the weight given to each interest before it. Possible difficulties cannot be simply blunted by a "judgment call" calculated to placate temporarily conflicting claims.³

3. BEST AVAILABLE SCIENCE SUPPORTS LOWER SNAKE PROJECT DAM REMOVAL:

The data assembled in the draft EIS and its accompanied appendices and documents (Draft EIS) sets forth a range of scientific judgement as to the nature and extent of recovery benefits to endangered fish that can be reasonably expected by a variety of actions in the Lower Snake River - including breaching of the four Lower Snake Dams. The analysis shows that dam removal will best assist in the recovery of endangered fish - although other factors will continue in the face of dam removal to influence the quality and quantity of recovery.

The Shoshone-Bannock Tribes believe that modifications to Habitat, Harvest, and Hatchery operations will fail to lead to the recovery of Snake River anadromous fish.

4. FEDERAL ITA AND ENVIRONMENTAL JUSTICE DUTIES FAVOR DAM REMOVAL:

a. The analysis of Indian Trust Assets and Environmental Justice in the DSEIS sets forth a compelling picture of how Federal development and management of the Snake River has altered the River as a fish and game rich corridor preserved in 1868 for the Shoshone-Bannock Tribes and their members. The DSEIS shows that in a systematic and deliberate way Federal agencies have since 1868 converted much of the River's flows away from fish and game to serve irrigation, M&I needs, and hydro power.

6 b. Dam removal is analyzed in the DSEIS as a most likely step to restoration of salmon - a restoration that the S-B Tribes believe is required not only under the ESA, but is also mandated by S-B's 1868 Treaty, widely acknowledged Indian Trust Asset policies, and emerging Environment Justice rights.

c. The DEIS discussion of Indian Trust Assets and Environmental Justice

³Pyramid Lake Paiute Tribe of Indians vs. Morton, 354 F. Sup 252, 256-57 (D.C. 1972).

incorporates by reference an October, 1999 report by Meyers Resources Inc. entitled "Tribal Circumstances and Impacts of the Lower Snake River Project on the Nez Perce, Yakima, Umatilla, Warm Springs, and Shoshone-Bannock Tribes ("Tribal Circumstances")". Tribal Circumstances analyzes in great depth each of the Treaty rights and each history of Tribal reliance upon Snake River fisheries.

d. A considerable amount of analysis is reserved for the Shoshone-Bannock Tribe. The study notes that the Tribe's members ranged over a vast territory, taking various foods – each in its appropriate place and season – and depending on the particular areas and circumstances in which each group found themselves. The report further notes:

The salmon of the Snake River were a significant element of these seasonal rounds for virtually all Shoshone-Bannock peoples – and were the principal element of diet for peoples who wintered along the salmon drainage, and along the Snake River and its tributaries up-river to Shoshone Falls.

(Tribal Circumstances at p.85)

e. Noting a Treaty and present Tribal population of approximately 4,300 members, the report emphasizes the quantity of fish consumption at the time of the 1868 Treaty and demonstrates how that reliance led to great strength in the Shoshone-Bannock community:

These riparian corridors were the routes by which the Shoshone and Bannock bands not only traveled to procure subsistence and engage their trade with neighboring peoples, but they were also the locations of their encampments. The corridors were rich in fish, game and plant resources the Shoshone and Bannocks depended upon for their livelihood. Productive salmon fisheries were located along the Snake River below Shoshone Falls and along the Salmon River to headwaters. These two Rivers and the others the Shoshone and Bannocks traveled contained a variety of non-anadromous species which were regularly harvested as well.

(Tribal Circumstances, p.88)

f. The report shows the linkage between alternative project actions on the Lower Snake River and the Shoshone-Bannock Tribes by tracing the movement of affected salmon, steelhead and sturgeon stocks far up the Snake River to reach traditional harvest places of the S-B. The report notes that a consensus of scholars has identified a significant Shoshone-Bannock historic presence throughout the area of the Upper Salmon River, its Southern tributaries – and throughout most of the Weiser River drainage. (Tribal Circumstances, p.41)

Fish constituted an important part of Northern Shoshone-Bannock subsistence. Trout, perch and other fish were found in streams throughout the river, but the most important fish, the salmon was restricted to the Snake River below Shoshone Falls, to the Lower Boise and Weiser Rivers, and to the Southern tributaries of the Salmon River, including the Lemhi.

Leaving the issue of exact determination of boundaries to others, we can safely conclude that Snake River salmon, steelhead and sturgeon potentially affected by Lower Snake River project alternatives swam upstream into Shoshone-Bannock traditional territory and are potentially accessible at Shoshone-Bannock traditional fishing areas. This conclusion holds for time periods prior to construction of the dams of the Middle Snake and for periods thereafter.

(Tribal Circumstances, p. 41)

g. The report utilizes conventional economic analyses to project Shoshone-Bannock Tribal harvest from contact times in the 19th Century to the present. For example Table 40, p. 201, projects the Tribes' harvest at 2,500,000 pounds at time of contact and concludes that current Tribal harvest is at 1,000 pounds – a decline of 99.9%. The report in turn relies upon a Columbia River Inter-Tribal Fish Commission Study from 1995 which projects that an all-species recovery of endangered fish could equal 11.3 million pounds of salmon. The study concludes that dam removal is most likely to bring about a substantial recovery of Treaty protected Salmon River salmon and steelhead production capability and harvest from the cumulatively depressed level that had damaged the Tribes through much of the 20th Century. (p. 211)

h. The study confirms that the transformation of the Lower Snake River subsequent to the 1868 Fort Bridger Treat for the benefit of electricity, irrigated agriculture, and river navigation interests has contributed greatly to the eradication of stock so important to the contact way of life of the Shoshone-Bannock and other Tribes. Finally, the report projects estimates of wild and hatchery salmon harvests on the Snake River after dam removal. While of course these projections are based upon the premise that dam removal will, in concert with other factors, begin to bring about a restoration of salmon, they note that on a 50-year period stocks can be expected to increase from 1,026 to 17,662 (spring-summer chinook), 18,093 to 34,976 (fall chinook), and from 30,087 to 116,518 (summer steelhead). (p.216)

i. The report provides the following conclusions from an Environmental Justice point of view:

- Tribal families are impoverished and unemployed at 3-4 times the level of

Washington/Oregon/Idaho residents as a whole;

- Wintertime Tribal employment reaches as high as 80%;
- Tribal members are dying at from 20% to 130% higher rates than non-Indian residents;
- The report summarizes that salmon is at the center of many of the Tribes cultural, spiritual and material words and that the Tribes report that the loss of salmon has had a devastating affect on Tribal culture, health and material well-being;
- The cumulative effects of dam construction have transferred potential wealth produced in the river basin from salmon upon which the Tribes depend to electricity, irrigation and water transport services (p.234);

5. ESA BENEFITS AND TRIBAL RESTITUTION POLICIES OUTWEIGH THE MODEST ADVERSE IMPACTS CAUSED BY DAM REMOVAL:

a. The DEIS demonstrates several adverse impacts from a decision to breach the Lower Snake River Dams. First, under Environmental Justice, it appears as if Hispanic farm workers would be disproportionately injured. Twelve farm operations accounting for 32,618 acres out of 37,000 acres irrigated from Ice Harbor Reservoir would be adversely affected. 812 full time and 2,161 seasonal and part-time workers would lose work at that location. About 84% of the farm workers are Hispanic (p. 5.13-30) Based on this data, 1,935 to 2,074 workers of Hispanic origin could be affected by dam breaching. However, this represents only 4.5% to 4.8% of the area population identified as Hispanic (p. 5.13-31).

b. With respect to adverse impacts to irrigated agriculture generally, there is a projected loss of 37,000 acres. The value of the lost agriculture is \$137,000,000. The cost of substituting the water supply to those 37,000 acres is in excess of \$250,000,000. Similarly, well modification costs to allow M&I users to substitute groundwater from surface water are quantified.

c. Turning to electric power, the loss of hydro power and the need to acquire substitute higher cost power was analyzed in great details (p. 5.9-9, 10). For the average household the monthly cost increase occasions by the need to acquire substitute power would run from \$1.20 to \$6.50; for commercial establishments \$6.70 to \$36.30; from larger industrial customers from \$302 to \$1645; and for the few aluminum projects \$172,600 to \$940,400.

d. With respect to impacts on transportation caused by the loss of barge transportation on the Lower Snake River, the DEIS projects that 30% of the lost barge traffic would go to railroads, and 70% would go to highways. Most of the increased cost would be borne by Washington residents and the additional highway costs would be primarily Washington State costs. (p. 5.8-7)

7 | E. If dam removal is not chosen as the preferred alternative, the operation of Hells Canyon for increased flow must be done in such a way where resources on the Fort Hall Indian Reservation are unaffected.

8 | The current way in which the American Falls dam is being operated substantially harms the Shoshone-Bannock Tribes and their resources. Operation to avoid harm to the Shoshone-Bannock Tribes and resources is not addressed in the DEIS.

6. CONCLUSION:

The DEIS and the attached Tribal circumstances together paint a compelling picture of Snake River anadromous fish in despair. The reports describe a history prior to the modern Federal management of the River where salmon, steelhead and other native species prospered and were relied upon for survival by both Tribal and non-Tribal citizens.

9 Both Endangered Species Act requirements, Indian Trust Asset policies, and the requirements of Environmental Justice require the Federal Caucus to fundamentally change the manner in which the Snake River and its aquatic resources are managed. Importantly, the DEIS indicates that re-operation can not only focus on the four Lower Snake Dams, but also on other facilities with a Federal connection.

10 The DEIS confirms that the ongoing FERC re-licensing proceeding at Hells Canyon Project is positioned to contribute to salmon restoration. Operational changes and enhancements developed during that re-licensing are able to increase the survival of fish and their habitat. Because the S-B's Treaty fisheries are up-stream of the four Lower Snake Dams, it intends to aid in the restoration of endangered fish which the DSEIS describes as having its best opportunity of success by dam removal. The S-B intends to aid in this effort not only by vigorously supporting dam removal, but also by vigorously assisting FERC to identify and implement connected and complementary restoration activities at the Hells Canyon Project.

The Shoshone-Bannock Tribes thank the Corps of Engineers and the other State, Federal and local agencies for their effort in analyzing this national resource and evaluating the ways in which a century of injury and deprivation can be reversed. We thank you again and look forward to cooperating in the recovery of our unique river.

Very truly yours,

Claude M. Bronckes

SHOSHONE-BANNOCK TRIBES
Fort Hall, Idaho