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Federal Caucus Comment Record  
Suite 500  
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Spokane, Washington 99201

Re: Comments of the Inland Ports and Navigation Group on: Conservation of Columbia Basin Fish: Building a Conceptual Recovery Plan, a publication in draft form of the Federal Caucus

Dear Ladies and Gentlemen:

Schwabe, Williamson & Wyatt is pleased to submit comments on the draft report, Conservation of Columbia Basin Fish: Building a Conceptual Recovery Plan ("Draft Plan") on behalf of the Inland Ports and Navigation Group ("IPNG"). IPNG is a group of navigation interests, primarily the Columbia and Snake River ports from Morrow, Oregon, to Lewiston, Idaho. Towboat and barge interests also are members of the IPNG.

#### INTRODUCTION

*IPNG directs these comments to the All-H Draft Plan.* These comments are submitted to the Federal Caucus and are directed specifically to their Draft Plan issued in December 1999. IPNG will submit separate comments regarding the "Draft Lower Snake River Juvenile Salmon Mitigation Feasibility Report/Environmental Impact Statement" (Draft EIS or D-EIS) and the "Bonneville Power Administration Draft Biological Assessment" later this month. Because the many appendices for the "John Day Drawdown Phase I Study" (John Day Study) were not available at the Corps Portland District office until late Friday afternoon, March 11, 2000, we will submit comments on that study in April.

*IPNG member ports are public entities, created by each Northwest State.* The Port of Lewiston, Idaho, is a port district created pursuant to the statutes of the State of Idaho. The Ports of Whitman County, Washington, and other Washington public ports located on the Columbia and Snake Rivers, are municipal corporations of the State of Washington pursuant to Wash. Rev. Code Title 53. The Port of Morrow, Oregon, is a municipal corporation of the State of Oregon pursuant to Or. Rev. Stat. §777.

These ports and other ports on the Columbia/Snake River system between the Port of Morrow, Oregon, and the Port of Lewiston, Idaho, are referred to collectively as Inland Ports and Navigation Group ("IPNG") for the purpose of these comments.

IPNG ports are specifically authorized by their respective states to promote navigation and economic development. These powers are granted to the Washington ports pursuant to Wash. Rev. Code § 85.100. The Oregon ports are governed by Or. Rev. Stat. § 777.003, *et seq.*, and specifically Or. Rev. Stat. § 777.120. This statute confers upon the Port of Morrow, Oregon, a municipal corporation of the State of Oregon, the power to regulate navigation "in the best interests of the maritime shipping and commercial interests of the port ...."

The Port of Lewiston has been granted broad powers by the State of Idaho including the power to acquire property and to develop facilities and other improvements "relating to industry and manufacturing and to commercial transportation." Idaho Code, §70-1501. As public bodies of their respective states, each of these ports has expended public funds to develop its port facilities.

Each of these public ports is legislatively authorized, and has developed and constructed commercial port facilities designed to load, store, or discharge waterborne commerce on the inland river system on the Columbia and Snake Rivers. These public entities have used public funds to develop these port facilities. Each of these inland ports is a direct and intended beneficiary of the inland waterway system created by Congress. Each port provides cargo handling facilities or services to the tug and barges that carry cargo on the Columbia/Snake River system. Cargo from these ports enters interstate and foreign commerce, and is exported to numerous different foreign countries.

***IPNG includes a private towboat and barge company as a member and in these comments.*** IPNG member Shaver Transportation Company owns and operates tugs and barges on the inland waterway system and conducts operations within and between the port districts of the Columbia/Snake River system. Shaver Transportation Company is also an intended and direct beneficiary of the inland waterway system. Shaver family members currently operating the company are the fifth generation of their family to provide water-related towing services on the Columbia River system.

***The Inland Ports and Navigation Group:*** IPNG was formed for two purposes. The first was to intervene in the "Clean Water Act Lawsuit" a case<sup>1</sup> in US District Court in Portland, wherein environment advocates sued the Corps of Engineers alleging a violation of the State of Washington's Clean Water Act regulations regarding water temperature and dissolved gas standards at the four lower Snake River dams. In granting IPNG's motion to intervene, the Federal Judge in Portland agreed that IPNG members were "direct and intended beneficiaries" of the Federal dams on the Lower Snake River. These dams have

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<sup>1</sup> National Wildlife Federation et al vs. US Army Corps of Engineers. US District Court of Oregon, No. 99-442-FR

been the subject of considerable discussion over the past two years. We will refer later in these comments to some arguments made in that lawsuit, submitted here for consideration by the Federal Caucus in its review of the appropriate next steps for the region in aiding recovery of listed fish species.

The second task for IPNG was to review the draft documents prepared by Federal agencies and distributed for public comment regarding various fish recovery options. Thereafter, IPNG prepared and submitted comments, both in oral summary form at the regional hearings held earlier in the year and in written comments that follow.

### SCOPE OF THE ALL-H PLAN

***We applaud the efforts of the Federal Caucus to broaden the prism of this debate.***

More than anything else, the region should move beyond dam breaching to look for "low-hanging fruit" where the region can agree on short-term steps to help restore listed stocks. We suggest some options later in these comments. The degree to which the Federal Caucus can resist the pressures to keep dam breaching front and center will help determine whether the region can make progress on the many areas where reasoned negotiated agreements can be reached.

***The broader vision of the All-H Plan is welcomed and is a good start, but funding and time constraints in its preparation limit its usefulness.*** Before turning to the substance of these remarks, IPNG raises a fundamental question: why was this important document not given the same degree of time, financial commitment, and staff resources as was given the Draft EIS? Why was the Federal Caucus not formed until 1998? Much valuable time was lost by the delay in forming the Caucus to address these larger recovery issues.

The Draft Federal Caucus Plan contains references to insufficient time for particular research work that should be considered by the Caucus and by the region. IPNG acknowledges that this report represents the best efforts of many dedicated civil servants. The Draft Plan is thin gruel, however, when compared to the many very thorough related reports that presented in other fora in the region.

The potential scope of the All-H Plan is far reaching, and its potential impact on our region is significant. For that reason, IPNG makes the case that it has been understaffed, underfunded and resulted from a time frame too short for its necessary workscope. Its product should equal its mandate. For a document whose recommendations may alter significantly the way the region lives and works, it fell short of the mark in several areas.

***Strengths of the Draft Plan should be acknowledged. Shortcomings should not overshadow those strengths.*** Lest IPNG sound predominantly negative about this Draft Plan, that is not the case. This Caucus effort represents the best hope to re-frame this

debate and discussion away from a dam-centric approach that has created great divisions in the region.

If this draft report is followed by a better and more thorough report (incorporating recommendations and suggestions IPNG offers in these comments), we believe this initiative by the Federal Caucus can shift the debate to the bigger picture that is at the heart of this matter. It will be a significant challenge for Federal Caucus, but it must be met if the Final Plan is to rally the region and not divide it further.

The Draft Plan raises performance standards and goals—a worthwhile task that should have been adopted by Congress, BPA, the Power Council and others during the past decade. And yet disagreements among scientists that impact harvest and hatchery roles, for example, create barriers to setting standards and goals.

As IPNG notes later in these comments, other alternatives and goals in this All-H approach are in conflict, such as harvest and species recovery. The Final Plan should discuss this conflict in considerable detail, so the region understands this basic conflict, and can make decisions based upon those fundamental choices.

*Scant prioritization is found in the Draft Plan.* Detracting from the Draft Plan is the lack of prioritization among actions and options that should be classed as short-term, medium-term and longer term. More importantly, this omission detracts from the region's ability to prioritize. This lack of prioritization also limits the ability of the Federal Caucus to organize this document and its follow-up Final Plan in a manner that generates public support.

Throughout these comments, IPNG raises a number of questions. IPNG specifically requests that they be answered in the Final Plan.

What can our region undertake now that offers the greatest chance for fish recovery that does not wreak economic havoc in the Inland Empire of the Columbia River Basin? We recognize the need for longer-term projects, but we encourage the Caucus to focus as well as some short-term unifying alternatives and options. Put another way, can our region agree on recovery steps that we can undertake now, or will we continue in a divisive debate whose future may be decided in the courthouse instead of at the spawning habitat?

*The impact of insufficient time to prepare the report is evident.* This failure to devote sufficient time and resources clouds this Draft Plan and its recommendations, making it difficult for the public to address comments to many specific topics raised in the report.

IPNG requests that the Final Federal Caucus Plan contain an addendum with two elements. First, the addendum should recount the areas in the Draft Plan where insufficient time and money did not permit important research to be undertaken and/or concluded. Second, the addendum should estimate how long it would take to compile such analysis and information.

Given the scope of the tasks at hand for the region, we understand the need to complete this product. It is a useful starting point in several areas. It is incomplete in many areas, however, and suggestions throughout IPNG' comments note specific areas where more research is required.

*The critical role in fish survival played by the ocean—where listed stocks spend much of their lives—is ignored, and must be examined and explained in detail in the Final All-H Plan.* IPNG sees a glaring hole in the Draft Plan. The ocean plays a critical role in species recovery, yet is given lip service (if at all) in this document. We realize that no one in our region—not Federal or state governments, not dam breachers nor dam retainers, not “dot-com” millionaires nor dock workers — no one can do much about the impact of the oceans on species survival rates. We all deserve better answers, though, about the ocean's critical role in fish species survival.

People in the Pacific Northwest deserve straight answers and candid talk about the risks inherent in spending more and more money on some risky recovery schemes (dam breaching is one)—without admitting that ocean conditions may erase fish species benefits from some past initiatives, and may threaten and outweigh some new and expensive new initiatives. Those people in the region who question this grant salmon recovery experiment—from whatever spot on the spectrum— deserve answers, or their support may well disappear for future controls in the absence of a clearer picture about the role of the ocean

We all read CRI analyses about potential survival probabilities under different alternatives and options. We also should have CRI analyses for our review that describe how ocean warming on a decade-long basis can trump many of our expensive initiatives, and how a naturally cooling ocean can do more to help returning stocks than many ideas proposed and supported by some advocate groups.

In sum, IPNG requests that the Federal Caucus devote significant attention in its final report to the impact of the High Seas—a Fifth H—on this complicated process of species recovery. We add more to this topic later in these comments.

## OVERVIEW OF ALL-H DRAFT PLAN

IPNG members support several strong actions by Federal agencies to help restore salmon runs in the Pacific Northwest. We are committed to steps that will help these runs recover. Because we believe strongly that “fish versus dams” is the wrong thesis, the wrong equation and the wrong solution, we also strongly oppose actions under consideration in all administrative proceedings that would partially breach any of the Snake River Dams. We oppose the alternatives, related options, or any combinations of alternatives/options/ actions under the All-H approach that include Snake River dam breaching.

*IPNG supports numerous fish recovery measures.* Although these written comments began with a paragraph restating what we oppose, IPNG wants to stress, instead, species recovery measures we support.

The Federal Caucus should continue to shift the discussion away from dam breaching to steps that provide reasonable short-term benefits. The Caucus should pause in the rush to longer-term measures/projects/solutions with unproven, speculative and even longer-to-emerge potential benefits. Instead, the region should dwell on short-term projects that deserve our regional support and our scarce dollars. IPNG realizes longer-term efforts are needed, but we urge the Federal Caucus to focus on steps that offer short-term progress.

The Caucus should isolate such projects that most people in the region would support. The Caucus should look for practical projects and steps that are cost-effective with basin-wide support. IPNG raises some ideas in our testimony. Please also consider what medium-term alternatives also combine higher probabilities for success with reasonable costs and unified regional support.

*IPNG encourages immediate actions and more focused study in several areas.* These steps will benefit listed species, or give the region the knowledge base needed before we commit to expensive and restrictive recovery measures that are speculative, at best. Such research will narrow the unknowns.

- We support habitat improvements that offer good chances for fish recovery at reasonable costs. In fact, we will describe later in these remarks one example we encourage the Caucus to pursue: culvert replacement
- We want tough action without delay to eradicate or reduce to manageable levels the devastating predation near the mouth of the Columbia River.
- For McNary pool and Lake Wallula specifically, the Draft Plan does not give sufficient attention to the potential damage from massive amounts of sediment that would come down the Snake River into Lake Wallula if the Snake dams were breached.
- As noted above, IPNG wants honest answers to questions from another of the "H"s: High seas. Our region deserves straight talk about the possible adverse impact on fish survival of shifts in ocean temperature and climate change, and how this can put at risk and undo different expensive recovery steps being urged on our region. We also deserve an explanation of how ocean temperature and related changes can improve fish recovery.
- We urge your review of results of water temperature analysis that challenge claims made by some critics of the Snake Dams regarding the impact on water temperature "caused" by the dams.

- We also think that a “regional” solution must include Canadian interests in harvest.
- We endorse options and alternatives under review that include greater use of transportation of juvenile fish.
- We see another “H”, Hypocrisy, in groups that tell the public that their only targets for breaching are the four Snake river dams, and yet now criticize the John Day Drawdown study because they claim that drawing down John Day is critical to fish recovery efforts.
- Conflicts and divisions in responsibilities of NMFS between ESA enforcement and harvest promotion may be resolved only if NMFS is split into two agencies.
- The Draft Plan does not discuss in detail the significant level of environmental damage caused in portions of the Basin if the Snake dams were breached. Air pollution degradation in the Columbia River Gorge and east of the Cascades, in particular, deserves more attention.
- IPNG believes that the special status given navigation by the US Constitution, Congress and the Courts means that the Federal Caucus must consider their unique role and rights as it reviews various species recovery options. This reminds all parties that various limits constrain the scope of recommendations that emerge from its review.

IPNG requests that the Federal Caucus review seriously our comments in several functional areas—some of which are “crosscutting” measures that do not fit within a specific Alternative or Option. IPNG also offers a number of specific comments on particular points in the Federal Caucus Draft Plan.

IPNG also discusses the unique role and rights of navigation under the Constitution and certain congressional actions in creating the Columbia-Snake River inland navigation channel. It reminds the Federal Caucus that certain legal limits may constrain the potential scope of the Caucus’ Final Plan.

#### FEDERAL CAUCUS DRAFT ALL-H PLAN

***Basin-wide problems require life-cycle solutions.*** We welcome the All-H attempt to broaden the discussion of various recovery options. It is essential that debate shift to this framework.

Running 1200 miles from its headwaters in Canada to its mouth beyond Astoria, the Columbia River is the magnificent artery binding together our entire region. The 39,000 square miles in the Columbia Basin generates an outflow averaging some 198 million acres feet at the Columbia’s mouth—or 275,000 cubic feet a second. That is

second only to the Missouri-Mississippi system. And yet, with this enormous geographic scope, and the full range of All-H contributions to species decline, we are disappointed that one narrow element—breaching four Snake River dams—has received so much attention.

The All-H approach is a belated recognition that the too narrow “dams or no dams” approach would not work. That narrow view has divided the region, invited outside pressures, wasted time of Federal agencies and officials, and diverted attention away from the broader All-H vision. We remind the Federal Caucus that an All-H study of the scope, length and cost of the Draft EIS—begun when work on the Draft EIS and lasting and costing as much— might have avoided much of the finger pointing and lack of true dialogue that today marks extremists on all sides of this issue.

The Federal Caucus recognizes a basin-wide full salmon lifecycle approach must be at the center of real recovery efforts. We support this vision, and believe it offers the only way to reach compromises that protect the species while not devastating the economy of the Columbia Basin.

*The All-H Draft Plan may need continued Congressional appropriations to fill in its gaps before decisions can be made with increased certainty.* After reviewing its future workscope for the caucus’ next steps, we may well want to support continued Congressional funding for ongoing work under this basin-wide full salmon life-cycle approach. If needed, and if aimed at filling in such blank spots in ocean and harvest issues, it is a matter that should unite various factions in this regional debate. The Federal Caucus should discuss with stakeholders with an interest in Federal appropriations whether timing allows a request for FY 2001 budget additions to allow expanded study of the role of the ocean in salmon survival. If sufficient literature already exists in this subject, then funds may be needed for analysis of that research. Although the All-H Draft Plan is a good start, much important work remains.

## CULVERT REPLACEMENT

*IPNG supports habitat improvements that focus on short-term options offering the greatest potential for near-term success.* In view of the Federal Caucus request that commenters try to present material and ideas beyond the options reflected in your analyses to date, IPG suggests one step that offers the potential for considerable positive habitat results for a reasonable investment.

*Fish-killing culverts now block access to thousands of miles of spawning and rearing habitat, and their replacement with fish friendly culverts or bridges should be a high priority in the short term.* Replacing these “killer culverts” should receive more focused attention. Providing fish friendly replacement culverts or bridges should be at the heart of a short-term habitat improvement strategy. Adequate funding should be sought from appropriate Federal and state agencies to allow this program to expand.

IPNG calls attention to some compelling statistics.

Washington Governor Gary Locke's salmon team leader said that her newest statistics show Washington State has 2400 barrier culverts blocking access to 3000 miles of potential spawning and rearing habitat. She also said that, of this total, 10% of the bad culverts are on state roads, 40% are on county roads, and the remaining 50% are on private and forest roads.

In Oregon, some 2900 culverts on state and county roads block access to "thousands" of miles of spawning and rearing ground. ODF&W experts said that a person could extrapolate 2 miles above each culvert as a reasonable "guestimate" of lost habitat. Such extrapolation leads to a reasonable conclusion that on Oregon State and county roads alone, excluding all forest and private roads, some 2900 culverts block access to more than 5000 miles of valuable habitat. This loss can be traced to culverts that do not allow upstream fish passage.

We do not have current statistics for Idaho, but we presume that they also would contain similar reports of killer culverts, and thus demonstrate opportunities for similar habitat improvements in spawning and rearing areas through culvert replacements.

The recent 1999 annual Oregon Salmon Plan Report contains some useful statistics that discuss the issue differently. The Report states that, although some 800 ODOT culverts on state roads now do not provide adequate fish passage, ODOT improved 50 culverts in 1998, allowing renewed access to 130 miles of habitat. The Report also notes that, in total, 300 culverts in Oregon were improved in 1998, opening up 200 miles of potential fish habitat. Lastly, it notes that 80% of these were on private industrial forestland and paid for by landowners. Compared to the need for more culvert replacements, this measured pace drives home our recommendation about the need for a higher priority for this issue.

***Private landowners should receive favorable Federal and state tax treatment for replacing fish killer culverts.*** As the statistics above detail, many fish-blocking culverts are on private lands. Incentives should be sought via tax treatment and other means to encourage private landowners to replace culverts on private land. Where private landowners are involved upstream from new culverts or other structures, we believe that the Caucus should recommend tax breaks for those private landowners who replace killer culverts or create/improve streamside habitat on their property. We hope the Federal Caucus will consider recommending this, or a variation, to regional Members of Congress.

IPNG believes that the USG would find considerable interest among private landowners in cooperating in both culvert replacement and streamside habitat improvement above replacement culverts. These are real-world projects and products that make streams more fish friendly, and would include clear upstream habitat improvements. If private landowners were not interested or not cooperative, the county or state could decide to replace other culverts elsewhere.

***Culvert replacement would generate new construction jobs.*** IPNG notes that critics of the Snake Dams cite potential new construction jobs that would be created during the construction period (for breaching) if those dams ever were breached. IPNG suggests that new short-term construction jobs throughout the region also would flow from a large culvert replacement effort, with the economic bounce from those new jobs spread throughout the region.

Such smaller construction jobs would replace killer culverts in many different locations in the Pacific Northwest, for they are found throughout the region—near and far from any dams. Many different construction contracts throughout the region also would be more likely to go to smaller local construction companies. Thus, they would be less likely to attract a larger workforce (working only a four sites) from outside the region who might move to the region only for short-term construction jobs helping beach the dams.

***Culvert replacement unites the region's various factions in this salmon-ESA debate.*** It should be a centerpiece of the Federal Caucus' short-term recommendations. In short, this is an achievable goal: replacing culverts that today kill or block fish with fish-friendly structures that would provide access to more spawning and rearing habitat. This project would unite various groups in a worthwhile common task.

#### PREDATOR CONTROL

***The timid response by the Federal government in the past to the issue of predation near the mouth of the Columbia River disappoints most Northwesters.*** The Federal Caucus should be far more aggressive in ridding the estuary of Caspian terns—a severe source of smolt mortality. We believe that the damage inflicted by Caspian terns on juvenile fish is so staggering, and the number of juvenile fish eaten is so enormous, that this issue requires a stronger Federal response. IPNG hopes that most environmental advocates would join IPNG and others in supporting much stronger measures to remove Caspian terns from Rice Island and elsewhere in the lower estuary.

Without strong and tough actions to rid Rice Island of its terns, we think the region always will be reluctant to adopt tough restrictions elsewhere in the region for any of the "Hs." We believe that the lack of past tern predation control efforts mocks attempts today to stress that the public in our region should embrace tough and sweeping actions to help listed species recover. Public response in the region today will resist tough measures, until the USG shows it is serious about removing the thousands of terns from the lower river. No groups in the region are willing to accept tough restrictions until and unless the tern problem is resolved.

***Rice Island is a "killing field" for juvenile fish.*** We acknowledge that the Corps soon will begin a belated effort to remove 8500 pair of nesting terns from Rice Island from April to July 2000. This 230-acre island provides the home for what we call a "killing field" for smolts. A recent article in the local Astoria newspaper describing the low-cost

and low-tech solution the Corps plans to use later this year also makes people ask: why in the world wasn't this done before now?

IPNG is among those who question whether the Corps actions merely will move the problem elsewhere with little reduction in predation, as opposed to eradicating or solving it. We hope we are mistaken.

The region deserves to know how this simple step took so long to initiate? Why wasn't this done several years ago? If serious steps aimed at real predator control had been taken some years ago, today we might be able to evaluate the beneficial impact of millions more juveniles entering the ocean. This is a vital element of this debate.

If Federal or state fish and wildlife officials blocked reasonable steps to control predation in past years, are those officials called on to explain such decisions? Are professional careers interrupted when the impact of past failures to curtail terns is shown? Alternatively, do the different Federal agencies treat past tern decisions as "business as usual" and allow careers to continue—even at such a huge cost to the valuable resource?

The Federal Caucus has proposed many far-reaching and costly options and tasks for our region, many at a staggering cost. At the same time, however, agencies have allowed Rice Island terns to be addressed only with Band-Aid solutions that have tiptoed around this clear cause of severe damage to migrating juvenile fish.

IPNG recognizes the need for Rice Island to continue as a site for dredged materials from the Columbia River channel O&M dredging. We believe that still can take place, along with more aggressive forms of tern control.

***Ridding the river of Caspian terns and other predator species will test the Federal government's commitment to fish recovery.*** Simply put, this effort to remove terns from the estuary will demonstrate whether the Federal and state agencies will be tougher on humans than they are on terns. Of course, that equation is never presented in such stark terns, but it is a way to raise some tough questions.

#### **SEDIMENT DAMAGE**

***Insufficient attention and review by the Federal Caucus has been given to the damage that would be caused by tens of millions of cubic yards of sediment deposits suddenly released from behind Lower Granite Dam if the Snake Dams were breached.*** IPNG does not believe that sufficient research has examined the detrimental impacts of this on fish survival. We acknowledge the useful Corps Appendix to the Draft EIS that covers this subject, but this issue needs to be mainstreamed, and the probable results analyzed and presented as part of the Alternative 4 discussion.

Furthermore, if the Snake dams were breached, the "trap" for this sediment then would shift from behind Lower Granite Dam downriver into the Columbia. We are unaware of much analysis on the impact on water withdrawals, water quality, habitat

damage and other adverse impacts adjacent to McNary Dam—both for the initial surge of sediment and the annual deposition of silt behind the dam.

IPNG believes that most of the sediment deposits in Lake Wallula will occur in an area where a National Wildlife refuge, a port's dock, and the county's largest taxpayer have water-dependent facilities. It could impact the vital navigation channel to the Tri Cities ports.

***Federal Caucus members should review the Sediment Appendix of the Draft EIS and incorporate many of its findings and analyses into your Final Plan.*** The public deserves clear answers to questions raised by that Appendix, as they will impact the rate at which Lower Snake River (and maintem reservoir) habitat recovers—if at all—from such extreme sedimentation. Critics charge that sediment harms spawning and rearing habitat when logging and farming cause it. Environmental groups should acknowledge the damage from severe habitat damage caused by the sudden release of sediment into the mainstem Columbia River if the Snake Dams were breached.

The Corps Sediment Appendix to the draft EIS states that: "The east bank of the Columbia River between its confluence with the Snake and Walla Walla Rivers, appears to be susceptible to sediment deposition, based on qualitative analyses." This refers to Lake Wallula, the reservoir behind McNary Dam.

In the McNary pool of Lake Wallula, the gentler slope and shallower area are on the east and northeast side of the reservoir below the mouth of the Snake River. If the dams ever were breached, IPNG believes that this shallower area on the north side of the Wallula reservoir will receive a large percentage of the sudden surge of sediment. We believe it also would be the site of regular siltation deposits on an annual basis. Several severe local consequences could result if breaching occurred.

***The large sediment buildup behind Lower Granite Dam would be deposited into McNary pool and beyond.*** The Corps fact sheet describes 100 to 150 mcy of sediment currently deposited behind the four Snake dams. The Corps predicts half of that total (50 to 75mcy) would be carried down river shortly after dam breaching, with much of it deposited in Lake Wallula. Federal Caucus members may have no frame of reference to judge the size and potential impact of this amount of material. This total amount of trapped sediment is equal to between 25 and over 30 years worth of annual maintenance dredging now done in the lower Columbia deep-draft navigation channel between Portland and Astoria, Oregon.

***Annual sediment deposits without the Snake Dams nearly equal the amount dredged annually for the entire Lower Columbia River Channel.*** After the initial surge, annual sediment deposits would build up on a regular basis. Without the effect of the four dams to act as sediment retainers, the Corps also expects annual deposits of sediments amounting to some 3 to 4 mcy, with most of that also deposited in Lake Wallula. As noted, for some people, this is merely a number, without any relationship to amount. For

reference, annual dredging done in the Lower Columbia River channel (not at the bar/mouth) has averaged about 4 to 4.5 mcy. Will environmental groups support necessary dredging to keep open channels for shipping in Lake Wallula, or will they challenge such permits as damaging to the fish environment? Lake Wallula, particularly in the shallower areas near the east and northeast shore of the river, would face serious problems from siltation

***Different size dislodged sediment could damage different areas.*** IPNG spoke with hydrology experts at the Corps Walla Walla office for details on the predicted amount of sediment that may settle in Lake Wallula. The Corps believes that sediment over .02 mm in diameter probably will settle in Lake Wallula, with smaller sediment staying suspended in the river current all the way to the lower river. IPNG requests that appropriate research determine whether there is any adverse impact of this smaller sediment (under .02 mm in diameter) on estuary habitat, where the water velocity slows again.

Sediment .02 mm diameter and larger (the size predicted to settle in Lake Wallula) represents 56% of the total sediment now behind the Snake River Dams. Calculations show that, in the first few years after Snake Dam breaching, some 28 mcy (million cubic yards) to 41 mcy of sediments are predicted to settle in Lake Wallula.

For comparison purposes, that is seven to ten times the annual amount of sediment dredged in the Lower Columbia River channel from Portland to the bar at the mouth of the Columbia River.

***Dredge material disposal plans would be needed.*** IPNG notes that no studies have been reported to examine where the material would be placed when dredged from Lake Wallula. Dredging of this potential scope would require preparation of disposal site plans approved by different agencies. Disposal sites must be located and purchased. IPNG is not aware that such costs have been calculated in the economic costs of dam breaching.

The Corps Sediment Appendix fact sheet states that 1 mcy of sediment would cover a square mile of land a foot deep in sediment. The Corps should report to the public the results of its calculations of how much of Lake Wallula is shallow enough to be the probable deposit site. The Corps should report on how deep that might make the short-term deposits after breaching the Lower Snake Dams, and how much and where the annual siltation would be deposited on an ongoing basis.

***The wildlife refuge habitat at the McNary National Wildlife Refuge could be damaged from siltation following any Snake River Dam breaching.*** IPNG specifically requests comments from USF&W, which operate the wildlife refuge on the northeast shore of Lake Wallula below the mouth of the Snake River. Please ask USF&W about the potential impact on this refuge of such severe siltation in the immediate aftermath of any dam removal. What species could be adversely impacted by loss of such habitat resulting from dam breaching? What would be the impact on the refuge and its hydrology from annual maintenance dredging in some nearby parts of Lake Wallula?

***Wetlands in Lake Wallula could be damaged from a surge in siltation and from increased annual siltation.*** IPNG suggests that this habitat issue merits greater attention. Questions deserve answers that take into account the expected adverse impact of siltation. For example, will a surge of sediment following any Snake Dam breaching adversely impact other existing wetlands along the shores of Lake Wallula? What is the ongoing impact on existing wetlands from annual silt deposits, inasmuch as such sediment will not be trapped behind Lower Granite Dam?

How much existing habitat is predicted to be lost in Lake Wallula below the mouth of the Snake River due to being buried by sediment from the Lower Snake if the dams ever were removed? What will be the impact on adults returning to spawn and on juveniles as they swim downstream?

***The impact of degraded water quality in Lake Wallula from such suspended solids deserves more examination.*** IPNG recognizes the useful work prepared by the Corps in its sediment Appendix for the Draft EIS. Federal agency tests should determine what the impact would be from murkier waters caused by suspended sediments will be on juvenile and returning fish. If no research and analysis exists, IPNG urges such research be carried out, with results presented before any final actions are taken.

***Federal agencies should address whether or not contaminated sediments are lodged within the large sediment accumulation behind Lower Granite Dam.*** IPNG has no independent knowledge whether or not contaminated sediments now exist behind Lower Granite Dam, capped by clean sediment and currently not harming fish. If any such contaminated sediment is there, although safe today because it is capped with benign sediment, we worry that such contaminated sediment would dislodge and enter the water in a suspended state as it flows down the Snake into the Columbia.

Federal officials should answer public questions whether or not toxic materials are contained in the 100 to 150 mcy of deposits currently in the reservoir behind Lower Granite Dam. If so, what is the amount? Are Federal officials confident that none is present in amounts that might damage juvenile fish if disturbed and swept into the water column if Lower Granite and other Snake Dams were breached? IPNG hopes that none is present.

What is the view of Federal officials regarding re-suspension of questionable materials that now capped (we presume) by clean material behind the dam? Do Federal agencies prefer to leave such material naturally capped where it now might be located, or to stir it up by allowing it to flow unimpeded down the Snake to resettle in Lake Wallula—and perhaps further downriver?

Are any such contaminants apt to remain suspended in the water beyond McNary Dam farther downstream? Is it possible that such contaminants could remain in the water until it reaches the estuary—or to the mouth of the river?

IPNG asks if Federal officials are confident that any amounts of dioxin, DDT or manganese are so minute or non-existent that the public need not be concerned over this possibility? IPNG members hope that is the case, and that there is no cause for concern. IPNG believes that such questions should be answered, however, with scientific certainty at least equal to the degree of scientific certainty now relied on by those scientists now urging dam removal because of their belief that this action will help fish recovery.

***Ongoing maintenance dredging in Lake Wallula at various port facilities may be needed to maintain open channels that allow continued export shipping.*** Products from IPNG ports leave the Inland Empire by barge destined for global markets. Thus, the Columbia-Snake navigation channel opens the door to world trade. Keeping those "world channels to trade" always open and dredged is critical. In a competitive world, any interruption in dredging at the wrong time of the year could send customers to other sources of supply. This uncertainty would add another variable to the equation of how Tri Cities ports can grow and continue to provide an economic engine for helping create new family-wage jobs in the area.

Regular O&M dredging might be needed if the siltation impacted channel access to the Tri-Cities port dock facilities. The channel to the Tri Cities port docks passes the mouth of the Snake as it approaches the Tri Cities. IPNG is concerned about potential conflicts between dredging needed after siltation that might conflict with a fish migration period. The Tri Cities deserve to know the potential impact on the viability of these port operations if siltation becomes a problem if the Snake Dams ever e breached.

***Sediment deposits resulting from breaching Snake Dams could damage or impair access both to the water intake pipe and to the pier/dock at the Boise Cascade paper mill at Wallula.*** This Boise Cascade (BC) mill is located at Wallula, on the northeast already-shallow side of the reservoir. This mill is Walla Walla County's largest taxpayer, providing many family-wage jobs. It offers a case study of associated costs imposed by sediment damage and other steps required for their paper plant and fiber farm operation if the Snake dams ever were breached.

On March 9, 2000, BC submitted to the Corps detailed comments about the potential but expected impact on its Wallula paper mill and the affiliated fiber farms if the Snake dams were breached. Under the "one comment for all Federal processes" approach, members of the Federal Caucus should have those detailed BC comments available to review. They illustrate what one large employer could face in an ancillary arena—sediment damage—that has not received much regional attention.

***The Caucus should answer concerns raised by Boise Cascade comments in the Caucus' final plan and detail potential adverse impacts from sediment.*** In addition to its large paper mill at Wallula, below the mouth of the Snake River, BC also has fiber farms where rapidly growing cottonwood trees provide the fiber required for paper mill operations. Those fiber farms draw irrigation water from the Ice Harbor Reservoir to nourish the cottonwoods. With any breaching, BC would be required to get a permit to

draw water from the free-flowing Snake to keep these fiber farms productive. Will environmental groups challenge all permit applications to draw water from the Snake at natural level? Will a long and complex permitting process today be made longer and more complex?

BC provided the Corps with estimates of the costs to cope with the damage from siltation and continue operating, if the Snake Dams ever were breached. For the fiber farms, the capital costs would be between \$14 and \$23 million. That includes replacing and relocating pumping stations, and increasing filtration for those irrigation systems. The annual incremental cost increase to operate the new facilities is estimated to be \$440,000 in today's dollars.

For the paper mill itself, the required capital cost estimate is between \$1-2 million. New shallow wells may well be needed due to silt damage, and barge shipments would be interrupted, subject to dredging to the BC dock. That annual incremental cost increase for the mill is estimated at \$800,000.

BC points out a practical problem in constructing a new pumping station to draw water from a natural Snake. Irrigation to the fiber farms must continue uninterrupted. Even an interruption of less than a week can be fatal to the fast-growing cottonwood trees. Thus, construction of a new pumping station cannot wait until after the Snake lowers to its natural river stage.

The new pumping station would have to be partially built before breaching, a complex and costly task. Partial construction that took place while the Ice Harbor Dam reservoir still exists would be difficult at best, and would be limited to periods when smolts are not migrating through the pools. Permitting for such work could be difficult to obtain.

Thus, this single BC paper mill and affiliated fiber farms estimates capital costs to operate if the dams were breached at between \$15- 25 million and annual incremental cost increases of \$800,000.

***The Port of Walla Walla sees potential adverse impacts to its tenants from siltation at its facilities at Lake Wallula.*** This offers another example of the ripple effect of dam breaching. The Port of Walla Walla tenants include Cargill Grain, Cograin, Western Trading Corporation, and a growing cruise ship business. These facilities, we presume, will require regular maintenance dredging. The cruise ship business also should remind the Caucus and others that a growing reservoir-based recreation business now exists in the region. Recreation is not, as some dam critics assert, only some potential new source of economic strength if dams are breached.

***The Final Plan should detail all potential impacts from such sediment deposits into Lake Wallula (and downriver) and quantify the associated costs on impacted entities.*** IPNG suggests that such impacts as to these examples—one large employer and one port— from sediment damage have not received sufficient study, and that this issue

deserves such review. IPNG recognizes that the Corps prepared a technical appendix addressing the issue of sediment deposition if the dams were breached. IPNG sees little evidence that material from the Corps Sediment Appendix was included in the Federal Caucus review and analysis. IPNG believes strongly that this element must be included in the Caucus' examination of habitat and hatchery options, and evaluated, as are other variables.

#### **ANOTHER "H" FOR THE "ALL-H" APPROACH: HIGH SEAS**

***IPNG strongly urges the Federal Caucus to increase the importance given another H: High Seas.*** IPNG raised this issue in the opening sections of these comments. We believe strongly that it must be addressed before major decisions must be made by other sectors in the region.

***NMFS and other Federal agencies must be more candid about the crucial impact on fish recovery of changes in the high seas.*** Ocean temperature and cyclical climate shifts are beyond our control, but they can severely upset and skew the tens and hundreds of millions of dollars spent elsewhere in the basin. Numerous reports regarding salmon recovery options use various ratios and probability percentages and other measurement measures that try to quantify tasks and the chances of succeeding with them. IPNG believes similar ratios and percentages for the downside and upside from changes in ocean conditions should be put in front of our region. They form an essential element in our region's understanding of these complex issues.

***Our region deserves straight talk that explains how some of our efforts and our funding may be in vain under certain ocean conditions.*** The region is told that normal, cyclical shifts in ocean temperature—often over a decade in length-- affect the amount of ocean food available, beginning with plankton. We are told that these changes, which we cannot control, could have a devastating impact on the results on juvenile fish entering the ocean and on returning spawning adult species.

Please provide as part of your All-H final Plan, therefore, useful conclusions and analysis of the ocean impact on the outlook for fish species recovery. Also, please provide mathematical formulas that reflect this examination and evaluation of the chances and/or probability that such ocean and climate changes may damage our region's recovery efforts, or how the changes may contribute to a natural surge in returning fish.

#### **WATER TEMPERATURE**

***Snake River Dams are not the cause of elevated summer water temperatures in their reservoirs.*** IPNG will address only one aspect of this complex issue: the impact of the Snake Dams on raising water temperatures. The record does not support such allegations.

***Before the dams were built, summer water temperatures in the Snake exceeded current standards.*** In 1963, written proceedings from a Public Health Service conference

examined water temperature data from 1955-58— before the Snake Dams were built. Those findings reported that “water temperature climbed to 65 degrees F late in June and quickly exceeded 70 degrees F where it remained throughout the summer months.” Corps measurement data showed that, in 1958, temperatures peaked at about 80 degrees F, and temperatures above 68 degrees F lasted for 60 to 75 days during those four summers.

In short, this data shows that the water exceeded water temperature standards before the dams were built. The Federal Caucus should include such material in discussions of options under review by the region.

*Temperature measurements above the Lower Granite pool on the Snake and Clearwater Rivers since the dams were built show temperatures exceeding water quality standards before this water even enters the Lower Granite reservoir.* In other words, the water temperature on the Snake and Clearwater already exceeds the standards—due to a number of reasons, we believe-- before it becomes part of the four reservoirs.

Thus, this research shows that water already exceeded the standards before the dams were built, and measurements in recent years show that water above the pool exceeded the state standards.

*Colder water release from Dworshak Reservoir that began in 1991 has resulted in declining water temperature trends in the Snake River reservoirs.* Cooler water in the Snake reservoirs in recent years during the hot summer months results from release of cold water from Dworshak, and the trends in summer water temperatures is downward.

*Corps expert examines water temperature issues.* In the Clean Water Act lawsuit<sup>2</sup> in which IPNG is an intervenor, the Corps introduced a declaration of a 25-year veteran of the Corps, John McKern, in support of the US Government’s cross-motion for summary judgment. His declaration dealt with water temperatures in the Snake before and after construction of the four Snake dams.

McKern’s court declaration concluded on this point, “Therefore, water temperatures in the free flowing river before the dams were constructed exceeded the water temperature standards.” (Emphasis added).

*Water temperature is impacted less by run-of-river reservoir than is asserted by some Snake Dam critics:* In his declaration, McKern next stated that water-warming characteristics that apply to storage reservoirs do not apply to run-of-river reservoirs. He quotes from the 1963 Federal Public Health Service report that stated

“Large and deep impoundments will decrease downstream water temperatures in the summer and increase them in the

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<sup>2</sup> National Wildlife Federation et al vs. The US Army Corps of Engineers, U.S. District Court for the District of Oregon, CV 99-442 FR

winter, if withdrawal levels are low; that shallow impoundments with large surface areas will increase downstream water temperatures in the summer; that water periodically withdrawn from the surface of a reservoir will increase downstream water temperatures, and that 'run-of-river' impoundments, when the surface area has not markedly increased over the normal river area, will produce only small increases in downstream water temperatures." (Emphasis added)

McKern also notes that "Snake River reservoirs are run-of-river reservoirs that are for the most part narrow and deep."

He states that water temperature increases begin with water entering Lower Granite in early to mid-July and progress downstream through Ice Harbor by mid-July to early August. As cool water enters Lower Granite in late August or September, the cooling trend progresses through the downstream reservoirs.

*The Corps' expert determines summer Snake water temperature trend is downward.* Some Snake dam critics attribute warm summer reservoir temperatures to the existence of the four Snake reservoirs. McKern stated

"I have reviewed the maximum water temperatures reached at each of the four lower Snake River dams since they became operational.... The trend lines on these graphs show that the maximum water temperatures have declined since the dams were installed." (Emphasis added)

*Lower Snake reservoir summer temperature result from several factors.* McKern noted in his court declaration that water temperatures vary because of climate, general level of discharge, and timing of discharge in the lower Snake River.

"During drought years, flows all year long are typically lower than normal and water temperatures in the summer are higher.... In hot, low flow summers, warmer water enters the lower Snake River from the Clearwater and Snake Rivers resulting in Lower Granite and the other water reservoirs having higher water temperatures." (Emphasis added)

*Dworshak cold water releases help the downward summer water temperature trend.* In his court declaration, McKern also discussed the impact of release of cold water from Dworshak Reservoir. This cool water release began as a test in 1991, and has been a regular part of the Corps' operation since 1995. McKern notes that the impact,

... is most dramatic at Lower Granite Dam where temperatures have been 71°F or lower for the five of the past six years. (NB:

McKern declaration was in 1999.) From 1975 to 1991, maximum temperatures ranged from 72 to 78°F.

Rivers creating the Lower Granite are the Clearwater and the Snake. No significant streams enter the Lower Snake until below Little Goose Dam. McKern states that the Palouse and Tucannon rivers Lower Monumental Reservoir below Little Goose Dam and influence water temperatures in Lower Monumental and Ice Harbor reservoirs.

***Summer water temperatures can exceed state standards above Lower Granite pool.*** The Clearwater and Snake Rivers enter the Lower granite pool. Dworshak Dam is located in a branch of the Clearwater River. Above the fork of the Clearwater where Dworshak is located (and from which cool water enters the Lower Granite pool), water temperatures have been measured on both the main Clearwater and Snake Rivers.

McKern states that water temperature on the main Clearwater River reached 85°F on July 25, 1994, and 78.5°F on August 7, 1997.

On the main Snake River above the Lower Granite pool, the Anatone gauge measures water temperature from the Salmon, Grande Ronde and the Imnaha rivers, as well as the main Snake. In his declaration, McKern noted that the Snake has flowed through Hells Canyon after release from Brownlee (a storage reservoir) and Oxbow and Hells Canyon Dams (run-of-river). Temperatures at the Anatone gauge reached 78°F on August 26, 1991 and 74°F on August 6-7, 1997.

Thus, it is clear that, for a variety of reasons, water entering the Lower Granite pool already can quite warm. Summer water temperatures vary today. McKern determined that:

In summary it is my opinion this data shows that as discharges from the Snake and Clearwater rivers warms up in the summer, the lower Snake River warms up starting with Lower Granite Reservoir and working on downstream over a matter of a few days. As the weather cools, and cool water starts coming in from the Clearwater and Snake rivers, the reservoirs cool off from Lower Granite working downstream to Ice Harbor Reservoir.

***Run-of-river reservoirs have no significant impact on water temperature.***

McKern noted in his declaration the difference between run-of-river reservoirs and storage reservoirs—with large surface areas where temperature stratification can occur during the summer. He states that run-of-river reservoirs:

mix the water and prevent stratification even during summer low flow periods. The temperatures in run-of-river usually are

within 1 to 2°F from top to bottom. This is the case with the lower Snake River reservoirs. (Emphasis added)

*Analysis refutes the claim that the Snake River Dams increased the number of days the water temperatures exceeded 68 °F.* In his court declaration, McKern also cited data from before and after the dams were built. He notes that the number of days of water temperature exceeding 68°F decreased after the dams were built. After citing statistics to show this, McKern states "In my opinion, trends for maximum temperatures have been downward at all four dams." (Emphasis added)

McKern also notes that at the one dam where the trend is up-- Little Goose-- gaps in data may impact this conclusion.

"... (M)aximum temperatures have been lower since 1991 in all four reservoirs due to cold water releases from Dworshak Reservoir." (Emphasis added)

*Snake Dams do not cause warm summer water temperatures in lower Snake reservoirs, a Corps expert concludes.* McKern finds that warming waters move down through the Lower Snake reservoirs in the summer, and the cooling pattern in the fall repeats the pattern. He said this convinces him that water moving through the system from above the reservoirs sets the pattern. He states that if reservoirs caused the temperatures to increase, it would have been seen first in Ice Harbor, where the canyon is wider and there is more surface water and the air temperature is higher. (Emphasis added)

McKern's conclusions re water temperature issues were clear. He stated:

In my opinion, the water temperatures in the reservoirs are controlled primarily by the water temperatures coming into Lower Granite reservoir from the Snake and Clearwater rivers, and into the lower two reservoirs from the Tucannon and Palouse rivers. There are no operational measures that I know of that the corps could take that would measurable reduce the temperature of the waters in the reservoirs. The Corps is making cold water releases from Dworshak Reservoir that, as I have described, make a substantial difference in lowering water temperatures in the lower Snake River. (Emphasis added)

McKern concludes his declaration in the Clean Water Act lawsuit by stating that

**... (I)t is my conclusion that the water of the lower Snake River does not get as warm as it did before the dams were installed. It is also my conclusion that water temperatures are determined more by temperature of**

**inflow from the main river and tributaries than by heating of surface waters in the run-of-river reservoirs.... It is my opinion that water temperatures are determined more by the temperature of inflow from the main river and tributaries than (NB: than) by heating of surface waters in run-of-river reservoirs.**  
(Emphasis added.)

#### **"COMBINATION H:" HIGH SEAS HARVEST**

*People in the Pacific Northwest expect some burden sharing by all parties outside the four Pacific Northwest states.* In examining its alternatives and options, IPNG suggests that the Federal Caucus also should add the "combination H" to your review. High seas Harvest issues include Canada fisheries—and Alaska— as part of this complex issue. We realize that high seas harvest reductions impacts regional relations with Canada, but failure to include proportional reductions in Canadian harvest will hurt Northwest regional public support for whatever major plans the Caucus develops for our region.

Some 15% of the Columbia basin is in Canada—along with 415 miles of the Columbia's total of 1200-mile length. We are told that rainfall in Canada produces 25% of the Columbia's outflow volume into the Pacific.

As our region's ratepayers, farmers and ranchers, businesses and urban dwellers all shoulder some share of the burden in restoring fish runs, we need to see that our basin-wide fish recovery picture does not omit burden-sharing by Canada.

*IPNG calls attention to material in the Harvest Appendix to the Draft Plan.* This document is wholly inadequate to encompass such an essential element of fish recovery. When one removes the graphs and charts, and references, the appendix has some 30 pages of analysis. It falls short by a great degree the quality and quantity and usefulness of material contained in the other appendices. More material regarding the management of ocean fisheries and the role Canada plays should have been included in the Draft Plan—*not just in the appendix.*

IPNG encourages inclusion into the Final Plan of material from the Harvest Appendix to the Draft Plan including analyses describing the international fisheries management aspect of this issue. Ocean harvest issues cannot be dismissed as difficult, complex and far-reaching. At a time when the Federal Caucus has under review its own series of recommendations that most people in the region would describe as complex and far-reaching, harvest must be addressed in a more complete manner.

#### **ANOTHER "H:" HYPOCRISY**

These comments opened with various proposals that IPNG supports. These comments do not attempt to answer criticisms, claims and exaggerations from critics of Snake Dams. Some of these dam critics, however, claim that the Snake Dams are their

only targets for breaching. Such environmentalist critics of the dams say that environmental groups do not seek to breach or lower dams on the mainstem Columbia. That statement has been repeated often in the region.

The Caucus received many postcards sent by advocates of dam removal, in the misguided idea that this was some regional plebiscite. IPNG asks the Federal Caucus to realize that the goal of many environmental groups is a free-flowing river from above Lewiston to the mouth of the Columbia River. We predict that many of those postcard senders next will endorse removal of the four lower main-stem dams as well as the Snake dams—and would have done so now if they were given a postcard containing that choice.

Hypocrisy may be an added H to the All-H list. The recent response by some environmental groups to release of the John Day Drawdown Phase I Study calls into question claims of many Snake Dam critics. In fact, it raises for the region's consideration another "H": Hypocrisy. To those critics who claim that their only target are the four Snake Dams, and not the entire Snake and mainstem dams, IPNG calls attention to comments in the Oregonian after the John Day study was released.

Among those groups suggesting that that their dam breaching efforts are limited to the Snake Dams is a well-known environmental advocacy group—Save Our Wild Salmon. In fact, the Executive Director of SOS, Pat Ford, was quoted in the Oregonian when the John Day Study was released as saying:

"A John Day drawdown, if it were to occur and if it were done properly, is the one measure in the hydrosystem that benefits every listed stock of salmon and steelhead in the basin except Willamette River fish."<sup>3</sup>

Through Bob Heinith, CRITFC said the John Day drawdown is "the single most effective step that could be taken for Columbia Basin salmon." (Emphasis added.)<sup>4</sup>

Oregonian reporter Jonathan Brinckman reported in that same article that "conservation groups and tribes consider modifying John Day even more important than breaching four Federal dams on the lower Snake River." (Emphasis added)<sup>5</sup>

IPNG reminds the Federal Caucus that many critics of the Snake Dam have a broader natural river agenda, and all parties should be candid about it. These assertions about the John Day study belie the environmental groups' assertions that the Tri Cities would replace Lewiston as the head of navigation. They claim that the Tri Cities "would boom" after breaching the Snake Dams. Such comments as appear in this newspaper

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<sup>3</sup> Portland, Oregon, Oregonian, January 27, 2000.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

article about the importance of drawing down the John Day reservoir should shine a bright light on this. Hypocrisy is an appropriate term in this context.

We request that the Federal agencies view with great skepticism any comments from supporters of dam breaching that try to isolate these four Snake River dams from later attempts to breach or draw down McNary, John Day, The Dalles, or even Bonneville Dam. IPNG suspects such a strategy. Environmentalists tipped their hand with the quotes in the Oregonian following release of the John Day Phase I Study.

If the Snake River dams were breached, IPNG questions whether environmental groups would allow river navigation and hydropower operations to continue elsewhere on the Columbia River without challenging operation of mainstem dams. One could imagine an argument constructed along the lines of, "Now that the region has spent billions to remove the Snake dams, we must not waste that money and now must complete the job by breaching mainstem dams, for the Snake breaching alone will not save fish."

IPNG suggests that critics of Snake River Dams should tell the Federal Caucus if they agree or disagree that drawdown or breaching of the mainstem dams also is on their agenda. We will disagree with that position, but will respect their candor and honesty.

#### FISH TRANSPORTATION

*IPNG supports All-H Alternatives and Options under review that increase the role for smolt transportation.* At a time when the science has moved away from viewing dam breaching as some silver bullet, science also tells us that barge transportation is providing greater survival successes than occurred some years ago. We also hear, unfortunately, that some scientists within USF&W still question and undervalue the role of smolt transportation. IPNG believes strongly that this proven method should continue to play a major role in regional fish recovery efforts. We also support reasonable efforts to increase survival rates even more for transported smolts.

IPNG encourages Caucus of NMFS data showing smolt survival has risen in recent years, as equipment improvements led to higher survival rates. NMFS has stated that survival rates now equal that of the period before the Snake Dams were built.

*IPNG views with skepticism arguments surrounding "delayed mortality."* As noted above, smolt survival rates are up for smolts transported by barge. Because transportation smolt survival data does not support continued arguments against smolt transportation, those critics must be creative. Perhaps they should introduce a new concept: delayed mortality. A cynic might translate that term as: if the transportation statistics oppose your forgone conclusion, then you develop some new terminology that will be harder to prove or disprove, but can be used to keep the anti-barging arguments in the mix. Sound science must back up any claims of delayed mortality, and it should require a solid, quantifiable definition.

**DIVIDE NMFS?  
ARE ENFORCEMENT AND PROMOTION APPROPRIATE IN A  
SINGLE AGENCY WITH A SPLIT MISSION**

*Congress should consider dividing NMFS into separate agencies that could focus on separate missions that do not conflict regularly with each other.* Although we recognize benefits from coordination of and easier access to data useful to both enforcement and promotion divisions within NMFS, the fundamental conflict cannot be papered over, and may require a Congressional fix. We believe the region, and the Congress, should ask and debate the question: should we separate the fish promotion aspects from the ESA enforcement part of NMFS? Separating them should allow the ESA division of NMFS to take a more "recovery friendly" stance toward harvest issues.

IPNG suggests that NMFS' ESA section might well have taken a tougher and more thorough look at past decisions regarding the size of the allowable catch of species in the past 15 years if promotion were not part of the NMFS mission. Today, NMFS should not examine itself to determine the role that overcatching contributed to the current problem for two reasons. It would be unconvincing to do so, and it would be the wrong use of the agency's scarce species recovery resources.

*IPNG suggests that Congress consider a GAO examination of how NMFS participated in setting Northwest salmon harvest limits over the past 15 years. How were conflicts between the promotion and enforcement arms of NMFS resolved during this period?* In an era of scarce resources, we are constrained from urging a full-scale examination by NMFS of how ocean catch limits that were set to high may have contributed to the current state of various fish stocks. As noted, it is not a smart use of its limited fish-recovery resources.

We believe, however, that a long-term GAO examination of the issue is appropriate. A GAO analysis could examine how catch decisions were reached over the past 15 years, and also examine the resulting impact today of those decisions. What was the basis for setting harvest limits? On what science were those decisions made? How good were the forecasts of expected returns? If the original forecasts were inaccurate and allowed overcatching, how were they improved over the period?

Did friction between the promotion side of NMFS and the enforcement side have an impact on catch decisions over the years? Is the friction greater today than in years past, due to the pressure of the ESA listings? How were and are and will be such contradictory positions reconciled?

At the least, we urge the Federal Caucus to provide material for public review and comment on the decisions on catch that were based on predicted size of the harvest over the past 15 years. Granted, this is in hindsight, and there have been enough

miscalculations by all parties at the table. We do not intend it merely as laying the blame. Yet, we are concerned that decisions on catch size that are made within NMFS, and any problems seen after the fact, might be a problem because the promotion arm of NMFS is too close to the enforcement arm of NMFS.

If NMFS can assuage the region that this has not been a problem, it will increase confidence of the region in future years. Nonetheless, IPNG believes that it is a question that needs addressing in view of the key role NMFS plays in this complicated fish recovery equation.

### **INCREASED ENVIRONMENTAL DAMAGE FROM DAM BREACHING GIVEN INSUFFICIENT CONSIDERATION**

#### ***Other significant environmental damage would result from dam breaching.***

Critics of dams and water transportation minimize or ignore environmental damage that would occur if the Snake River dams were breached and the John Day pool were drawn down to natural river level.

***The Columbia River Gorge Scenic Area will suffer degraded air quality and increased traffic if barging disappears.*** We urge the Federal Caucus to ask the Columbia River Natural Scenic Area officials about the environmental degradation that would occur if river transportation were removed as a source of cargo movement through the Gorge and replaced by increased truck and rail transportation.

IPNG urges the Federal Caucus and the Gorge Commission to examine the added traffic on the highways or rail lines through the Gorge Scenic Area. We urge you to examine the greater wear and tear on existing infrastructure. (We are told that 120,000 added rail cars and some 700,000 semi-trucks would be needed if barging disappeared and the cargo moved via these modes.) The staggering number of added trucks or unit trains (100 rail cars each train) will degrade this favorite spot of many Northwesterners: the Columbia River Gorge.

IPNG suggests that such traffic increases through the Gorge will be unsafe, and will degrade the experience visitors now enjoy in this unique area. Both increased traffic and loss of air quality in the Gorge will result from a loss of barge transportation for cargo

***Severe adverse environmental impacts will result from curtailing barging.*** If the Snake Dams are breached and the John Day Dam is lowered below the level allowing navigation, environmental damage will occur. This issue merits more discussion and study than is found in the Draft Plan. For agricultural exports to reach lower river ports for loading into ocean vessels, then the cargo must travel by truck or rail. Increased air pollution is just one negative impact.

Various studies in the past illustrate the problem if barging disappears as a transportation option. One 3500-ton barge equals the cargo capacity of 35 jumbo hopper

rail cars or 134 loads varied by one large semi-truck (910 bushels). One barge tow (of several individual barges) equals 1.4 unit trains (100 rail cars each) or 538 semi trucks. Each Panamax vessel calling at a lower river port takes 60,000 tons of grain. That is 4-5 barge tows, or 6500 rail cars, or 2400 semi trucks.

***Barges are far more fuel-efficient than these other modes.*** Degraded air quality will result from the less fuel-efficient movement of cargo. A ton of commodities can move 524 miles by barge on a gallon of fuel. The same product can move only 59 miles by truck on a gallon of fuel, or 202 miles per gallon by rail. Water transportation results in 1/4 to 1/3 the emissions of rail or truck.

IPNG specifically asks the Federal Caucus to solicit views from the Columbia River Gorge Commission on the potential adverse impact on the gorge of such increased rail or truck traffic as would be required if the slackwater barge transportation was not available above Bonneville and The Dalles Dams. edseaports. You have heard from others how barge transportation uses less energy and creates less pollution than rail or truck.

***IPNG believes that the lower river transportation logistics systems are not equipped to handle this shift in modes without a significant capital investment.*** Securing adequate rail cars anywhere in the Pacific Northwest always is difficult. IPNG urges the Federal Caucus to call upon MARAD and USDOT for assistance in evaluating the impact on such a shift from barge to rail or truck. A dramatic shift from barge to truck, for example, could overwhelm transfer facilities at lower river ports.

The Caucus also should draw on expertise within the USDOT/National Highway Administration, and with state highways departments in Idaho, Washington and Oregon. They should examine and report on the adverse impact on highway wear and tear and on traffic congestion and safety-- from Lewiston through the Gorge Scenic Area to Lower Columbia River ports.

***EPA and State DEQs should examine degradation of air quality from increased truck and rail pollution.*** Experts on river transportation and logistics issues know the energy and freight statistics. It is easy to grasp how highways would be clogged and unsafe if trucks substituted completely for barges in carrying regional cargo to lower river ports for export. Yet, this issue has received insufficient attention.

***These agencies also should study the worsened air quality from greater pollution resulting from gas turbine energy plants needed to make up for energy production lost if the dams were breached.*** The hydropower produced by the four Snake River dams produces enough energy to provide for all of Seattle's energy needs, or to meet the energy needs of the entire states of Idaho and Montana. If the dams ever were breached, that power loss must be made up here in the region. Some critics of dams ignore this potential result, asserting that energy savings will not require construction of such new plants. IPNG disputes such interpretation, in spite of the benefits of past energy saving initiatives

promoted in the region. More generating capacity, we believe, will be needed—with or without effective energy savings initiatives.

### COLUMBIA-SNAKE RIVER SYSTEM NAVIGATION

*Navigation interests are unique and merit separate status from many other parties in the region.* Ports have certain characteristics separating them from many commenters in this process. As such, a review of some of these distinguishing characteristics is useful. The range of alternatives and options now under review by the Federal Caucus and discussed in the Draft Plan includes some choices which would have a direct impact on navigation on the Columbia Snake River system. It is important that the Caucus examine the unique role navigation plays, and the special rights to which it is entitled. In this context, IPNG does not mean the economic or environmental benefits of navigation, but the statutory basis for its unique status. This sets navigation apart somewhat from other economic interests in the region. Nothing in these comments to the Federal Caucus, however, should imply that IPNG does not recognize the central role the Endangered Species Act also plays in the region and in this specific issue.

IPNG offers these observations for review by the Federal Caucus for two reasons. First, the right of navigation is a complex issue, and some Caucus members may not have reviewed the statutory and case law basis supporting navigation's unique position. Second, this review reminds critics of upriver navigation about the fundamental rights enjoyed by navigation.

Some Federal agency recommendations also could conflict with navigation's well-known (and well-litigated) rights under existing law. At a time when zealous advocates push the Federal Caucus from all sides, IPNG offers comments in this section as a reminder of factors that make navigation unique.

*The Columbia/Snake River inland waterway system was developed by Congressional action with navigation as its centerpiece, pursuant to its powers granted under the commerce clause of the United States Constitution.* Congress may pass legislation that not only protects rights of navigation, but it may enlarge them through river and harbor improvements. The power to develop the navigable capacity of the Columbia and Snake Rivers is found under the commerce clause of the United States Constitution. See, e.g., *The Daniel Ball*, 10 Wall. 577, 77 U.S. 557 (1870); *Wisconsin v. Duluth*, 96 U.S. 379 (1877).

After completion of the Bonneville Dam in 1937, the United States Army 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. H.R. 704, 75<sup>th</sup> Cong., 3d Sess. 8-11 (1938) (report of the Board of Engineers for Rivers and Harbors). Development of an inland navigation system to Lewiston, Idaho was later approved by Congress. In 1945, Congress not only authorized construction of the McNary Dam, it also authorized the development of an inland navigation system on the Snake River:

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 concerned.<sup>6</sup>

*Construction of the Columbia/Snake River inland waterway system was a central part of a federal policy to develop inland ports and navigation.* For example, five years later, Congress authorized construction of the John Day and The Dalles Dams, pursuant to Section 204 of the Rivers and Harbors Act of 1950. These dams were authorized "for the benefit of navigation and the control of destructive flood waters . . ." Senate Report No. 1143, issued by the Committee on Public Works in support of the legislation, addressed the importance of the inland water way system:

The Federal program for the improvement of the Nation's rivers and harbors is now in its one hundred twenty-fifth year. During the entire history of this all-important Federal undertaking, the work involved in this program has been under the supervision of the Corps of Engineers, United States Army. The program has produced the best system of inland waterways to be found anywhere in the world and in addition has opened for all forms of navigation . . .

. . . The importance of the system of inland waterways is indicated by the vast annual increase in the tonnage and in the variety of commodities that move over these waterways. For each ton of freight that uses the improved inland waterways, there is return to the Nation as a general benefit a saving in transportation costs. While these savings may be considered as a prime factor in the use of the system of inland waterways, another factor just as important is that the improved waterways have to a large extent been responsible for the growth and the development of the interior sections of the country. Low-cost water transportation, on one hand, has enabled a movement of products from the mines, forests, and the farms to a widespread consuming area. On the other hand, it has enabled the distribution, at low cost, of semi-finished and finished products from industrial communities that have

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<sup>6</sup> Rivers and Harbors Act of 1945, §2 (1945).

been established on these waterways to the consumers spread over almost the entire Nation.<sup>7</sup>

Thus, IPNG has a clear interest in maintaining the legally protected navigation channel depth. IPNG also has a direct interest in decisions made by the Federal Caucus, specifically as they may impact navigation from the mouth of the Columbia River to Lewiston, Idaho.

**Congress mandated the inland navigation channel at 14 feet.** Congress specifically authorized the channel in the Columbia/Snake River "barge navigation project" at 14 feet, at minimum regulated flow, pursuant to Section 203 of the Flood Control Act of 1962:

"Sec. 203. The following works of improvements for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: Provided, that the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this title with funds from appropriations hereafter made for flood control so as to be ready for rapid inauguration of a construction program. *Provided further*, that the projects authorized herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, that penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the Department of the Army when approved by the Secretary of the Army on the recommendation of the Chief of Engineers and the Federal Power Commission. . . .

#### COLUMBIA RIVER BASIN

The projects and plans for the Columbia River Basin, including the Willamette River Basin, authorized by the Flood Control Act of June 28, 1938, and subsequent Acts of Congress, including the Flood Control Acts of May 17, 1950, September 3, 1954, July 3, 1958 and July 14, 1960, are hereby modified to include the projects listed below for flood control and other purposes in the Columbia River Basin (including the Willamette River Basin) substantially in

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<sup>7</sup>U.S. Code Cong. Serv. 2311-12 (1950).

accordance with the recommendations of the Chief of Engineers in House Document Numbered 403, Eighty-seventh Congress: *Provided*, that 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.

Asotin Dam, Snake River, Idaho and Washington;  
Bruces Eddy Dam and Reservoir, North Fork,  
Clearwater River, Idaho;...<sup>8</sup>

The Corps of Engineers is required, therefore, to maintain the level of the reservoirs behind each dam consistent with this Congressional mandate. This entails keeping a 14-15-foot clearance over the top of the lock to permit tug and barge traffic to pass through the dam. 33 C.F.R. § 207.718(e). A minimum navigation channel behind each navigation lock is known as the "Minimum Operating Pool" (MOP). Port facilities have been constructed to accommodate the river levels that are based on this 14-foot mandate.

During the salmon migration the four lower Snake River dams are operated at or near minimum operating pool levels. Thus, the system is operated at its lowest level permitted by federal law. Congress has not authorized any reduction in the navigational minimums for the Columbia and Snake River Inland Navigation Channel. Operation of the Channel at less than 14 feet will impair navigation.

***Congress has not waived its sovereign immunity to permit claims resulting in modification of the 14-foot navigational channel.*** Since Lewis and Clark led the Corps of Discovery to the mouth of the Columbia, this nation has considered the development of its inland navigation system a national priority. IPNG suggests to all those who invoke the names of Lewis and Clark in this debate to recall that a central purpose of that mission was to seek the Northwest Passage—a navigable waterway connecting the Mississippi-Missouri to the Pacific Ocean.

Congress has not waived its sovereign immunity with respect to claims against the four lower Snake River dams – each must be operated to provide a navigation channel of 14 feet as mandated by federal law. The US Constitution protects the Congressionally mandated Columbia/Snake River inland navigation system and the exercise by Congress of the navigational servitude pursuant to the Commerce Clause. As such, only Congress has the power to order a change or modification to the 14-foot navigation channel. Any administrative recommendation adversely affecting the operation and maintenance of that channel conflicts with this mandate.

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<sup>8</sup>Flood Control Act of 1962, § 203, P.L. 87-874, 76 STAT. 1173, 1962 Code Cong. and Admin. News 1385, 1400.

Raising the water level of the Snake River by creating reservoirs was required to develop navigation to the extent desired by Congress. None of the Lower Snake dams has any appreciable storage capacity. As noted in IPNG's earlier discussion of water temperature, lower Snake dams are run-of-river dams. Two dams operate within a three-foot range, and two dams operate within a five-foot range. The lowest level is the navigational minimum. Because of that, any decisions made regarding dam operations must include the navigational component. To challenge river operations which would require levels below MOP is simply a challenge of the Corps' authority to maintain the navigational channel as mandated by Congress.

The assertion by some critics that the reservoirs themselves have raised the water temperature of the river simply cannot survive the protection afforded to navigation, in addition to failing the examination made by Corps experts who examined the impact on temperature by those four specific run-of-river dams. MOP is required to maintain navigation. Spill below MOP will impair navigation.

*All navigable waters of the United States are subject to a federal navigational servitude, which is superior to rights possessed by the States, Indian nations, or private parties.* The nature and scope of the navigational servitude was recently discussed by the United States Supreme Court in United States v. Cherokee Nation of Oklahoma, 480 U.S. 700; 107 S. Ct. 1487; 94 L.Ed.2d 704 (1987). In that case, the Court reviewed a claim by the Cherokee Nation for damage to its fee simple title to certain portions of the riverbed of the Arkansas River in Oklahoma. In 1971 the construction of a federally authorized navigation channel was completed from the mouth of the Arkansas River to Catoosa, Oklahoma (the McClellan-Kerr Project). This Project was approved by Congress in 1946, Act of July 24, 1946, ch. 594, 60 Stat. 634, 635-636.

In that case, the Cherokee Nation claimed that the construction of this navigation channel damaged its proprietary interest in the riverbed of the Arkansas River granted to it earlier by the United States of America, and that it was entitled to just compensation. The Supreme Court refuted this claim:

"[T]he interference with in-stream interests results from an exercise of the Government's power to regulate navigational uses of 'the deep streams which penetrate our country in every direction.'" Gibbons v. Ogden, 9 Wheat. 1, 195 (1824). Though this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation," Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979), there can be no doubt that "the Commerce Clause confers a unique position upon the Government in connection with navigable waters." United States v. Rands, 389 U.S. 121, 122 (1967). It gives to the Federal Government "a 'dominant servitude.'" FPC v. Niagara Mohawk Power Corps, 347 U.S. 239, 249 (1954),

which extends to the entire stream and the steam bed below ordinary high-watermark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interest of riparian owners have always been subject." Rands, supra, at 123. n.3. See also United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950); Scranton v. Wheeler, 179 U.S. 141, 163 (1900).<sup>9</sup>

In ruling against the claim for compensation, the Court also stated that the navigational servitude was superior to that of a state's own sovereign interest in its navigable waters.

"Indeed, even when the sovereign States gain "the absolute right to all their navigable waters and the soils under them for their own common use" by operation of the equal-footing doctrine, Martin v. Waddell, 16 PET. 367, 410 (1842), this "absolute right" is unquestionably subject to the "paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." Montana v. United States, supra, at 551. If the states themselves are subject to this servitude, we cannot conclude that respondent - - through granted a degree of sovereignty over tribal lands - - gained an exemption from the servitude simply because it received title to the riverbed interest. Such a waiver of sovereign authority will not be implied, but instead must be "surrendered in unmistakable terms." Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986), quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).<sup>10</sup>

*The integrity of a navigable channel is protected further by the Rivers and Harbors Act of 1899*, 33 U.S.C. § 401, *et seq.* That Act protects navigable rivers from unauthorized obstructions. Section 401 prohibits the construction of bridges, causeways, dams, dikes and the like over any navigable water of the United States without the consent of Congress and unless plans have been submitted to and approved by the Corps of Engineers. Section 403 of the same title protects the navigable capacity of the navigable waters of the United States.

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<sup>9</sup>United States v. Cherokee Nation of Oklahoma, 480 U.S. at 703-704, 107 S. Ct. at 1489-1490. As discussed in Cherokee Nation, the navigational servitude has been enforced even where dredging damaged privately held oyster beds. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913).

<sup>10</sup>U.S. v. Cherokee Nation of Oklahoma, 480 U.S. at 706-707, 107 S. Ct. at 1491.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited . . ." Section 403 applies to federal agencies and states agencies, as well as to private individuals. United States v. State of Arizona, 296 U.S. 174, 55 S. Ct. 666 (1934).

The four lower Snake River dams provide irrigation and hydropower as well as navigation. The fact that the dams are multiple use dams, however, does not impair the integrity of the navigational servitude. See, U.S. v. Grand River Dam Authority, 363 U.S. 229, 232-233, 80 S. Ct. 1134, 1136-37, 4 L.Ed.2d 1186 (1960), quoting State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 527-534, 61 S. Ct. 1050, 1060-1063, 85 L.Ed. 1487 (1941).

***Congressional intent is clear.*** The lower Snake River dams were specifically authorized and constructed to create a barge navigation channel. The intent of Congress is clear – these four dams are an intended part of the inland navigation system created by Congress. The 14-foot navigation channel and the operation of the dams, therefore, are protected by the exercise of the navigational servitude by Congress. The 14-foot navigation channel on the Columbia and Snake River is mandated by several acts of Congress.

***Congressionally authorized navigation rights to Lewiston, Idaho, limit actions that the Federal Caucus can take to those which do not curtail navigation.*** As its members are aware, the Federal Caucus will face certain limits as to what it can recommend involving navigation as part of the region's species recovery plan, absent Congressional authorization.

In keeping with the tone of these comments focusing on fish recovery actions IPNG supports, these comments will not contain a "lawyer's brief" repeating to the Caucus the specific Endangered Species Act standards within which the Federal caucus recommendations will fall. Those legal "sideboards" will guide the Caucus as to what it can implement and what it merely can recommend. Nonetheless, those legal limitations need to be on the table as part of this comment process.

## LIMITS TO CLEAN WATER ACT

***Navigation rights limit application of Clean Water Act.*** IPNG currently is an intervener in a lawsuit<sup>11</sup> in which the scope of the Clean Water Act (CWA) is at issue. Among the issues raised by IPNG was the limit on the CWA when applied to navigation rights. In view of references in the Draft Plan regarding integration of CWA into ESA-related recovery measures, it is useful to review this one distinct area.

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<sup>11</sup> National Wildlife Federation et al v. US Army Corps of Engineers, US District Court for the District of Oregon, No. CV 99-442 FR.

***The Clean Water Act recognizes a special role for navigation.*** At no time during this ESA-salmon process that has engaged the Pacific Northwest for several years has sovereign authority over navigable waters been “surrendered in unmistakable terms.” Certainly, the Clean Water Act contains no specific surrender of the navigational servitude. On the contrary, the Clean Water Act specifically states that the “Act shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army to maintain navigation.”<sup>12</sup>

This expression of congressional intent has two ramifications. By its terms, the authority of the Corps of Engineers to maintain navigation is not to be impaired by any provision contained in the “chapter,” that being Chapter 26 of Title 33 of the United States Code.

This provision also clearly provides that there has been no waiver of sovereign immunity in circumstances that would impair the authority of the Corps to maintain navigation. Nothing in Chapter 26 – i.e., 33 USC §1251- 1376 impairs that “authority.” This provision of the Clean Water Act is clear and unambiguous, thus making reference to legislative history unnecessary. A review of that legislative history confirms the clear mandate of the provision: “Specifically, the authority of the Secretary of the Army to maintain navigation and under the River and Harbors Act of 1899 is preserved.”<sup>13</sup>

***Congress did not intend that the Clean Water Act be used to affect or impair operations undertaken for the maintenance of navigation.*** Congress lawfully authorized these structures pursuant to its Commerce Clause powers. These dams are used to maintain a 14-foot navigational channel. Operations of these dams must protect that channel. For example, state certification for private activities cannot be given where “in the judgment of the Secretary of Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigational waters would be substantially impaired thereby.” 33 USC §1342(b)(6).

***Washington State CWA regulations acknowledge navigation’s unique status.*** Some commenters may suggest that Washington State CWA regulations require some modification of the operation of the Lower four Snake River dams located within the state of Washington.

Washington regulations provide for protection of the Snake River navigation channel, specifically providing that “commerce and navigation” are uses that are to be maintained on all navigable waters of the State of Washington. A characteristic use of Class A Waters specifically includes “commerce and navigation.”<sup>14</sup>

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<sup>12</sup> 33 U.S.C. § 1371(a)(2)(A). See also 33 U.S.C. § 1344(t). (Emphasis added)

<sup>13</sup> S. Rep. 92-414, 1972 U.S. Code Cong. & Admin. News, 3751.

<sup>14</sup> WAC 173-201A-030(2)(b)(vi)

The State of Washington recognized these commerce and navigation interests are identified as a "characteristic use" for all classes of surface waters within the state of Washington pursuant to Wash. Admin. Code § 173-201A-030. IPNG has a direct interest in seeing that Washington regulations are applied properly and are interpreted to protect the characteristic use of the surface waters of the state of Washington.

The Washington State anti-degradation regulation, Wash. Admin. Code §173-201A-070, clearly provides that existing beneficial uses "shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed." That same regulation provides that where the natural condition of surface waters are of a lower quality than the criteria assigned, the "natural conditions shall constitute the water quality criteria." In addition, Wash. Admin. Code §173-201A-060 provides a special exemption for fish passage on the Snake and Columbia Rivers.

Commerce and navigation also are protected by the anti-degradation policy of the same Washington regulation (WAC 173-201A-070). No degradation "which would interfere with or become injurious to existing beneficial uses shall be allowed."<sup>15</sup>

The Washington anti-degradation policy was reviewed by the United States Supreme Court in PUD No. 1 v. Washington Department of Ecology. In holding that the State of Washington could condition a §1341 certification for construction of a dam on minimum stream flows in order to protect fisheries, the Court noted that water quantity was part of the state's water quality anti-degradation policy.

Petitioners also assert more generally that the Clean Water Act only is concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation, or here as a fishery.<sup>16</sup>

Various provisions in the water quality standards of the State of Washington also provide for relief from strict imposition of numerical standards. The anti-degradation regulation provides:

"Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural

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<sup>15</sup> WAC 173-201A-070(1)

<sup>16</sup> PUD No. 1 v. Washington Department of Ecology, 511 U.S. at 719, 114 S. Ct. 1900, at 1912-13, 128 L.Ed.2d 716, (1994) (emphasis added).

conditions shall constitute the water quality criteria." WAC 173-201A-070(2).<sup>17</sup>

Pursuant to WAC 173-201A-060(4)(a), total dissolved gas standards do not apply "when the stream flow exceeds the 7-day, 10-year frequency flood". When considering the dissolved gas criteria for a fish passage over dams, a complete understanding requires review of WAC 173-201A-060(4)(b) ("the elevated total dissolved gas levels are intended to allow increased fish passage without causing more harm to fish populations than caused by turbine fish passage"), the special fish passage exemption for sections of the Snake and Columbia Rivers stated therein, and subparagraph (c) "nothing in these special conditions allows an impact to existing and characteristic uses." Finally, the Washington regulations provide for short-term modifications to both criteria and special conditions pursuant to WAC 173-201A-110.

In addition, the interpretation of the Washington surface water regulations does not establish any violations of those standards by the Corps of Engineers. The State of Washington mandates that commerce and navigation, as designated existing uses of the lower Snake River, be protected by the water quality standards. The 14-foot navigation channel therefore constitutes a limit on the power of the state to further impair commerce and navigation; a sufficient quantity of water to provide a 14-foot navigation channel at minimum regulated flows must be provided at all times.

Certain references in the Draft Plan and its appendices discussed benefits from "integrating" into ESA recovery plans certain CWA-related activities. IPNG notes that the Federal Caucus may not use the Clean Water Act to attack either the existence of dams already protected under the Commerce Clause, or operations necessary to maintain navigation.

### CONCLUSION

IPNG hopes our testimony demonstrates several points worth serious consideration by the Federal Caucus. Neither the DEIS nor the All-I study should dwell on the simplistic question: "Breaching the dams: Yes or No." Instead, our region should commit to a series of steps that focus on habitat, harvest and hatchery reform. The Federal Caucus should take the lead.

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<sup>17</sup> In Oregon Natural Desert Association v. Dornbeck, *supra*, the District Court examined whether the term "discharge" under § 401 of the Clean Water Act includes releases from both point and nonpoint-sources. In concluding that it did, the District Court looked at § 502 of the Act which defines the term "discharge." In overruling of the District Court, the Ninth Circuit relied on §§ 502(12) and 502(16) holding that the term "discharge" includes only point-source pollution and that the nonpoint-source pollution is not regulated by the Act. Water quality limitations can be imposed by a state on intrastate waters once the existence of a discharge has been satisfied. PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700, 128 L.Ed.2d 716, 114 S. Ct. 1900 (1994).

All Federal Caucus leaders should echo comments by NMFS Regional Director Will Stelle at the All-Agency press conference in Portland, Oregon on December 17, 1999. Paraphrasing Mr. Stelle, he said, "Sure, fish would be in better shape with no dams. They also would be in better shape if there was no irrigation, and no building on flood plains, and if we all moved back East."

People of the Pacific Coast know that only four species of the 32 listed or proposed fish are Snake River stocks—only 1/8 of the total. They support a basin-wide and full life-cycle approach as the only path to real fish recovery.

Comments at regional hearings by Federal officials have emphasized the need to step back from the simplistic issue of dam breaching. We thank the Federal Caucus members for this effort, and we urge that it continue.

IPNG does not ignore Hydro in its comments. We favor continued improvements at Federal dams that improve fish passage and reduce damage to juveniles passing the dams on their way downstream. We support increased transportation as an adjunct to dam operations.

IPNG believes that short-term solutions such as culvert replacements offer the chance to "pick the low-hanging fruit" and provide the basis for species to recover through habitat improvement. We urge a far stronger program of predator control—in the estuary and at the dams. We urge straight talk about why the fifth H—High seas—might wipe out much of what costly and risky steps we are urged to take within the basin.

The All-H paper demonstrates that the Federal government is moving from the simplistic dams or salmon equation. IPNG applauds this shift, and we urge that his message be repeated in every public forum.

We were pleased to see Federal Caucus members explain the role of Fall-H versus the possible benefits of dam breaching during the several regional recent rounds of hearings.

The Inland Ports and Navigation Group is committed, as a group and as individual ports and towing companies, to finding ways that the region can cooperate in restoring listed species. We recognize the commitment of time and energy by members of the Federal Caucus. As civil servants, we know there is no overtime for the extra efforts made to educate the region as to the scope, the costs, the options and the hazards that lie ahead.

In closing, we thank you all for your commitment to leading the region toward solutions that match our spirit. Although IPNG disagrees with some specific points in the All-H Draft Plan, we close with our thanks for the extra effort each of you and your departments or agencies has made

The Inland Ports and Navigation Group thanks the Federal Caucus for the opportunity to present written comments on its Draft Plan, and for the Caucus' consideration of our views.

Sincerely,

SCHWABE WILLIAMSON & WYATT

by



Walter H. Evans, III

WHE