

October 3, 2005

The Honorable Darlene Hooley
U.S. House of Representatives
Washington, DC 20515-3705

Dear Ms. Hooley:

As you may be aware, the Senate has inserted language in the Energy and Water appropriation report that directs the Bonneville Power Administration to not fund the Fish Passage Center. The federally-recognized treaty fishing tribes of the Columbia River Basin feel very strongly that the Fish Passage Center (FPC or Center) is providing critically needed data and analysis on the status of fish runs in the Basin and we support its continued funding by the Bonneville Power Administration. The Center has been directed to undertake the collection and analysis of salmon and water data as a part of the Columbia River Basin Fish and Wildlife Program, adopted by the Northwest Power and Conservation Council. The Council was established pursuant to Northwest Power Act (see below).

Beyond that, the FPC has a history you may not be familiar with and its genesis is essential to any conversation dealing with its future.

- In 1973 in the case of *Confederated Tribes of the Umatilla Reservation vs. Callaway*, the Federal District Court for Oregon issued findings of fact included in a joint stipulation (which included the Department of the Interior and the Army Corps of Engineers) that there must be continued research and studies to identify and assess impacts of the modifications and operation of the Columbia River hydro projects upon upstream and downstream fish migration, fish mortality, reproduction and fishing activities. The court discussed the need for factual information for management decisions and to insure that the Columbia River water resource system was responsive to the interests and desires of the public.

The court ordered the defendant hydro operators to supply the plaintiff tribes with fishery research and ongoing studies.¹

- Following *Callaway*, on September 24, 1976, BPA Administrator Don Hodel met with the tribes and the Bureau of Indian Affairs to develop an agreement by which BPA would provide \$500,000 to the Columbia River Inter-Tribal Fish Commission for the purpose to, in Mr. Hodel's words, "Get as many fish as fast as possible into the river." and "Get the Indians' interest in this and have them help with the work. . . . I was thinking of approximately a half million dollars in some kind of Pilot Program. We have a good opportunity to set up a program in which the Tribes will be in charge. It would be up to you [the tribes] to set up a program" (Verbatim quotes from notes of meetings.)

Shortly thereafter, the state governors on behalf of their fisheries programs sought to be parties to the Memorandum of Understanding and joined the discussions.

- A Memorandum of Understanding signed by the region's governors, BPA Administrator Don Hodel and the four Columbia River treaty fishing tribes in 1976 committed the signatories and their agencies to seek the restoration of the anadromous fishery of the Columbia River and its tributaries and acknowledged that some of the parties would be seeking minimum stream flows consistent with maintaining the integrity of fish and wildlife habitat. In fact, the agreement "recognized that Federal court decisions have specifically established that the Tribes have treaty rights to an equitable share of the Columbia Basin fishery resources and to restraints on fluctuations in river levels which would interfere with their harvest of the resource."

The MOU further stated that: "BPA recognizes that operation of the Federal Columbia River Power System (FCRPS) may be subject to restraints on peaking and rates of flow for the protection of the fishery resource, even though such restraints may reduce power generation." Mr. Hodel's discussions with the tribes, the federal agencies and states (i.e. the regional fishery managers) and the subsequent funding for fishery and water flow data and analysis is the genesis of what is now the Fish Passage Center. The enactment of the Power Act cemented this agreement into place. In basic terms, the Fish Passage Center is to ensure that the state and federal fish and wildlife agencies and the tribes have a seat at the management table and are provided sound technical data so

¹ Interestingly, the Federal District Court for Oregon in a hearing Friday, September 20 in a case dealing with hydro system operations referred to the FPC language in the Energy and Water Report stating:

I note in passing that the Tribes are concerned about the continued existence of the fish passage center. And it's a matter that's of great concern to the Court as well. I think it would be a drastic mistake for them to yank the subsidy from the center which has been giving out neutral information. And really has been for many years. And I think we all need it.

that fish and wildlife management decisions are not left up to the whims of the BPA. If the tribes no longer have that data, the repercussions will be profound. Though we do not speak for the states, but judging on the correspondence from Oregon, Washington, and Idaho urging the retention of the FPC, it would appear they share that perspective.)

The Fish Passage Center and the Northwest Power Act - In 1980, the Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501 (generally known as the Northwest Power Act or NPA). One of the major purposes of the Act was to:

“protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.”

The Northwest Power Act created what is now known as the Northwest Power and Conservation Council (the Council) to achieve and implement the fish and wildlife and power planning purposes of the Act and facilitate cooperation amongst the states of Oregon, Washington, Idaho and Montana and the Bonneville Power Administration. As you know, the Governors of each of the four states appoint two representatives to the Council. The Act directed that the protection, enhancement and mitigation of fish and wildlife affected by the operation of the Federal Columbia River Power System was to be undertaken in a manner that provides “equitable treatment” for fish and wildlife with power generation, see Sec. 839b(h)(11)(A)(i). The NPA called for the Council to develop a comprehensive Fish and Wildlife Program.

The NPA outlined specific instructions for the development of this Program. Importantly, the Council was required to request of the region’s State and Federal fish and wildlife agencies and appropriate Indian tribes, among other things, recommendations for handling “fish and wildlife management coordination and research and development (including funding) which, among other things, will assist protection, mitigation, and enhancement of anadromous fish at, and between, the region’s hydroelectric dams” (§ 839b(h)(2)(C)). The Council was also instructed to include specific measures in the Fish and Wildlife Program that provided for improved salmon survival at federal hydroelectric dams on the Columbia River system (§ 839b(h)(7)(E)(i)) and flows of sufficient quality and quantity to improve salmon migration conditions (§ 839b(h)(7)(E)(ii)).

The Council was also to give “due weight to the expertise, and legal rights and responsibilities” of state, federal, and tribal fishery managers in the development

of measures for Fish and Wildlife Program measures (839b(h)(7)) in the event that the Council felt that the recommendations were inconsistent with the purposes of the Act. The Northwest Power Act's legislative history confirms an important point here. As Rep. Dingell noted, "[c]learly, the Council should rely heavily on the fish and wildlife agencies of the State and Federal Governments and not try to become a superfish and wildlife entity" (Cong. Record, Vol. 126, November 17, 1980, pg 29810).

The present day Fish Passage Center evolved shortly after the Act's passage, during the development of the Council's very first Fish and Wildlife Program in 1982. That Program included a provision for BPA to fund the establishment of two "Water Budget Managers" to "provide expert assistance to the [state, federal and tribal fishery managers] in working with the power project operators and regulators to ensure that the requirements for fish are made a part of river system planning and operations" and to be the "primary points of contact between the power system and the fish and wildlife agencies and tribes on matters concerning the Water Budget" (1982 Fish and Wildlife Program, § 300(b)(1) and (3)).

The Water Budget Managers (now the Fish Passage Center) therefore provided expertise to state, federal, and tribal salmon managers to ensure that these agencies had a credible seat at the table in the development of dam management policies, and to ensure that these agencies provided sound, scientifically based recommendations to meet the congressionally required purposes for the Fish and Wildlife Program.

In 1987, the Council's Fish and Wildlife Program codified the transformation of the Water Budget Managers into the Fish Passage Center to provide for two fish passage managers and technical and clerical support in order to assist with "planning and implementing the annual smolt monitoring program called for in the [Fish and Wildlife Program]...developing and implementing flow and spill requests; and...monitoring and analyzing research results to assist in implementing the water budget and spill planning and in preparing reports" (1987 Fish and Wildlife Program, § 300(b)(1)).

The Council's 1994 Fish and Wildlife Program called for the continued operation of the Fish Passage Center in Section 5.1B and directed that it be funded by the BPA. Among other responsibilities the Council called for the Fish Passage Manager to 1) Plan and implement the annual smolt monitoring program; 2) Develop and implement flow and spill requests; and, 3) Monitor and analyze research results to assist in implementing the water budget. Section 5.1B.2 directs BPA to fund the Fish Passage Manager position *designated by the federal and state fish and wildlife agencies and the Columbia River Basin Indian Tribes*. It further directs that the fish passage manager "provide expert assistance to the designated entities in working with the power project operations and regulators to ensure that requirements for fish are made a part of all river

system planning and operations" (emphasis added). Perhaps it should be noted that Idaho's two representatives to the Council voted in favor of this plan.

Section 5.1B.5 spells out even further the duties of the Fish Passage Manager and directs that s/he be the primary point of contact between the power system and the fish and wildlife agencies and tribes on matters concerning all flow and velocity augmentation, temperature control and spill operation affecting juvenile fish migrating downstream at projects on the mainstem of the Columbia and Snake Rivers and even goes so far as to direct that "The fish passage manager will be responsible for informing the Corps of Engineers when and to what extent the manager wishes to draw on the water budget."

The Council's 2003 Amendments to the Fish and Wildlife Programs calls for the continued funding and operation of the Fish Passage Center. It directs the Center to provide technical assistance and information to fish and wildlife agencies and tribes in particular, and the public in general, on matters related to juvenile and adult salmon and steelhead passage through the mainstem hydro-system. This information relates to the implementation of the water management measures in the Council's Fish and Wildlife Program. In performing this function, the 2003 Amendments directed that the FPC shall:

- 1) Plan and implement the annual smolt monitoring program;
- 2) Gather, organize, analyze, house, and make widely available monitoring and research information related to juvenile and adult passage, and to the implementation of the water management and passage measures that are part of the Council's program;
- 3) Provide technical information necessary to assist the agencies and tribes in formulating in-season flow and spill requests that implement the water management measures in the Council's program, while also assisting the agencies and tribes in making sure that operating criteria for storage reservoirs are satisfied; and
- 4) In general, provide the technical assistance necessary to coordinate recommendations for storage reservoir and river operations that, to the extent possible, avoid potential conflicts between anadromous and resident fish.

Fish Passage Center Oversight Board - Any impartial observer of the Center's activities in recent years would conclude that the Center and its manager have performed the tasks as directed by the Council. However, the power industry has attempted to discredit the Center in general and its manager in particular. It is clear that their efforts are tied to their opposition to spill operations. However, their complaint really should be directed at the Northwest Power Act itself and the Council's Fish and Wildlife Plan, which clearly acknowledges that spill may be needed. Nonetheless, the industry complained enough so that the Council created the Fish Passage Center Oversight Board (initially in 2000 and through supplemental language via its 2003 amendments). The general purpose of the

Oversight Board is to "provide policy guidance for the Center and to ensure that the Center carries out its functions in a way that ensures regional accountability and compatibility with the regional data management system." Its membership includes representatives of the Council, NOAA, upper and lower Columbia River tribes, state fish and wildlife managers, a representative of the scientific community and two members from the public at large. One of the public at large reps presently is Shauna McReynolds, the Deputy Director of the Pacific Northwest Utilities Conference Committee (PNUCC). Prior to that it was Rob Walton with the Public Power Council (PPC). The Oversight Board was specifically established to investigate several concerns raised at various times, about duplication, data accuracy, and analysis. Since it has been in existence, the Oversight Board has yet to charge the staff of the FPC staff with doing anything improper or questioned the accuracy of their data, their reports or their analyses. The Board has been unable to validate, or justify any of the concerns expressed by the power industry despite having one of the leading critics as a member.

Audits - Additionally the FPC has been audited by Symonds, Evans & Larson, P.C. and investigated by the ISRP, and every year the FPC issues three year-end reports that report the passage characteristics of that year's juvenile migration including survival and travel time; smolt-to-adult return by passage route and adult facilities inspections. These reports as well as all other FPC products are submitted for regional review, and all comments are addressed and appended to the final report. The FPC responds directly to Independent Scientific Review Panel and Independent Scientific Advisory Board comments and suggestions on study design and analysis.

Recent Study - A member of Senator Craig's staff asked one of our representatives two questions. One was why the recent FPC study examining the impact of this summer's spill ended on July 15 when the spill itself did not end until August 31, 2005. Another question was why the fish were only counted to McNary. There are in fact good answers to both of those questions, and in fact it was a beneficial exercise to look at the data in the manner suggested by the questions, rather than under the NOAA-mandated summer migration timing.

The data used by the Fish Passage Center were the most current available and included data collected through September 1, 2005 at John Day and Bonneville dams. These data measured the survival of fish that passed Lower Granite Dam by July 15 and were exposed to the hydro conditions prevailing between July 15 and September 1, including the court ordered spill. On September 15, the FPC updated the calculations with data collected through September 15. The results changed insignificantly. Further updates will be forthcoming from the FPC.

The scientific method typically used to assess salmon survival in the Columbia Basin's hydrosystem requires tagged salmon to be detected at two dams,

including one dam downstream from the point to which survival is measured. In this case survival was measured to McNary Dam based on tag detections at John Day Dam. Unfortunately, juvenile survival to points below McNary Dam, e.g. to John Day Dam, cannot be measured in-season because there is no tag detection equipment at The Dalles Dam and the tag collection equipment at Bonneville Dam is very inefficient. This scientific method has been developed and refined by the Corps of Engineers, NOAA, the University of Washington, and others, including the FPC. When the juvenile salmon return as adults further survival information will be available.

Benefits to Idaho, Montana and Eastern Washington – Our tribes accept dam breaching as an option in the event that non-breach options do not recover our salmon. Those who do not want to see the Snake River Dams breached should be pleased with some aspects of the recent Fish Passage Center analysis of the effects of this summer's spill on survival rates of juvenile smolts heading downstream.

- 1) The study proves fish passage survival rates can be significantly increased through spill alone.
- 2) This study (or further spill studies), suggest that downstream fish passage could be significantly increased without drawing down reservoirs in Idaho or Montana. In this regard, it is noteworthy that Judge Redden only ordered spill, not drawdown of reservoirs and the region saw increases of between 24% to 44% from similar periods (summer 2001 – 2004), where there had been no spills. We believe this news should be welcomed by agricultural interests in Idaho who have historically been concerned that downstream passage would take place on their backs by drawing down reservoirs that they need to be kept elevated for the retention of water for irrigation.
- 3) The Port of Lewiston should be pleased for similar reasons as the river was not reduced in flow so as to affect concerns with barge traffic.
- 4) Without data on water flows and fish passage there would be more pressure to breach dams, not less, because the lack of data leaves dam breaching as our only alternative because without the information generated by the Fish Passage Center, our tribes would not have a basis for recommending salmon-friendly operations.

The entities that don't like to spill water are the dam operators, power companies and BPA who refer to spill as "lost revenue." This is really a highly inappropriate phrase because the argument has at its basis the underpinning that all water in the Columbia River is there for the sole purpose of creating hydro power. That simply is not the case and that sentiment stands in stark contrast to the Northwest Power Act with its dictate that fish receive equitable treatment. It stands in stark contrast to the treaties signed between the United States and the Columbia River Tribes and it is totally at odds with the tens of thousands of jobs in Idaho and throughout the northwest that are dependent on salmon, be they

commercial or sportfishing related. According to the 2003 Survey of the American Sportfishing Association, sportfishing in Idaho produces over 7,700 jobs and generates \$681 million in economic output to the state. In the northwest as a whole it produces over 36,500 family wage jobs and generates over \$3.6 billion in economic benefits to the economy of the region.

To demonstrate the absurdity of the lost or foregone revenue argument, that "lost revenue" constitutes a 52% of what BPA says it spends on salmon recovery every year, we would turn it on its head and suggest that water going through a turbine means the loss of millions of dollars to the fishery industry not to mention an abrogation of treaties. Think how much more robust the fishing economy of the Northwest would be if we had 16 million fish coming back every year, as once was the case instead of a minute fraction of that number. Is the hydro power industry suffering the way the fishing communities of the Pacific Northwest have suffered? The difference is like night and day. The fact that BPA just lowered its rates for the second straight year shows that they can absolutely afford a certain amount of spill. Clearly there needs to be some spill but from the power industry perspective, why not use the best science to utilize, and even minimize it? We can't have good science without the data collected by the FPC and we can assure you that our tribes and many others have absolutely no confidence in the DART program being an impartial analyzer of data. The Director of the DART program has been a paid expert witness in numerous proceedings against the interests of tribes and fishery groups which appears to be the reason why the power industry is proposing DART as an alternative. No one employed by the FPC has ever taken such a conflicting position. Additionally, the DART Director has been the major proponent of arguments that have been routinely rejected by most fishery scientists and biologists in the Northwest (other than those hired by the power companies). He has actually argued that spilling water was bad for fish, a contention that has been proven totally false. To suggest that this would be the impartial entity the Northwest should rely on to analyze data is an argument that no fishery manager in the region will find remotely credible.

Lest there be any concern that the thoughts expressed in this correspondence do not represent the consensus position of every state, tribal and federal fishery manager in the Pacific Northwest as well as the position of thousands of anglers please consider the following statements:

Look at the attached letter from the Pacific States Marine Fisheries Commission (which includes Idaho) from their annual meeting last month. It pointed to the previous audits and reviews the FPC has undergone and urged that it should continue to be funded. It also pointed out that no universities in the Pacific Northwest collect the same data or perform the same analysis.

Attached are letters from the Governors of Oregon and Washington and from the Fish and Wildlife Department directors of those states. Their confidence in the data from the FPC is clear. Governor Gregoire states that the FPC "performs a

vital role that no other regional participant does,". She points out that defunding the FPC will create more controversy at a time when the region needs to focus on finding effective solutions to salmon recovery. WDFW Director Koenings points out that eliminating funding for the FPC will increase salmon recovery costs and that the FPC now provides needed data on a very efficient basis. He points to a study by the Independent Scientific Review Panel reviewed the University and concluded that there was not a duplication of services and he points to the limitations of the University program.

In 2004 when the Council was deliberating the Fish Passage Center's Budget, the Fish and Wildlife Service in the US Department of the Interior Department weighed in. Paul Henry from the Portland Regional Office wrote to the Council and stated, "I am writing to express the Fish and Wildlife Service's support for the Fish Passage Center (FPC) including its structure, function, capabilities, and funding. The technical information provided by the FPC is essential for effective and scientifically sound management of the fishery resources affected by the Federal Columbia River Power System.

What of Idaho's position? In 2004 when the Council was being asked by power industry to curtail the FPC, Governor Kempthorne's appointed Director of the Idaho Fish and Game Department, Mr. Steven Huffaker, wrote to the Council urging the continued operation and funding of the Fish Passage Center. He wrote,

"State and tribal fish managers rely heavily on the Center for technical analyses pertaining to salmon and steelhead and salmon migration in the Snake and Columbia Rivers. The Center has over twenty years of experience monitoring steelhead and salmon smolt migrations from the basin's tributaries." He also wrote, "Technical analyses requested of and completed by the Center are made publicly available in addition to being distributed to the basin's fish and wildlife managers. My staff and I use the Center's technical analyses as a basis for our further technical analyses and subsequent policy deliberation and development. Most important to us is that we are using the same technically sound science as other entities in the basin to develop our independent policy recommendations.

The restoration of salmon and steelhead in the Columbia River Basin will be realized as result of collective and coordinated efforts across the basin. I believe the technical services provided by the Center are instrumental in ensuring the actions of the fish and wildlife managers are collective and coordinated, and those services should be continued in the future."

Troubling Precedent - A further matter to consider is the unprecedented step this language represents of congressional micro management into the clear authority and responsibility that has been entrusted to the NW Power and Conservation Council. Our tribes worked on the NW Power Act when it passed and we can recall no time since that a congressional proposal has sided so blatantly for the interest of one group over another. The establishment of the Fish and Wildlife Program is an amazing exercise in democracy with hearings and ample opportunity for the public and all parties to have input into the Council's plans. Certainly the hydro industry has had tremendous influence on the BPA budget and annual plan of operations as well as the actions of the Council. We therefore urge Senators to leave this issue to the regional decision makers and states.

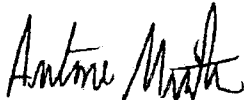
Finally, beyond the perspective of the state, tribal and federal fish managers, what might be the perspective of your average citizen? A telling bit of information might be that in 2004 the Fish Passage Center's web site received 2.5 million visits and 35,000 information downloads in a three month period. That's about 30,000 hits and 400 data downloads a day! People don't access information in those numbers unless they have confidence in the source. That is a lot of citizens that will be denied dependable data if the FPC is closed.

We would appreciate your consideration of our position and request that you use your good offices and influence to remove the language defunding the Center from the Energy and Water Appropriation Report and allow the Center to continue operating via Conference Report Language.

Sincerely,



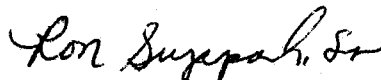
Louis Cloud
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Enclosures