Committee on Resources

Testimony

Subcommittee on Water and Power
Saturday, May 31, 1997
Lewiston, Idaho

TESTIMONY OF
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NEZ PERCE TRIBAL EXECUTIVE COMMITTEE
on behalf of the
COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
before the
UNITED STATES HOUSE OF REPRESENTATIVES'
SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON RESOURCES

FIELD HEARING
LEWISTON, IDAHO
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Mr. Chairman, on behalf of the Columbia River Inter-Tribal Fish Commission (Commission), thank you for the opportunity to present the Commission's views on various drawdown proposals that are currently under consideration for certain dams on the on the Columbia/Snake River system.

My name is Samuel N. Penney. I am Chairman of the Nez Perce Tribal Executive Committee, the governing body of the Nez Perce Tribe.

Welcome to Nez Perce Country. The Nez Perce Tribe originally occupied a territory encompassing more than 13 million acres in what is today known as northeastern Oregon, southeastern Washington and northern Idaho. In 1855, the Nez Perce Tribe entered into a treaty with the U.S. government. In that treaty, we were promised a permanent homeland for our people and we maintained the right to maintain our culture and way of life. In that treaty, we reserved, among other things, the right to take fish. As the Supreme Court has recognized, "The right to resort to...fishing places...was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians that the atmosphere they breathed. (U.S. v. Winans, 1905).

Before presenting testimony on behalf of CRITFC, I must note, as Chairman of the Nez Perce Tribe, that I am extremely concerned that the U.S. House of Representatives Committee on Resources chose to invite the Columbia River Inter-Tribal Fish Commission to appear at this hearing, and not the individual sovereign tribal nations. I believe that when issues, such as the ones that are being addressed today, have such a significant and direct impact on the Basin's tribal sovereigns each sovereign should be offered the opportunity to be heard.

Moreover, I am deeply troubled that this Committee has chosen to place me, as a representative of four

tribal sovereigns, not on a panel with representatives of federal and state sovereigns, but on a panel with "interest groups."

Today, I am speaking on behalf of the Columbia River Inter-Tribal Fish Commission (CRITFC). The Columbia River Inter-Tribal Fish Commission was formed by resolution of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes for the purpose of coordinating fishery management policy and providing technical expertise essential for the protection of the tribes' treaty-protected fish resources. The Commission's primary mission is to provide coordination and technical assistance to the member tribes to ensure that outstanding treaty fishing rights issues are resolved in a way that guarantees the continuation and restoration of our tribal fisheries into perpetuity. The tribes' Wy-Kan-Ish-Mi Wa-Kish-Wit (Spirit of the Salmon), is a framework plan for Columbia Basin salmon restoration that documents threats to fisheries, identifies hypotheses based upon adaptive management principles for addressing these threats, and provides specific recommendations and practices that must be adopted by natural resource managers to meet their treaty obligations and restore the resource. The tribes' plan, which is in many respects similar to plans developed by the Northwest Power Planning Council (NPPC) and the National Marine Fisheries Service (NMFS), calls for significantly increasing the survival of salmon during their juvenile and adult migrations through the basin's hydroelectric system (FCRPS). The tribes' ultimate goal is to restore a sustainable fishery resource for the benefit of all peoples in the Pacific Northwest and Alaska.

In developing a framework for restoring salmon, we have provided policy direction, as well as conservation actions, that must be acted upon by the federal government and the states. The tribes have identified the need to insure that the burden of conserving these salmon stocks is allocated fairly across those land and water uses responsible for their decline. Consistent with this need, the Commission has identified changes that harvest management, hatchery programs, hydroelectric development, and habitat management activities (e.g., forestry, irrigation, mining and other development activities) must make in their operations to ensure the recovery of salmon stocks and fisheries.

Our framework recovery plan covers all the areas that must be addressed in order to protect salmon stocks and insure their restoration to levels consistent with the international obligations of the United States and with its trust obligation to the tribes; but that will be the easy part: the most difficult obstacle facing the restoration of the salmon runs is the lack of political will to tackle the issues head on. We will do everything necessary to insure that these runs will be rebuilt. The focus of our testimony today is the actions that must be taken to correct the damages caused by the hydropower system.

As a preliminary matter, to sustain the renewable salmon resource, the system of reservoirs and dams that provide power for industry and water for irrigation must be managed to provide flows and passage for migrating juvenile and returning adult salmon. The tribal approach is founded on hydrosystem objectives and measures in the Spirit of the Salmon and is consistent with the ecological and scientific principles expressed in the Independent Scientific Group's Return to the River. The tribal plan prioritizes funds to 1) drawdowns, 2) actions to meet water quality standards, 3) measures to increase spill efficiency and surface bypass at lower Columbia dams, and 4) measures to assure juvenile and adult passage performance standards are met.

Legal Basis for Tribal Drawdown Proposal

Tribal fishing rights are as valuable to the Columbia River treaty tribes as the air we breathe. In the Columbia River Treaties, our tribes reserved to themselves a right they have practiced since time immemorial: the right to fish at all usual and accustomed fishing sites regardless of where these sites are

located. This right is vital to Columbia River tribes' subsistence, culture, religion and economy. The following summary is drawn from the paper, "Columbia River Treaty Fishing Rights," that I have provided to the committee in order to provide you and your staff with a better understanding of the legal and moral obligations of the United States in its relationship with our tribes.

The United States stands in a trust relationship to the Columbia River treaty tribes. All federal actions, by all federal agencies, affecting Indian people must be judged by the most exacting fiduciary standards. The trust responsibility imposes an affirmative duty on all federal agencies to protect tribal resources. Canons of construction unique to Federal Indian law are an example of the trust relationship. These canons require treaties to be interpreted as the Indians negotiating them would have understood them and any ambiguous expressions are to be liberally construed in favor of our people.

The right to fish that our people had reserved under those treaties is meaningless if all or most of the fish are killed by the hydro-electric system and environmental degradation before they return to tribal fishing grounds. The Stevens treaties off-reservation fishing rights are the principal component of the Columbia River tribes' treaties. These rights were expressly reserved to allow our tribes to preserve our traditional way of life, which is centered around the river and its resources. These rights are to be respected by the States and by the United States government. In Winans the Supreme Court established the reserved rights doctrine; a treaty is not a grant of rights to the Indians, instead it is a reservation of those rights not granted away. Pursuant to the Constitution, treaties with the tribes are the supreme law of the land.

State and federal government regulation of treaty fishing is permissible only when the government shows that the regulation is reasonable and necessary for conservation. Before regulating treaty fishing the government must first demonstrate that adequate conservation cannot be achieved by regulating non-Indian activities. Treaty rights may not be restricted in a manner which discriminates against Indians. The courts have clarified that tribal fishermen have an absolute right to a fair share of the fish produced by the Columbia River system. In Passenger Fishing Vessel the Supreme Court made clear that treaty fishermen were entitled to more than an equal opportunity to take fish with non-treaty fishermen and upheld lower court determinations that a fair share was up to fifty percent of the fishery resource. The Court found that the Indian tribes are entitled to harvest sufficient fish to insure "a moderate living," up to the fifty percent ceiling. Currently, the Columbia River fisheries are providing the tribes with far less salmon than is necessary to meet the moderate living standard. This deficiency is preventing ceremonial and subsistence fishing, as well as commercial fishing.

Since both the government and the tribes assumed the fishery resource was inexhaustible, and because treaties are to be liberally interpreted in favor of the tribes, a strong argument can be made that fisheries should be reserved for the exclusive use of our tribes when exclusive use is necessary to insure a "moderate living" for our people. It is inequitable for the federal government to require the tribes to bear the burden of resource conservation when non-treaty development activities are the principle cause of the decline of the fishery resource. This view is consistent with federal trust obligations which require the federal government to protect and enhance treaty fisheries.

The Commission's member tribes ceded millions of acres of land to the federal government. In exchange for this land the tribes received an express guarantee that they would maintain the exclusive right to take fish on their reservations, as well as the right to take fish at their usual and accustomed places off the reservation. The tribes believed that there would always be fish to take. By guaranteeing ourselves the right to take fish, the tribes thought that they were protecting their livelihood and their culture. It was inconceivable to our peoples in the mid 1800s that settlers could exploit the Columbia River ecosystem in such a way that there

would not be enough salmon in the future to satisfy both Indian and non-Indian needs. The Columbia River tribes' treaty fishing rights mean more than the right to hang a net in an empty river.

The intent of the treaties has been subverted. Despite its sovereign treaty commitments to secure the tribes' fishing rights, the United States has destroyed, or acquiesced in the destruction of, Columbia Basin anadromous fish resources by means of hydropower development. Because the diminishment of the tribes' treaty reserved fisheries in the Columbia River basin has occurred as a result of these actions, and inadequate attention to trust obligations to the tribes, the allocation of the conservation burden to protect the runs must not further deprive the tribes of their treaty rights to take fish. The means for salmon recovery must be consistent with the treaty secured tribal rights and coordinated with tribal natural resource management programs. In other words, the proportion of the salmon resource losses caused by the hydropower system must be addressed in proportion to the magnitude of the effects; the drawdown of the John Day Dam to spillway crest and the lower Snake River Dams to the normative river level must be undertaken by the U.S. in order to meet its trust obligations to the tribes.

Biological Rationale for Draw Downs

The tribes' Wy-Kan-Ush-Mi Wa-Kish-Wit anadromous fish restoration plan calls for a halt of the declining trends of anadromous fish stocks in seven years, and increasing the existing 0.5 million adults above Bonneville Dam to 4.0 million in 25 years. With respect to mainstem passage and habitat improvements, the tribes' plan in the draft Multi-Year Implementation Plan (MYIP) provides the technical details, scope and schedule to support the implementation of the Wy-Kan-Ush-Mi Wa-Kish-Wit anadromous fish restoration plan.

The tribes' MYIP plan is supported by other Basin tribes and calls for the majority of capital construction funding during the federal Memorandum of Agreement (MOA) period (1997-2001) to be applied to major tasks that include surface flow bypass systems and spill efficiency, drawdowns, dissolved gas abatement and temperature control, adult passage, and several other measures. These tasks are necessary to meet regional juvenile passage performance objectives of 80-90 percent fish passage efficiency and 95 percent survival per dam by 2001. These tasks are also necessary to meet the tribal adult passage performance objective of reducing adult delay and prespawning mortality by 50% by 2001. Further, these tasks will promote substantially improved water quality by reducing total dissolved gas and temperature through the mainstem Snake and Columbia Rivers. Our plan calls for specific prioritization of appropriate measures and funds toward dams that currently have the poorest ability to meet regional ecological and passage performance standards.

Snake River Draw Downs

The tribal plan's highest priority is to immediately begin preparations for implementing sequential drawdowns of the four lower Snake River reservoirs to natural river levels by 2002, with completion of three dams to natural river drawdown by the end of the MOA period. The tribal plan calls for all engineering and biological plans, NEPA compliance and the federal report to Congress to be completed by the middle of 1998 to allow Congressional appropriations for drawdown for fiscal year 1999. The tribal plan allocates $350 million, or about 55% of the MOA capital construction budget, to this task.

John Day Spillway Crest Draw Down

Another key priority of the tribal plan is to complete preparations to implement a spillway crest drawdown

of the John Day pool by 2004-5. The tribal plan allocates $22 million, or about 3.5% of the MOA capital construction budget, to this task. Based upon cost figures provided by Harza, and contingency estimates to remove Condit Dam on the White Salmon River in Washington State, the tribal plan estimates that about $650 million would be necessary to implement John Day drawdown to spillway crest. This figure includes construction costs, modifications for the navigation lock, modification to irrigation withdrawals and mitigation for other impacts. A proposed plan to accomplish this task has been presented in a feasibility report by Harza. Essentially, the John Day pool would be lowered to spillway crest level by opening the spillgates. Modifications to the adult fishway exits at John Day and to the spillway entrances at McNary would be necessary, and some modifications to the powerhouses may be necessary.

With the restoration of about 40 miles of river for spawning and rearing habitat and reduction of chronic periods of high water temperatures and water particle travel times, the tribes, Harza and the Independent Scientific Group believe this measure could be among the most beneficial available to restore anadromous fish in the Columbia River Basin.

Ecological Benefits of Draw Downs

As noted by the Northwest Power Planning Councils' Independent Science Group's Report, Return to the River, reservoir drawdowns will reestablish ecological functions of the river necessary to achieve anadromous fish restoration. For example, without reservoirs and dams that act as heat sinks, temperature regimes will moderate. Further, substantial and critical spawning areas will be restored in the mainstem and at junctions between the mainstem and lower tributaries. CRITFC estimates that if the four lower Snake River dams are drawn down to natural river levels and John Day is drawn down to spillway crest, some 186 miles of spawning habitat will be restored to the Basin. Based upon estimates for Hanford Reach fall chinook adult production, this restored spawning habitat has the potential of producing over 69,000 adult fall chinook.

Juvenile Passage Benefits with Draw Downs

For juvenile passage, USFWS estimates that under low flow conditions natural river drawdown of the four Snake River dams will reduce water travel time by 92% over that when the reservoirs are at minimum operating pool. USFWS estimates that this would reduce juvenile salmon migration time through the lower Snake River by nearly 50%. Reduction of migration time is critical for juvenile salmon that must reach saltwater at the proper time and size. Scientific analyses have demonstrated that this is among the most important criteria for influencing overall stock production. Further, natural river drawdown will eliminate very high levels of juvenile mortality from passage through lethal turbines and screen systems. Recent estimates of mortality through these routes by NMFS indicate that only 37% of juveniles fall chinook survive from above Lower Granite Reservoir to Lower Monumental Dam.

Adult Passage Benefits with Draw Downs

Reservoir draw downs will reduce or eliminate the substantial bioenergetic expenditures and delays and injuries suffered by adult salmon as they must find and climb over fishways and other passage facilities. Even if adults are successful in passing a dam at the first attempt, delays are substantial. WDFW research has documented that more than 5,000 steelhead annually fall back over the dams through screen systems and turbines.

Solid evidence exists that drawing down impoundments or removing dams to restore natural river systems

has substantially increased or enabled anadromous fish production to occur to areas above where the former dams partially or fully blocked anadromy. For example, removals of Harpster Dam on the south fork of the Clearwater River, Idaho, and Lewiston Dam on the north fork of the Clearwater River, Idaho, restored adult chinook passage and increased steelhead passage to upstream areas, which resulted in seeding of available upstream habitat. Steelhead have benefitted from removal of Sweasy Dam on the Mad River, California.

Even though conventional passage methods such as screened bypass systems and fish ladders were considered to restore five species of anadromous fish above two dams in the Elwha River, Washington, considerable analysis and review by tribal, state, and federal fishery managers resulted in recommending removal of the two dams as necessary to fully restore all of the river's stocks. In addition, studies of juvenile chinook passage through the Brownlee Reservoir, Idaho, indicated that substantially more juveniles survived reservoir passage when the reservoir was drawn down.

Economic Rationale for Tribal Drawdown Proposal

The tribes propose removing the four Snake River dams and drawing the John Day Dam down to spillway crest. A preliminary analysis finds that there will be no significant reduction in the reliability of the electrical generation or transmission system while the proposal will meet or exceed the flow targets in the Biological Opinion. The proposal will also add significant amounts of spawning habitat for fall chinook (increasing production capability in the Basin by more than three times that of the long term average output of the Hanford Reach) and improve resting and feeding habitat for all migrating salmon and steelhead. These stock productivity increases will result in substantial economic and cultural benefits in the Pacific Northwest and Southeast Alaska.

The estimated annual costs to the Northwest power system would be $200 million, due to decreasing the regional energy output by approximately 2,250 average megawatts (compared to 840 average megawatts under the Biological Opinion), most of which would fall on the BPA. In one instance, alternative power marketing techniques could increase revenues by $333 million per year to offset these costs, while other alternatives involving cost cutting measures, while also increasing revenues, could provide $290 million per year. Finally, if the other alternatives could not be implemented by the BPA, a stranded cost charge of one cent per kilowatt hour over the next five years could cover the stranded costs of the Washington Public Power Supply System, other costs of the tribal drawdown proposal (construction and mitigation costs, e.g., for irrigation system modifications), and would keep the BPA competitive. This stranded cost charge is less than one-half of the competitive and stranded cost charges being imposed in other parts of the United States, such as California and Rhode Island, a measure of how fortunate we are in the Pacific Northwest to enjoy such low cost hydropower.

On the other side of the ledger, the estimated benefit to Southeast Alaskan, Washington and Oregon Coastal and in-river fisheries, as well as Idaho fisheries, remains to be calculated. But, in light of the potential for quadrupling the output of fall chinook alone (without calculating increased benefits for other stocks) from the Columbia River system, the coastwide benefits (direct and in-direct) would be large. For example, in Southeast Alaskan troll fisheries, access to abundant coho stocks are limited by restrictions to protect far-north migrating chinook stocks (Snake River fall chinook). Under the U.S. Chinook Agreement reached last year, the chinook harvest in Southeast Alaska is now sensitive to changes in stock abundance, based upon the aggregate abundance of chinook stocks. An increase in fall chinook production from the Columbia and Snake River system would provide for increased harvest opportunities, not only for chinook stocks but for Alaskan origin coho stocks as well. Under the U.S. chinook agreement, meeting domestic in-river allocation requirements under U.S. v. Oregon and Yakama v. Baldrige is also assured. Increased fishing opportunities

would provide economic and cultural benefits to commercial, sport, and tribal fisheries and would have a economic multiplier effect for small communities from Southeast Alaska to the headwaters of the Snake River in Idaho.

Our preliminary analysis shows that the tribal proposal compares favorably with flow regimes provided for under the NMFS Biological Opinion. McNary Dam flows would average 389,000 cubic feet per second during the spring migration, compared to a flow target of 220,000 cubic feet per second under the Biological Opinion. In July, the tribes' proposal would average 237,000 cubic feet per second compared to the 189,000 average provided under the Biological Opinion. In August, both alternatives provide an average equivalent to 142,000 cubic feet per second. With additional analysis, it may be possible to increase August flows closer to the 200,000 cubic feet per second target in the Biological Opinion.

In the Snake River, under the Biological Opinion, Snake River flow targets are set at 95,000 cubic feet per second in the spring and 50,000 cubic feet per second in July and August. The tribal proposal provides flow equivalents of 1,130,000 cubic feet per second in the spring, 505,000 cubic feet per second in July and 256,000 cubic feet per second in August.

One variation of the tribal proposal could reduce adverse impacts at Dworshak, Grand Coulee, Libby, and Hungry Horse Reservoirs. The potential benefits would be to improve recreation and the survival of resident fish in those reservoirs. Under this variation, pool levels at each of these reservoirs would be greater than those provided in the Biological Opinion. The limitation on this proposal is ensuring that there are adequate flows of appropriate quality and quantity in the mainstem Columbia River.

Under our preliminary analysis, the BPA will bear most of the added costs associated with replacing the lost electricity from the dams that are removed or drawn down. We recommend that the three sovereigns undertake additional analysis that would determine the revenue that could be generated by the BPA from the revised configuration of the power system. This revenue should be compared to the costs and savings associated with dam modification. The modifications would add costs, but there would also be offsetting savings, such as the elimination of fish protection facilities and new or modified turbines at those dams. Comparing net costs and revenues would allow the Administration and Congress to evaluate the true impact on BPA and determine which combination of the strategies the three sovereigns tribes are reviewing would be needed to implement our drawdown proposal.

Conclusions and Recommendations

Critical adult and juvenile passage and mainstem habitat measures at the Lower Snake River dams and the Lower Columbia dams are being precluded because capital construction funds are being directed to development and installation of more screen and transportation systems. These measures would be inoperable under draw downs, thus, would be wasted investments. Further, studies have shown that these systems are no better or may be worse for juvenile salmon than turbine passage. Considering the merits of other fish mitigation such as draw downs, spill and adult passage improvements under the MOA and the increasing proportion of capital construction reimbursements and operation and maintenance costs for years to come, funding the more development of screen and transportation systems appears even more misplaced and should not go forward.

Natural river draw downs of the Lower Snake River dams and draw down of John Day pool to spillway crest are critical to 1) greatly increase spawning areas and production potential, 2) insure that adults reach spawning areas by reducing migratory energy demands, 3) reduce temperatures and total dissolved gas, 4)

significantly decrease juvenile travel time and reduce substantial juvenile mortalities through dams. Drawdown is supported by Return to the River and is necessary to meet ecological, juvenile and adult objectives of the federal, NPPC and tribal plans. Evidence exists from the Columbia, the Fraser and other basins that drawing down impoundments or removing dams can restore salmon runs to areas above these areas that previously partially or wholly blocked passage of salmon.

If capital construction funds from the federal Memorandum of Agreement are appropriately utilized, and existing subsidies to other river users are modified, the tribes believe that enough funding exists in the MOA to accomplish natural river draw downs of the four Lower Snake River dams. Further, if existing MOA capital construction funds and future funding obligations of the federal government to restore Columbia Basin anadromous fish after the MOA are fulfilled, the tribes believe that spillway crest drawdown of John Day pool can be realized. As the tribes' trustee, the federal government must do no less to uphold and restore tribal treaty trust resources.

WE ENCOURAGE YOU TO PROVIDE LEADERSHIP AND SUPPORT FOR A PROCESS THAT COMPREHENSIVELY ADDRESSES FISH AND WILDLIFE RESTORATION

As the United States and the Pacific Northwest addresses anadromous fish restoration in a manner which ensures the United States will honor its treaty obligations and trust responsibility to the Basin's tribal sovereigns and ensures compliance with applicable resource protection, mitigation and enhancement statutes, the Federal Columbia River Power System and the Bonneville Power Administration face the challenges of adapting to a deregulated utility environment.

There is a critical need for an intergovernmental decision making process that will protect and restore fish and wildlife while allowing sustainable use of the river, including power, irrigation, and navigation. At a recent meeting facilitated by Jim Waldo, federal, state, and tribal representatives agreed that "The region needs to discuss a common set of values for the Columbia River system. Constructing a common view will require hard decisions on long term river operation, fish and wildlife, and funding. The status quo is unacceptable." (Summary points from that meeting is attached.)

Neither the limited process fashioned by NMFS for deciding which major structural modifications must be made to the hydroelectric system nor the Transition Board sanctioned by the region's governors to discuss energy issues have been structured to accomplish this. These processes, by the very structure, separate the interrelated river operation, fish and wildlife, and funding issues preventing a comprehensive decision-making forum.

However, we are hopeful that a forum to address these issues may be emerging at the regional and national level. Specifically, we have been discussing these interrelated issues with the states of Idaho, Washington, Oregon and Montana, the federal agencies, and the Administration. As the federal, state, and tribal participants agreed at the meeting facilitated by Jim Waldo, "The next 6-12 months are critical to achieving a comparable level of regional progress on fish and wildlife issues as on energy issues. Failing to make significant progress will result in a chaotic regional and national battle over energy deregulation."

We are looking forward to engaging the sovereigns in a discussion of these issues at a high level government-to-government level of consultation. We are encouraged that the states, federal government and tribes are participating in a meeting on June 3 among the sovereigns to discuss committing to work together to assure fish and wildlife restoration in the face of energy deregulation.

A high level government-to-government consultation forum would allow the sovereigns to deal with issues such as hydrosystem reconfiguration in a comprehensive way that is based on the best science, is geared toward restoration of all stocks and species of fish, and assesses the implications of these decisions. A comprehensive effort such as this will require the sovereigns to consider aligning a number of conflicting decision tracks, such as the prospect of federal and state energy deregulation legislation, Bonneville Power Administration's subscription process, the National Marine Fishery Service's 1999 decision date for what major structural modifications must be made to the hydroelectric system, a proposed extension of the fish and wildlife budget memorandum of agreement and the Snake River Basin Water Rights Adjudication.

Significant leadership will be required from federal, state, and tribal governments to make progress in comprehensively approaching these issues. We are willing to rise to this challenge, and urge you to provide leadership and support to this effort.

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