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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION,
et al.,

Plaintiffs,

and

STATE OF OREGON, et al.,

Intervenor-Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants,

and

PUBLIC POWER COUNCIL, et al.,

Intervenor-Defendants.

Case No. 3:01-cv-640-SI

JOINT MOTION TO EXTEND THE
LITIGATION STAY

LR 7-1 CONFERRAL STATEMENT

The Moving Parties—National Wildlife Federation et al., the State of Oregon, the Nez Perce Tribe, the Coeur d'Alene Tribe, the Spokane Tribe, and the United States—conferred with the parties and amicus on this Motion.

The Confederated Tribes of the Umatilla Indian Reservation,¹ the Confederated Tribes of the Warm Springs Reservation of Oregon,¹ the Confederated Tribes and Bands of the Yakama Nation,¹ the Confederated Tribes of the Colville Reservation, the State of Washington, and the Northwest Power & Conservation Council support the motion to stay the litigation through August 31, 2023.

The Kootenai Tribe of Idaho, the Confederated Salish and Kootenai Tribes, the State of Montana, the State of Idaho,² the Inland Ports and Navigation Group (IPNG),³ and the Public Power Council (PPC)⁴ do not oppose the motion to stay the litigation through August 31, 2023.

The Columbia-Snake River Irrigators Association, Northwest RiverPartners, and James M. Waddell, P.E. responded to the conferral request but did not indicate a position of support for or opposition to the stay motion.

¹ The Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes and Bands of the Yakama Nation support the motion to extend the litigation stay, based on the moving parties' commitment to rapidly engage on comprehensive, durable solutions in the Columbia River Basin. However, the process for engagement of these sovereigns—with their Treaty-reserved rights and legally recognized co-management status in the Columbia River Basin—has not yet been determined. The federal government must recognize, respect and protect the unique rights and interests of these three sovereigns by fully involving them in the development of regional solutions in this yet to be determined process.

² The State of Idaho indicated that it intends to file a response to clarify their positions.

³ IPNG indicated that, while it does not oppose the requested stay, it also does not endorse or agree with the positions or statements contained in Exhibits 1 and 2.

⁴ PPC indicated that it does not oppose the requested relief to stay the case through August 31, 2023, but that its lack of opposition to such relief does not signify that it endorses or otherwise agrees with the content of the two exhibits filed with the motion, and that it in fact has serious concerns with at least certain of the positions reflected in those exhibits. PPC also indicated that it expects to file a short response to the Motion to clarify its position and briefly outline some of its primary concerns.

MOTION TO EXTEND THE LITIGATION STAY

The National Wildlife Federation (NWF) et al., plaintiffs, the State of Oregon, the Nez Perce Tribe, and the United States asked the Court to stay proceedings in October 2021 (ECF 2411). The Court granted the motion (ECF 2415). The United States, NWF plaintiffs, Oregon, and the Nez Perce Tribe, joined by plaintiff-intervenors Coeur d'Alene Tribe and Spokane Tribe (together, Moving Parties), now ask the Court to extend the litigation stay through August 31, 2023. In support of the Motion, the Moving Parties state as follows:

1. “A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants.” *MAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

2. During the litigation stay, the United States prepared for and started engaging with other Tribes, States, and stakeholders on timely, basin-wide, durable comprehensive solutions that have the potential for resolving this litigation. As part of these efforts, the United States committed to developing strategies through inclusive regional collaborative processes that restore native fish and their affected habitats, honor the United States’ commitments to Tribal Nations, deliver affordable clean power, and satisfy other interests served by the Columbia River System projects. *See* Exhibit 1; *see also* Exhibit 2 (Administration commitments).

3. The United States also secured the services of the Federal Mediation and Conciliation Service (FMCS; www.fmcs.gov) to facilitate meaningful engagement on comprehensive solutions by the United States, Tribes, States, and Stakeholders. The Moving Parties have committed to engage with each other and other Tribes, States, and stakeholders within the FMCS process. They agree and expect that the first task following a continued litigation stay is for the Administration, in the forums managed by FMCS, to expeditiously collaborate with affected Tribes, States, and regional stakeholders and to produce by no later than December 1, 2022, a schedule of Administration actions and critical milestones that the Administration intends to pursue.

4. Based on the United States' commitments discussed above (¶ 2), as well as the Moving Parties' expectations that the participants in the FMCS process meaningfully collaborate and that sufficient progress is made on identifying and implementing comprehensive basin-wide solutions, the Moving Parties believe that a continued stay of the litigation is warranted. This stay will allow the Moving Parties and others to continue working toward solutions that have the potential to resolve all claims in this litigation.

5. In requesting a stay, the Moving Parties agree that the FMCS process and the participants need to make substantial progress on identifying and implementing comprehensive basin-wide solutions. Every 90 days during the extended stay, the Moving Parties therefore agree to file with the Court and serve on the parties and amicus a progress report of steps and actions taken during the FMCS process. The Moving Parties also agree that any party can move to lift the litigation stay for good cause, which can include the lack of sufficient progress on identifying and timely implementing comprehensive basin-wide solutions, whether due to the action or inaction of the Administration, the Plaintiffs, or any other party.

Based on the foregoing, the Moving Parties ask the Court to stay the case through August 31, 2023.

DATED Aug. 4, 2022

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CERTIFICATE OF SERVICE

I certify that on August 4, 2022, I filed the foregoing through the Court's CM-ECF system, which will automatically notify counsel of record. I also caused the foregoing to be manually sent to following:

James M. Waddell, PE
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/s/ Michael R. Eitel
MICHAEL R. EITEL
U.S. Department of Justice

EXHIBIT 1



US Army Corps
of Engineers®



Contact: Press@ceq.eop.gov

FOR IMMEDIATE RELEASE:

March 28, 2022

Blogpost: Columbia River Basin Fisheries:
Working Together to Develop a Path Forward

The Columbia River and its tributaries are the life spring of the Pacific Northwest. The Columbia River Basin was also once among the most productive aquatic ecosystems in the world with an estimated 7.5 to 16 million adult salmon and steelhead returning to Pacific Northwest tributaries each year and providing food for over 130 wildlife species, including Orca, bears, and wolves. The salmon and steelhead sustained the cultures and economies of Tribal Nations since time immemorial, and in turn, Tribes successfully managed these fisheries for millennia.

Today, the river provides energy to communities and business, irrigation water for thousands of farms, transportation services, recreational opportunities, and vital habitat for fish and wildlife species.

On March 21, 2022, we convened a Nation-to-Nation consultation between our agencies and departments and leaders and representatives from the Tribes of the Columbia River Basin. We heard clearly the request for accountability for actions by the U.S. Government that have caused harm to the ecology of the river, its tributaries, and importantly, its first residents.

Since colonization of the Pacific Northwest, numerous Tribal Nations entered into treaties with the United States, ceding millions of acres of their homelands in exchange for and acknowledgement of rights already held, including, critically, the right to fish in all “usual and accustomed places.” This exchange was premised on a notion that the salmon and steelhead resources of the region were “inexhaustible,”^[1] a premise that subsequent human activities in the Basin proved false as salmon and steelhead disappeared or significantly declined at many Tribal fishing locations.

From the 1930s to the 1970s, the Federal government constructed a series of 14 multipurpose dams in the Basin to address a myriad of economic challenges, and,

^[1] Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979)

additionally, more than 100 non-Federal dams were constructed. Communities across the Northwest have come to rely on these dams for flood risk management, water supply, irrigation, navigation, and recreation and importantly: reliable and affordable electricity.

The dams also altered free-flowing rivers, affected juvenile fish as they migrate out to sea, impeded adult fish returning to spawn, inundated Tribal fishing areas and sacred sites, and forever displaced people from their homes. In the 1990s, 13 of the Columbia River Basin's salmon populations required the protection of the Endangered Species Act to survive. We have been working to stem the decline ever since.

The Federal Government has spent several billion dollars, in partnership with Tribes, states, and non-governmental organizations, on efforts that contribute to fish recovery. These efforts include modifying the operation and configuration of the federal dams to improve passage conditions for fish, investing in hatchery facilities to produce and supplement Tribal and non-Tribal fisheries and improving fish habitat, changing flow augmentation releases from some projects to counteract warmer water, and implanting programs to transport juvenile fish downstream by barge and truck.

States have also funded recovery programs, purchased, protected, and restored fish and wildlife habitat; and overseen numerous habitat improvement measures. Tribes are also implementing their own comprehensive recovery plans that integrate indigenous and western science to heal the ecosystem through innovative projects.

Despite hard work, ingenuity, great expense, and commitment across all levels of Federal, state, Tribal and local governments and a wide range of stakeholders, many fish populations in the Columbia River Basin—salmon, steelhead, and others— have not recovered, some continue to decline, and many areas remain inaccessible to them. We heard a specific example of a fishery where there has been no measurable improvement, about the ongoing and acute harm experienced by Tribes in blocked areas where salmon and steelhead no longer exist, and about the deep and emotional experience of seeing fish return again.

For the Tribes, their past, present, and future is inextricably linked to the continued existence of salmon and the health of the rivers that support them, which is why the Tribes experience profound consequences from the dwindling salmon runs. As the Affiliated Tribes of Northwest Indians and the National Congress of American Indians explained in resolutions passed last year, the Basin faces not only an environmental crisis, but an environmental justice crisis too.^[2]

The Tribal leaders welcomed the dialogue, and they made clear that they want more than words. They brought ideas to the table and they want action.

^[2] National Congress of American Indians, Resolution #AK-21-009 (June 2021), <https://ncai.org/AK-21-009.pdf>; Affiliated Tribes of Northwest Indians, Resolution #2021-23 (May 2021), <https://atnitribes.org/wp-content/uploads/2021/06/Res-2021-23.pdf>.

We heard calls to support breaching the four dams on the lower Snake River to restore a more natural flow, also about the need to replace the services provided by those dams, and recognition that such a step would require congressional action. This approach has been supported by Idaho Congressman Mike Simpson of Idaho and is being evaluated by Washington Senator Patty Murray in collaboration with Washington Governor Jay Inslee.

We heard a request to fully fund fish and wildlife restoration and to vest in Tribes and states a stronger role in managing those funds. Relatedly, we heard a consistent theme that the current fish mitigation funding is mismatched with the burdens experienced by Tribes: it is too little in light of the scale of the harms and the extent of restoration needed, and the locations and species benefitted are not in proportion to the impacts. We heard a request to support reintroduction of salmon in areas that historically yielded abundant populations, but are fully blocked by dams lacking fish passage: the Upper Columbia and Upper Snake.

We were asked to consider the Basin holistically because of its inherent interconnectedness.

We heard that the expertise and sovereignty of the Tribes should be recognized in federal agency processes and actions that might affect the Basin. We agree. Respecting the sovereignty of Tribal Nations and their knowledge and expertise is a priority for this Administration.

We heard more as well. Each proposal merits serious consideration, and we and our staff are carefully considering all of the input we received.

As we reflect on what we heard, we know that any long-term solution must account for the varied and crucial services provided by the dams, as well as the people, communities, and industries who rely upon them.

We cannot continue business as usual. Doing the right thing for salmon, Tribal Nations, and communities can bring us together. It is time for effective, creative solutions.

We also know that Tribes will continue to be critical partners in the work ahead, and that to work effectively in partnership externally requires that we coordinate across the Federal government internally.

To that end, last fall, the White House Council on Environmental Quality convened an interagency group with leaders from the Department of the Interior, including the Bureau of Indian Affairs, Bureau of Reclamation, and Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the Department of the Army, including the Army Corps of Engineers, and the Department of Energy, including the Bonneville Power Administration. This interagency group will build on existing analyses to identify a durable path forward that ensures a clean energy future, supports local and regional economies, and restores ecosystem function, while honoring longstanding commitments to Tribal Nations.

Crafting an equitable long-term solution requires broad input; so, our staff has also conducted listening sessions with stakeholders in the region to hear their perspective. Finally, we have engaged a team of experienced mediators to facilitate a transparent and productive public policy dialogue with all of the sovereigns and stakeholders in the region. If you would like to share information with us, please email us at salmon@ceq.eop.gov. We look forward to hearing from you.

Deb Haaland, Secretary of the Department of the Interior

Jennifer M. Granholm, Secretary of the Department of Energy

Michael Connor, Assistant Secretary of the Army for Civil Works

Brenda Mallory, Chair of the Council on Environmental Quality

Dr. Richard W. Spinrad, Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator

EXHIBIT 2

UNITED STATES COMMITMENTS

Guiding Principles

The Biden Administration is committed to supporting development of a durable long-term strategy to restore salmon and other native fish populations to healthy and abundant levels, honoring Federal commitments to Tribal Nations, delivering affordable and reliable clean power, and meeting the many resilience needs of stakeholders across the region. The Administration recognizes that business as usual will not achieve the goals of restoring salmon populations and ecosystem functions and that, despite hard work, ingenuity, great expense, and commitment across all levels of Federal, State, Tribal, and local governments and a wide range of stakeholders, many fish populations in the Columbia River Basin—salmon, steelhead, and others—have not recovered, some continue to decline, and many areas remain inaccessible to them. In the face of climate change, urgent action is needed to restore salmon and other native fish populations to healthy and abundant levels. The Administration is committed to rapidly engaging on comprehensive, durable solutions in the Columbia River Basin.

In carrying out this commitment, the Administration will consider the goals identified in the Columbia Basin Partnership Task Force’s Phase 2 Report and the Northwest Power and Conservation Council’s Fish and Wildlife Program’s 2020 Addendum. The Administration also will work collaboratively to address matters that affect Tribes and States and regional stakeholder interests, while also respecting Tribal and State sovereignty and expertise. In doing so, the Administration may not have the ability to commit to certain actions affecting other sovereigns through negotiations with Plaintiffs without first collaborating with those other sovereigns.

If stays are in place, the United States commits to engaging in substantive discussions in the forums facilitated by FMCS, with a whole of government commitment from the Administration. During any continued stay period, the Biden Administration also commits to the continued and deliberate engagement of senior Administration officials within CEQ and the Departments of the Interior, Commerce, Army, and Energy.

Duration and Purposes of a Litigation Stay

To facilitate broad regional buy-in to collaborative processes essential to develop a durable strategy for obtaining long-term comprehensive solutions that meet the Administration’s principles and commitments described herein, the Administration believes a minimum 13-month stay extension (i.e., until end of August 2023) is required. In agreeing to an extended stay, the Administration will commit to status reports or other meaningful progress check-ins at appropriate intervals. These commitments and proposed off-ramps—including the ability of any party to move to lift the stay if “sufficient progress” is not being made in the FMCS process—is contained in a proposed Stay Motion.

The Administration is proposing to stay the litigation at least through the end of 2023 spill operations (through August 31, 2023), which allows it to work collaboratively with the region’s sovereigns and stakeholders to set schedules, identify critical milestones, and ultimately make substantive progress on the commitments described above.

Federal Government Commitments

To demonstrate the breadth and seriousness of the Administration's commitment to completing and implementing the durable long-term strategy stated above, the Administration offers the following commitments:

- The Administration commits NOAA and the USFWS to review comments on the draft salmon rebuilding report from Tribal and State fishery managers and scientists and finalize the report on or before September 30, 2022, or within 30 days of the close of the comment period if reasonable requests for an extension of the comment period from Tribal or State fishery managers and scientists are received and granted. The Administration recognizes time is of the essence to have a final science-based report for policymakers and agrees to proceed accordingly.
- The Administration commits to thoroughly examining supporting all legislative proposals to advance salmon restoration in the Columbia River and examining all legislative proposals that undermine such restoration.
- The Administration commits to exploring lower Snake River habitat restoration opportunities, including but not limited to migration corridor restoration through breaching the four lower Snake River dams.
- The Administration commits to collaborating with sovereigns and other stakeholders and to immediately exploring appropriated or otherwise available short- and long-term funding opportunities and actions identified by Plaintiffs and other regional stakeholders—including addressing unmitigated Tribal needs, avoiding future issues with respect to creating inequities, and actions supporting salmon and other fisheries and fish and wildlife programs and infrastructure that can be implemented in 2023 and subsequent years. The Administration understands that this commitment will require ensuring adequate funds are available for agreed upon short- and long-term measures. By December 1, 2022, the Administration agrees to identify those short-term funding, operational, and other actions that can be implemented in 2023 based on actual and projected funding available from sources across the federal Departments and Agencies.
- The Administration commits to examining all current funding opportunities in 2023 and seeking additional funding for new power and transmission resources to offset future changes to the CRS as well as other emerging energy needs. The Administration understands that “future changes to the CRS” contemplates a broad set of future changes related to spills and other operational changes in addition to potentially breaching the four lower Snake River dams.
- Specific to reintroduction, the Administration commits to developing and implementing a plan to explore providing full support for and funding of Phase II reintroduction actions as well as other reintroduction efforts in the Upper Columbia River. The Administration commits to summarizing the status of the plan and progress on its implementation for these actions by December 30, 2022.

- The Administration commits to extending the current agreed upon operations in the October 2021 Term Sheet for Stay until August 31, 2023. By October 31, 2022, the Administration commits to evaluating and, as appropriate, adopting any reasonable operational changes proposed by Plaintiffs based on lessons learned from implementation of 2022 spill operations. The Administration further commits to exploring with Plaintiffs and other sovereigns post 2023 operations as part of a long-term comprehensive solution.
- The Administration commits to collaborating with affected Tribes, States, and regional stakeholders in the FMCS process and, by December 1, 2022, producing a schedule of Administration actions and critical milestones to meet the Administration's principles and commitments described herein and which the Administration intends to pursue.
- The Administration agrees that any litigation party can move to lift the litigation stay for good cause, which can include the lack of sufficient progress on the above commitments or on any collaboratively developed comprehensive basin-wide solutions.

Federal Government Position on a Litigation Stay

At the highest levels, the Administration obtained informed consensus on and support for these commitments, a key accomplishment of the initial nine-month stay. During this stay period, Department leaders also engaged in good faith Nation-to-Nation consultation with the Basin's tribes, and high-ranking officials participated in weekly interagency meetings for months to develop and coordinate Administration positions. The agencies also have devoted thousands of hours preparing for and participating in meetings and presentations to senior Administration leaders on key issues. This work could not have occurred but for the stay, and it has developed the foundations necessary for meaningful Administration engagement on urgent problems that have sustained decades of litigation in the region. The full value of this Administration consensus and preparedness to rapidly engage on comprehensive, durable solutions in the Columbia River Basin will not be realized without an extended stay of the litigation.