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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**

The Moving Parties—National Wildlife Federation et al., the State of Oregon, the Nez Perce Tribe, the Coeur d’Alene Tribe, the Spokane Tribe of Indians, and Federal Defendants—move the Court to extend the litigation stay to October 31, 2023. The Moving Parties conferred on this motion with the other litigation parties and amicus. The other litigation parties and amicus either supported the motion, took no position, or did not respond to the conferral requests,¹ except for Mr. Waddell, who asked that his opposition be noted and his statement—contained in Attachment 1—be incorporated into this Motion. 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. The Court stayed this case in 2021 and 2022 to facilitate mediated discussions on potential solutions that could resolve Plaintiffs’ claims in this case and in three related petitions for review filed in the Ninth Circuit.² *See* Order, ECF 2415 (filed Oct. 26, 2021); Order, 2425 (Aug. 4, 2022). Since that time, the parties and amicus have engaged in confidential mediation with the Federal Mediation and Conciliation Service (FMCS). *See, e.g.*, Status Reports, ECFs 2429, 2430, 2433, 2434.

3. The FMCS mediation process has involved primarily confidential caucuses that include a subset of the litigation parties. The discussions have been positive, and progress has

¹ While not opposing the Motion, the State of Idaho considers the requested 60-day extension insufficient for reasons it will set forth in a separately filed response, and IPNG does not endorse the positions or statements in the Motion due to disappointment in being left out of river-system related negotiations.

² The Ninth Circuit petitions for review are *Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc., v. Bonneville Power Admin.*, 20-73761, *Coeur d’Alene Tribe v. Bonneville Power Admin.*, 20-73762, and *Spokane Tribe of Indians v. Bonneville Power Admin.*, 20-73775.

been made, but the private caucus participants need more time to continue the discussions and expand them to involve the other parties and amicus in this case.

4. For example, Federal Defendants and the Confederated Tribes of the Colville Reservation, the Coeur d'Alene Tribe, and the Spokane Tribe of Indians are continuing confidential discussions on a proposed agreement that could resolve two complaints-in-intervention in this case and two petitions for review filed in the Ninth Circuit.³ These three tribes and the Federal Defendants believe they are close to concluding negotiations, after which time they intend to coordinate with the other litigation parties and amicus on any proposed agreement. Following coordination, the three tribes and Federal Defendants anticipate filing a motion with the Court for judicial action that would facilitate a long-term resolution of the Spokane Tribe of Indians' and the Coeur d'Alene Tribe's complaints-in-intervention and petitions for review.

5. In sum, the Moving Parties believe that an additional 60 days is warranted to allow mediation to continue over the matters discussed in Paragraph 4, as well as over broader efforts to develop a durable long-term strategy to restore salmon and other native fish populations to healthy and abundant levels, honor Federal commitments to Tribal Nations, deliver affordable and reliable clean power, and meet the many resilience needs of stakeholders across the region.

For these reasons, the Moving Parties request that the Court extend the litigation stay to October 31, 2023.

³ See Coeur d'Alene Tribe's Complaint-In-Intervention (ECF 2330), the Spokane Tribe of Indians' Complaint-In-Intervention (ECF 2320), the Coeur d'Alene Tribe's Petition for Review (Doc. 11938199) filed in *Coeur d'Alene Tribe v. Bonneville Power Admin.*, 20-73762 (9th Cir. Dec. 23, 2020), and the Spokane Tribe of Indians' Petition for Review (Doc. 11944854) filed in *Spokane Tribe of Indians v. Bonneville Power Admin.*, 20-73775 (9th Cir. Dec. 24, 2020).

DATED August 31, 2023

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DATED August 31, 2023

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CERTIFICATE OF SERVICE

I certify that on August 31, 2023, 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
289 Ocean Cove Lane
Port Angeles, WA 98363

/s/ Michael R. Eitel
MICHAEL R. EITEL
U.S. Department of Justice

ATTACHMENT 1

Eitel, Michael (ENRD)

From: James Waddell <kairos42@earthlink.net>
Sent: Thursday, August 31, 2023 4:17 PM
To: Eitel, Michael (ENRD); Amanda Goodin; Todd True; rohlf@lclark.edu; Englander Nina; Chang Deanna; ted; Rick Eichstaedt; Ginsberg, Beth S. (bsginsberg@stoel.com); dcraig@stoel.com; sodell@martenlaw.com; Jay.Weiner@mt.gov; Joy Vega; Jay T. Waldron; lthane@schwabe.com; James Buchal; weis@hk-law.com; wbarquin@kootenai.org; jason.morgan@stoel.com; John.Harrison@cskt.org; stu.levit@cskt.org; Brent Hall; 'Howard G. Arnett'; djc@nezperce.org; gwhiting@gmwnezperce.com; Heidinger, John G. (ATG); jshurts@nwcouncil.org; agoodwin@nwcouncil.org; Kate Marckworth; Brian Gruber; Anna Brady; scott.campbell@ag.idaho.gov
Cc: Philpott, Romney (ENRD); Turner, Frederick (ENRD); Frankel, David (ENRD)
Subject: [EXTERNAL] Re: NWF v. NMFS, 01-640-SI, LR 7-1 Conferral

Mike,

After digesting my thoughts and comments today I would like to go on record opposing the stay extension. I ask that my opposition and below text be included in the motion.

Jim Waddell, Amicus party, while a two month extension doesn't sound like much, the extension would impede immediate breaching of the lower Snake River dams starting this year, effectively delaying it a year. Therefore I am opposed to extending the stay. There is a limited in water work window and if a decision to breach does not come until October or November it would be too late for the Corps of Engineers to execute it this winter work season. Breaching this year is possible because Congress does not need to authorize or legislate anything or appropriate money to get these dams breached. Breaching is within the discretionary authority of the Corps of Engineers and the Biden Administration today. It is clearly within Bonneville Power Administration's authority to not pay for any more operations of the dams, and then pay for fish mitigation by breaching the dams as per the Northwest Power Act. As stated in Mr. Waddell's amicus brief, the Court also has authority to breach the dams under the Endangered Species Act. While discussions involve issues with the Columbia River Operating System beyond the lower Snake River dams, there is no excuse to delay a breach decision specific to these dams given the dire situation of endangered and threatened species and the pathways available for immediate breaching.

Breaching is also technically feasible as described in the Corps of Engineers' own studies, including its 2002 comprehensive environmental impact statement specific to the lower Snake River dams. The government should also select dam breaching as the preferred alternative under on the most recent 2020 Columbia River Operating System Environmental Impact Statement. The actual breach is quite simple to do. It is a matter of a few bulldozers excavating a notch in the earthen berm of the dam, while de-watering 75% of the reservoir and then conducting a hydraulic breach. The Corps can do all this through simple "time and materials" type contracting. Continued delay amounts to willful disregard of the Corps' obligations under federal law.

Jim Waddell
Civil Engineer, USACE Retired, DamSense

On 8/30/23 4:59 PM, Eitel, Michael (ENRD) wrote:

Counsel,

All, pursuant to LR 7-1, attached is a draft motion to extend the existing litigation stay to October 31, 2023. The Moving Parties are available to answer any questions, or we can discuss at the FMCS

process meeting at 1:00 PT/4:00 ET tomorrow. Otherwise, please let me know your position on the motion by 3:30 PT, 6:30 ET tomorrow, August 31. Thank you for your attention to this matter.

Mike

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