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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION,
et al.,

Plaintiffs,

and

STATE OF OREGON,

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants,

and

NORTHWEST RIVERPARTNERS, *et al.*,

Intervenor-Defendants.

Case No. 3:01-cv-00640-SI

**INLAND PORTS & NAVIGATION
GROUP'S JOINDER OF FEDERAL
DEFENDANTS' PROPOSED TIMING
FOR A REASONABLE NEPA
PROCESS**

INTRODUCTION

Intervenor Inland Ports and Navigation Group (“IPNG”) is comprised of thirteen public and private entities in Washington, Oregon and Idaho: the Port of Clarkston, the Port of Lewiston, the Port of Morrow, the Port of Pasco, the Port of Umatilla, the Port of Walla Walla, the Port of Whitman County, the Lewis Clark Terminal Association, LD Commodities, Clearwater Paper, Shaver Transportation, Tidewater Barge Lines, and the Pacific Northwest Farmers Cooperative.

IPNG’s members touch every stretch of the entire Columbia Snake River System. There are 34 deep water and inland ports anchored on the river. These ports are the service points for a stable, integrated navigation highway on which the Northwest—and other inland states—depend. Because of their location and function, IPNG’s members have a long and existential relationship with the Federal Columbia River Power System (“FCRPS”). The FCRPS system allows the safe, fuel-efficient movement of commerce by navigation along the most important commercial waterway on the west coast. The Columbia Snake River System is the number one gateway in America for wheat, wood, and mineral bulk exports.

In addition to IPNG’s interest in maintaining the Columbia Snake River System as an irreplaceable navigation channel, IPNG also strongly supports preserving and improving the system’s other important functions, such as providing essential habitat for fish and wildlife, and flood control for hundreds of miles of riparian property. As such, IPNG supports a NEPA process that will devote the resources and the time necessary to do it right. While the preceding BiOps have focused on the impacts to fish passage and survival, the influence of the FCRPS on the Northwest region is far more expansive. In many ways, it defines the region’s environmental, cultural and economic identity.

A properly performed EIS will not just weigh the effects on fish species against recovery efforts. It must account for the entire spectrum of costs and benefits the FCRPS provides, which are intractably integrated into the fabric of the Northwest. This sort of comprehensive, quantitative analysis cannot be artificially accelerated without the risk of sacrificing sound science, analysis, scope and process. Thus, IPNG joins the Federal Defendant's Opening Brief Regarding Proposed Timing for a Reasonable NEPA Process [Dckt. No. 2070] and the timelines proposed therein.

A. NAVIGATION IS A RECOGNIZED AND PROTECTED USE OF THE COLUMBIA SNAKE RIVER SYSTEM

Navigation exists on the Columbia and Snake Rivers because of the FCRPS. The FCRPS's accompanying navigation lock system provides the controls necessary to move goods along the entire reach of the Snake and Columbia Rivers downstream from Lewiston. Among the many considerations that the EIS will review are the "possible conflicts between the proposed action and the objectives of Federal ... controls for the area concerned." *See* 40 C.F.R. § 1502.16. Dams and other channel improvements were originally considered by Congress for "slack water navigation," flood control, and other purposes,¹ which later approved early portions of the FCRPS "for the benefit of navigation and the control of destructive flood waters"² The Flood Control Act of 1962 then specifically mandated an "authorized channel" for navigation on the Columbia and Snake Rivers spanning of 250 by 14 feet."³

¹ *See* H.R. 704, 75th Cong., 3d Sess., pp. 8–11 (1938) (Report of the Board of Engineers for Rivers and Harbors).

² *See* Rivers and Harbors Act of 1950, Section 204; *see also* Rivers and Harbors Act of 1945, § 2 (1945) (authorizing the construction of "dams as are necessary ... for the purposes of providing slack water navigation and irrigation ...").

³ Pub. L. No 87-874, § 203, 76 Stat. 1173, 1193 (1962).

B. THE EFFECTS OF THE FCRPS ON THE ENVIRONMENT ARE BROAD

The FCRPS today consists of 14 federal dams and eight locks that form an integrated system for flood control and power generation, and are complemented by the 250 x 14-foot navigation channel. While independent structures, the dams and locks constitute a unified system whose combined functions carry out the purpose of the FCRPS to control floods, generate power, provide irrigation, and aid navigation.

The navigation channel created by the Flood Control Act of 1962 is an essential “federal control on the area” with a symbiotic relationship with the dams and other channel improvements that make up the “action” the EIS will analyze. This Court has found that a “programmatic EIS” is necessary to meaningfully consider the impacts of the FCRPS on the environment and listed fish species. This effort will obligate the federal agencies to take a “hard look” at the environmental consequences of the project,⁴ which must include consideration of connected and cumulative actions, which may have significant impacts.⁵

1. The Socio-Economic Impact of the FCRPS

The Court has noted that it is “doubtful” that a programmatic EIS could ignore breaching, bypassing or removing “one or more of the Snake River dams.”⁶ Case law, however, indicates that dam removal is generally not considered a “reasonable alternative” because of the multiple functions dams provide unrelated to power production for flood control, irrigation and recreation.⁷ Any NEPA analysis concerning dam removal as a reasonable alternative is questionable, and any decision on the fate of

⁴ *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (DC Cir. 1972).

⁵ 40 C.F.R. § 1508.25; *see also* Opinion and Order, pp. 130–39 (May 4, 2015) [Dckt. 2065] (hereinafter, “2015 Opinion and Order”).

⁶ 2015 Opinion and Order, p. 137.

⁷ *Am. Rivers v. FERC*, 201 F.3d 1186, 1201 (9th Cir. 1999).

dams in the FCRPS is outside the province of the federal agencies in the executive branch. Congress alone has the authority to determine the ultimate destiny of any particular dam within the collective FCRPS system.⁸

That aside, any comprehensive EIS must analyze the environmental benefits and burdens of all fourteen dams within the FCRPS, not merely the effects of a select few in isolation. While the Lower Granite, Little Goose, Lower Monumental and Ice Harbor dams are geographically proximate, the FCRPS was created as an integrated system for the entire region to serve multiple functions. It is greater than the sum of its parts. Analyzing the direct, indirect and cumulative effects of the FCRPS will entail taking a hard look at the radiating effects of the system on not only listed species, but on green power generation, local and regional economies, interstate commerce, U.S. exports, property owner rights and encroachments, cultural resources, irrigation, agriculture, trade-offs in fuel-efficient transportation options, and the Columbia River Treaty, to name a few.

The effects of the FCRPS on the region's economic viability are multitudinous. IPNG's member ports, along with non-member Ports, such as those in Portland and Vancouver, are integral hubs for trade and economic survival up and down the entire Columbia Snake River System. Cities all along the 465-mile span of the system rely on the navigation and flood control provided by the locks and dams for goods, services and protection of life and property. In 2015, 49% of the wheat grown in the United States moved on the Columbia Snake River System. A great deal of that wheat moved through the Lower Snake River locks before being exported to feed the world. Since 1975, over 1.5 billion bushels of grain have been shipped from terminals along the Columbia and

⁸ *Cf. National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1179 (9th Cir. 2004).

Snake Rivers, resulting in an estimated \$8 billion dollar return to those local communities.

If dam removal is considered in the EIS, analyzing the socioeconomic loss from removal of one or more dams in the FCRPS will be a monumental undertaking. The calculus is not just the engineering and contractor costs of dam removal. It will require a thorough understanding of the damage that will result to communities, businesses, local governments, farmers and ratepayers across the region. It will also require consideration of how to replace any lost service from the number one wheat exporting waterway in America. Additional highway or rail capacity will be needed to compensate for lost barge traffic, which will require additional analysis to understand the impacts of such changes to the Northwest's transportation infrastructure. Impacts to cultural resources, like Kennewick Man, from construction and demolition activities—and any change in river levels—must be evaluated. Changes to geographic features will impact housing, population density, land use, FEMA designations and insurance, and will conceivably shift employment and economic realities along the Columbia and Snake Rivers. In sum, a “hard look” will require a deep look into the institution that the FCRPS has been in the region for more than 75 years.

2. The Complexities and Consequences of Dam Removal

Perhaps the simplest component of a programmatic EIS that addresses breaching, bypassing or removing one or more dams will be calculating how much it may cost to take out a dam. But accounting needed to calculate for the cost, time, engineering, and permitting needs for removal itself will be just one aspect of what the EIS should consider. Removing dams will have many collateral impacts, including how to account for legacy contamination, sediment, and liabilities associated with the same. These are

largely unknown, “wild card” issues that will need significant attention as part of any comprehensive analysis of the impacts of dam removal.

For example, in 1992, the Corps of Engineers drew down the Lower Granite reservoir 17 years after it was built, as a test. The result was the thousands of fish stranded, grain terminals rendered inoperable, foundations weakened, and the bankruptcy of the Red Wolf Marina in Clarkston, as illustrated in the following photo.



Avulsion, due to drawdown will need to be analyzed and modeled, and compensation considered for lost riparian properties. Soils compressed by saturated banks will be weakened and will affect existing riparian infrastructure. Engineering analysis will be necessary to consider, for example, whether bridges or other existing structures may need upgrades, replacement or removal.

In sum, the analysis surrounding the removal of one or more dams will involve a hard look at the direct effects on fish recovery and the mechanics of the removal effort itself as a starting point. But including dam removal as an alternative will also entail a highly technical review of the resulting geotechnical, environmental, hydrological, and geographic landscape that would remain after such dam removal, as well as the economic costs associated with those residual impacts.

3. Effects on Non-Listed Species

Analyzing the environmental impact from dam removal will also entail more than modeling direct effects on listed species. The Columbia and Snake Rivers provide habitat for a wide variety of animals in the air, on land, and in the water. Fish species such as sturgeon, lamprey, and resident fish may be affected by changes to the FCRPS, as might organisms up and down the food chain reliant on those fish. Wetlands and existing habitat may be gained, lost or modified. Water levels—and attendant effects to fish and other species—may change and will need to be modeled and analyzed. Temperature differentials due to fluctuating water flow will affect listed species and other organisms, particularly for hot summer months in Eastern Washington, Oregon and Idaho. Many of these contingencies will require peer-reviewed studies from scratch.

Setting aside the analysis on fish and wildlife resulting from dam removal, the EIS will need to further consider mitigation alternatives, such as habitat maintenance and expansion, cumulative effects of predation, harvest, and hatcheries, and other potential mitigating measures. In short, a programmatic EIS must consider the organic and interdependent ecosystem for many other species that depend on the Columbia and Snake Rivers to survive.

4. Climate Change

Finally, the Court's Opinion and Order contained scrutiny of the inadequacy of the BiOp's climate change analysis. The Court highlighted numerous deficiencies: lack of freshwater quantitative analysis, failure to account for climate change in RPA effectiveness, failure to account for long-term effects, failure to account for worsening ocean conditions, failure to use best available science, and failure to analyze potential catastrophes.

The effects of climate change are of great import to the future of IPNG's members—and the FCRPS also serves to mitigate those effects. On average, the FCRPS generates 9800 megawatts of emission-free electricity each year, about half of the firm energy produced in the Northwest. The Lower Snake River dams alone provide enough carbon-free electricity to power a city the size of Seattle.

As a highway for commerce, the FCRPS enables carbon-friendly transport of goods compared to other reasonable alternatives. By way of example, a typical four-barge tow can carry as much cargo as approximately 538 freight trucks or 140 rail cars. An indirect effect of dam removal may include construction of additional highway or rail capacity—and the attendant emissions related to the same—to absorb the lost use of the river for transportation. Thus, the NEPA analysis for the FCRPS should not only include a more comprehensive analysis of climate change on listed species, but an evaluation of how the FCRPS mitigates climate change impacts as well.

C. A FIVE-YEAR SCHEDULE IS REASONABLE FOR A COMPLEX EIS

IPNG has a long-standing commitment to salmon recovery efforts in the Columbia and Snake Rivers. IPNG desires solutions earlier rather than later because of the certainty it will provide its members. The complexity and detail that this programmatic

EIS will require, however, should not be attempted in a truncated timeline. The five-year schedule will not encourage dilatoriness. Rather, it will ensure that this EIS will be grounded in sound science, analysis, scope and process.

DATED this 1st day of July, 2016.

Respectfully submitted,

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