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THE HONORABLE MICHAEL H. SIMON

Attorneys for Intervenor-Plaintiff State of Oregon

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION,  
AMERICAN RIVERS, PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS, INSTITUTE FOR  
FISHERIES RESOURCES, SIERRA CLUB,  
IDAHO RIVERS UNITED, NORTHWEST  
SPORTFISHING INDUSTRY  
ASSOCIATION, NW ENERGY  
COALITION, COLUMBIA RIVERKEEPER,  
IDAHO CONSERVATION LEAGUE, and  
FLY FISHERS INTERNATIONAL, INC.,

Plaintiffs,

and

STATE OF OREGON, SPOKANE TRIBE OF  
INDIANS, and COEUR D'ALENE TRIBE,

Intervenor-Plaintiffs,

v.

NATIONAL MARINE FISHERIES

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

UNOPPOSED JOINT MOTION TO STAY  
LITIGATION

SERVICE, U.S. ARMY CORPS OF  
ENGINEERS, U.S. BUREAU OF  
RECLAMATION and U.S. FISH AND  
WILDLIFE SERVICE,

Defendants,

and

PUBLIC POWER COUNCIL, COLUMBIA-  
SNAKE RIVER IRRIGATORS  
ASSOCIATION, NORTHWEST RIVER  
PARTNERS, CONFEDERATED SALISH  
AND KOOTENAI TRIBES, STATE OF  
MONTANA, INLAND PORTS AND  
NAVIGATION GROUP, STATE OF IDAHO,  
and KOOTENAI TRIBE OF IDAHO,

Intervenor-Defendants.

### **LR 7-1 Conferral Certification**

Undersigned counsel certify that they made a good faith effort to confer with counsel for all parties and *amici* on this motion. Intervenor-Plaintiff Coeur d'Alene Tribe, and *amici* 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.<sup>1</sup> The following parties and *amici* have no objection to this motion: Intervenor-Plaintiff Spokane Tribe of Indians; Intervenor-Defendants Public Power Council, State of Montana, State of Idaho and Kootenai Tribe of Idaho; *amici* Confederated Tribes of the

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<sup>1</sup> 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 full conferral statement is: "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. However, these three sovereigns with reserved treaty rights in the Columbia River are concerned that there is, as of yet, no commitment by the moving parties to include these sovereigns in ongoing or contemplated future discussions or negotiations regarding 'a long-term comprehensive solution that, if successful, may resolve this litigation.'"

Colville Reservation, and Northwest Power and Conservation Council. The remaining parties and amici did not provide a response to the conferral email, sent Monday, October 18, 2021.

### **Joint Motion to Stay the Litigation on All Claims**

Plaintiff National Wildlife Federation et al., Plaintiff-Intervenor State of Oregon, and Federal Defendants, with the support of amicus Nez Perce Tribe (collectively, “the moving Parties”), file this joint motion to stay litigation on all claims in this matter, including but not limited to any preliminary injunction and/or summary judgment motions, until **July 31, 2022**.

“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.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). The moving Parties believe a stay of the litigation is warranted to allow the parties to engage in discussions that have the potential to resolve all claims in this long-running litigation. Specifically, the moving Parties have reached an agreement for short-term operations of the Columbia River System. For context and informational purposes only,<sup>2</sup> the agreement is attached as **Exhibit 1** (“Agreement”). The Agreement provides an interim compromise while the Parties work together to develop and begin implementing a long-term comprehensive solution that, if successful, may resolve all claims in this litigation. The moving Parties agree that any long-term comprehensive solution that resolves this litigation will involve collaboration with the states, tribes, and stakeholders involved in the litigation. With this Agreement and the parties’ commitment to long-term comprehensive solutions, the moving Parties believe that a short-term stay of the litigation is warranted. As such, the moving Parties respectfully ask the Court to stay the litigation through July 31, 2022, to facilitate these discussions.

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<sup>2</sup> The Agreement is not intended to constitute a consent decree, be entered as a Court order, or be enforceable in this action. Federal Defendants object to the entry of an order adopting or modifying any of the provisions of the Agreement, and Federal Defendants request an opportunity to be heard if the Court considers entering an order adopting or modifying any of the terms of the Agreement.

The moving Parties will file a status report with the Court by March 18, 2022, to provide an update on the status of progress on a long-term comprehensive solution.

DATED October 21, 2021.

Respectfully submitted,

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Attorney General

s/ Nina R. Englander

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s/ Todd D. True

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*Attorneys for the Nez Perce Tribe*

**Term Sheet for Stay of Preliminary Injunction Motion and Summary Judgment Schedule  
NWF et al. v. NMFS et al. (3:01-cv-00640-SI)**

NWF et al., Oregon, and the Nez Perce Tribe (“Plaintiffs”) and the U.S. Army Corps of Engineers (Corps), Bureau of Reclamation, Bonneville Power Administration, U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) (the “United States”) (collectively, “the Parties”) have reached the following Agreement for short-term operations of the Columbia River System (“CRS”). This Agreement provides a compromise while the Parties work together to develop and begin implementing a long-term comprehensive solution.

The United States agrees to implement the operations specified in Sections I through III below.<sup>1</sup> The Parties agree to request a stay of the litigation (including but not limited to any preliminary injunction or summary judgment motions) in *NWF et al. v. NMFS et al.* (3:01-cv-00640-SI) through July 31, 2022. NWF et al. agrees to join with BPA to request a comparable stay/administrative action on its petition for review filed in the Ninth Circuit Court of Appeals (20-73761).

This Agreement is effective upon signature of the Parties and the entry of orders staying *NWF et al. v. NMFS et al.*, 3:01-cv-640-SI (D. Or.) and the pending petitions for review filed in the Ninth Circuit Court of Appeals (20-73761, 20-73762, 20-73775). Nothing in this Agreement alters or modifies the Parties’ rights (including any claims or defenses) in *NWF et al. v. NMFS et al.* or in any other forum, and no Party makes any concessions regarding the legal or scientific validity of the operations outlined in this Agreement, the 2020 CRSO Environmental Impact Statement, NMFS’s and FWS’s 2020 CRS Biological Opinions, or the 2020 CRSO Record of Decision.

**I. SPILL OPERATIONS**

**A. Planned Spring Fish Passage Spill Operations for 2022**

<b>Table 1: Planned Spring Fish Passage Spill Operations<sup>2</sup> for 2022</b>	
<b>Project</b>	<b>Spring operation (April 3 to June 20 in Lower Snake River (LSR); April 10 to June 15 in Lower Columbia River (LCR))</b>
Lower Granite	125% Gas Cap spill 24 hours per day/7 days per week until Adult Salmonid Abundance Criteria <sup>3</sup> is satisfied, at which point the Corps will implement the 2021 FOP operation (125% Gas Cap spill 16 hours per day/7 days per week; “performance standard” spill for 8 hours per day/7 days per week) subject to one modification: best

<sup>1</sup> Except as expressly modified in Sections I-III, the United States will implement CRS operations as outlined in FWS’s and NMFS’s 2020 CRS Biological Opinions, the 2020 CRSO Record of Decision, and other guiding documents including the annual Fish Operations Plan, Fish Passage Plan, Water Management Plan (WMP), and seasonal WMP updates.

<sup>2</sup> The fish passage spill operations outlined herein are subject to, and will be implemented consistent with, the annual Fish Operations Plan, Fish Passage Plan, WMP, and seasonal WMP updates.

<sup>3</sup> The Adult Salmonid Abundance Criteria is satisfied when the earliest of the following conditions is met: (1) a cumulative total of 25 adult spring Chinook salmon (not including jacks) pass Lower Monumental Dam; or (2) a cumulative total of 50 adult spring Chinook salmon (not including jacks) pass Ice Harbor Dam; or (3) April 24, 2022.

**Term Sheet for Stay of Preliminary Injunction Motion and Summary Judgment Schedule  
NWF et al. v. NMFS et al. (3:01-cv-00640-SI)**

	efforts will be made to implement eight hours of performance standard spill between 0400 and 1200. <sup>4</sup>
Little Goose	2021 FOP operation (125% Gas Cap spill 16 hours per day/7 days per week; 30% spill for 8 hours per day/7 days per week, subject to two exceptions specified in Table 3, 2021 FOP).
Lower Monumental	125% Gas Cap spill 24 hours per day/7 days per week until Adult Salmonid Abundance Criteria is satisfied, at which point the Corps will implement the 2021 FOP operation (125% Gas Cap spill 16 hours per day/7 days per week; “performance standard” spill for 8 hours per day/7 days per week) subject to one modification: best efforts will be made to implement eight hours of performance standard spill between 0400 and 1200.
Ice Harbor	125% Gas Cap spill 24 hours per day/7 days per week.
McNary	125% Gas Cap spill 24 hours per day/7 days per week.
John Day	125% Gas Cap spill 16 hours per day/7 days per week; “performance standard” spill for 8 hours per day/7 days per week, with priority to maintain 40% spill for 24 hours at The Dalles Dam as needed for TDG management.
The Dalles	2021 FOP Operation (40% spill for 24 hours per day).
Bonneville	125% Gas Cap spill 24 hours per day/7 days per week, capped at 150 kcfs.

**B. Planned Fall/Winter Spill Operations from Sept. 1, 2022 to April 2, 2023 (LSR) and April 9, 2023 (LCR).**

1. From September 1, 2022 to November 15, 2022 and March 1, 2023 to the start of the spring fish passage spill season in April 2023, the Corps will provide surface oriented spill at least three times each week on non-consecutive days for 4 hours each morning (generally between 0500 and 1100) through a spillway weir at each of the following five dams: Lower Granite, Little Goose, Lower Monumental, Ice Harbor, and McNary.

2. Except as modified herein, the Corps shall conduct the planned fall-winter spill operation as outlined in Term and Condition 1.G of NMFS’s 2020 CRS Incidental Take Statement.

**II. RESERVOIR OPERATIONS**

The Corps shall operate Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams at minimum operating pool (MOP) with a 1.5 foot forebay operating range and a 1.0 foot range to the extent possible (referred to operationally as a “soft constraint”) from April 3 until August 14, 2022, unless adjusted on occasion to meet authorized project purposes, primarily Navigation, as specified in the FOP (e.g., 2021 FOP Section 4.6).

<sup>4</sup> When conducting flexible spill operations at Lower Granite and Lower Monumental dams, similar exceptions to those that apply at Little Goose Dam (Table 3, 2021 FOP) may be required. These exceptions will be addressed in the 2022 FOP and coordinated regionally.

**Term Sheet for Stay of Preliminary Injunction Motion and Summary Judgment Schedule  
NWF et al. v. NMFS et al. (3:01-cv-00640-SI)**

**III. SYSTEM OPERATIONAL REQUESTS**

A. The Corps will implement SOR 2021-1 (Updated February 24, 2021 version) in 2022 and 2023. The Corps and Bonneville will refrain from within-day load shaping at Dworshak Dam as occurred during January 2021 unless necessary for equipment testing or other operation and maintenance related activities.

B. The Corps will implement SOR 2021-6 in 2021 and 2022. Zero Generation Operations as described in the 2020 CRSO ROD will no longer commence as early as October 15, and will instead commence once the previously defined implementation trigger of “few, if any” actively migrating anadromous fish (as described in SOR 2005-22) has been met. This trigger will be implemented in relation to both date (implementation will be limited to periods between December 1 and through February 28) and abundance.

**IV. SIGNATURES**

The Parties agree to the provisions set forth in this Agreement as evidenced by the signatures of their authorized representatives on the following pages.



NATIONAL WILDLIFE FEDERATION, *et al.*



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Todd D. True, Earthjustice  
Attorney for National Wildlife Federation, *et al.*

Oct. 21, 2021

Date

OREGON

A handwritten signature in cursive script that reads "Kate Brown". The signature is written in black ink and extends across the width of the signature line.

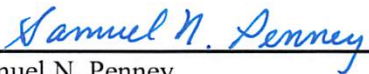
October 20, 2021

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Kate Brown  
Governor  
State of Oregon


Date

NEZ PERCE TRIBE

  
\_\_\_\_\_  
Samuel N. Penney  
Chairman  
Nez Perce Tribal Executive Committee

10-21-21

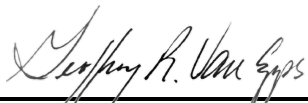
Date

  
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Shirley J. Allman  
Secretary  
Nez Perce Tribal Executive Committee

10/21/21

Date

United States



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Geoffrey R. Van Epps  
Colonel, Corps of Engineers  
Division Commander

**LORRI GRAY** Digitally signed by LORRI GRAY  
Date: 2021.10.20 18:37:00  
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Lorri J. Gray  
Regional Director, Columbia - Pacific Northwest  
Interior Region 9  
Bureau of Reclamation



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Hugh R. Morrison  
Deputy Regional Director  
Columbia Pacific Northwest and Pacific Islands Regions  
U.S. Fish and Wildlife Service

JOHN  
HAIRSTON

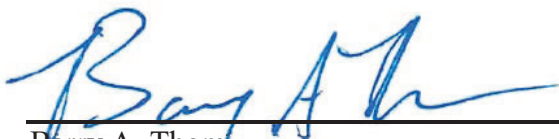


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HAIRSTON

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John L. Hairston  
Administrator and CEO  
Bonneville Power Administration



October 21, 2021

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Barry A. Thom  
Regional Administrator  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service, West Coast Region.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

**NATIONAL WILDLIFE FEDERATION,  
AMERICAN RIVERS, PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS, INSTITUTE FOR  
FISHERIES RESOURCES, SIERRA  
CLUB, IDAHO RIVERS UNITED,  
NORTHWEST SPORTFISHING  
INDUSTRY ASSOCIATION, NW  
ENERGY COALITION, COLUMBIA  
RIVERKEEPER, IDAHO  
CONSERVATION LEAGUE, and FLY  
FISHERS INTERNATIONAL, INC.,**

Plaintiffs,

and

**STATE OF OREGON, SPOKANE TRIBE  
OF INDIANS, and COEUR D'ALENE  
TRIBE,**

Intervenor-Plaintiffs,

v.

**NATIONAL MARINE FISHERIES  
SERVICE, U.S. ARMY CORPS OF  
ENGINEERS, U.S. BUREAU OF  
RECLAMATION, and U.S. FISH AND  
WILDLIFE SERVICE,**

Defendants,

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

**ORDER STAYING LITIGATION**

and

**PUBLIC POWER COUNCIL,  
COLUMBIA-SNAKE RIVER  
IRRIGATORS ASSOCIATION,  
NORTHWEST RIVER PARTNERS,  
CONFEDERATED SALISH AND  
KOOTENAI TRIBES, STATE OF  
MONTANA, INLAND PORTS AND  
NAVIGATION GROUP, STATE OF  
IDAHO, and KOOTENAI TRIBE OF  
IDAHO,**

Intervenor-Defendants.

**Michael H. Simon, District Judge.**

This lawsuit began in May 2001, more than twenty years ago. On January 20, 2021, Plaintiffs filed their Eighth Supplemental Complaint. Shortly thereafter, Intervenor-Plaintiff Spokane Tribe of Indians filed its Complaint-in-Intervention, followed by Intervenor-Plaintiff State of Oregon's Fifth Supplemental Complaint-in-Intervention, followed by Intervenor-Plaintiff Couer D'Alene Tribe's Complaint-in-Intervention. In July 2021, Plaintiffs and the State of Oregon filed motions for preliminary injunction. Pursuant to the parties' stipulation, briefing on these motions will not be complete for several more months.

On October 21, 2021, the parties filed their Joint Motion to Stay Litigation until July 31, 2022. This would include staying the two pending motions for preliminary injunction and all anticipated motions for summary judgment. The parties explain that they currently are in good faith discussions to resolve the entire litigation and that they have reached an agreement regarding short-term operations of the Federal Columbia River Power System, including spill operations, which is the subject of the pending motions for preliminary injunction. Only *amicus curiae* James M. Waddell opposes the parties' Joint Motion to Stay Litigation. Mr. Waddell

argues the Court, under either its “inherent authority” or the authority provided by the Endangered Species Act, should “order breach of the lower Snake River dams starting this year.” ECF 2413. No party in this lawsuit, however, has moved for such an order, nor have the parties presented legal argument on whether the Court legally can enter any such order. Thus, it is premature to consider this issue.

For the reasons stated by the parties, the Court GRANTS the parties’ Joint Motion to Stay Litigation (ECF 2411). The Court DENIES WITHOUT PREJUDICE AND WITH LEAVE TO RENEW Plaintiffs’ Corrected Motion for Preliminary Injunction (2390) and the State of Oregon’s Corrected Motion for Preliminary Injunction (2392). The Court DENIES AS MOOT AND SUPERSEDED Plaintiffs’ Motion for Preliminary Injunction (2373) and the State of Oregon’s Motion for Preliminary Injunction (2382). The Court STAYS this litigation until July 31, 2022. Not later than July 31, 2022, the parties shall jointly file a status report.

**IT IS SO ORDERED.**

DATED this 26th day of October, 2021.

/s/ Michael H. Simon  
Michael H. Simon  
United States District Judge