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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

To: Dr. Darryll Olsen, Board Representative
Columbia Snake River Irrigators Association

From: James L. Buchal

Date: April 7, 2023

Re: Judge Michael Simon Scope of Authority

You have asked me to discuss whether the statutes authorizing construction and operation of the Snake River dams should be construed to limit the authority of the U.S. Army Corps of Engineers and other agencies to initiate radical measures beyond the current "preferred alternative" in the EIS, including operations that would draw down Snake River reservoir levels, drastically reducing or even destroying existing navigation and power production.

The short answer is that stakeholders of the Columbia and Snake River dams who assert that the project authorizations are likely to constrain Judge Simon in his response to the Columbia River System Operations EIS and associated BiOp will almost certainly be disappointed.

As set forth below, prior examples of very significant interference with project purposes have been upheld, the United States District Court for the District of Oregon has made it clear that it believes that other project purposes may be balanced away in favor of fish, and Congress has even acquiesced in this interpretation by repeatedly attempting (and failing) to pass legislation to limit the discretion of the project operators.

A case can also be made that under the Stevens Treaties, as interpreted by the federal courts, the relevant Pacific Northwest tribes may pursue claims that the Treaties themselves require the dam operators to provide remedies against a breach of the Treaties

from dam effects. Those remedies could also extend to operations curtailing other authorized purposes of the dams.

Prior Interference with Project Purposes and Congressional Inaction.

A full history of the interference with project purposes is beyond the scope of this memorandum, but one of the most striking examples is the frustration of the federal purpose of encouraging "the widest possible use of electric power and the lowest possible rates to consumers . . .". 16 U.S.C. 838g; *see also* 16 U.S.C. § 839b(h)(5) ("an adequate, efficient, economical, and reliable power supply").

Since the 1991 listings of Snake River salmon as endangered, fish measures have destroyed low-cost capacity of the Federal Columbia River Power System by approximately 1,200 MW (*compare* SOR EIS (Nov. 1995) *and* Northwest Regional Forecast of Power Loads and Resources (PNUCC 2020), the equivalent of one or more nuclear power plants. Congress has made no effective objection (see below), and the Ninth Circuit has upheld such interference. *Nw. Res. Info. Ctr. v. Nw. Power Planning Council*, 35 F.3d 1371, 1394 (9th Cir. 1994).

Judge Redden's 2005 Decision.

Judge Redden's 2005 opinion striking down the 2004 BiOp contains an extensive review of much of the relevant legal authority, and makes it clear that the District of Oregon is likely to regard the dam operators as having substantial discretion to re-balance conflicting commands concerning project operations in a way that favors fish. Given that Judge Simon would review the issue in the very same case, it is worth quoting the opinion at length:

> As early as 1958, Congress amended the Fish and Wildlife Coordination Act, authorizing the Secretary of the Interior to provide conservation assistance to federal agencies, among others, so that "wildlife conservation shall receive *equal consideration* and be coordinated with other features of water-resource development programs…." 16 U.S.C. § 661 (emphasis added).
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> In the 1980 Pacific Northwest Electric Power Planning and Conservation Act, Congress intended the Act's purposes, including hydropower development, "to be construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. The Act was intended
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> > to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions

> substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

Id. The Act established an affirmative conservation mandate for FCRPS agencies:

> Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall--
>
> (i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.

16 U.S.C. § 839b(h)(11)(A) (emphasis added).

The Northwest Power Act places "fish and wildlife concerns on an equal footing with power production." *Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission*, 746 F.2d 466, 473 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116, 86 L. Ed. 2d 259 (1985).

District courts have considered statutorily-mandated operations of the Missouri River dams by the Army Corps of Engineers and its obligations under the ESA. In *American Rivers v. Corps of Engineers*, 271 F. Supp. 2d 230 (D. D.C. 2003), the court applied the rule that "if an agency has *any* statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA." *Id.* at 251 (emphasis added). In evaluating the governing statute, the court found that the Flood Control Act (FCA), 33 U.S.C. § 709 "does not deprive the Corps of all discretion in its management of the Missouri River Basin." *Id.* at 252. The court further found that the Corps' Master Manual on navigation "allows the Corps to consider a variety of factors" and thus "affords the Corp discretion in management of the Missouri River." *Id.* at 251-52. The court therefore held that the Corps must fulfill its ESA responsibilities. *Id.*

Similarly, the court held in *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 2004 WL 1402563 *3 (2004), that the Corps was required to manage the Missouri River for multiple purposes, including flood control, irrigation, power, navigation, wildlife, and recreation. 363 F. Supp. 2d

1145, *Id.* at *3. The court emphasized that "the Corps' prioritization of river interests is discretionary" and "the priority that the Corps gives the competing river interests is a discretionary function, and subject to the ESA." 363 F. Supp. 2d at 1153, *Id*. at *4.

The congressionally-authorized operating purposes of all 14 Columbia Basin DAMS and water projects include hydroelectric power production, fish and wildlife protection, and recreation. The authorized operating purposes for 10 of the DAMS also include navigation; for six of the DAMS, irrigation; for five of the DAMS, flood control; and, for two of the DAMS, water quality activities. . . . . The action agencies have considerable discretion in their administration of the systems, allowing them to meet their mandates and yet adjust operations to fulfill multiple purposes, even though there may be some conflict among the purposes. Decisions in operating the DAMS to accommodate the divergent interests involve choices and the exercise of discretion. The Corps Statement of Decision implementing the 2004BiOp makes this clear:

> Traditionally, the Corps has been granted broad discretion by Congress in planning, constructing, and operating federal water resource projects. This discretion is based on Congressional reliance on Corps' experience and technical expertise. However, this discretion is not unconstrained; the authorizing legislation mandates the Corps provide for specified project uses. *The Corps is responsible for using its expertise in making decisions on how to operate and maintain the FCRPS projects for multiple uses based on principles of operating experience, public concerns, water supply, public health and safety, funding, international agreements, and the needs of the Pacific Northwest and the Nation.* The Corps operates the FCRPS projects . . . for multiple purposes, including flood control, hydropower generation, irrigation, navigation, fish, wildlife, water quality, municipal and industrial water, and recreation.

Record of Consultation and Statement of Decision, p. 2 (emphasis added).

The ESA contains but a single exemption for agencies that claim their statutory mandate to "authorize, fund, or carry out" a project leaves them with insufficient discretion to avoid jeopardizing a listed species. The exemption came into being when Congress amended the ESA after the Supreme Court's 1978 decision in *Tennessee Valley Authority v. Hill* to create the Endangered Species Committee. 16 U.S.C. § 1536(e)-(1). The exemption covers situations where agencies cannot insure an action is not likely to jeopardize the continued existence of the endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. 16 U.S.C. § 1536(a)(2). For the

> exemption to apply, the Committee must find, among other things, that there are no reasonable and prudent alternatives to the proposed action; the proposed action is of regional or national significance; and the "benefits of alternative courses of action" that are "consistent with preserving the species or its critical habitat" are clearly outweighed by the benefits of the proposed action." 16 U.S.C. § 1536(h)(1)(A)(i)-(iv). "The [Endangered Species] Committee is known as the "God Squad" because it is the ultimate arbiter of the fate of an endangered species. *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1537, as amended, 988 F.2d 121 (9th Cir. 1993).
>
> NOAA's current interpretation of § 402.03 would create a second exemption far broader than the only one thus far created by Congress. Under NOAA's interpretation, an action agency would be able to exempt itself from accountability by characterizing some, even lethal, elements of any proposed action as "nondiscretionary." The consequences would be, as in the 2004Bi0p, a jeopardy analysis that ignores the reality of past, present, and future effects of federal actions on listed species. NOAA's interpretation conflicts with the structure, purpose, and policy behind the ESA. If Congress had meant to provide additional exemptions, it would have done so.

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *29-36 (D. Or. May 26, 2005).

In short, Judge Redden held that given conflicting commands to the dam operators, the operators had very, very broad discretion to balance the project purposes. He rejected the argument that project purposes can be characterized as mandatory and non-discretionary, and said that the God Squad is the remedy for anyone who disagrees with the Corps' rebalance of project purposes in favor of ESA protection.

Judge Redden did not address the operation of the Clean Water Act, which is presently being interpreted further to undermine core project purposes. The U.S. Army Corps of Engineers challenged Washington's Clean Water Act § 401 certification for the dams before the Pollution Control Hearings Board, arguing that conditions imposed by Ecology were inconsistent with discharging project purposes, but lost entirely. *U.S. Army Corps of Engineers v. Ecology*, PCHB No. 20-043c (Summary Judgment Order November 3, 2021).

Congressional Acquiescence in Agency Flexibility to Undermine Project Purposes.

With full knowledge of the decisions in the District of Oregon, in 2018 several Northwest Members of Congress sponsored H.R. 3144, characterized as an Act to "provide for operations of the Federal Columbia River Power System pursuant to a certain operational plan for a specified period of time, and for other purposes". The

Members were primarily concerned about lost low-cost energy production; the accompanying H. Rep. No. 116-643 reported that spill costs had recently constituted "30% of BPA's costs charged in rates".

H.R. 3144 would have mandated operations under the 2014 BiOp, and further provided that:

> No structural modification, action, study, or engineering plan that restricts electrical generation at any FCRPS hydroelectric dam, or that limits navigation on the Snake River in the State of Washington, Oregon, or Idaho, shall proceed unless such proposal is specifically and expressly authorized by an Act of Congress enacted after the date of the enactment of this Act.

The bill passed in the House but died in the Senate.

In 2022, several Northwest Members of Congress introduced H.R. 8016, the "Federal Columbia River Power System Certainty Act," which would have mandated FCRPS operations "consistent with" a particular supplemental biological opinion issued in September 2020, forbidding any changes to operations unless "necessary for public safety or transmission and grid reliability" or other factors. The Act also repeated the language of H.R. 3144 forbidding changes in electrical generation. Congress took no action on the bill after its introduction, and Congressman Dan Newhouse and others promised to reintroduce it again on March 23, 2023, this time denominated as the "Northwest Energy Security Act". By his actions, Rep. Newhouse apparently does not believe that Congress retains authority to block dam breaching/drawdowns without supplemental legislation in force.

The District of Oregon is likely to regard all this legislative history of failed attempts to limit operator discretion to balance away electrical generation and other project purposes as further support for Judge Redden's opinion, invoking it to hold that the dam operators may utilize existing authority to further restrict electric generation and limit navigation.

The Power of the Stevens Treaties

The Pacific Northwest Indian tribes that are parties to the Stevens Treaties have over the years successfully advanced the view the "right of taking fish at all usual and accustomed places, in common with the citizens of the Territory" carries with it certain implied rights to impose an environmental servitude to protect the right to take fish. As far back as 1980, the District Court for the Western District of Washington declared it "necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause". United States v. Washington, 506 F. Supp. 187, 205 (W.D. Wash. 1980). While that portion of its opinion was vacated on appeal as too broad, the Ninth

Circuit made it clear that when it had "vacated the district court's decision with respect to the environmental issue, we made clear that we were not absolving Washington of environmental obligations under the fishing clause." *United States v. Washington*, 853 F.3d 946, 959 (9th Cir. 2017).

In the 2017 case, the Ninth Circuit upheld the District Court's finding that Washington State "had violated, and was continuing to violate, the Treaties by building and maintaining culverts" that interfered with salmon migration, and upheld the District Court's order "to correct [the] offending culverts". *Id.* at 953 (9th Cir. 2017). The Supreme Court accepted the State's petition for a writ of certiorari to review the decision, but it was affirmed by an equally divided Court after Justice Kennedy declined to participate in the case. *Washington v. United States*, 138 S. Ct. 1832 (2018).

Unlike the State of Washington, Congress has power to breach Indian treaties, triggering an obligation to pay compensation. *E.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374, 100 S. Ct. 2716, 2720 (1980) (The Black Hills were granted to the tribes by treaty in 1868; in 1877, after gold was found, Congress passed an act taking the Hills back). The United States could argue that the Congressional decisions to build the projects constituted breaches of this type, but express and repeated Congressional statements such as dam operators were expected "to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat" (16 U.S.C. § 839b(h)(11)(A)) undermine this position.

Accordingly, the Tribes are likely to be able to advance the position that any and all discretionary authority to operate the projects, even in a way that essentially destroys other project purposes, must be utilized to "to correct the offending dam effects".

Conclusion

The foregoing discussion demonstrates that the District of Oregon will likely uphold agency discretion to engage in the functional equivalent of dam breaching: extreme drawdowns that substantially reduce if not eliminate electricity production from the Snake River Dams, and destroy navigation by existing barges during large if not all portions of the year. Proponents will argue that these actions are not permanent, and do not require any specific de-construction authorization, because the dams would remain in place, such that the action would be theoretically reversible. As set forth above, not only may environmentalists bring suit asserting that such extreme action is required under the ESA, the Tribes may also assert that the Treaties require it, and Judge Simon would likely grant relief in their favor.