July 21, 2023

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Lt. Gen. Scott Spellmon
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers Headquarters
441 G Street NW
Washington, D.C. 20314-1000

Lt. Col. ShaiLin KingSlack
District Commander and Engineer
Walla Walla District, U.S. Army Corps of Engineers
201 North 3rd Avenue
Walla Walla, WA 99362-1876

Re: Sixty-Day Notice of Intent to Seek Removal of Lower Snake River Dams

Dear U.S. Army Corps of Engineers:

Columbia Riverkeeper, Idaho Conservation League, Idaho Rivers United, and the Northwest Sportfishing Industry Association provide 60 days notice of our intent to sue the U.S. Army Corps of Engineers (Corps) for causing hot water conditions that kill and injure Snake River sockeye salmon in violation of the Endangered Species Act. To remedy these violations, we will ask a court for all necessary relief to reduce, mitigate, or eliminate the hot water conditions caused by the Lower Snake River dams, up to and including dam removal. The federal government can, and should, avoid this litigation by honoring its commitment to develop a credible plan to restore abundant Snake River salmon.

I. Lower Snake River dams cause hot water that kills and injures large numbers of endangered sockeye.

Snake River sockeye are "at a high risk of extinction."[1] Hot water, caused primarily by dams,[2] kills and injures significant numbers of sockeye in the Lower Snake River each year.[3]

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[1] National Marine Fisheries Service (NMFS), *2019 Biological Opinion for Columbia River System Operations* (hereinafter "*BiOp*"), p. 578 (March 29, 2019).
[2] U.S. EPA, *Columbia and Lower Snake River Temperature TMDL*, pp. 55–59 (2021) (Columns E and F in Tables 6-6 through 6-10 show heat pollution caused by the four Lower Snake River dams individually and cumulatively during the summer and fall.).
[3] *See* Appendix 1.

Scientists predict that hot water will soon cause the extinction of Snake River sockeye.[4] Without the four dams, the Lower Snake River would remain cool enough to allow most sockeye salmon to migrate safely, even in very hot years.[5]

II. The Corps' killing of Snake River sockeye violates the Endangered Species Act.

The Corps' killing, or "take," of Snake River sockeye violates Sections 9 and 7 of the Endangered Species Act.[6] The Lower Snake River dams cause take by creating hot water conditions that kill and injure sockeye salmon and significantly impair their essential behaviors, such as migration and spawning.[7] Because adult Snake River sockeye migration survival frequently fails to meet the targets set in Incidental Take Statements,[8] the Endangered Species Act's safe harbor provision[9] does not protect the Corps from this suit, and take is occurring at levels that result in jeopardy. The Corps is culpable for all take of Snake River sockeye caused by the existence, as well as the operation, of the Lower Snake River dams.[10]

III. A court has authority to order Lower Snake River dam removal.

We will seek, and a court may order, all necessary relief up to and including removal of the Lower Snake River dams to prevent the illegal killing and likely extinction of endangered Snake River sockeye. The U.S. Supreme Court in *TVA v. Hill* specifically explained that congressional authorizations and appropriations for federal dams do not create exceptions to the Endangered Species Act or prevent injunctions prohibiting such dams.[11] The Corps' oft-repeated contention that courts lack authority to order Snake River dam removal is therefore meritless. Because Snake River dam removal or other far-reaching remedies are necessary to prevent the illegal killing and extinction of endangered Snake River sockeye, the Endangered Species Act empowers courts to grant such relief.

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[4] Crozier *et al*., *Snake River Sockeye and Chinook Salmon in a Changing Climate: Implications for Upstream Migration Survival During Recent Extreme and Future Climates*, PLoS ONE 15(9), (2020).

[5] *See* Columbia Riverkeeper, *White Paper: Computer modeling shows that Lower Snake River dams caused dangerously hot water for salmon in 2015*, p. 4 (2017) (dam removal would have kept the Lower Snake River cool enough for salmon during the very hot summer of 2015); *see also* U.S. Army Corps of Engineers, *Environmental Impact Statement for Columbia River System Operations*, Appendix D, Annex A, p. A-1-28 (2020) (similar results).

[6] 16 U.S.C. § 1538(a)(1)(B) (prohibiting "take" of endangered species); 16 U.S.C. § 1536(a)(2) (prohibiting federal agencies from jeopardizing the continued existence of endangered species).

[7] *See* 50 C.F.R. § 222.102 (defining prohibited means of incidental take).

[8] *See* Appendix 1.

[9] 16 U.S.C. § 1536(o)(2).

[10] NMFS, *Endangered and Threatened Wildlife and Plants; Definition of "Harm"*, 64 Fed. Reg. 60727, 60729 (Nov. 8, 1999) ("Maintaining an existing barrier that prevents or impedes access to habitat may cause take of listed species"); *see also Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262, 1269–71 (W.D. Wash. 2008).

[11] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 172–74, 189–91 (1978).

CONCLUSION

For decades, courts have observed that the system of dams on the Lower Snake and Columbia "cries out for a major overhaul" if salmon are to survive.[12] For decades, the Corps and other federal agencies have resisted meaningful change. If the Biden Administration breaks its promise to deliver a "durable solution" for salmon recovery, this letter provides 60 days' notice[13] of our intent to sue the Corps for violations of the Endangered Species Act and seek relief up to and including the removal of four dams on the Lower Snake River. Please contact me or the individuals listed below if you wish to discuss this notice letter.

Sincerely,

Miles Johnson, Legal Director
Columbia Riverkeeper
P.O. Box 950
Hood River, OR 97031
miles@columbiariverkeeper.org
541.490.0487

On behalf of:

Northwest Sportfishing Industry Association
Liz Hamilton, Executive Director

Idaho Conservation League
Justin Hayes, Executive Director

Idaho Rivers United
Nic Nelson, Executive Director

cc:
Secretary of U.S. Dep't of Commerce (per 16 U.S.C. § 1540(g)

[12] *Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 876 (D. Or. 2016).
[13] *See* 16 U.S.C. § 1540(g).

Appendix 1. Adult Snake River Sockeye Survival Rates, Bonneville to Lower Granite Dam.

Year	Estimated Survival	ESA-mandated Survival
2012	57%[14]	81%[15]
2013	46%[16]	81%[17]
2014	69%[18]	81%[19]
2015	4%[20]	81%[21]
2016	72%[22]	81%[23]
2017	57%[24]	81%[25]
2018	72%[26]	81%[27]
2019	25%[28]	50%[29]
2020	27%[30]	65%[31]
2021	30%[32]	65%[33]
2022	66%[34]	65%[35]

[14] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[15] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[16] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[17] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[18] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[19] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[20] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[21] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[22] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[23] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[24] NMFS, *2019 Adult Survival Estimates for Distribution; SR Sockeye tab* (2019).
[25] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[26] Fish Passage Center, *Adult Returns for Columbia & Snake River Dams Webpage* (ladder counts showed 72% survival between Ice Harbor and Lower Granite in 2018). In 2018 through 2020, too few PIT-tagged Snake River sockeye returned to estimate survival using PIT-tag data.
[27] NMFS, *2008 BiOp*, Table 14.1 (2008); *also* NMFS, *2014 Supplemental BiOp*, p. 352 (2014).
[28] Fish Passage Center, *Adult Returns for Columbia & Snake River Dams Webpage* (ladder counts showed 25% survival between Ice Harbor and Lower Granite in 2019).
[29] NMFS, *2019 BiOp*, p. 853 (March 29, 2019).
[30] Fish Passage Center, *Adult Returns for Columbia & Snake River Dams Webpage* (ladder counts showed 27% survival between Ice Harbor and Lower Granite in 2020).
[31] NMFS, *2020 BiOp*, pp. 1377, 1379 (July 31, 2020).
[32] Columbia River Data Access in Real Time (DART) Conversion Rate webpage.
[33] NMFS, *2020 BiOp*, pp. 1377, 1379 (July 31, 2020).
[34] Columbia River Data Access in Real Time (DART) Conversion Rate webpage.
[35] NMFS, *2020 BiOp*, pp. 1377, 1379 (July 31, 2020).