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Honorable Rosanna Malouf Peterson

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLUMBIA RIVERKEEPER,)

Plaintiff,)

v.)

UNITED STATES BUREAU OF)
RECLAMATION; and ESTEVAN)
LÓPEZ, in his official capacity as)
the Commissioner of the United)
States Bureau of Reclamation,)

Defendants.)

No. 2:16-CV-00236-RMP

[PROPOSED] ORDER OF
DISMISSAL WITHOUT
PREJUDICE PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 41

The Court, having considered the Joint Motion for Dismissal Without
Prejudice (“Joint Motion”), and for good cause shown, hereby GRANTS the Joint
Motion.

Accordingly, IT IS HEREBY ORDERED that:

ORDER OF DISMISSAL WITHOUT
PREJUDICE - 1

KAMPMEIER & KNUTSEN, PLLC
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1 (1) Subject to and in accordance with the terms and conditions of the
2 Settlement Agreement attached hereto, this case is dismissed without prejudice;
3
4 and

5 (2) Subject to and in accordance with Section IV, paragraph 9(b) of the
6 above-referenced Settlement Agreement, this Court shall retain jurisdiction over
7
8 this case for the purpose of resolving those disputes for which Plaintiff Columbia
9 Riverkeeper or Defendants the United States Bureau of Reclamation and its
10 Commissioner may petition the Court. *See Kokkonen v. Guardian Life Ins. Co. of*
11 *Am.*, 511 U.S. 375 (1994).
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15 DATED this _____ day of _____, 2017.
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19 _____
20 Honorable Rosanna Malouf Peterson
21 United States District Judge
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29 ORDER OF DISMISSAL WITHOUT
PREJUDICE - 2

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SETTLEMENT AGREEMENT

This Settlement Agreement (“Settlement Agreement”) is made by and between Columbia Riverkeeper (hereafter, “Riverkeeper”) and the United States Bureau of Reclamation and Estevan Lopez, in his official capacity as the Commissioner of the United States Bureau of Reclamation (hereafter, collectively, “Bureau”). In this Settlement Agreement, Riverkeeper and the Bureau may collectively be referred to as “Parties” and may be referred to individually as a “Party.”

WHEREAS, on June 29, 2016, Riverkeeper filed a Complaint in the United States District Court for the Eastern District of Washington (Case No. 2:16-CV-00236-RMP);

WHEREAS, the Complaint asserts that the Bureau discharges pollutants from the Grand Coulee Dam Project, including associated structures and facilities such as turbines, powerhouses, transformers, spillways, and cranes (but not including the Switchyards, which are described as “Facility 7” in the Spill Prevention Control and Countermeasure Plan for the Grand Coulee Dam Project), which the Bureau owns and operates in Washington, allegedly in violation of section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a)¹;

¹ Hereafter, the terms “Grand Coulee Dam Project,” “Grand Coulee Dam,” and “Dam” are used interchangeably to refer to the same project, which includes the

WHEREAS, the Complaint seeks declaratory and injunctive relief and an award of Riverkeeper's litigation costs as authorized by section 505(d) of the CWA, 33 U.S.C. § 1365(d);

WHEREAS, this Settlement Agreement resolves the claims alleged and relief sought in the Complaint;

WHEREAS, the Bureau has in place a Spill Prevention Control and Countermeasure ("SPCC") plan at the Grand Coulee Dam, which plan addresses oil spill prevention, preparedness, and response intended to prevent or minimize oil discharges to navigable waters and adjoining shorelines due to accidental oil spills, and the Bureau conducts annual drills with other agencies intended to ensure that they have appropriate capability to respond to such spills;

WHEREAS, the Bureau represents that it currently uses non-lubricated components on portions of Grand Coulee Dam to minimize the risk of discharges to navigable waters;

WHEREAS, the Bureau received a National Pollutant Discharge Elimination System ("NPDES") permit, Number WA0024163, from the United States

associated dam structures and facilities such as turbines, powerhouses, transformers, spillways, and cranes, but does not include the Switchyards, which are described as "Facility 7" in the Spill Prevention Control and Countermeasure Plan for the Dam.

Environmental Protection Agency (“EPA”) for discharges from the wastewater treatment plant at Grand Coulee Dam, which discharges and permit are not at issue in the Complaint or this Settlement Agreement;

WHEREAS, Riverkeeper and the Bureau have agreed to this Settlement Agreement without any admission of fact or law;

WHEREAS, Riverkeeper and the Bureau consider this Settlement Agreement to be a fair, adequate, and reasonable resolution of the claims that were or potentially could have been raised in the case regarding alleged discharges of pollutants from the Grand Coulee Dam; and

WHEREAS, Riverkeeper and the Bureau believe that it is in the interest of the public, the Parties, and judicial economy to enter into this Settlement Agreement rather than engage in protracted litigation;

NOW THEREFORE, the Parties, by and through their undersigned counsel, hereby agree upon the following settlement terms and conditions:

I. Parties Bound.

1. This Settlement Agreement applies to, is binding upon, and inures to the benefit of the Parties and their successors, assigns, and designees.

II. The Bureau's Obligations.

2. Within ten (10) months of the Effective Date of this Settlement Agreement, the Bureau shall apply in full for an NPDES permit to address alleged discharges of pollutants at Grand Coulee Dam, including, at a minimum, alleged discharges from drainage sumps, unwatering sumps, drains, and discharges of cooling water systems. The application also may address alleged discharges from wicket gate bearings and other potential lubricant contact points. The Bureau shall diligently respond to any requests from EPA related to the Grand Coulee NPDES permit application. Starting one (1) year from the date the Bureau submits that NPDES permit application to EPA, the Bureau shall submit written requests to EPA every twelve (12) months, with copies provided to Riverkeeper at the same time, requesting an update on the status of that permit application. The Bureau's obligations to submit such requests shall terminate when EPA takes final action on that application or in the event that Riverkeeper commences an action pursuant to paragraph 8 below, whichever is earlier.

3. The Bureau shall notify Riverkeeper of those events that the Bureau reports to the National Response Center pursuant to the Bureau's Spill Prevention, Control and Countermeasure plan for the Grand Coulee Dam; provided, however, that the Bureau's obligation to provide such notification shall terminate when the

Bureau obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at the Dam or in the event that Riverkeeper commences an action pursuant to paragraph 8 below, whichever is earlier. Such notifications to Riverkeeper may be provided via email, and shall be made promptly and in no instance later than three calendar (3) days from the Bureau's discovery of the event. The Bureau's notification to Riverkeeper shall not constitute an admission by the Bureau of a discharge of any pollutant in violation of the CWA or any other law.

4. Within eighteen (18) months of the Effective Date of this Settlement Agreement, the Bureau shall complete an assessment of whether it is feasible, based on the considerations identified in this paragraph, to: (1) switch from using components of the Grand Coulee Dam that require lubrication to using components that do not require lubrication ("Non-Lubricated Components"); and (2) switch lubricant on certain "in-water" equipment at Grand Coulee Dam to using one or more "Environmentally Acceptable Lubricants" ("EALs") on such equipment. Based on that assessment and within eighteen (18) months of the Effective Date of this Settlement Agreement, the Bureau shall prepare a report addressing: (1) whether it is feasible to install additional Non-Lubricated Components and/or to switch to one or more EALs for components at Grand Coulee Dam; and (2) if the

use of additional Non-Lubricated Components and/or EALs is feasible, a projected schedule under which the Bureau determines it would be feasible, during regularly scheduled maintenance within five years of the Effective Date of this Settlement Agreement, to: (a) install the additional Non-Lubricated Components; and/or (b) switch to the EALs. The projected schedule shall not be binding or enforceable by Riverkeeper or the court, but the Bureau shall complete the actions identified in the projected schedule even in the event that operational requirements, including, but not limited to, unplanned outages, Endangered Species Act or other flow obligations, and power grid reliability, prevent the Bureau from completing those actions within five years of the Effective Date of this Settlement Agreement; provided, however, that, if Riverkeeper commences an action against the Bureau regarding alleged unpermitted discharges of pollutants from the Grand Coulee Dam as discussed in paragraph 8 below, then the Bureau shall not be obligated to complete those actions identified in the projected schedule that have not been completed on the date that Riverkeeper commences such action. The Bureau will provide a copy of the assessment of feasibility report to Riverkeeper upon its completion. The assessment of feasibility and the projected schedule will be made solely by the Bureau, taking into consideration consistency with meeting: applicable legal requirements, including but not limited to the Endangered Species

Act; facility operational requirements; costs of conversion; risk of potential damage to the equipment; and maintenance and outage schedules. As used in this paragraph, “Environmentally Acceptable Lubricants” (or “EALs”) means those lubricants that have been demonstrated to meet industry standards for biodegradability, toxicity, and bioaccumulation potential that minimize their likely adverse consequences in the aquatic environment compared to conventional lubricants.

5. The Bureau shall prepare annual reports accounting for all oils, greases, and lubricants delivered to the Grand Coulee Dam to lubricate components that may contact the Columbia River. The annual reports shall describe the locations, amounts, types, and uses of all aforementioned oils, greases, and lubricants. The first such annual report shall be prepared within twelve (12) months of the Effective Date of this Settlement Agreement with subsequent reports prepared every twelve (12) months thereafter, until such time as the Bureau obtains NPDES permit coverage for the Grand Coulee Dam or in the event that Riverkeeper commences an action pursuant to paragraph 8 below, whichever is earlier. Copies of the annual reports shall be provided to Riverkeeper upon their completion.

6. Without any admission of law or fact, within ninety (90) days after

the Bureau's receipt of correct payment and deposit information described below from Riverkeeper or the Effective Date of this Settlement Agreement, whichever is later, the Bureau shall pay to Riverkeeper the amount of \$33,875.00 by Electronic Funds Transfer ("EFT"). Riverkeeper's counsel shall provide the following payment and deposit information to counsel for the Bureau:

EFT Payable to
Bank name
Bank address
ABA Routing number
Account number
Name and Type (Checking or Savings) of Account
Taxpayer identification number

Riverkeeper hereby releases any and all claims and potential claims under any statute or other authority, including, but not limited, to 33 U.S.C. § 1365(d), for costs of litigation, attorney fees, expert fees, court costs, and other costs or fees accrued through the Effective Date of this Settlement Agreement in connection with Case No. 2:16-CV-00236-RMP.

III. Dismissal of Claims and Releases.

7. The Parties agree that this Settlement Agreement represents a good faith compromise of all matters addressed in this Settlement Agreement. Upon execution of this Settlement Agreement, the Parties shall file an agreed-upon joint motion and proposed order providing that Case No. 2:16-CV-00236-RMP shall be

dismissed without prejudice pursuant to Fed. R. Civ. P. 41, subject to the provisions of this Settlement Agreement. This Settlement Agreement shall be null and void if the Court does not dismiss Case No. 2:16-CV-00236-RMP in accordance with the terms set forth in the agreed-upon joint motion and proposed order.

8. Notwithstanding dismissal of this case without prejudice, Riverkeeper hereby releases, discharges and covenants not to assert (by way of commencement or refiling of any action, the joinder of the Bureau in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind in law or in equity regarding alleged unpermitted discharges of pollutants from the Grand Coulee Dam until either: (i) the Bureau obtains NPDES permit coverage that addresses discharges of pollutants associated with operations at the Dam; or (ii) five (5) years after the Effective Date of this Settlement Agreement, whichever is earlier. In the event that Riverkeeper commences any action against the Bureau after the passage of time under the preceding clause (ii), the Bureau's obligations under this Settlement Agreement shall terminate.

IV. Dispute Resolution.

9. The Parties agree that efforts shall be made to resolve any future dispute arising out of this Settlement Agreement (the “Dispute”) in accordance with the procedures specified below.

(a) Negotiation. In the event of a disagreement between Riverkeeper and the Bureau concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied Party shall provide the other Party with written notice of the Dispute and a request for informal negotiations. The Parties shall meet and confer in a good faith effort to attempt to resolve the Dispute within thirty (30) days of receipt of the written notice or such time thereafter as is mutually agreed.

(b) Petition for Judicial Resolution. If the Parties are unable to resolve the Dispute informally within thirty (30) days of receipt of the written notice or such time thereafter as is mutually agreed, then either Riverkeeper or the Bureau may petition the Court to resolve the Dispute. The Parties shall follow the motion practice procedures prescribed by the Federal Rules of Civil Procedure and the Local Rules for the District Court for the Eastern District of Washington in presenting the Dispute to the Court, and a Party’s response to a petition under this provision may include a cross-motion under Federal Rule of Civil Procedure 60.

The Court shall retain jurisdiction over this case for the sole purpose of resolving those disputes over which Riverkeeper or the Bureau may petition the Court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). Notwithstanding any other provision of this Settlement Agreement, however, Riverkeeper and the Bureau expressly preserve, and do not waive or limit, any and all defenses relating to such litigation, including any that may exist under Federal Rule of Civil Procedure 60. Contempt of court is not an available remedy under this Settlement Agreement.

(c) Confidentiality of Negotiations and Mediation. All informal negotiations and related communications and proceedings conducted pursuant to paragraph (a) of this Section IV are confidential and shall be treated as compromise and settlement negotiations for the purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law.

V. Force Majeure.

10. The possibility exists that circumstances outside the reasonable control of the Bureau could delay compliance with the timetables set forth in this Agreement. Such circumstances include, but are not limited to, sufficient funds not being appropriated as requested, the unavailability of appropriated funds for expenditure, government shutdown, and significant events that are outside of

normal fluctuations in Dam operations and that require an immediate and/or time-consuming response by the Bureau, including, but not limited to, significant events related to electrical power needs, flow augmentation actions, or actual or potential flooding. Should a delay occur due to such circumstances, then any resulting failure to meet the deadlines or other terms set forth in this Settlement Agreement shall not constitute a failure to comply with those deadlines or other terms, and any deadlines so affected shall be extended one day for each day of the delay. The Bureau will provide Riverkeeper with reasonable notice in the event that the Bureau invokes this term of this Settlement Agreement. Any dispute regarding invocation of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section IV above.

VI. Miscellaneous Provisions.

11. Any notice required or made with respect to this Settlement Agreement shall be in writing and shall be effective upon receipt. Any notice or other documents required pursuant to this Settlement Agreement shall be sent to the following contact persons:

For Riverkeeper:

Lauren Goldberg
Columbia Riverkeeper
111 Third Street
Hood River, OR 97031
Phone: (541) 965-0985
Email: lauren@columbiariverkeeper.org

Brian Alan Knutsen
Kampmeier & Knutsen, PLLC
833 SE Main Street, No. 318
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Phone: (503) 841-6515
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For the Bureau:

Jeremiah I. Williamson
U.S. Department of the Interior
Office of the Solicitor
Pacific Northwest Region, Boise Field Office
960 South Broadway Avenue, Suite 400
Boise, ID 83706
Phone: (208) 334-1915
Fax: (208) 334-1918
Email: jeremiah.williamson@sol.doi.gov

M. Rodney Smith Jr.
U.S. Department of the Interior
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Chief, Environmental Defense Section
U.S. Department of Justice
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Phone: (202) 514-2219
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Sheila Baynes
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Email: Sheila.Baynes@usdoj.gov

Upon written notice to the other Parties, any Party may designate a successor contact person for any matter relating to this Settlement Agreement.

12. Upon fulfillment of the Bureau's obligations under this Settlement Agreement, the Bureau's obligations under this Settlement Agreement shall terminate.

13. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to the Bureau by any laws, including but not limited to the CWA or any other environmental statutes, or any principles of administrative law.

14. Nothing in this Settlement Agreement shall constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the Bureau, its officers or any person affiliated with it. The provisions, terms and conditions of this Settlement Agreement shall not be admissible in any judicial or administrative proceeding except: (i) in the Bureau's defense of a claim, cause of action, suit or demand asserted by Riverkeeper pursuant to paragraph 8 above; or (ii) in support or defense of a petition to the Court submitted by either Party pursuant to paragraph 9(b) above.

15. Riverkeeper recognizes that the Bureau's performance under this Settlement Agreement is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq., and nothing in this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that the Bureau obligate or pay funds in contravention of the Anti-Deficiency Act. In addition, nothing in this Settlement Agreement shall be interpreted as or constitute a commitment or

requirement that the Bureau take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the CWA, or any other substantive or procedural law or regulation.

16. If, subsequent to the Effective Date of this Settlement Agreement, any change in the law or legal requirement goes into effect that alters or relieves the Bureau's obligations concerning matters addressed in this Settlement Agreement, then the Settlement Agreement shall be amended to conform to such changes. Any dispute regarding invocation or the applicability of this provision shall be resolved in accordance with the Dispute Resolution provisions of Section IV above.

17. Except as set forth in this Settlement Agreement, the Parties reserve and do not waive any and all other legal rights and remedies.

18. This Settlement Agreement shall be governed and construed under the laws of the United States.

19. This Settlement Agreement constitutes the final, complete and exclusive agreement and understanding between Riverkeeper and the Bureau with respect to the matters addressed in this Settlement Agreement. There are no representations, agreements or understandings relating to this settlement other than those expressly contained in this Settlement Agreement.

20. The Effective Date of this Settlement Agreement shall be the date upon which the Court enters the order of dismissal proposed by the Parties.

21. The Parties may, in a written document signed by all of the Parties, modify this Settlement Agreement.

22. The Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

23. Each undersigned representative of the Parties certifies that he or she is fully authorized by the Party to enter into this Settlement Agreement and to bind such Party to comply with the terms and conditions of this Settlement Agreement.

24. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to constitute an original, and such counterparts shall together constitute one and the same Settlement Agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

25. Nothing in this Settlement Agreement shall be construed to make any person or entity not executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

WHEREFORE, after having reviewed the terms and conditions of this Settlement Agreement, Plaintiff Columbia Riverkeeper and the United States on behalf of Defendants the United States Bureau of Reclamation and Estevan Lopez, in his official capacity as the Commissioner of the United States Bureau of Reclamation, hereby consent and agree to the terms and conditions of this Settlement Agreement.

DATE: 01/19/2017

s/ Brian A. Knutsen
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ATTORNEY FOR COLUMBIA
RIVERKEEPER

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Res. Division

DATE: 01/19/2017

s/ Mark A. Nitzczynski
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ATTORNEYS FOR U.S. BUREAU OF
RECLAMATION AND COMMISSIONER
ESTEVAN LOPEZ