

FILED 14 MAR '17 15:20 USDC-ORP

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Attorneys for Plaintiffs Pacific Coast Federation of
Fishermen's Associations and Institute for Fisheries Resources

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, INC., a
California non-profit corporation, and
INSTITUTE FOR FISHERIES
RESOURCES, a California non-profit
corporation,

Plaintiffs,

v.

LISA A. NORTHROP, Forest Supervisor
of Mount Hood National Forest, in her
official capacity; UNITED STATES
FOREST SERVICE; and MICHAEL
YOUNG, Secretary of Agriculture, in his
official capacity,

Defendants.

Case No. **3'17 - CV 00416 SI**

COMPLAINT FOR DECLARATORY,
INJUNCTIVE AND MANDAMUS RELIEF

COMPLAINT

#71755

INTRODUCTION

1. This is a public interest citizen suit brought by fishermen and conservation leaders to secure long-overdue environmental protection and comprehensive management of the Wild and Scenic South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek. These rivers were designated by Congress in 2009 under the Wild and Scenic Rivers Act, 16 U.S.C. section 1271 et seq. (the “Act”). *Omnibus Public Land Management Act of 2009*, Pub. L. No. 111-11, § 1203, 123 Stat. 1011-1012 (March 30, 2009), codified at 16 U.S.C. § 1274(a)(171)-(179). Despite a clear Congressional mandate under the Act, defendants LISA A. NORTHROP, UNITED STATES FOREST SERVICE, and MICHAEL YOUNG have failed to establish detailed river corridor boundaries for these rivers, and to adopt comprehensive management plans to protect their “outstandingly remarkable” river values. The Congressionally-mandated deadlines for these actions have long passed. Defendants continue to make decisions that impact these nine rivers without preparing the comprehensive management plans that Congress ordered to ensure that the rivers’ outstandingly remarkable values are protected.

2. Plaintiffs seek this Court’s ruling directing defendants to comply with the Wild and Scenic Rivers Act. Specifically, plaintiffs ask this Court to declare that defendants have failed to comply with their duties under the Act to establish river corridor boundaries and adopt comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek within the deadlines set by Congress. Plaintiffs also seek injunctive and mandamus relief requiring defendants’ compliance with these statutory duties.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. sections 701-706 (Administrative Procedure Act), 28 U.S.C. section 1331 (federal question), 28 U.S.C. section

2201 (declaratory judgment), 28 U.S.C. section 1346 (United States as defendant) and 28 U.S.C. section 1361 (mandamus).

4. An actual controversy exists between the parties regarding defendants' duties to establish river corridor boundaries and adopt comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek under 16 U.S.C. sections 1274(b) and 1274(d)(1) respectively. Defendants have failed to perform those duties even though the deadlines for doing so expired several years ago. Therefore this Court has declaratory judgment jurisdiction under 28 U.S.C. section 2201.

5. Defendants owe a present duty to plaintiffs to establish river corridor boundaries and to adopt comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek under 16 U.S.C. sections 1274(b) and 1274(d)(1), respectively. Therefore this Court has mandamus jurisdiction to compel defendants to perform these mandatory duties under 28 U.S.C. section 1361.

6. Defendants reside, and the omissions giving rise to plaintiffs' claims occurred, within the Portland Division of this Judicial District. Therefore this Court has venue of this action under 28 U.S.C. sections 1391(b)(1) and (2), (c) and (e), and the Portland Division of this Court has divisional venue under Local Rule 3-2(b).

PARTIES

7. Plaintiff PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS ("PCFFA") is a non-profit, tax-exempt corporation which represents a coalition of 15 fishermen's organizations in California, Oregon, and Washington with a combined membership of approximately 750 fishing professionals. Each of its members depends for his or her livelihood on the ocean's fisheries. Pacific salmon are important components of these fisheries. Pacific salmon rely upon cold, unpolluted fresh waters for (1) rearing habitat as they emerge from eggs and grow into alevins and fingerlings, (2) migratory habitat as they grow

into juveniles and smolts and swim downstream to sea, and (3) spawning habitat as they return as adults and swim upstream to spawn in their natal streams. The interests of PCFFA and its members in healthy fisheries along Oregon's coast and the Columbia River Basin have been, are being, and unless the relief requested herein is granted, will continue to be adversely affected and injured by defendants' continuing failure to establish the river corridor boundaries and adopt the comprehensive management plans prescribed by Congress to assure protection and restoration of the salmon fisheries and other outstandingly remarkable values of the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek. Establishment of the river corridor boundaries and adoption of the comprehensive management plans required by the Act will help restore and preserve water quality and salmon rearing, migratory and spawning habitat, directly benefitting the salmon fisheries upon which PCFFA's members depend for their livelihood. PCFFA maintains its principal place of business in San Francisco, California and its Northwest Regional office in Eugene, Oregon. PCFFA and its members are directly and indirectly injured by defendants' failure to adequately protect both salmon habitat and salmon in the streams involved in this action.

8. Plaintiff INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a California non-profit, tax-exempt organization that works to protect and restore salmon and other fish populations and the human economies that depend on them. IFR both funds and manages many of PCFFA's fish habitat protection programs and initiatives. In that capacity, IFR advocates for reforms to protect fish health and habitat throughout the West Coast of the United States and has successfully advocated for dam removals, improved pesticide controls, better forestry stream protection standards, and enhanced marine and watershed conservation regulations throughout the West Coast. IFR maintains its principal place of business in San Francisco, California, and its Northwest Regional Office in Eugene, Oregon. IFR and PCFFA have common Board members, general membership, and staff, but are legally and financially independent organizations. Establishment of the river corridor boundaries and adoption of the comprehensive

management plans required by the Act will help restore and preserve water quality and salmon rearing, migratory and spawning habitat, directly benefitting the salmon fisheries that IFR seeks to protect and restore. IFR and its members are directly and indirectly injured by defendants' failure to adequately protect both salmon habitat and salmon in the streams involved in this action.

9. Defendant LISA A. NORTHROP ("NORTHROP") is sued in her official capacity as the Forest Supervisor for Mount Hood National Forest, an administrative subdivision of defendant UNITED STATES FOREST SERVICE. Defendant NORTHROP is the federal official with primary management authority over the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek who is responsible for assuring that they are managed in compliance with the Act.

10. Defendant UNITED STATES FOREST SERVICE ("FOREST SERVICE") is the federal agency within the United States Department of Agriculture charged with managing both National Forests, and the Wild and Scenic Rivers that flow through them, including the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek. Defendant FOREST SERVICE is the federal agency with primary responsibility for assuring that these rivers are managed in compliance with the Act.

11. Defendant MICHAEL YOUNG ("YOUNG") is sued in his official capacity as the Secretary of Agriculture. The United States Department of Agriculture is the executive agency tasked with overseeing the United States Forest Service and assuring its compliance with the Act.

WILD AND SCENIC RIVERS ACT

12. Congress adopted the Wild and Scenic Rivers Act ("Act") in 1968 to protect public use and enjoyment of the rivers of the United States that possess outstandingly remarkable values in their natural condition. 16 U.S.C. § 1271. Congress directed that the lands and waters

that comprise the Wild and Scenic River System must be managed to “preserve[] [their] free-flowing condition,” “protect [their] water quality,” and protect “their immediate environments . . . for the benefit and enjoyment of present and future generations.” *Id.*

13. As relevant here,¹ Congress designates a river for inclusion in the Act’s system if it possesses “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” 16 U.S.C. §§ 1271, 1273(a)(i). Congress classifies rivers, or segments thereof, as “wild, “scenic,” or “recreational.” 16 U.S.C. § 1273(b).

14. “Wild” rivers are those in their most natural state, representing “vestiges of primitive America.” 16 U.S.C. § 1273(b)(1). Wild rivers are “free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted.” *Id.*

15. “Scenic” rivers are those that are “free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.” 16 U.S.C. § 1273(b)(2).

16. “Recreational” rivers are those that “are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.” 16 U.S.C. § 1273(b)(3).

17. “The agency charged with the administration of each component of the national wild and scenic rivers system . . . shall *within one year from the date of designation* . . . establish detailed boundaries therefor” 16 U.S.C. § 1274(b) (emphasis added). The “boundaries shall include an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river” 16 U.S.C. § 1274(b). The boundaries for each designated river must include not only the actual river itself, but also “the related adjacent land area that possesses one or more” of the river’s outstandingly remarkable values. *Id.*; 16 U.S.C. § 1273(b).

¹ The Secretary of the Interior is authorized under 16 U.S.C. section 1273(a)(ii) to designate Wild and Scenic Rivers upon application by the affected state. However, Secretarial designation is not involved here.

18. For rivers designated after January 1, 1986, the federal agency charged with administration of the river “shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values.” 16 U.S.C. § 1274(d)(1). These plans must “address resource protection and development of lands and facilities, user capacities, and other management practices.” *Id.* River management plans must be prepared “*within 3 full fiscal years after the date of designation*” of the river. *Id.* (emphasis added).

19. The Act mandates that “[e]ach component of the national wild and scenic rivers system shall be administered in such a manner as to protect and enhance the values which caused it to be included in said system without, insofar as it is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.” 16 U.S.C. § 1281(a). “In such administration primary emphasis shall be given to protecting [each river’s] esthetic, scenic, historic, archeologic, and scientific features.” *Id.*

20. The Act directs further that “the Secretary of Agriculture . . . , and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic River System . . . shall take such action respecting management policies, regulations, contracts, plans, affecting such lands as may be necessary to protect such rivers in accordance with the purposes of this chapter.” 16 U.S.C. § 1283(a). It mandates that “[p]articular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter.” *Id.*

FACTUAL ALLEGATIONS WHICH GIVE RISE TO CLAIMS

21. In 2009, Congress added nine rivers within Oregon – the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek – as components of the Wild and Scenic Rivers System. *Omnibus Public Land Management Act of 2009*, Pub. L. No. 111-11, § 1203, 123 Stat. 1011-1012 (March 30, 2009), codified at 16 U.S.C. § 1274(a)(171)-(179).

22. In the Clackamas subbasin, Congress designated 4.2 miles of the South Fork Clackamas River as a wild river (16 U.S.C. § 1274(a)(171)), 8.3 miles of Eagle Creek as a wild river (*id.* at § 1274(a)(172)), 4.6 miles of the South Fork Roaring River as a wild river (*id.* at § 1274(a)(174)), 11.0 miles of the Collawash River as a scenic river and 6.8 miles as a recreational river (*id.* at § 1274(a)(178), and 13.5 miles of Fish Creek as a recreational river (*id.* at § 1274(a)(179)).

23. In the Lower Columbia-Sandy subbasin, Congress designated 4.3 miles of the Zig Zag River as a wild river. 16 U.S.C. § 1274(a)(175).

24. In the Middle Columbia-Hood subbasin, Congress designated 3.7 miles of the Middle Fork Hood River as a scenic river (*id.* at § 1274(a)(173)), and 13.5 miles of the East Fork Hood River as a recreational river. 16 U.S.C. § 1274(a)(177). Congress designated 11.1 miles of Fifteenmile Creek, with “[t]he 2.6-mile segment from its source at Senecal Spring to the Badger Creek Wilderness boundary,” and “[t]he 7.9-mile segment from the point 0.4 miles downstream of the Badger Creek Wilderness boundary” as wild rivers, and “[t]he 0.4-mile segment from the Badger Creek Wilderness boundary to the point 0.4 miles down-stream” and “[t]he 0.2-mile segment from the western edge of section 20, township 2 south, range 12 east, to the southern edge of the northwest quarter of the northwest quarter of section 20, township 2 south, range 12 east as a scenic river.” 16 U.S.C. § 1274(a)(176)(A). For Fifteenmile Creek, Congress specified that the “lateral boundaries of both the wild river area and the scenic river area . . . shall include an average of not more than 640 acres per mile measured from the ordinary high water mark on both sides of the river.” *Id.* at § 1274(a)(176)(B).

25. The nine Oregon rivers that Congress designated as part of the Wild and Scenic River System in the *Omnibus Public Land Management Act of 2009* are habitat for salmon and steelhead, or provide cool water flows to support such habitat. Pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. sections 1531 et seq., the National Marine Fisheries Service (“NMFS”) has designated portions of Fish Creek, and the South Fork Clackamas, Collawash, Middle Fork Hood, East Fork Hood, and Zig Zag Rivers as critical habitat for the Lower

Columbia River Coho salmon evolutionarily significant unit (“ESU”). 81 FR 9251-9325 (Feb 24, 2016). NMFS has designated portions of Fish Creek and the Collawash River as critical habitat for the Upper Willamette River Chinook salmon ESU, and the Middle Fork Hood River as critical habitat for the Lower Columbia River Chinook ESU. 70 FR 52630-52858 (September 9, 2005). NMFS also designated a portion of Fifteenmile Creek as critical habitat for the Middle Columbia steelhead ESU, and portions of Fish Creek, and the Collawash, South Fork Clackamas, Zig Zag, East Fork Hood, and Middle Fork Hood Rivers as critical habitat for the Lower Columbia River steelhead ESU. *Id.*

26. Defendant YOUNG, through defendant FOREST SERVICE, has management authority over all segments of these nine rivers that are designated for protection under the Act, as the designated segments of these rivers primarily fall within the boundary of the Mount Hood National Forest. 16 U.S.C. § 1274(a)(171)-(179).

27. Notwithstanding Congress’ mandate that defendants establish detailed river corridor boundaries, and adopt comprehensive management plans for these rivers within, respectively, one year and three full fiscal years after Congress designated those rivers under the Act in 2009, defendants have to date failed to establish the required boundaries and adopt the required plans. Instead, defendants have continued to approve and undertake management activities in proximity to the designated rivers that threaten to harm these rivers and their outstandingly remarkable values.

28. In 2016, defendants proposed and conducted tree removal and thinning projects, dam improvements, and other watershed-disturbing activities in the watersheds of the nine designated rivers. These activities pose harm to the outstandingly remarkable values of the nine designated rivers through removal of native trees and other protective vegetation, grading of access roads, skid trails and landing areas, and other forms of watershed degradation that remove vegetative cover, disturb soils, cause erosion, and discharge sediment into and increase the water temperature of these rivers. For example, the 36 Pit Native Vegetation Planting and Danger Tree Removal Project, which defendants conducted in the first half of 2016, included tree removal

within a quarter mile of the South Fork Clackamas River near its confluence with the Clackamas River. Yet defendants' public scoping letter for the project did not even include the South Fork Clackamas River on the project map, let alone any discussion of whether the tree removal project would impair its outstandingly remarkable river values. Similarly, the planned Clear Branch Dam Improvements project will be implemented directly upstream of the designated reach of the Middle Fork Hood River. The project information available on the Forest Service's website does not mention that the designated portion of the river is less than 0.5 mile downstream from the spillway. Prior work on the Clear Branch Dam removed materials from the river corridor along the designated portion of the Middle Fork Hood River to supplement rip-rap above the dam. Defendants approved this work but included no discussion of the Wild and Scenic River impacts in their decision memo. These and other projects impacting the nine designated rivers are expected to continue in 2017 and beyond.

29. Plaintiff PCFFA informed defendant NORTHROP of plaintiffs' concerns regarding defendants' ongoing violation of the Act by letter dated July 6, 2016.

30. Defendant NORTHROP acknowledged receipt of PCFFA's letter via email dated July 12, 2016, and responded via a letter, dated August 16, 2016. Defendant NORTHROP's letter provides no timeline for compliance with the Act, and instead states that compliance with the Act is one of many competing priorities that would be addressed only "[a]s resources become available."

FIRST CLAIM FOR RELIEF

(Failure to Establish Detailed River Corridor Boundaries 16 U.S.C. § 1274(b))

31. Each and every allegation set forth in this Complaint is incorporated herein by reference.

32. Defendants have a mandatory duty to establish detailed river corridor boundaries for the designated reaches of the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek. Congress designated these rivers under the Act in 2009. The

deadline for establishing detailed river corridor boundaries under 16 U.S.C. section 1274(b) was therefore 2010. Defendants have not established detailed river corridor boundaries for these designated rivers and have not transmitted the same to Congress despite their ongoing statutory duty to do so.

33. By failing to establish detailed river corridor boundaries for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek, defendants have unlawfully withheld compliance with, and failed to act in the manner required by, the Act within the meaning of the Administrative Procedure Act. 5 U.S.C. §§ 706(1), (2)(D).

SECOND CLAIM FOR RELIEF

(Failure to Prepare River Management Plans 16 U.S.C. § 1274(d)(1))

34. Each and every allegation set forth in this Complaint is incorporated herein by reference.

35. Defendants have violated their mandatory duty to prepare comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek within three full fiscal years after Congress designated these rivers under the Act. Congress designated these rivers in March 2009. The deadline for completion of these comprehensive management plans under 16 U.S.C. § 1274(d)(1) was therefore 2012. Defendants have not prepared comprehensive management plans for these designated rivers, despite their ongoing statutory duty to do so.

36. By failing to prepare comprehensive management plans for these nine rivers, defendants have unlawfully withheld compliance with, and failed to act in the manner required by, the Act, within the meaning of the Administrative Procedure Act. 5 U.S.C. §§ 706(1), (2)(D).

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PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment providing the following relief:

1. Declare that defendants have “unlawfully withheld” compliance with, and failed to act in the manner required by, their mandatory duty to designate detailed river corridor boundaries and to prepare comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek as required by the Wild and Scenic Rivers Act;

2. Order defendants, through a writ of mandate and preliminary and permanent injunctions, to designate river corridor boundaries and to adopt comprehensive management plans for the South Fork Clackamas River, Eagle Creek, Middle Fork Hood River, South Fork Roaring River, Zig Zag River, Fifteenmile Creek, East Fork Hood River, Collawash River, and Fish Creek within two years of judgment;

3. Award plaintiffs’ costs, including reasonable attorneys’ fees and expert witness fees in accordance with 28 U.S.C. section 2412 and other applicable laws; and

4. Provide other such relief as the Court deems just and proper.

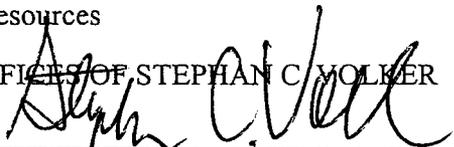
Dated: March 13, 2017

Respectfully submitted,

KAHN & KAHN


By: STEVEN A. KAHN
Attorney for Plaintiffs
Pacific Coast Federation of Fishermen’s
Associations and Institute for Fisheries
Resources

Dated: March 13, 2017

LAW OFFICES OF STEPHAN C. VOLKER

By: STEPHAN C. VOLKER
Attorney for Plaintiffs
Pacific Coast Federation of Fishermen’s
Associations and Institute for Fisheries
Resources (pro hac vice application
pending)