

1 MARK A. NITCZYNSKI
2 Environmental Defense Section
3 999 18th Street; South Terrace; Suite 370
4 Denver, CO 80202
5 (303) 844-1498

6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 COLUMBIA RIVERKEEPER,

9 Plaintiff,

10 v.

11 UNITED STATES ARMY CORPS OF
12 ENGINEERS; and LIEUTENANT
13 GENERAL TODD SEMONITE, in his
14 official capacity as the Commanding
15 General and Chief of Engineers of the
16 United States Army Corps of Engineers,

17 Defendants.

) No. 2:19-cv-126-RMP

)
) **NOTICE OF ACCEPTANCE OF**
) **OFFER OF JUDGMENT**
) **(FED. R. CIV. P. 68), JOINT**
) **REQUEST FOR ENTRY OF**
) **JUDGMENT, AND JOINT**
) **MOTION TO EXTEND**
) **RULE 54(d) DEADLINES**

) 12/22/19 without oral argument

18 Plaintiff, Columbia Riverkeeper (“Riverkeeper”), and Defendants, the
19 United States Army Corps of Engineers and Lieutenant General Todd T. Semonite,
20 in his official capacity as the Commanding General and Chief of Engineers of the
21 United States Army Corps of Engineers (collectively, the “Corps”), hereby notify
22 the Court that Plaintiff accepted an Offer of Judgment (“Offer”) in this matter
23 pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Offer, which was

24 Notice of Acceptance of Offer of Judgment
(Fed. R. Civ. P. 68), Joint Request for Entry
of Judgment, and Joint Motion to Extend
Rule 54(d) Deadlines

1 served on October 30, 2019, and the Notice of Plaintiff's Acceptance of Offer of
2 Judgment ("Acceptance"), which Plaintiff served on November 13, 2019, are
3 attached hereto as Attachments A and B, respectively.

4
5 Federal Rule of Civil Procedure 68(a) provides:

6 [A] party defending against a claim may serve on an opposing party
7 an offer to allow judgment on specified terms, with the costs then
8 accrued. If, within 14 days after being served, the opposing party
9 serves written notice accepting the offer, either party may then file
the offer and notice of acceptance, plus proof of service. The
clerk must then enter judgment.

10 Fed. R. Civ. P. 68(a). The Parties are jointly filing the Offer and Acceptance. In
11 addition, because the Offer includes equitable relief, and the Court typically would
12 retain discretion whether to grant such relief, the Parties respectfully request that
13 the Court issue an order directing the clerk to enter judgment as set forth in the
14 Offer.

15
16 In addition, the Parties respectfully request extension of the deadlines
17 imposed by Federal Rule of Civil Procedure 54(d) and Local Civil Rule 54(d). The
18 Offer specifies that the Corps "shall pay to Riverkeeper 'costs then accrued' under
19 Fed. R. Civ. P. 68(a), including 'costs of litigation (including reasonable attorney
20 and expert witness fees)' under 33 U.S.C. § 1365(d), in the amount that this Court
21 determines to be sufficient." Offer at 6. Both Federal Rule of Civil Procedure
22

23 Notice of Acceptance of Offer of Judgment
24 (Fed. R. Civ. P. 68), Joint Request for Entry
of Judgment, and Joint Motion to Extend
Rule 54(d) Deadlines

1 54(d) and Local Civil Rule 54(d) require Riverkeeper to seek costs and attorney
2 fees within fourteen days after entry of judgment. The Parties have conferred and
3 agreed to jointly request a reasonable period of time to pursue settlement of such
4 issues, in the hope that the Parties will be able to reach a settlement and, thereby,
5 avoid having the Parties and the Court dedicate their resources to engaging in
6 motions practice and issuing a ruling.¹

8 Accordingly, the Parties respectfully request that the Court, in addition to
9 directing the clerk to enter the judgment, extend Riverkeeper's Rule 54(d)
10 deadlines to January 24, 2020.

11 A proposed form of order is being submitted herewith.

12 Respectfully submitted,

13 Kampmeier & Knutsen, PLLC

14 /s/ Paul A. Kampmeier
15 Paul A. Kampmeier, WSBA No. 31560
16 811 First Avenue, Suite 468
17 Seattle, Washington 98104
18 (206) 858-6983

19 *Attorneys for Columbia Riverkeeper*

20 ¹ Defendants expressly reserve all of their defenses and arguments regarding
21 Riverkeeper's efforts to seek any costs and attorney fees.
22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

/s/ Mark A. Nitczynski
MARK A. NITCZYNSKI
United States Department of Justice
Environmental Defense Section
999 18th Street; South Terrace; Suite 370
Denver, CO 80202
(303) 844-1498

Attorney for the Federal Defendants

Notice of Acceptance of Offer of Judgment
(Fed. R. Civ. P. 68), Joint Request for Entry
of Judgment, and Joint Motion to Extend
Rule 54(d) Deadlines

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CERTIFICATE OF SERVICE

I certify that on November 22, 2019, I caused to be filed electronically the foregoing **NOTICE OF ACCEPTANCE OF OFFER OF JUDGMENT (FED. R. CIV. P. 68), JOINT REQUEST FOR ENTRY OF JUDGMENT, AND JOINT MOTION TO EXTEND RULE 54(d) DEADLINES**, along with a proposed order, with the Clerk of Court using the Court's CM/ECF system, which sends a Notice of Electronic Filing to counsel of record.

/s/ Mark A. Nitzynski
Mark A. Nitzynski

Notice of Acceptance of Offer of Judgment
(Fed. R. Civ. P. 68), Joint Request for Entry
of Judgment, and Joint Motion to Extend
Rule 54(d) Deadlines

ATTACHMENT A

1 MARK A. NITCZYNSKI
2 Environmental Defense Section
3 999 18th Street; South Terrace; Suite 370
4 Denver, CO 80202
5 (303) 844-1498

6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 COLUMBIA RIVERKEEPER,)
9 Plaintiff,)
10 v.)
11 UNITED STATES ARMY CORPS OF)
12 ENGINEERS; and LIEUTENANT)
13 GENERAL TODD SEMONITE, in his)
14 official capacity as the Commanding)
15 General and Chief of Engineers of the)
16 United States Army Corps of Engineers,)
17 Defendants.)

No. 2:19-cv-126-RMP

**OFFER OF JUDGMENT
(FED. R. CIV. P. 68)**

1 Defendants, the United States Army Corps of Engineers and Lieutenant
2 General Todd T. Semonite, in his official capacity as the Commanding General
3 and Chief of Engineers of the United States Army Corps of Engineers
4 (collectively, the “Corps” or “Defendants”), pursuant to Rule 68 of the Federal
5 Rules of Civil Procedure, offer to allow judgment to be taken against them on the
6 following terms.
7

8 1. By March 27, 2020, the Corps shall apply for a National Pollutant
9 Discharge Elimination System (“NPDES”) permit to address alleged discharges of
10 pollutants at Chief Joseph Dam¹, including, at a minimum, alleged discharges from
11 drainage sumps, unwatering sumps, drains, and discharges from cooling water
12 systems, and any other alleged discharges that the permitting authority requires.²

13 The Corps shall diligently respond to any requests from the United States
14 Environmental Protection Agency (“EPA”) or the Washington Department of
15

16
17 ¹ Hereafter, the terms “Chief Joseph Dam Project,” “Chief Joseph Dam,” and
18 “Dam” are used interchangeably to refer to the same project, which includes the
19 associated dam structures and facilities such as turbines, powerhouses,
20 transformers, spillways, and cranes.
21

22 ² This Judgment does not contain any requirement to apply for a permit to address
23 mere river flow through or over the Dam.
24

1 Ecology related to the Chief Joseph Dam NPDES permit application or a CWA
2 section 401 certification for that permit application, and the Corps shall otherwise
3 take whatever reasonable steps are necessary, in good faith, to facilitate the prompt
4 issuance of an NPDES permit for the Dam. Starting six months from the date the
5 Corps submits that NPDES permit application to EPA, the Corps shall submit
6 written requests to EPA every six months, with copies provided to Riverkeeper at
7 the same time, for an update on the status of that permit application. The Corps'
8 obligations to submit such requests shall terminate when EPA takes final action on
9 that application or in the event that Riverkeeper commences an action pursuant to
10 paragraph 6 below, whichever is earlier.
11
12

13 2. The Corps shall notify Riverkeeper of those events that the Corps
14 reports to the National Response Center pursuant to the Corps' Spill Prevention,
15 Control and Countermeasure plan for the Chief Joseph Dam; provided, however,
16 that the Corps' obligation to provide such notification shall terminate when the
17 Corps obtains NPDES permit coverage that addresses discharges of pollutants
18 associated with operations at the Dam or in the event that Riverkeeper commences
19 an action pursuant to paragraph 6 below, whichever is earlier. Such notifications to
20 Riverkeeper may be provided via email, and shall be made promptly and in no
21 instance later than three calendar days from the Corps' discovery of the event. The
22
23
24

1 Corps' notification to Riverkeeper shall not constitute an admission by the Corps
2 of a discharge of any pollutant in violation of the CWA or any other law.

3 3. (a) By May 31, 2020, the Corps shall complete an assessment and
4 report addressing whether it is feasible to switch from using grease as a lubricant
5 on certain "in-water" components of the Chief Joseph Dam to using: components
6 that do not require lubrication ("Non-Lubricated Components"); or one or more
7 "Environmentally Acceptable Lubricants" ("EALs"). Based on that assessment and
8 report, and by May 31, 2020, the Corps shall prepare a projected schedule for
9 completing those switches to Non-Lubricated Components or EALs that (i) are
10 deemed to be feasible in the assessment and report and (ii) can be completed
11 during regularly scheduled maintenance within five years of the Effective Date of
12 this Judgment. The projected schedule shall not be binding or enforceable by
13 Riverkeeper or the Court, but the Corps shall complete the actions identified in the
14 projected schedule even in the event that operational requirements, including, but
15 not limited to, unplanned outages, Endangered Species Act or other flow
16 obligations, and power grid reliability, prevent the Corps from adhering to the
17 timeline in the projected schedule; provided, however, that, if Riverkeeper
18 commences an action against the Corps regarding alleged unpermitted discharges
19 of pollutants from the Chief Joseph Dam as discussed in paragraph 6 below, then
20 the Corps shall not be obligated to complete those actions identified in the
21
22
23
24

1 projected schedule that have not been completed on the date that Riverkeeper
2 commences such action. The Corps will provide a copy of the assessment and
3 report of feasibility to Riverkeeper upon its completion.

4 (b) The assessment and report, and the projected schedule, will be
5 developed solely by the Corps, taking into consideration consistency with meeting:
6 applicable legal requirements, including but not limited to the Endangered Species
7 Act; facility operational requirements; costs of conversion; risk of potential
8 damage to the equipment; and maintenance and outage schedules.

9 (c) As used in this paragraph, “Environmentally Acceptable
10 Lubricants” (or “EALs”) means those lubricants that have been demonstrated to
11 meet industry standards for biodegradability, toxicity, and bioaccumulation
12 potential that minimize their likely adverse consequences in the aquatic
13 environment compared to conventional lubricants.

14 4. The Corps shall prepare annual reports that: account for all oils and
15 greases delivered to the Chief Joseph Dam within the prior calendar year to
16 lubricate “in-water” components that may contact the Columbia River; and include
17 the volumes of such oils and greases stored, purchased, used, recovered, and
18 disposed of during the year. The Corps shall prepare the first such annual report by
19 February 14, 2021, with available information from the 2020 calendar year, and
20 subsequently shall prepare annual reports for every calendar year thereafter, until
21
22
23
24

1 such time as the Corps obtains NPDES permit coverage for the Chief Joseph Dam
2 or in the event that Riverkeeper commences an action pursuant to paragraph 6
3 below, whichever is earlier. The Corps shall make copies of the annual reports
4 publicly available on a Corps website. In addition, the Corps shall prepare an
5 interim report by May 31, 2020, with available information from the 2019 calendar
6 year. These reports shall not constitute concessions or admissions by the Corps.
7

8 5. Within one hundred twenty (120) days after the Corps' receipt of
9 correct payment and deposit information described below from Riverkeeper or
10 after the date of this Court's determination of the proper amount to be paid,
11 whichever is later, the Defendants shall pay to Riverkeeper "costs then accrued"
12 under Fed. R. Civ. P. 68(a), including "costs of litigation (including reasonable
13 attorney and expert witness fees)" under 33 U.S.C. § 1365(d), in the amount that
14 this Court determines to be sufficient. Payment shall be made by Electronic Funds
15 Transfer ("EFT"), and Riverkeeper's counsel shall provide the following payment
16 and deposit information to counsel for the Corps:
17

18 EFT Payable to
19 Bank name
20 Bank address
21 ABA Routing number
22 Account number
23 Name and Type (Checking or Savings) of Account
24 Taxpayer identification number

1 6. This Judgment resolves Riverkeeper's claims in this case regarding
2 alleged discharges from the Dam through and including the Effective Date of this
3 Judgment. In addition, Riverkeeper is barred from asserting (by way of
4 commencement or refiling of any action, the joinder of the Corps in an existing
5 action, or in any other fashion) any and all claims, causes of action, suits or
6 demands of any kind in law or in equity alleging that discharges of pollutants from
7 the Chief Joseph Dam are not permitted under the CWA until either: (i) the Corps
8 obtains NPDES permit coverage that addresses discharges of pollutants associated
9 with operations at the Dam; or (ii) four years after the Effective Date of this
10 Judgment, whichever is earlier. In the event that Riverkeeper commences any
11 action against the Corps after the passage of time under the preceding clause (ii),
12 the Corps' obligations under this Judgment shall terminate. Neither party will take
13 any action for the sole purpose of obstructing or delaying the issuance of an
14 NPDES permit for the Dam.
15
16

17 7. The possibility exists that circumstances outside the reasonable
18 control of the Corps could delay compliance with the timetables set forth in this
19 Judgment. Such circumstances include, but are not limited to, sufficient funds not
20 being appropriated as requested, the unavailability of appropriated funds for
21 expenditure, government shutdown, and significant events that are outside of
22 normal fluctuations in Dam operations and that require an immediate and/or time-
23
24

1 consuming response by the Corps, including, but not limited to, significant events
2 related to electrical power needs, flow augmentation actions, or actual or potential
3 flooding. Should a delay occur due to such circumstances, then any resulting
4 failure to meet the deadlines or other terms set forth in this Judgment shall not
5 constitute a failure to comply with those deadlines or other terms, and any
6 deadlines so affected shall be extended one day for each day of the delay. The
7 Corps will provide Riverkeeper with reasonable notice in the event that the Corps
8 invokes this *Force Majeure* term.
9

10 8. Efforts shall be made to resolve any future dispute arising out of this
11 Judgment (the "Dispute") in accordance with the procedures specified below.
12

13 (a) Negotiation. In the event of a disagreement between
14 Riverkeeper and the Corps concerning the interpretation or performance of any
15 aspect of this Judgment, the dissatisfied Party shall provide the other Party with
16 written notice of the Dispute and a request for informal negotiations. The Parties
17 shall meet and confer in a good faith effort to attempt to resolve the Dispute within
18 thirty days of receipt of the written notice or such time thereafter as is mutually
19 agreed.
20

21 (b) Petition for Judicial Resolution. If the Parties are unable to
22 resolve the Dispute informally within thirty days of receipt of the written notice or
23 such time thereafter as is mutually agreed, then either Riverkeeper or the Corps
24

1 may petition the Court to resolve the Dispute. The Parties shall follow the motion
2 practice procedures prescribed by the Federal Rules of Civil Procedure and the
3 Local Rules for the District Court for the Eastern District of Washington in
4 presenting the Dispute to the Court, and a Party's response to a petition under this
5 provision may include a cross-motion under Federal Rule of Civil Procedure 60.
6

7 The Court shall retain jurisdiction over this case for the purpose of resolving those
8 disputes over which Riverkeeper or the Corps may petition the Court.

9 Notwithstanding any other provision of this Judgment, however, Riverkeeper and
10 the Corps expressly preserve, and do not waive or limit, any and all defenses
11 relating to such litigation, including any that may exist under Federal Rule of Civil
12 Procedure 60.
13

14 (c) Confidentiality of Negotiations and Mediation. All informal
15 negotiations and related communications and proceedings conducted pursuant to
16 subparagraph (a) of this paragraph 8 are confidential and shall be treated as
17 compromise and settlement negotiations for the purposes of applicable rules of
18 evidence and any additional confidentiality protections provided by applicable law.
19

20 9. Any notice required or made with respect to this Judgment shall be in
21 writing and shall be effective upon receipt. Any notice or other documents required
22 pursuant to this Judgment shall be sent to the following contact persons:
23
24

For Riverkeeper:

Lauren Goldberg
Simone Anter
Columbia Riverkeeper
407 Portway Avenue, Suite 301
Hood River, Oregon 97031
Phone: (541) 965-0985 (Goldberg)
(541) 399-5312 (Anter)
Email: lauren@columbiariverkeeper.org
simone@columbiariverkeeper.org

And

Brian Alan Knutsen
Kampmeier & Knutsen, PLLC
221 S.E. 11th Avenue, Suite 217
Portland, Oregon 97214
Phone: (503) 841-6515
Email: brian@kampmeierknutsen.com

For the Corps:

U.S. Army Corps of Engineers
Northwestern Division
Attn: Office of Counsel
1201 NE Lloyd Blvd., Suite 400
Portland, Oregon 97232

And

Mark A. Nitzczynski
U.S. Department of Justice
Environment & Natural Res. Division
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Phone: (303) 844-1498
Email: mark.nitzczynski@usdoj.gov

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

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

11. The Corps' performance under this Judgment 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

1 Judgment shall be interpreted as or constitute a commitment or requirement that
2 the Corps obligate or pay funds in contravention of the Anti-Deficiency Act. In
3 addition, nothing in this Judgment shall be interpreted as or constitute a
4 commitment or requirement that the Corps take actions in contravention of the
5 Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the CWA, or any
6 other substantive or procedural law or regulation.
7


8 12. If, subsequent to the date of this Judgment, any change in the law or
9 legal requirement goes into effect that alters or relieves the Corps' obligations
10 concerning matters addressed in this Judgment, then the Judgment shall be
11 amended to conform to such changes.
12

13 13. The Effective Date of this Judgment shall be the date upon which this
14 Judgment is entered.

15 14. The Parties may, in a written document signed by all of the Parties
16 and with approval of the Court, modify this Judgment.
17

18 FOR THE DEFENDANTS:

19 Date: Oct. 30, 2019



20 MARK A. NITCZYNSKI
21 United States Department of Justice
22 Environmental Defense Section
23 999 18th Street; South Terrace; Suite 370
24 Denver, CO 80202
(303) 844-1498


CERTIFICATE OF SERVICE

I certify that on October 30, 2019, I served the foregoing OFFER OF JUDGMENT (FED. R. CIV. P. 68) upon counsel for Plaintiff by United States mail at the following addresses that are set forth on the Court's Docket Sheet:

Brian Alan Knutsen
Kampmeier & Knutsen, PLLC
221 S.E. 11th Avenue
Suite 217
Portland, Oregon 97214

Paul A Kampmeier
Kampmeier & Knutsen PLLC
811 First Avenue
Suite 468
Seattle, WA 98104

Simone Anter
Columbia Riverkeeper
407 Portway Avenue, Suite 301
Hood River, OR 97031


K. Joy Gosnell