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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Northwest Environmental Defense	)	
Center, Public Employees for	)	Civil No. 06-70430
Environmental Responsibility,	)	
and Northwest Sportfishing Industry	)	MOTION FOR IMMEDIATE STAY
Association,	)	PURSUANT TO FRAP 18
Petitioners	)	
	)	URGENT MOTION UNDER
v.	)	CIRCUIT RULE 27-3(b)
	)	
Bonneville Power Administration,	)	ACTION NECESSARY PRIOR TO
Respondent.	)	MARCH 17, 2006
_____	)	

INTRODUCTION

Petitioners request an immediate stay of the Bonneville Power Administration (BPA) decision to abolish the Fish Passage Center. BPA will implement the decision on March 20, 2006. The Fish Passage Center has operated for over twenty years to provide objective, technical information and analyses

relied upon by the public, state and federal fisheries agencies, Indian tribes and the federal courts. The sound science provided by the Center is important to the mitigation and recovery of the region's salmon and steelhead.

BPA decided to abolish the Fish Passage Center in violation of the Northwest Power Act requirement to act consistent with the Fish and Wildlife Program, which explicitly requires the Fish Passage Center. BPA justifies its unlawful decision by misrepresenting that Congress passed appropriations legislation directing it to defund the Fish Passage Center. In fact, no reference to the Fish Passage Center is found anywhere in the appropriations bill adopted by Congress; the language was inserted into a House Conference Report. The conference report is not the law, nor can it amend the Northwest Power Act.

An immediate stay of this decision is crucial to avoid irreparable harm to Petitioners' interests in healthy fish in the Columbia Basin and to avoid the chill on the ability of federal employees and contractors to provide sound science without fear of political repercussions and censorship. Action is necessary prior to March 17, 2006, otherwise BPA terminates the Center's funding the following Monday, March 20, 2006.

Without a stay, the combined experience and expertise of the Fish Passage Center and its employees will be lost. The public, states, fish agencies and Indian

tribes rely upon the Center's objective, scientific expertise to fully participate in hydropower operation decisions to mitigate impacts to imperilled fish listed under the Endangered Species Act. It is no coincidence that the Petitioners will lose the Center's expertise at a critical time during the next year of court-ordered, collaborative, salmon recovery negotiations. See Declaration of Rodney W. Sando ¶ 7; National Wildlife Fed'n v. National Marine Fisheries Svc. ("NWF v. NMFS"), CV 01-640-RE, slip op. at 11-12, 2005 WL 2488447 (D. Or. Oct. 7, 2005) (ordering remand of biological opinion on hydropower operations and requiring collaboration with sovereigns, including states and tribes); NWF v. NMFS, slip op. at 16-17, 2005 WL 3576843 (D. Or. Dec. 29, 2005) (court expresses "concern over the demise of the Fish Passage Center" as a remand issue); NWF v. NMFS, Fed. Defs' First Remand Report, Exhibit 5 at 3 (Jan. 3, 2006) ("Sovereign Parties have raised concerns about the consequences of the pending termination of the funding for the Fish Passage Center" believing "the data analysis to support the Collaborative Process and its demanding timelines is compromised" by uncertainty of upcoming transfer of Center functions and funding) (attached as Exhibit A at p. 7 of 8); Exhibit B (letter from Congressmen stating it is "difficult to imagine a worse time to eliminate the most important source of technical information" as the region deals with the biological opinion remand).

Currently, and for the past twenty-three years, the Center has been a centralized provider that has demonstrated its expertise, availability and timely responses for scientific information. The two entities that BPA unilaterally has chosen to replace the Center do not have the Center's expertise, centrality or track record. Moreover, BPA's abolishment of the Fish Passage Center will leave key technical assistance functions unperformed, restructure the oversight mechanism for data and policy management, and reduce public access to the collected data. If BPA is allowed to unlawfully dissolve the Fish Passage Center, its integrated facilities could not effectively be reconstituted. Equally important, allowing BPA to disband the Fish Passage Center at the behest of individual members of Congress will have the obvious impact of chilling federal employees and contractors in their efforts to provide objective, scientific data and analyses.

#### **FEDERAL RULE OF APPELLATE PROCEDURE 18 REQUIREMENTS**

Federal Rule of Appellate Procedure 18 provides that petitioners must ordinarily move the agency for a stay pending review of its decision, unless this would be impracticable. FRAP 18(a). Here, moving BPA is impracticable. BPA made its decision to eliminate the Fish Passage Center without any public or adjudicatory process. In December, 2005, Counsel for Petitioner NEDC sent BPA a letter detailing concerns about the agency's unlawful action. Exhibit C. BPA did

not respond to the letter. BPA also received letters of concern from the expert fisheries agencies and other stakeholders. See e.g., Exhibit D (letter from State, Federal and Tribal Fishery Agencies Joint Technical Staff explaining why the Center could not be replaced without impacts to fish). Nonetheless, on January 26, 2006, BPA announced its decision to contract with two other entities. Exhibit E. BPA believes itself to be constrained to act within 120 days based on the Conference Committee Report language. Exhibit F at 2. Thus, moving BPA is not practicable. Petitioners provided BPA reasonable notice that it intended to move this Court for a stay. FRAP 18(a)(2)(C); Exhibit G.

#### **STANDARD OF REVIEW**

This Court evaluates stay requests under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Abbassi v. INS, 143 F.3d 513, 514 (9<sup>th</sup> Cir. 1998). Petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor. These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point in the continuum a stay pending review is justified. Id.

## ARGUMENT

### I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

A. BPA's Decision to Abolish the Fish Passage Center Violates the Northwest Power Act Because it is Not Consistent with the Fish and Wildlife Program.

The Northwest Power Act requires that BPA use its funding and authorities to protect, mitigate and enhance fish and wildlife in a manner consistent with the Fish and Wildlife Program adopted by the Council established by the Act. 16 U.S.C. § 839b(h)(10)(A). The Program expressly delineates the funding and functions of the Fish Passage Center. BPA's decision to abolish the Center violates the Northwest Power Act requirement to act consistent with the Program.

The Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839-839h (1988) (the Northwest Power Act) radically altered BPA's role as a power provider in the Northwest. For the first time, BPA was allowed to acquire new energy sources, rather than just market the power from the federal dams. Association of Public Agency Customers v. BPA, 126 F.3d 1158, 1166 (9<sup>th</sup> Cir. 1997). This expansion of BPA's sphere of influence was, however, coupled with the creation of a check upon that expansion in the form of the Northwest Power Planning Council (Council), an interstate compact agency comprised of two appointed members from the states of Oregon, Washington, Idaho and Montana.

16 U.S.C §839b(a)(2)(B). While the Council and BPA operate independently of each other, “[t]heir functions directly overlap, however, under those portions of the Act which provide that certain BPA actions will be consistent with the Council’s plan, §§ 839b(d)(2), 839b(h), 839c(d)(3).” Seattle Master Builders Ass’n v. Pacific Northwest Power and Conservation Planning Council, 786 F.2d 1359 (9<sup>th</sup> Cir. 1986).

Under the Act, the Council is required to develop a program to protect, mitigate, and enhance fish and wildlife (“the Fish and Wildlife Program”). 16 U.S.C. § 839b(h)(1)(A). The Act provides that the Council must develop the Fish and Wildlife Program on the basis of recommendations, supporting documents, and information obtained through public comment and participation, as well as through consultation with the agencies, tribes, and customers. 16 U.S.C. § 839b(h)(2)-839b(h)(5). In turn, BPA is required to use its authority and its funds to protect, mitigate, and enhance fish and wildlife ‘in a manner consistent with...the program adopted by the council under this subsection...’<sup>1</sup> 16 U.S.C. § 839b(h)(10)(A).

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<sup>1</sup>BPA’s responsibilities to protect fish and wildlife, however, go beyond the Council’s program. BPA has further “substantive” and “independent” obligations under 16 U.S.C. §839b(h)(11)(A)(i) and §839b(h)(11)(A)(ii). Northwest Environmental Defense Center v. BPA (“NEDC v. BPA”), 117 F.3d 1520, 1531 (9<sup>th</sup> Cir. 1997).

The Council adopted the current Columbia River Basin Fish and Wildlife Program in 2000 and amended it in 2003, through the public process required by the Northwest Power Act. The Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (2003 Mainstem Amendments) (excerpts attached as Exhibit H). The 2003 Mainstem Amendments expressly call for “the continued operation of the Fish Passage Center (Center).”<sup>2</sup> Exhibit H at 27. The Center’s primary purpose is “to provide technical assistance and information to fish and wildlife agencies and tribes in particular, and the public in general, on matters related to juvenile and adult salmon and steelhead passage through the mainstem hydrosystem.” Id.

To meet this purpose, the 2003 Mainstem Amendments provide that the Center “shall:” monitor smolt; gather, organize and disseminate fish passage information, as well as information concerning water management and passage measures; provide technical information to assist agencies and tribes in formulating in-season flow and spill requests and in ensuring that operating criteria for storage reservoirs are satisfied; and, provide technical assistance to coordinate recommendations for storage reservoir and river operations that, to the extent possible, avoid conflicts between anadromous and resident fish. Id. at 27-8.

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<sup>2</sup>See Sando Decl. ¶ 3 (explaining that the Fish Passage Center has been a component of the Fish and Wildlife Program since 1982).



According to the 2003 Mainstem Amendments, the Center is also to be overseen by a board made up of representatives from NOAA Fisheries, state fish and wildlife agencies, tribes, and the Council. Id. at 28. The oversight board provides policy guidance for the Center and “assures regional accountability and compatibility with the regional data management system.” Id. Further, the Center’s manager shall be “selected by, and be subordinate to, the Executive Director of the Columbia Basin Fish and Wildlife Authority (Authority), in consultation with the oversight board.” Id. The data collected by the Center “shall not be considered proprietary,” and “the Center [will] ensure that all parties have timely and thorough access to the database.” Id.

On December 8, 2005, BPA issued a “program Solicitation for Key Functions previously performed by the Fish Passage Center.” Exhibit I. On January 26, 2006 BPA announced its decision to have Pacific States Marine Fisheries Commission (Pacific States) manage smolt monitoring, perform related data collection and management, and conduct routine data analysis and reporting and to have Battelle Pacific Northwest Laboratory (Battelle) “oversee, coordinate and facilitate broader, non-routine” scientific data analysis and to manage the scientific analysis process. Exhibit E. In reference to the Columbia Basin Fish and Wildlife Authority, BPA proposed that the Authority should “assume the

function of coordinating the policy interests of regional fishery agencies and tribes on flow and spill issues.” Id. BPA’s proposal requires that the Authority’s current contract be modified and that the Authority’s members approve such a modification. Id.

BPA’s decision to eliminate the Fish Passage Center is inconsistent with the Fish and Wildlife Program in a number of respects. First, and most obvious, the Program calls for the continued operation of the Fish Passage Center explicitly. Second, BPA made its decision to hire Pacific States and Battelle to perform some of the functions of the Center unilaterally, despite the Program’s explicit provision that the Center’s manager be selected by the Columbia Basin Authority in consultation with the oversight board. Third, BPA’s decision to replace the Center with Pacific States and Battelle will leave many of the functions provided by the Center unfulfilled. They will gather and analyze data, but there is no indication that they will provide the extensive technical assistance functions performed by the Center. Nor does it appear that Pacific States and Battelle will work with the Council’s oversight board, or be subordinate to the authority of the Columbia Basin Fish and Wildlife Authority’s Executive Director, as required by the Program. Finally, BPA’s decision also does not safeguard public access to the data collected by Pacific States and Battelle because it does not guarantee that

collected data will remain non-proprietary or that the public will have access to the company's databases. Moreover, even if the public and stakeholders are given nominal access, there is no guarantee of the timeliness of a response. Sando Decl.

¶¶ 4-6. Having abandoned these crucial technical and public participation functions of the Fish Passage Center, it cannot be said that BPA is acting consistently with the Council's Fish and Wildlife Program.

In NEDC v. BPA, this Court interpreted Section 839b(h)(11)(A)(ii) of the Northwest Power Act to mean BPA must take into account the Council's Program "to the fullest extent possible." 117 F.3d at 1532. However, Section 839b(h)(11)(A)(ii) only concerns BPA's duties to the Program when exercising responsibilities for managing, operating, or regulating hydroelectric facilities. 16 U.S.C. § 839b(h)(11)(A)(ii). And, this section qualifies that BPA shall exercise such responsibilities taking into account the Fish and Wildlife Program "to the fullest extent practicable." Id. At issue here is BPA's duty under Section 839b(h)(10)(A), which requires that BPA use the fund and authorities available to it to protect fish and wildlife in a manner consistent with the Program. This provision of the Act does not qualify the duty to act consistent with the Program "to the fullest extent possible." 16 U.S.C. § 839b(h)(10)(A). When Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that the omission was intentional and purposeful. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002); ONRC v. Kantor, 99 F3d 334, 338 (9th Cir. 1996). Even if BPA's duty to act consistent with the Program is qualified, there is no evidence here to suggest that BPA's decision to disband the Center is a consequence of impossibility.

B. BPA's Assertions That the Fish Passage Center Is Being Abolished Pursuant to a Congressional Mandate Are Not Supported by the Facts.

BPA asserts that it is abolishing the Fish Passage Center pursuant to legislation passed by Congress. Exhibit J. Nothing in the language of the Energy and Water Development Appropriations Act of 2006, Public Law 109-103, supports BPA's decision to act inconsistently with the Council's Fish and Wildlife Program. Public Law 109-103 does not mention, or even drop a hint, about the Fish Passage Center. Exhibit K (mentioning BPA only twice at pages 30 and 33 of the Enrolled Bill, but never mentioning the Center). BPA's decision to abnegate its fish and wildlife responsibilities does not stem from a Congressional mandate, but from a non-binding recommendation placed within a House Conference Report.

The Conference Report, H.R. 109-275, states that:

The Bonneville Power Administration may make no new obligations in support of the Fish Passage Center. The conferees call upon Bonneville

Power Administration and the Northwest Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions (warehouse smolt monitoring data, routine data analysis and reporting and coordination of the smolt monitoring program) occurs within 120 days of enactment of this legislation.

H.R. 109-275 (attached as Exhibit F). However, this Report language is not binding and does not have the force of law.

Report language that is untethered to any language in the act adopted by Congress is not meaningful or binding. Under the plain meaning rule – the overriding principle of statutory construction – the meaning of a statute must be anchored in its text. Aldridge v. Williams, 44 U.S. 9, 24 (1845) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself”). It may be appropriate to resort to legislative history, such as conference reports, when the plain meaning is ambiguous.

Shannon v. United States, 512 U.S. 573, 583 (1994). However, the use of report language becomes improper when the line is crossed from using legislative history to resolve matters that are not clear in the statutory language to using it to rewrite the statute. Shannon, 512 U.S. at 583 (declining to give effect to “a single passage of legislative history that is in no way anchored in the text of the statute”); see also GAO Office of the General Counsel, “Principles of Federal Appropriations Law,” Third Ed. Vol. I at p. 2-97 (excerpts attached as Exhibit L). In Shannon, the

defendant tried to argue that the Insanity Defense Reform Act (IDRA) required a specific jury instruction because it was endorsed in a Senate Report. However, the Supreme Court held:

We are not aware of any case, however (and Shannon does not bring one to our attention), in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute. On its face, the passage Shannon identifies does not purport to explain or interpret any provision of the IDRA. Rather, it merely conveys the Committee's "endorsement" of the Lyles "procedure"-a procedure that Congress did not include in the text of the Act. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process. We agree with the District of Columbia Circuit that "courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point." International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB, 814 F.2d 697, 712 (1987) (emphasis deleted).

Shannon, 512 U.S. at 583-84. Additionally, the Comptroller General decided:

"[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that language for the purpose of writing into the law that which is not there."

55 Comp. Gen. 307, 325 (1975). Here, BPA is attempting to write into the law that which is not there by relying upon report language to circumvent its duty under the Northwest Power Act to fund the Fish Passage Center consistent with the Council's Fish and Wildlife Program. However, the Congressional Record also shows that, through the report language, the Committee "did not intend this

language to supersede the Northwest Power Act or the Council's fish and wildlife program." Cong. Rec. Nov. 14, 2005 Page S12744 (attached as Exhibit M).

While individual members of the House Conference Committee may well have wished to eliminate the Fish Passage Center, their wishes did not make it into the text of Public Law 109-103. Thus, BPA's reliance upon the House Conference Report is an attempt to write into the law "that which is not there." BPA cannot use the Conference Report as a justification for making a decision that violates the Northwest Power Act.

## II. THE BALANCE OF HARDSHIPS FAVORS A STAY

### A. Petitioners and the Public Will Suffer Irreparable Harm

Petitioners are the Northwest Sportfishing Industry Association (NSIA), Public Employees for Environmental Responsibility (PEER) and Northwest Environmental Defense Center (NEDC). All petitioners will suffer irreparable harm if a stay is not granted because the loss of the Fish Passage Center will harm the ability to provide for protections and recovery of fish as well as chilling federal employees and contractors from conducting and reporting objective science that could impact economic objectives.

NSIA and its members rely upon healthy fish stocks for their business and livelihood, recreation and family enjoyment and bonding. Declaration of Liz

Hamilton ¶¶ 1-2, 7; Sando Decl. ¶¶ 4-6. The economic well-being of NSIA members and the Pacific Northwest Region is dependent upon healthy fish runs that can be fished by sportfishers. Hamilton Decl. ¶¶ 13-14, 16. NSIA focuses its efforts to improve fish runs for its members through public participation and, when necessary, litigation. Hamilton Decl. ¶¶ 3-6.

Through interim relief in litigation concerning the biological opinion on the operation of federal hydroelectric dams, NSIA and others gained greater spills over the dams for better fish passage in the summer of 2005. NWF v. NMFS, CV 01-640-RE, 2005 WL 1398223 (D. Or. June 10, 2005). This victory was due in part to information and analyses produced by the Fish Passage Center. See e.g. Second Declaration of Stephen W. Pettit at 22, relying on two Fish Passage Center reports (attached as Exhibit N). NSIA also secured a remand of the biological opinion with an order that the federal government must collaborate with the Sovereigns (states and Indian tribes) and cooperate with all parties in preparing a new biological opinion. NWF v. NMFS, CV 01-640-RE, slip op. at 11-12, 2005 WL 2488447. The parties in NWF v. NMFS, in particular, plaintiffs (including NSIA) and the tribes, rely heavily on the information and analyses produced by the Fish Passage Center. Hamilton Decl. ¶¶ 9-12. BPA's unilateral decision to eliminate the Fish Passage Center at this point in time will harm NSIA's ability to



ensure a biological opinion that is protective of fish. Hamilton Decl. ¶¶ 11-12, 15; see also Exhibit D (letter from the expert fish agencies, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife and the Columbia River Intertribal Fish Commission, explaining the importance of the Fish Passage Center); Northwest Resource Information Center v. Northwest Power Planning Council, 35 F. 3d 1371, 1388 (9th Cir. 1994) (giving a high degree of deference to fishery managers' interpretations of fish provisions and their recommendations for program measures). The loss of the Center will harm this effort and may result in a significant depletion of the salmon population in the Columbia River Basin, harming NSIA and its members. Sando Decl. ¶¶ 5-7, 9.

NSIA also will be harmed because NSIA actively participates in the public processes required by the Northwest Power Act and the Fish and Wildlife Program. NSIA and its members participate by testifying at public hearings and providing written comments on policies and rules relative to the effects of the Columbia River hydrostem operations on their industry. Hamilton Decl. ¶ 17. The NSIA Executive Director also sits on the board that oversees the Fish Passage Center. Hamilton Decl. ¶¶ 5, 17. BPA's decision does not appear to retain an oversight board. As a result, NSIA will be further harmed because it will not be able to participate in the *de facto* decision to amend the Program and to ensure that

the information and analyses produced by Pacific States and Battelle is objective.

PEER and its members are irreparably harmed as a result of the chilling effect closing the Center will have on fisheries scientists and managers in the Columbia River. Here, the Fish Passage Center information and analyses were relied upon to increase summer spill, with a resultant loss in additional power production. Thereafter, individual members of Congress inserted language into a committee report ordering the defunding of the Center. Sando Decl. ¶ 7. Many of the Region's fisheries scientists work for entities that receive funding from BPA or other federal sources. Sando Decl. ¶ 8. Allowing BPA to eliminate funding "because the analysis results were inconvenient for some of the Region's policy makers" will have a chilling effect on the federally funded scientists.<sup>3</sup> Sando Decl. ¶ 8. Allowing BPA to succeed in abolishing the Center will have the irreparable effect of influencing the science and scientists in the Columbia Basin with detrimental results to fish protection and recovery.

NEDC's and its members' use and enjoyment of salmon for recreation and

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<sup>3</sup>Many scientists who are federal employees or federally funded are contending with censorship or the shaping of science to meet policy needs. See Exhibit O (NASA press office exerted strong pressure during the 2004 presidential campaign to cut the flow of news releases on glaciers, climate, pollution and other earth sciences); Exhibit P (Oregon State University graduate student's federal funding suspended after publication of study that logging in burned forests sets back recovery of those forests; funding restored to avoid the impression of scientific censorship).

nourishment will be irreparably harmed without a stay because the loss of the Fish Passage Center. Declaration of Mark S. Riskedahl ¶¶ 7, 9. In addition, NEDC is harmed by the circumvention of the public participation requirement of the Northwest Power Act when the Fish and Wildlife Program is amended because it could not participate in this decision, and BPA will be emboldened to ignore public participation requirements in future. Riskedahl Decl. ¶¶ 8, 10.

B. BPA Will Suffer No Harm as a Result of the Stay

In contrast, to Petitioners' knowledge, BPA will not suffer irreparable harm as a result of the stay. BPA can continue the Fish Passage Center contract under the existing terms and conditions. Upon information and belief, BPA intends to implement contracts with Pacific States and Battelle on March 1, 2006. To the extent that BPA chooses to implement those contracts, it may incur more costs than it would without the stay. However, in balancing the harms, "the Government's economic loss cannot be considered compelling if it is to be gained in contravention of federal law." Wilderness Soc'y v. Tyrrel, 701 F.Supp. 1473, 1491 (E.D. Cal. 1988) (citing Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990).

III. THIS COURT SHOULD NOT REQUIRE A BOND.

It is well established that in public interest environmental cases the

plaintiffs need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. People ex rel. Van de Kamp v. Tahoe Regional Plan, 766 F.2d 1319 (9th Cir. 1985) (no bond); Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) (\$100).

Respectfully submitted this 16<sup>th</sup> day of February, 2006

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**PROOF OF SERVICE**

I, the undersigned, hereby certify that true and correct copies of Petitioners' Urgent Motion for Stay and supporting declarations were transmitted via electronic mail (without exhibits) and U.S. First Class Mail, postage prepaid, on February 16, 2006, to the following:

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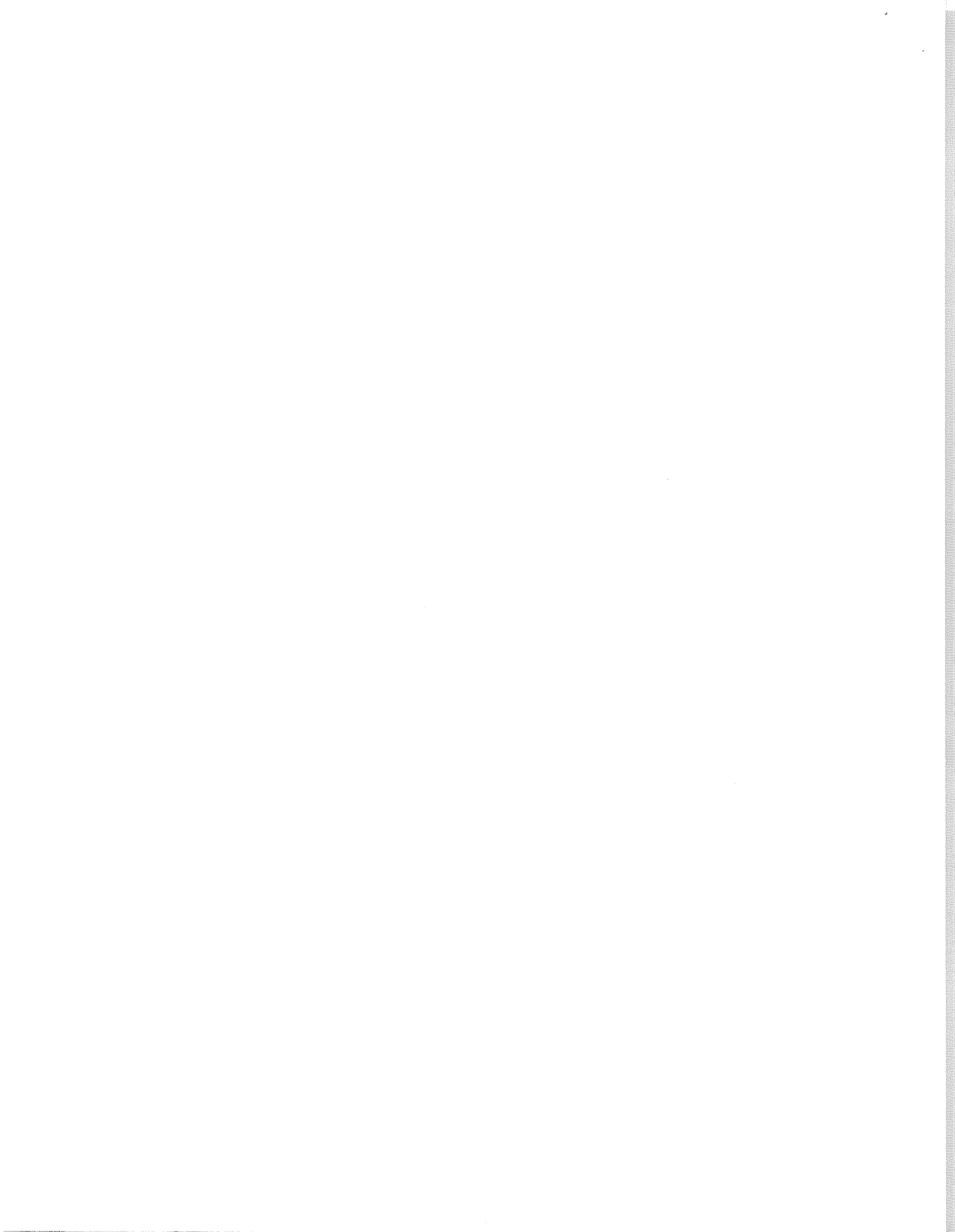
Stephanie M. Parent (OSB # 92950)

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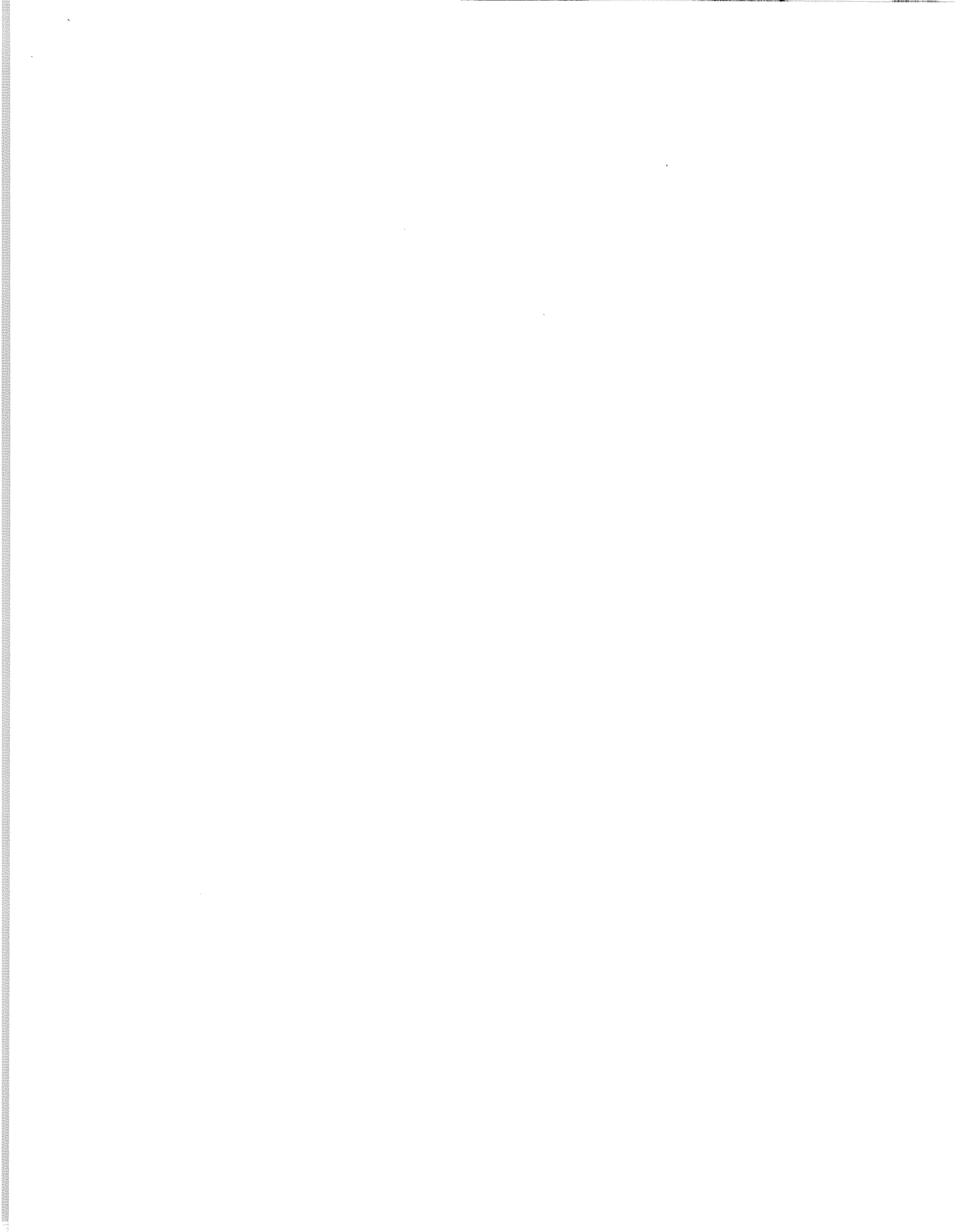
## EXHIBIT LIST

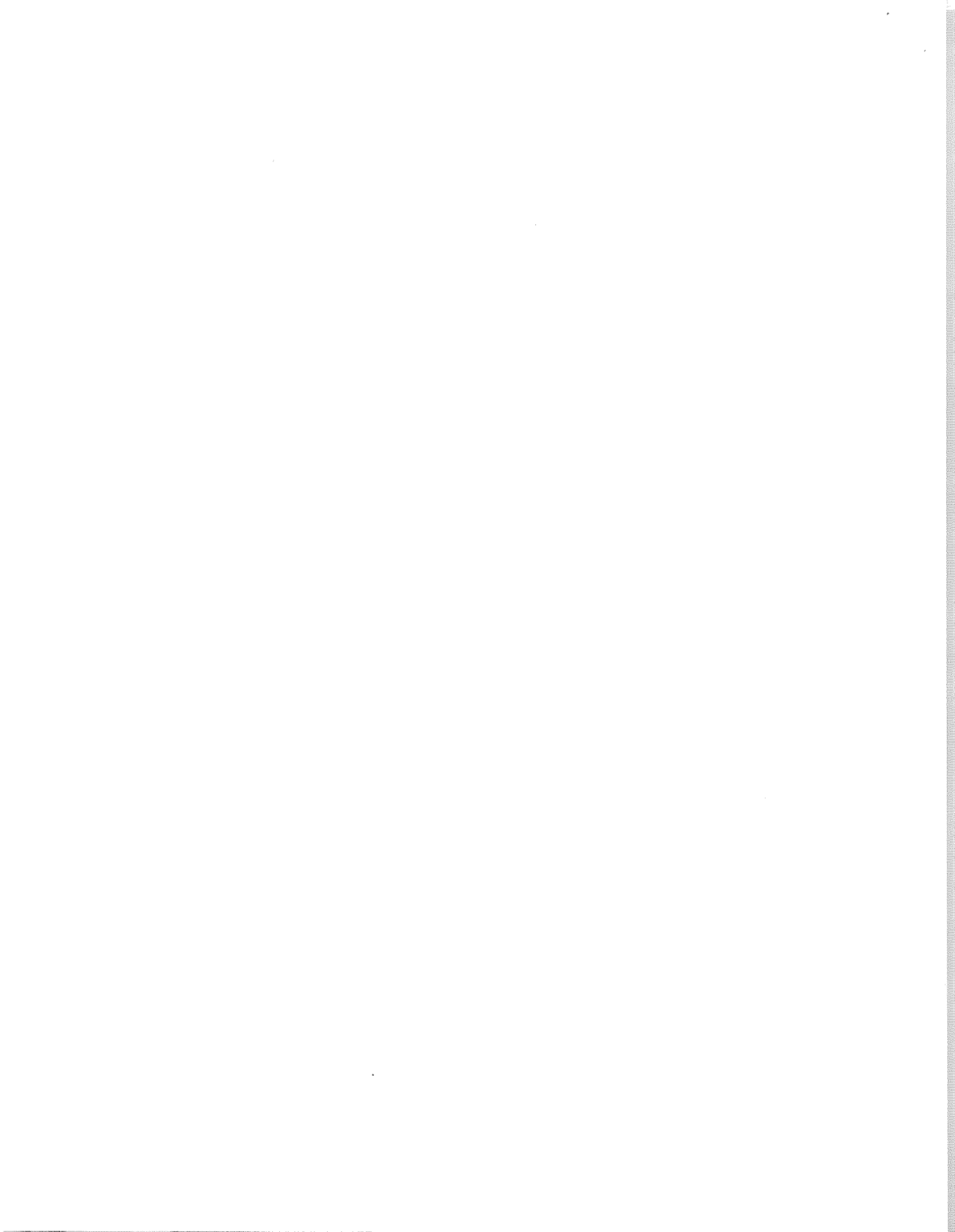
- Exhibit A National Wildlife Fed'n v. National Marine Fisheries Svc., CV 01-640-RE, Fed. Defs' First Remand Report (Jan. 3, 2006) .
- Exhibit B Letter from Congressmen Earl Blumenauer and Jay Inslee to BPA (Dec. 2, 2005).
- Exhibit C Letter from counsel for Petitioner NEDC to BPA (Dec. 15, 2005).
- Exhibit D Letter from State, Federal and Tribal Fishery Agencies Joint Technical Staff to BPA (Jan. 25, 2006).
- Exhibit E BPA Press Release, "BPA selects successors to Fish Passage Center" (Jan. 26, 2006).
- Exhibit F Conference Report H.R. 109-275 (Nov. 7, 2005).
- Exhibit G Letter from counsel for Petitioners to counsel for BPA (Feb. 13, 2006).
- Exhibit H Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (Northwest Power and Conservation Council Document 2003-11) (excerpts).
- Exhibit I BPA Program Solicitation for Key Functions previously performed by the Fish Passage Center (Dec. 8. 2005).
- Exhibit J BPA announcement of Program Solicitation (last viewed 2/16/2006).
- Exhibit K Energy and Water Development Appropriations Act, 2006, H.R. 2419.
- Exhibit L GAO Office of the General Counsel, "Principles of Federal Appropriations Law, Third Ed. Vol. I (GAO-04-261SP) (excerpts).
- Exhibit M Congressional Record – Senate, p. S12744 (Nov. 14, 2005).

- Exhibit N National Wildlife Fed'n v. National Marine Fisheries Svc., CV 01-640-RE, Second Declaration of Stephen W. Pettit in Support of Motion for an Injunction (May 16, 2005).
- Exhibit O "Call for Openness at NASA Adds to Reports of Pressure," New York Times (Feb. 16, 2006).
- Exhibit P "About-face restores OSU study money," The Oregonian (Feb. 9, 2006).









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UNITED STATES COURT OF APPEALS  
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Northwest Environmental Defense	)	
Center, Public Employees for	)	Civil No. 06-70430
Environmental Responsibility,	)	
and Northwest Sportfishing Industry	)	DECLARATION OF
Association,	)	MARK S. RISKEDAHL
Petitioners	)	
	)	
v.	)	
	)	
Bonneville Power Administration,	)	
Respondent.	)	
_____	)	

I, Mark S. Riskedahl, hereby declare:

1. I am the Executive Director and a member of Northwest Environmental Defense Center (NEDC) and make this declaration to demonstrate that NEDC and its members interests will be irreparably harmed if this Court does not grant a stay

Riskedahl Declaration

of the Bonneville Power Administration (BPA) decision to disband the Fish Passage Center.

2. NEDC is a non-profit organization whose mission is to protect the natural environment of the Pacific Northwest. Since 1969, our staff and student volunteers have used the law to advocate for cleaner water and air, and to preserve public lands and wildlife habitat across the region.

3. I work for and am a member of NEDC because I believe in its mission and its efforts to protect and restore the natural environment, in particular to preserve and restore habitat for imperiled species. I believe that NEDC's focus on the protection and restoration of the Columbia River basin and on Columbia River salmon is particularly important. NEDC has long been interested in and involved in BPA actions that impact fish. See NEDC v. BPA, 117 F.3d 1520, 1531 (9<sup>th</sup> Cir. 1997) (challenge to BPA actions for failure to provide equitable treatment to fish). As a resident of Portland, Oregon, and frequent user of the Columbia River and its tributaries, I strongly support NEDC's advocacy, education, and litigation on behalf of that river ecosystem and its inhabitants.

4. I regularly recreate on the Columbia River. I live less than three miles from the mainstem Columbia River, and I ride my bike alongside the river at least once a month, and much more frequently in the summer, viewing the water, birds,

Riskedahl Declaration

vegetation, and other components of the Columbia River ecosystem. I occasionally join friends in boat trips on the river. I take photos of ships, birds, migrating salmon, vegetation, and the water when I travel near the Columbia. I plan to continue these activities in the future and will most assuredly bike, boat and recreate on and along the Columbia River this summer and autumn.

5. I feel a special connection with and regularly visit a place called Wood's Landing, a property located along the Columbia River in Vancouver, WA, where chum salmon and steelhead spawn. I have visited their spawning sites several times over the past three years to watch and photograph the fish spawning. I derive great personal pleasure from watching the coho spawn in cold springs that upwell along the banks of the Columbia and from watching the steelhead make their way up a small, narrow stream that flows into the Columbia. The chum and steelhead usually spawn in November and December, and I intend to return to Wood's Landing to watch them spawn again this coming year. I also visit Wood's Landing when the fish are not spawning and will continue to do so.

6. I also eat wild salmon and other fish from the Columbia River. I eat wild salmon in part because I justify that these salmon will contain less contaminants than hatchery-raised salmon and in part because I want to support the local salmon fishing economy, particularly that of Native American fishermen.

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7. I am concerned that the BPA decision to abolish the Fish Passage Center will irreparably impact my ability to enjoy wild salmon and steelhead through recreation and nourishment. The Fish Passage Center has a history of providing fair and objective scientific analyses and data. I am aware that this information was relied upon, in part, by Judge Redden when he ordered summer spill in 2005 to aid in salmon migration. Without objective information, it will be difficult to continue moving the BPA and other agencies in the direction of providing greater protections for the conservation and recovery of imperiled salmon runs.

8. I am particularly concerned about the manner in which BPA has made its decision to disband the Center. First, BPA adhered to congressional report language as if it were binding law. I am concerned that our government comply with the law, rather than invent it or act outside it. Second, BPA could have requested an amendment to the Council's Fish and Wildlife Program if it felt so strongly that the Fish Passage Center needed to be reconfigured. The Northwest Power Act required that the public and stakeholders be allowed to participate in the development and amendment of the Fish and Wildlife Program. When BPA acted unilaterally, it circumvented legally required public participation requirements. NEDC, its volunteers and members, including myself, spend an enormous amount of time and effort participating in state and federal public decisionmaking

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processes. However, in this case, NEDC was not afforded any opportunity, even though it is required by law.


9. If this Court does not grant a stay of BPA's decision, then the Fish Passage Center will be disbanded this March, 2006. I am concerned that this will cause harm in a number of respects. The timing is highly suspect. Currently stakeholders are undergoing a collaborative process to devise a new biological opinion for the hydropower dams in the Columbia Basin. These same stakeholders have relied in the past upon the Fish Passage Center's information and analyses. It is not merely the information that is provided but the timeliness of it as well. I am concerned that the stakeholders attempting to provide more protections for fish will not have the information and analyses necessary to advocate on behalf of fish. As a result, a less protective recovery scheme will mean less fish, which will impact my ability to recreate and eat wild salmon.

10. In addition, I am very concerned that allowing BPA to circumvent public participation requirements on the basis of report language will mean, first, that NEDC and its members will never have an opportunity to participate in the challenged decision to *de facto* amend the Fish and Wildlife Program and disband the Fish Passage Center. Second, I fear that lack of a stay will only encourage BPA to ignore public participation requirements and fish needs in the future.

Riskedahl Declaration

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

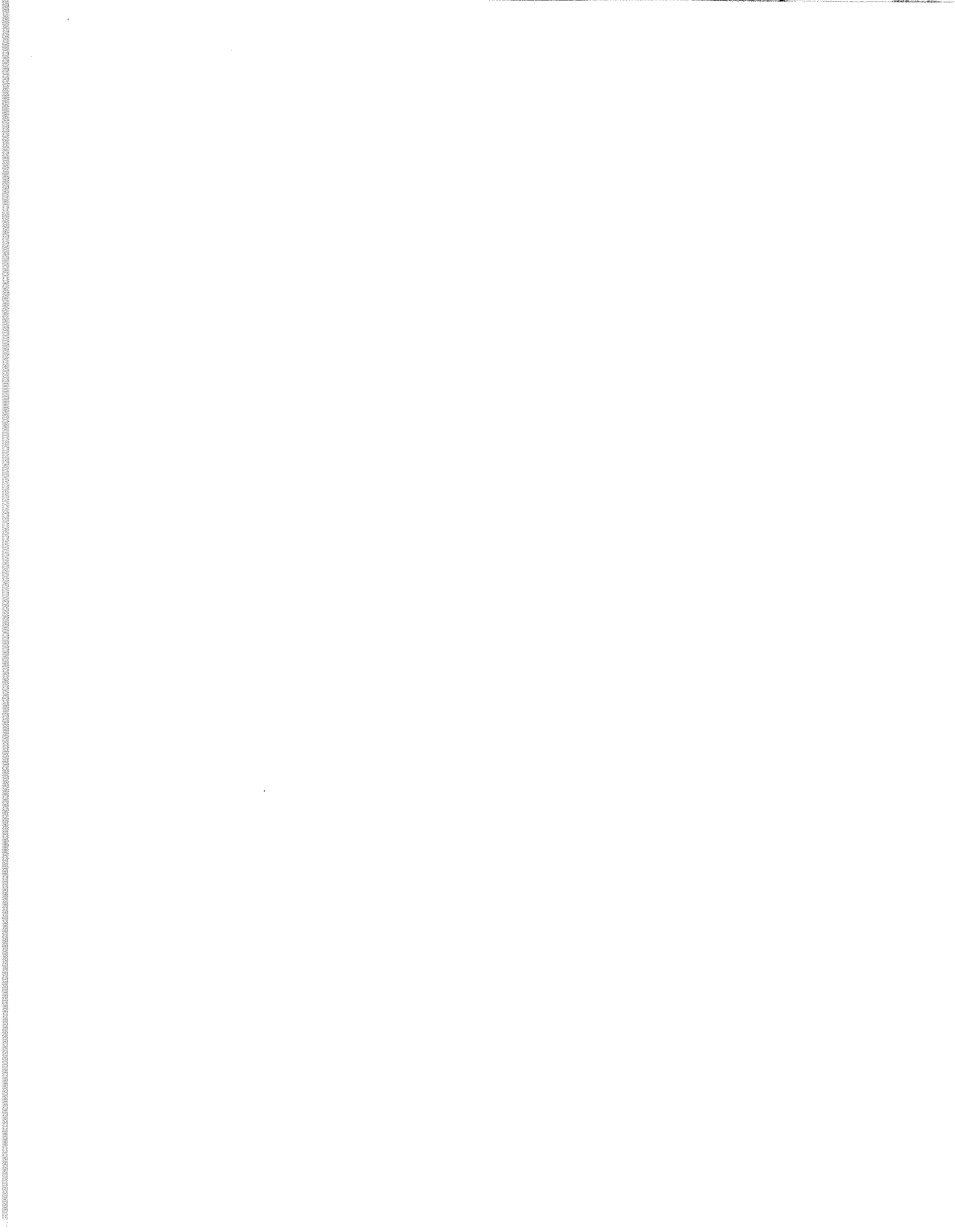
Executed on this 15<sup>th</sup> day of February, 2006

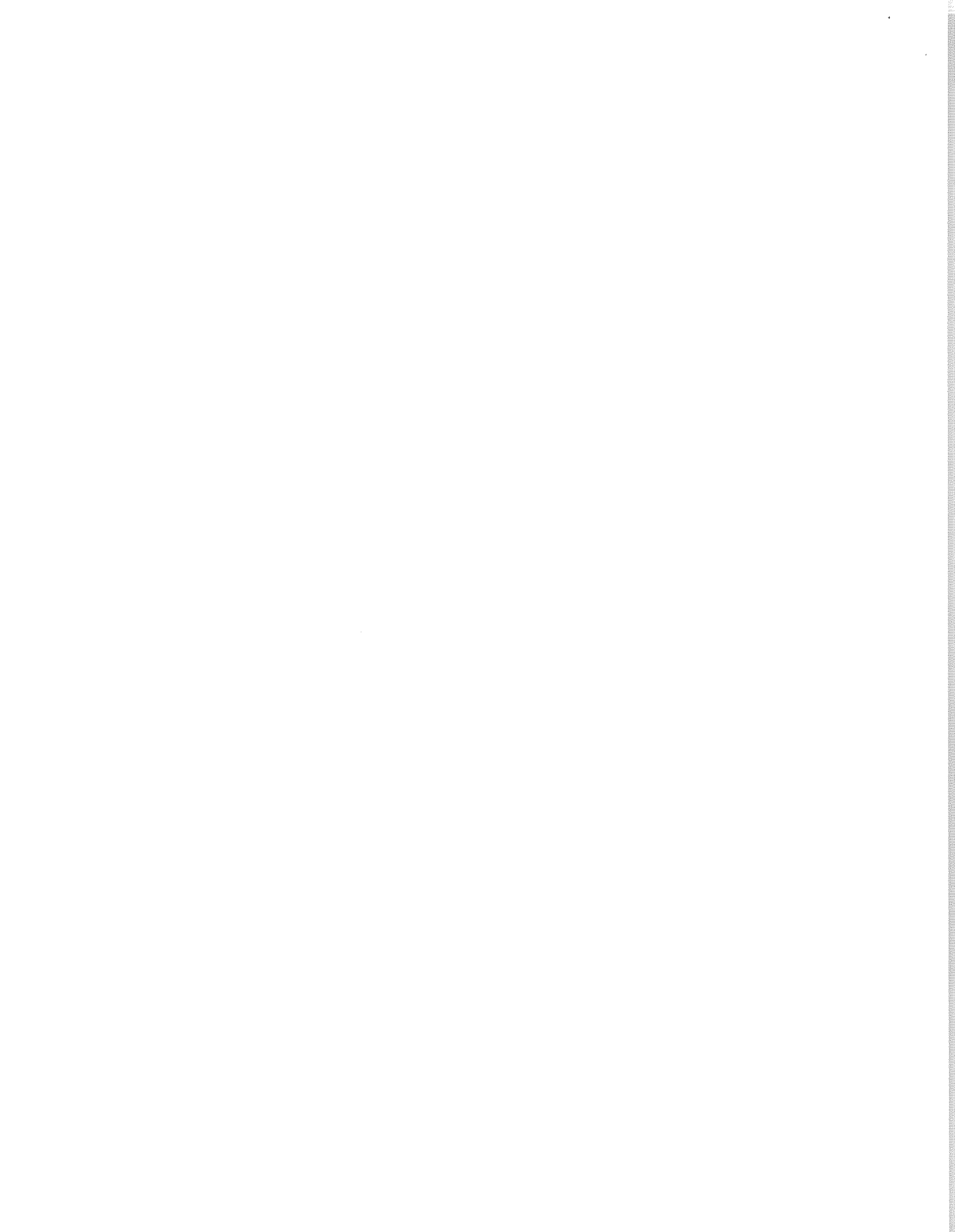
A handwritten signature in cursive script, appearing to read "Mark Riskedahl", written over a horizontal line.

Mark Riskedahl  
Portland, Oregon

Riskedahl Declaration







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Attorney for Petitioners

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Northwest Environmental Defense	)	
Center, Public Employees for	)	Civil No. 06-70430
Environmental Responsibility,	)	
and Northwest Sportfishing Industry	)	
Association,	)	<b>DECLARATION OF</b>
	)	<b>RODNEY W. SANDO</b>
Petitioners	)	
	)	
v.	)	
	)	
Bonneville Power Administration,	)	
	)	
Respondent.	)	
_____	)	

I, RODNEY W. SANDO, STATE AND DECLARE AS FOLLOWS:

1. My name is Rod Sando and I am a member of Public Employees for Environmental Responsibility (PEER). My declaration discusses the chilling effect closing or transferring the duties of the Fish Passage Center

(FPC) will have on fisheries scientists and managers in the Columbia River Basin, the detrimental effect it will have on the public and private entities that rely on the information provided by the FPC, and also the harm that will result to myself and other sport fishermen whose recreational enjoyment and opportunities may be diminished by the resulting loss of salmon populations in the Columbia River Basin.

2. In July of 2005, I retired from public service, after more than forty years of service and from June, 2002 to July, 2005; I was Executive Director of the Columbia Basin Fish and Wildlife Authority, directly supervising the FPC Director. In prior assignments I served as the Idaho Fish and Game Director. Further, I worked for the Minnesota Department of Natural Resources in a variety of positions including the position of Commissioner for eight years. The Commissioner serves as the head of the agency and is a member of the Governor's Cabinet. I hold a Bachelor's degree in forestry and a Master's degree in forestry with a minor in fish and wildlife management. I currently serve as a science and policy advisor for the Northwest Sportfishing Industry Association.

3. Formerly designated the Water Budget Managers from 1982 until 1987, by the first Northwest Power and Conservation Council's (NCP) Fish and Wildlife Program, the FPC was then established in the NCP's 1987 Fish and Wildlife Program and was addressed in the Council's mainstem amendments to its program in 2003. The FPC has four primary duties assigned to it. They are:

- *Plan and implement smolt monitoring.*
- *Gather, organize, analyze, house, and make widely available monitoring and research information related to juvenile and adult fish passage.*
- *Provide technical information necessary to assist the agencies and tribes.*
- *Provide technical assistance and analysis as requested by the agencies and tribes and by other entities within the region and the general public.*

4. The FPC maintains large databases and also manages a website which is a major access port to the data. The website is very popular and is widely used by the general public to obtain information about the status of fish passage on the river. Contact traffic reaches high levels through the spring and summer fishing seasons with thousands of contacts monthly.

5. The FPC is staffed with data analysts and data managers who are very well qualified to carry out the mission. The FPC has established highly efficient, extensive and cost effective procedures for collecting this data and making it available to various public and private entities. These entities have depended on this data for over twenty (20) years and have used it as the foundation for many of the analyses done by the region's fisheries managers and scientists as problems and issues were addressed.

6. The FPC is very efficient and cost effective at providing this data and analysis. If the FPC is altered or closed, the entities that rely upon FPC data will no longer have anyone as reliable or efficient to provide them with the this necessary information. In addition, to transfer the duties of the FPC to another, less experienced organization, will result in the implementation of much more expensive methods in order to develop the information previously supplied by the FPC.

7. The FPC is part of the Fish and Wildlife program funded by the Bonneville Power Administration to mitigate for the effects of the dams on the Columbia River and its tributaries. The program is broadly based and is carried out by the fish and wildlife agencies, tribal governments and other

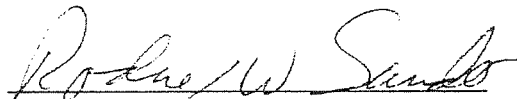
entities with expertise in fish and wildlife management in the region. The controversy associated with the FPC has largely been caused by the continuing evidence produced by the unbiased data analysis of the impact of the dams on fish passage and mortality. This reached a peak during the summer spill of 2004 and the reaction to U.S. District Court Judge Redden's decision to implement spill in 2005. It is my opinion that the decision to impact the FPC is in retaliation for the evidence produced by the FPC for the plaintiffs in Judge Redden's decision.

8. Many of the Region's fisheries scientists work for entities that receive funding from BPA. Because they work for entities that are funded by BPA they are vulnerable to the same treatment and in my opinion there is a substantial chilling effect on these scientists and managers. This is the first time a decision has been made to eliminate funding of a mitigation project that was performing its duties as assigned simply because the analysis results were inconvenient for some of the Region's policy makers. This will no doubt embolden these parties to take further steps if they deem it necessary in the future to shape science to meet their policy needs. This "flat earth" approach to science does not bode well for the management of fish resources in the Columbia. Many of these fish stocks are in serious trouble and the

general welfare of all citizens will not be served by a community of fisheries scientists and managers who cannot carry out their responsibilities without fear of retaliation.

9. If the entities who rely on FPC fish passage and mortality data to develop their salmon recovery programs, do not have access to this data, the result may be a significant depletion of the salmon population in the Columbia River Basin. This loss, will cost myself and other sport fishermen in the area our recreational enjoyment and opportunities to fish salmon.

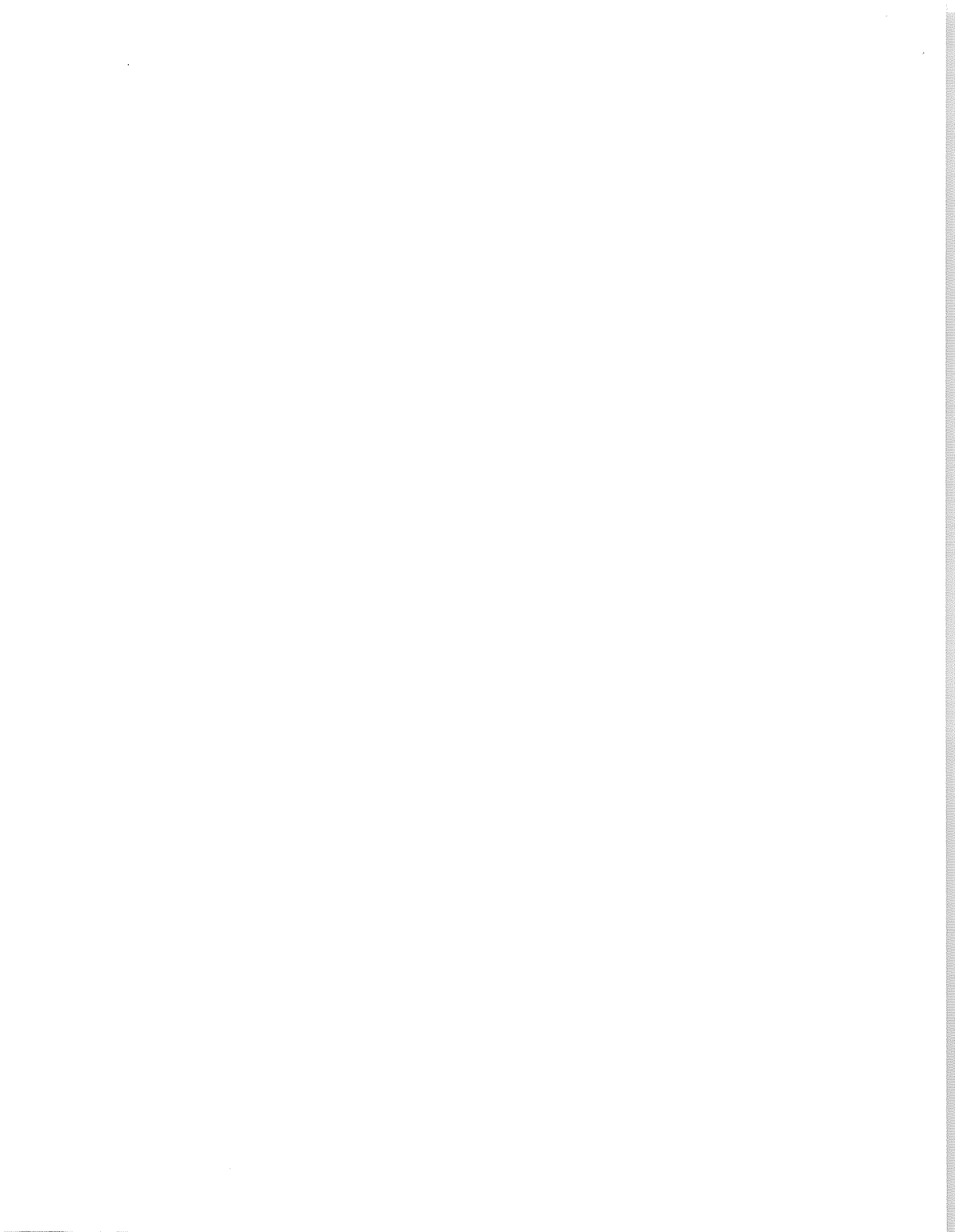
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 15<sup>th</sup> day of February 2006 at Woodburn, Oregon.

  
Rodney W. Sando

2 - 15 - 2006  
Date







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Attorney for Petitioners

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Northwest Environmental Defense	)	
Center, Public Employees for	)	Civil No. 06-70430
Environmental Responsibility,	)	
and Northwest Sportfishing Industry	)	DECLARATION OF
Association,	)	LIZ HAMILTON IN SUPPORT
Petitioners	)	OF PETITIONERS' MOTION
	)	FOR STAY
v.	)	
	)	
Bonneville Power Administration,	)	
Respondent.	)	
_____	)	

I, Liz Hamilton, hereby declare as follows:

1. I am the executive director of The Northwest Sportfishing Industry Association ("NSIA"), a trade organization of nearly three hundred sporting goods manufacturers, wholesalers, retailers, marinas, and guides. About 55 percent of the

member businesses are located in Oregon, and 45 percent in Washington. NSIA's principal place of business is Oregon City, Oregon.

2. NSIA is dedicated to restoring and protecting the region's rivers, lakes, and streams, keeping them healthy and full of fish. NSIA's mission is to preserve, restore and enhance sport fisheries and the businesses that are dependent on them. Members of NSIA, including me, enjoy both economic and recreational benefits from the Columbia River system, and the health of the Snake River stocks directly affect the members.

3. I have been the executive director of NSIA since its inception, in 1993. My job is to take care of both the important and the urgent issues that affect the members of our organization. Both habitat and hydropower issues are extremely important, and our choice is to get involved now, so the important does not become urgent. However, hydropower issues have now been elevated to urgent priority within our organization because of the constraints that have been and continue to be placed on the fisheries.

4. Over the past 13 years, NSIA has been dedicated to the preservation, restoration, and enhancement of sportfishing and the businesses dependant on them. NSIA members and I worked on the following issues:

- a. Adequate funding for hatcheries and their reforms;

- b. Adequate funding for both habitat protection and habitat restoration measures and the cost of their implementation; and
- c. Negotiation of forest practices that affect rivers, watersheds, and fish.
- d. Fish passage concerns, including spill versus transportation, and adequate tributary flows to ensure fish passage from tributaries through the mainstem to the ocean.

5. I am a member of the Fish Passage Center Oversight Board, having served in that capacity since the Board was established.

6. In the past, I served on an agricultural task force that addressed such issues as fish passage and fish screening.

7. I personally fish in the Columbia River below Bonneville, on the Willamette, Santiam, and the Clackamas rivers. I was able to fish for spring chinook in the Columbia River for the first time in my life March, 2001 because the fishery had been closed since 1977. Fishing has been the glue that binds our family together. I fished with my grandfather at the mouth of the Columbia River when I was just five years old. My husband and I fish together, and it is a part of our culture that we share with my children. We usually take between four and six fishing trips each month, and intend to continue our fishing trips in the future as often as possible. In my opinion, no other activity bonds a family like fishing, because there are no other distractions, and we have the opportunity to bond as a family. I hope that my

children can continue to share our fishing traditions with their children, and it would be devastating to our family if we were no longer able to share in this activity.

8. NSIA and its members, including me, are very fearful for our economic and recreational future. The Federal Columbia River Power System (FCRPS) has changed what used to be a free and dynamic river into a stagnant series of pools. The FCRPS imposes formidable barriers on migrating salmon – particularly on juveniles that must struggle to survive the passage through deadly turbines and reservoirs full of predators, lethal levels of dissolved gas and high water temperatures. The combination of deadly impacts posed by the FCRPS is responsible for 80% of human-caused mortality on salmon and steelhead.

9. NSIA, along with the federal and state fish agencies and tribes, has placed heavy reliance on the Fish Passage Center to provide scientifically correct and unbiased analysis to river and resource managers as to how transportation, as compared with in-river passage, affects the timing and survival of juvenile salmon during their migration.

10. Although the vast majority of science indicates that the practice of barging and trucking fish harms them more than it helps, the National Marine Fisheries Service has continued to rely on this system of transporting juvenile fish around the dams. This practice has been ongoing for more than 20 years, but has yet to result in returns of adult salmon large enough to recover depleted populations. The Fish

Passage Center has been gathering data on this issue on an annual basis, and produces an annual status report on this issue. This report has provided critical information on the comparative benefits of transportation and spill, and the impacts of hydrosystem operation on fish survival.

11. NSIA is a plaintiff in the ongoing litigation challenging the NMFS biological opinions for operations of the federal hydropower system. Currently, the U.S. District Court for the District of Oregon has ordered a collaborative remand after which NMFS is ordered to produce a biological opinion that complies with the Endangered Species Act. See National Wildlife Fed'n v. National Marine Fisheries Svc. (“NWF v. NMFS”), CV 01-640-RE, slip op. at 11-12, 2005 WL 2488447 (D. Or. Oct. 7, 2005) (ordering remand of biological opinion on hydropower operations and requiring collaboration with sovereigns, including states and tribes). The Fish Passage Center’s annual comparative survival study status report provides invaluable guidance to BPA, NMFS and the District Court in the development of an appropriate Biological Opinion. Without the Fish Passage Center’s presentation of data on this issue, NSIA fears NMFS will continue the harmful practice of barging fish to the detriment of NSIA and its members businesses and ability to fish.

12. Dismantling the Fish Passage Center at this critical time threatens the quality and consistency of information available not only to the hydrosystem managers charged with operating the system in a manner consistent with the Endangered

Species Act, but also to the court which is providing oversight of that management in light of the failure of past actions by hydrosystem managers and NMFS to stem the decline of the Columbia's imperiled salmon runs.

13. The Northwest sport fishing industry is also imperiled. In 1996, the sport fishing industry contributed nearly 3 billion dollars in economic benefit to the Washington, Oregon, Idaho region. Since 2001, truncated salmon fishing seasons on the Columbia have cost our industry an estimated half of its anticipated economic return.

14. The number of hatchery fish that we are allowed to catch is restricted by the health of the Snake River wild salmon runs. Because of the serious trouble that the Snake River stocks continue to face as a result of the dams, reducing the harvest will have little to no effect on restoring the Snake River stocks to healthy, sustainable levels until the Biological Opinion requires some real changes in the current hydrosystem and its management. Without the unbiased information the Fish Passage Center provides, NSIA fears the next Biological Opinion will not be protective enough to improve fish runs to the detriment of NSIA and its members.

15. Changes in the hydrosystem and its management necessary to reverse the decline of Columbia River salmon will only take place if all parties involved receive accurate data and unbiased analyses of the effects of current system operations and consequences. Dismantling the Fish Passage Center at this critical time will at best



delay, and at worst deny, meaningful protection and eventual recovery of imperiled Columbia River salmon runs.


16. Fish Passage Center data and analysis has also been used by the sport fishing industry as an invaluable tool for guiding our economic decisions, including production, purchasing, hiring, and marketing. Additionally, many thousands of the anglers we serve use data generated by the Fish Passage Center and available on the Fish Passage Center web site on a regular basis to make decisions that affect our economic success.

17 I, and members of NSIA, have actively participated in the public processes required by the Northwest Power Act. In addition to serving on the Fish Passage Oversight Board, I and members of NSIA have testified at public hearings and provided written comments on policies and rules relative to the effects of Columbia River hydrosystem operation on our industry. BPA's unilateral decision to dismantle the Fish Passage Center without providing me and NSIA members the opportunity to participate in the decision-making process results in injury to us as individuals and as an industry.

18. I believe that the injuries to myself as an individual, to my family, and to NSIA and its employees and members can be remedied only if BPA is ordered to stay its decision to abolish the Fish Passage Center.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

February 15, 2006, Oregon City, Oregon.

  
\_\_\_\_\_  
LIZ HAMILTON