

10 August 2009

Colonel Steven R. Miles, P.E.  
Commander and District Engineer  
US Army Corps of Engineers, Portland District  
Robert Duncan Plaza Bldg  
10th Floor/Office of Counsel  
333 SW First St.  
Portland, OR 97204  
e-mail: [Steven.R.Miles@usace.army.mil](mailto:Steven.R.Miles@usace.army.mil)

**Re: Obligation of the Army Corps of Engineers to comply with Oregon Revised Statutes section 509.585(4) in respect to the Dorena Lake Dam Hydroelectric Project - HE 559**

Dear Colonel Miles,

I am writing to request that you obtain a formal determination from the Oregon Department of Fish and Wildlife as to whether native migratory fish are or historically have been present in the waters above and below Dorena Dam pursuant to ORS 509.585(4).

Since 1984, I have lived at 34882 Spillway Road in Cottage Grove, along the Row River and within a few thousand feet of Dorena Dam. I have a deep concern for our State's fish resources. Since learning about the proposal to co-locate a hydroelectric facility at Dorena Dam, I have actively participated in public comments about the proposed project. In September 2006, I submitted timely, written comments on the Federal Energy Regulatory Commission's (FERC) draft Environmental Assessment of the proposed project. In May 2008, I submitted timely, written comments to the Oregon Water Resources Department (OWRD) objecting to proposed orders granting a new water right for the proposed hydroelectric facility at Dorena Dam.

Oregon law provides citizens with the right to compel government officers to perform an act that the law specifically enjoins. ORS 34.110 states:

“A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court, corporation, board, officer or person to exercise judgment, or proceed to the discharge of any functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.”

Oregon law mandates that owners or operators of artificial obstructions (including dams) obtain a determination from the Oregon Department of Fish and Wildlife as to whether native migratory fish are or historically have been present in the waters above and below the artificial obstruction if certain conditions are met. ORS 509.585(4) states:

“A person owning or operating an artificial obstruction **shall**, prior to construction, fundamental change in permit status or abandonment of the artificial obstruction in any waters of this state, obtain a determination from the department as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have been present in the waters, the person owning or operating the artificial obstruction **shall** either submit a proposal for fish passage to the department or apply for a waiver pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the alternatives to fish passage must be obtained from the department prior to construction, permit modification or abandonment of the artificial obstruction.”

The Army Corps of Engineers is the owner and operator of Dorena Dam located on the Row River about six miles east of Cottage Grove.

With respect to ORS 509.585(4), Oregon law defines a fundamental change in permit status as:

“‘Fundamental change in permit status’ means a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits.”  
ORS 509.590(4)

A fundamental change in permit status has occurred at Dorena Dam because:

- 1) On October 17, 2008, FERC issued an original license to construct, operate, and maintain an 8.3-megawatt (MW) hydroelectric facility at Dorena Dam; and/or
- 2) On or about June 10, 2009, the Oregon Water Resources Department issued a water right for a major hydroelectric project to divert up to 812 cubic feet per second (cfs) of water from Dorena Reservoir, tributary to the Row River, tributary to the Coast Fork Willamette River, in the Willamette basin.

Unless the Army Corps of Engineers obtains a formal determination from the Oregon Department of Fish and Wildlife as to whether native migratory fish are or historically have been present in the waters above and below Dorena Dam pursuant to ORS 509.585(4), I may have no other plain, speedy and adequate remedy in the ordinary course of the law than seeking a Writ of Mandamus compelling the performance of this act that the law specifically enjoins.

Respectfully,

John William Steele  
34882 Spillway Road  
Cottage Grove, OR 97424

CC: Kevin J. Brice, P.E., PMP  
Deputy District Engineer for Programs and Project Management  
US Army Corps of Engineers, Portland District  
Robert Duncan Plaza Bldg  
10th Floor/Office of Counsel  
333 SW First St.  
Portland, OR 97204  
e-mail: [kevin.j.brice@usace.army.mil](mailto:kevin.j.brice@usace.army.mil)

BG William E. Rapp, P.E.  
Commander and Division Engineer  
US Army Corps of Engineers  
Northwestern Division  
1125 NW Couch St., Suite 500  
Portland, OR 97209

Mr. Roy Elicker, Director  
Oregon Department of Fish and Wildlife  
3406 Cherry Ave NE  
Salem, OR 97303  
e-mail: [roy.ellicker@state.or.us](mailto:roy.ellicker@state.or.us)

Governor Ted Kulongoski  
160 State Capitol  
900 Court Street  
Salem, Oregon 97301-4047

The Honorable Peter DeFazio  
405 East 8th Avenue, Suite 2030  
Eugene, OR 97401

Senator Ron Wyden  
405 East 8th Avenue, Suite 2020  
Eugene, OR 97401

Senator Jeff Merkeley  
405 East 8th Avenue, Suite 2010  
Eugene, OR 97401

Ken Homolka  
Hydropower Program Leader  
Oregon Department of Fish and Wildlife  
3406 Cherry Ave NE  
Salem, Or 97303  
[ken.homolka@state.or.us](mailto:ken.homolka@state.or.us)

Corey Saxon  
Oregon Department of Environmental Quality  
2020SW Fourth Ave, Suite 100  
Portland, Or 97201  
[saxon.corey@deq.state.or.us](mailto:saxon.corey@deq.state.or.us)

Chris Stine  
Oregon Department of Environmental Quality  
1102 Lincoln Ave, Suite 210  
Eugene, Or. 97401  
[stine.chris@deq.state.or.us](mailto:stine.chris@deq.state.or.us)

Bryn Thoms  
Oregon Department of Environmental Quality  
1102 Lincoln Ave, Suite 210  
Eugene, Or. 97401  
[thoms.bryn@deq.state.or.us](mailto:thoms.bryn@deq.state.or.us)