Environment

Fish

[16] Judge Says No to BiOp Science Review ■ *from [1]*

Federal District Court Judge James Redden ruled last week that the new BiOp will not get any independent scientific scrutiny before he decides whether to throw it out.

Plaintiff environmental and fishing groups are mounting a challenge to the new salmon plan and have asked for such a review. Redden spent the afternoon of Aug. 21 listening to the pros and cons of putting together an independent panel to weigh in on the salmon science used in hydro BiOp released last May.

But attorneys for the defendants, especially Coby Howell from the Department of Justice, evidently swayed the judge. Redden had posed a few questions to all parties, including whether it was even legal to convene such a panel before he had ruled on summary judgment.

Even Earthjustice attorney Todd True admitted there was no precedent for such an action. Others pointed out that if such a course were followed there was a good chance it would be reversed since it raised serious issues of legality.

But Redden left the door open for the possibility that a panel of independent scientists, likely picked from former ISAB members, could be used to answer narrow, technical questions during litigation over a preliminary injunction. However, federal attorneys argued the timeframe for injunction proceedings were too short to institute a panel. Besides, they felt the main issues in the new BiOp had already been vetted by the ISAB or were in the process thereof.

'To referee the referee is inappropriate.'

Plaintiffs are expected to file a motion for preliminary injunction by Oct. 1 challenging current reservoir operations--especially flood control constraints--because they want more water for fish flows.

They were joined by the state of Oregon, whose attorney, David Leith, also argued for a science review before the judge rules on summary judgment.

The Nez Perce tribes weighed in with plaintiffs in the call for more review. Tribal attorney David Cummings said the tribe was still committed to the Upper Snake BiOp agreement, but was maintaining its position as a leading advocate for breaching the four lower Snake dams.

The other three lower Columbia tribes, along with the Colvilles, have now joined defendants in support of the BiOp and said no further review was necessary. The Salish-Kootenai tribes also voiced support for the new salmon plan.

The Spokane tribe has switched sides since the litigation over the 2004 BiOp, and now supports the plaintiffs' challenge. They said it would take an independent review to ensure the BiOp used the "best, available science."

The other three Northwest states expressed support for the feds' position. Mike Grossman, from Washington AG's office, said his state biologists just "rolled their eyes" when he asked them about using an independent panel. He said the region has argued for decades about the science and the region needs a decision with NOAA as the final decision-maker. "To referee the referee is inappropriate," he said.

Representing Montana, attorney Mark Stermitz said the new BiOp is nothing like its predecessor. He said it takes an ESU-by-ESU approach, "doing what the judge wants," and its efficacy will be decided by its All-H approach [improvements to habitat, hatcheries, harvest and hydro], rather than more debate and flow and spill issues.

Near the end of the hearing, Earthjustice attorney True argued that the new BiOp was not really a product of collaboration, since debate over science issues had been elevated to a policy workgroup.

He was doing his best to counter the feds' characterization of the new salmon plan, with its hundreds of millions of dollars in extra projects for tribes to improve fish habitat, as a product of years of meetings and representing a new paradigm for parties in the region.

DOJ attorney Howell said the latest BiOp collaboration was maybe the first time that federal agencies really listened to the other sovereigns.

"We did that at your order," he told the judge.

Redden said he would deny the motion to form a science panel, though no party had actually filed one, and told the litigants to get on with their briefing over the new round of litigation.

He complimented the BiOp parties for "a remarkable effort," but cautioned that very likely there will be "holes" in the new BiOp.

However, he wondered out loud whether that would be enough to "throw the whole thing out" ***[Bill Rudolph].***

Press Release

July 22, 2008

Governor challenges federal salmon plan for Columbia River Basin
Federal plan continues flawed, inadequate analysis to justify hydro power operations

(Salem) – Governor Ted Kulongoski today announced that the State of Oregon will continue to press the Federal government for a true salmon recovery plan for the Columbia River Basin by filing a supplemental complaint against the most recent federal plan for operating dams on the Columbia and Snake Rivers released last May. Specifically, the complaint requests that the U.S. District Court direct the Federal government to withdraw the plan.

"The State of Oregon has a long legacy of protecting our wild fish for future generations so they remain a vital part of our heritage, and this is a legacy worth fighting for," Governor Kulongoski said. "The Federal government may be satisfied with the number of wild salmon and steelhead in our rivers. I am not."

The Governor has found that the plan fails to provide adequate protections for the survival and recovery of salmon and steelhead runs as required under the Endangered Species Act (ESA). Previous plans have also been struck down by the U.S. District Court in 2000 and 2004.

The State contends in today's filing, that the Federal government again has offered a plan driven by allegiance to justifying status quo hydro power operations, rather than providing for the survival and recovery of endangered Columbia and Snake River salmon and steelhead. Any dam improvements proposed in the plan are clouded by a failure to test benefits to fish prior to increasing power production.

Among the plan's most serious flaws, it substantially lowers the standard for evaluating whether hydro power operations jeopardize the survival and recovery of protected species, and it does so without adequate scientific basis. Under the new standard, the Federal government does not assess the necessary levels to achieve viable fish populations and risks letting species linger on the brink of extinction.

Flaws in the plan are so severe that it concludes half of the 13 fish populations currently under ESA protections are not jeopardized by current power system operations and that most populations do not require any improvements in their present status to avoid jeopardy.

The plan also diverts attention from necessary changes in the operation of the dams by focusing on hatcheries and tributary habitat improvements that are inadequate to recovering Oregon's wild fish and ignore the known harm of physically transporting juvenile smolts downstream. The proposed measures, similar to those outlined in the 2000 and 2004 plans, are now predicted to result in dramatically stronger improvements in fish runs than they were in the previous plans.

The Governor concluded, "I support efforts to secure funding for hatcheries, habitat and tribal infrastructure. But I take issue with the plan's lack of improvement and accountability in the hydro power system, which remains the primary constraint to wild fish recovery. What I am looking for is a plan that restores wild fish populations to viable and sustainable levels."

In addition to asking the U.S. District Court to direct the Federal government to withdraw the plan, the State encourages the Court to empanel independent experts to assist it in evaluating the efficacy of different available hydro power operations.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES, *et al.*, Defendant.	CV 01-640-RE (Lead Case) CV 05-23-RE (Consolidated Cases)
COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, *et al.*, Plaintiffs, v. CAROS M. GUTIERREZ, *et al.*, Defendants.	MEMORANDUM IN SUPPORT OF SECOND RENEWED MOTION TO INTERVENE

Summary of Argument

Two years ago, this Court denied the motion of the Columbia Snake River Irrigators Association (hereafter, the Irrigators) to intervene in this action, finding it

untimely. (Order, May 25, 2005, at 3-4.) At that time, arguments on summary judgment concerning the 2004 biological opinion had already been heard, and the National Wildlife Federation (NWF) group of plaintiffs expressed what the Court deemed "well-founded" concerns of prejudice in that the intervention would permit the Irrigators "the opportunity to argue against the merits of NWF's case without any corresponding ability of NWF to do so in [the] Irrigators' case". (*Id.* at 3.) Last summer, this Court denied the renewed motion of the Irrigators to intervene, holding it "premature," noting that "challenges to the forthcoming biological opinion are not yet ripe". (Opinion and Order, July 19, 2007.)

The forthcoming biological opinion has now come forth. It has been challenged by plaintiffs and, presuming the Court grants the State of Oregon's application to do so, will shortly be challenged by the State of Oregon. Inasmuch as this Court has determined that prosecution of a claim by the Irrigators against NOAA Fisheries for its continuing failure to utilize the best available science would have "little practical effect" because the Irrigators do not challenge the ultimate "no jeopardy' conclusion, the Irrigators propose to intervene as defendants and focus upon refuting erroneous views concerning the relationship between river velocity and salmon survival to be proffered by the State of Oregon and plaintiffs.

As set forth below, the Irrigators have protectable interests meriting intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedures, as explained in the previously-filed Third Declaration of Dr. Darryll Olsen. In particular, their irrigation interests are threatened by the erroneous theory, advanced by the State of Oregon and plaintiffs, that one can manufacture appreciable numbers of salmon by increasing river velocity.

More broadly, the technical challenges of the State of Oregon to analyses in the Supplemental Comprehensive Analysis (SCA) will, if accepted, inevitably undermine the "no jeopardy" conclusions associated with the entire suite of prospective agency actions analyzed in the Supplemental Comprehensive Analysis, including 2008-2017 *U.S. v. Oregon* Management Agreement Biological Opinion. Inasmuch as NMFS has "tiered" its harvest "no jeopardy" conclusions to the SCA, this Court's rulings on the adequacy of "no jeopardy" conclusions will necessarily expand this Court's brief to harvest issues, and provide important opportunities for the Irrigators to vindicate their interests, and those of the Region, in improved harvest management.

Inasmuch as no other party shares the perspective or interests of the Irrigators, they renew their motion to intervene, this time timely and not prematurely seeking to intervene *before* this Court renders any decisions concerning the forthcoming biological opinion, after plaintiffs have attacked it, and before defendants have even filed their answer.

Argument

I. THE IRRIGATORS SHOULD BE PERMITTED TO INTERVENE AS OF RIGHT IN THIS ACTION.

Under Rule 24(a) of the Federal Rules of Civil Procedure,

> "(1) the motion must be timely; (2) the applicant must claim a `significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action." *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

The rule is to be broadly construed in favor of allowing intervention. *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d

525, 527 (9th Cir. 1983); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). As set forth below, the Irrigators meet each requirement for intervention as of right.

A. This Motion Is Timely

Last time around, this Court set a deadline for intervention associated with the release of the 2004 biological opinion, but the Irrigators elected instead to file a separate action, and only moved for intervention after the scope of this Court's order consolidating the two actions became clear (to them, at least). This time, the proposed schedule before the Court makes no allowance for such intervention, but inasmuch as defendants have yet even to answer plaintiffs' complaint, and the State of Oregon has yet even to file its similar claims, this motion is plainly timely.

B. The Irrigators Have Protectable Interests in this Litigation

1. Interests arising through dam operations.

This Court has already determined that the Irrigators have standing to pursue their own separate actions against the biological opinions covering FCRPS operations. The immediate focus of their interest concerns the operation of John Day Dam and the associated reservoir level, decisionmaking for which can and does directly interrupt their irrigation operations. (*See, e.g.*, [First] Olsen Declaration, filed March 25, 2005 (01-640-RE Dkt. No. 845).) The State of Oregon's latest filing makes it entirely clear that "irrigators" remain a target of the State's ill-conceived agenda for alterations to hydropower operations. (See State of Oregon's [Proposed] Supplemental Complaint-in-Intervention for Declaratory and Injunctive Relief, ¶ 6 & n.2.)

More generally, the Irrigators have for many years sought to improve the quality of scientific decisionmaking, consistent with the commands of the ESA, so as "to avoid

needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives", *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). The attacks of the State of Oregon and plaintiffs would, if accepted, move decisionmaking even further from utilization of the "best scientific and commercial data available", 16 U.S.C. § 1536(a)(2), required under the ESA.

2. Interests in improved harvest management

But for defects in NOAA decisionmaking apparently lacking any remedy in law, the FCRPS has been tuned to optimize salmonid survival to the point where there is no appreciable gain from further operational manipulations, and palpable, serious risk. At the same time, numerous NOAA analyses confirm that harvest impact on listed Columbia Basin salmonids could be dramatically reduced through sound management. This Court's consideration of the State of Oregon's challenges to the lawfulness of NOAA Fisheries' conclusions concerning agency actions analyzed in the 2008 BiOp will necessarily implicate these harvest management decisions.

That is because both the 2008 BiOp on dam operations and the 2008-2017 *U.S. v. Oregon* Management Agreement Biological Opinion are both "tiered"[1] to the Supplemental Comprehensive Analysis (SCA) that contains the core of the jeopardy analyses. (SCA, at 1-4 ("the multiple biological opinions are tiered off of the common SCA").) As NOAA Fisheries explains in the SCA, "NOAA Fisheries' consideration and evaluation of the relevant data and analysis on which these decisions are based, are found in the SCA". (*Id.*)

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[1] The term "tiering" is not analogous to the use of this term for NEPA purposes. Cf. 40 C.F.R. § 1502.2 & § 1508.28. Here the entire, action-specific analysis is contained in the foundational document, rather than just general issue discussions.

Even more specifically, as NOAA Fisheries explains in the 2008 BiOp on dam operations that

> "The fundamental principle, common to all metrics, is that the quantitative component of the jeopardy analysis seeks to determine if the survival changes associated with the Prospective Actions, after taking into consideration the environmental baseline and cumulative effects, meet or exceed the remaining survival gap." (*Id.* at 7-7.)

The "general approach" involves "base, current and future (with Prospective Actions) Analyses" set forth in the SCA (id. at 7-7 to 7-8), which manifestly include future state and tribal harvest among those future actions.[2]

Thus the State of Oregon technical attacks on the SCA foundational metrics and analyses (*see, e.g.,* Proposed Oregon Supplemental Complaint, ¶¶ 16-24) will necessarily, if granted, undermine both the dam and harvest biological opinions. To the extent the Court accepts such attacks, and proceeds to consider the threatened requests for equitable relief, consideration of the public interest implicated in such injunctions will necessarily require consideration of the entire suite of prospective actions to assist listed salmon within the discretionary control of defendant NOAA Fisheries. The Irrigators have commissioned new scientific work proving excessive harvest rates prevent recovery, and

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[2] Although the 2008 BiOp (at xxviii) attempts to define "Prospective Actions" as "[a]ctions from both the FCRPS Biological Assessment and Upper Snake Biological Assessment, August 2007", the 2008 BiOp also states:

> "For the purposes of NOAA Fisheries' Supplemental Comprehensive Analysis there are additional actions NOAA Fisheries is considering *as part of the Prospective Actions*. In addition to the actions considered by the Action Agencies' Comprehensive Analysis, NOAA Fisheries is . . . also considering the effects of in-river salmon and steelhead harvest levels that are the subject of the 2008 Agreement in the *U.S. v. Oregon* litigation concerning state and tribal fishing in the Columbia River." (2008 BiOp at 1-10; *see also* SCA, at 8.2-17.)

are probably the only party both willing and able to provide the Court with accurate information concerning the full range of available options for equitable relief. Inasmuch as the Court of Appeals has previously instructed that the cornerstone purpose of such relief is to "effectuate the congressional purpose behind the statute", *NWF v. NMFS*, 422 F.3d 782 (9th Cir. 2005) (quoting *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002), the Irrigators look forward to assisting the Court, to the extent it identifies errors in the SCA, in crafting relief promoting real salmon recovery.[3]

C. No Other Party Adequately Represents the Interests of the Irrigators

The Ninth Circuit

> "has consistently followed *Trbovich v United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 636 n.10, 30 L.Ed.2d 686 (1972), in holding that the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and that *the burden of making this showing is minimal*." *Sagebrush Rebellion*, 713 F.2d at 528 (emphasis added).

The Irrigators easily meet this minimal showing.

The State of Oregon and the *NWF* plaintiffs obviously cannot represent the interests of the Irrigators. Nor can the Federal defendants, whose decisions continue to mangle the applicable law and misapply pertinent scientific data. While the Irrigators are now intervening to uphold the 2008 BiOp, given the apparent judicial determinations that the law forbids them from improving it, they are the only party that stands ready to resist calls for injunctive relief associated with changes in flow management by demonstrating

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[3] The Irrigators recognize that additional procedural steps may be required properly to put these issues before the Court. However, the proposition that NOAA Fisheries will be collaterally estopped from any defense of the SCA as applied in the harvest biological opinion seems self-evident.

that the federal defendants grossly overstated possible flow-survival relationships. More specifically, they are the only party prepared to show that relief previously sought by the State of Oregon concerning the operation of John Day pool would be positively inimical to the fish.

The Irrigators are the only party willing and able to marshall the pertinent scientific evidence contrary to the positions of the plaintiffs *and* the Federal Defendants, and an interpretation of the Endangered Species Act congruent with its text and plain meaning. The Irrigators are also the only non-governmental parties willing to seek appellate review of this Court's rulings concerning the FCRPS; some initiated appeals from the Court's last injunction, but abandoned the appeals.

The Irrigators are aware that the United States Court of Appeals, in *Irrigators v. Gutierrez*, No. 05-35736, slip op. at 4 (April 6, 2007), added an additional ground in support of this Court's earlier order denying leave to intervene, suggesting that the Farm Bureau defendants could adequately represent the interests of the Irrigators. Whatever may have been the circumstances back in June 2005, the Farm Bureau has no active, ongoing role in this litigation and obviously cannot represent the interests of the Irrigators going forward. (*See also* 3d Olsen Decl. ¶¶ 7-8.) It presently appears they would participate, if at all, only by virtue of membership in "River Partners," a group dominated by electric power interests. (*See* Exhibit A to Declaration of Terry Flores, July 22, 2008, at 2.)

Conclusion

For the foregoing reasons, the Irrigators' Second Renewed Motion to Intervene should be granted.