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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiffs,

Civ. No. 01-0640-RE (Lead Case)
CV 05-0023-RE
(Consolidated Cases)

and

STATE OF OREGON,

NWF'S NOTICE REGARDING
INJUNCTION PROCEEDINGS

Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE, U.S.
ARMY CORPS OF ENGINEERS, and U.S. BUREAU
OF RECLAMATION,

Defendants,

and

NORTHWEST IRRIGATION UTILITIES, PUBLIC
POWER COUNCIL, WASHINGTON STATE FARM
BUREAU FEDERATION, FRANKLIN COUNTY
FARM BUREAU FEDERATION, GRANT COUNTY

FARM BUREAU FEDERATION, STATE OF
IDAHO, INLAND PORTS AND NAVIGATION
GROUP, and KOOTENAI TRIBE OF IDAHO,

Intervenor-Defendants.

COLUMBIA SNAKE RIVER IRRIGATORS
ASSOCIATION, and EASTERN OREGON
IRRIGATORS ASSOCIATION,

Plaintiffs,

v.

CARLOS M. GUTIERREZ, in his official capacity as
Secretary of Commerce, NOAA FISHERIES, and D.
ROBERT LOHN, in his official capacity as Regional
Director of NOAA Fisheries,

Defendants.

COME NOW plaintiffs, National Wildlife Federation, et al. (“NWF”), and notify the Court and the parties as follows regarding injunction proceedings relating to 2007 FCRPS operations:

1. By Order dated December 15, 2006, and based on a joint report from NWF and the federal defendants, the Court directed any party wishing to seek injunctive relief with respect to 2007 FCRPS operations to file such a request and supporting papers on or before January 19, 2007.

2. NWF has evaluated the opportunities to improve FCRPS operations to better protect migrating juvenile salmon during the 2007 spring and summer migration seasons through a motion for further injunctive relief. Based on this review, while it appears that there are changes to river operations that would provide improved survival benefits for ESA-listed salmon, NWF has decided not to file a motion for further injunctive relief with respect to 2007 FCRPS operations for at least four reasons.

3. First, while there are still changes that could be implemented to assist salmon migration under the current FCRPS configuration, from a review of 2006 spring and summer operations, it appears that a request for increased spill to improve juvenile salmon survival, even if it were granted, would be unlikely to increase actual spill levels at a number of FCRPS dams because of the current total dissolved gas caps and the way they are implemented. The gas caps are currently set at 115% in the dam forebays and 120% in the dam tailraces. As the chart below indicates, during the spring of 2006, spill at upstream projects was often limited to less than the court-ordered spill level, even when the 120% tailrace gas cap at that project would not have been exceeded, in order to avoid exceeding the 115% gas cap in the forebay of the next dam downstream.

Project	Total Number of Exceedances during Spring 2006 (Apr 3-June 20 - Snake R.; Apr 20-June 30 - Columbia R.)	Number of Days that Forebay was in Exceedance but Upstream Tailrace was not (Spring 2006)	Proportion of Total Exceedances where the Forebay was in Exceedance while Tailrace was Not (Spring 2006)
Lower Granite	38	10	0.26
Little Goose	53	34	0.64
Lower Monumental	52	23	0.44
Ice Harbor	39	17	0.44
McNary	40	10	0.25
John Day	47	14	0.30
The Dalles	46	37	0.80
Bonneville	64	12	0.19

The Fish Passage Center has estimated that approximately 4.4 million acre feet of court-ordered spill did not occur in the spring of 2006 because spill was managed to meet the 115% forebay gas caps. See Fish Passage Center (hereinafter “FPC”), Memorandum to FPAC re: Spring Spill 2006 (September 29, 2006) at 3 (attached as Exhibit 1) (hereinafter “Memorandum re 2006 Spring Spill”); see also FPC, Presentation to ODEQ (December 2006) (available at http://www.fpc.org/documents/misc_reports/PresentationDEQ_files/frame.htm). If tailrace gas caps and monitors were used for in-season spill management decisions rather than the forebay caps and monitors, or even if forebay gas caps were the same as those in the tailrace, it is likely that as much as 4.1 million acre feet of the 4.4 million acre feet of spill that fish did not receive in 2006 would have been delivered to support juvenile migration. See FPC, Memorandum re 2006 Spring Spill at 3. In addition, spill levels at some or all of the projects could be increased in the future, perhaps significantly, without exceeding the gas caps. As the FPC concluded, even the additional spill ordered in 2006 but not delivered “would have provided additional survival benefits to migrating salmonids by increasing the number of fish that passed a project via spill.”

Id.

4. The problem with the current spill management to meet the 115% forebay gas caps is that solid biological evidence indicates these gas caps are not necessary to protect migrating juveniles from gas bubble trauma. See id. at 10-11 (discussing monitoring results since 1995). In fact, a number of fish managers, including the lower river Tribes and experts at the Fish Passage Center have urged the Corps to either manage dissolved gas based only on the tailrace gas caps, or to seek a gas cap of 120% in the dam forebays, in order to allow increased spill levels that would benefit fish. Unfortunately, for 2007, the 115% forebay gas cap will remain in place and cannot be changed by court order. See infra at ¶ 9 (describing process for setting gas caps). As a consequence, even if NWF were to seek – and the Court were to order – higher spill levels, particularly in the spring, these levels likely could not be consistently achieved because of the effect of the current gas caps.

5. Second, the Court has made clear that it expects improved in-river flows for salmon to be addressed in the preparation of a biological opinion on remand, not through further injunction proceedings. See, e.g., NWF v. NMFS, CV-01-640-RE Opinion and Order (Dec. 29, 2006) (Docket #1221) at 17-18; but see NWF's Response to Federal Defendants' Third Remand Report (filed July 13, 2006) (Docket #1268) at 2 and Exhibits 1-4 (discussing the federal defendants' refusal to consider significant flow changes in the remand process); see also Treaty Tribes' Response to Federal Defendants' Third Remand Report (filed July 13, 2006) (Docket #1269) at 2-3 and (Exhibit A) (same). While NWF believes that strong evidence supports flow improvements, particularly at low flow levels in the late spring and through most of the summer migration seasons, see, e.g., R. Williams, et al., Return to the River: Restoring Salmon to the Columbia River at 296-299 (2006), and while NWF is concerned that these improvements will

not be part of a revised proposed action or RPA, NWF will not seek such relief either in the form of flow enhancements or lower reservoir levels by way of an injunction motion in 2007.

6. Third, the federal defendants have repeatedly asserted that any motion for additional injunctive relief in 2007 would take necessary resources away from completing a revised biological opinion in a timely fashion. Again, while NWF does not agree with this assessment, we are not interested in having further delays in completion of an opinion blamed on such a request. The window for timely completion of a revised biological opinion cannot fairly be extended much past the current due date of July 31, 2007.

7. Finally, as the Court is aware, the four lower Columbia River Treaty Tribes have notified the Court that they do not intend to seek or support any request for injunctive relief with respect to 2007 FCRPS operations based on an agreement they have reached with the Bonneville Power Administration and the Corps of Engineers. See Treaty Tribes' Response re Injunction at 2 (Jan. 9, 2007) (Docket #1303). As is apparent from the papers the Tribes filed in connection with this agreement, the 2007 FCRPS operations to which they have agreed will at least ensure the continuation in 2007 of the 2006 spring and summer spill operations the Court ordered, to the extent they can be implemented. See id. Attachment 1 (pages 9-10 of 18). As the agreement among these parties states, however, the Tribes do not believe these FCRPS operations provide "precedent for any future proceedings" or are adequate "for the long term operation of the federal dams." Id. at 1 of 18.

8. It also appears that factors other than implementation of FCRPS operations in 2007 that would best protect migrating juvenile salmon played a significant role in the Tribes' agreement with BPA and the Corps to forego participation in injunction proceedings this year. Specifically, it appears that preventing the loss of funding for a number of tribal projects and

positions related to ESA-listed and non-listed salmon management (funding that BPA otherwise apparently intended to withhold) played an important role in the agreement. See id. at 1 of 18 (of the agreement's four provisions, only one addresses 2007 operations, the other three address "interim funding for certain tribal projects" and prohibit tribal involvement in injunction proceedings); see also, e.g., id. at 12 of 18 (BPA Letter to Nez Perce Tribe) ("In support of the Agreement regarding 2007 fish operations, we are agreeing to extend/provide the contracts and budget amounts for the remainder of FY07 as noted below . . ."). This agreement also explicitly requires that "[t]he Tribes and Columbia River Intertribal Fish Commission, and their staffs, will not provide direct or indirect support for any other party's position in any legal proceedings conducted to determine what 2007 FCRPS operations will be implemented." Id. at 1 of 18.

9. Even though NWF will not seek further injunctive relief for 2007, it will take steps to ensure that improved river operations can be implemented in 2008 and thereafter, either as part of operations under a legally adequate revised biological opinion or through further order of the Court. The current gas caps are set through waivers of state water quality standards for dissolved gas approved by the states of Oregon and Washington under the provisions of the federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. Unfortunately, on November 30, 2006, the Corps applied to Oregon and Washington for a five-year renewal of the current 115% forebay gas caps for the period 2008 through 2013. See Exhibit 2 (attached) (Corps Letter to ODEQ and WDOE). The fact that the Corps has applied to renew the gas caps at the current level suggests strongly that the federal agencies do not intend to propose any significant changes to river operations, or even a continuation of the current court-ordered spill program (let alone increased spill), to benefit ESA-listed salmon in preparing a revised proposed action and biological

opinion. Nonetheless, NWF will urge the states of Oregon and Washington, through upcoming public comment on the Corps' pending water quality standard waiver application, to approve either forebay gas caps of 120% or dissolved gas management based on the tailrace gas caps in light of the biological evidence that increased spill will benefit salmon and the evidence that the current 115% forebay gas caps contribute little or nothing to salmon protection. In the absence of such a change, continued status quo river operations appear all but inevitable.

10. Improving river operations to benefit migrating juvenile salmon is as urgent now as ever. The increased spring spill the Court ordered in 2006 and the increased summer spill it ordered in 2005 and 2006 have produced some of the highest in-river juvenile survival rates in years and have allowed more juvenile salmon to migrate in the river under better conditions. See, e.g., NOAA Fisheries – Northwest Fisheries Science Center, Preliminary Survival Estimates 2006 Spring Juvenile Migration at 1-4 (Aug. 30, 2006) (attached as Exhibit 3) (“[h]igher survival for in-river migrants in 2006 was likely the result of higher flows and greater volumes of water spilled [as well as the operation of the RSWs]”); see also FPC, 2005 Annual Report at 71, 75, 78, 81, & App.1 (July 2006); FPC, Subyearling Chinook Survival in Lower Granite to McNary Dam Reach in 2006 Compared to Years 1998 to 2005 at 18 (Oct. 5, 2006).

11. However, as the most recent analyses from the Comparative Survival Study (CSS) demonstrate, at least for Snake River Spring/Summer chinook and steelhead, these species continue to decline under the current constraints on FCRPS operations, see 2006 Final Comparative Survival Study Report at xvii-xviii (wild chinook smolt-to-adult return rates declining), xix (wild steelhead smolt-to-adult return rates declining), 30 & Figure 17 (same points in graph form) (full report available at http://www.fpc.org/documents/CSS/144-06_FINAL%202006%20CSS%20ANNUAL%20REPORT.pdf), and it is unlikely that the

modest court-ordered spill increases that have occurred recently will alone change this picture significantly. Indeed, as Figure 17 and other information in the 2006 Final CSS Report shows, survival rates for both Snake River Spring/Summer chinook and Snake River steelhead are now below the level that would be necessary to sustain these populations and avoid extinction – and for Spring/Summer chinook, they are far below this level.

12. Moreover, the Oregon Department of Fish and Wildlife and the Washington Department of Fish and Game recently have released their projections for 2007 adult returns which indicate that almost all Columbia River salmon and steelhead populations are expected to have returns for both hatchery and wild fish in 2007 that are similar to or lower than the already low returns the region saw last year. See Oregon Department of Fish & Wildlife & Washington Department of Fish & Game, 2006 Adult Returns and 2007 Expectations: Columbia River (Preliminary – Dec. 8, 2006) (attached as Exhibit 4). Of course, only a very small fraction of these overall returns are naturally spawning wild salmon.

Respectfully submitted this 12th day of January, 2007.

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