



Chambers of  
**JAMES A. REDDEN**  
United States District Judge

*United States District Court*

**DISTRICT OF OREGON**  
1527 United States Courthouse  
1000 S.W. Third Avenue  
Portland, Oregon 97204-2902

December 7, 2007

To: Counsel of Record in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., CV 01-640 RE, and American Rivers v. NOAA Fisheries, CV 04-00061 RE  
From: Hon. James A. Redden  
Re: December 12, 2007 In-Court Status Conferences

Dear Counsel,

Federal Defendants should be commended for their effort in assembling and analyzing a massive amount of technical and scientific information, but I share Plaintiffs' concerns that the draft biological opinions ("draft BiOps") for the Federal Columbia River Power System ("FCRPS") and the upper Snake River Basin fail to satisfy the biological and legal requirements of the Endangered Species Act ("ESA"), its implementing regulations, and the relevant case law. These are "draft" biological opinions and Federal Defendants have not yet had an opportunity to respond to the parties' comments. I remain hopeful that they will produce final Biological Opinions that are scientifically and legally defensible. I encourage Federal Defendants to continue to discuss and consider additional improvements to these draft opinions. On Wednesday, December 12, 2007, the parties should focus on the following issues:

(1) Whether the Jeopardy/Metrics Analysis is legally or scientifically flawed.

Is the "likely to trend toward recovery" standard consistent with the requirements of the ESA, its implementing regulations, and the relevant case law? Is it based on the best available science?

(2) Whether the proposed mitigation measures are reasonably certain to occur.

The draft BiOps appear to rely heavily on various hydro, habitat, and hatchery mitigation actions that are not reasonably certain to occur and/or not certain to benefit listed species within a reasonable time. Many of the proposed Research, Monitoring, and Evaluation actions appear to be contingent on uncertain funding. As Federal Defendants are keenly aware, the final biological opinions must ensure that these actions are "reasonably certain to occur." The parties should be prepared to discuss whether Federal Defendants' proposed habitat and hatchery improvements are reasonably certain to benefit the species within a reasonable period of time.

(3) Do Federal Defendants plan to include additional mitigation actions in the final BiOps?

The parties point out that the hydro actions included in the draft FCRPS BiOp provide less protection for listed species than Federal Defendants' previous biological opinions. Federal Defendants do not appear to be seriously considering any deviation from status quo operations in the upper Snake River. Are there any additional hydro measures that Federal Defendants plan to include in the final biological opinions? Are there any additional mitigation measures Federal Defendants could include in the final BiOps? Federal Defendants need to respond to the parties' specific comments regarding potential improvements in dam operations, and habitat restoration. The State of Oregon indicates that the parties are discussing additional actions that may significantly improve dam operations. We need to discuss this.

(4) Is the FCRPS BiOp is consistent with the United States' Treaty Commitments?

Federal Defendants should address the Treaty Tribes' concern that the "draft FCRPS BiOp for 2008-2017 fails to acknowledge and incorporate the Treaty fisheries (and the non-Indian fisheries) that will occur during this time period pursuant to United States v. Oregon." See Treaty Tribes Joint Comments, at 2 (Dec. 12, 2007). Will the Final BiOp for the FCRPS reflect the abundance-based harvest rate schedule for Group B steelhead, which the parties to United States agreed to as part of the new 10-year Columbia River Fish Management Plan? Will Judge King need to consider, or rule on any of these issues?

(5) Do the draft BiOps rely on the best available science?

Several of the parties are concerned that the 2007 Draft BiOp is not guided by the best available science. When we have the final BiOps, I may consider appointing a panel of

independent scientists to evaluate Federal Defendants' biological analyses and conclusions. I may also ask the independent scientific panel to advise the court as to the biological benefits of additional mitigation measures, such as flow augmentation, spill, and reservoir drawdowns. I would like to hear the parties' responses to such an approach.

(6) What happens next?

(a) Notice and Comment. There seems to be some confusion as to deadline for public comments on the 2007 BiOps. Given the massive amount of information included in these biological opinions and the importance of the issues presented, I believe the deadline for public comments should be extended until December 30, 2007, at the earliest. This will give the parties and the public an opportunity to fully express their concerns with draft biological opinions.

(b) Final Biological Opinions. I am certainly willing to allow Federal Defendants additional time to complete the final biological opinions if needed to produce legally and biologically sound final biological opinions.

(c) Supplemental Injunctive Relief. Plaintiffs have indicated that they intend to move for supplemental injunctive relief. The parties should be prepared to briefly discuss what that relief might entail, as well as a briefing schedule for any motions.

When I remanded the 2004 FCRPS BiOp, I instructed Federal Defendants to consider all mitigation measures necessary to avoid jeopardy, including removal of the four lower Snake River Dams, if all else failed. I also instructed Federal Defendants to ensure that any mitigation measures were reasonable certain to occur. Despite those instructions, the Draft FCRPS and upper Snake River BiOps again appear to rely heavily on mitigation actions that are neither reasonably certain to occur, nor certain to benefit listed species within a reasonable time. Moreover, Federal Defendants seem unwilling to seriously consider any significant changes to the *status quo* dam operations. It appears that Federal Defendants have abandoned the Conceptual Framework they committed to during the early phases of this remand. Are you now relying on the jeopardy/metrics analysis? Do Federal Defendants believe that the recovery prong of the jeopardy analysis will be satisfied if the species is "likely to trend towards recovery" within a reasonable time? Does this standard comply with the ESA's "best available science" and recovery standards?

I remanded both the 2000 and 2004 BiOps because I was confident Federal Defendants

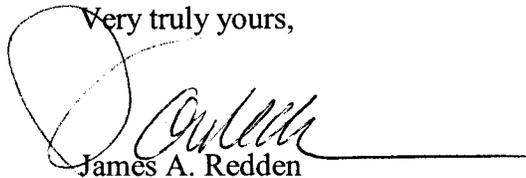
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could correct the specific flaws in those biological opinions. If this FCRPS BiOp fails, it is not likely to be remanded again. If I decide not to remand the BiOp, but decide to simply vacate the opinion instead, would this not result in wrongful "taking" by the Corp of Engineers, the Bonneville Power Administration, and the Bureau of Reclamation? What are the consequences of such "takings"? Will non-treaty fisheries be subject to "takings" liability?

Alternatively, a flawed biological opinion may result in a permanent injunction directing Federal Defendants to implement additional spill and flow augmentation measures, to obtain additional water from the upper Snake and Columbia Rivers, or to implement reservoir drawdowns to enhance in-river flows. We have an opportunity to get this right. I remain hopeful that the parties will do what needs to be done.

Very truly yours,

A handwritten signature in black ink, appearing to read 'James A. Redden', with a long horizontal line extending to the right.

James A. Redden

United States District Judge

JAR:js