

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, *et al.*,

Defendants.

Civ.No. CV01-00640-RE

**SECOND DECLARATION OF
D. ROBERT LOHN, IN
SUPPORT OF REMAND
PROPOSAL**

I, D. Robert Lohn, aver as follows:

1. As stated in my previous declaration of April 22, 2005, I am the Regional Administrator of the Northwest Region of the National Marine Fisheries Service (NMFS or NOAA Fisheries Service), an agency within the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, a position I have held since October 2001. Prior to coming to NOAA Fisheries Service I have, over the past decade, held various positions relevant to Columbia Basin salmon issues. From 1987 to 1994, I served as the General Counsel to the Northwest Power Planning Council, now known as the Northwest Power and Conservation Council. After that I managed the fish and wildlife division of the Bonneville Power Administration from 1994 to 1999. Most recently, before coming to NOAA Fisheries Service, I held the position of Director of the Fish and Wildlife Division for the Northwest Power and Conservation Council.
2. The NOAA Fisheries Service's Northwest Region is responsible for the administration of the Endangered Species Act (ESA) for anadromous Pacific salmonids (species of salmon and steelhead) originating within the states of Oregon, Washington and Idaho and for other marine species. These responsibilities include: recommending ESA listings and designation of critical habitat for endangered and threatened marine species to the NOAA Assistant Administrator for Fisheries; preparing recovery plans for listed species; and conducting Section 7 consultations and

**SECOND DECLARATION OF D. ROBERT LOHN
(REMAND PROPOSAL)**

Page 1

issuing Section 10 permits for activities that may adversely affect or take listed species or modify their critical habitat. With particular relevance to this case, I oversaw implementation of the 2000 FCRPS Biological Opinion's Reasonable and Prudent Alternative (RPA) from October, 2001. I also managed the development of the biological opinion for the Federal Columbia River Power System (FCRPS) and 19 U.S. Bureau of Reclamation (BoR) projects issued by NMFS on November 30, 2004, most recently invalidated by this court's opinion of May 26, 2005.

3. I have carefully reviewed the Court's May 26, 2005 Opinion, as well as its May 7, 2003, Opinion, and I have consulted with executives from the FCRPS Action Agencies and have had numerous, lengthy discussions with my staff. Based on this review and upon my experience with ESA consultations for the FCRPS and BoR, it is my opinion that at least 24 months, that is, until or after October, 2007, will be necessary to complete a new consultation on remand. This will comprise two major tasks: 1) the FCRPS Action Agencies will develop a program of operations and actions for the FCRPS and BoR projects, which I understand will be done by working with the states, tribes and stakeholders of the Columbia Basin; and 2) NOAA Fisheries Service will prepare an ESA § 7(a)(2) biological opinion (BiOp) for such a program. This declaration presents the basis for my opinion.

4. For the purposes of this analysis, I am assuming NOAA Fisheries Service and the FCRPS Action Agencies will be working to develop an approach for applying the ESA consistently with this Court's rulings in this case dated May 7, 2003, and May 26, 2005.¹ The time necessary to issue a new biological opinion consistent with these rulings is determined by the need to develop sufficient information to enable a full and adequate biological analysis, and to inform the development of any required offsetting beneficial actions (sometimes referred to as "mitigation") to satisfy ESA § 7(a)(2). The effort to implement a remand will therefore necessarily involve the simultaneous development of NOAA's biological opinion and the Action Agencies' underlying

¹ We anticipate we will need to work to develop an opinion that would comply with this Court's decision even though NOAA Fisheries Service may be simultaneously seeking review of the legal issues in the 9th Circuit Court of Appeals.

proposal for a program of actions and, potentially, will involve consideration and development of certain other federal and non-federal activities.

5. In my view, the biological opinion to be prepared under a remand will require a methodology that differs in important respects from that applied in NOAA's 2000 FCRPS BiOp, invalidated by this Court in 2003, and in NOAA's 2004 FCRPS BiOp, invalidated this year. The new methodology must be different to collectively address the Court's concerns with each of those prior opinions. In the course of developing this new approach, certain analyses that were not fully developed for the 2004 FCRPS BiOp will need to be more fully developed. The analysis of recovery for the jeopardy and critical habitat standards will necessarily be more thorough than was possible for the 2000 FCRPS BiOp, which focused primarily on the productivity (λ) of the listed salmon and steelhead, listed in Evolutionarily Significant Units (ESUs). Since 2000, NOAA Fisheries Service's Pacific Salmonid Biological Review Team and the Technical Recovery Teams, which have been laying the scientific basis for recovery planning, have added additional factors to the consideration of ESU viability for recovery purposes. For analysis under the remand, NOAA Fisheries Service may need to incorporate the additional viability criteria of abundance, genetic diversity and spatial distribution. Also, there remains the issue raised by the Court's 2003 ruling. In particular, while we must evaluate the total effects of the projects on the likelihood of recovery, which involves estimation of future effects, we must also adhere to the regulatory limitations on considering future actions that are not reasonably certain to occur or have not undergone § 7(a)(2) consultation. A new methodology to implement the Court's rulings must address these and other analytical issues.

6. Recognizing that Section § 7(a)(2) dictates that NOAA Fisheries Service must base its opinion on the best science currently available, we must also gather any additional scientific data or analysis that may be available during the course of the remand to augment the science on which the 2004 BiOp was based. Furthermore, since the 2004 BiOp was issued on November

30, 2004, NOAA Fisheries Service has issued a final rule revising listing determinations for seven of the thirteen ESUs previously considered in the 2004 BiOp² and, on September 2, 2005, a rule designating critical habitat for all remaining ESUs affected by the FCRPS and BoR projects.³ The next biological opinion must reflect consideration of any effects by the FCRPS and the 19 BoR projects on all ESU's, using current listing determinations, and on the newly designated critical habitat.

7. My estimate that at least 24 months (until October 2007) is necessary to allow for a fully developed biological opinion that would replace the 2004 FCRPS BiOp is based on several particular considerations. First there is the increased focus on recovery in the jeopardy analysis as the decision of the Court would require. When NOAA Fisheries Service issued the FCRPS BiOp in 2000, the federal agencies issued a Basinwide Salmon Recovery Strategy which called for the development of subbasin plans to serve as building blocks for ESU-specific recovery plans throughout the Columbia Basin. Subbasin plans have been completed with the oversight of the Northwest Power and Conservation Council, which also uses these plans to guide salmon and steelhead conservation funding decisions in the Columbia Basin. The rationale for this program is that communities in watersheds affected by the needs of salmon, in concert with federal agencies, should develop recovery plans, thereby enhancing regional support and the likelihood such plans will be implemented. It is NOAA Fisheries Service's goal to utilize these locally-developed plans as the basis for draft recovery plans. After opportunity for public comment on the draft plans and revisions based on such input, NOAA Fisheries Service has as its goal to issue them in final form for all Columbia Basin ESUs in December 2006. Each recovery plan would contain NOAA Fisheries Service's biological criteria for determining when a species of

² While the seven ESUs remain listed with the same 'endangered' or 'threatened' determination, NOAA Fisheries Service must consider the revised definition of the ESUs and the basis for that revision. At the same time, NOAA Fisheries Service extended its consideration of listing revisions for all steelhead ESUs, including those in the Columbia Basin, for another six months. See 70 Fed.Reg. 37160 (June 28, 2005). A final rule for steelhead ESUs is, therefore, likely to be issued before this remand is concluded.

³ See 70 Fed.Reg. 52630-52858 (Sept. 2, 2005). The designations of critical habitat for three Snake River ESUs considered in the 2004 FCRPS BiOp were not affected by this rule.

salmon or steelhead may be delisted, no longer requiring ESA protection, which will inform analysis of the likelihood of recovery for each ESU. Additionally, the recovery plans would identify those “measures for survival and recovery specific to other life stages” that would be considered in a life-cycle analysis similar to the analysis used in 2000 (2000 FCRPS BiOp p. 1-8). Consistent with the Court’s 2003 decision, NOAA Fisheries Service would have to determine which non-Federal conservation actions in the recovery plans are reasonably certain to occur and which Federal actions have already completed § 7(a)(2) consultation.


8. Just as recovery plans would benefit from the involvement of the affected communities, the federal agencies believe the elements of a program of operations and actions for the FCRPS and BoR projects should be the subject of substantive discussions with affected states, tribes and stakeholders. The Declaration of Colonel Gregg Martin, to be filed with the Court with my declaration, describes the Action Agencies’ proposal for collaborative discussions regarding the proposed action that may be submitted to NOAA Fisheries Service for ESA § 7(a)(2) consultation. This regional process could go forward at the same time as recovery planning is proceeding toward completion.

9. Also at the same time, NOAA Fisheries Service proposes three or more meetings to discuss biological issues among regional scientists possessing relevant scientific expertise. The purpose of these meetings would be to exchange ideas regarding the relevant scientific information and analytical tools necessary for NMFS to make its assessment of the effects of any proposed actions and the likely probabilities of survival and recovery for each salmonid ESU. These discussions would include a review of recovery planning analyses from Technical Recovery Teams and draft recovery plans from regional recovery boards and NOAA Fisheries Service. Additionally, the review would include identification of policy determinations that ultimately NOAA Fisheries Service would need to make in order to complete the analyses. NOAA Fisheries Service has already initiated an informal collaboration with state and tribal scientists to revise the Simulated Passage (SIMPAS) model that NOAA Fisheries Service used in the 2004 FCRPS BiOp to estimate the survival of juveniles passing through the FCRPS corridor.

Similar scientific discussions may be useful for analyzing the effects of short-term and long-term impacts to critical habitat in the context of salmonid life-cycles and migratory patterns.

10. Given the number of ESUs involved in this opinion, the broad geographical scope of designated critical habitat, and the need to fully develop the types of information and analyses referenced above, in my opinion, any less time than 24 months for this effort would constrain agency decision making and negatively affect the nature and thoroughness of the BiOp as well as the underlying proposed action. The first portion of this time must be devoted to laying the groundwork for the consultation by allowing the Action Agencies to determine any revisions to the FCRPS proposed action, completing work on recovery plans based on subbasin planning and developing the analytical tools required to apply the ESA standards. This work would benefit from discussions with the State and tribal salmon co-managers, other affected sovereigns and the many non-governmental stakeholders in the Columbia Basin. A conservative estimate is that this portion of a remand is not likely to be completed in the first 12 months. The latter phase of this remand effort is to implement the planning achieved during the first 12 months. Actions must be sufficiently developed to be included in a § 7(a)(2) consultation, whether for the FCRPS or other federal agencies, and to meet the “reasonably certain to occur” standard for non-federal activities. Finally, NOAA Fisheries Service must produce a biological opinion that presents an RPA, if necessary, and that fully displays and explains the determinations made to enable public understanding. This latter phase is also likely to take at least 12 months, and probably substantially longer. I estimate that these overlapping phases collectively will require a total of 24 months.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 19, 2005.


D. Robert Lohn