

NATIONAL WILDLIFE FEDERATION, IDAHO WILDLIFE FEDERATION,
WASHINGTON WILDLIFE FEDERATION, SIERRA CLUB, TROUT
UNLIMITED, PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, IDAHO
RIVERS UNITED, IDAHO STEELHEAD AND SALMON UNITED,
NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, FRIENDS OF
THE EARTH, SALMON FOR ALL, COLUMBIA RIVERKEEPER, NW
ENERGY COALITION, FEDERATION OF FLY FISHERS, and AMERICAN
RIVERS, INC.

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

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, and BPA CUSTOMER GROUP,

Defendants-Intervenors.

On Appeal from the United States District Court for the District of Oregon
Judge James A. Redden, CV 01-640-RE

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 OF THE
FEDERAL APPELLANTS FOR A STAY PENDING APPEAL**

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(2) Facts Showing Existence and Nature of Emergency

On June 10, 2005, the district court entered a mandatory preliminary injunction in this Endangered Species Act (ESA) case, requiring the United States Army Corps of Engineers (Corps) to 1) provide summer spill at Lower Granite, Little Goose and Lower Monumental dams and provide increased spill at Ice

Harbor Dam from June 20, 2005, through August 31, 2005, and 2) provide summer spill at McNary dam from July 1, 2005, through August 31, 2005. Injunction Opinion and Order (Attachment A).^{1/} An emergency stay of the injunction is critical because the injunction will prevent the Corps from implementing NOAA's strategy of maximizing the transport of juvenile Snake River Fall Chinook Salmon, the management strategy with the least risk of harm to their survival. Lohn Decl. ¶15-20 (Attachment C); 2004 BiOp at D-20 (Attachment K).^{2/} The spill ordered by the injunction may also harm listed fish by elevating the total dissolved gas in the river. Ponganis Decl ¶69-71 (Attachment D); Henriksen Decl. ¶23-25 (Attachment E). Additionally, the injunction will lower electricity production by the Bonneville Power Administration (BPA), at an estimated cost to ratepayers of approximately \$67 million. Norman Decl. ¶4 (Supp. Attachment). The harm caused by the injunction is immediate and irreparable. Accordingly, the Appellants ask the Court to grant a stay as soon as possible, but no later than **June 21, 2005**. Pursuant to Federal Rule of Appellate

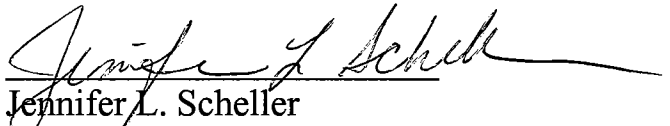
^{1/} In simple terms, "spill" as used herein means passing water through the spillgates of the dams instead of directing it through turbines for power generation.

^{2/} Attached in support of this motion are, in addition to documents submitted to the district court, two new declarations: (1) a June 14, 2005 declaration of Paul E. Norman, Senior Vice President of the Power Business Line, BPA; and (2) a June 14, 2005 declaration of Gregory K. Delwiche, Vice President, Environment, Fish and Wildlife, BPA. Declarations of both of these persons were filed in the district court; the new ones provide updated information.

Procedure 8(a), the Appellants moved for a stay in the district court. The district court denied this motion. Clerk's Record (CR) 1014.

(3) Notification and Service of Motion on Counsel

On June 15, 2005, the United States filed the Notice of Appeal in the district court. On June 15, 2005, the United States filed this Rule 27-3 motion and served the parties by overnight Federal Express and electronic mail, and the amici by regular mail and electronic mail. Counsel for all parties were notified of the filing of this motion on June 15, 2005, by electronic mail (where e-mail addresses were available), and counsel for the Plaintiffs-Appellees were also notified by telephone.


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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY PENDING APPEAL**

Pursuant to Fed.R.App.P. 8(a) and Circuit Rule 27-3, appellants, the United States Army Corps of Engineers (Corps), the United States Bureau of Reclamation (Bureau), and the National Marine Fisheries Service (also known as the NOAA Fisheries Service (NOAA)) respectfully move this Court to stay the preliminary injunction entered by the district court on June 10, 2005. The district court took the unprecedented step of experimenting with salmon migration by altering longstanding Corps summer operations at five dams along the Snake and Columbia rivers, which have been based on years of research and careful management of out-migrating juvenile salmon. The court has imposed an unproven approach to river operations based on its faulty understanding of the governing law and the facts relevant to summer spill. Specifically, the injunction requires the Corps to provide large amounts of summer spill at the dams, which will significantly reduce the number of fish transported in barges, leaving a large proportion to migrate under the adverse in-river conditions in this low water year. Lohn Decl. ¶¶15-20. In so doing, the Court has substituted, at best, an experiment regarding the effects of spill on summer migration for the considered judgment of NMFS scientists as to what will work best to ensure salmon survival for this summer. The Court's error is exacerbated by the fact that it does not point to any specific findings or evidence in the record to justify this experiment, nor does it even address any of the numerous declarations and evidence put forward by NMFS and the Corps to the contrary. Instead, the Court

rests its order on mistaken interpretations of past NOAA statements and ultimately on the conjecture, not evidence, that additional spill may benefit salmon this summer. Moreover, even beyond the untested nature of the Court's spill order, on its face, the court's order does not contemplate careful management of the spill to avoid the likelihood of total dissolved gas exceedances, which would violate state water quality standards and expose fish to harm. Henriksen Decl. ¶¶23-25. The spill will also reduce power generation at the dams, resulting in millions of dollars in foregone revenues and likely increasing electricity rates. The federal defendants are likely to prevail on the merits of their appeal because the district court incorrectly characterized the nature of the violation it found, abused its discretion in assessing the relative harm to the parties and the fish, abused its discretion in issuing a remedy which is speculative as to whether it will redress the alleged harm and may very well make things worse, and committed legal error in its non-final order granting summary judgment to the environmental plaintiffs (collectively, NWF) and intervenor-plaintiff State of Oregon. (Attachment B).

The district court denied Appellants' oral motion for a stay on June 10, 2005. Clerk's Record (CR) 1014. A Notice of Appeal was filed on June 15, 2005. For the reasons below, Appellants respectfully request that this Court stay the preliminary injunction pending appeal on or before **June 21, 2005**. All grounds advanced in support of this motion were presented to the district court.

INTRODUCTION

In these consolidated cases, NWF and other parties challenge the 2004 Biological Opinion (2004 BiOp) and the Corps' and Bureau's Records of Decision (RODs) governing operations of the Federal Columbia River Power System (FCRPS).^{3/} On May 26, 2005, the district court found the 2004 BiOp legally flawed in four respects and entered a non-final order granting summary judgment against NOAA only and in favor of NWF. On June 10, 2005, the district court entered an order finding the Corps' and Bureau's (collectively, the action agencies) RODs flawed for relying on the 2004 BiOp and granting injunctive relief requiring the Corps to provide additional spill at five dams on the lower Snake and Columbia rivers.

BACKGROUND

A. Statutory Background

Section 7(a)(2) of the Endangered Species Act ("ESA"), provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat ...unless such

^{3/} The FCRPS is a system of 14 dams and associated facilities on the Columbia and Snake rivers located in Idaho, Montana, Oregon and Washington. The projects are operated under a variety of statutory mandates for multiple purposes, including recreation, fish and wildlife, water quality, water supply, providing hydropower to the Pacific northwest, flood control, navigation and irrigation. *See* Ponganis Decl. ¶4.

agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

16 U.S.C. § 1536(a)(2). Regulations implementing Section 7(a)(2) are set forth at 50 C.F.R. Part 402 (excerpted at Addendum). The regulations state: “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. 402.03 (emphasis added). *See also Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1075-76 (9th Cir. 2001) (describing ESA section 7 process).

B. Factual Background

1. The 2004 BiOp

The approach taken in previous biological opinions on the FCRPS and the case law that followed provide important context for understanding the analytical approach taken in the 2004 BiOp. Since the first listings of salmon under the ESA in 1991, the action agencies have repeatedly consulted with NOAA. *NWF v. NMFS*, 254 F. Supp. 2d 1196, 1200-01 (D. Or. 2003). The 2004 BiOp, which the Court invalidated in the May 26 order, was the most recent comprehensive BiOp on the FCRPS. Immediately preceding it was the 2000 Biological Opinion (2000 BiOp), which was a jeopardy opinion that proposed a Reasonable and Prudent Alternative (RPA) to avoid jeopardy. *Id.* at 1201; *see also* 16 U.S.C. 1536(b)(3)(A) (describing RPAs). The 2000 BiOp did not attempt to address the narrow question posed by the regulations of whether “the action” was “likely to jeopardize.” Rather, it took a broader, range-wide approach which was a product of the consultation history and the

regional interest in a broad analysis focused on the species' entire life-cycles. *See* 2000 BiOp at 1-8 to 1-12 (Attachment N). Rather than focusing precisely on the effects of "the action," NOAA attempted to predict the likelihood that the biological needs of the listed fish species would be met over the next 100 years in light of many predicted future actions to be taken by many actors (not just the action agencies) throughout the species' range. *See* 2004 BiOp at 1-5. This approach necessarily included in its consideration elements that did not fall into the categories set out at 50 C.F.R. § 402.02.

On May 7, 2003, the district court (Judge Redden) held that the 2000 BiOp was invalid, finding that NOAA had impermissibly included in its analysis federal actions that had not undergone Section 7 consultation (and thus were not properly in the "environmental baseline") and non-federal off-site mitigation actions that were not reasonably certain to occur (and thus not properly "cumulative effects"). *NWF v. NMFS*, 254 F. Supp. 2d at 1213.⁴ The court remanded to NOAA, which was "to insure that only those range-wide off-site non-federal mitigation actions that were reasonably certain to occur, are considered in the determination whether any of the 12 salmon ESUs will be jeopardized by continued FCRPS operations." *Id.* at 1215.

On remand, the action agencies' proposed action – designated the Updated Proposed Action (UPA) – was similar to and based upon the 2000 BiOp's RPA (as

⁴ The court also found that NMFS had defined the "action area" too narrowly in light of the apparent reliance NOAA had placed on mitigation beyond the defined action area. *Id.* at 1212.

refined and updated). 2004 BiOp at 2-3-4. The 2004 BiOp concludes that the UPA is not likely to jeopardize the continued existence of the fish, nor to destroy or adversely modify designated critical habitat. 2004 BiOp at 8-1-38. Thus, the 2000 BiOp and 2004 BiOp are largely consistent as to the result.

The analytical approach taken in the 2004 BiOp is different, however. NOAA concluded that it could not predict future effects to fish while providing the certainty about future actions demanded by the district court's 2003 opinion and that the court's holding had effectively rejected the range-wide, long-term approach and scientific tools utilized in the 2000 analysis. A.R. C.293 at 1-13 (Attachment M);^{5/} 2004 BiOp at 1-5. NOAA refined its analytical approach to conform the 2004 BiOp more closely to actual Section 7 requirements. A.R. C.293 at 1-13. Rather than comprehensively attempting to predict and consider the full range of effects to which the fish would be subjected up to 100 years into the future, NOAA isolated the effects of "the action" in order to focus its analysis precisely on them. To do this, NOAA applied 50 C.F.R. § 402.03, which required parsing out those parts of "the action" that were discretionary and therefore subject to consultation. 2004 BiOp at 1-9; *id.* at 5-1. The dams' existence and certain non-discretionary ongoing operations were thus properly identified as part of the pre-existing "environmental baseline," rather than part of the "action" upon which the action agencies must consult. *Id.* at 5-1. This followed from the fact that the agencies lack discretionary control over these

^{5/} All references to "A.R." refer to NOAA's record for the 2004 BiOp.

elements.

The 2004 approach also reflects the principle that the inquiry under Section 7(a)(2) should be whether or not the direct or indirect effects of the discretionary action are likely to “jeopardize the continued existence of” a listed species, as defined in the regulations, 50 CFR § 402.02, or result in the destruction or adverse modification of designated critical habitat. That is, the inquiry under the statute and regulations is not whether the effects of the discretionary action when added to the baseline and cumulative effects would result in “jeopardy” (which is not defined in the regulations) or adverse modification. A.R. C.293 at 1-4, 1-38 to 1-39. “Jeopardize the continued existence of” is defined in the regulations, and means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. 402.02.

To estimate the incremental effects that would be added to the baseline if the proposed action were implemented, NOAA compared the effects of the UPA to a hypothetical “Reference Operation.” 2004 BiOp at 5-5 to 5-6; A.R. C.293 at 1-23 to 1-24. The Reference Operation is a set of theoretical operational parameters for the dams that would maximize fish survival.⁹ NOAA concluded that for three

⁹ The Reference Operation comprises a set of theoretical operational parameters for the dams that, given their existing structures, would maximize fish survival. Conversely, the adverse effects of such an operation would be beyond the

species, the UPA would cause no net reduction as compared to the Reference Operation. See 2004 BiOp at 8-4 (Table 8.1). As to the other ten species, NOAA found reductions in the short term, *id.*, but determined that over the ten-year term of the action, as the beneficial off-site actions and hydrosystem configuration improvements are implemented, the positive effects would counterbalance initial negative effects. *Id.* at 1-12 and 8-1; *see also e.g., id.* at 8-8 to 8-12 (summary of Snake River fall chinook analysis). NOAA went on to determine that the short-term reductions would not constitute an “appreciable” reduction in terms of the species’ likelihood of both survival and recovery and thus inherently could not be likely to “jeopardize the continued existence of” any listed species. *Id.* at 8-4 (Table 8.1).

2. The Spill Regime Prior to the Court’s Injunction

Under the 2004 UPA (and previously under the 2000 BiOp RPA), there is usually no summer spill at Lower Granite, Little Goose, and Lower Monumental Dams on the lower Snake River and McNary Dam on the Columbia River (collectively, the collector projects). *See* Lohn Decl. ¶15-20; 2004 BiOp at D-20. Under both, however, there would be some spill at Ice Harbor, though not as much as the court ordered. *See* 2000 BiOp at 9-89 (Table 9.6-3); UPA at 50 (Table 4) (Attachment L). The absence of summer spill at the collector projects allows the

agencies’ discretion to avoid. 2004 BiOp 5-6. For more information on how NOAA determined what operations to include in the Reference Operation – including its conservative and precautionary approach – see 2004 BiOp 5-5-8; A.R. C.293 at 1-24.

Corps to maximize collection of migrating juvenile Fall Chinook. Lohn Decl. ¶15. The Corps then transports the fish to below Bonneville dam (the furthest downstream dam on the Columbia), where they can continue their migration unimpeded by dams. *Id.* This mode of operation reflects NOAA's determination, based on the current state of knowledge, that transportation at the collector projects is preferable to spill during the summer. *Id.* at ¶16-20. If there is spill at the collector projects, a large portion of fish will migrate through the spillways and not be collected for transportation. *See id.* ¶15.

C. Procedural Background

On May 26, 2005, the district court granted NWF's and Oregon's motions for summary judgment, holding that the 2004 BiOp was invalid because, in the court's view, NOAA: 1) improperly excluded non-discretionary elements of the proposed action, 2) based its jeopardy analysis on the net incremental effect of the discretionary actions rather than basing it on the aggregation of impacts from the environmental baseline, cumulative effects, and the action, 3) failed to adequately consider short term impacts to critical habitat in light of considerations of the species' life cycles and migration patterns and in the absence of knowing the in-river survival rate needed to ensure recovery, and 4) failed to specifically analyze the listed species' prospects for recovery in its jeopardy determination.⁷ Attachment B.

⁷ The court found it unnecessary to reach NWF's other claims and rejected the irrigator plaintiffs' claims.

NWF⁸ had previously moved for a preliminary injunction. CR 834. The district court issued an injunction on June 10, 2005, requiring the action agencies to:

- (1) Provide spill from June 20, 2005, through August 31, 2005, of all water in excess of that required for station service,⁹ on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and
- (2) Provide spill from July 1, 2005, through August 31, 2005, of all flows above 50,000 cfs, on a 24-hour basis, at the McNary Dam on the Columbia River.

Op. 10-11.¹⁰ In issuing this relief, the June 10 order contains one citation to the record to support its findings and wholly fails to address the government's numerous

⁸ Although the State of Oregon joined NWF in arguing that the 2004 BiOp is invalid, Oregon did not affirmatively support NWF's request for injunctive relief at the June 10, 2005, injunction hearing. Washington, Idaho, and Montana expressly opposed the request.

⁹ Station service is the water needed to maintain adequate generators on the electrical system to provide the station service needs of the projects themselves and to provide voltage control and support for the FCRPS electrical transmission system, but not to supply electricity to the system for sale. Schiewe Decl. ¶17 (Attachment J).

¹⁰The court denied NWF's request to require increased flow in the river, which would have entailed a combination of reservoir drawdowns and increased "flow augmentation," subject to the requirement that the parties engage in collaboration on remand "to resolve the issues raised by flow." Op. 10. The court denied plaintiffs' request to require NOAA to withdraw the 2004 BiOp. Op. 6. The court set a status conference for September 7, 2005, to discuss the remand and possible withdrawal of the 2004 BiOp. *Id.* The court also held that the action agencies violated the ESA by relying on the 2004 BiOp in issuing their Records of Decision (RODs). Op. 6. The court stated that although it intended to order the action agencies to withdraw their RODs implementing the proposed action, it reserved its final order until after the September 7, 2005, status conference. Op. 9. Briefs from NWF and the Federal Defendants on the Federal Defendants' request for an injunctive bond are due June 15, 2005.

