

DWIGHT C. HOLTON
Acting United States Attorney
STEPHEN J. ODELL, OSB #90353
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY, Assistant Section Chief
COBY HOWELL, Trial Attorney
BRIDGET McNEIL, Trial Attorney
MICHAEL R. EITEL, Trial Attorney
Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Civil No. 01-CV-640-RE

**FEDERAL DEFENDANTS'
REPLY TO PLAINTIFFS'
OPPOSITION MEMORANDUM
ON 2010 SPRING OPERATIONS**

In accordance with the Court's April 13, 2010, Order, (Docket No. 1756), Federal

Defendants hereby respond to the joint response and memorandum of opposition filed by the National Wildlife Federation plaintiffs (“NWF plaintiffs”) and the State of Oregon (collectively “Plaintiffs”) and provide the Federal Agencies’ final determination on transport operations for spring 2010.¹ (Docket No. 1753).

INTRODUCTION

Following the Obama Administration’s review of the Federal Columbia River Power System Biological Opinion (“FCRPS BiOp”) and the development of the Adaptive Management Implementation Plan (“AMIP”) the agencies renewed and clarified their commitment to this Court to pursue an adaptive management approach that incorporates new data as it becomes available and makes any necessary changes based on that information, all to aid listed salmon and steelhead throughout their lifecycle. The FCRPS BiOp and AMIP call for evaluating emerging data by discussing this new information within the Regional Implementation Oversight Group (“RIOG”), taking into account all of the sovereign’s expertise, perspectives, and concerns, and making reasoned operational decisions consistent with those technical discussions. Consistent with this approach, the 2010 Spring Fish Operations Plan (“Spring FOP”) provides: “If the April final water supply forecast indicates a seasonal regulated flow of ≤ 65 kcfs in the lower Snake River, *the Corps and NOAA, in coordination with the regional sovereigns, will consider the best available science, including the ISAB input*, to make a final determination on the transportation operations.” Spring FOP at 8 (emphasis added) (Docket No. 1752-1). The Federal agencies have now undertaken this review and after considering all of this information, as well as the various perspectives of the sovereigns, the Action Agencies in conjunction with

¹ The Nez Perce Tribe does not appear to join in the opposition memorandum, but seeks

NOAA have decided to implement a fish passage operation at Snake River dams this spring that uses a mixed strategy, combining spill and juvenile transportation. This is essentially the same FCRPS operation as implemented last year. This final determination is reflected in the Corps' Addendum to the Spring 2010 FOP and is incorporated by reference into Federal Defendants' proposed order. *See* Addendum A, Spring FOP (Fed. Defs.' Ex. 1).

Because the agencies do not intend to implement a maximum transportation (“max-transport”) operation for this year, meaning the planned operation is to continue spill as identified in the 2010 Spring FOP at all dams, including the three Snake River dams with transportation facilities, there is no need for the Court to consider Plaintiffs' proffered alterations to the Federal Defendants' proposed order or otherwise modify Federal Defendants' proposed order. As Federal Defendants no longer propose to reduce spring spill for transportation purposes, Plaintiffs' proposed modifications are not applicable. *See* Pls.' Opp'n Memo. at 10 (suggesting modifications only to prevent the cessation of spill for transportation purposes). The process worked here as it should – decision making based on the best available science and after regional coordination and collaboration. We urge the Court to carefully consider the Federal agencies' actions on the issue of transport, and request that the Court enter Federal Defendants' proposed order.

BACKGROUND

On the immediate issue of transportation, the AMIP provides: “Data on fish survival will be reviewed with RIOG again in 2010, and each year thereafter, to determine the best operation for the fish, and there is no longer a presumptive operation for this time period as set forth in the

the same modifications to Federal Defendants' proposed order. Docket No. 1754.

RPA.” AMIP at p.10. In accordance with this direction, the NOAA Science Center compiled extensive data looking at the relative benefit between in-river survival and transportation, and NOAA salmon experts were asked to make operational recommendations based on this new data. These scientists developed a specific proposal for 2010 operations and advised that a max-transport operation (with the necessary cessation of spill at transportation collector dams) would likely return substantially more Snake River steelhead and spring Chinook in a low-flow year, based on 2007 data.² As this Court knows, this is a complicated issue and that is why NOAA, along with the Action Agencies, sought additional review of the max-transport proposal and supporting information from the Independent Scientific Advisory Board (“ISAB”).

On April 9, 2010, the ISAB issued its report. *See* ISAB 2010-2, April 9, 2010 (Fed. Defs.’ Ex. 2). This ISAB panel found that the NOAA Science Center’s data was sound and that their conclusions were correct, but this panel also considered a number of different factors such as sockeye, straying, and lamprey (a non-ESA listed species) with information from a number of different sources.³ *Id.* The ISAB found that NOAA’s analysis and new data “buttress and extend the earlier data, but that uncertainties remain.” *Id.* at 3. The ISAB also found that

² The Plaintiffs contend that it is “not altogether surprising” that the agencies would “sharply reduce spring spill and benefit power generation at the expense of salmon and steelhead survival.” Pls.’ Opp’n Memo. at 1, 10. Rather, the federal agencies, relying on dedicated agency scientists and the Independent Science Advisory Board (ISAB), conducted a difficult set of discussions in a process designed to achieve a sound 2010 FCRPS spring operation.

³ The Plaintiffs suggest that the U.S. Fish and Wildlife Service has urged a position that differs from that of NOAA and the other Action Agencies on hydropower operations. *See* Pls.’ Opp’n Memo at 5. This is incorrect. The U.S. Fish and Wildlife Service did not urge or suggest any specific operation to the ISAB. Throughout this entire process, the U.S. Fish and Wildlife Service has been completely engaged on these issues, particularly related to Pacific lamprey conservation and the operation of National Fish hatcheries. The U.S. Fish and Wildlife Service fully supports this Administration's position on the FCRPS BiOp and AMIP in this litigation.

“survival may be better between these dams with more spill, but overall SARs for the entire life cycle may be higher for transported fish.” *Id.* at 5. But relying on “ecological and evolutionary considerations”, and taking into account sockeye, straying, and lamprey, the ISAB recommended maintaining a “mixed strategy for spill and transport” for this particular water year. Ultimately, it recommended that in the interest of collecting additional data on which future decisions could be based the Federal agencies should maintain the existing spill operation. *Id.*

The Federal agencies have reviewed the ISAB’s recommendation and have participated in regional technical forums, including the Technical Management Team (“TMT”) and the Fish Passage Advisory Committee (“FPAC”), discussing this report. The Federal agencies also convened the sovereigns’ policy representatives in a RIOG meeting on April 16, 2010, in accordance with the FCRPS BiOP and AMIP, to discuss the results of the ISAB’s report and collaborate on the mixed strategy for the spring operational decision.

As noted earlier, the Spring FOP specifies that: “If the April final water supply forecast indicates a seasonal regulated flow of ≤ 65 kcfs in the lower Snake River, the Corps and NOAA, in coordination with the regional sovereigns, will consider the best available science, including the ISAB input, to make a final determination on the transportation operations.” Spring FOP at 8. The final forecast indicates that regulated flow will be well below ≤ 65 kcfs. The agencies have conducted extensive outreach (while in the middle of a 90 day remand) within many forums. They have conducted a thorough and well-reasoned process and have ultimately determined not to implement a max-transport operation in 2010. This means the agencies will implement the Spring FOP as proposed and will maintain spill levels specified within the FOP as they have done in prior years. *See* Addendum A, Spring FOP.

DISCUSSION

The decision faced by the federal agencies, as well as the regional sovereigns consulted, is complex and influenced by many uncertain factors and countervailing resource management concerns. The ISAB considered a number of different factors and has approached this issue from a broad ecosystem perspective. ISAB 2010 at 3. While this approach may be consistent with the ISAB's broad basin-wide focus, in many cases their statements are broader than the scope of decisions required under Section 7(a)(2) of the Endangered Species Act ("ESA"). *Id.* (discussing concerns with lamprey, a non-listed species). Although the agencies have decided to implement the ISAB's recommendation for this particular year, this does not mean the agencies agree with many of the broad conclusions in this report. Both the ISAB and NOAA scientists acknowledge that leaving juvenile fish in the river will result in higher total mortality for some species, and for Snake River steelhead could reduce adult returns from this year's outmigration by as much as half. Regional scientists will monitor the impact of this year's mixed strategy, and the Federal agencies will revisit operations in future years in accordance with the mandates of the ESA § 7(a)(2), the FCRPS BiOp, and the AMIP.

With respect to the Plaintiffs' modifications to the Federal Defendants' proposed order, because the agencies do not plan to implement a max-transport operation, there is no need for the Court to modify Federal Defendants' proposed order. As Federal Defendants no longer plan to reduce spring spill for transportation purposes, the Plaintiffs' proposed modifications are not applicable. *See* Pls.' Opp'n Memo., Plaintiffs' Proposed Order (suggesting modifications only to page 7-8 of the Spring FOP). More fundamentally, the Plaintiffs' proposal is legally flawed. Under their proposal, the Plaintiffs would require the Federal agencies to seek permission to

implement their own FCRPS operation, presumably by justifying this operation by motion, which would place the Court in the position of operating the FCRPS dams in the first instance instead of the Corps. Such a proposal conflicts with well-established Supreme Court case law requiring the Plaintiffs to bear the burden of demonstrating a “likelihood of success on the merits” and “irreparable harm” before a court may interfere with agency operations. *See, e.g., Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008). To the extent the Plaintiffs wish to alter FCRPS operations, they may file a motion seeking injunctive relief and demonstrate for the Court that the current *status quo* operation is causing irreparable harm to these species as a whole.

CONCLUSION

After considering all of the information and viewpoints in the region, the Federal agencies have concluded that the best approach to operation of the Columbia Basin hydropower system this spring is with a mix of spill and transport. We urge the Court to consider the agencies’ decisionmaking process on this issue and their actions. It is precisely this kind of informed assessment and modification of operations through adaptive management that exemplifies this Administration’s approach to implementing the 2008 FCRPS BiOp and AMIP. For the reasons set forth above, the Court should enter Federal Defendants’ proposed order.

Respectfully submitted: April 19, 2010.

IGNACIA S. MORENO
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

SETH M. BARSKY, Assistant Section Chief

/s/ Coby Howel

COBY HOWELL, Trial Attorney
BRIDGET KENNEDY McNEIL, Trial Attorney
MICHAEL R. EITEL, Trial Attorney
Wildlife & Marine Resources Section
CYNTHIA J. MORRIS, Trial Attorney
Environmental Defense Section
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023
(503) 727-1117 (fx)

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to Local Rule Civil 100.13(c), and F.R. Civ. P. 5(d), I certify that on April 19, 2010, the foregoing will be electronically filed with the Court's electronic court filing system, which will generate automatic service upon on all Parties enrolled to receive such notice. The following will be manually served by overnight mail:

Dr. Howard F. Horton, Ph.D.
U.S. Court Technical Advisor
Professor Emeritus of Fisheries
Department of Fisheries and Wildlife
104 Nash Hall
Corvallis, Oregon, 97331-3803
FAX: (541)-737-3590
(hortonho@onid.orst.edu)

Walter H. Evans, III
Schwabe Williamson Wyatt, P.C.
1211 S.W. Fifth Ave
1600-1800 Pacwest Center
Portland, OR 97204
(wevans@schwabe.com)

James W. Givens
1026 F Street
P.O. Box 875
Lewiston,