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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NATIONAL WILDLIFE FEDERATION, *et al.*,
Plaintiffs,
and
STATE OF OREGON,
Intervenor-Plaintiff
v.
NATIONAL MARINE FISHERIES SERVICE,
et al.,
Defendants,
and
NORTHWEST RIVERPARTNERS, *et al.*,
Intervenor-Defendants.

Case No. 3:01-cv-00640-SI

**INLAND PORTS & NAVIGATION
GROUP'S REPLY IN SUPPORT OF
FEDERAL DEFENDANTS' AND ALLIED
PARTIES' CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

After thousands of pages of briefing by all parties, one thing is abundantly clear: experts disagree. For Plaintiffs (National Wildlife Federation, *et al.*) to prevail, however, they must do more than disagree with the Bi-Op's conclusions. Plaintiffs must demonstrate in the record that

the federal agencies have appreciably reduced the likelihood of survival and recovery of listed species. Plaintiffs have not (and cannot) do this. The comprehensive and concrete actions taken by the Action Agencies have resulted in marked improvements, not reductions, in fish survival, and recovery, rates.

The successes in the Columbia and Snake Rivers have been achieved on a complex river system that provides much more than vital habitat for listed species. The Federal Columbia River Power System (“FCRPS”) is the ecological and economic backbone for the entire Northwest. It serves as an irreplaceable corridor for navigation, provides flood control for hundreds of thousands of acres of riparian property, renewable hydropower for millions of residents and businesses, and more than a thousand miles of habitat for fish and other wildlife.

In conjunction with maintaining the FCRPS for all these functions, the Action Agencies continue to improve the FCRPS for fish passage, survival and habitat. Intervenor-Defendant Inland Ports and Navigation Group (“IPNG”) respectfully requests that the Court grant summary judgment in favor of the Federal Defendants and allied parties to allow the Action Agencies to continue their significant progress made with the survival and recovery of the listed species in the Columbia and Snake Rivers.

II. PLAINTIFFS’ OBJECTIONS TO THE JEOPARDY STANDARD ARE POLICY QUESTIONS, NOT LEGAL QUESTIONS

Salmon recovery is a dynamic target, involving conditions both inside and outside the scope of the Action Agencies’ control. But in the context of this case, and the Endangered Species Act, the function of the Bi-Op is not to predict when recovery will occur, as Plaintiffs remonstrate. The question is whether the actions taken by the federal government will appreciably harm the listed species. *See* 50 C.F.R. § 402.02 (defining actions that “jeopardize the continued existence” of a species as actions “that would reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species.”).

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The answer here is, decidedly, “no.” As comprehensively set forth in the 2014 Bi-Op, the efforts by the Action Agencies in managing the FCRPS do not appreciably reduce the likelihood of both the survival and recovery of the listed species. Plaintiffs appear to acknowledge this. *See NWF’s Reply Memorandum*, p. 9 [Dckt. 2016]. But Plaintiffs want the Bi-Op to do more than continue the recovery of listed species. They want to pinpoint when “recovery” will be achieved. *Id.*

What Plaintiffs seek falls outside the scope of the Endangered Species Act (“ESA”). Under the ESA, the proper inquiry is not when a species will recover. It is, instead, whether the Reasonable and Prudent Alternatives (“RPAs”) in the Bi-Op will, or will not, appreciably reduce recovery prospects. *See Salmon Spawning & Recovery Alliance v. NOAA*, 342 Fed.Appx 336, 338 (9th Cir. 2009).

Plaintiffs employ a number of experts to contradict the conclusions of Action Agencies’ experts regarding survival and recovery of the listed species at issue. Plaintiffs have filed dozens of pages to explain why Plaintiffs’ experts disagree with the interpretations and predictions of NMFS’s experts regarding fish recovery. As noted by Mr. Ritchie J. Graves, Chief of the Columbia Hydropower Branch for NMFS with respect to just one issue of disagreement (comparing upriver and downriver population productivity), “[i]n short, while Mr. Nigro (and Oregon and the other plaintiffs) purport that the upriver downriver comparison is appropriate, there is substantial scientific dissent.”¹ This same conclusion is true for nearly all of Plaintiffs’ objections to the Bi-Op.

These are the kinds of issues on which agencies are afforded substantial deference. When an agency approaches a “decision in a thoughtful, comprehensive manner that balances the agency’s concerns and goals,” and relies on “substantial—though not dispositive—scientific data, and not a mere speculation,” that decision is entitled to deference. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992). In matters of scientific expertise, the deference normally afforded agency decisions is even higher. As the Ninth Circuit has

¹ *See* Declaration of Ritchie J. Graves (“Graves Decl.”), p. 18 [Dkt. No. 2005].

recognized, the difficulty in assessing the likelihood of if, or when, a species may become extinct “involves a great deal of predictive judgment....” *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008). Such judgment is “entitled to particularly deferential review.” *Id.*

The work outlined in the 2014 Bi-Op’s RPA continues efforts that have “substantially improved migration and passage conditions and increased the survival of migrating salmon and steelhead smolts compared to the 1970 to mid-1990 period.”² Current hydro survival “is higher on average than it was during the last 20 years.”³ In sum, the actions taken on the FCRPS with harvest reduction, hatchery supplement programs, and hydropower modifications, have resulted in “dramatic increases in abundance” since the listed species’ near extinction in the early 1990s.⁴

The disagreements Plaintiffs’ experts have with Federal Defendants’ experts are on matters grounded in science and predictive judgment, the very areas on which deference is most warranted. Plaintiffs have not shown that the Action Agencies will appreciably reduce the likelihood of survival and recovery of listed species. Rather, the record supporting the 2014 Bi-Op demonstrates that the Action Agencies are improving the survival and recovery of listed species.

III. MAINSTEM SYSTEM IMPROVEMENTS HAVE DEMONSTRABLY HELPED FISH PASSAGE

In addition to the unprecedented collaborative effort taken by the Action Agencies to improve habitat in response to Judge Redden’s remand order, they have also implemented projects to improve fish survival on the mainstem, where IPNG’s members primarily operate.

By 2009, each of the eight mainstem dams was upgraded to include surface passage improvements with spillway weirs, powerhouse corner collectors, or modified sluiceways.⁵ At The Dalles Dam, for example, a spillway wall was constructed to redirect fish away from

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² *Id.* at pp. 10–11.

³ NMFS000052 (2014 FCRPS Supplemental Biological Opinion, New Information, p. 52).

⁴ Graves Decl., pp. 18–19 & Fig. 5 [Dkt. No. 2005].

⁵ *Id.* at NMFS000345 (2014 FCRPS Supplemental Biological Opinion, RPA Implementation, Section 3.3 Hydropower, p. 345).

predators and toward a deeper, faster-moving channel.⁶ This, plus other modifications at The Dalles Dam, have increased the survival of spillway-passed fish from 92.3% to 97.4%.⁷ At Little Goose Dam, improvements to fish passage have boosted survival rates from 95.7% to 99.5%.⁸ At Lower Monumental and McNary Dams, juvenile bypass system outfalls were relocated to allow fish to resume passage farther downstream, away from the shore and known predators.⁹ The result has been increased juvenile survival rates for fish passing through the outfalls, *e.g.*, 99% to 100% for yearling Chinook and steelhead, and 96% to 100% for subyearling Chinook.¹⁰

System-wide, the combined efforts to reduce migration delay and increase spill passage efficiency have improved inriver survival of Snake River spring/summer Chinook salmon, Snake River fall Chinook salmon, Snake River sockeye salmon, Snake River steelhead, Upper Columbia River spring Chinook salmon, Upper Columbia River steelhead, and Middle Columbia River steelhead.¹¹ Notably, these improvements have been achieved in harmony with the other functions served by the FCRPS for power generation, flood control, and navigation.

IV. DAM BREACHING CONTINGENCIES ARE INCLUDED IN THE BI-OP

The Nez Perce Tribe has advocated breaching the four Snake River dams, for decades. Given the Nez Perce's historical relationship with the Columbia and Snake Rivers, IPNG remains respectful of the Tribe's continued advocacy for this option during this long litigation.

But IPNG disagrees with the Nez Perce that now is the time to consider the most extreme and damaging option available to address survival and recovery of listed species. The 2014 Bi-Op does include a plan for evaluating dam breaching.¹² The 2014 Bi-Op incorporates the

⁶ *Id.*

⁷ *See* Graves Decl., p. 27 [Dkt. No. 2005].

⁸ *Id.*

⁹ NMFS000345 (2014 FCRPS Supplemental Biological Opinion, RPA Implementation, Section 3.3 Hydropower, p. 345).

¹⁰ *Id.* at NMFS000345–346.

¹¹ *Id.* at NMFS000345.

¹² *Id.* at NMFS000419–426 (2014 FCRPS Supplemental Biological Opinion, RPA

2009 Adaptive Management Implementation Plan (“AMIP”) that establishes specific quantitative metrics the Action Agencies will use to evaluate dam breaching options. These metrics are specifically tied to population declines of listed species, from early warning signs, to rapid response measures.¹³

Any plan to remove the Snake River dams would be a monumental undertaking with incalculable collateral consequences. And dam breaching would very likely require Congressional action to address the collision such action would have with the Flood Control Act of 1962, which protects navigation on the Columbia and Snake Rivers. The 2014 Bi-Op appropriately ties the plan for evaluating dam breaching to the kinds of monumental declines in species survival that such a solution might warrant.

As such, dam breaching has been properly excluded as an RPA in the 2014 Bi-Op. The RPAs in the 2014 FCRPS Bi-Op are required only to address the impacts of the system (the “action”) on listed species. *See* 50 C.F.R. § 402.02 (RPAs must be “consistent with the intended purpose of the action...”). Destroying the action that is the subject of the Bi-Op would, by definition, be directly contrary to, that is, inconsistent with, the intended purpose of the FCRPS. The political desire by some to remove the Snake River dams properly remains in that (political) arena.

V. CONCLUSION

Plaintiffs’ primary strategy in their summary judgment motions appears to cherry-pick a few select areas where survival metrics or results are in flux, and have their experts conclude that a system-wide failure exists. But the record, as a whole, points to system-wide improvements. The Action Agencies continue to collaborate with region-wide stakeholders to not just avoid appreciable harm to listed species—but to orchestrate their recovery.

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Implementation, Section 3.7 AMIP Contingency Planning, pp. 345–46).

¹³ *Id.*

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Every party to this lawsuit strongly supports fish recovery. The Action Agencies' efforts to help fish have never been more comprehensive or successful in achieving that common goal. IPNG respectfully requests that the Court grant summary judgment in favor of the Federal Defendants and allied parties and allow the Action Agencies to continue their important work in improving the FCRPS for the entire region.

Dated this 6th day of May, 2015.

Respectfully submitted,

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