

FILED
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PATRICK E. DUFFY, CLERK
By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

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|-----------------------------------|---|----------------|
| CENTER FOR BIOLOGICAL DIVERSITY |) | CV 03-29-M-DWM |
| and THE ECOLOGY CENTER, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| and |) | |
| |) | |
| THE STATE OF MONTANA, |) | |
| |) | |
| Plaintiff-Intervenor, |) | |
| |) | |
| vs. |) | ORDER |
| |) | |
| UNITED STATES FISH AND |) | |
| WILDLIFE SERVICE, U.S. ARMY CORPS |) | |
| OF ENGINEERS, |) | |
| |) | |
| Defendants, |) | |
| |) | |
| and |) | |
| |) | |
| KOOTENAI TRIBE OF IDAHO, |) | |
| |) | |
| Defendant-Intervenor. |) | |
| |) | |

The original Complaint in this case was filed February 18, 2003. The issues presented in the Complaint were resolved on summary judgment by Order dated May 25, 2005 (Doc. No. 49).

Defendant United States Fish and Wildlife Service issued a new Biological Opinion on February 18, 2006, and the Plaintiffs filed an Amended Complaint challenging that Biological Opinion on May 2, 2006 (Doc. No. 74). On October 5, 2006, the Court instructed the parties to file a joint case management plan by December 1, 2006 (Doc. No. 109). The parties failed to meet that deadline, and instead jointly moved for an extension of time to allow for the consideration of settlement proposals and to allow Plaintiffs to consider joining the Army Corps of Engineers (the "Corps") as a defendant. (Doc. No. 115.) The motion was granted, and the parties filed a Joint Case Management Plan on December 8, 2006, in which they stated the Plaintiffs' intention to join the Corps as a defendant in this case. The parties told the Court, "Plaintiffs believe that only by joining the Corps in this litigation can meaningful and thorough relief be provided by the Court." (Doc. No. 117, p. 3.)

Based on these representations, the Court issued an Order on December 21, 2006, in which it set a series of deadlines intended to move the case forward. (Doc. No. 118.) At the suggestion of the parties, the deadlines were tied to the appearance of the Corps in this case, which was delayed for nine months because the Plaintiffs failed to act on their plans to file an amended complaint naming the Corps as a defendant. The Court ordered the Plaintiffs to explain their failure to act on September 6, 2007,

stating, "This matter has now been stagnant for nine months. It is time for this case to move forward." (Doc. No. 121, p.2.) Plaintiffs filed an Amended Complaint adding the Corps as a Defendant on September 17, 2007 (Doc. No. 124).

The Court issued a Scheduling Order on October 9, 2007 setting deadlines for the filing of the Answer to the Amended Complaint and the Corps' Administrative Record. The parties were instructed to file a joint status report by January 15, 2008. (Doc. No. 127.) The deadlines imposed were those suggested by the parties. The Corps nonetheless failed to meet the deadline for filing its Administrative Record, and sought an extension, which was granted. (Doc. No. 131.) By the same Order, the status report deadline was extended at the request of the parties to January 31, 2008.

The parties did not meet the January 31, 2008 deadline. They filed a joint motion for an extension of time on January 29, 2008, in which they signaled their intention to pursue an agreement to stay this matter pending the release of more information on the proposed recovery efforts for the white sturgeon. (Doc. No. 133.) The Court granted a two-week extension, and warned the parties against further delays, stating, "This case is on the Court's three year list, heading for the five year list. A stay is not likely acceptable to the Court. The case should be resolved, tried, or dismissed without

prejudice." (Doc. No. 134, p. 2).

The parties responded on February 15, 2008 with yet another request for a four-week extension (Doc. No. 135). This time the rationale was that the parties needed time to hold settlement negotiations. The Court granted the extension to March 14, 2008, noting that "[t]his case needs to be moved with dispatch." (Doc. No. 136, p. 2.)

The joint status report was not filed on March 14, 2008. Instead the Court received the parties' sixth request for an extension of time since December of 2006. The parties asked for an additional four weeks to continue settlement negotiations and the Court granted the motion by Order dated March 19, 2008 (Doc. No. 138). That same day the Court referred the case to Judge Lynch for a settlement conference. The settlement conference was set for May 6, 2008, prompting the parties to file another motion for extension of the deadline for filing their joint status report. The parties asked for an extension of 30 days beyond the date of the settlement conference, until June 5, 2008. (Doc. No. 143.)

The Court granted the motion by Order dated April 14, 2008 (Doc. No. 144). The Order declared that no further extensions would be granted:

This is the last extension of time to file the joint status report the Court will grant. As the parties' have represented to this Court in their motion, following the settlement conference the parties shall

inform the Court either that the case is settled or file their joint status report, at which time the Court will ensure that this case is timely resolved.

Doc. No. 144, p. 2.

The parties filed their joint status report regarding scheduling on June 5, 2008 (Doc. No. 147). The parties proposed that they be allowed an additional two weeks, until June 19, 2008, to continue settlement negotiations. If the negotiations were not successful, the parties agreed to begin summary judgment briefing on July 31, 2008. The Court issued an Order implementing the parties' proposed dates (Doc. No. 149).

The parties did not settle the case before June 19, 2008, thereby triggering the summary judgment briefing schedule beginning on July 31, 2008. The Plaintiffs and Plaintiff-Intervenor did not file their opening briefs on July 31, 2008 as required by the Scheduling Order. Instead the parties filed a joint status report seeking a 30-day extension of the briefing schedule (Doc. No. 150). The Court granted the motion based on the parties' representations regarding settlement, but added, "This case was filed in 2003. It needs resolution." (Doc. No. 151.)

The parties have now filed a joint motion to approve their settlement agreement. The agreement provides that the Corps and the Bonneville Power Administration ("BPA") will request a clarification from the Fish and Wildlife Service of the Service's

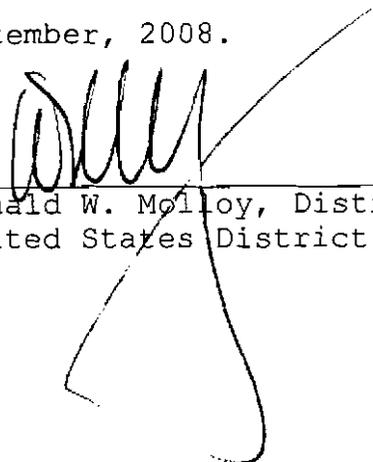
2006 Biological Opinion. This is to be done within 30 days of the execution of the agreement. The Service would then have 30 days in which to give notice of its decision whether to clarify its Biological Opinion. If the Service elects to clarify, it is to have another 60 days in which to issue a clarification. If the clarification is to the liking of the Plaintiffs and Plaintiff-Intervenor, they would then move to dismiss the case with prejudice.

Because the parties have represented the case is settled, the Court will accept their characterization and dismiss the case without prejudice. It will be up to the parties to file any documents that clarify the dismissal as one with prejudice as opposed to dismissal without prejudice.

Therefore, IT IS HEREBY ORDERED that this case is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that all pending motions are DENIED as moot, and the Clerk of Court is directed to close the case file.

DATED this 11th day of September, 2008.



Donald W. Molloy, District Judge
United States District Court