IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, U.S. ARMY CORPS OF ENGINEERS, and **U.S. BUREAU OF RECLAMATION*, et al.***,

Defendants.

Case No. 3:01-cv-640-SI

ORDER

Michael H. Simon, District Judge.

On May 4, 2016, the Court issued its Opinion and Order resolving the parties' cross-motions for summary judgment in this case ("Opinion"). Dkt. 2065. The following day, Defendant-Intervenor Columbia-Snake River Irrigators Association ("CSRIA") filed a motion under Rule 60 of the Federal Rules of Civil Procedure. Dkt. 2066. In its motion, CSRIA states that the Court made certain factual misstatements in its Opinion regarding the federal government's efforts to study breaching, bypassing, or removing one or more of the four dams (Ice Harbor, Lower Monumental, Little Goose, and Lower Granite) located on the lower Snake

River. CSRIA asks the Court to correct the purported misstatements. For the reasons that follow, CSRIA's motion is denied.[1]

STANDARDS

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides grounds for relief from a final judgment or order based on "mistake, inadvertence, surprise, or excusable neglect." Under the first provision, a litigant "may seek relief . . . if the district court has made a *substantive* error of law or fact in its judgment or order." *Bretana v. Int'l Collection Corp.*, 2010 WL 1221925, at *1 (N.D. Cal. 2010) (emphasis added); *see also Utah ex. rel. Div. of Forestry v. United States*, 528 F.3d 712, 722-23 (10th Cir. 2008) ("Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in only two instances: (1) when 'a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) whe[n] the judge has made a *substantive* mistake of law or fact in the final judgment or order.'" (alteration in original) (emphasis added) (quoting *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996))). A party making a motion under Rule 60(b) bears the burden of proof. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

DISCUSSION

CSRIA does not argue that any of the Court's legal conclusions were erroneous, and CSRIA does not request that the Court reconsider any of its conclusions. CSRIA asks the Court only to correct purported factual misstatements contained in the Court's summary of the history of this litigation. In its Opinion, the Court referred to earlier comments by U.S. District Judge James A. Redden urging the relevant federal agencies to consider dam breaching and to earlier

[1] CSRIA is correct, however, that the Court in its Opinion misidentified CSRIA as an amicus, rather than as a Defendant-Intervenor. CSRIA is a Defendant-Intervenor. *See* Dkt. 1963. That error has been corrected in the official docket for this case.

comments by U.S. District Judge Malcom F. Marsh urging federal agencies to consider a "major overhaul" to the Federal Columbia River Power System. CSRIA disagrees with the Court's background discussion of the earlier comments by these two judges. This is not an appropriate motion under Rule 60(b)(1), which allows for *relief* from a final judgment or order that was based on a *substantive* factual or legal error. Accordingly, CSRIA's motion is denied.

Even if this were a proper motion under Rule 60(b)(1), however, CSRIA's argument is without merit. CSRIA asserts that the Court misstated the facts in characterizing the federal government's earlier efforts relating to studying the possibility of breaching or bypassing one or more of the four dams on the lower Snake River. CSRIA challenges the Court's statements that the federal government has "ignored" Judge Redden's admonishments to consider dam breaching and that the federal government had done their "utmost" to avoid preparing a comprehensive analysis under the National Environmental Policy Act ("NEPA") that includes the alternative of breaching or bypassing the four dams. According to CSRIA, the Court's statements are belied by the record. In support of its conclusion, CSRIA cites to two documents in the record. These documents, however, do not show that the Court made a substantive factual error. In addition, CSRIA also points to documents outside of the record, which necessarily places them outside of the Court's consideration.

CSRIA first cites to the structural modifications alternative from a 1992 environmental impact statement ("EIS"). That document predated Judge Redden's admonishments by more than a decade and thus does not serve to render the Court's statements regarding the federal agencies' *response* to Judge Redden factually incorrect. Moreover, the content of the document supports the Court's factual discussion. The document lists, among numerous other "proposed" structural modifications, the proposed modification of "completely removing one or more of the mainstem

dams." ACE_0053293. After listing these proposed structural modifications, however, the document concludes that:

> The apparent feasibility of proposed structural measures is also variable if understood at all because *little or no evaluation has been conducted*. . . . Some other actions such as removing one or more dams would clearly have major consequences and would require years to develop a regional consensus on feasibility. A number of structural proposals may have technical merit but plans and effects have not been established to the point where such actions could be implemented soon. The general disposition of the proposed structural measures by the cooperating agencies is that they are measures requiring a relatively long time to study.

Id. (emphasis added). The fact that "little or no evaluation has been conducted" on dam removal and that it was determined that such a measure would require "a relatively long time to study" does not render the Court's background statements erroneous; to the contrary, they confirm the Court's observations.

CSRIA also cites a 2002 EIS summary in which an alternative of breaching the four lower Snake River dams is discussed. ACE_0059744-98. This document also does not support CSRIA's assertion that the Court made a substantive factual error.

CSRIA alludes to, although it does not specifically cite, the Corps's EIS relating to the Lower Snake River, the final draft of which was issued in 2002. ACE_ 0059799-60679 (LOWER SNAKE RIVER JUVENILE SALMON MIGRATION FEASIBILITY REPORT/ENVIRONMENTAL IMPACT STATEMENT). This document also pre-dates Judge Redden's admonishments, and thus does not render erroneous the Court's factual recitation regarding the federal government's response to Judge Redden. Moreover, although this EIS considered the alternative of dam breaching as compared to other alternative methods of *operating the dams*, it is not a comprehensive NEPA analysis that considers dam bypass, breach, or removal as an alternative to other actions prescribed in the biological opinions, such as habitat improvement. This is one of the documents

that the Court noted in its Opinion was both outdated and too narrowly-focused to suffice to meet the Corps's NEPA obligations. The Court emphasized in its Opinion the purpose and benefits of a comprehensive NEPA analysis, which allows the parties, the public, and public officials to evaluate the costs and benefits of various alternatives, such as habitat restoration, avian predation measures, and dam removal, bypass, or breaching, and then make the important decisions on how best to move forward in compliance with federal law.

CSRIA also cites to a Ninth Circuit opinion discussing a draft of this EIS. CSRIA states that this shows that removal of the four dams on the lower Snake River would increase water temperatures. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1176 (9th Cir. 2004). The discussion in that case, however, is not relevant to CSRIA's motion. In any event, CSRIA misunderstands the finding being discussed in that case and the position of the Corps and the Environmental Protection Agency ("EPA") relating to the draft EIS at issue there.

In that case, the Ninth Circuit discussed three temperature models that were included in the EIS. *Id.* The first model, prepared by Normandeau Associates, Inc., concluded that removal of the four dams would cause water temperatures to warm up faster and be higher early in the season, but would cool down faster in the early fall. *Id.* The second model, prepared by the EPA, "stated that the presence of the dams played a significant role in increasing the magnitude and duration of water temperature exceedances in the Snake River. The EPA temperature model concluded that the dam breaching alternative 'would produce fewer temperature threshold exceedances greater than 68F than under the current operating conditions.'" *Id.* The third model, prepared by the Pacific Northwest Laboratory, concluded that reservoirs decrease water temperature variability by keeping water cooler later in the spring and warmer later in the fall. *Id.* The Ninth Circuit specifically noted that the Corps and the EPA had concluded that the existence

of the dams caused temperature exceedances, not dam operations. *Id.* at 1176-77 (noting that the Corps argued that the EIS "temperature models generally support the Corps's conclusion that the existence of the dams causes temperature exceedances (in terms of creating a "temperature shift"), not dam operation" and that "[w]e cannot agree with NWF's contention that the EPA study establishes that it is the Corps's operations of the dams that is causing temperature exceedances on the lower Snake River. To the contrary, the EPA study supports the Corps's contention that it is the existence of the dams that is causing temperature exceedances"). Thus, the Ninth Circuit held that that Corps did not violate the Clean Water Act by concluding that dam *operations* did not cause temperature exceedances because it was reasonable for the Corps to conclude that the *existence* of the dams caused the temperature exceedances. *Id.* at 1178 ("Where the Corps has concluded reasonably that the sole cause of the temperature exceedances is the existence of the dams and not any discretionary method of operating the dams, we do not interpret the compliance provision of the [Clean Water Act] as requiring that the dams authorized by Congress be removed.").

CSRIA fails to meet its burden of showing that the Court made any substantive misstatements of fact that would require reconsideration of the Court's Opinion. CSRIA also has not demonstrated that the Court's comments regarding the federal agencies' failure to engage in a comprehensive analysis of bypassing, removing, or breaching the dams as a reasonable alternative to some or all of the selected reasonable and prudent alternatives set forth in the biological opinions constituted a substantive factual error. This is further demonstrated by the 2010 study by the U.S. Army Corps of Engineers on how properly to study dam breaching, if such a study ever became necessary. *See* ACE_0033447-544 (FEDERAL COLUMBIA RIVER POWER SYSTEM ADAPTIVE MANAGEMENT PLAN, LOWER SNAKE RIVER FISH PASSAGE IMPROVEMENT

STUDY: DAM BREACHING UPDATE, PLAN OF STUDY, March 2010 ("The purpose of this Plan of Study is to define how a Lower Snake River Fish Passage Improvement/Dam Breaching Feasibility Study (Feasibility Study) will be managed and conducted *should such a study be initiated in accordance with provisions set forth in the Federal Columbia River Power System Biological Opinion (BiOp) Adaptive Management Implementation Plan (AMIP)*. The Feasibility Study would address breaching of four Federal dams on the lower Snake River that are operated by the U.S. Army Corps of Engineers (Corps). Breaching these dams has been considered as a potential action to address the problem of declining salmon and steelhead populations in the Snake River Basin. The Obama Administration views dam breaching as a 'contingency of last resort,' although it recognizes the need for a contingency measure to be ready for implementation. Consequently, *the Corps is preparing a plan for a science-driven study on breaching that would be initiated* if the status of Snake River salmonid species declined to the level of a pre-defined biological 'trigger.'" (emphasis added)).

CONCLUSION

CSRIA's motion for reconsideration (Dkt. 2066) is DENIED.

IT IS SO ORDERED.

DATED this 9th day of June, 2016.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge