

**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 OF REMAND**

**Michael H. Simon, District Judge.**

In its Opinion and Order dated May 4, 2016 (“Opinion and Order”) resolving the parties’ cross motions for summary judgment, the Court found that the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation<sup>1</sup> had violated the National Environmental Policy Act of

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<sup>1</sup> NOAA Fisheries, the U.S. Bureau of Reclamation, and the U.S. Army Corps of Engineers are collectively referred to herein as the “Federal Defendants.” The U.S. Bureau of

1969 (“NEPA”)<sup>2</sup> by failing to prepare an environmental impact statement (“EIS”) in connection with their records of decision adopting the reasonable and prudent alternatives described in the biological opinion issued by NOAA Fisheries in 2014 (“2014 BiOp”). The Court requested briefs from the Federal Defendants and Plaintiffs regarding what would be a reasonable schedule to ensure proper compliance with NEPA.<sup>3</sup>

The Federal Defendants propose a schedule of approximately five years. Plaintiffs object that the proposed schedule is too long, particularly in light of the lengthy history of this litigation and the numerous biological opinions that already have been invalidated by the Court in this case. Plaintiffs argue that the Federal Defendants propose an unreasonably lengthy schedule that ignores the lethal conditions facing the listed species, which is highlighted by the deadly conditions that occurred in 2015. Plaintiffs add that the Federal Defendants have been operating in violation of the law for nearly 17 years and that this “intransigence” should not be allowed to continue for another five years in order to comply with NEPA.

The Court has reviewed the Federal Defendants’ proposed schedule and does not find it to be unreasonably lengthy or advanced for purposes of improperly delaying or avoiding the Federal Defendants’ obligations under federal law. The Court emphasized in its Opinion and Order the importance of a comprehensive NEPA analysis so that the Action Agencies, tribal and state sovereigns, relevant public officials, and the public generally may be adequately informed regarding the relevant issues and alternatives. The NEPA process must be sufficiently thorough

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Reclamation and the U.S. Army Corps of Engineers are collectively referred to as the “Action Agencies.”

<sup>2</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>3</sup> The Court also permitted briefing from defendant-intervenors and amici who requested to be heard on the matter.

to enable thoughtful and meaningful scoping, robust public and sovereign participation throughout the process, and appropriate consideration by the Action Agencies of the issues raised and reasonable options and alternatives. Although the Court agrees with Plaintiffs that there is an urgent need to address the problems facing the listed species, truncating the NEPA process to meet an arbitrary court deadline may be counterproductive to the purpose of NEPA and result in an inadequate response to the Court's concerns expressed in its Opinion and Order. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 606 (9th Cir. 2014) (observing in the context of a court-ordered deadline for a biological opinion that “[w]e wonder whether anyone was ultimately well served by the imposition of tight deadlines in a matter of such consequence”).

Plaintiffs also object that the proposed schedule by the Federal Defendants does not include a co-extensive NEPA analysis and preparation of the next biological opinion, which was ordered by the Court to be completed on or before March 31, 2018. If these processes are not completed concurrently, argue Plaintiffs, the records of decision adopting the reasonable and prudent alternatives of the 2018 biological opinion will likely violate NEPA, just as did the records of decision adopting the 2014 BiOp, as previously found by the Court. The Federal Defendants acknowledge that the two independent, yet related, processes (NEPA and consultation under Section 7 of the Endangered Species Act) may well inform one another and may require interrelated schedules. *See also Jewell*, 747 F.3d at 648 (stating that “agencies are expected to concurrently comply with both Section 7 of the ESA [Endangered Species Act] and NEPA”); 40 C.F.R. § 1500.2 (“Federal agencies shall to the fullest extent possible: . . . integrate the requirements of NEPA with other planning and environmental review procedures . . . so that all such procedures run concurrently rather than consecutively.”). The Federal Defendants state,

however, that because of the complexity of the analyses in this case, they are not *yet* in a position precisely to delineate how the two processes can be integrated, coordinated, and sequenced. The Court defers to the expertise of NOAA Fisheries and the Action Agencies and leaves for future consideration how best to integrate the two processes.

In the meantime, the Federal Defendants ask the Court to extend the deadline for completing the next biological opinion from March 31, 2018, to December 31, 2018. This request is GRANTED. NOAA Fisheries and the Action Agencies are directed to keep in place the 2014 BiOp and the related incidental take statement and continue to fund and implement the 2014 BiOp until the 2018 biological opinion is prepared and filed.

The Court adopts the NEPA schedule proposed by the Federal Defendants. In addition, the Court requires the Federal Defendants to submit a status report approximately 30 days after the close of the scoping period and the Court will then set a status conference for approximately 30 days after the status report has been filed. This is to ensure that the Court, parties, and amici may consider, after scoping is completed, the appropriateness of the remaining NEPA schedule and, if not previously resolved, how best to integrate and coordinate the NEPA process and Section 7 consultation.

### **CONCLUSION**

Subject to any further orders of the Court, the Court Orders the following schedule on remand:

- The Federal Defendants shall complete scoping under NEPA on or before September 30, 2017;
- The Federal Defendants shall file a status report with the Court on or before October 30, 2017;
- A status conference is set for November 30, 2017, at 10AM;

- NOAA Fisheries' further consultation under Section 7 of the Endangered Species Act, correcting the deficiencies identified in the Court's Opinion and Order of May 4, 2016, shall be completed on or before December 31, 2018;
- The draft EIS shall be completed on or before March 27, 2020;
- The final EIS shall be completed on or before March 26, 2021; and
- The Records of Decision shall be issued on or before September 24, 2021.

**IT IS SO ORDERED.**

DATED this 6th day of July, 2016.

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