



Chambers of
JAMES A. REDDEN
United States District Judge

United States District Court

DISTRICT OF OREGON
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February 22, 2008

To: Counsel of Record in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., CV 01-640 RE
From: Hon. James A. Redden
Re: 2008 Fish Operations Plan

Dear Counsel,

Federal Defendants have submitted a proposed Fish Operations Plan for 2008 for the FCRPS, which essentially mirrors 2007 spill operations. The parties agreed to "rollover" 2007 spill operations to avoid the distraction of potential injunction proceedings while the Federal Defendants were finalizing the new biological opinion.

Plaintiffs and the State of Oregon raised the issue of how total dissolved gas (TDG) should be measured in 2008, for purposes of regulating the amount of spill passing over Bonneville Dam. Under Oregon law in effect in 2007, TDG caused by spill at Bonneville Dam was measured at the Camas-Washougal gauge. Spill at Bonneville Dam was curtailed if the TDG reading at that gauge exceeded 115%. As of 2008, both Oregon and Washington have abandoned the Camas-Washougal gauge because it is an unreliable indicator of TDG caused by spill at the Bonneville Dam. The states now measure TDG based solely on the gauge at the tailrace of the Bonneville Dam. Oregon and Plaintiffs contend that the "rollover" agreement for 2008 spill operations requires Federal Defendants to spill "to the spill cap," as measured under applicable state law (*i.e.*, by using the gauge at the tailrace of Bonneville Dam). Because state law allows for up to 120% TDG at the tailrace of Bonneville Dam, Plaintiffs and Oregon argue that use of the tailrace gauge will provide more spill, resulting in greater fish survival.

Federal Defendants, the State of Washington, and BPA Customer Group acknowledge that the Camas/Washougal gauge is not a reliable indicator of TDG caused by spill at Bonneville Dam. They contend, however, that the "rollover" agreement was intended to essentially continue the *status quo* by continuing the spill operations that the parties agreed to in 2007. They argue that there is no evidence that the use of the gauge at the tailrace of the Bonneville Dam will provide any measurable benefit to listed species.

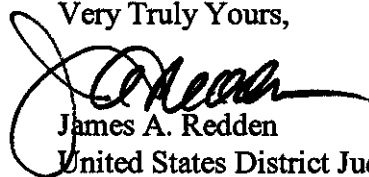
There was no convincing argument that the use of the Camas/Washougal gauge would significantly reduce the likelihood of survival of listed species migrating over Bonneville Dam. Federal Defendants relied on the Camas-Washougal gauge in 2006 and 2007, and by most accounts, spill operations in those years were successful. I am not persuaded that tweaking Federal Defendants' proposed spill operations will provide any measurable biological benefit to listed species.

The purpose of the parties' "rollover" agreement was to avoid time-consuming motion practice regarding injunctive relief while Federal Defendants are completing the biological opinion, which is due May 5, 2008. The government has requested, and the court has granted several extensions. No further extensions should be granted. Federal Defendants should be focused on the critical task of completing a biological opinion that complies with the ESA. On this record, I conclude the *status quo* should be maintained and Federal Defendants may continue to rely on the Camas-Washougal gauge to measure TDG below Bonneville Dam.

The State of Montana and the Kootenai Tribe have asked the court to order Federal Defendants to implement portions of the Northwest Power and Conservation Council's Mainstem Amendments. The Mainstem Amendments are part of Federal Defendants' draft biological opinion, and Montana's proposal would result in piecemeal implementation of the biological opinion, which has yet to be finalized, challenged, or subjected to judicial review.

I am sympathetic to the parties' respective positions, but I am not persuaded that either of the proposals are necessary to prevent irreparable harm to listed species. Absent further objection, I will sign Federal Defendants' Proposed Order implementing the 2008 Fish Operations Plan not later than Monday, February 25, 2008, at 5:00 p.m.

Very Truly Yours,



James A. Redden
United States District Judge