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[1] Idaho Wants Niners To Re-Hear BiOp Case

The state of Idaho has petitioned the Ninth Circuit Court to take another look at its April ruling that upheld the decision in Oregon District Court that threw out the 2004 BiOp, preferably by the full court.

It cited a [June ruling](#) by the US Supreme Court that overturned a 2006 Niners' panel ruling (*NAHB v. Defenders of Wildlife*) that said the ESA effectively trumps other federal statutes. Now, Idaho says the panel opinion conflicts with the Supreme Court's decision that says agencies can only apply the ESA to their discretionary actions.

The state was a defendant-intervenor in the litigation that led to Judge James Redden tossing the controversial hydro BiOp nearly two years ago.

Federal attorneys haven't decided yet whether to pursue an appeal. A spokesman from the US Solicitor General's Office told *NW Fishletter* last week that the Niners had given the government until July 30 to decide whether to petition for a rehearing itself.

The July 18 petition from Idaho says the 2004 BiOp reconciled obligations of the Corps of Engineers and the Bureau of Reclamation over operation of the federal dam system in the Columbia and Snake basins-- and went even further when it compared fish survival from proposed dam operations to a "reference" operation that included "non-discretionary" obligations to operate the dams for other purposes as well. The comparison was developed to determine if the proposed operations would appreciably reduce the likelihood of survival and recovery of the ESA-listed salmon and steelhead stocks.

But by adding these obligations to the reference operation, Idaho said the analysis overestimated the beneficial effects that could actually be achieved for fish, and hence, overestimated the gaps between current fish survivals and those that could be theoretically achieved.

In its ruling on the 2004 BiOp, the Niners' panel said the NMFS analysis was inconsistent with the Ninth Circuit's 2005 opinion in *Defenders of Wildlife v. EPA*, which expanded the concept of agency actions that are "discretionary" as "any action actually taken by an agency."

But Idaho said that idea has been "rejected squarely" by the Supreme Court in the *Homebuilders* case, which dictates that the Niners reconsider its opinion on the 2004 hydro BiOp.

Idaho argued that the Supreme Court's ruling is not limited to the Clean Water Act, the federal statute involved in the case, but also "many additional otherwise categorical statutory commands."

And that is why the state says that NMFS properly included the impacts from non-discretionary actions regarding dam operations in the environmental baseline of their analysis, rather than as effects of the action.

Idaho's petition went so far as to say that the Corps and Bureau have a mandatory duty to operate the dams for various purposes and cannot be prevented from that by any ESA requirements because operating the hydro system "is itself non-discretionary." The state argued that "it is hardly clear" that ESA consultation was even necessary under *Homebuilders'* analysis. In any case, says the state, the NMFS reference operation and gap analysis falls well within the Supreme Court's interpretation of Section 7(a)(2) of the ESA.

In the 2004 BiOp, the NMFS analysis found that the proposed dam operations did not jeopardize any listed ESU when compared to the reference operation, which both the Ninth Circuit and the District Court said did not satisfy ESA jeopardy requirements.

Idaho says the Ninth Circuit's panel opinion must be vacated and the NMFS analysis reconsidered in light of the Supreme Court's opinion and another case as well, the Ninth's precedent-setting 2004 decision in *Ground Zero Center v. the US Navy*, which ruled on the siting of nuclear missiles in Hood Canal. It said the Navy did not violate the ESA's Section 7(a)(2) by failing to consult over the potential impact on listed salmon from an accidental missile explosion because it would be "an exercise in futility" since any risk of explosion derived "solely from the President's siting decision."

Idaho said it would be equally futile to conduct an ESA consultation over impacts from the existence and operation of the federal dams for non-discretionary purposes. [-Bill Rudolph](#)