



NW FISHLETTER

NW Fishletter #296, November 11, 2011

[5] BiOp Plaintiffs Ask For Settlement Judge To Iron Out Differences

Plaintiffs in the hydro BiOp litigation have panned the federal agencies' recent report on how well BiOp actions progressed in 2010, and have asked that a settlement judge be appointed to hasten matters.

The aim, they said, would be "to resolve the scope of, and issues that NOAA will address in developing a revised biological opinion by Jan. 1, 2014."

In their Oct. 25 filing, plaintiffs said tributary, estuary and hatchery improvements are way behind schedule, and that the feds' narrow interpretation of federal judge James Redden's ruling will only waste more time before an adequate suite of actions is developed.

They also want an independent panel appointed to review implementation of the current plan -- "in light of the specific predictions in the 2008/2010 BiOps and the lack of specific actions" -- and to evaluate how well the agencies have provided "verifiable and independently reviewable information about RPA [reasonable and prudent action] implementation."

The plaintiffs also want the panel to determine whether the RPA implementation "is achieving the survival improvements necessary to avoid jeopardy."

Plaintiffs said the feds' report provides no clear basis for the conclusion that fish are benefiting as expected from actions already implemented.

The plaintiffs' filing said a settlement judge could provide a setting for reconciling views of all the parties.

In May, Redden ruled that the 10-year salmon plan was inadequate, chiefly because it didn't spell out specific actions to improve habitat after 2013. But he gave the agencies two years to fix it -- presumably to flesh out future actions, even though the judge wasn't really persuaded that the expected benefits to fish would be as high as the feds had predicted.

Oregon and the Nez Perce Tribe have supported the call for a settlement judge, and Oregon also supported the creation of a panel to review the implementation report.

But others weren't impressed. Terry Flores, executive director of defendant-intervenor group Northwest River Partners, said the plaintiffs were still employing "their tired, old tactics."

She said the latest criticism of the salmon plan's implementation was an attempt "to crush the BiOp with unexplained, unending, mindless process." Her group filed its own response, noting that many new actions have been implemented since the end of 2010.

"The massive investment in state and tribal Accord habitat projects represents one of the largest ramp-ups of infrastructure restoration actions anywhere in the country," said the NRP filing, which also pointed to improvements in juvenile passage at federal dams that have helped boost the 10-year rolling average of annual salmon and steelhead returns by nearly a million fish since 2000.

The NRP filing said that habitat work in the estuary was behind schedule mainly due to "challenges associated with planning and acquiring lands and environmental reviews needed to support major habitat changes and breaches of existing dykes."

The group said a major hatchery review is still under way, as the report says, to develop plans that reduce adverse impacts to ESA-listed stocks. NRP said they would like to see this process completed as soon as possible.

The NRP filing also noted mounting biological evidence showing that many stocks of fish benefit from transport through the hydro system, particularly juvenile steelhead and some spring chinook populations. "This new evidence is significant because it calls into question the practice of using increased spill in May, because that practice could actually result in fewer fish being transported, thus reducing salmon and steelhead survivals."

It was reported that federal agencies will soon file their own response, and that they are not interested in any new settlement process, but want to continue with the BiOp implementation and add more specific actions beyond 2013.

In 2002, a mediation process failed to bring parties together after environmental and fishing groups sued over the 2000 BiOp. At the time, plaintiffs said the 2000 hydro BiOp's reliance on off-site mitigation efforts to help boost listed stocks was misguided and illegal. They claimed this approach relied on "speculative and voluntary actions" by other federal agencies and state and private entities outside of the authority of the Action Agencies involved with the hydro system.

The judge eventually agreed with them, and the years-long remand process began in earnest, one that continues to this day. **-B. R.**

◆ Subscriptions and Feedback ◆

Subscribe to the Fishletter notification e-mail list.

NW Fishletter is produced by Energy NewsData.
Publisher: Cyrus Noë, Editor: Bill Rudolph
Phone: (206) 285-4848 Fax: (206) 281-8035