

LATEST BRIEFS BY FEDS, 3 STATES, 3 TRIBES, PORTS DEFEND SALMON BIOP; ORAL ARGUMENTS LIKELY NEXT

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“The federal salmon plan is based in sound science, is action oriented, has a vast partnership as an implementation team and should be given a chance to succeed,” according to a legal brief filed jointly Feb. 11 by the Warm Springs, Umatilla and Yakama tribes.

That is the theme detailed in the recent briefs filed in U.S. District Court by the three tribes, the federal government, an alliance of the states of Idaho, Montana and Washington and the Inland Ports and Navigation Group.

All of the latest filings refute claims by the state of Oregon and a coalition of fishing and conservation groups that the 2008/2010 NOAA Fisheries Federal Columbia River Power System “biological opinion” is inadequate, scientifically flawed and contrary to the Endangered Species Act.

BiOPs are required under the ESA to judge the impact of federal actions on listed species. In this case the FCRPS BiOp judges the impact of Columbia and Snake River dams on 13 protected salmon and steelhead stocks.

The plaintiffs say that the strategy’s biological jeopardy analysis – the estimation of the risk faced by the species and how BiOp actions would mitigate that risk -- is flawed. They allege the analysis is based on favorable data that leads to a preconceived conclusion.

The coalition, Oregon and Nez Perce Tribe allege that the BiOp depends on habitat actions that are not certain to be implemented and that the salmon survival benefits stemming from such habitat improvements are also uncertain. They also claim that planned estuary and tributary habitat actions are not occurring as planned and that assumed fish survival benefits from such projects “remain speculative and may never be confirmed.” The Nez Perce Tribe is an intervenor in the lawsuit.

The National Wildlife Federation and Oregon also contend that NOAA failed in its 2010 supplemental BiOp, which incorporates the terms of a 2008 BiOp, to properly evaluate new data and explain the significance to the prospective conclusions.

The federal, tribal and state briefs filed Feb. 11 say that NOAA’s jeopardy standard is consistent with the statute and regulations and that the agency “thoroughly evaluated and cogently explained the significance of the new data.” They also said that the habitat actions proposed in the BiOp will improve salmoid survival and that the science supporting the habitat actions is sound.

And, the federal agencies say that implementation of the habitat actions is occurring in accordance with the BiOp's prescriptions.

“With this Administration’s full support, the agencies have charted a course that is protective and that complies with the law. Operational advancements and habitat mitigation are working. Indeed, Plaintiffs have clarified that they do not seek a change in the extensive habitat projects that are being implemented over the next seven years; to the contrary, they would seek an injunction forcing the agencies to implement the very Reasonable and Prudent Alternative (“RPA”) that we now debate,” the federal brief says, referring the BiOp’s mitigation prescriptions.

“The science has been exhaustively reviewed by some of the best minds this country has to offer, and the RPA has been judged to be sound. It is time to re-focus on the salmon and steelhead, end the litigation, and move forward with implementation.”

“Plaintiffs dismiss the fact that nine different sovereigns are in agreement on the technical aspects of the RPA, suggesting that Federal Defendants and the other sovereigns equate ESA compliance with a simple democratic majority, of Columbia Basin states and tribes. Rather, this convergence, perhaps the greatest alignment of sovereigns ever on the Columbia River, is evidence that NOAA’s conclusions are reasonable and entitled to deference in accordance with Ninth Circuit case law.”

“It is time to decide whether the immense undertaking reflected in the 2008 and 2010 BiOps is consistent with the focused remand direction from this Court when the 2000 BiOp was invalidated,” the three states’ brief says. “Perhaps because Plaintiffs sense that the opportunity to advance their own agendas is waning (with NWF unabashedly acknowledging in public that it seeks removal of the dams), their latest briefs even more stridently paint everything that NOAA and the Action Agencies have done in the last ten or more years as abject failure.”

That is simply not true, the three tribes’ brief says.

“The Tribes share the optimism expressed by the Court that this unique collaborative remand exercise might have in fact led us collectively to a respite from the cycle of litigation,” the tribal says, referring to a remand process of nearly three years in which the involved federal agencies engaged Columbia basin states and tribes -- sovereigns like the federal government – in discussions during the building of the 2008 BiOp.

“Our testimony that we stand behind the scientific soundness of this salmon plan remains unqualified even after careful consideration of the criticisms lodged by our co-managers that we respect and work with every day,” the Feb. 11 tribal brief says.

“There is now a historic opportunity for the region -- federal agencies in partnership with all of the other sovereigns in the region, informed by completed litigation – to move forward and turn their full attentions to implementing this RPA and to Section 4 of the ESA, so that the region can collectively achieve the recovery of Columbia and Snake River salmon and steelhead,” the federal brief says. It asks the judge to dismiss the lawsuit and let the BiOp stand.

The Inland Ports and Navigation Group weighed in to address a “narrow issue raised by the Nez Perce Tribe regarding the sufficiency of the United States’ commitment in the AMIP to address the potential removal of one or more Snake River dams as a Long-term Contingency Action in the event of a significant decline in the status of listed species on the Snake and Columbia Rivers.” The Adaptive Management Implementation Plan, an addendum to the BiOp, sets out a schedule for evaluating the prospect of removing dams, and then, if triggered by extreme fish population declines, pursuing the authority that is needed from Congress to breach the dams. The Nez Perce Tribe in a brief filed in late January suggested that the federal agencies should immediately seek dam breaching authority so it could act more quickly if need be.

“At its core, the Nez Perce Tribe’s objection appears to be that the dam removal plan is not a primary action item in the AMIP. But simply because dam removal may be possible does not automatically give the remote potential of dam removal primacy over the AMIP’s reasonable and prudent alternatives that will avoid jeopardy,” the IPNG’s Feb. 10 brief says.

“The dam removal contingency is exactly where it should be. If the science triggers a conclusion that the Rivers requires a more radical alternative than the reasonable and prudent measures already implemented, then the dam removal contingency plan will be implemented,” the IPNG says. “Prior to that time, however, it is neither reasonable nor prudent to spend millions of dollars to study a potential solution in search of a potential problem.”

The BiOp concludes that the planned mitigation actions counter hydro system impacts and, as a result avoid jeopardizing the survival of the 13 listed Columbia River basin salmon and steelhead stocks.

The Feb. 11 filings complete what has been extra round of briefing in the nearly three-year battle over the legality of the FCRPS BiOp. It is expected that Judge James A. Redden will now schedule oral arguments in the case.

The latest arguments focus on the legality under the ESA and other statues of NOAA Fisheries’ May 2010 supplemental FCRPS BiOp, which outlines dam passage improvements and operations, habitat restoration and other work in its RPA that federal agencies say mitigate for negative impacts from dams on Columbia-Snake river salmon and steelhead.

Defendants in the lawsuit are NOAA Fisheries and the operators of the dams, the U.S. Army Corps of Engineers and the Bureau of Reclamation. The Bonneville Power Administration, which markets the power generated in the FCRPS, is also involved in the federal BiOp ESA consultations.

Briefing in the lawsuit began shortly after NOAA Fisheries released in May of 2008 its FCRPS BiOp, which was later absorbed with updates into the 2010 supplement. Both Earthjustice, which represents the coalition, and Oregon updated their complaints this past fall to address the supplemental BiOp.

Redden ordered that briefing on the supplement focus on changes to the BiOp from 2008 to 2010 and the submitted administrative record, which includes documents and other materials considered in developing the new BiOp.

For more information see:

--- CBB, Jan. 28, 2011 BiOp: “Oregon, Nez Perce, Coalition Again Contend Fish Survival Benefits ‘Remain Speculative’” <http://www.cbulletin.com/404690.aspx>

-- CBB, Dec. 23, 2010 “BiOp Litigation: Briefs Filed Contending Agencies’ Salmon Plan Legally, Scientifically Valid” <http://www.cbulletin.com/403321.aspx>

-- CBB, Nov. 5, 2010, “BiOp Challengers: 2010 Supplemental Salmon BiOp ‘Adds Nothing of Legal Significance’” <http://www.cbulletin.com/401381.aspx>

For documents and information related to BiOp litigation go to www.salmonrecovery.gov