



Judge Redden's Ruling

A Solid “Yes, No, Maybe” from the Judge

“Yes, No, Maybe.” That was the conclusion The Oregonian's editorial board reached on reading Judge James Redden's long-awaited ruling on the federal Biological Opinion (BiOp) - or salmon plan - issued last week. It's an apt characterization. For those of us who had been waiting with bated breath for the ruling and working on the issues for the last six years (a decade for some), we were understandably disappointed and frustrated with its ambiguity.

The 2008/2010 BiOp is the product of an unprecedented collaboration, the best science that sovereign and independent scientists could bring to bear, and a massive investment by Northwest citizens in salmon protection. The like of this plan hasn't been seen anywhere else in the country.

While The Oregonian applied its characterization only to the Judge's take on habitat restoration, I think the “yes, no, maybe” applies to the whole of the ruling, as follows.

The Judge remanded the plan back to the federal agencies, while also directing them to continue to implement it. In particular, he endorsed the state and tribal Accords, which make up the habitat component of the plan (the “yes”). He urged the federal agencies to look at even “more aggressive” operational changes to the hydro system, but rejected plaintiffs' injunction seeking such changes (the “no”). He is comfortable implementing the habitat measures in the plan until 2013, but not after, and ordered the agencies to continue to work with the Sovereigns and come back to him with a revised plan that includes more specificity in the habitat analysis and benefits. Then he'll decide where to go from there (the “maybe”).

In fact, what he did not do in his ruling is in some ways more telling than what he focused on in his order.

- He did not accept the litigants' arguments about the jeopardy/recovery legal standard, which is really the heart of the case. The litigants seek to raise the legal bar to a much higher standard than the law requires. They want the salmon plan “to recover” the listed species, rather than impose no further jeopardy, and provide opportunity for recovery – a huge distinction.
- He did not question the overall scientific framework of the Biological Opinion developed by the sovereign biologists and endorsed by the Obama Administration's top scientists and independent scientists. (One held out as a model for addressing scientific uncertainty by the

National Academy of Science). His concerns were limited to the analysis of habitat benefits in the BiOp's out-years.

- And, as mentioned, he did not grant the litigants' injunction seeking even more flow/spill and changed hydro operations. He maintained the court-ordered spill the federal agencies have been implementing for the past five years.

So where are we now? Despite the litigants' claims of some type of victory, they clearly didn't get it. We all got, well, more of the same, and probably will for several more years by the time a revised plan is before the Judge, briefed and decided. It's possible that the litigants or the federal agencies may appeal. The legal experts are digesting and analyzing the ruling and have 60 days minus a week to figure that out.

One thing that is crystal clear: Judge Redden will retain jurisdiction over the case while the federal agencies and Sovereigns work on the narrow issue he raised – habitat benefits. And they will continue to implement the plan collaboratively. They likely will be pressured to “do more” by the Judge and others as that has been the tactic since the 2000 BiOp was rejected.

RiverPartners would like to see the agencies focus all of their time and energies on implementing the current plan in response to the Judge's ruling, and resist taking on any more. Simply throwing more money at the plan is not a solution, and is a sure fire way to put a lot of public money at risk of being wasted, with little or nothing to show for salmon.

However, there is no “maybe” about this: the Northwest's hardworking families and businesses will continue to foot the bill through their electric rates for ALL the actions in the plan, hydro, habitat and hatchery measures, to the tune of hundreds of millions of dollars each year. It's just not clear when the court will give them the recognition and certainty they deserve for that investment and all that it is accomplishing for the salmon.



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