



PRESIDENT'S NOTES

By Allison MacEwan, P.E., CFM, AWRA-WA President

With September comes the start of a busy fall for AWRA. Here is an update on our activities:

- For September through December, we are planning a series of monthly dinner meetings to be held in either the Puget Sound area or in Central Washington. See information for our September 28th dinner meeting in this newsletter and stay tuned for future dinner meeting announcements.
- Our 2016 AWRA-WA Annual State Conference on Rural Domestic and Municipal Water Supply, to be held on October 26th at the Mountaineers Center in Seattle is rapidly approaching. This topic is proving to be of great interest to our membership and I encourage you



to get your registration in as soon as possible. More information on the conference can be found in this newsletter and at: <http://www.waawra.org/2016-State-Conference>

- Our nominations process for the 2017 AWRA-WA Board is currently underway. If you are interested in being a part of our Board and would like to learn more, please contact me at: amacewan@gmail.com.

- We are currently seeking

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nominations for our annual Student Fellowship Awards. Two \$2,000 fellowships, that include both state and nation AWRA membership benefits, will be given for the 2016 – 17 academic year. More information on the application process can be found in this newsletter.

Lastly, I am headed to the **AWRA-WA National Conference** in Orlando Florida, from November 13-17th, 2016, representing our AWRA Washington Chapter. I am hoping to see other Washingtonian colleagues there! More information on the conference can be found at: <http://awra.org/meetings/Orlando2016/>.

Each of these AWRA events provides an opportunity for learning more about current and pertinent water topics and for the sharing of diverse perspectives within our water resources community. Please join us at one or more of these fall events and share your insights and perspectives with us.

AWRA-WA SEPTEMBER DINNER MEETING

JOIN US ON SEPTEMBER 28, 2016

IVAR'S SALMON HOUSE ON LAKE UNION

401 NE NORTHLAKE WAY, SEATTLE, WASHINGTON

SPEAKER: JOHN CHANDLER, WATER RESOURCES TECHNICAL LEAD, PUGET SOUND ENERGY

TOPIC: NO DROUGHT ABOUT IT: MANAGING THE BAKER PROJECT'S DRIEST SEASON

SOCIAL HOUR STARTS AT 5:30, DETAILS ON PAGE 5 .

AWRA-WA 2016 STATE CONFERENCE AGENDA

RURAL DOMESTIC AND MUNICIPAL WATER SUPPLY

OCTOBER 26, 2016

7:00-8:00	Registration and Networking
8:00-9:00	Welcome and Session 1: Rural Domestic & Municipal Water Supply Law and Policy Moderator: Adam Gravley, Esq., Partner, Van Ness Feldman, LLP <u>Speakers:</u> Alan Reichman, Esq., Managing Assistant Attorney General, Washington State Attorney General's Office Hon. Chuck Mosher, Board Member, Eastern Washington Growth Management Hearings Board
9:00-9:45	Keynote Address <u>Speaker:</u> Maia Bellon, Esq., Director, Washington State Department of Ecology
9:45-10:00	Networking Break
10:00-12:00	Session 2: Intersection of Growth Management Act and the Water Code Moderator: Steve Hirschey, Comprehensive Planning, King County <u>Speakers:</u> Tadas A. Kisielius, Esq., Partner Attorney, Van Ness Feldman, LLP Jean Melious, Esq., Attorney, Nossaman, LLP Tim Trohimovich, Director of Planning and Law, Futurewise Honorable Paul Jewell, Commissioner, Kittitas County Board of Commissioners TBD, Lightning Talk
12:00-12:40	Lunch and Networking
12:40-1:00	State of the AWRA-WA Section and Outstanding Service Award
1:00-2:45	Session 3: Current Rural Domestic and Municipal Water Supply Tools and Programs Moderator: Jay Chennault, Associate Hydrogeologist/Engineer, Associated Earth Sciences, Inc. <u>Speakers:</u> Joel Freudenthal, Senior Natural Resources Specialist, Yakima County Amanda Cronin, Project Manager, Washington Water Trust Melissa Downes, Hydrogeologist, Office of Columbia River, Dept. of Ecology William Meyer, Biologist, Washington State Department of Fish and Wildlife TBD, Lightning Talk
2:45-3:05	Networking Break
3:05-4:50	Session 4: Progressive Rural Domestic and Municipal Water Supply Strategies Moderator: Dave Christensen, Program Dev. and Operations Support, Water Resources, Dept. of Ecology <u>Speakers:</u> Philip Rigdon, Department of Natural Resources Deputy Director, Confederated Tribes and Bands of the Yakama Nation Larry Wasserman, Environmental Policy Director, Swinomish Indian Tribal Community Mike Hermanson, Water Resources Specialist, Spokane County Bill Clarke, Attorney, Washington REALTORS Steve Malloch, Principal, Western Water Futures, LLP
4:50-5:00	Closing by Conference Co-Chairs
5:00-7:00	Reception

AWRA-WA STATE CONFERENCE: RURAL DOMESTIC AND MUNICIPAL WATER SUPPLY

MOUNTAINEERS SEATTLE PROGRAM CENTER, 7700 SAND POINT WAY NE, SEATTLE

OCTOBER 26, 2016

EVENT INFORMATION

It is no small secret that water budgets in the State of Washington are tight. Now that legal water availability must be considered for rural domestic water supply (groundwater permit-exempt uses) under the Growth Management Act (GMA), and some municipalities have been struggling with water quantity and quality, the question of how to maintain water supplies for Washington's residents has never been more critical. The American Water Resources Association Washington State Section (AWRA-WA) is holding its 2016 Annual State Conference on October 26, 2016 at the Mountaineers Seattle Program Center. The topic for this year's event, Rural Domestic and Municipal Water Supply, transpires from the recent changes in the water resources legal landscape in the state.

Recent court rulings have significantly altered how the state must manage water, including rural domestic (permit-exempt) uses, and brings Washington State counties into the calculus, as counties must now demonstrate legal water availability in addition to physical availability under the GMA. These changes embrace a larger shift in general perception in the state that permit-exempt groundwater is no longer freely available for appropriation under Washington Water Law. Legal and public policy perception shifts represent a paradigm change in the appropriation and management of Washington's increasingly limited water resources.

This year's conference will involve in-depth discussions of recent legal cases and consequential water management challenges. We will summarize the status of rural domestic and municipal water programs and discuss current water resources strategies. Lastly, we will explore future options, and delve into potential policy choices and solutions in response to this changing legal environment. An evening reception will follow the Conference with an opportunity to meet and mingle among water resource professionals, and the opportunity to enjoy a variety of hors d'oeuvres and select beverages.

Our annual conferences have consistently gained popularity over the years, and earned our organization a reputation for approaching the timeliest water-related issues in the State from diverse viewpoints. We hope that you will join us for what promises to be a full day of opportunities to share information, find resources, and network with colleagues from around the region.

Early bird registration is now open. Please contact one of the conference co-chairs with questions: Rabia Ahmed (rahmed@ramboll.com) or Jason McCormick (jason@mccormickwater.com).

For more information, registration, and updates, visit the conference page on our website:

<http://www.waawra.org/2016-State-Conference>



2016 AWRA-WA Annual State Conference

Rural Domestic and Municipal Water Supply

 <p>American Water Resources Association Washington Section</p>	<p>October 26 Seattle, Washington</p>	<p>Details and Registration at: www.waawra.org</p>
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EVOLVING WASHINGTON WATER LAW, OR A PRIMER FOR THE 2016 AWRA-WA STATE CONFERENCE

By Terry Smith, AWRA-WA Board Member

Events in water law seem to move at a furious pace recently, even though many of the regulations and laws have been in effect for several years. In this rapidly evolving scenario, placing the terminology into current, real life situations can be helpful in understanding how these changes will affect each of us, whether personally or professionally.

Recently, there has been much in the way of discussion about instream flow (ISF) “rules” for different watersheds, and “over-riding concerns of public interest” (OCPI). While these concepts were often developed over time and sometimes apart from each other, recent water shortages have caused controversy over implementation of these rules and policies to converge. Prior editions of AWRA-WA newsletters have provided extensive articles about the court cases and history that have been instrumental in defining the rules for water use. This article attempts to provide a summary of the terms as they have been defined by recent court decisions, and to use current examples of pending court cases and legislation to further clarify the terminology and impact of the decisions.

In anticipation of multiple and increasing use of the limited water resource in some watersheds, Ecology has been tasked with determining the minimum instream flows (ISF) for some of the most utilized and endangered watersheds. The primary factor used for determining minimum ISF is the amount of water that is necessary to sustain fish and wildlife, in particular salmon and its habitat. Ecology has the ability to determine the minimum flow for a particular watershed, and to adopt a “rule” for that watershed. The “Instream Flow Rule for the Dungeness”, that applies to the Dungeness River in Clallam County and adopted in 2013, is the minimum flow required for the river in that basin.

Since the minimum flow for fish survival evolves from prior court decisions that the tribes have an historic right to fish, the minimum flow rule trumps most successive water rights. Add to this a series of court decisions that determined where there is a hydrological connection between groundwater and streams, and therefore the ISF applies to use of groundwater, and we have the latest cases concerning the impact of the minimum ISF on “exempt” wells. Exempt wells are wells that a landowner would have the right to drill for use for that property. The Dungeness rule provides that property owners can access new wells if they pay a mitigation fee, which in turn goes toward purchasing water from a water bank.

Currently, the rule is being challenged by a group of property owners and developers. A decision in Thurston County Court in October could have an impact on use of the rule or possibly on how the rule is applied.

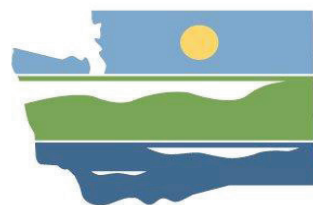
Population growth in the state, combined with the droughts of the last few years, has put a strain on the amount of water left in the streams. In an effort to meet the challenge of growth, Ecology has attempted to utilize over-riding considerations of public policy OCPI (history). This is a provision in the Water Resources Act that allows Ecology to permit water

use that would otherwise deplete the in-stream flows below the minimum if it finds there is an issue of public concern so compelling as to allow withdrawal with conditions despite the in-stream flow. Several recent court cases have gradually defined when OCPI can be used, resulting in the latest case that greatly restricts the application of OCPI.

Another aspect of the Dungeness rule is that it reserves water for future uses. Ecology made the reservations using OCPI authority. Recently passed legislation, ESSB 6513, provides legislative approval of the subsection of the rule that provides reservation of water for specific uses. Since recent court cases have narrowly defined when OCPI can be applied, it may be possible that the use of OCPI could be challenged, putting any restrictions of its use in conflict with the recently adopted legislation.

If this is still confusing (and for those who have not been following the progression of state water law since 1970, some catching-up is inevitable), there is still an opportunity for clarification at the 2016 annual AWRA-WA conference. Future issues of the newsletter will continue to provide more explanation as new court cases are decided and legislation is proposed.

THANKS TO OUR BASIN SPONSORS!



DEPARTMENT OF
ECOLOGY
State of Washington



IT'S DÉJÀ VU ALL OVER AGAIN: FEDERAL DISTRICT COURT IN OREGON REJECTS 2014 COLUMBIA RIVER BIOLOGICAL OPINION

By Douglas MacDougal, Marten Law

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See: <http://www.martenlaw.com/newsletter/20160614-columbia-river-biological-opinion-rejected>

It is always somewhat surprising – though it shouldn't be by now – when a District Court throws out a biological opinion on which more than a few federal agencies and technical teams have worked, in collaboration, for years to create. Once again, the United States District Court for the District of Oregon rejected the latest Biological Opinion (BiOp) prepared by the National Oceanic and Atmospheric Administration (NOAA) for the operation of the Federal Columbia River Power System (FCRPS). Federal District Judge Michael Simon pulled no punches in his evisceration of the 2014 NOAA Fisheries Supplemental Biological Opinion. His lengthy opinion this May in *National Wildlife Federation v. National Marine Fisheries Service*, [1] demanded that NOAA Fisheries and federal action agencies consider more creative and aggressive approaches to saving and restoring salmonid species in the Columbia River. [2] He urged them to avoid going down “the same well-worn and legally insufficient path” of previous recovery plans over the past two decades, and prepare yet another biological opinion not later than March 1, 2018, together with an Environmental Impact Statement (EIS) that complies with the National Environmental Policy Act (NEPA). [3]

Background

The challenge, of course, is a mighty one. The Columbia River is the natural hatchery and migration corridor of at least 13 species or populations of salmon and steelhead (salmonids) which are now listed as threatened or endangered under the Endangered Species Act (ESA). [4] In the modern era, that corridor has become an obstacle course for salmonids, navigating through hydroelectric dams, powerhouses and reservoirs. Since the first ESA listing of Snake River sockeye in 1991, NOAA Fisheries (then known as the National Marine Fisheries Service or NMFS)

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Doug MacDougal has over 30 years of experience in water rights, natural resources, and real estate law. His water-related experience includes representing clients in water rights, permitting and regulatory matters, and natural resource policy issues. Doug has been lead counsel on a number of complex water negotiations in Oregon water basins, involving federal, tribal, environmental, and private party interests. He has substantial experience in contested water cases involving water right transfers, stream and ground-water hydrology, and native rights, and has been involved in the ongoing Klamath Adjudication. He frequently consults on individual, basin, and watershed issues involving water rights, the Clean Water Act, endangered species, dams, and hydropower operations. He also has been heavily engaged in various ESA Section 7 consultations, and has undertaken a variety of due diligence assignments involving water, natural resource, and real estate issues in large multi-party transactions.

AWRA-WA DINNER MEETING

SEPTEMBER 28TH, 2016

NO DROUGHT ABOUT IT: MANAGING THE BAKER PROJECT'S DRIEST SEASON 2016

Speaker: **John Chandler**, Water Resources Technical Lead, Puget Sound Energy

Location: Ivar's Salmon House on Lake Union
401 NE Northlake Way, Seattle, Washington

Time: 5:30 - 8:00 PM

Topic Overview:

In 2015 the Baker Project, located in the Skagit River basin, experienced the worst drought in its 90 year record. The drought occurred during the implementation of the Baker Project's new FERC license, which requires a much higher minimum instream flows than previous operations. How does a water manager handle the competing objectives of a stressed resource in this situation? This talk will cover the low snowpack in 2015, how decisions were made to fulfill the license requirements with an uncertain water supply, communications with external stakeholders, and some thoughts about the present and future water resources situation in Washington.

Pre-register at www.waawra.org using PayPal or register at the door.

Registration is limited, so we encourage you to register early.

Students: Free

Members: \$30

Non-Members: \$40



John Chandler is the water resources technical lead at Puget Sound Energy. He is the water manager of the Baker Project, a two reservoir system with three powerhouses and a combined capacity of 200 MW. John also supports operational compliance, dam safety, license implementation, and marketing. He received an M.S. in Water Resources & Environmental Engineering from the University of Maine at Orono in 2008.

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has issued seven separate biological opinions: 1992;

1993 (concluding that the operations of the FCRPS would not jeopardize the listed species, but rejected by U.S. District Judge Malcolm Marsh); 2000 (finding jeopardy and superseding previous BiOps, but rejected by U.S. District Judge James Redden); 2004, 2008, and 2010 Supplemental BiOp (all rejected by Judge Redden); and 2014 Supplemental BiOp (now rejected by Judge Simon [5]).

The amount of time, energy, and resources devoted not only to the production of these biological opinions but also to their challenges is enormous. One may well ask, what is it about the case that makes getting a workable biological opinion seem nearly impossible? Why does compliance with the ESA, and now NEPA, seem for all practical purposes to be out of reach for these federal agencies? Part of the answer may lie in the sheer scope of the project: the 1,200 miles of the Snake and Columbia rivers flow through one Canadian province and seven Pacific Northwest states, and through a network of hydropower dams that supply low cost reliable and renewable energy to the region and beyond. It is an immensely complex system. Making it survivable for the 13 listed species of salmonids is only part of the problem. While the vast majority of salmonid mortality appears to come from its time in the ocean, the spawning reaches in the Northwest River system are essential to its recovery. Over the years since that first NMFS biological opinion, the law has evolved to include far more emphasis on recovery. It is not enough just to not kill fish; there must be a means for their recovery. Moreover, and perhaps more fundamentally, the “elephant in the room” – which is no longer an elephant – has always been whether the FCRPS hydropower system, no matter how it is tweaked, modified, or operationally reconfigured, is ultimately incompatible with the survival and recovery of the species. Can we have dams and fish too? The clear overriding message of Simon’s opinion is that the agencies must come to grips with that fundamental question.

Judge Simon excerpted passages from District Court BiOp opinions seventeen years apart to rail against agency sluggishness in dealing with this question. This from Judge Marsh’s 1994 opinion:

[The] process is seriously, “significantly,” flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation – that is, relatively small steps, minor improvements and adjustments – when the situation literally cries out for a major overhaul. Instead of looking for what can be done to protect the species from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption. [6]

And this excerpt, referring to Judge Redden’s 2011 opinion:

Judge Redden expressly ordered: No later than January 1, 2014, NOAA Fisheries shall produce a new biological opinion that reevaluates the efficacy of the RPAs [Reasonable and Prudent Alternatives] in avoiding jeopardy, identifies reasonably specific mitigation plans for the life of the biological opinion, and considers whether more aggressive action, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy. [7]

The emphatic message from Judge Simon was that NOAA fisheries must change its mindset and move from “minimal disruption” and “small steps” to “more aggressive action,” if that is necessary to achieve survival and recovery of the species. [8] This article reviews key themes of his opinion to understand what Judge Simon perceived as insufficient in the 2014 Supplemental BiOp, to define what a more aggressive path forward might look like.

The NEPA challenge

If plaintiffs wanted to find an additional vehicle to force consideration of dam removal, they may have succeeded by attaching a NEPA challenge to the attack on the 2014 Supplemental Biological Opinion. The BiOp has 73 RPAs that the action agencies – the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation – must comply with in order to avoid jeopardy. Plaintiffs asserted that a NEPA evaluation of alternatives must occur with respect to each and every one of those RPAs. Judge Simon relied on a recent Ninth Circuit case to support his conclusion that Plaintiffs were correct, even though in all of its decades of Columbia River BiOp litigation, no plaintiff had ever raised a NEPA claim as part of the challenge to a biological opinion. [9] This angle would allow a kind of escape from the strict, statutory confines of the ESA’s biological opinion and permit free investigation of options for saving and restoring fish populations that have never been seriously considered before in past BiOp analyses of the FCRPS:

It is this combination of the need of the consulting agency under the Endangered Species Act (here, NOAA Fisheries) to address and cure the continuing deficiencies in its biological opinions, including the 2014 BiOp under review, and the opportunity presented by requirement under the National Environmental Policy Act that the federal action agencies (here, the Corps and BOR) prepare a comprehensive environmental impact statement that evaluates a broad range of alternatives that may finally break the decades-long cycle of court-invalidated biological opinions that identify essentially the same narrow approach to the critical task of saving these dangerously imperiled species. The federal consulting and action agencies must do what Congress has directed them to do. [10] [Emphasis added.]

Judge Simon held that an Environmental Impact Statement (EIS) was indeed required by NEPA in this case and that it would allow consideration of a broader range of alternatives than had previously been undertaken, for example, dam breaching, bypassing, or removal:

Congress enacted the National Environmental Policy Act to ensure a process in which all reasonable alternatives are given a “hard look” and all necessary information is provided to the public. In addition, a central purpose of an environmental impact statement is “to force the consideration of environmental impacts in the decisionmaking process.” For example, the option of breaching, bypassing, or even removing a dam may be considered more financially prudent and environmentally effective than spending hundreds of millions of dollars more on uncertain habitat restoration and other alternative actions. [11] [Emphasis added.]

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The Judge emphasized that the alternatives analysis could and should include those which are outside of the lead agency's jurisdiction, and would of necessity require Congressional authorization. "Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies." [12]

The implications for the next round of NOAA Fisheries BiOp of combining a comprehensive EIS which would include evaluation of environmental impacts of alternative scenarios, with a fresh biological opinion, are dramatic and will no doubt present formidable challenges to the NOAA Fisheries and the action agencies.

Key ESA Holdings

We focus here on three important elements in the ESA analyses in Judge Simon's opinion: the metric used in determining whether a salmonid species is on the path to recovery; whether NOAA Fisheries' habitat mitigation measures were reasonably certain to occur; and climate change.

NOAA Fisheries' "Trending toward Recovery" Standard

Judge Simon heavily faulted NOAA Fisheries for concluding that their RPAs would not jeopardize the listed species' likelihood of recovery if the species was "trending toward recovery." [13] This, according to NOAA, would be the case if the population growth rate were anything greater than 1.0. A 1.0 growth rate means that the population is replacing itself – neither increasing nor declining. "Such a standard, however, does not take into account whether a population is already at a precariously low level of abundance." [14] The District Court felt that such a standard would not likely assure the recovery of an already, appreciably diminished population. There was no connection in the BiOp between this metric and existing abundance levels and a timeframe needed to achieve those levels, "even roughly." [15]

Uncertain Habitat Projects and Benefits

As with the 2008 BiOp, the Court found some of the action agency commitments to habitat improvement project too uncertain to be relied upon for the purposes of this biological opinion. [16] The uncertainty lay not only in whether the projects would be actually and reliably be completed, but also in whether the advertised benefits from those projects would be realized within projected time frames. In his review, the Judge laid out the "layers of uncertainty" entailed in predicting benefits from habitat improvement. It is uncertain, according to the Judge, how much improvement to habitat quality each project will provide; whether habitat quality improvements will translate into improvements in survival and overall condition during the portion of the fish's life cycle in that habitat; and, whether habitat improvements will correlate to improvements in survival over the full life cycle of the fish, resulting in greater numbers of fish returning to spawn. [17]

After considerable technical discussion, the Court found defects in NOAA Fisheries' analyses in the BiOp at each level, including notable failures to provide a room for error in cases where exact outcomes were projected. Despite NOAA Fisheries' repeated assertions that its habitat improvement projects will be completed, that they will meet adequate survival improvement standards, and its pleas to the Court to defer to its expertise, the Court held that the level of uncertainty was

too great:

The flaws in the 2014 BiOp with respect to habitat improvement projects are not that NOAA Fisheries relied on habitat mitigation efforts to avoid jeopardy, but that some of the habitat projects relied on are not reasonably certain to occur and that NOAA Fisheries relied on habitat mitigation projects achieving the exact amount of extremely uncertain survival benefits required to avoid jeopardy. The Court shares Judge Redden's previously-expressed concern that "[i]f NOAA Fisheries cannot rely on benefits from habitat improvement simply because they cannot conclusively quantify those benefits, they have no incentive to continue to fund these vital habitat improvements." [Citation omitted.] The ESA, however, tips the scale toward listed species and requires that the risk that mitigation will not be achieved be placed on the project. [18]

Climate Change

The Court found that NOAA Fisheries' analyses of the effects of climate change were incomplete and inadequate. It was unimpressed with NOAA Fisheries' reliance upon rather dated and general climate change information in the 2008 BiOp. NOAA Fisheries, in the Court's view, had information that climate change could undermine or eliminate the effectiveness of some of the BiOp's habitat mitigation efforts "but it does not appear to have considered or analyzed that information." [19]

The best available information indicates that climate change will have a significant negative effect on the listed populations of endangered or threatened species. Climate change implications that are likely to have harmful effects on certain of the listed species include: warmer stream temperatures; warmer ocean temperatures; contracting ocean habitat; contracting inland habitat; degradation of estuary habitat; reduced spring and summer stream flows with increased peak river flows; large-scale ecological changes, such as increasing insect infestations and fires affecting forested lands; increased rain with decreased snow; diminishing snow-packs; increased flood flows; and increased susceptibility to fish pathogens and parasitic organisms that are generally not injurious to their host until the fish becomes thermally stressed. Even a single year with detrimental climate conditions can have a devastating effect on the listed salmonids.[20]

The Court stated that NOAA Fisheries did not consider whether the RPA's effectiveness would be diminished by climate change effects.[21] In a gradually warming world, would the BiOp's mitigation requirements aimed at recovering salmonid species still be as effective as predicted? The Court did not know because, in its view, NOAA Fisheries dropped the ball: "In considering how the jeopardy metrics apply in the future, NOAA Fisheries assumed recent climate conditions would remain the same and did not engage in any analysis as to whether the survival benefits attributed to habitat actions would be diminished by the future effects of climate change." [22]

The Court also faulted NOAA Fisheries' conclusion that deteriorating ocean conditions "would not make a difference during the BiOp period," [23] and its inadequate analysis of climate change effects on freshwater salmonid life stages, as well.[24] While Defendants vainly argued that some climate change science is still speculative, the Court was unmoved. To Defendants' claim that NOAA Fisheries need not consider future climate effects because they are too uncertain, Judge Simon stated that "uncertainty does not excuse NOAA Fisheries from conducting an analysis using

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the best available science
regarding climate change and

its effects.”[25]

Conclusion

Judge Simons’ lengthy, detailed, and technical opinion will be carefully studied by NOAA Fisheries and the action agencies in order to try, once again, to craft an opinion that, once and for all, may pass muster with the Federal court. The twist here is that it must be accompanied by a NEPA analysis broadly investigating all reasonable alternatives for saving and recovering salmonids in the Columbia-Snake River basin. The clear admonition from the Court is for the action entities to think boldly and consider even drastic alternatives that might create a more realistic likelihood for survival and recovery, such as dam breaching, bypass, and/or removal. This will be a challenge because that analysis is supposed to include even potential, undoubtedly highly controversial actions outside of the jurisdiction of the agencies that would ultimately require future congressional approval.

[1] No. 3:01-CV-00640-SI, 2016 WL 2353647 (D. Or. May 4, 2016) (herein referred to as the “Judge Simon Opinion”).

[2] The action agency Defendants in the case were the U.S. Army Corps of Engineers and the U.S. Bureau of Reclamation.

[3] 42 U.S.C. §§ 4321 et seq.

[4] 16 U.S.C. §§ 1531 et seq.

[5] See generally Judge Simon Opinion at 2-4.

[6] Judge Simon Opinion at 2 & 7, citing Idaho Dept. of Fish & Game v. NMFS, 850 F. Supp. 886, 900 (D. Or. 1994), with emphasis added by Judge Simon.

[7] Judge Simon Opinion at 3, citing Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv., 839 F. Supp. 2d 1117, 1131 (D. Or. 2011), with emphasis added by Judge Simon. See 50 CFR §402.2 for the definition of “reasonable and prudent alternatives,” abbreviated as “RPAs”.

[8] Judge Simon stated: “For more than 20 years, however, the federal agencies have ignored these admonishments and have continued to focus essentially on the same approach to saving the listed species — hydro-mitigation efforts that minimize the effect on hydropower generation operations with a predominant focus on habitat restoration. These efforts have already cost billions of dollars, yet they are failing. Many populations of the listed species continue to be in a perilous state.” Judge Simon Opinion at 7.

[9] The Court relied upon the recent case of San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 602, 640-42 (9th Cir. 2014). Judge Simon Opinion, at 4, note 21. “In Jewell, the Ninth Circuit held clearly and explicitly, for the first time, that action agencies adopting an ROD [Record of Decision] implementing a biological opinion generally must prepare an EIS. Jewell, 747 F.3d at 640-42.” Judge Simon Opinion at 4. The Judge also noted, “An environmental impact statement provides the public with an opportunity to comment and also requires the action agencies to consider all reasonable alternatives, regardless of whether there currently is a funding source or whether any particular alternative is reasonably likely to occur.” Judge Simon Opinion at 4.

Defendants argued that “because there have been decades of litigation involving various BiOps relating to the FCRPS and

Plaintiffs have never before raised a NEPA claim, Plaintiffs have waived their right now to assert their NEPA claim.” The Court found this argument “unavailing.” Judge Simon Opinion at 53.

[10] Judge Simon Opinion at 4.

[11] Judge Simon Opinion at 62. Judge Simon was careful not to state what the NEPA analysis must conclude, but his conviction that dam breaching/removal must at least be comprehensively considered was evident in passages like this in several places in the opinion: “Although the Court is not predetermining any specific aspect of what a compliant NEPA analysis would look like in this case, it may well require consideration of the reasonable alternative of breaching, bypassing, or removing one or more of the four Lower Snake River Dams. This is an action that NOAA Fisheries and the Action Agencies have done their utmost to avoid considering for decades. Judge Redden repeatedly and strenuously encouraged the government to at least study the costs, benefits, and feasibility of such action, to no avail.” Judge Simon Opinion at 60.

[12] Judge Simon Opinion at 60-61.

[13] Judge Simon Opinion at 4.

[14] Id.

[15] Judge Simon Opinion at 5. The judge noted that the goal could be satisfied “with only infinitesimally small growth, despite populations that are already dangerously low in abundance...” Id.

[16] Citing Judge Redden’s language in that BiOp, the court reiterated:

Mitigation measures may be relied upon only where they involve “specific and binding plans” and “a clear, definite commitment of resources to implement those measures.” [NMFS III, 524 F.3d at 935-36] (finding agency’s “sincere general commitment to future improvements” inadequate to support no jeopardy conclusion). Mitigation measures supporting a biological opinion’s no jeopardy conclusion must be “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D.Ariz.2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir.1987)).

Judge Simon Opinion at 28. The reference to NMFS III is to Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv., 524 F.3d 917, 924 (9th Cir.2008).

[17] See Judge Simon Opinion at 30.

[18] Judge Simon Opinion at 37.

[19] Judge Simon Opinion at 6.

[20] Id.

[21] Judge Simon Opinion at 40.

[22] Id.

[23] Judge Simon Opinion at 42.

[24] Id.

[25] Judge Simon Opinion at 43. “The ESA, however does not require scientific certainty.” Id.

AWRA-WA 2016 - 17 FELLOWSHIP ANNOUNCEMENT

The Washington State Section of AWRA is seeking nominations for its 2016 – 17 Student Fellowship Awards. Two fellowships will be given For the 2016 – 17 academic year. One award will be to a member of a Washington Section affiliated Student Chapter. The other award will go to a student enrolled in a graduate program at a college or university in Washington State. Both fellowships are for a full-time graduate student completing an advanced degree in an interdisciplinary water resources subject. In addition to \$2,000 in cash, the award includes a one-year membership in both the State and National AWRA, a one-year subscription to the Journal of the American Water Resources Association, and admission to the Washington State Section Annual Conference.

Any academic department with students enrolled in water resources programs may submit nominations for the award. The application packet, limited to five pages, should include the following:

1. A brief letter of nomination from a faculty representative familiar with the students work;
2. Completed Application Form;
3. Statement of goals and objectives for graduate work;
- 4a. Detailed description of research interest; or
- 4b. For students pursuing a non-thesis degree, a one page essay on how the course of study being followed will allow the applicant to accomplish the goals and objectives outlined in item 3.

Qualified students need to fill out the application form and prepare the additional information requested above and mail it to the address below. The letter of nomination may be mailed under separate cover by the faculty representative or included with the applicant's package. Items two through four constitute the application package and must be prepared by the applicant. Nominations will be evaluated on:

1. The interdisciplinary nature of the course of study and research;
 2. The effectiveness of the response in communicating research objectives;
 3. The potential for application of the work to the current needs in water resources management; and
 4. The reviewers overall impression of the applicants qualifications and presentation.
 5. The reviewers will consider applications from prior winners of the award if the research is different from or an expansion on the work presented earlier.
- Applicants may receive no more than two awards during their academic career.

Nominations will be accepted at any time between now and November 18, 2016. The Fellowship Committee will evaluate all applications received and will recommend recipients for the Open and Student Section winners to the Washington Section Board of Directors. The winners will be notified as soon as the board approves the award. Special recognition will be given to the fellowship recipients at a State Section event.

The recipients will prepare an article describing their research or other relevant topic for the Section newsletter within one year of the award.

The application and additional information can be found on the AWRA-WA website at <http://www.waawra.org>. For additional information contact Stan Miller by email at: samillerh2o@comcast.net or by phone at (509) 953-7887.

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