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April 3, 2017

### MEMORANDUM

**TO: Council members**

**FROM: John Shurts**

**SUBJECT: Briefing on recent developments in FCRPS Biological Opinion litigation: court order on spill/capital investment injunction requests**

On the agenda for Wednesday morning at the April Council meeting in Missoula is a short briefing on the opinion and order Judge Simon issued in March in the BiOp litigation. Leslie Bach of the Fish and Wildlife Division will also be part of the briefing, as might Tony Grover.

The court's order came after consideration of requests from the plaintiffs for injunctive relief that would (1) increase spring spill and (2) prevent the Corps of Engineers from making certain planned capital improvements at the four lower Snake River dams.

With regard to spill, the court did order an increase in spring spill. But, the court ordered the increase to occur in 2018 and not this year, with the details still to be worked out in planning between now and then.

With regard to the other basis for requested relief, the court did *not* order the Corps to cease efforts on any of the planned capital investments. The court agreed with the plaintiffs that, in concept, proposed capital improvements might bias the upcoming NEPA review. But the court also ruled that it would not curtail improvements related to safety or to immediate gains in fish survival. The court then ordered the Corps to provide certain additional information to the plaintiffs, and left open or implied the possibility that the court might consider a return request from the plaintiffs to enjoin planned investments not related to safety or fish survival.

The briefing will include a discussion of (1) what relief the plaintiffs requested; (2) what the court ordered and did not order in response; (3) what the court left unresolved and what happens next; and (4) reasoned speculation on the implications for the work of the Council. An outline will follow later this week.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION,  
*et al.*,

Plaintiffs,

Case No. 3:01-cv-0640-SI

AMENDED OPINION AND ORDER<sup>1</sup>

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Billy J.  
STATES



Avenue, Portland, OR 97204; John C. Cruden, Assistant Attorney General, Seth M. Barsky,  
Section Chief, and Michael R. Eitel and Andrea Gelatt, Trial Attorneys, UNITED STATES  
DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION, WILDLIFE &

**What injunctive relief was requested?**  
**What did the Court decide?**  
**What was left undecided?**  
**What happens next?**  
**What are some implications for the Council?**





# What injunctive relief was requested?

## Spring spill

- Spring spill to the gas caps 24 hours/7 days a week beginning in 2017
- Apr 3 - June 20 at lower Snake River projects
- April 10 - June 15 at Columbia River projects
- Operate the PIT-tag detection systems beginning March 1



# What injunctive relief was requested?

## Improvements at Lower Snake projects

- Prohibiting the Corps from expending any additional funds on:
  - (1) two planned capital improvement projects at Ice Harbor Dam (est \$37 million)
  - (2) any new capital improvement projects or expansion of existing projects at any of four Lower Snake River dams costing more than one million dollars
- Note: original motion identified 11 capital improvement projects as part of the injunction request



# What injunctive relief was granted?

## Spring spill

- Increased spring spill at lower Snake and Columbia projects **in 2018**
- Allows “sufficient time to consider an appropriate protocol and methodology for spill at each dam, incorporating the most beneficial spill patterns”
  - Could use 2017 “to conduct short-term tests to consider at least the immediate effects of increased spill”
- PIT-tag monitoring to begin March 1 in 2018





# What injunctive relief was granted?

## Spring spill (cont'd)

- Court declined to order a new process for planning, implementing, monitoring, and adaptive management of increased spill
  - Parties shall confer on appropriate adaptive mgmt system
  - FPAC/TMT/RIOG system remains in place for now
- Periodic status conferences “regarding increased spill that must take place in 2018 and related planning before then”  
Recommendations within

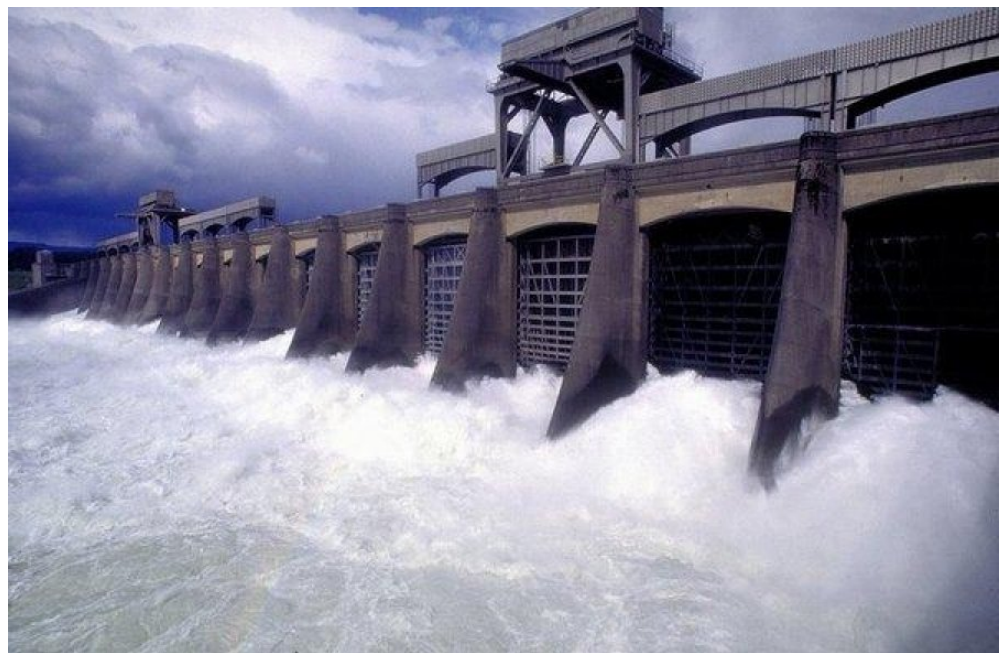


# What injunctive relief was granted?

## Spring spill (cont'd)

How much more spill?

- Injunction request: spring spill to gas caps.
- Court ordered an “increase” in spill from BiOp provisions.
- BUT, w/o saying precisely how much of an increase, and while recognizing possible dam by dam considerations.
- Will parties reach consensus or will court be needed?





# What injunctive relief was granted? Improvements at Lower Snake projects

- “Court finds that spending ... millions of dollars on the four Lower Snake River Dams ... is likely to cause irreparable harm by creating a significant risk of bias in NEPA process”
- BUT, Court did not enjoin any investment



# What injunctive relief was granted? Improvements at Lower Snake projects

- **Specific** Ice Harbor projects challenged have primary benefit of increasing fish survival, so balance tips to not enjoining
- Court cannot evaluate balance of harms/benefits for **future** projects - and:
  - **Not** enjoin if needed for safe operation
  - **Not** enjoin if “provide substantial immediate survival improvement for listed species”



# What injunctive relief was granted?

## Improvements at Lower Snake projects

- Feds required to “disclose sufficient information” “regarding planned projects at each dam ... at appropriate and regular intervals”
- Plaintiffs may file new motion – if project is not needed for safe operation of the dams and “substantially may bias the NEPA process”
- Feds have 14 days to submit details of information sharing





# Possible implications for Council:

- Fish and Wildlife Provisions on spill and spill experiments
- Possible independent science review of study design for spill
- Financial impacts of increased spill – possible impacts to F&W budget; program priorities



Columbia  
River Basin  
Fish and Wildlife  
Program 2013 / 2014

