

9th Circ. Urged To Call Off Extra Water For Threatened Fish

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Law360, New York (October 27, 2017, 7:59 PM EDT) -- The federal government, two states, two tribes and others urged the Ninth Circuit on Thursday to overturn a lower court ruling that the government must boost water spill and monitoring at a series of dams along the Columbia and Snake rivers to help imperiled fish, arguing that an Oregon district judge abused his discretion in ordering the water releases.

In March, U.S. District Judge Michael Simon ruled that, beginning in the spring of 2018, the government **must increase releases** over spillways at eight dams in the Federal Columbia River Power System, or FCRPS, to increase the survival of threatened salmon and steelhead that migrate up and down the waterways.

The National Marine Fisheries Service and the U.S. Army Corps of Engineers argued in a brief to the Ninth Circuit on Thursday that the judge had improperly “ordered wholesale changes” in how the dams are operated “that were not shown to be necessary to avoid irreparable harm to [Endangered Species Act]-listed salmon and steelhead,” and didn’t consider the economic harm to local communities from the additional spill ordered.

“The district court has gone too far,” the government said. “The extraordinary and drastic remedy of an injunction should not be used as a tool to conduct experiments or collect data that the court thinks might be useful. The court’s injunction order should be vacated.”

In his ruling, Judge Simon partially granted injunctive relief sought by the National Wildlife Federation and other conservation organizations and fishing business associations, the state of Oregon and the Nez Perce Tribe in a long-running lawsuit challenging the NMFS’ so-called biological opinion determining that the dam system, which is composed of dams and their associated powerhouses and reservoirs, does not jeopardize the vulnerable fish.

Last year, the judge invalidated a 2014 biological opinion — the latest of six biological opinions and supplemental biological opinions to be invalidated in the case by three different judges since it was filed in 2001 — after finding that the NMFS violated the Endangered Species Act by adopting it and concluding that the continued operation of the

dam system is likely causing harm to the species, according to the ruling.

As a judge who previously oversaw the case held in 2005, “spill is something that can offer immediate survival benefit and is worth trying,” Judge Simon said in his March opinion. The previous judge’s conclusion has “proven accurate,” Judge Simon said, finding it “similarly applicable today, if implemented appropriately.”

To that end, Judge Simon held that an injunction should be granted, but delayed the increase in spill from April 2017 until the 2018 spring migration season.

The federal agencies said in their brief Thursday that a court must “be mindful of the enormity and complexity” of the dam system as well as the “uncertainty of the science” around the threatened fish species, but that Judge Simon “failed to heed these core principles in ordering increased spring spill and monitoring activities.”

In a separate brief, the states of Idaho and Montana said the court wrongly found that federal rules didn’t block the Endangered Species Act motions for an increased spill, as the “requisite exceptional circumstances” necessary to support the court’s injunction weren’t present.

Nonprofit group Northwest RiverPartners said in its own brief Thursday that the district court’s “experiment will cost ratepayers an estimated \$40 million, put the integrity and reliability of the FCRPS and its infrastructure at risk, and increase regional greenhouse gas emissions by an estimated 840,000 metric tons,” despite potentially harmful effects on the fish the spill is meant to assist.

The Kootenai Tribe of Idaho and the Confederated Salish and Kootenai Tribes filed a joint brief Thursday arguing that the district judge had erred by failing to require the plaintiffs to show that they were likely to suffer irreparable harm without an injunction.

And Inland Port and Navigation Group, a nonprofit trade group that represents ports, ship companies, utilities, public agencies and others in Idaho, Oregon and Washington, said in its brief Thursday that the spill injunction could make it harder for ship operators to safely navigate through locks in the dam system.

Representatives for the parties were not immediately available for comment Friday.

The plaintiff groups, Oregon and the Nez Perce Tribe are represented by Todd D. True and Stephen D. Mashuda of Earthjustice, Daniel J. Rohlf of the Earthrise Law Center at Lewis & Clark Law School, Oregon Attorney General Ellen F. Rosenblum and Assistant Attorneys General Stephanie M. Parent and Nina R. Englander, and David J. Cummings and Geoffrey M. Whiting of the Nez Perce Tribe Office of Legal Counsel.

The federal government is represented by Gayle Lear of the U.S. Army Corps of Engineers, Jeremiah Williamson of the U.S. Department of the Interior, Ryan Couch of the U.S. Department of Commerce, and Jeffrey H. Wood, Eric Grant, Michael Eitel, Emily A. Polachek and Ellen J. Durkee of the U.S. Department of Justice.

Idaho is represented by Attorney General Lawrence G. Wasden and Darrell Early, Clay R. Smith and Steven W. Strack of the attorney general's office. Montana is represented by Attorney General Timothy C. Fox and Jeremiah D. Weiner of the attorney general's office.

Northwest RiverPartners is represented by Beth S. Ginsberg and Jason T. Morgan of Stoel Rives LLP.

The Kootenai Tribe of Idaho is represented by Attorney General William K. Barquin and Julie A. Weis of Haglund Kelley LLP. The Confederated Salish and Kootenai Tribes are represented by Stuart M. Levit and John Harrison of the tribe's legal department.

The Inland Port and Navigation Group is represented by Jay T. Waldron, Carson Bowler and Sara Kobak of Schwabe Williamson & Wyatt PC.

The case is National Wildlife Federation et al. v. National Marine Fisheries Service et al., case numbers 17-35462, 17-35463, 17-35465, 17-35466, 17-35467 and 17-35502, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Juan Carlos Rodriguez and Christine Powell. Editing by Aaron Pelc.