

SOUTHERN RESIDENT KILLER WHALE RECOVERY IS ABOUT SALMON—“NO FISH, NO BLACKFISH”

The Columbia Basin is a crucial source of food for Southern Resident Killer Whales’ survival and recovery. Yet, in the Columbia Basin, it’s not about salmon. It’s about hydropower, agribusiness, industry and, for more than two decades, NOAA’s failure to give salmon a fighting chance.

The Watershed and its Relation to SRKW Recovery

At over 1,200 miles in length, the Columbia River is the fourth largest river by volume in North America, draining an area the size of France (259,000 square miles). The Columbia River watershed extends from the Canadian Rockies in British Columbia to the Pacific Ocean near Astoria, Oregon. It drains portions of seven states and British Columbia.

<http://columbiariverkeeper.org/the-river/facts/>

“Perhaps the single greatest change in food availability for resident killer whales since the late 1800s has been the decline of salmon from the Columbia River basin. . . . Returns during the 1990s averaged only 1.1 million salmon, representing a decline of 90 percent or more from historical levels.” NOAA SRKW Recovery Plan Recovery Plan for Southern Resident Killer Whales, (Orcinus orca), National Marine Fisheries Service, Northwest Region, Seattle, Washington, January, 2008, p. II-82.

Hydropower operations have been a major cause of salmon decline in the Columbia Basin. Yet, since listing the SRKW’s as endangered in 2005, when given an opportunity, surprisingly, **NOAA has agreed with hydropower and industry that the Columbia Basin dam operations are “not likely to adversely affect” the Southern Resident Killer Whales.**

The four lower Snake River dams impede access to more than 5300 miles of prime salmon habitat and operate with huge public subsidies, largely to maintain a seaport 465 miles inland at Lewiston, Idaho.

The fastest way to recover Snake River salmon according to many scientists and the court overseeing the fish litigation in the Columbia Basin is to remove the four lower Snake River dams.

The Players as They Relate to the Contemporary Columbia Basin Fish Scarcity

Bonneville Power Administration (BPA). Sells electricity from the dams and holds the purse strings for much research and habitat restoration.

Army Corps of Engineers. Builds and operates the federal dams in the Columbia Basin.

NOAA Fisheries Service (aka NMFS). The federal agency charged by law with implementing the Endangered Species Act to ensure endangered salmon runs survive and recover in the Columbia River Basin. This includes issuing Biological Opinions (BiOps) when federal agencies propose to take an action that may “jeopardize” a listed species. “Jeopardize” is defined as reducing appreciably the likelihood of both survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

James Redden. The federal judge in Portland who presided over the Columbia Basin fish litigation from 2003 to November 2011, when he removed himself from the case due to his planned retirement.

NOAA, the Bonneville Power Administration (BPA), and the Army Corps of Engineers have failed and refused to comply with the Endangered Species Act in the Columbia River Basin for at least two decades, per Judge James Redden.

The Columbia Basin as it Impacts SRKW Recovery

Salmon need river and stream flows sufficient to permit juveniles to travel downstream to develop and grow, and upstream for adults to spawn and reproduce. Dams impede or block flows.

To avoid increasing “spill” over the dams to aid juveniles traveling downstream, and to avoid augmenting river flow, the federal agencies have spent billions on less effective mitigation efforts.

More than two decades of effort establishes that habitat improvement, without increases in stream and river flow, will not permit salmon to recover sufficiently for SRKW recovery. Indeed, “***NOAA Fisheries acknowledges that the benefits associated with habitat improvement may not accrue for many years, if ever.***” *NWF v. NMFS*, 839 F. Supp. 2d 1117, 1125 n. 3 (D. Or. 2011), Judge James Redden.

Judge Redden has ordered the BPA, the Army Corps, and NOAA to consider demolishing the four lower Snake River dams since 2003. To date the federal agencies have not followed the court’s directive.

Removing dams is not a novel idea, with 241 dams demolished nationwide between 2006 and 2010. (Juliet Elperin, “Elwha Dam Removal Illustrates Growing Movement, Washington Post, 9/16/11). http://www.washingtonpost.com/national/health-science/elwha-dam-removal-illustrates-growing-movement/2011/09/13/gIQAZFjtYK_story.html

Columbia Basin Endangered Species Fish Listings and Litigation Time Line □

1991/92: *Federal government lists Snake River sockeye as an endangered species, others as threatened.*

1992: NOAA's first biological opinion says dams will not jeopardize endangered or threatened fish. Plan immediately challenged in court.

1994: U.S. District Judge Malcolm Marsh strikes down plan.

1995: New biological opinion says dams jeopardize salmon and steelhead. Standards proposed for spill, flow, reservoir levels and barging juvenile fish downstream.

1996: Environmental, fishing groups and Oregon sue. Oregon argues for greater river flows. □ □

1997: Judge Marsh upholds 1995 plan. Ruling appealed.

1998: *Upper Columbia steelhead are listed as endangered.* Snake River and lower Columbia steelhead listed as threatened.

1999: Appeals court upholds Judge Marsh's ruling and the 1995 plan. *Six more Columbia basin*

salmon and steelhead are listed as endangered or threatened.

- 2000:** With a nine-agency federal caucus, NOAA releases 2000BiOp focused on hydropower, habitat, hatcheries and harvests for 10 years. ***2000BiOp claims salmon “survive” if one fish from each run returns to spawn.***
- 2001:** National Wildlife Federation, fishing and conservation groups challenge 2000BiOp. Oregon and four Native tribes join.
- 2003:** Judge James A. Redden takes case, rejects NOAA's plan, saying it doesn't protect salmon harmed by dams. Later he states that it is apparent that there is no federal funding for the mitigation and monitoring measures set forth in the 2000BiOp.
- 2004:** Army Corps and the BPA ***restrict summer spill*** at four dams even though spill was given “the highest priority” for avoiding jeopardy to salmon in the 2000BiOp. NOAA concurs with the other federal agencies’ decision, while acknowledging restricted spill could kill up to 376,000 listed fish. Judge Redden orders federal agencies not to curtail spills.
- 2004:** NOAA issues new BiOp that protects salmon less than the rejected 2000BiOp. ***It found no jeopardy to endangered fish runs, reasoning that NOAA was not required to consider dam operations essentially because the dams had been in place so long that they had become part of the landscape. The 2004BiOp weakens salmon protections by reducing spill. NOAA announces that hatchery fish will be counted as wild fish to determine whether a stock requires ESA protection.***
- 2005:** Judge Redden throws out the 2004BiOp for violating the Endangered Species Act and for failing to consider the dam operations risks to salmon survival and recovery. He orders summer spill at three Snake dams and one Columbia dam to aid juvenile salmon in their migration down river.
- 2005:** ***The Fish Passage Center, an independent science center, issues a preliminary study reporting that the court ordered spill had resulted in the highest levels of salmon survival recorded in recent years.***
- 2005:** In October, 2005 Judge Redden issues a remand order observing that the “demise of the 2000BiOp and the 2004BiOp followed the pattern of earlier failures by NOAA to comply with the ESA.” “NOAA returned to the practice, criticized by Judge Marsh in 1995, of tailoring its framework for analyzing jeopardy in order to reach a no-jeopardy finding.” The judge then advised that “[t]his remand, like the remand of the 2000BiOp, requires NOAA and the Action Agencies to be aware of the possibility of breaching the four dams on the lower Snake River, if all else fails.”
- 2005:** BPA attempts to defund the independent science Fish Passage Center because of its support for over the dam spills.
- 2007:** In January, 2007, the Ninth Circuit rules that the BPA violated the Constitution and the Administrative Procedures Act, and throws out the BPA’s attempt to defund the Fish Passage Center.
- 2007:** In March and April 2007 the BPA intentionally violates its agreed upon spill requirements in order to meet its oversold power generating commitments.
- 2007:** The Court chastises the BPA and orders it to meet its spill commitments for the next four years.
- 2008:** Federal agencies, five tribes and two states sign 10-year outline of fish and habitat projects,

the “Fish Accords” funded up to \$933 million by the Bonneville Power Administration. In return, the parties receiving the funding agree to support the 2008BiOp in any subsequent litigation.

2008: NOAA releases the 2008BiOp. The NWF and others again sue NOAA for failing to comply with the Endangered Species Act

2009: Judge Redden tells NOAA that the 2008BiOp falls short. *Says time may be running out before dams are found to violate law and courts assume their operation; he again orders consideration of removing four dams on the lower Snake. He admonishes NOAA that he has serious reservations about their newly devised “trending toward recovery” standard, and rebukes the federal agencies for spending the better part of the last decade treading water and avoiding their obligations under the Endangered Species Act.*

2010: NOAA supplements the 2008BiOp. It is now known as the 2008/2010BiOp. NOAA again concludes that the endangered salmon runs are jeopardized by the dam operations, but jeopardy is remedied by mitigation measures. NWF again sues.

2011: August 2011, Judge Redden throws out plan again, since the BiOp relies on elaborate, but speculative, habitat restoration measures to avoid significant changes to dam operations. The BiOp authorized dam operations through 2018, but failed to identify any specific habitat projects after 2013. Judge Redden terms “neither reasonable nor prudent,” and concludes that, absent the benefits projected to result from the unidentified mitigation measures, there was no factual or rational basis for NOAA's no-jeopardy decision beyond 2013. **Judge Redden orders agencies to maintain summer spills** and remands the BiOp for another rewrite. In the 2008/2010BiOp remand Judge Redden observed:

- “the lack of scientific support for [its] survival predictions is troubling”
- even the government’s own scientists “expressed skepticism about whether [salmon survival] benefits will be realized.”
- “[c]oupled with the significant uncertainty surrounding the reliability of [the government’s] habitat methodologies, the evidence that habitat actions are falling behind schedule, and that benefits are not accruing as promised, [the government’s] approach to these issues is neither cautious nor rational.”

2012: Judge Redden retires. Judge Michael H. Simon assigned the case.

2014: January 2014 NOAA issues BiOp saying that 2008/2010BiOp was correct. Contrary to court’s direction, NOAA continues to rely on speculative remedial measures, and fails to mention, much less discuss, breaching four Lower Snake River dams.

2014: June 2014 the National Wildlife Federation, State of Oregon, conservationists sue, alleging 2014 BiOp is again arbitrary and capricious and violates the ESA.

Results to date: *The most significant hydropower operational changes that have occurred from this nearly 20 year litigation have been the summer spills order by Judge Redden.*

What can we do to change this dynamic?