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Government Shirked Its Duty to Wild Fish, a Judge Rules

By [FELICITY BARRINGER](#)

WASHINGTON, May 26 - A federal judge in Oregon ruled Thursday that the Bush administration had arbitrarily limited and skewed its analysis of the harm that 14 federal dams cause to endangered Columbia and Snake River salmon and steelhead.

As a result, Judge James A. Redden of Federal District Court ruled, the administration had shirked its duty to ensure that government actions were not likely to jeopardize the survival of the species.

The ruling came in a challenge by environmentalists, fishing groups and Indian tribes to the administration's determination that the harm the hydropower dams were posing to the young salmon and steelhead could be remedied over the next 10 years by \$6 billion in improvements to the dams, including spillways designed to get the fish through safely.

The ruling sends the issue back to the National Marine Fisheries Service for the third time. It also paves the way for the judge to rule on other pending requests by the same groups that the fish have a greater claim than they have had on limited water resources, especially when the Army Corps of Engineers manages the rate of flow this summer during the annual out-migration of year-old fish.

At least in the short term, these decisions could change the balance of power on the rivers. The rulings could give fish and fishing interests new leverage in the perennial competition among the hydropower industry, farming and ranching interests, Indian tribes and commercial fishermen, all of which want a share of drought-depleted water resources in Idaho, Washington and Oregon.

In his ruling, Judge Redden pointed out four fundamental flaws in the November 2004 "biological opinion" presented by the National Marine Fisheries Service, a branch of the National Oceanographic and Atmospheric Administration, which estimated the threats to the fish and made conservation recommendations. Chief among the flaws cited was the distinction that the agency drew, for the first time, between harm to the fish resulting from the dams' existence and the harm resulting from the operation of the dams.

The oceanographic agency argued in the November document that the dams were an immutable part of

the landscape and that the agency's obligations to the fish under the Endangered Species Act extended only to accounting for and ameliorating those actions that it could control.

The judge ruled that the administration was trying to carve out a loophole that would restrict its obligations under the Endangered Species Act. "Under N.O.A.A.'s interpretation," he wrote, the agency "would be able to exempt itself from accountability by characterizing some, even lethal, elements of any proposed action as 'nondiscretionary.' "

Judge Redden added that the consequences would be an analysis "that ignores the reality of past, present and future effects of federal actions on listed species."

The November 2004 biological opinion was just such an analysis, the judge wrote, adding, that "N.O.A.A.'s interpretation conflicts with the structure, purpose and policy behind" the Endangered Species Act. He also said the analysis "has the effect of substantially lowering the threshold required for the mitigation."

The ruling comes at a moment when unexpectedly low returns of spring Chinook salmon to their spawning grounds to produce the next generation have caused great concern among fishing interests.

Environmental and fishing groups say that this generation, the offspring of a bumper crop of salmon, was decimated by low river flows that made the seaward passage unusually difficult. Officials of N.O.A.A.'s regional office and the Bonneville Power Administration argue that changes in ocean temperatures or disruptions of the saltwater food chain that supports these fish are responsible for the low returns.

The ruling also comes as a group of largely western Republican governors and members of Congress, along with ranching, mining and timber interests are re-examining provisions of the Endangered Species Act, with an eye to making its requirements for protecting species from extinction more flexible.

The judge's decision was a step in a long-running struggle between environmentalists and the federal government over the harm done to salmon by the dams.

It was the third time that federal courts in Portland have rejected the fisheries services analysis of how federal actions might affect the fish and what could be done. The first two were in the Clinton administration. The second, completed shortly before George W. Bush was inaugurated, included the possibility of dam removal, as a last resort, to protect the fish.

The Bush administration's biological opinion last fall treated the dams as an immutable part of the landscape. The environmental and tribal groups that had objected to that opinion embraced the ruling.

John Kober, wildlife program manager for the National Wildlife Federation, said in a telephone interview: "We applaud this decision. What the Bush administration was trying to do was essentially rewrite the Endangered Species Act by ignoring the most egregious impact to species, such as salmon in

this case, on a technicality, discretion."

Charles Hudson, a spokesman for the Columbia River Inter-Tribal Fish Commission, which represents the four tribes with treaty rights to fish in the rivers, said in an interview, "He takes on, head-on, the Bush administration's attempt to rewrite recovery, federal recovery policy on the Columbia River."

The agencies on the losing end of the ruling - including the fisheries service, the Bureau of Reclamation and the Army Corps of Engineers -expressed disappointment in a news release and said agency officials would consult lawyers about their options.

The Northwest regional director of the fisheries services, Bob Lohn, said in the statement: "Our efforts to protect salmon are yielding measurable improvements, and we are hard at work on recovery plans. Together, Northwest stakeholders have helped to restore over 3,000 miles of salmon habitat and are producing locally driven recovery plans for the entire Northwest."

Bonneville Power Administration officials warned that if the environmental and fishing groups prevailed in reallocating river water operating costs would skyrocket.

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