

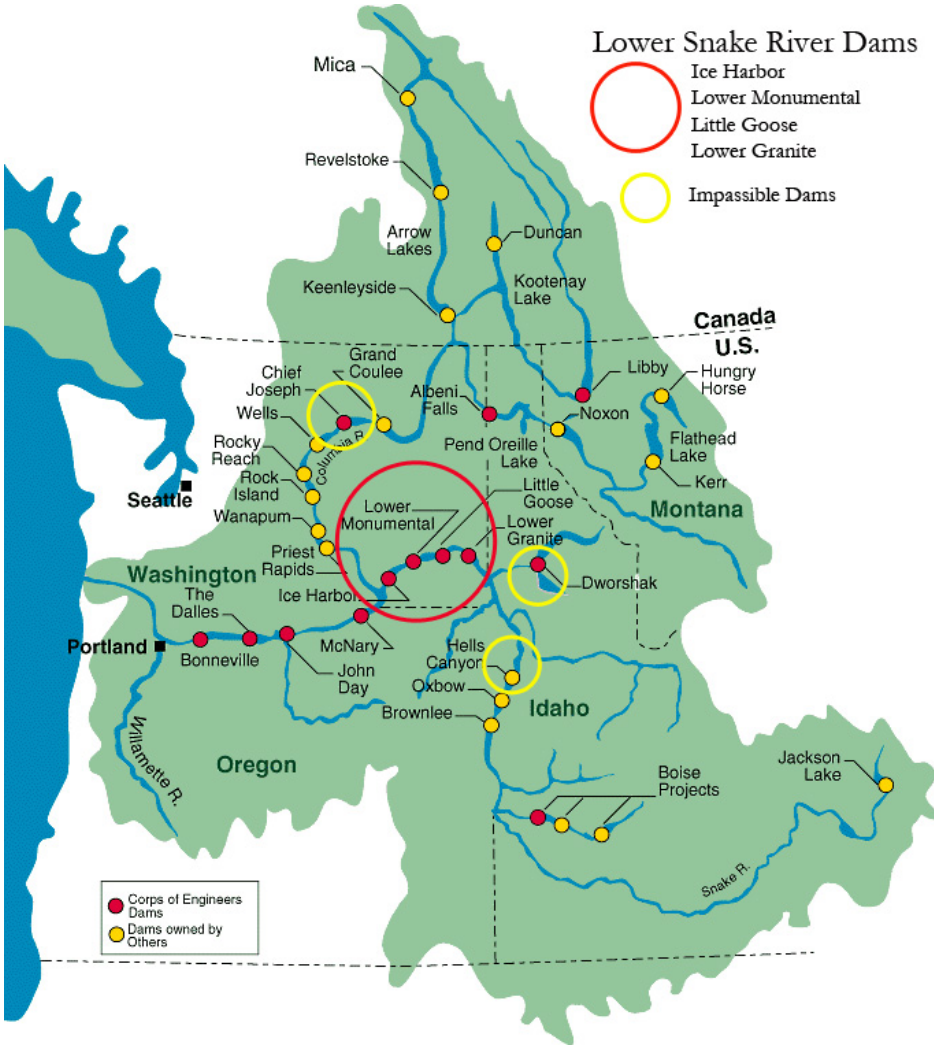
OREGON WATER LAW: Federal Columbia River Power System Litigation



Beth S. Ginsberg
Stoel Rives, LLP
The Seminar Group

Portland – November 16 -17, 2016

WHAT'S AT ISSUE



SUMMARY OF DECISION

- *National Wildlife Federation v. National Marine Fisheries Service*, 2016 WL 2353647 (D. Or. 2016)
 - *Overtaken BiOp on numerous bases*
 - *But Court left BiOp in place and enforceable*
 - *Remanded it to be reissued in compliance with ruling in 2019*
 - *Compelled Comprehensive NEPA Analysis to evaluate Reasonable Alternatives*

SUMMARY OF DECISION

- Invalidated Jeopardy Framework and “Trending Towards Recovery Standard”
 - BiOp must determine whether there is an appreciable reduction in likelihood of recovery from operation of hydrosystem
 - Populations at dangerously low abundance levels
 - Can’t stay the course merely because less harmful than previous set of operations
 - Standard failed to include metric that ensures that incremental improvement in abundance levels are sufficient to prevent any new risk of harm

SUMMARY OF DECISION

- Court upheld NOAA's Critical Habitat Analysis, despite finding it used wrong standard
- Where critical habitat is already severely degraded, asking whether the RPA allows this degraded habitat to retain its current ability to someday become functional is contrary to Act.
- However, Court found that NOAA's scientific conclusion was not arbitrary in light of "significant improvements to mainstem habitat", *e.g.*, system and project operations and configurations have improved fish survival through the dams

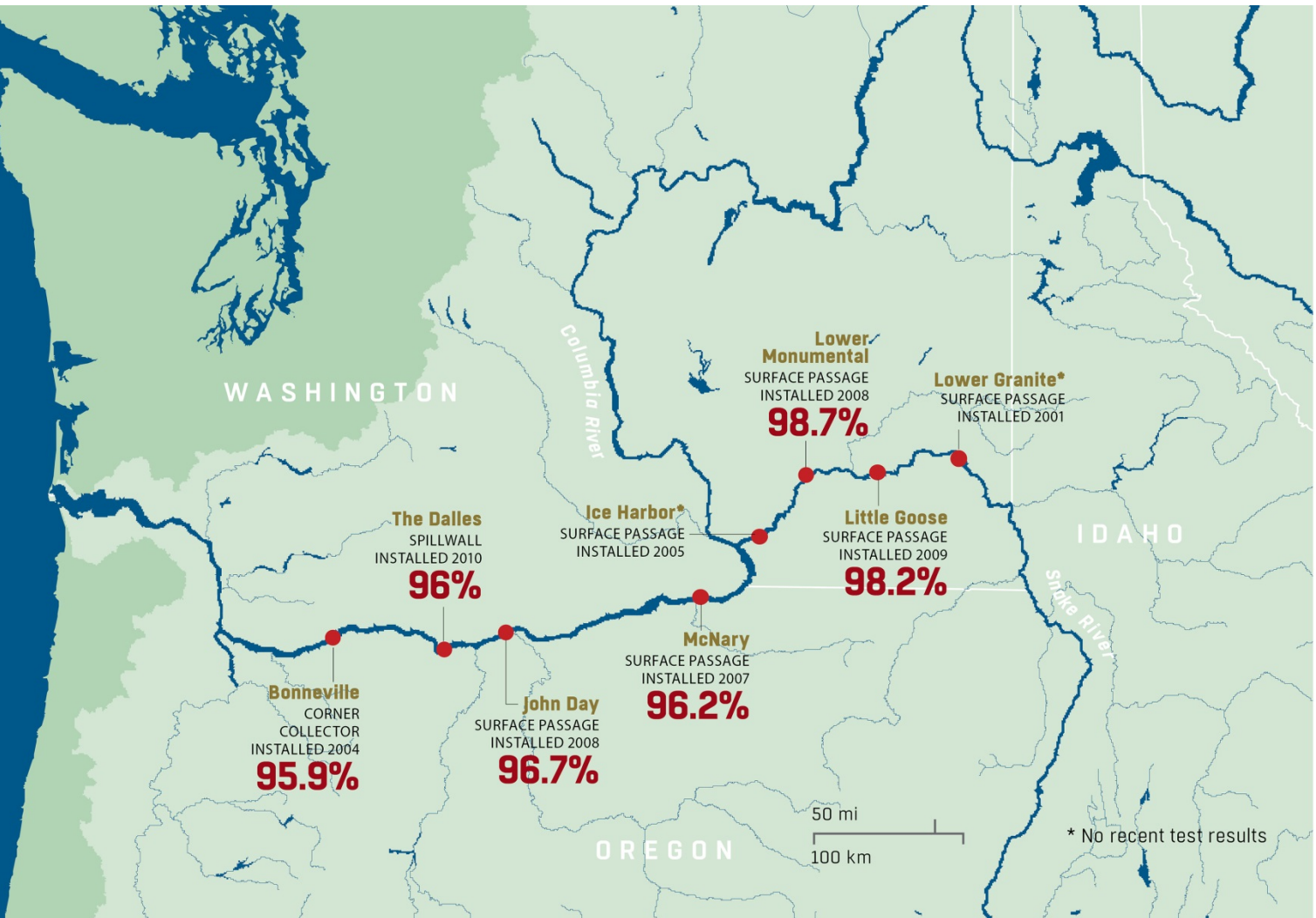
SUMMARY OF DECISION

- Impact on Critical Habitat- upheld NOAA's approach to computing quantifiable survival improvements from dams as a result of safe passage measures
 - Spillway weirs, fish ladders,
 - Found that action agencies have done all they can do to retrofit dams

PROJECT MITIGATION

Shown are the dates surface passage was installed and 2010-2012 test results where available for juvenile spring Chinook overall dam passage survival.

Combined with refined spill operations, surface passage has reduced the percentage of fish that go through powerhouses, turbines and bypass facilities, decreased fish travel time through the system and increased overall dam survival.



SUMMARY OF DECISION

- Uncertain Habitat Benefits
 - Measures must be reasonably certain to occur and occur on time;
 - survival benefits predicted too uncertain– voodoo science
 - Projects lagging behind
 - Court finds no room for error given status of species
 - Calls into serious question utility of the more than a billion dollars of habitat measures, and Tribal Accords

SUMMARY OF DECISION

- Climate Change Analysis Deficient
 - Failed to adequately consider impacts of climate change on effects analysis
 - BiOp unreasonably assumed status quo would remain over life of BiOp
 - Court found that future will bring warmer river and ocean temperatures, contracting habitat, reduced flows, increased insect infestation, decreased snow pack; increased likelihood of stochastic events

SUMMARY OF DECISION

- Climate Change renders habitat measures likely less effective
- BiOp fails to address whether RPA effectiveness will be reduced as a result
- Court finds climate change *is* likely to have a significant effect on the species and that RPA may not be adequate as result

NEPA

- Court found agencies failed to conduct comprehensive NEPA analysis
- Court believes NEPA compliance best way to “break the twenty years logjam”
- In *dicta* strongly urged agencies to consider Snake River dam breaching and reservoir draw-down, increased spill
- Held that NEPA analysis needed to evaluate all 73 measures of Reasonable and Prudent Alternative together to account for full panoply of effects and options in one comprehensive (not multiple) EISs

NEPA

- Judge authorized 5 years period to complete EIS.
- Will result in number of scoping meetings, lots of public participation
- Agencies appear poised to disregard harvest, including hatchery impact- two of the four “H’s”
- Will be less than the comprehensive analysis ordered by the Court
- Court concluded that threats to species require analysis of suite of “all-H measures”-

NEPA

- Focus on lower Snake River dams is puzzling
- Dams affect at most only 4 out of 10 Evolutionary Significant Units
- Has more to do with politics than salmon recovery
- Plaintiffs have threatened preliminary injunction vis a vis routine navigation improvements
- Corps not required to take or consider action that would nullify purpose of FCRPS
- Since Congress approved hydro-projects, not reasonable to consider their removal under NEPA

PROJECT OPPOSITION



FCRPS SERVES MULTIPLE PURPOSES

- Under NEPA's "rule of reason" Congressional action has strong bearing on what is considered reasonable alternative
- Snake River dams built for flood control, navigation, irrigation, recreation and hydropower development
- Inland navigation system ensued- 9 million tons cargo with \$3 billion annually transit on Snake-Columbia River inland navigation system, including 40 percent of nation's wheat.

FCRPS SERVES MULTIPLE PURPOSES

- Since their initial construction Congress has repeatedly affirmed need for and utility of Snake River dams
- Has provided consistent funding for their maintenance, navigation channel dredging
- Proposals to remove lower Snake River dams have failed to garner any Congressional support.
- Thus, not reasonable alternative when Congress would have to reverse course on more than 7 decades of Congressional funding approvals

WHERE DO WE GO FROM HERE?

- FCRPS Crown Jewel of Region's Carbon-Free, "Green Energy" Power System
- Polls suggest dam removal not favored
- Region is the epicenter of hydrocarbon export debate
- Enviros oppose crude-by-rail, methanol, coal export projects

WHERE DO WE GO FROM HERE?

- Snake River dams provide more than enough power to light up all of Seattle, at low cost to consumers
- Government should undertake comprehensive NEPA alternatives analysis to include harvest and hatchery issues to ensure all potential solutions are being addressed
- Congressional silver bullet??