



NATIVE FISH SOCIETY

Advancing the Recovery of Native, Wild Fish in Their Homewaters

RE: Briefing from Arlen Thomason, the board representative from our co-plaintiff the McKenzie Flyfishers

DATE: March 25, 2014

As some of you may have heard, on Friday March 14th the federal District Court issued its decision about remedies in the Sandy hatchery case. If you only read the headlines of various news reports, you likely came away with a misimpression of the full substance of the ruling. The paragraphs below provide our summary of what happened and what it means. Most notably, the overall result of the lawsuit is that hatchery-bred competitors to the wild fish of the Sandy River are being reduced by 45%.

In January the court had issued its decision on the facts of the case, finding largely in favor of the plaintiffs, Native Fish Society (NFS) and the McKenzie Flyfishers (MFF). The court ruled that defendants-- National Marine Fisheries Service (NMFS) and Oregon Department of Fish and Wildlife (ODFW)--had violated the law, though ODFW was technically protected from liability by virtue of NMFS having approved its hatchery management plans during the course of the legal proceedings. It found that NMFS had incorrectly approved those plans by not going through a more rigorous Environmental Impact Statement (EIS) process. The judge wrote that *"it is undisputed that hatchery operations can pose a host of risks to wild fish."* The ruling concluded that while ODFW's plans to reduce mixing of hatchery with wild fish relied heavily on the success of some planned weirs, NMFS had not provided an adequate analysis to conclude that such weirs would in fact be successful; particularly in light of *"ODFW's miserable track record of containing [hatchery] stray rates."*

The case then moved into the Remedy phase, in which the court would decide what steps it should order to correct the violations. Plaintiffs asked the court to invalidate the approved hatchery management plans for four hatchery populations (spring Chinook salmon; coho salmon; winter steelhead; and summer steelhead). All of those hatchery populations had long histories of exceeding the official target levels of straying onto the wild spawning grounds. Plaintiffs also requested that the court order NMFS to conduct a full EIS assessment for the new hatchery management plans that ODFW has recently submitted. In addition, they petitioned the court to enjoin ODFW from releasing any more hatchery fish until the above steps are completed.

The court issued its remedy ruling Friday Mar. 14th. Plaintiffs got less than they asked for. The court *did* order that releases of Coho salmon be reduced to a level, 200,000 smolts, that should lower the number of spawning-ground strays to near the target level that plaintiffs had argued should apply. But it *did not* order a reduction in the now-planned smolt releases for the other three hatchery populations. It *did not* invalidate the existing, approved hatchery management plans. And it *did not* order NMFS to conduct an EIS analysis of recently submitted hatchery management plans that will replace the incorrectly-approved ones; rather, it left the type of analysis up to NMFS' discretion, which could still be subject to judicial reversal if they get it wrong again.

221 MOLALLA AVE. SUITE 100 OREGON CITY, OR 97045 ▪ (503) 496-0807 ▪ NATIVEFISHSOCIETY.ORG

There were some last-minute factors that affected the court's decisions.

Probably the most important factor that convinced the court not to act more strongly was the eleventh-hour introduction of the most recent stray rates for 2013. After years of being excessively high, and failure of the weirs' first-year deployment to materially lower them, the stray rates for three of the hatchery populations came in dramatically lower in the latest period. From appearances at least, only the coho stray rate remained substantially above target. So the court gave the benefit of the doubt about future outcomes for those populations to the agencies, and ordered further release reductions only for coho salmon.

It is disappointing that the court did not go further to ensure that Sandy hatchery operations do not negatively impact the river's wild fish. But it's also important to keep in mind what this case achieved that benefits those wild populations.

First, the pressure of the lawsuit resulted in overall reductions of hatchery fish releases by almost one half, compared to what existed and was planned prior to its initiation. The content of the 2012 hatchery management plans was influenced by the lawsuit. Then in early 2013, responding to plaintiffs' request for an injunction, the court did not order but nevertheless pressed the defendants to "voluntarily" reduce the number of planted spring Chinook salmon--which they did. Planned releases were further reduced in the new hatchery management plans submitted to NMFS near the end of 2013. So the now-planned (and ordered) hatchery release levels are considerably lower than the pre-lawsuit levels.

Second, the lawsuit put the agencies on notice that casual, non-critical approval of hatchery plans that do not provide adequate protections for wild fish will not pass muster. Courts can rule, and now have ruled, that rigorous analysis and justification of decisions are required when considering plans that affect threatened wild fish. Excesses and omissions will not be tolerated.

Third, the lawsuit produced a legal ruling and standard that "*hatchery operations can pose a host of risks to wild fish*". The ruling also upheld the principle that when the agencies establish a hatchery stray rate beyond which harm to wild fish will likely occur, they must operate the hatchery in a manner to remain below that rate. It had appeared that the court was prepared to order steps that would ensure the stray rate for each hatchery population would come down to the target stray rate. The agencies avoided that kind of ruling for three of the hatchery populations when the 2013 actual stray rates came in near the target levels; but the court carried through with such an order for hatchery coho salmon, which continued to exceed the relevant maximum rate.

Fourth, the maximum stray rates themselves must be reasonably established, and the criteria for meeting them must be clear and evidence-based. (From the court's ruling: "*there is no analysis...regarding whether the broodstock utilized in the HGMPs are "no more than moderately divergent from the local natural population" or defining what "moderately divergent" means.*" Further, "*plaintiffs contend that the ten percent stray rate is unlawful. Without a finding that the hatchery fish are "no more than moderately divergent," this court agrees.*")

So it is our opinion that on balance, the results of this lawsuit provide real benefits to the Sandy River's threatened wild fish. Moreover, the implications for other cases where hatchery operations are a danger to threatened wild populations, as on the McKenzie, are mostly favorable to our point of view.