

RESTORATION

A NEWSLETTER ABOUT SALMON, COASTAL WATERSHEDS, AND PEOPLE

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Court Finds Oregon Plan Illegal

Editor's Note: On June 1, federal district court Judge Janice Stewart ruled that the National Marine Fisheries Service's (NMFS) decision last year to defer listing coastal coho salmon in Oregon under the Endangered Species Act was illegal. NMFS was directed to respond to the court's ruling by August 3. Last year NMFS placed Oregon coastal coho on a "candidate listing" for two years and signed a memorandum of agreement with the State of Oregon to use the Oregon Plan as the recovery strategy for coho. NMFS also committed itself to monitoring the progress of restoration efforts and state regulatory changes in the interim to determine whether the Oregon Plan would provide the restoration criteria needed in lieu of the stricter federal ESA listing.

The court's decision raises major questions about state-led conservation programs vis-a-vis federally mandated regulatory approaches. Excerpts from the court's decision are reprinted below. We edited the 47-page opinion for clarity and space, omitting citations, references, and subject headings from the text. Readers who want to review the entire opinion can do so by calling the governor's office and asking for a copy at 503-378-6169. We also asked Dick Hildreth and Maria Trost, of

the University of Oregon Ocean and Coastal Law Center, for a legal analysis of the opinion.

Oregon Natural Resources Council, et al. v. William M. Daley, Secretary of Commerce, Rolland A. Schmitt, Director, National Marine Fisheries Service, and the State of Oregon (as defendant-intervenor).

Plaintiffs . . . challenge the determination by defendants William M. Daley . . . and Rolland A. Schmitt . . . that the Oregon Coast evolutionarily significant unit of coho . . . salmon . . . ("Oregon Coast ESU") did not warrant listing as a threatened or endangered species under the Endangered Species Act. This determination was based, among other reasons, on the expectation that the recently adopted Oregon Coastal Salmon Restoration Initiative ("OCSRI") [now the Oregon Plan for Salmon and Watersheds—ed.] would reverse the decline of the Oregon Coast ESU.

A . . . species is "endangered" if the appropriate Secretary determines that the species is "in danger of extinction throughout all or a significant portion of its range." A species is "threatened" if the appropriate Secretary determines that the species "is likely to become an endangered species within the foreseeable future throughout all of a significant portion of its range." Thus, a species is threatened if it is likely to qualify for endangered status within the foreseeable future.

A reviewing court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." An agency's decision is arbitrary and capricious if it:

has relied on factors which Congress had not intended to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . . .

Plaintiffs make numerous arguments that the NMFS's final determination not to list the Oregon Coast ESU as a threatened species violates the ESA. They contend that the federal defendants violated the ESA because: (1) the Oregon Coast ESU is threatened or endangered as a matter of "biological fact" and therefore the NMFS had a non-discretionary duty to list the ESU; (2) the NMFS used an improper legal standard for determining whether the Oregon Coast ESU is threatened; (3) the NMFS did not base its decision upon the best scientific data available to it because that data supports a finding that the Oregon Coast ESU is threatened; (4) the NMFS improperly relied on the OCSRI, even taking into account the MOA, because the OCSRI is unimplemented, untested, and

**THIS COURT
CONCLUDES THAT
THE FINAL RULE
MUST BE SET ASIDE.**

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Court Finds Oregon Plan Illegal

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largely reliant on voluntary measures; and (5) the NMFS improperly relied on the NFP [Northwest Forest Plan].

In addition, plaintiffs assert that the “no list” decision was arbitrary and capricious and thus violated the APA [Administrative Procedures Act—the authority that grants courts the right to review agency actions under the ESA—ed.] for the following reasons: (1) the NMFS relied on factors not intended by Congress; (2) the decision was contrary to the evidence before the NMFS and ignored or contradicted the conclusions, findings, advice, and recommendations of its staff; (3) the decision was inconsistent with the NMFS’s previous decisions on the Central California Coast ESU, the Transboundary ESU, and other threatened salmonids in Oregon; and (4) the decision was based upon political concerns, rather than biological data. . . .

As set forth below, this court concludes that the final rule is based upon an erroneous legal standard and therefore must be set aside. This court also finds that the explanation for the final rule is contrary to the evidence currently available to the NMFS and therefore was arbitrary and capricious. . . .

The fatal flaw in the final rule is that the NMFS failed to use the proper legal standard for determining whether the Oregon Coast ESU is threatened. As already noted, a species is threatened if it is “likely to become an endangered species *within the foreseeable future* throughout all or a significant portion of its range.” (emphasis added). In concluding that the Oregon Coast ESU is not likely to become endangered, the final rule does not use the words “within the foreseeable future.” Instead, it states that “the Oregon Coast coho is not likely to become endangered *in the interval between* this decision and the adoption of improved habitat measures by the State of Oregon.” (emphasis added).

THE FATAL FLAW IS THAT THE NMFS FAILED TO USE THE PROPER LEGAL STANDARD.

The ESA does not define the term “foreseeable future.” . . . This court need not decide whether the “foreseeable future” for coho salmon is 30 or 100 years because it is clear that the NMFS only determined that the Oregon Coast ESU would not become endangered within the next two years, falling far short of any reasonable definitions of the “foreseeable future.” The reference to “the adoption of improved habitat measures by the State of Oregon” means the possible amendments to the State of Oregon’s forest practices regulations which may occur in 1999. . . .

The NMFS may well have believed that the State of Oregon likely will adopt improved habitat measures, which will then protect the Oregon Coast ESU from becoming endangered within the foreseeable future. However, it did not so state in the final rule. Instead, the final rule expressly warns that “the habitat measures contained in the OCSRI *will not secure* adequate high quality habitat *over the long term* to ensure coho survival under a range of environmental conditions.” (emphasis added). . . .

The ESA requires a determination as to the likelihood—rather than merely the prospect—that a species will not become endangered in the foreseeable future. In addition, as discussed below, that determination must be based on the current regulatory structure. It is not enough for the NMFS to merely hope that the Oregon Legislature will in fact adopt the requisite forest practices amendments within two years and hope that they may prove to be sufficient to protect the Oregon Coast ESU. Instead, the NMFS must determine, based upon a rational analysis of the factors set forth in the ESA, and in light of current regulatory measures, that the Oregon Coast ESU is not likely

to become endangered in the foreseeable future.

It is incongruous for the NMFS to defer listing a species as “threatened” because the agency is hoping for a significant alteration in the conditions or practices presently threatening the long-term viability of the species, which in turn might prevent the species from actually reaching the “endangered” level. The whole purpose of listing species as “threatened” or “endangered” is . . . to compel those changes needed to save these species from extinction. . . .

. . . The Secretary has no authority under the ESA to simply defer a listing decision for as long as he sees fit while waiting for some possible future event. Here, the final rule did no more than merely defer a decision on the Oregon Coast ESU for two years to allow the State of Oregon to perhaps take some action. If the NMFS determined that the Oregon Coast ESU likely will not become endangered in the foreseeable future, then it should have said so. Had it said so, the only issue in this case would be whether the administrative record rationally supports his decision. Instead, the final rule clearly indicates that the NMFS was concerned over the status of the Oregon Coast ESU and may reconsider its decision in a few years, but was unwilling to make the hard choice required by the ESA in April 1997.

Because the NMFS applied the wrong standard in the final rule, its decision violated the ESA and must be set aside and remanded to the NMFS for reconsideration. . . .

Even if the NMFS had applied the correct legal standard, it acted arbitrarily and capriciously by relying on improper factors and offering an explanation for its decision that runs contrary to the administrative record. When issuing its proposed rule on July 26, 1995, the NMFS concluded that, based upon the currently available evidence, the Oregon Coast ESU

EVEN IF THE NMFS HAD APPLIED THE CORRECT LEGAL STANDARD, IT ACTED ARBITRARILY AND CAPRICIOUSLY.

should be listed as threatened. Yet 20 months later it reached the opposite conclusion. . . .

The final rule specifies the following reasons for the NMFS's "no list" decision: (1) "the harvest and hatchery improvements," (2) "the habitat protections in the NFP," and (3) "the improving escapement trend." In addition, the final rule specifically relies upon the OCSRI, which contains harvest, hatchery, and habitat measures, and the MOA. However, when looking at the administrative record as a whole, none of these factors, alone or in combination, support the NMFS's decision not to list the Oregon Coast ESU. . . .

As previously noted, one section of the ESA requires the Secretary to consider . . . "the adequacy of existing regulatory mechanisms." . . . [The Act] cannot reasonably be interpreted to include future efforts, whether regulatory or non-regulatory. . . . The few courts that have addressed this issue have concluded that the reliance on future actions is not permitted by the ESA.

The more difficult issue is whether the ESA permits consider-

ation of voluntary actions, as opposed to regulatory actions. . . .

. . . [F]or the same reason that the Secretary may not rely on future actions, he should not be able to rely on unenforceable efforts. Absent some method of enforcing compliance, protection of a species can never be assured. Voluntary actions, like those planned in the future, are necessarily speculative. . . .

Therefore, voluntary or future conservation efforts by a state should be given no weight in the listing decision. Instead, the NMFS must base its decision on current, enforceable measures. . . . [T]he final rule improperly relied on future and voluntary measures contained in the OCSRI. . . .

However laudable Oregon's efforts to employ new management techniques to try to restore the Oregon Coast ESU, such future, voluntary conservation efforts cannot be a legal substitute for listing. There is simply no rational

basis for the NMFS to assume that Oregon will adopt any, much less adequate, habitat measures. Further, at this point the NMFS cannot possibly judge the effectiveness of any voluntary measures that Oregon does implement because they have not been tested. In short, whether the OCSRI's and MOA's habitat measures can succeed over the long term is currently unknown and unknowable. Any rational listing decision requires the testing of conservation measures to determine their effectiveness in protecting a species. Should the OCSRI ultimately achieve the results its proponents predict, the Oregon Coast ESU may be delisted.

In summary, it was arbitrary and capricious for the NMFS to rely

on future, voluntary and untested habitat measures premised upon an admittedly inadequate OCSRI and an MOA that can be terminated with 30 days notice.



ODFW

Developments on the Coastal Coho Decision

Editor's Note: The court's decision rippled through the state, the Justice Department, and NMFS. In a June 4 press release, Governor Kitzhaber contended that Judge Stewart's ruling regarding the legality of the Oregon Plan for Salmon and Watersheds under the Endangered Species Act challenged all state-sponsored recovery efforts. Oregon asked for a stay of the court's ruling pending its appeal to the 9th U.S. Circuit Court of Appeals. A stay would have sustained the Oregon Plan as the framework for coho recovery until the state's appeal was decided in the appellate court. Judge Stewart denied that request. On July 21, the Justice Department waded into the torrent in support of the Oregon Plan, with its own appeal of Judge Stewart's decision to the 9th Circuit Court. NMFS joined Oregon's appeal.

Then, on August 3, NMFS listed the coastal coho under the ESA, citing Judge Stewart's decision and the unwillingness of the 9th Circuit Court to impose a stay. The state's and Justice Department's appeals will be heard in the 9th Circuit Court sometime next year. In the meantime, the Oregon coastal coho ESU is now listed under the ESA.

One element left uncertain in this unfolding drama is what the timber industry's response to the listing will be. Originally, the bill creating the Timber Harvest Tax that pays half of the anticipated \$30 plus million for the Oregon Plan specifically stated that if the coho were listed under the ESA, the tax would be eliminated. The political climate under which that original agreement was decided has changed, however. Timber industry representatives are currently

talking with state legislators about changing the bill's language to continue the timber tax program. Governor Kitzhaber wants a special session of the legislature this fall to address the timber tax issue and avoid an anticipated \$6-7 million shortfall through elimination of the tax, but Republican leaders indicate there is a slim chance that such a session will convene. Governor Kitzhaber's August 3 response to the ESA listing is excerpted below, as is his June 4 response. In June the governor sounded an alarm about the implications of the listing, whereas his latest response strikes a more hopeful tone. These excerpts are taken from press releases available from Governor Kitzhaber's Web site at www.governor.state.or.us.

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Oregon Coastal Salmon Listed Under ESA

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Many people concerned about the fate of Oregon coastal coho salmon breathed a sigh of relief when federal Magistrate Judge Janice Stewart rendered a significant decision on June 1. In response to the appeal brought by the Oregon Natural Resources Council, Judge Stewart found that the National Marine Fisheries Service (NMFS) had unlawfully placed the species at risk by deferring to the Oregon Coastal Salmon Restoration Initiative (OCSRI), now known as the Oregon Plan for Salmon and Watersheds, rather than listing the coho as threatened under the federal Endangered Species Act (ESA). While no federal appellate court has confronted similar issues, Judge Stewart's decision is consistent with several recent federal trial court rulings invalidating agency decisions not to list a species under the ESA. Judge Stewart's decision was not likely to be overturned on appeal, and indeed, it was upheld.

Congress passed the ESA in 1973 "to provide a program for the conservation of endangered and threatened species." NMFS, acting under the delegated power of the Secretary of Commerce, has the responsibility of promoting and overseeing conservation efforts for species of fish determined to be in danger of extinction ("endangered") or likely to be endangered within the foreseeable future ("threatened").

The controversy over the listing of Oregon coastal coho salmon (coho) began in October 1993 with the petition by environmental organizations to list the species as endangered or threatened. Federal administrative procedures require a petitioned agency to issue a proposed rule, putting interested parties on notice of intended action

and requesting comments before issuance of the final rule. NMFS proposed the listing of the coho as threatened, stating that the agency would issue a final decision one year later.

Oregon Governor John Kitzhaber launched the OCSRI in response to the proposal. With federal control of Oregon's natural resources looming, the state sought a comprehensive and proactive means to retain ultimate control. Funded by an annual timber harvest tax, this volunteer recovery effort brings together public and private interests to restore at-risk fish populations and water quality throughout the state. The plan addresses factors responsible for the decline of the coho populations, focusing on those factors relating to harvest, habitat, and hatchery activities.

The ESA states that NMFS shall make listing determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those efforts, if any, being made by a State . . . to protect such species. . . ."

A team of scientists assembled by NMFS (Biological Review Team, or BRT) concluded that, while the coho is not at significant short-term risk of extinction, the species remains at risk of becoming endangered in the foreseeable future. BRT members were split as to whether the effects of the OCSRI would be



Bruce Babbitt, Secretary of the Interior.

substantial enough to move the coho out of the "likely to be endangered" category. The BRT asserted that long-term survival depended on habitat protection and restoration. To mitigate this concern, Kitzhaber and NMFS agreed to collaborate with the Department of Forestry to develop adjustments to the OCSRI. The collaborative responsibility of state and federal interests regarding OCSRI measures is outlined in the memorandum of agreement (MOA); the MOA also includes a unilateral termination clause.

Although NMFS staff recommended that the agency err on the side of conservation when questions of uncertainty exist, the final rule concluded that the coho "does not warrant listing at this time." The agency further stated that, because of its heavy reliance on the OCSRI and subsequent MOA, it would revisit the listing determination in three years (a full life cycle of the coho). As provided in the ESA, "any negative finding [by NMFS] . . . shall be subject to judicial review."

The original petitioners appealed NMFS's decision not to list. The court found two violations: (1) NMFS used an improper legal standard for determining whether the Oregon coast coho salmon was threatened, and (2) the decision was arbitrary and capricious, violating federally mandated administrative rule-making procedures.

Regarding (1), the ESA defines a threatened species as "any species likely to become an endangered species *within the foreseeable future*" (emphasis added). Quoting directly from the NMFS determination: "The Oregon Coast coho is not likely to become endangered *in the interval between this decision and the adoption of improved habitat measures* by the State of Oregon" (emphasis added). The "fatal flaw" was the absence of the term "foreseeable future." Arguments that "foreseeable future" was implicitly addressed because NMFS will revisit the listing determination in three years, fell far short of any reasonable definition of the foreseeable future. The court found that NMFS "has no authority under the ESA to simply defer a listing decision for as long as . . . [they see] fit while waiting for some possible future event."

Regarding (2), in accordance with the federal Administrative Procedure Act, a reviewing court may nullify an agency rule only if the court finds it to be arbitrary and capricious. This standard represents significant deference by the courts to the agency's choice of action. To rule on this issue, the court had to determine whether the factors relied on when revising the proposed rule supported the agency's final determination. NMFS admittedly relied on the OCSRI and MOA in determining that the coho did not warrant a threatened species listing; other factors mentioned in the final rule were substantially in place at the time of the proposed rule. Plaintiffs argued that the OCSRI was largely an unimplemented voluntary effort and, therefore, speculative in nature. The court cited statutory language and recent case law to conclude that NMFS "may not rely on plans for future actions to reduce threats and protect a species as a

basis for deciding that listing is not currently warranted." This conclusion logically follows the intent of the ESA.

The more difficult issue is whether voluntary actions may be considered. Here, case law provides little guidance. The court observed: "Voluntary actions, like those planned in the future, are necessarily speculative." NMFS must base decisions to list on programs set forth within a regulatory structure. Thus, the critical issue was the extent to which the final rule relied upon future and voluntary efforts under the OCSRI and MOA.

The BRT's principal concern was habitat conservation and restoration. Yet NMFS commented in the final rule: "The habitat measures of the OCSRI do not currently provide the protection NMFS considers essential to creating and maintaining the high quality habitat needed to sustain the Oregon Coast coho over the long term. . . ." The only praise the BRT gave the OCSRI was that it "contains the tools necessary to ensure that adequate habitat measures are ultimately adopted and implemented."

The speculative nature of the factors inappropriately relied on in the NMFS final rule extended to the MOA between Governor Kitzhaber and NMFS. There is nothing that would prevent the state from terminating the MOA and discontinuing implementation of improved habitat measures should political leadership change. Habitat protection under the OCSRI was not only speculative in structure; it relied on consistency in the ever-changing political environment.

The OCSRI might ultimately achieve the goal of restoring at-risk fish populations such as the coastal coho through its impressive holistic approach to habitat restoration. That hope, however, did not provide a legal basis on which NMFS could revise its proposed threatened species listing. As the court concluded, "it was arbitrary and capricious for NMFS to rely on future, voluntary and untested habitat measures premised upon an admittedly inadequate OCSRI and an MOA that can be terminated with 30 days notice."

Alarmists may assert that the court's decision is the end of the OCSRI and state-led species conservation efforts. However, what NMFS is now referring to as the inevitable listing of coho does not displace the OCSRI in any way and may give it needed momentum. In the Oregon Plan's annual report, issued prior to Judge Stewart's ruling, OCSRI management acknowledged that little had been done beyond procedural organization. Now is the time to move forward with coho recovery, using both ESA's requirements and state voluntary efforts. The success of the OCSRI and coho recovery depends on this cooperation.

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Funding Cuts Leave Some Councils on Hold

by Pat Kight

They knew it was coming, but the loss of federal funding through For the Sake of the Salmon has some Oregon watershed councils scrambling for new ways to pay their coordinators. At least two coordinators have resigned, citing funding uncertainty among their reasons, and some councils are in a holding pattern until new money can be found.

Twelve councils in Oregon — along with 10 in Washington and 11 in California — have been paying their coordinators out of federal grants administered by For the Sake of the Salmon (FSOS). But those grants are running out, and the private nonprofit group has been unable to convince Congress to renew federal funding for the coordinator salaries.

The old grants began to expire this spring, with the last of them scheduled to run out this August. For councils that haven't yet lined up other funding sources, that means bad news.

In Lakeside, Ten Mile Lakes Watershed Council coordinator Jim Brown left several months ago, and the organization had "a terrible time" finding a replacement, according to city administrator Tricia Quigley. "We weren't sure where the money was going to come from, and that made people reluctant to apply for the job." The council was able to get additional funds from the Governor's Watershed Enhancement Board (GWEB) and hired a new coordinator in mid-July.

The Lower Rogue Watershed Council is also losing its coordinator. Jennifer Dwyer, who left the position in July to move to Montana, said the funding uncertainty "was definitely a factor" in her decision to leave a job she said she loves. The council's FSOS grant ran out in March, and a request to GWEB for additional money won't be reviewed until late September.

"The lack of stability is difficult for the person holding the job — they often can't afford to hang in there and wait to see if the funding gets renewed," Dwyer said. "But it's also difficult for the council. If you can't keep a coordinator, then that makes it hard to develop trust in the community. People say, 'Who's in charge now?' It can make us look flakey."

Dwyer leaves her council "in a holding pattern," awaiting word on several grants she wrote in hopes of finding more stable funding. Council members have picked up some of her tasks, and the South Coast Watershed Council coordinator, with whom she has shared an office, has agreed to keep tabs on projects already underway. "We haven't started anything new in some time," she said.

For the Sake of the Salmon has always said that its coordinator grants were intended as startup money, not as dependable, long-term funding. Councils which heeded that advice are weathering the loss of the grants relatively well.

The Coquille council, for instance, has been writing administrative overhead costs into all its grant applications "for some time now," according to Extension Sea Grant agent Paul Heikkila, who works closely with the group. "We saw it coming," Heikkila says. "We've always known it was soft money, so we've been working to spread out the costs over several funding sources."

Heikkila said some councils whose areas encompass large, private holdings have been able to persuade larger landowners, including timber and paper companies, to contribute toward coordinator salaries.

"Yes, we're in the process of diversifying," says Jackie Dingfelder, coordinator for the



Will adequate funding for watershed councils continue to be available?

Tom Gentile photo

Tualatin Watershed Council. "It was great to have that [FSOS] money, but we knew it wasn't a given that it would always be there." Besides writing a share of Dingfelder's salary into project grants, where possible, the Tualatin council is developing a fund-raising program to seek more support from local governments, businesses, and council partners.

Diversifying, though, is not as simple as it may sound. Many funding agencies do not permit their grants to be spent on administration, and even those that do may specify that the money can be used only for rent and supplies, not for salaries.

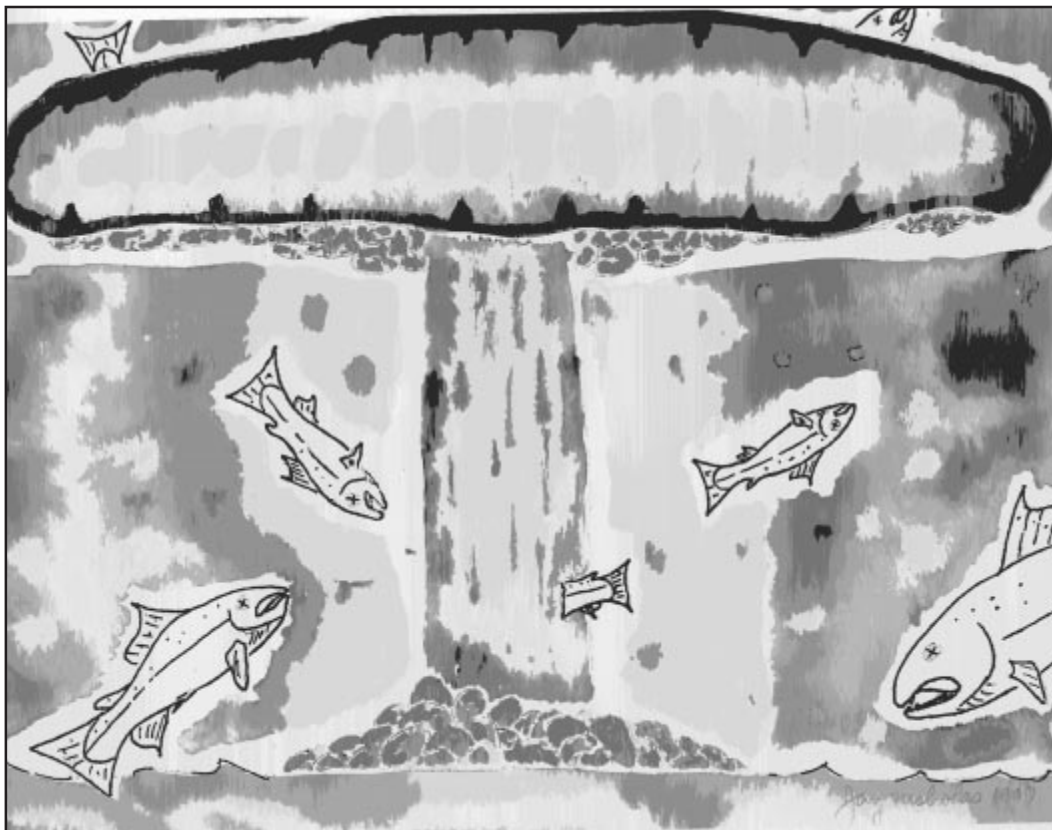
For the Sake of the Salmon, meanwhile, continues to seek federal support for the watershed coordinators. A recent report on the coordinator program points out that most other government and private grants will not pay for coordinator-type positions. Yet, the report says, councils able to hire their own coordinators "are better able to develop strong partnerships with landowners, coordinate volunteers, identify sources of technical assistance, maintain a group's momentum and secure grant funding to implement restoration projects."

Oregon Plan for Children

Editor's Note: Jay Nicholas, program leader for the Oregon Plan, has written and illustrated two stories for children about the plan. One of them, *The Oregon Plan Boiled down for a little fish...*, is posted on the Oregon Plan Web site at www.oregon-plan.org. We've reprinted two illustrations from the other story, *Conversation with a Salmon*, with permission of the author.



A fish biologist attempts to explain the Oregon Plan to a skeptical chinook.



From a salmon's perspective, human technology has taken some disastrous turns.

Washington State Tightens Forest Practices Guidelines

Editor's Note: In May, the State of Washington adopted interim guidelines on logging and road-building operations for private and state-owned forested lands in watersheds where steelhead are protected under the Endangered Species Act. Washington is reviewing permanent changes to its forest practices as well. Oregon's timber industry, state officials, and public interest groups are studying these developments because of their potential influence on Oregon's own pending decisions about forest practices. Most of the following article has been taken directly from Washington State's Department of Natural Resources Web site at www.wa.gov/dnr and the *Oregonian*.

Washington State has ruled that private and state-owned forest landowners will need to use stricter standards

for logging and road-building operations within 200 feet of streams deemed critical for the survival of steelhead populations listed under the Endangered Species Act.

According to the Department of Natural Resources, the new protections were adopted by the state Forest Practices Board as part of an emergency rule requiring more environmental review of forest practices near streams bearing threatened and endangered steelhead.

The rule is intended to protect Washington's upper and lower Columbia steelhead and Snake River steelhead. All three species have been federally listed as either endangered or threatened within the last year.

This set of standards protects steelhead by identifying two proposed activities—timber harvest and road construction—which

result in those forest practices applications being classified as Class IV-Special. This classification triggers further environmental review to determine whether the proposed activity has a significant adverse impact on steelhead-bearing streams and rivers. An environmental review will be required to harvest trees or to build forest roads within 200 feet of fish-bearing rivers and streams in critical habitat areas, also known as evolutionarily significant units, or salmonid listed areas

The rule applies to private and state forestlands in southwest, southeast, and north-central parts of the state that drain into the Columbia and Snake Rivers. This includes most of Okanogan, Chelan, Douglas, Clark, Cowlitz, Skamania, Asotin, and Garfield counties and a portion of Kittitas, Lewis, Franklin, Walla Walla, Columbia, and Whitman counties.

Developments

Continued from page 3

GOVERNOR'S JUNE 4 PRESS RELEASE

State to Appeal Magistrate's Ruling

I'm announcing today [June 4] that the State of Oregon will appeal the recent U.S. Federal District Court decision on the Endangered Species Act (ESA) by Magistrate Stewart. . . .

I want to make it clear that these actions by the State of Oregon do not reflect a disagreement with the objectives of the ESA. Rather, these actions reflect a deep concern about the implications of Magistrate Stewart's extremely narrow interpretation of the Act on our ability to actually achieve its objectives—restoration of those species whose habitat includes substantial areas in private ownership.

Magistrate Stewart's interpretation, if allowed to stand, implies that the requirement under the ESA for federal agencies to consider state conservation plans means almost

nothing; that state-led conservation efforts have no place under ESA; that conservation efforts by individuals count only if they are mandated by government and that state and local regulatory actions count only if there are legal assurances that they will remain in place into the future (which is extremely difficult for states like Oregon that are constitutionally prohibited from taking actions to bind future legislatures).

In short, under this narrow interpretation, the objectives of ESA can only be met through federal regulation and federal enforcement which creates an enormous contradiction—especially on private land. This is a critical point that needs some elaboration.

The primary role of the federal government under the ESA is a regulatory one by which it can prevent landowners from engaging in activities that "take" a listed species. The federal government cannot require individuals to restore watersheds. Yet to restore coastal coho and many other species,

restoration work on private land is essential. In Oregon, 65 percent of coho habitat is privately owned, thus ESA prohibitions alone will not result in the kind of restoration needed for recovery.

The only way such restoration work can be achieved is to involve private landowners in the decision-making and give them some ownership and investment in the work being done. And this, of course, is the heart of the Oregon Plan.

GOVERNOR'S AUGUST 3 PRESS RELEASE

In response to the listing of Oregon coastal coho by the National Marine Fisheries Service (NMFS) . . . Governor John Kitzhaber announced that the state will proceed nonetheless with full implementation of the Oregon salmon recovery plan.

"The point of the Oregon Plan was never simply to avoid a listing, it was to help recover coastal coho. That's what our plan does and we are going to do everything we can to implement it," Kitzhaber said.

Test Your Salmon Smarts

Editor's Note: Court Smith, an anthropologist at OSU, recently raised a question about how knowledgeable *Restoration's* readership is on salmon issues. To test your knowledge (and our assumptions), we present the following quiz. For enticement, we'll draw a name from among those who send us all correct answers and send that person a copy of the *Northwest Salmon Crisis*, edited by Joe Cone and Sandy Ridlington. You can either cut out this copy and mail it to our address, listed on the back cover, or respond electronically by going to our Web site at <http://seagrant.orst.edu/communications/restorequiz.html>. Whether you send us your answers or not, take a moment to see how many you get right. Answers will be in the next issue.

1. Which of the following is not a key element of the Oregon Plan? (A) landowner involvement; (B) state funding; (C) licenses to exterminate seals; (D) regulations.
2. What is an ESU?
3. If you wanted to know the exact boundaries of the steelhead ESUs, who would you call? (A) the governor; (B) USFWS; (C) DOA; (D) NMFS
4. Which term encompasses the largest geographical area? (A) stock; (B) run; (C) ESU.
5. Does this hierarchy of size change, depending on which salmon species is being discussed? Yes____; No ____
6. Do coho, chinook, steelhead, and sea-run cutthroat trout all use rivers and streams for spawning and rearing at the same time? Yes____; No ____
7. Do these species all use rivers and streams for the same amount of time before they head out to sea? Yes____; No ____
8. The word "anadromous" refers to (A) ascending; (B) hermaphroditic; (C) antiquated.
9. What does CAFO stand for?

10. What agency handles CAFOs?

11. What does TMDL stand for? _____
12. Can high measures of turbidity exist without the presence of sediment? Yes____; No ____
13. Does shade lower stream temperatures? Yes____; No ____
14. Jack salmon are (A) important indicators of the size of the following year's run; (B) slang for young returning salmon; (C) both of the above.



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Media Received

Editor's Note: In the Spring issue of *Restoration*, we encouraged readers to surf Interrain Pacific's Web site Tidepool periodically. Below are excerpts of an article entitled, "Don't Buy The (Fish) Farm," by Richard Manning, published on that Web site (www.tidepool.org). We also excerpt an article from the July 4 issue of *New Scientist* (www.newscientist.com) about declines in sea trout in Scotland attributed to salmon farming.

. . . In 1980, fish farms accounted for about 1 percent of all salmon production; fourteen years later, the share was 36 percent, the result of a boom in Norway, Scotland, and Chile. Farmed salmon are expected to account for more than half of all salmon production in as few as five years.

The marketers, especially those who would expand beyond the salmon farming already practiced in the Puget Sound and around Vancouver Island (a small part of the global picture), tell us aquaculture is good because artificially raised fish will take pressure off the beleaguered wild stocks and at the same time provide a hungry world with more food. The environmentalists counter that salmon farms pollute, and fish that escape the pens (mostly Atlantic salmon) can spread disease to wild fish and compete with them for food. The environmentalists are right, but set their arguments aside for a second. This is not a conflict between the environment and the economic realities of feeding the world. Salmon farming fails the economic test as well.

. . . Despite what you may have heard in the incessant jobs-versus-environment debate, biology respects an economic logic, ordering its market with the food chain. Species use resources according to their positions in the chain. The chain serves no free lunch, particularly a free protein lunch, which is to say that the protein of a farmed salmon does not come out of thin air.

Animals low on the food chain eat plants. Cows eat the carbohy-

drates in grass to make protein. Animals higher on the chain eat animals. They eat protein to make protein, losing as much as 90 percent of it in the process of maintaining life forces. This is why we don't, as a rule, raise predators for food. We don't farm lions because it would be stunningly inefficient.

But we do farm salmon, and salmon are predators. They derive their protein from protein; they eat fish. Estimates vary, but there is a metabolic loss in each step up the food chain. For instance, the Worldwatch Institute says it takes about five grams of captured fish protein—converted to fishmeal—to make each gram of farmed fish protein. Fishmeal is produced globally, especially from sardines off South America and especially from herring in the North Pacific.

Worldwide, aquaculture is sponsoring a secondary fishery that vacuums the ocean floor like a Shop Vac. Ocean fisheries historically have depleted fish stocks, but until recently were at least somewhat selective to marketable species. However, when the end product is fishmeal, most of what shows up in a net can be ground into the mix, setting the stage for a decimation of the ecosystem the way markets for wood pulp set the stage for clearcuts. Wild salmon graze this ecosystem selectively, efficiently harvesting its protein for us. Our blundering nets know only how to destroy it and move on.

Fish farming takes the relatively low-cost protein of species like sardines and herring (much of it once consumed directly by the world's poor), reduces its volume by a factor of five, and then sells it to the world's wealthiest consumers. Meanwhile, wild salmon, those few that are left, hatch to fingerlings and migrate to oceans only to find that the fishmeal trawlers have beat them to the herring.

Locally, one does what one can. To date it has taken all we can muster, maybe more, to begin putting the salmon's world back together watershed by watershed, piece by piece. Our attention has

been drawn to logging and dams and the restoration of streamside habitat. We'll go on with this work.

Yet if we are to take a reasonably realistic view of the job ahead, larger issues must be faced. One can travel to remote villages on Thailand's Andaman Sea and find fishermen reduced to using cyanide and dynamite to wring the last ounce out of a subsistence fishery hosed out by a passing factory trawler seeking fishmeal. The air of desperation in this scene rings just the same in First Nations villages fighting both fish farms and low salmon prices on Vancouver Island, and it echoes, too, in the empty shelves and empty nets of Astoria. . . .

More Farmed Fish Fiascos

Excerpted from the *New Scientist*, July 4, 1998. Written by Rob Edwards.

The catastrophic decline of wild sea trout in northwest Scotland is largely due to commercial salmon farming, say government scientists. The researchers have found that sea lice, which have long infested caged salmon, have now spread to sea trout, weakening and killing them. The accusation is the most serious ever leveled at salmon farmers, who have been criticised before for polluting lochs and damaging wildlife.

[S]cientists from the Pitlochry laboratory and the Marine Laboratory in Aberdeen, who advise the Scottish Office, have concluded that lice from farmed salmon are "a major contributory factor" in the collapse.

Other factors have been blamed, although none is as clear cut as sea lice. Climate change may have been responsible for a gradual decline in the fish throughout Europe since the 1960s, but the scientists say it cannot be blamed for the sudden collapse of the population in northwest Scotland since 1989. They have also ruled out overfishing, pollution, changes in land use and droughts as major causes.

The latest evidence, which is due to be published next year, comes partly from a genetic study by researchers at the University of St Andrews in Fife. By differentiating between the DNA of farm and wild lice, they have demonstrated for the first time that lice found on sea trout came from farmed salmon.

Surveys by the Pitlochry laboratory found that sea trout from the northwest coast were infested with four times as many lice as trout from the east coast, where there are no salmon farms. Young sea trout spend long periods in sea lochs near fish farms before they migrate out to sea, where Pitlochry scientists believe they are dying in increasing numbers.

The evidence that lice from salmon are causing the decline in sea trout is overwhelming, scientists argue. "We should act on the assumption that there is a link," says [a] senior government scientist.

But the Scottish Office continues to insist that lice are not the root cause of the decline in sea

trout. "It is a combination of causes including climate change, afforestation and acidification," says a spokeswoman.

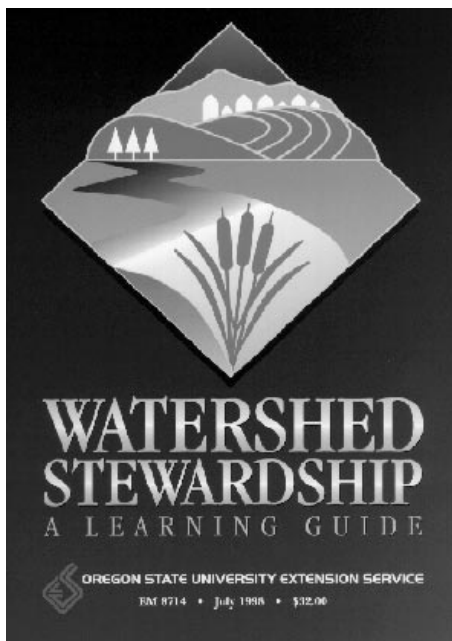
Strangely, the fish-farming industry seems more willing to accept that there is a problem. Lord Lindsay, chairman of the Scottish Salmon Growers' Association, says the industry is introducing a new policy to control lice. "I really think that lice will be confined to history in a matter of years," he predicts.

Instream Flow Protection: Seeking a Balance in Western Water Use, David M. Gillilan and Thomas C. Brown, Island Press. 378 pp. \$30.00 paperback.

This reference book takes the reader through the history, politics, and legal issues surrounding the evolution of water usage in the West and the corresponding development of water laws designed to protect those uses. The beginning chapters tell how water usage evolved in the West (in most states it was an outgrowth of mineral

mining laws that supported the "first in time, first in line" rationale of early gold miners and other fortune seekers). Noting that water laws have changed to fit the contemporary political and economic values of a given time, the authors lay the foundation for later discussions of how future changes needed in water law may be accomplished. The authors argue that society's values are changing regarding water allocations and priorities and that rivers need formal laws to maintain in-stream flows. They also provide numerous case studies and examples of how difficult changes in water law have been made historically. The book builds a case for how, and under what conditions, water laws are changed. This is a well-researched book. It provides references to other texts and documents and gives a comprehensive overview of the issues and contexts associated with the growing need and support for in-stream flows.

Book Offers Guidance on Watershed Restoration



A new publication from Oregon State University makes a useful tool for training new watershed group members or others who want to learn about the complexity of watersheds. *Watershed Stewardship: A Learning Guide* is a resource for watershed groups, landowners and managers, and workers and volunteers. The guide was written by a team of OSU Extension educators with input from watershed councils, federal and state agencies, industry, private groups, and academia.

A practical learning tool

This 22-chapter guide is an easy-to-use resource that will help you learn how to

- Form effective partnerships
- Know the parts of your watershed and how they fit together
- Understand assessments of watershed conditions
- Develop strategies for enhancing watershed resources
- Implement effective enhancement projects

Each chapter contains a self review, exercises, and a list of resources for further information and training.

Ordering instructions

Request publication EM 8714, and send \$32.00 per copy to

Publication Orders
Extension & Station Communications
Oregon State University
422 Kerr Administration
Corvallis, OR 97331-2119
Fax: 541-737-0817

Calendar of Events

Oregon Trout's education program, Salmon Watch, needs volunteers to help staff field trips for middle and high school students in the Portland, Corvallis, Eugene, and Medford areas. Volunteers lead hands-on activities to investigate wild fish and their watersheds during field trips to local salmon spawning areas. Volunteers can enroll in Oregon Trout's summer training program to prepare for fall outings with students. For more information, call Oregon Trout at 503-222-9091, or e-mail the organization at info@ortrout.org. Training workshops are scheduled from mid-July through mid-September.

GWEB's semiannual conference—Who Will Catch the Rain?—will be held in Ontario at the Four Rivers Cultural Center, October 14-16. October 16 will be a field day with tours to local restoration and field sites. For more information, call 503-378-3589, ext. 825.

The Willamette University College of Law and the *Willamette Journal of International Law and Dispute Resolution* are cosponsoring a one-day symposium, Current Issues in Conserving and Managing North Pacific Fisheries, September 11, 1998, at Willamette University. For more information, call Diane Lohof at 503-370-6877.

Restoration



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