

Court rules against assessments of how Glen Canyon Dam affects humpback chub fish

By Howard Fischer, Capitol Media Services | Posted: Tuesday, August 14, 2012 6:00 am

A federal appeals court on Monday rejected a bid by the Grand Canyon Trust to force annual environmental assessments on how operation of the Glen Canyon Dam by the Bureau of Reclamation affects an endangered fish that lives downstream.

The three-judge panel said nothing in federal environmental law requires such an intense review. Judge Ronald Gould also said it would be impractical, as each review would result in a new legal challenge.

But Neil Levine, an attorney for the trust, said Monday's ruling is not a complete loss.

He said the appellate court, in its unanimous ruling, threw out a trial judge's order that dismissed one part of the organization's challenge to the assessments of what the current dam operating scheme means not only to the humpback chub but other downstream uses, including camping. Levine said that gives the trust another chance to force major changes to when and how water is released.

"We're going to get back to work in seeing how we change operations so that it's better for the chub and the downstream resources, including beach habitat which provides places for rafters and boaters," he said.

Central to the debate is the trust's objections to the fact that the federal agency operates the dam on the Colorado River in a way so that water releases vary depending on demand for electricity. That results in higher water releases in summer and winter.

By contrast, the trust prefers a system where the water releases are highest in the spring and lower, steady flows in the summer and fall, mimicking the natural flow of the river.

The issue focuses around the humpback chub.

Construction of the dam trapped much of the sediment that used to wash down the river and repair the chub's habitat. Water from the dam also is colder than the river's natural flow; the chub thrives in warmer water.

In 1992, Congress directed that the dam be operated to "protect and mitigate adverse impacts" on the environment. That included not only a full Environmental Impact Statement but also annual operating plans in consultation with the public, including academics, scientists, environmental organizations, the recreation industry and those who purchase power generated by the dam.

In 1994, the U.S. Fish and Wildlife Service rejected the Bureau of Reclamation's plans. But the wildlife service approved a 2008 modification.

The Grand Canyon Trust then filed suit, saying that the bureau should prepare at least an environmental assessment for each operating plan.

But Gould said what the trust really wants is an ability to challenge each year the decision to regulate water flows based on electricity demand rather than mimicking the natural flow of the river.

Anyway, the judge said, accepting the trust's arguments -- and the challenges likely to come if it did not get its way -- make no sense.

"Annual challenges could not likely be resolved fully before the next annual operating plan came along, and there is no benefit to endangered species in having an unending judicial process concerning annual reporting requirements that Congress mandated," Gould wrote.

Levine said that argument makes no sense.

"The court itself has said, at least in two opinions that we've referenced, that the idea it's practical or impractical is sort of beside the point," he said. Levine said there are provisions in the law to deal with these matters quickly.

Attorneys for the trust also argued that the requirement for an annual operating plan actually gives the Bureau of Reclamation some opportunity to change the dam's operations, even to the point of adopting the seasonal flows it prefers to protect the fish. Gould rejected that contention.

He said those annual plans must be created "under the adopted criteria for the preceding compact water year and the projected operation for the current year." And Gould noted that the "adopted operating criteria" for the dam, selected by the Interior Secretary in 1966, was the one which maximizes energy production.

What's left to adjust, Gould wrote, are changes based on things ranging from the amount of winter snowpack to the yearly demand for electricity and water

The court separately rejected challenges by the trust to statements by Fish and Wildlife Service that had justified the method of operation for dam releases, saying that any problems were cured by subsequent biological opinions.