UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY and ENVIRONMENT MAINE,

Plaintiffs,

v.

TOPSHAM HYDRO PARTNERS LIMITED PARTNERSHIP,

Defendant.

Civil Action No. 2:11-cv-00037

PLAINTIFFS' OPPOSITION TO TOPSHAM HYDRO'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs Friends of Merrymeeting Bay and Environment Maine oppose the motion to dismiss by defendant Topsham Hydro Partners Limited Partnership ("Topsham"). A memorandum of law setting forth the bases for this opposition follows.

PRELIMINARY STATEMENT

Plaintiffs bring this suit to stop Topsham from harming endangered Atlantic salmon in violation of the "take" prohibition of the Endangered Species Act ("ESA" or "the Act"). Plaintiffs' complaint alleges that Topsham's Pejepscot dam on the Androscoggin River: kills and injures the salmon with its rotating turbine blades; impedes upstream and downstream salmon passage, which prevents salmon from gaining access to significant amounts of spawning and rearing habitat; alters the natural habitat to such a degree that the essential behavior patterns of the fish are significantly impaired; and has other deleterious effects on the salmon. Plaintiffs' complaint also alleges that the Atlantic salmon population of the Androscoggin River is near extinction, that dams such

as Topsham's are a significant cause of the salmon's current peril, and that immediate measures are needed to protect the remaining salmon from the effects of these dams.

Topsham denies none of these allegations in its motion to dismiss. Instead, it urges this Court to decline to hear the case. Despite the ESA's clear grant of jurisdiction to the district courts to entertain suits to "enforce any … provision" of the Act, 16 U.S.C. § 1343(g)(1), Topsham argues that this Court lacks jurisdiction. The company bases this argument on two flawed propositions: first, that only the National Marine Fisheries Service ("NMFS") and the United States Fish and Wildlife Service ("USFWS") (collectively, the "Services") have the authority to determine whether a "take" has occurred; and second, that the true focus of Plaintiffs' suit must thus be the federal government's implementation of the ESA, and not Topsham's ongoing violation of the ESA. This view of the law is fundamentally inconsistent with the language and structure of the statute, and has been rejected by the Court of Appeals for the First Circuit and other courts.

Plaintiffs have sued Topsham, and not the federal government, because it is Topsham, and not the federal government, whose Androscoggin River dam is harming endangered Atlantic salmon. (Indeed, in their formal statement listing the Androscoggin salmon population as endangered under the ESA, the Services declared the river's dams to be a "significant threat" to the population's survival.) This Court has jurisdiction over this case under the plain terms of the ESA, and it should not hesitate to exercise that jurisdiction to save this historic and imperiled species.

STANDARD OF REVIEW

Although it does not differentiate its arguments between the two, Topsham brings its motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For Rule 12(b)(1) motions adjudicated on the pleadings, courts "take as true all well-pleaded facts in the plaintiffs' complaints, scrutinize them in the light most hospitable to the plaintiffs' theory of liability, and draw all reasonable inferences therefrom in the plaintiffs' favor." Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009), cert. denied, 130 S.Ct. 1892 (2010). Similarly, under Rule 12(b)(6) "[t]he factual allegations of the complaint are to be accepted as true, and all reasonable inferences that might be drawn from them are indulged in favor of the pleader." Gorski v. New Hampshire Dep't of Corrections, 290 F.3d 466, 473 (1st Cir. 2002). A case may be dismissed under Rule 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Id. (citation and internal quotations omitted).

PLAINTIFFS' "TAKE" CLAIM AGAINST TOPSHAM

Citizens are authorized to commence a civil action to enjoin any person "alleged to be in violation of any provision" of the Act. 16 U.S.C. § 1540(g)(1).

I. THE TAKE PROHIBITION

Section 9 of the ESA makes it unlawful for any person to "take" an endangered species unless authorized to do so under the Act. 16 U.S.C. § 1538(a)(1) & (a)(1)(B). An "endangered species" is a species that has been so listed because it "is in danger of extinction throughout all or a significant part of its range." 16 U.S.C. § 1532(6).

The term "take" means, *inter alia*, to "kill," "harass," or "harm" a member of a protected species. 16 U.S.C. § 1532(19). By USFWS regulation, actions or omissions

will be found to "harass" an animal if they "significantly disrupt normal behavior patterns" such as "breeding, feeding, or sheltering," and will be found to "harm" the animal if they "actually kill[] or injure[] … by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. A NMFS regulation further defines "harm" as including habitat modification where a causal link is established between such modification and injury or death of a listed species. 50 C.F.R. § 222.102. In publishing that rule, NMFS listed the following among its examples of activities that may modify habitat and thus cause a take:

> 1. Constructing or maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate;
>
> * * *
>
> 4. Removing or altering rocks, soil, gravel, vegetation or other physical structures that are essential to the integrity and function of a listed species' habitat;
>
> * * *
>
> 5. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavior patterns; [and]
>
> * * *
>
> 7. Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat …

64 Fed. Reg. 60,727, 60,730 (Nov. 8, 1999).

II. TOPSHAM'S TAKE OF ATLANTIC SALMON

The allegations in Plaintiffs' complaint – which are not denied in the motion to dismiss – plainly make out a case for illegal "take" against Topsham.

Topsham owns and operates Pejepscot hydroelectric dam on the Androscoggin River. Complaint ¶ 7. The Androscoggin River population of Atlantic salmon is listed as

an "endangered species" under the ESA. Complaint ¶¶ 16-17; 74 Fed. Reg. 29,344 (June 19, 2009). The portion of the Androscoggin River where Pejepscot dam is located and the other portions of the river affected by the dam are part of the "critical habitat" for the endangered salmon (*i.e.*, the habitat is deemed "essential to the conservation of the species"). 16 U.S.C. § 1532(5)(A)(i); 74 Fed. Reg. 29,300 (June 19, 2009); Complaint ¶ 17.

Historically, the Androscoggin River, along with the neighboring Kennebec River, had the largest Atlantic salmon runs in the United States, estimated at more than 100,000 adults each year. Complaint ¶ 13. Now, according to recent annual surveys done by the Maine Atlantic Salmon Commission, the number of adult Atlantic salmon returning to the Androscoggin River each year is dangerously low. For example, only ten salmon returned in 2010. Complaint ¶ 13.

The complaint makes the following allegations regarding the adverse effects of Pejepscot dam on Atlantic salmon:

> a. The dam's turbines kill and injure out-migrating salmon when the salmon attempt to pass through them.
>
> b. The dam severely limits upstream passage of salmon, preventing access to significant amounts of spawning and rearing habitat.
>
> c. Facilities meant to allow the salmon to pass around or through the dam cause delays in passage, resulting in incremental losses of salmon smolts, pre-spawn adults, and adults.
>
> d. The dam is a barrier to the migration of other fish whose presence is necessary for the salmon to complete their life cycle.
>
> e. The dam adversely alters predator-prey assemblages, such as the ability of the salmon to detect and avoid predators.
>
> f. The dam creates slow-moving impoundments in formerly free-flowing reaches. These altered habitats are less suitable for spawning and rearing of salmon and contribute to the dam's significant impairment of essential behavior patterns of the salmon. In addition, these conditions may favor non-native competitors at the expense of the native salmon.

> g. The dam results in adverse hydrological changes, adverse changes to stream and river beds, interruption of natural sediment and debris transport, and changes in water temperature, all of which contribute to the dam's significant impairment of essential behavior patterns.

Complaint ¶ 24.

The substance of these allegations is supported by findings made by the Services themselves. In their decision to list the Androscoggin River population of Atlantic salmon as endangered, NMFS and USFWS found that dams play a major role in imperiling the salmon.

> The National Research Council stated in 2004 that the greatest impediment to self-sustaining Atlantic salmon populations in Maine is obstructed fish passage and degraded habitat caused by dams … Dams are known to typically kill or injure between 10 and 30 percent of all fish entrained at turbines. With rivers containing multiple hydropower dams, these cumulative losses could compromise entire year classes of Atlantic salmon … [D]ams remain a direct and significant threat to Atlantic salmon."

74 Fed. Reg. at 29,362 (citation omitted); Complaint ¶ 26. The Services further noted that dams "are among the leading causes of both historical declines and contemporary low abundance" of Androscoggin River salmon, and that they "have led to a situation where salmon abundance and distribution has been greatly reduced, and thus the species is more vulnerable to extinction." 74 Fed. Reg. at 29,366-29,367 (citation omitted); Complaint ¶ 26. "Therefore," the Services concluded, "dams represent a significant threat to the survival and recovery" of the Androscoggin salmon population. 74 Fed. Reg. at 29,367; Complaint ¶ 26.

TOPSHAM'S PARTICIPATION IN INFORMAL CONSULTATION

There are only three potential exemptions from the ESA's take prohibition. A take is allowed if authorized by (1) an incidental take permit ("ITP") issued by the Services under Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B); (2) an incidental take statement ("ITS") issued by the Services under the Section 7 consultation process, 16 U.S.C. § 1536(o)(2); or (3) an exemption granted by the Endangered Species Committee made up of seven Cabinet-level members, 16 U.S.C. § 1536(e)-(p). Topsham does not have authorization to take Atlantic salmon under any of these exemptions. Complaint ¶¶ 2, 25.

However, apparently anticipating that its federal licensing agency, the Federal Energy Regulatory Commission ("FERC"), will eventually engage in formal "consultation" with the Services under Section 7 of the ESA, Topsham has obtained FERC's approval to act as its "non-federal representative" in "informal consultation" with the Services.[1] Skancke Dec. Ex. 1 (submitted by Topsham). One potential outcome of the formal consultation process, if it in fact begins, is the issuance of an incidental take statement to Topsham, which would allow Pejepscot dam to take a limited number of

[1] Section 7 of the ESA directs federal agencies to ensure that the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely affect its critical habitat, 16 U.S.C. § 1536(a)(2), and further directs federal agencies to "consult with" the Services "on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant" where the contemplated action is likely to affect a listed species, id. § 1536(a)(3). Although Topsham already has a license from FERC to operate Pejepscot dam, the company presumably would apply to FERC for an amendment to its license, thus triggering the Section 7 consultation process. Informal consultation, in which Topsham apparently is now engaged, is an "optional process" that is "designed to assist the Federal agency in determining whether formal consultation … is required." 50 C.F.R. § 402.13(a).

Atlantic salmon but would require that specified "reasonable and prudent measures" be taken to "minimize" the harm to the salmon.[2] 16 U.S.C. § 1536(b)(4)(ii).

The availability of an ITS to Topsham is far from certain. An ITS is authorized only where the activity in question is not likely to "jeopardize the continued existence" of the endangered species or to "result in the … adverse modification" of its critical habitat. 16 U.S.C. § 1536(a)(2) & (b)(4)(B). Section 7 does not authorize the issuance of an ITS (and Section 10 does not authorize the issuance of an ITP) if the Services find that the species' condition is too fragile to allow for a take of any magnitude. With a returning Androscoggin River salmon population in the low double digits, such a finding is a very realistic possibility here.

Topsham now argues that its participation in this (presently informal) consultation process strips this Court of jurisdiction to adjudicate Plaintiffs' take claim. As a matter of law, Topsham is wrong.

ARGUMENT

I. THE COURT HAS JURSIDCTION OVER THIS LAWSUIT UNDER THE PLAIN LANGUAGE OF THE ESA.

A. This Court Is Authorized To Determine Whether Topsham Is Committing A Take Of Atlantic Salmon.

The essence of Topsham's argument is that this Court lacks the authority to determine whether the company is committing a take, and that only the Services

[2] A take is considered "incidental" when the purpose of the activity is not to take an endangered species, but rather to conduct some otherwise lawful activity that incidentally results in a take. 16 U.S.C. § 1539(a)(1)(B) (regarding incidental take permits); 50 C.F.R. § 402.02 (regarding incidental take statements). Presumably, Pejepscot dam's take of salmon would be deemed incidental because the purpose of the dam is not to take salmon but to generate electrical power and its operation is an otherwise lawful activity.

(especially in the course of Section 7 consultation) may make that determination.[3] The language and structure of the statute demonstrate otherwise.

Section 9 of the ESA contains a flat prohibition against committing a take: "it is unlawful for any person subject to the jurisdiction of the United States to … take any [endangered] species." 16 U.S.C. § 1538(a)(1)(B). Under Topsham's erroneous view of the ESA, however, takes would be *allowed* until barred by the Services. Thus, Topsham's argument runs, it may kill an unlimited number of Atlantic salmon now with impunity, and only later, if the Services conclude after formal consultation that a take is occurring, must the company halt the take or implement measures to reduce the size and impact of that take (assuming the Androscoggin salmon have not by then become extinct). This is akin to a person without a driver's license arguing that he can legally drive a car now because he has scheduled a driver's license test with the Bureau of Motor Vehicles for some point in the future. If he flunks the test, he would argue, he will stop driving then.

Nothing in the Act supports this nonsensical interpretation. The definition of "take" in the ESA is unequivocal: it means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Determining whether a take is occurring involves a straightforward analysis of whether the activity in question falls within the statutory definition. Had Congress wanted instead to limit the definition of a take to those activities *which the Services*

[3] See, e.g., Defendant Topsham Group's Motion to Dismiss ("MTD") at 10 ("[the] consultation process … is a necessary prerequisite to identifying the appropriate method for a facility's compliance with the ESA"); 16 ("the question of whether operation of a dam results in a taking of Atlantic salmon … was **expressly** assigned to federal agencies by Congress under the ESA") (bold in original).

determine to be a take, it could easily have done so. Similarly, as discussed above, the statute specifies three clearly delineated exemptions from the take prohibition. Had Congress wanted to also include *participation in section 7 consultation* among the situations qualifying for an exemption, it could easily have done so.

Moreover, there is nothing in the citizen suit provision of the Act that prevents a district court from adjudicating whether a take is occurring. That section grants "jurisdiction" to the district courts both to "enforce" the provisions of the Act against any party alleged to be in violation thereof and to "order" the Services to carry out their duties in implementing the Act. 16 U.S.C. § 1540(g)(1). Topsham's argument would write the first of these grants of jurisdiction out of the Act, thus limiting those who seek to restrain unlawful takes to the recourse of mounting an Administrative Procedure Act ("APA") appeal to a decision of the Services – and then only if Section 7 consultation has been pursued and brought to completion. See MTD at 11 (suggesting that Plaintiffs "must await final agency action and then pursue their claims under the [APA]").

Again, Congress *could* have drafted the ESA in this fashion, but did not. Rather, the Act specifies that federal government activity precludes the commencement of a citizen enforcement suit only in two limited situations: where the Services have already commenced a penalty action against the alleged violator, or where the United States is already prosecuting a criminal action against the violator. 16 U.S.C. § 1540(g)(2)(ii) & (iii). Otherwise, the grant of jurisdiction to the federal courts is unaffected by ongoing or anticipated administrative proceedings.

Accordingly, the First Circuit has recently held that a pending application for an incidental take permit – the statutory analogue to the incidental take statement – does not

prevent the district courts from exercising jurisdiction in a citizen suit to determine whether an unlawful take is occurring in the interim.

> Nothing in the statutory language about ITPs constrains the power of the federal judiciary. Similarly, *nothing in the citizen suit provision purports to subordinate judicial remedies to the ITP process*. The provision simply states that "[t]he district courts shall have jurisdiction … to enforce any … provision or regulation, or to order the Secretary to perform such act or duty," at issue in a citizen suit. 16 U.S.C. § 1540(g)(1). *There is no reason to think that while Congress intended for FWS to consider the facts as to whether species-wide harm would be done before it can issue an ITP, it intended to preclude a federal judge from considering the same facts*.

Animal Welfare Institute ("AWI") v. Martin, 623 F.3d 19, 28-29 (1st Cir. 2010) (emphasis added; footnote omitted) (State of Maine liable for illegally taking endangered Canada lynx through its trap licensing program, even though ITP application to authorize take was pending); see also Loggerhead Turtle v. Volusia County Council, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995) (court in ESA citizen suit held it was "not divested of jurisdiction over this case simply because" defendant "filed an application for an incidental take permit"), rev'd on other grounds, 148 F.3d 1231 (11th Cir. 1998). Similarly, courts have adjudicated citizen suit take claims where the conduct at issue was also the subject of Section 7 consultation. See Strahan v. Roughead, 2010 U.S. Dist. LEXIS 123636 (D. Mass. Nov. 22, 2010) (take claim against the Navy for killing endangered whales during training operations adjudicated on merits despite pendency of Section 7 process); Alabama v. United States Army Corps of Eng'rs, 441 F. Supp 2d 1123 (N.D. Ala. 2006) (take claim against the Corps of Engineers for killing endangered mussels by decreasing water flow through dam adjudicated on merits even though Corps was in process of Section 7 consultation with USFWS); cf. United States Public Interest Research Group ("USPIRG") v. Atlantic Salmon of Maine, 215 F. Supp. 2d 239 (D. Me.

2002), aff'd, 339 F.3d 23 (1st Cir. 2003) (under Clean Water Act, discharger liable for discharging pollutants into the ocean without a permit even though its permit application was pending).

Rather than cite, much less discuss, these cases, Topsham relies instead on Bennett v. Spear, 520 U.S. 154 (1997), a case that did not involve a claim of illegal take. In Bennett, the Supreme Court held that a developer seeking to challenge a biological opinion issued by the Services must proceed under the APA rather than under the ESA's citizen enforcement provision. The ESA provision, noted the Court, "is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties – both private parties and the Government agencies – but is not an alternative avenue for judicial review of the Secretary's implementation of the statute." 520 U.S. at 173. In the instant case, Plaintiffs invoke the citizen suit provision for precisely the purpose endorsed by the Court: to enforce a "substantive provision" of the ESA (the take prohibition) against a "regulated party" (Topsham). In an attempt to avoid the logical conclusion that this case is therefore a proper use of the ESA citizen suit provision, Topsham concocts a fiction: that the *real* subject of the action is a challenge to the Services' implementation of the Act (despite the fact that the complaint does not name the Services as defendants, makes no allegations against them, and seeks no relief from them).[4]

[4] In arguing that Plaintiffs' "real objective" is to have this Court, rather than the Services, administer the Section 7 consultation process, Topsham focuses on that portion of Plaintiffs' prayer for relief that asks that the company be required to "prepare a [biological assessment] according to a specified schedule." See MTD at 5, 12; Complaint Relief Request (b). However, ordering one found to be in violation of the take prohibition to timely seek authorization through the "incidental take" process is a logical step toward remedying the violation, e.g., Animal Protection Institute v. Holsten, 541 F.

A nearly identical argument was recently rejected by the District of Massachusetts in Strahan v. Roughead, 2010 U.S. Dist. LEXIS 123636. There, the plaintiff sued the Navy for its alleged take of endangered whales during training exercises. In moving to dismiss for lack of subject matter jurisdiction, the Navy invoked Bennett v. Spear and argued that the plaintiff must wait until NMFS takes final action under section 7 of the ESA, and then appeal that determination under the APA. The court disagreed, and declined to dismiss the case:

> The instant action is not analogous to Bennett on this point. In contrast to the type of suit prohibited by Bennett, the instant action does not challenge the Secretary of the Interior's administration of the ESA, but rather the alleged violations of the Navy, a regulated agency. Specifically, Strahan alleges that the Navy's operation of "a fleet of just under a thousand vessels" in the Federally Protected Whales' marine habitat "routinely kills, injures, harms, harasses and otherwise unlawfully takes" Federally Protected Whales, alters their habitat, and impedes their life activities, all in violation of the "take" prohibition of Section 9.

2010 U.S. Dist. LEXIS 123636, at *21.

Similarly, the Court has jurisdiction here to determine whether Topsham is committing an unlawful take of Atlantic salmon at Pejepscot dam.

B. The Case Is Ripe For Adjudication.

Topsham also contends this Court lacks jurisdiction because the case is not ripe for review. A claim is ripe if (1) it is fit for judicial decision and (2) hardship would ensue if the court withholds jurisdiction. Stern v. United States Dist. Court, 214 F.3d 4,

---

Supp. 2d 1073, 1081 (D. Minn. 2008) (defendant ordered to submit an ITP application within 33 days), and leaves the administration of that process to the Services. Moreover, Topsham ignores the other aspects of this prayer for relief, which request that company be ordered to "prevent Atlantic salmon from swimming into operating turbines," and to "implement other appropriate measures to comply with the ESA's take prohibition," relief that has nothing to do with the Section 7 process. Complaint Relief Request (b)(1) & (2).

10 (1st Cir. 2000). These criteria are easily satisfied here.

A claim is fit for judicial decision when it is based "on an application of historical facts to the law." Downeast Ventures v. Washington County, 2005 U.S. Dist. LEXIS 32649, at *26 (D. Me. Dec. 12, 2005) (claim by alleged property owner that county wrongly seized its property was ripe even though contemporaneous state case could have resolved questions regarding ownership of the property). If instead the claim is based on "anticipated events and injury" that are "remote," it is not ripe. Ernst & Young v. Depositors Econ. Protection Corp., 45 F.3d 530, 537, 540-41 (1st Cir. 1995) (cited by Topsham) (claim unripe where a "stretched chain" of eight separate events, many of them "speculative," would have had to transpire before the harm alleged by plaintiffs would have occurred). Here, the facts underlying Plaintiffs' claim are neither remote nor contingent; they are happening now. The Complaint alleges that Pejepscot dam *presently* kills and injures salmon and blocks their access to spawning and rearing habitat.

Topsham suggests this case is not fit for judicial decision because it could become moot if the Services in the Section 7 process decide Topsham is not committing a take. MTD at 14. This argument is simply a variation of Topsham's flawed argument that this Court lacks jurisdiction under the ESA to determine whether a take is occurring.[5] Whether Topsham is committing a take *now* is not contingent on what the Services may say later. In fact, it is Topsham's suggestion that the Services might find no take is occurring, and not Plaintiffs' take claim, that is speculative. In listing the Androscoggin River salmon as endangered in 2009, the Services declared that "[d]ams are among the

[5] It also makes little conceptual sense, as "mootness" is concerned with whether a controversy has *already* been resolved, while "ripeness" is concerned with whether a controversy is *not yet ready* for resolution.

leading causes of both historical declines and contemporary low abundance" and "represent a significant threat to [their] survival and recovery." See supra at 6. It is highly unlikely the Services would reverse themselves and conclude that Pejepscot dam has no adverse effect on salmon. There is a greater likelihood the Services would find any level of take unacceptable and deny an ITS altogether.[6]

Nor would eventual issuance of an ITS render this case moot. To begin with, Plaintiffs are entitled to relief during the period Topsham is committing a take without authorization. Holsten, 541 F. Supp. 2d at 1077 (rejecting argument that a citizen suit alleging take is moot because an incidental take permit may be issued later, and granting relief during pendency of ITP application). Moreover, federal courts have the equitable power in citizen enforcement cases to order remediation of past harm caused by illegal conduct; this is so even where the relief imposes requirements more stringent than those contained in an agency-issued permit. See generally USPIRG v. Atlantic Salmon of Maine, 339 F.3d 23, 30 (1st Cir. 2003) (upholding order imposing conditions to protect Atlantic salmon that were more stringent than those imposed by Clean Water Act discharge permit).[7] As the First Circuit has stated, "the remedying of past violations, so long as it does not reduce protection ordered by the agency, is a matter of district court

[6] In any event, a decision by the Services that an ITS is not required would not immunize Topsham from ESA Section 9 liability if this Court determines the company is currently taking salmon. Only compliance with an *issued* ITS shields a person from Section 9 liability. Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv., 219 F. Supp. 2d 1142, 1148 (D. Or. 2002).

[7] I Ka'aina v. Kaua'I Island Util. Corp., 2010 U.S. Dist. LEXIS 101948 (D. Hawaii Sept. 24, 2010), cited by Topsham, suggested in dictum that issuance of an ITP could render a take claim moot. However, the court in that case offered no analysis of the mootness issue, and did not address either the many cases that have adjudicated take claims despite the pendency of ITP applications or Section 7 consultation, see supra at 10-12, or the availability of remediation as a remedy to redress past violations.

judgment reviewed for abuse of discretion." Id.[8]

With respect to hardship, Topsham pointedly ignores the fact that the Androscoggin River population of salmon is nearly extinct, and that delay only worsens their plight. There is no deadline by which the Services must complete the consultation process. 16 U.S.C. § 1536(b)(2) ("Consultation under [16 U.S.C. § 1536(a)(3)] shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the [license] applicant concerned."). And the Services' track record in timely addressing requests for incidental take authorization in Maine is less than stellar. Martin, 623 F.3d at 23 (as of October 2010, USFWS had taken no action on ITP application filed in August 2006 seeking authorization for trapping program to incidentally take lynx).[9] Topsham seeks immunity from potential liability while the administrative process plays out on some unspecified timetable, but in the meantime its Pejepscot dam hastens the demise of a species. Such a view of the ESA is diametrically opposed to Congress' intent in enacting the statute. Tennessee Valley Auth. ("TVA") v. Hill, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

II. THE COURT SHOULD NEITHER DECLINE TO EXERCISE JURISDICTION NOR STAY THIS CASE.

As an alternative, Topsham asks the Court to either (a) invoke the doctrine of primary jurisdiction and abstain from hearing the case or (b) stay the case during the

[8] Further, as part of the injunctive relief in that case, the district court ordered defendants to operate "in strict compliance with" any permit ultimately issued. USPIRG v. Atlantic Salmon of Maine, 257 F. Supp. 2d 407, 432-33, 435 (D. Me. 2003). The Court here could similarly order Topsham to operate Pejepscot dam in compliance with any take authorization it receives, and for this reason, too, this case would not be rendered moot by the issuance of an ITS.

[9] To Plaintiffs knowledge, final action on that ITP application still has not been taken.

pendency of the Section 7 consultation process. The primary jurisdiction and stay analyses are essentially the same. St. Bernard Citizens for Envl. Quality v. Chalmette Ref., 348 F. Supp. 2d 765, 767 (E.D. La. 2004).

Federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given to them." Chico Serv. Station v. Sol Puerto Rico Ltd., 2011 U.S. App. LEXIS 1568, at *19 (1st Cir. Jan. 26, 2011) (citation omitted). Similarly, the moving party must overcome a "heavy burden" to prevail on a stay motion. E.g., Chalmette Refining, 348 F. Supp. 2d at 767 (citation omitted); Amersham Int'l v. Corning Glass Works, 108 F.R.D. 71, 72 (D. Mass. 1985).

Here, "enforcement of the ESA's prohibition against the 'take' of endangered or threatened species has been placed squarely within the jurisdiction of the courts through the ESA citizen suit provision." Coho Salmon v. Pacific Lumber Co., 61 F. Supp. 2d 1001, 1016 (N.D. Cal. 1999) (declining to invoke primary jurisdiction doctrine in ESA take case despite defendant's pending application for incidental take permit). As the First Circuit recently stated, the circumstances justifying abstention from jurisdiction in a citizen enforcement suit "will be exceedingly rare." Chico Service, 2011 U.S. App. LEXIS 1568, at *28; see also Atlantic Salmon of Maine, 339 F.3d at 34 ("primary jurisdiction should be invoked sparingly where it would preempt a citizen suit under the Clean Water Act") (citation omitted); Maine People's Alliance v. Holtrachem Mfg., 2001 U.S. Dist. LEXIS 11162, at *23 (D. Me. Jan. 8, 2001) (primary jurisdiction is to be invoked in citizen suit "most sparingly, if at all").

Federal environmental statutes "specifically delineate the narrow circumstances in which agency actions may interfere with citizen enforcement," and abstention from

jurisdiction in other circumstances "would 'frustrate Congress's intent, as evidenced by its provisions for citizen suits, to facilitate broad enforcement of environmental protection laws and regulations.'" Chalmette Refining, 348 F. Supp. 2d at 768 (citations omitted); Chico Serv., 2011 U.S. App. LEXIS 1569, at *28 (noting "Congress's careful delineation of the limited situations in which federal courts must refrain from hearing citizen suits"); Holtrachem, U.S. Dist. LEXIS 11162, at *23. As discussed supra at 10, neither of the ESA provisions under which government actions preclude a citizen "take" suit is present here.

This is not one of those rare cases in which a deviation from the jurisdictional scheme devised by Congress is justified. Special expertise is not needed to determine whether Topsham is taking Atlantic salmon; the federal courts routinely make "take" determinations. E.g., Martin, 623 F.3d at 29 (court ruled Maine violated ESA by taking lynx); Strahan v. Coxe, 127 F.3d 155, 163-165 (1st Cir. 1997) (court ruled Massachusetts violated ESA by taking whales); Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1109-1110 (9th Cir. 1988) (court ruled Hawaii violated ESA by taking endangered bird species); AWI v Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 564-580 (D. Md. 2009) (court ruled wind turbines take Indiana bats); Loggerhead Turtle, 896 F. Supp. at 1177 (M.D. Fla. 1995 (in rejecting primary jurisdiction argument, court found USFWS expertise not needed to determine whether defendant is taking endangered turtles).[10]

[10] Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 703, 708 (1995) does not hold otherwise. The issue in that case was not whether a particular party was committing a take. Rather, that case involved a challenge to a USFWS regulation interpreting the term "harm" under the ESA's definition of "take." The Court simply stated that in construing the validity of such a regulation, courts should

Moreover, staying this case or declining jurisdiction would be anathema to strong enforcement of the ESA. As the Supreme Court concluded in the seminal case of TVA v. Hill, 437 U.S. at 174, "examination of the language, history, and structure of [the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." See also AWI v. Martin, 2008 U.S. Dist. LEXIS 97765, at *70 (D. Me. 2008) (quoting TVA v. Hill in denying request to stay ESA citizen suit while ITP application was pending); Holsten, 541 F. Supp. 2d at 1077 (stay denied despite pendency of ITP application). Under Topsham's view of the Act, the company should be left free to await the culmination of the Section 7 consultation process before taking steps to meaningfully protect salmon, even though it had years of warning that the Androscoggin River salmon would be listed as endangered. See Complaint ¶ 34. This is not the result envisioned by the ESA. TVA v. Hill, 437 U.S. at 177 (the "dominant theme" in congressional discussion of the Act was the "'overriding need to devote whatever effort and resources were necessary to avoid further diminution of … wildlife resources'") (citation omitted).

Lastly, Topsham does not demonstrate that any hardship or inequity will occur by proceeding with the case, much less that such considerations could outweigh the strong federal interest in preserving the Atlantic salmon. See generally Landis v. North American Co., 299 U.S. 248, 255 (1936) ("[A] suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else."). Rather,

---

give deference to the agency's interpretation. Further, proceeding with the instant case is perfectly *consistent* with the Services' finding that dams on the Androscoggin River are both a primary cause of the near extinction of the river's Atlantic salmon population and a significant impediment to that population's revival.

it is staying the case that presents the greater risk of harm, both because the survival of a national resource is at risk and because (assuming for purposes of this motion that Plaintiffs' allegations are true) an unlawful take is ongoing. See Martin, 2008 U.S. Dist. LEXIS 97765, at *70 (denying State of Maine's motion to stay ESA take suit pending its application for an incidental take permit, where "to stay the case would sanction an ongoing violation of the ESA.").[11]

CONCLUSION

For the reasons set forth above, Topsham's motion should be denied.

Dated: March 29, 2011

/s/
David A. Nicholas
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

/s/
Bruce M. Merrill
225 Commercial Street Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

Joshua R. Kratka (*Pro hac vice*)
National Environmental Law Center
44 Winter Street, 4th Floor
Boston, Massachusetts
(617) 747-4333
josh.kratka@verizon.net

Charles C. Caldart (*Pro hac vice*)
National Environmental Law Center
1402 Third Ave., Suite 715
Seattle, Washington 98101
(206) 568-2853
cccnelc@aol.com

[11] I Ka'aina, the ESA stay case on which Topsham relies, involved both a considerably different fact pattern from that of the instant case and a degree of federal government involvement considerably more advanced than is present here. In I Ka'aina, the United States was readying a criminal prosecution against the defendant for past takes of an endangered species, and the defendant in that case requested a stay of a related citizen suit action addressing alleged ongoing takes of the same species. The defendant requested a stay of the civil action to protect its Fifth Amendment rights against self-incrimination. After an analysis of the Ninth Circuit's "Keating factors" (designed to determine whether a criminal defendant's Fifth Amendment rights justify a stay of a civil action), the Hawaii court granted a four-month partial stay of discovery in the citizen suit, but allowed the plaintiff to take discovery in the interim on the issues relevant to an anticipated motion for preliminary injunction. 2010 U.S. Dist. LEXIS 101948, at *24-27 This is hardly comparable to, or probative of, the situation before the Court here.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2011, I electronically filed Plaintiffs' Opposition to Topsham's Motion to Dismiss and Incorporated Memorandum of Law with the Clerk of the Court using the CM/ECF system which will send notification of this filing to the Defendant's counsel:

Jeffrey A. Thaler, Esq.
Theodore A. Small, Esq.
Bernstein Shur
100 Middle Street; PO Box 9729
Portland, Maine 04104-5029

Dated at Portland, this 29th day of March, 2011.

/s/
Bruce M. Merrill, Esq.
225 Commercial Street Suite 501
Portland, Maine 04101