Natural Resources Law Institute * * Lewis and Clark Law School * * Portland, Oregon

Anadromous Fish Law Memo

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ANADROMOUS FISH AND FEDERALLY-LICENSED COLUMBIA RIVER DAMS

I. Introduction

There are 5 federally-licensed dams on the mainstem Columbia River, all owned and operated by Public Utility Districts in the State of Washington. These projects (i.e., Priest Rapids, Wanapum, Rock Island, Rocky Reach, and Wells) produced about 8-10% of the Northwest's hydroelectric power in 1975. However, because they flood nearly 150 river miles, their construction (4 of the 5 were completed within the last 20 years) destroyed a considerable amount of anadromous fish spawning habitat.

The dams' adverse impacts upon migrating salmon and steelhead are not, however, confined to construction-related impacts. Each season the projects, which represent hurdles over which both upstream and downstream migrants must pass, claim significant numbers of casualties. For example, during low water years, nearly all of the available water in the river is sent through power turbines. Downstream migrants follow the flow through the turbines and suffer extremely high mortality rates. The National Marine Fisheries Service estimates that in moderate runoff years cumulative mortalities range from 40% to 65% and in low flow years can amount to 95%.[1]

The manner in which these projects are operated is thus of major concern to those interested in the declining state of the Columbia Basin's anadromous fish runs. This Memo, a summary of a more detailed Working Paper which the NRLI prepared in connection with its research for the Oregon State University Sea Grant Program,[2] includes 1) an analysis of the Federal Power Act, including non-power considerations and federal-state interactions; 2) an examination of the water projects licensed by the Federal Energy Regulatory Commission (FERC) on the mid-Columbia, including license conditions governing the operation of the dams that can help to protect anadromous fish; and 3) recent developments which indicate that the FERC is willing to insist that its licensees operate their projects in a manner that minimizes harm to migrating fish.

[1] These cumulative figures include, of course, mortalities attributable to federally-operated dams. See Fish Law Memo #1.

[2] Copies of the detailed Working Paper are available from the Natural Resources Law Institute.

II. Analysis of the Federal Power Act (FPA)

A. Overview

The FERC derives the bulk of its authority from the Federal Power Act (FPA), which charges the Commission with licensing the construction of hydroelectric projects on navigable waters. The FERC may issue such licenses to private citizens, corporations, or to any state or municipality. If the Commission determines that a project should be undertaken by the federal government, however, the Act prohibits it from issuing a license.

The FPA establishes two principal criteria for the issuance of FERC licenses. The Commission must find: 1) that the project is "best adapted" to a comprehensive basin plan for improving or developing water power and other beneficial uses, including recreation; and 2) that it is in the public interest. The FPA instructs the Commission to evaluate the totality of a particular project--including both immediate and long-range effects--not merely the engineering and navigation aspects.

Licenses issued on federal reservations must be consistent with the purposes for which the land was reserved or acquired. If, for example, fishing rights are part of an Indian reservation, then the FERC must protect those rights by imposing conditions ordered by the Secretary of Interior or by denying the applicant's license.

Project proponents may initiate FERC procedures by applying for either a license or a preliminary permit. The latter is not a prerequisite for a license, but it does serve to provide the applicant with priority over competitors and permit the initiation of pre-construction studies. License applications must be accompanied by detailed environmental information, and the FERC staff will prepare an environmental impact statement (EIS) on major projects.

After the preparation of the EIS, evidentiary hearings are held to allow applications to be contested by other applicants or intervenors. In these hearings the FERC staff may be cross-examined regarding the contents of the EIS. After the hearing record is closed, the presiding Administrative Law Judge issues an initial decision on the application, which may be appealed to the FERC Commissioners and ultimately to the courts.

Participation in FERC licensing procedures is not limited to the applicant and the FERC staff. The Commission's regulations allow interested members of the public to become parties to the proceedings by filing a petition to intervene. Such petitions, which generally are liberally granted, are often precipitated by the staff's recommendations in the EIS.

Intervention in licensing proceedings is not the only way in which the interested public can influence FERC decision-making. The public (including federal, state, or local agencies) may initiate FERC proceedings by filing complaints alleging violations of statutes, regulations, or administrative orders and petitioning the Commission to take action. The licensee must respond to such complaints, and if the FERC is not satisfied with the response, it may conduct hearings and take any action it deems appropriate. As the discussion of recent developments below points out, state and federal fisheries agencies and Indian tribes in the Columbia Basin have recently invoked such procedures to secure protection for anadromous fish by changing project operations of federally-licensed dams on both the mid-Columbia and lower Snake Rivers.

B. Non-Power Considerations

Although the FPA contains few direct references to non-power considerations, judicial decisions have made it clear that the FERC has not only the authority but the duty to consider non-power purposes in making licensing decisions. For example, in Scenic Hudson Preservation Conference v. FPC the Second Circuit Court of Appeals held that, in determining whether particular project is consistent with a comprehensive plan, the FERC must compile an adequate record demonstrating that it has examined all aspects of the project, including immediate and long-term effects. Further, the Second Circuit ruled that the Commission must give full consideration to alternative sites and alternative power sources.

The U.S. Supreme Court extended this holding in Udall v. FPC by reversing a Commission decision to license a project on the Snake River because the Commission had not adequately considered alternatives to the project (including the alternative of not constructing the project at all). The Supreme Court instructed the Commission to reconsider the alternatives to the proposed project, specifically ruling that, in order to determine whether a project is in the public interest, the preservation of anadromous fish for commercial and recreational purposes is an issue that the Commission must consider.

The mandates of these court decisions are, of course, reinforced by the requirements imposed upon the FERC by the National Environmental Policy Act and the Fish and

Wildlife Coordination Act.[3] These statutes compel the Commission to evaluate the environmental effects of its licensing decisions, to consider alternatives to proposed actions, and to give "equal consideration" to the preservation of fish and wildlife resources.

C. Federal-State Conflicts

Despite provisions of the FPA which seem to require compliance with state law prior to issuing licenses, the courts have made it clear that states may not block construction of FERC-licensed projects, even if they do not conform to state law. However, states may be entitled to exercise some control over the operation of federally-licensed projects under the Supreme Court's 1978 U.S. v. California decision.

In the California case the Court ruled that states may impose conditions on the "control, appropriation, use, or distribution of water" impounded by federal water projects, so long as the condition is not inconsistent with clear congressional directives regarding the particular project. Although this decision concerned a Bureau of Reclamation project, it may have applicability to projects licensed by the FERC, due to the similarity in language between the FPA and the Reclamation Act which the Supreme Court interpreted. Thus, state laws that, for example, require the maintenance of minimum flows may be able to affect the operation of federally-licensed dams.

Such an increased state role in the operations of FERC licensees has been promised by the State of Washington, which recently proposed a "Columbia River Instream Resource Protection Program" that includes participation by the State in FERC proceedings in order to secure flow provisions for fish and wildlife. In addition to participating in FERC proceedings, the program calls for the provision of minimum daily and instantaneous flows at all Columbia River projects in the State; the inclusion of fish and wildlife protection as authorized purposes in federal projects; and the reservation of Columbia River flows specifically for fish and wildlife. This increased state interest has already precipated negotiations aimed at reaching an agreement with the FERC and the mid-Columbia PUD's to provide flows both for downstream fish migration and for fish spawning (See recent developments).

III. Licensing and Operation of the Mid-Columbia Dams

A. FERC Licenses

Rock Island Dam is the oldest major hydroelectric project on the Columbia River. The Commission licensed the dam in 1930, and, like the other mid-Columbia projects, it must be relicensed after 50 years. Relicensing proceedings for this project will thus begin in 1980. The other four mid-Columbia dams are of more recent vintage. The Priest Rapids project, which consists of two dams--Wanapum and Priest Rapids--was licensed in 1955. The Rocky Reach dam was licensed in 1956, and the northernmost of the dams, Wells, was licensed in 1962.

These four dams were built to follow (in general) the comprehensive plan set forth in the 1948 Corps of Engineers' Review Report on the Columbia River and Tributaries. That plan contemplated that the projects would serve power and flood control purposes primarily, but the importance of other purposes was not disregarded. The study identified the improvement of navigation, the further expansion of irrigation and recreational benefits as important considerations, as well as the importance of developing up-stream storage to allow the mid-Columbia projects to provide minimum stream flows for fish.

Fisheries protection was an explicit consideration in the construction of the mid-Columbia dams. Most obviously, the Commission required the installation of fish ladders to allow for upstream migration at each project.[4] Perhaps even more important are several open-ended conditions in the licenses which give the Commission ample authority to require modifications in the operation of the projects in order to protect anadromous fish.

B. License Conditions Relating to Anadromous Fish Protection

Several provisions in the project licenses may be invoked in the name of salmon and steelhead protection. For example, Article 39 of the Priest Rapids and Wanapum Dams, which is similar to provisions in the other licenses, specifically requires the licensees to modify project operations

[3]The Fish and Wildlife Coordination Act and its applicability to Columbia Basin water projects will be discussed in Anadromous Fish Law Memo #4.

[4]Section 18 of the FPA requires the FERC to order the licensee to construct "such fishways as may be prescribed by the Secretary of the Interior."

in the interest of fish life:[5]

> The licensee shall construct, operate, and maintain or shall arrange for the construction, operation and maintenance of such fish ladders, fish traps, fish hatcheries, or other fish facilities or fish protective devices for the purpose of conserving the fishery resources, and comply with such reasonable modifications in project structures and operations in the interest of fish life in connection with the project as may be prescribed hereafter by the Commission upon recommendations of the Secretary in the interest of fish life in connection with the project as may be prescribed hereafter by the Commission upon recommendations of the Secretary of Interior, the Washington State Departments of Fisheries and Game and the licensee."

Furthermore, each mid-Columbia license contains a standard provision allowing the FERC to regulate the volume and rate of water releases, from the projects "in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes." Coupled with the Supreme Court's ruling in Udall v. FPC that the emphasized language includes consideration of anadromous fish needs, these license provisions provide the FERC with a powerful mandate to ensure that the operations of its licensees are consistent with anadromous fish protection and enhancement.

C. Recent Developments

During the drought year of 1977, the Columbia River Fisheries Council and the Corps of Engineers, among others, requested the FERC to order the operators of the five mid-Columbia projects to cooperate with "Fish Flow '77". These project modifications involved spilling water over the dams and otherwise assisting the outmigration of juvenile salmon and steelhead. The licensees were reluctant to cooperate because of the power losses that would result. Nevertheless, the Commission ordered them to abide by the guidelines of the "Fish Flow" program, observing:

> [I]t is uncertain how much generation loss will directly result from the operation of the program, [but] it is clear, on the other hand, that the loss to the anadromous fisheries resource and related economy over a matter of years will be severe if the operation of the Fish Flow 1977 program is frustrated.

In 1978 the Commission was once again asked to order modification in the operations of the five dams. The Washington State Departments of Fisheries and Game, the Oregon Department of Fish and Wildlife, the National Marine Fisheries Service, and the Confederated Tribes and Bands of the Yakima Indian Nation urged that minimum flows and spills be maintained at the projects to protect juvenile salmon and steelhead during their 1979 out-migration. The Washington Department of Fisheries also made a separate request to increase the discharge of water from the Priest Rapids projects during certain months to improve spawning, incubation, and rearing of fall chinook.

The licensees contended that the FERC lacked authority to grant these requests. But the FERC responded that "[f]low releases are unquestionably an element of 'project operations', which it may reasonably modify in the interest of fish life." The Commission added:

> The issuance of a license does not relieve the Commission from ensuring throughtout the term of the license that fishery resources are protected and enhanced. During the term of the license, changes in circumstances or available information may well demand reappraisal of the ways in which the project as originally conceived may be kept best adapted to a comprehensive plan of development. This is precisely why we include open-ended conditions in the project license.... Both the courts and Congress have recognized the Commission's authority to impose open-ended license conditions, which reserve our right to impose changes in project works or operations... By accepting a license with open-ended conditions, a licensee agrees to make modifications the Commission might order under those conditions. If the licensee could later avoid the imposition of modifications ordered under an open-ended license condition simply by refusing to agree to them, the Commission's recognized reservation of rights would be vitiated.

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[5] Under Section 6 of the FPA, every license issued is "conditioned upon the acceptance by the licensee of all terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe."

As a result of these petitons, the FERC ordered a two-phased hearing. In March 1979 the parties negotiated an interim settlement agreement on the first phase that established flows for the 1979 downstream migration season. Hearings aimed at reaching a long-term resolution of the downsteam migrant problem are scheduled for January 1980. Negotiations on the second phase--concerning flows below Priest Rapids--have produced a draft settlement agreement that, if accepted by all the parties, will establish a 4-year study of the effects of various flow levels on fall chinook mortalities.

The focus of recent FERC developments has not, however, been confined exclusively to the mid-Columbia. State and federal fisheries agencies have petitioned the FERC to provide for greater fish protection in the operation of the Idaho Power Company's dams on the lower Snake. If the draft settlement agreement which has been negotiated (see Fish Law Briefs) is agreed to, considerable improvement may be expected in vitality of the lower Snake's fisheries.

D. Northwest Power Pool

Coordination of the operation of the entire network of Columbia and Snake River dams in the interest of protecting migratory fish, as illustrated by "Fish Flow '77", is made possible in part by the existence of the Morthwest Power Pool. Established during World War II, the Power Pool was designed to coordinate the federal and non-federal power systems and to facilitate the pooling and delivery of power to the Bonnevelle Power Administration for marketing.

The operating procedures of the Power Pool are set out in the Pacific Northwest Coordination Agreement. The Agreement provides a mechanism by which water use may be coordinated, but also emphasizes that nothing in the agreement shall require a project to be operated "in a manner inconsistent with its requirements for nonpower uses or functions". In other words, nothing in the Agreement prevents operation of federally-licensed projects in accordance with modifications initiated voluntarily by the licensee, or ordered by the FERC, in the interest of fish protection.

IV. CONCLUSION

Although spawning habitat destruction and increased migrant mortality is a necessary consequence of the extensive water project development that has occurred in the Columbia Basin, the operation of the dams can be, and has been, modified to provide for the protection and enhancement of the Basin's depleted anadromous fish resources.

Under the Federal Power Act, the FERC has both the authority and the obligation to consider non-power interests, including anadromous fish protection. Recent FERC decisions concerning the operations of the five mid-Columbia dams clearly demonstrate that the Commission is willing to assert its authority, at the request of interested parties, to modify project operations in order to help accommodate the needs of migratory fish. Continued recognition by both the FERC and its licensees of their obligations to protect fishery resources is essential if the Region's anadromous fish stocks are to be revitalized.

COLUMBIA RIVER CONFERENCE SCHEDULED

The law review of Lewis and Clark Law School, Environmental Law, and the Natural Resources Law Institute are pleased to announce that a conference on the Columbia River and Multiple Purpose Water Use will be held at the Law School on November 9-10, 1979. Speakers will deliver papers and panels will discuss a variety of issues now confronting decision-makers in the Columbia Basin, including energy, transportation, irrigation, and fish and wildlife concerns. Further information may be obtained from:

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NORTHWEST ENERGY BILL PASSES SENATE WITH WEAK FISH PROVISIONS

Although the Senate floor echoed with statements of the crucial importance of protecting the Region's anadromous fishery, the version of the Pacific Northwest Electric Power Planning and Conservation Act (S. 885) that passed the Senate on August 3, 1979 embodies only lukewarm fish protection provisions. Section 4(h) of the Senate bill requires only that "consideration" be given by a proposed regional electric power planning council (which would be composed of representatives appointed by the governors of the States of Oregon, Washington, Idaho, Montana and the Bonneville Power Administration) to recommendations of the Region's state and federal fisheries agencies and Indian tribes that would contribute to the preservation and enhancement of the Region's anadromous resources.

The language in the Senate bill, however well intentioned, appears to require less of federal water managers than does existing law--since the Fish and Wildlife Coordination Act already requires that "equal consideration" be given to fish and wildlife preservation as to other purposes in the planning, construction, and operation of federal water projects. Efforts are currently underway in the House of Representatives to strengthen the Senate-passed provisions.

Spearheading the House effort is Congressman Don Bonker of Washington who has proposed extensive amendments to S.885 (see 125 Cong. Rec. E3966, July 27, 1979). In addition, Congressman Weaver of Oregon has introduced his own bill (H.R. 4159, supported by the Oregon Environmental Council), which contains procedures to establish minimum flows that are absent from the bill that passed the Senate. Hearings on the Northwest Energy Bill have been scheduled by the House Energy and Power Subcommittee for late September in Washington, D.C.

Persons interested in submitting oral or written testimony should contact Congressman John Dingell, Chairman of the Energy and Power Subcommittee, U.S. House of Representatives, Washington, D.C. 20515.

A key individual on the Energy and Power Subcommittee may prove to be Congressmsn Allan Swift of Washington, the Region's only Representative on the Subcommittee. Interested persons may wish to contact Congressman Swift by writing him c/o U.S. House of Representatives, Washington, D.C. 20515.

TREATY RIGHTS HELD TO PROVIDE MINIMUM FLOWS FOR FISH

A recent federal court decision has interpreted the treaty rights of the Spokane Indians to include a reserved water right sufficient to preserve the Tribe's traditional fishing rights in Chamokane Creek. On July 23, 1979, in U.S. v. Anderson (Civ. No. 3643), Judge Neill of the Eastern District of Washington ruled that maintenance of the Creek for tribal fishing was one of the purposes for the creation of the Spokane Indian Reservation, thus entitling the Spokanes to a water right for fish preservation, with a priority date of 1877 (the date of the creation of their reservation).

Evidence produced at the trial indicated that the fish inhabiting the creek could not survive at water temperatures above 68°, which could not be maintained without a streamflow of at least 20 cfs. Accordingly, the court held that the tribe's reserved water right for fish entitled them to a streamflow of at least 20 cfs, or such greater flow as might be needed to attain a water temperature of 68° or less.

In addition, the court held that the Spokane Tribe had a reserved right to water sufficient to irrigate all of the practicably irrigable land within the Reservation. However, the Judge ruled that the priority dates for irrigation varied because not all of the irrigable land was continuously held by the Indians.

SUPREME COURT ASKED TO RECONSIDER BOLDT DECISION

Three weeks after the Supreme Court issued its decision in Washington v. Fishing Vessel Ass'n, which basically affirmed the 1974 decision of Judge Boldt in U.S. v. Washington (see Anadromous Fish Law Memo #2), the State of Washington filed a "Petition for Reconsideration" of the Supreme Court's decision.

The State submitted the petition in an attempt to establish that, under current circumstances, the Indians are entitled to only 20%--not 50%--of the total harvest of anadromous fish in the "case area", which encompasses most of Western Washington.

The States's petition was precipitated by footnote 16 of the Supreme Court's July 2 opinion, which appeared to adopt an estimate by the Solicitor General that 1/2 of the anadromous fish in the case area are exempt from the 50% allocation formula because they do not pass through recognized tribal fishing grounds. Based on this representation, the Court estimated that (absent interference by non-Indians) the Indian's treaty-share would have amounted to only 20% of the total number of fish taken within the case area in 1977.

Claiming that "every drop" of the marine waters of Washington are recognized tribal fishing areas, the State contends that an allocation of 50% could easily lead to an Indian harvest of more than 20% in the case area. Consequently, the State asked the Supreme Court to amend footnote 16 in a manner that would disclaim any intent to require a 50% allocation over the entire case area, under the circumstances now existing.

The Court requested the Solicitor General to respond to the State's petition but no further action had been taken by the Court as this issue went to press. As this latest dispute attests, attempts to implement the Supreme Court's decision are likely to lead to protracted and costly litigation.

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NINTH CIRCUIT STAYS SCHWARZER'S ORDER, BUT KREPS REFUSES TO REOPEN OCEAN FISHERY

Despite an August 30 decision of a divided panel of the Ninth Circuit Court of Appeals granting a stay of District Judge William Schwarzer's July 23 decision ordering Secretary of Commerce Juanita Kreps to adopt emergency regulations shortening the commercial ocean troll fishing season (see Ocean Law Memo # 14), the Secretary refused to reopen the ocean troll season. Secretary Kreps decided not to revoke the emergency regulations, which advanced the closure of the commercial salmon season north of Cape Falcon, Oregon from September 8 to September 1 (and prohibited fishing during a 10-day period earlier in the season), even though the Pacific Fishery Management Council voted 8-5 to rescind the court-ordered regulations.

The Ninth Circuit stayed the District Judge's order (after denying a petition to vacate the order one week earlier) with the assistance of a strong hint from Supreme court Justice William Rehnquist that Schwarzer's ruling contravened the Fishery Conservation and Management Act's prohibition against granting interim relief. Secretary Kreps did not agree, however, with the assessment of the Pacific Council's assertion that a September 8 closure would be sufficient to meet U.S. treaty obligations, noting that recent assessments of salmon populations underscored the necessity for an earlier closure. Although the net effect of these legal maneuvers is to affirm Judge Schwarzer's early closure of the ocean troll season, there now exist significant questions as to the capability of federal judges to overrule regulations promulgated under the Fisheries Act--questions that need resolution before the beginning of the 1980 fishing season.

FERC SETTLEMENT ON THE LOWER SNAKE RIVER

FERC actions designed to minimize adverse impacts on the Columbia Basin's anadromous resources have not been confined to operations of the mid-Columbia PUD's. In response to an FERC petition (Docket No. E-9579) filed by the National Marine Fisheries Service, the Idaho Fish and Game Department, the Oregon Department of Fish and Wildlife and the Washington Departments of Fisheries and Game, the Idaho Power Company has recently negotiated a draft settlement agreement that is designed to minimize adverse fish impacts resulting from the construction and operation of three dams (Hells Canyon, Oxbow, and Brownlee) on the lower Snake. The draft agreement stipulates that Idaho Power will provide, operate, and maintain fish traps, fish handling and transporting facilities and fish hatcheries necessary to provide an annual production of one million fall chinook smolts, four million spring chinook smolts, and 400,000 pounds of steelhead smolts. Further, it establishes a schedule of minimum flow requirements to facilitate fish passage.

A settlement conference on the proposed agreement was held in Portland on August 17 which indicated no major obstacles to the adoption of its terms (although some minor language changes are likely). The parties are expected to sign the settlement by the end of September, which will have the effect of formally transmitting the settlement agreement to the FERC for its adoption.

In a unusual procedure, the FERC has scheduled an evidentiary hearing for November 13 (in Portland) to take testimony in support of the agreement. Normally formal hearings are not held on uncontested settlement agreements, but the FERC wishes to develop a self-contained record on the state of the anadromous fishery in the lower Snake and steps necessary to improve it.

NEW OREGON LAW REQUIRES MITIGATION OF ESTUARINE DEVELOPMENTS

One of the most notable laws enacted by the 1979 Oregon Legislature was HB 2619, requiring mitigation of dredge and fill impacts on Oregon estuaries. These amendments to the State's Fill and Removal Law constitute the legislature's response to the Oregon Supreme Court's recent interpretation of the old Fill and Removal Law. (See Fish Law Memo #11). They also represent some of the most innovative thinking by a state concerning the difficult question of how to minimize or compensate for habitat losses due to estaurine developments.

The amendments define mitigation as "the restoration or enhancement of an estuarine area in order to maintain the functional characteristics and processes of the estuary." Under the new law, the Director of the Division of State Lands must require mitigation as a condition of any permit for filling or removal of material from an intertidal or tidal marsh area of an estuary unless he finds that 1) there is no alternative way to accomplish the project; 2) there is no feasible manner in which mitigation could be accomplished; 3) the economic and public need and benefits of the project clearly outweigh the potential degradation of the estuary; 4) the project is for a public use; and 5) the project is water-dependent or the project is publicly-owned and water-related.

Even if the Director determines that all the above conditions are satisfied, he may waive mitigation only in part. Mitigation may be waived in whole only in connection with certain specified activities that would cause negligible physical or biological damage to the estuary or would have negligible adverse impact on estuarine resources. The law does not specify, however, whether mitigation must be undertaken prior to, concurrent with, or after the proposed dredge or fill activity.

Comments, criticisms, or suggestions for future research or coverage by the Anadromous Fish Law Memo are welcomed. In addition, those wishing to be placed on the mailing list should contact:

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REPORT ON NEGOTIATING STREAM FLOWS ISSUED

In August the United States Fish and Wildlife Service released a draft report, "Elements in Negotiating Stream Flows Below Federal Projects," prepared by the Cooperative Instream Flow Service Group. This report covers the general elements in developing an acceptable instream flow recommendation and general considerations involved in negotiations and cooperation among the state and federal agencies and interested groups involved in water project proposals. Copies of the draft report are available from: Cooperative Instream Flow Service, Office of Biological Services, 2625 Redwing Road, Fort Collins, Colorado 80526.

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