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

Anadromous Fish Law Memo

NRLI

Issue 4 October 1979

THE PACIFIC NORTHWEST POWER BILL AND ANADROMOUS FISH PROTECTION

In no other region of the country is the supply of electric energy so dependent upon water resource management than in the Pacific Northwest. In the past this dependence has produced both the cheapest residential electric energy rates in the nation and a strong stimulus for economic growth. Those concerned with the plight of the Columbia Basin's once-abundant anadromous fish resources, however, would add that the Region's heavy reliance on hydro-electric power has also taken its toll in the form of high salmon and steelhead mortalities.

It should come as no surprise, therefore, that the potential ramifications of the pending Northwest Power Bill are currently the subject of considerable debate throughout the Region and in the halls of Congress. While the focus of most of the attention has concerned the proposed legislation's impacts upon consumer electric bills and its implications for future nuclear power development, its potential effect on the vitality of the Columbia Basin's dwindling salmon and steelhead runs should not be overlooked. This Fish Law Memo explores how a number of alternative versions of the bill could influence efforts to protect anadromous stocks from the adverse effects of the operation of hydro-electric dams.

I. Overview

Having passed the Senate and now under consideration by two Committees of the House of Representatives, the "Pacific Northwest Electric Power Planning and Conservation Act" (S. 885) may revolutionize electric energy decision-making in the Columbia Basin. The principal impetus for this Congressional action is the fact that the Bonneville Power Administration (BPA), which markets cheap hydropower from the Basin's federal dams, can no longer keep up with the Region's increasing residential and industrial demands. In short, the pending legislation is a manifestation of the fact that the days of a limitless supply of hydropower in the Pacific Northwest are over.[1]

A. Background

Because the 1933 Bonneville Power Act gives public utilities priority of access to BPA's low-cost hydropower, the costs associated with federal hydropower shortfalls have been borne largely by private investor-owned utilities and their customers -- who have been forced to turn

[1] See, e.g., U.S. Comptroller General, Region At The Crossroads -- The Pacific Northwest Searches for New Sources of Electric Energy (EMD-78-76, August 10, 1978)

Distributed by: OSU Extension Service' Sea Grant Marine Advisory Program, Corvallis, OR 97331

increasingly to high-cost nuclear-generated power (up to 10 times as expensive) to meet their electric demands. The existence of this "preference clause" has made the inequities of the present system of power allocation dramatically apparent: most residential consumers in Oregon, Idaho, and Western Montana are served by private utilities (and therefore pay higher electric rates), while those in Washington are serviced by public utilities (and consequently pay lower rates). With residential electric rates dependent upon the fortuity of state boundaries, the ingredients of a regional energy war are present.

Thus, one of the motivating forces behind the proposed regional energy bill is the extension of the "preference clause" to residential customers of private utilities in order to resolve the rate disparity problem.[2] Another is to eliminate the existing directive requiring BPA to devise a plan fully allocating its limited supply of federal power to preference customers by 1983 -- an action that is certain to precipitate a multitude of lawsuits. Consequently, there is a good deal of interest, particularly on the part of BPA and investor-owned utilities, in Congressional efforts to revise the means of allocating the Region's electric energy supplies.

B. Current Status

Senator Henry Jackson, the chief architect of the regional energy legislation, introduced S. 885 in the Senate on April 5, 1979.[3] Co-sponsored by the entire Senate delegation from Oregon, Washington, and Idaho, and also supported by the governors of those states, the bill passed the Senate on August 3 and is now under consideration by two House Subcommittees -- Water and Power Resources (of the House Interior Committee, chaired by Congressman Abraham Kazen) and Energy and Power (of the House Commerce Committee, chaired by Congressman John Dingell).

In addition to the Jackson bill, the two House Subcommittees are considering amendments offered by Congressman Don Bonker of Washington, a substitute bill offered by Oregon Congressman Jim Weaver, and other potential changes to the Senate-passed bill. Moreover, the General Accounting Office recently completed a study recommending that amendments be made to the Jackson bill in order to provide greater protection for anadromous fish. Each of those versions would have different implications for salmon and steelhead and those who depend upon them. The succeeding sections of this Memo analyze the potential implications of these divergent approaches.

II. Fish Protection Measures in the Jackson Bill

S. 885 contained no mention of anadromous fish when it was introduced. However, as a result of an eleventh hour amendment offered by Idaho Senator Frank Church, the following language was added as section 4(h) to the bill that eventually passed the Senate:

> The Council shall request from the region's State and Federal fisheries agencies and the appropriate Indian tribes their recommendations of measures which would contribute to the preservation and enhancement of the fish resources of the Columbia River and its tributaries for inclusion in the plan and their recommendations for the funding of research and development efforts which have the potential of providing improved passage for anadromous fish migrants at and between the region's hydroelectric dams. The Council shall consider such recommendations in the preparation of the plan or amendments to the plan. Upon the adoption of the plan or amendments to the plan by the Council, the Administrator shall (1) include in his annual budget funds for fisheries research and development to be paid from the Bonneville Power Administration fund, or from appropriations, and (2) acquire and dispose of power and utilize the flexibility of the resources available to him in a manner which will assist in the preservation and enhancement of the anadromous fisheries resource while meeting his other obligations. [emphasis added]

The most immediately noticeable aspect of this provision is the total discretion accorded the regional energy council (composed of representatives from Oregon, Washington, Idaho and Montana and the Bonneville Power Administrator) in accepting or rejecting fisheries recommendations. The only requirement is that the council "consider" such recommendations. Moreover, even where fisheries recommendations are

---

[2]Extending cheap hydropower to private utilities would come at the expense of industrial customers, who apparently are willing to assume higher electric costs in return for guaranteed long-term supplies.

[3]S. 885, as it was introduced, was identical to a bill that Senator Jackson sponsored last year during the 95th Congress (S. 3418).

adopted by the council, the language appears to give the BPA Administrator a considerable amount of discretion in implementing the recommendations. For example, the vague directive that he "acquire and dispose of power and utilize the flexibility of the resources available to him" to assist in fish protection "while meeting his other obligations" could easily be interpreted as requiring something less than complete adherence to the recommendations adopted by the council.

Most importantly, there is no indication that either fisheries agencies or the public may administratively or judicially appeal adverse decisions of either the council or the Administrator. Section 9 of S. 885, which enumerates those determinations that are subject to judicial review, does not list the above-quoted provision. Consequently, the lack of clear standards to guide administrative discretion, together with uncertainties as to the scope and availability of appeals, makes it difficult to perceive how section 4(h) of the Jackson bill alters the status quo at all. In short, protection of anadromous stocks would occur, if at all, only at the discretion of the Basin's water managers.[4]

III. The Bonker Amendments

On July 27, Congressman Bonker proposed an amendment to the Jackson bill that would, in the Congressman's words, produce "an energy plan that is responsive to fish needs." The Bonker language[5] is nearly identical to that in the Jackson bill, but with a crucial difference. Where the Jackson bill merely authorizes the regional energy council to "consider" recommendations of federal and state fishery agencies and Indian tribes, the Bonker language directs the council to "implement" those recommendations.

Thus, the most significant difference in the Bonker approach is that it gives the discretion to adopt fish protection measures to fisheries agencies, not the energy council or BPA. In addition, the Bonker amendment contains a laundry list of activities that BPA should undertake upon the recommendation of the fisheries agencies, such as: 1) coordinating the operation of dams to minimize impacts, including flows necessary for both upstream and downstream migrants; 2) modifying existing structures to install protective devices such as screens and bypass systems; 3) continuing fish transportation efforts; 4) conducting research; 5) constructing fish hatcheries to compensate for fish losses; and 6) improving natural spawning areas.

IV. The Weaver Bill

Instead of attempting to amend the Jackson bill, Congressman Weaver drafted his own bill. On May 21, he introduced H.R. 4159 which, in section 8, directs the BPA Administrator to maintain minimum flows, add structural modifications, and undertake mitigation and enhancement measures necessary to restore fisheries damaged by the Columbia's system of dams.[6] Moreover, the Weaver bill attempts to establish a formula to allocate power losses that might result from fish protection measures.[7]

The Weaver bill also contains two important provisions not included in either the Jackson bill or the Bonker amendments. First, the BPA Administrator would be required to condition new power supply contracts on maintaining minimum fish flows. Second, the bill would direct the Federal Energy Regulatory Commission, when issuing or renewing licenses to non-federal dam operators

---

[4]In fact, it could be argued that §4(h) presents more hurdles for fish protection measures than does the current system, since any recommendations would require approval of both the federal-state council and the BPA Administrator. Furthermore, if the adoption of the recommendations would amount to an amendment of the Region's energy plan, the Administrator would have veto authority under §4(b) of the bill.

[5]The language is reprinted at 125 Congressional Record E3966 (July 27, 1979).

[6]As this issue went to press, Congressman Weaver was considering making changes to the bill he introduced on May 21.

[7]Section 8(c) of the Weaver bill would first cut the amount of power exported out of the Region in order to provide for flows necessary for fish protection. If cuts in power exports were insufficient for fish needs, the bill would direct BPA to reduce power sales within the Region on an "equitable basis," providing compensation (at replacement costs) to those with long-term contracts.

in the Region,[8] to similarly condition its authorizations on the maintenance of minimum flows and the undertaking of necessary structural modifications.

V. The GAO Recommendations

At the request of Congressman Dingell, Chairman of the House Energy and Power Subcommittee, the General Accounting Office (GAO) on September 4 issued an analysis of the pending regional energy legislation, which included specific recommendations regarding anadromous fish protection.[9] Noting that BPA has proved to be only "somewhat sympathetic" to fishery needs and referring to the present approach to anadromous fish protection as a "patchwork solution to a continuing problem," the GAO concluded:

> [S]ome fish runs have declined to the point of near extinction, and others are threatened by increasing electric power developments and irrigation withdrawals. For some upriver fish runs, time is a critical factor. This bill can be an effective vehicle for restoring the anadromous fisheries. We believe it should be amended to restore the salmon and steelhead fisheries....[10]

GAO recommended that the proposed bill be amended to (1) direct the U.S. Army Corps of Engineers and the Federal Energy Regulatory Commission to ensure that both federal and federally-licensed main-stem dams are retrofitted with equipment necessary to minimize fish mortalities; (2) establish a Regional Anadromous Fisheries Council (composed of federal, state, and Indian members) to consolidate fisheries planning, policymaking and coordination functions; (3) require the Anadromous Fisheries Council, the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission to reach agreement within 12 months on minimum stream flows; (4) give the Anadromous Fisheries Council sufficient funding and authority to annually direct reservoir releases to minimize fish impacts; and (5) direct the Secretary of the Interior to report to Congress within 6 months on the steps necessary to consolidate and make more effective the efforts of the numerous federal agencies with fish and water responsibilities in the Columbia Basin.

VI. Conclusion

The findings of the GAO report serve to highlight the inadequacies of the Jackson bill's fish provisions. If BPA has proved merely "somewhat sympathetic" to fishery needs, there is little reason to anticipate that the Region's steadily diminishing anadromous fish stocks will markedly improve by entrusting their fate entirely to its discretion. The Bonker amendments would avoid this anomaly by shifting the discretion to a consortium of federal and state fisheries agencies and Indian tribes, which the GAO report would formalize into an "Anadromous Fisheries Council."

Bonker, Weaver, and GAO all recognize the importance of pursuing a coordinated strategy for restoring the fisheries, including both the maintenance of flows and the installation of protective structural devices. They differ, however, in the specific procedures they would employ to implement such a strategy. For example, unlike the Bonker amendments and the GAO Report, the Weaver bill would not rely on the Region's fisheries agencies to devise fish protection measures, but attempts to supply BPA (and the FERC) with legislative directives to accommodate anadromous fish needs, including conditioning power supply contracts upon the maintenance of minimum flows. On the other hand, the GAO recommendations would establish perhaps the most comprehensive procedural framework, involving not only federal, state, and Indian fisheries entities, but also the FERC, the Corps of Engineers, the Bureau of Reclamation, and the Secretary of the Interior.

It is apparent that any of the three principal alternatives to S. 885 under consideration in the House would buttress the weak Senate-passed language. The goal of effective anadromous fish protection would perhaps be best served if Congress could agree to language that incorporates the strengths of each of the alternatives. Such an approach should, at a minimum, include provisions designed to:

1. Reaffirm[11] that the Region's water managers (including BPA, the Corps, the Bureau of Reclamation, and the FERC) have both the authority and the obligation to give fish and wildlife protection and enhancement "equal consideration" with other water project purposes when (a) formulating or modifying reservoir release plans; (b) modifying project structures; (c) establishing and maintaining minimum streamflows; and (d) engaging in general operation of projects.

---

[8] See Anadromous Fish Law Memo #3, for a discussion of FERC-licensed dams on the Mid-Columbia.

[9] U.S. Comptroller General, Impacts and Implications of the Pacific Northwest Power Bill (EMD-79-105, Sept. 4, 1979).

[10] Id., at 23-24 [emphasis added].

[11] For a review of the existing authorities of the Basin's federal water managers, see Anadromous Fish Law Memo #1.

2. Specify that this "equal consideration" requirement must be fulfilled by either (a) adopting the recommendations of an Anadromous Fisheries Council, or similar body; or (b) demonstrating in writing why the implementation of such recommendations would impose unreasonable burdens on other water uses, and why an alternative would be both consistent with the equal consideration requirement and with the goal of restoring and enhancing the Basin's fishery resources;

3. Help to ensure against arbitrary decisions by providing that any action taken under #2 be subject to judicial review under the standards provided by the Administrative Procedure Act;

4. Advance the state of the art by providing sufficient funding to conduct research designed to provide enchanced fish protection capabilities;

5. Encourage effective public participation by (a) providing for public representation on the Fisheries Council; (b) making publicly available summaries of all Council meetings; and (c) requiring reimbursement of attorney and expert witness fees incurred by public interest groups that substantially prevail in litigation authorized under #3.

6. Ensure that fish protection measures are responsive to changing conditions by requiring the Anadromous Fisheries Council (or similar body) to annually report on the overall management of the Columbia River system and its impact upon the state of the Region's anadromous fishery, including (a) the effects of water supply changes; (b) the effects of hydropower marketing activities; and (c) any measures taken the previous year and those anticipated in the following year that demonstrate that the "equal consideration" mandate is being fulfilled.

The House Subcommittee on Energy and Power has scheduled a hearing on the Northwest Power Bill for October 19 in Washington, D.C. Mark-up sessions by both the Subcommittee on Energy and Power and the Subcommittee on Water and Power Resources are expected shortly thereafter.

Members of the public interested in commenting in writing on the proposed legislation should write to:

Congressman Abraham Kazen, Jr.
Chairman
Subcommittee on Water and Power Resources
U.S. House of Representatives
Washington, D.C. 20515

Congressman John Dingell, Chairman
Subcommittee on Energy and Power
U.S. House of Representatives
Washington, D.C. 20515

Washington residents in particular may wish to write to Congressman Al Swift, the Region's only representative on the Dingell committee:

Congressman Al Swift
1511 Longworth House Office Bldg.
U.S. House of Representatives
Washington, D.C. 20515

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 such topics as energy, transportation, irrigation, and fish and wildlife concerns. For further information, contact: Bowen Blair, Environmental Law, Lewis and Clark Law School, 10015 SW Terwilliger Blvd., Portland, OR 97219

FISH LAW BRIEFS

UNEXPECTED DROP IN SIZE OF CHINOOK RUN PROMPTS UP-RIVER CLOSURE

The Columbia River Fish Compact (composed of the fisheries agencies of the states of Oregon and Washington) decided on September 20 to close all fishing above the Bonneville Dam on the Columbia River. The Compact took the action in response to data which indicated that only 140,000 fall chinook would escape past Bonneville this year.

The action abruptly ended the up-river Indian treaty fishery, and the Compact received considerable criticism at its meeting from Indians who felt that the fisheries agencies had managed the fisheries in a manner that deprived them of their share of fish. Earlier this summer,

when the Secretary of Commerce was defending her ocean salmon regulations in response to an Indian court challenge, the Secretary asserted that 238,000 fall chinook would escape past Bonneville. The Compact originally set the treaty and non-treaty fishing seasons based on an estimate that 212,000 fall chinook would escape past Bonneville. Similar run size overestimates in 1977 and 1978 resulted in a deficit in the treaty share of 20,000 fish.

Officials of the U.S. Fish and Wildlife Service recommended at the Compact meeting that, because of the extremely low run size estimate, all fishing on the Columbia River should cease. A member of the Compact responded that the Fish and Wildlife Service was merely interpreting the data differently than the Compact staff (which recommended continued fishing on the lower river) and asserted that the Service was appearing before the Compact in an "adversary relationship." The Compact decided to permit continued fishing in the lower Columbia River, and rejected a request by a biologist with the Columbia River Intertribal Fish Commission that only terminal area (i.e., areas other than the main-stem Columbia) fisheries be permitted on runs originating below Bonneville, so that the depressed fall chinook run would not be further reduced.

Closure of the treaty fishery mooted an attempt by Idaho to prevent gill-net fishing in the Columbia until at least 30,000 steelhead escaped into the Snake River. Idaho had filed a motion on September 14 in federal court to restrain Oregon and Washington from permitting such fishing, and a hearing had been scheduled on the matter for September 25.

INDIAN TREATY RIGHTS HELD TO REQUIRE MINIMUM STREAMFLOW

The treaty that created the Klamath Indian Reservation in order to preserve Indian hunting and fishing rights and to encourage agriculture gave the Klamath Indians an implied right to as much water on the Reservation as needed to protect their hunting and fishing rights, according to a recent Oregon federal court decision. In U.S. v. Adair (Civ. No. 75914), Senior U.S. District Judge Gus Solomon ruled on September 27 that "[i]f the preservation of these [hunting and fishing] rights requires that the [Klamath] Marsh be maintained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results." The court noted that the treaty, signed in 1864, reserved hunting and fishing rights that the Indians had enjoyed for over 1000 years. Thus, the court held that the treaty established a priority date of "time immemorial" for the use of water needed to preserve those rights. The ruling comes on the heels of the U.S. v. Anderson decision (See Fish Law Memo #3), where the Federal court for the Eastern District of Washington held that the Spokane Indian tribe was entitled to a minimum flow in the Chamokane Creek for tribal fishing purposes.

The Government (including the U.S. Fish and Wildlife Service and the Forest Service) filed the Adair suit to determine the rights of the various parties with water interests in the Williamson River System. The Fish and Wildlife Service and the Forest Service wished to secure enough water to preserve a National Wildlife Refuge located in the Klamath Marsh and to maintain and preserve the Winema National Forest. The opinion noted that "[m]uch less water reaches the Marsh than it did 75 years ago," and added that the "number of migratory birds which use the Marsh has declined." After declaring the Klamath Tribe's water rights, the court found it unnecessary to decide whether the Government had any water rights to maintain the lands in question, because "[t]he Indians' use of their rights to that streamflow will ensure that enough water flows through the Refuge and through the Winema National Forest within the former Reservation to fulfill the Government's purposes for those lands."

WASHINGTON AGAIN FAILS TO PERSUADE SUPREME COURT

The U.S. Supreme Court denied on October 2 the State of Washington's petition to modify the Court's recent decision that basically upheld Judge Boldt's controversial ruling in U.S. v. Washington. Washington had, in essence, asked the Supreme Court to disclaim any intent to require more than a 20% allocation to treaty Indians, under current circumstances,

of the harvestable numbers of anadromous fish destined for or passing through traditional fishing grounds of the tribes. The Supreme Court rejected this request, but did strike from a footnote to the opinion a reference to an erroneous estimate by the Solicitor General that only about half of the runs of anadromous fish in the case area were subject to the 50-50 allocation formula. (It was this footnote that precipitated the state's petition -- see Fish Law Memo #3.)

TRIBES SEEK INJUNCTION AGINST WASHINGTON

On September 28, the Tulalip Indian Tribes of Washington filed a motion in federal court to prevent the State of Washington from prohibiting treaty fishing on coho in certain areas of eastern Puget Sound. The court action was prompted in part by the arrest of about 12 tribal fishermen by agents of the Washington Department of Fisheries (WDF) for fishing while a WDF emergency fishing closure was in effect.

The tribes have asked the court to prevent further state enforcement of the fishing closure (they also asked the court to declare the citations issued to tribal fishermen invalid), contending that (1) the state allocated most of the coho passing through the closed areas to non-treaty fishermen by permitting sport fishing on the runs sought to be protected by the treaty fishing closures, thereby unlawfully discriminating against the Indians; (2) the state had not exhausted other means of protecting the weak runs prior to closing the treaty fishery, as required by U.S. v. Washington; and (3) the state chose to promote non-treaty fishing at the expense of treaty fishermen, which is prohibited by U.S. v. Washington.

The state had not had time to respond to these allegations as this issue went to press.

The Anadromous Fish Law Memo is an aperiodic publication of the Lewis and Clark Law School's Natural Resources Law Institute and is distributed by the OSU Extension Service's Sea Grant Marine Advisory Program. The Memo is supported in part by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, through the Sea Grant College Program, Oregon State University.

INDIANS DENIED INJUNCTIVE RELIEF

Two members of the Wahkiakum Band of Chinook Indians claiming treaty fishing rights on the lower Columbia River failed on October 4 to obtain a preliminary injunction in federal court against Oregon and Washington. The injunction would have prevented the states from regulating the fishing activity of the individuals in the same manner as it regulates non-Indian fishing. In denying the Indian's motion, U.S. District Judge Walter Craig of Arizona (who has been assigned to handle all matters arising under the continuing jurisdiction of U.S. v. Oregon and Phase 1 of U.S. v. Washington) said he could find no basis to support their claim that they were entitled to fishing rights under a treaty securing such rights to the Quinalt and Quileute Tribes of Washington.

Judge Craig had earlier issued a temporary restraining order against Oregon and Washington which permitted the two individuals to fish free of state interference during the same periods that upriver treaty tribes were permitted to fish, and refused to modify the order when the upriver tribes had to prematurely end their fisheries for conservation reasons. A full trial on the merits of the case have been tentatively scheduled to begin on January 14 in Portland.

COMMISSION WITHHOLDS HATCHERY PERMIT

In response to a petition filed by the Oregon Environmental Council and by two commercial fishing groups, the Oregon Fish and Wildlife Commission has delayed the issuance of a private salmon hatchery permit to Crown Zellerbach Corporation. The permit will be withheld until the Oregon Court of Appeals decides whether the Commission's decision to grant the permit should be vacated.

The groups challenging the permit are concerned that the hatchery releases proposed by Crown could adversely impact the biological resources of Tillamook Bay. The Commission issued the permit in June even though it found that insufficient evidence existed to determine whether additional releases of smolts into Tillamook Bay would negatively impact the biological resources of the estuary (see Fish Law Memo #2).

Michael Blumm

Brad Johnson

Valerie McCourt