



# Anadromous Fish Law Memo



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FISH AND WILDLIFE PRESERVATION, ENVIRONMENTAL PROTECTION, AND THE  
NORTHWEST'S ELECTRIC POWER SYSTEM: A PANEL OF VIEWS

COLUMBIA RIVER INTER-  
TRIBAL FISH COMMISSION  
PORTLAND, OREGON

This issue of the Memo contains edited versions of speeches given at the 5th Annual Public Interest Law Conference held in Eugene, Oregon in March 1987. Because several of the speakers have been intimately involved with issues of considerable importance to the struggle to preserve and restore the Northwest's anadromous fish runs, we felt it appropriate to reprint their contributions here.

John Volkman's discussion of the Northwest Power Act and Indian treaty fishing rights highlights the critical role that the region's Indian tribes have played in the development and implementation of the Columbia Basin Fish and Wildlife Program. He notes the revolutionary change in attitude among former adversaries, the tribes and state fish and wildlife agencies, which now act more cooperatively and less hostilely than anyone could have imagined in 1980 when Congress approved the Act. Mr. Volkman also surveys a number of issues that the Northwest Power Planning Council will tackle in the years ahead. The editor then explains some of the institutional innovations occasioned by the Act and also portrays some of the Act's unfulfilled promises.

Terrence Thatcher's talk begins with an overview of the high stakes involved in the pending proposals to expand the Pacific Intertie lines that electrically connect the Northwest with California. He suggests that the region ought to employ these proposals as a vehicle to

overcome centrifugal forces that are threatening to undermine the Northwest Power Act's policies and programs. Mr. Thatcher also discusses the Federal Energy Regulatory Commission's (FERC) persistent failure to protect anadromous fish in its hydroelectric licensing decisions.

Both Bill Kloos and Robert Lothrop also examine FERC activities. Mr. Kloos updates the status of the Winchester Dam on Oregon's North Umpqua River, a controversy analyzed in detail in Issue 35 of the Memo. He portrays FERC as an agency unwilling or unable to learn from its mistakes. Mr. Lothrop examines what may be a precedent-setting draft settlement agreement concerning fishery measures at the Rock Island Dam, located on the mid-Columbia in central Washington. Of particular interest are the provisions of the agreement setting a timetable for installation of mechanical juvenile fish bypass systems at the unscreened dam, and establishing novel dispute resolution procedures and a "conservation account" that may be triggered by the fishery agencies and tribes under specified circumstances.

Special thanks for making this issue possible are owed to Lenair Mulford, who performed more than her usual wizardry at the Word Processor. Marlyn Twitchell, Lewis and Clark Law School Class of 1988, supplied superb editorial assistance and somehow managed to footnote each of the speeches.

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Inside: Question and Answer Session (p. 24) and Salmon Law Symposia (p. 27).



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**Moderator:** We have a distinguished panel of speakers today to discuss Northwest electric power issues and their environmental consequences. John Volkman is Associate Counsel for the Northwest Power Planning Council, charged by Congress with the responsibility of producing an environmentally sensitive electric power plan for the Northwest and a fish and wildlife restoration program for the Columbia Basin. Michael Blumm is a Professor of Law at Lewis and Clark Law School, where he edits the Anadromous Fish Law Memo. Terrence Thatcher, Counsel for the National Wildlife Federation's Pacific Northwest office in Portland, has been involved in several cases that will have major effects on prospects for fish and wildlife protection, including National Wildlife Federation v. FERC.<sup>1</sup> Bill Kloos has brought a number of FERC appeals and won The Steamboaters case.<sup>2</sup> Rob Lothrop, with the Columbia River Inter-Tribal Fish Commission, also has been active in FERC adjudications and recently participated in the settlement negotiations concerning the Rock Island Dam. Two invited panel members were unfortunately unable to attend, so you'll have to be content with reading the writings of Lorraine Bodi<sup>3</sup> and Dale Goble.<sup>4</sup>

### **The Columbia River Fisheries Thirteen Years After the Boldt Decision**

by

**John Volkman, Associate Counsel,  
Northwest Power Planning Council**

At the Northwest Power Planning Council, we spend a great deal of time considering the interplay of fish and power in the Columbia River Basin and by and large we find ourselves concen-

1. National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986) (ordering FERC to study the cumulative impacts of 7 proposed projects in the Salmon River Basin).

2. The Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985) (determining that FERC violated NEPA in issuing an exemption for the Winchester Dam hydroelectric project).

3. See Bodi, FERC's Mid-Columbia Proceeding: Ten Years and Still Counting, 16 Envtl. 555 (1986); Bodi & Erdheim, Swimming Upstream: FERC's Failure to Protect Anadromous Fish, 13 Ecology L.Q. 7 (1986).

4. See Goble, Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context, 22 Idaho L. Rev. 417 (1986); Goble, The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council, 1 J. of Env'tl. L. & Lit. 10 (1986).

\* The views expressed are the author's, not the Northwest Power Planning Council's.

trating on technical issues--biological questions, economic questions, complex operational questions that inevitably arise in planning for complex systems and resources.<sup>1</sup> While these technical issues are important, it is also important to think of our work in broader context, to ask, for instance, how the Northwest Power Act grew out of, and in turn has changed the political and institutional setting for fish and wildlife management in the region. That issue, in turn, is directly related to the way in which the region's energy system satisfies its obligations to Indian treaty fishing rights, an issue pervading fishery management in the Northwest.

Today, I want to step back from the details of the Northwest Power Act<sup>2</sup> and the Council's Fish and Wildlife Program.<sup>3</sup> I propose, instead, to look at the Act and the Program as a chapter in the region's history, a history we are still in the process of writing. Then I'll discuss those chapters of the history we expect to make in the next year or two.

### **I. The Treaties**

Much of this country (and most of this region) is owned by non-Indians because of a series of 19th century treaties with Indian tribes. The tribes' right to fish is central to the Columbia River treaties, but we haven't yet determined what the treaty promise means.<sup>4</sup> Just 15 years ago, the disputes over Indian fishing rights on Puget Sound and the Columbia River were the closest the Northwest has ever come to the civil rights battles of the South.<sup>5</sup> In the early 1970s, the states and tribes were locked in a bitter feud over rights to harvest salmon and steelhead.<sup>6</sup> In 1974, Judge Boldt's seminal decision established the principle that Indians and non-Indians should share the fish equally.<sup>7</sup> This principle, subsequently affirmed by the Supreme Court,<sup>8</sup> and adopted on the Columbia

1. See, e.g., Memo #18 (May 1982) at 2-6 (explaining the fundamentals of system operations).

2. 16 U.S.C. §§ 839-839h.

3. Northwest Power Planning Council, Columbia Basin Fish and Wildlife Program, as amended (1987).

4. See generally Landau, Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest 10 Env'tl. L. 412 (1980).

5. See generally Fay Cohen, Treaties on Trial: The Continuing Controversy Over Northwest Indian Fishing Rights 67-82 (1986).

6. See, e.g., American Friends Service Committee, Uncommon Controversy: The Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians (1970).

7. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976).

8. Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979).

River,<sup>9</sup> prompted a revolution in fisheries management in the Northwest. It was not, however, a bloodless revolution. These were hot, bitter disputes. There was shooting, seemingly endless litigation, and some of the most concerted state resistance to federal court decrees that the nation has ever seen.<sup>10</sup>

If you look carefully at what was happening in the 1970s, it was apparent that the fish runs were rapidly losing ground; the intensity of the battle actually increased because of that fact. The fighting was so intense that the idea that the tribes and the states should work together to reverse the declines, was overlooked.

In a sense, those battles represent one of the benchmarks from which we can measure our progress--the point at which the politics, the economics, and the law of fishery management changed fundamentally, and we started operating under new rules. The Northwest Power Act is one of the products of that fundamental shift. When we consider what's happened under the Northwest Power Act during the last 5 years, and what's happening now, it is important to recall those times.

## II. The Northwest Power Act

In the late 1970s, the region's Indian tribes and fishery agencies saw a strategic opportunity to address this problem. The Northwest Power Act was being drafted to respond to an anticipated regional electric power shortage.<sup>11</sup> At that time, the primary provisions in the Act were power provisions addressing how the region should acquire more power, who should be involved in the decisions, who should have primary access to the cheap hydroelectric power from the Columbia River's dams, and so forth.

The tribes and fish and wildlife agencies saw the agenda differently. The causes for the decline in the fish runs were numerous--irrigation withdrawals, pollution in the rivers, agricultural runoff, poor logging practices--but clearly one of the largest causes was the dams on the Columbia River.<sup>12</sup> In the Columbia Basin you have a succession of 8 or 9 dams on the mainstem of the river. Each dam takes its toll on migrating fish, and cumulatively the toll runs very high. The tribes and fishery agencies saw in the Northwest Power Act an opportunity to require the power system to repair the damage to

fish runs.

The serious problems facing the Northwest Power system proved to be an ideal opponent for the tribes and their allies. There were strong equities favoring the fishery interests: some runs of salmon and steelhead were in such poor shape that they were being considered for protection under the Endangered Species Act,<sup>13</sup> and it was hard to deny that the power system had a measure of responsibility for that. The power system had a relatively deep pocket, generating a lot of revenue, and it seemed fair to ask the system to pay its share of the damage. The power operators needed something from Congress, and with encouragement from key legislators, had to bargain with the fishery interests. The tribes' treaty fishing rights loomed in the background, potentially threatening substantial changes in the operation of the hydroelectric system.<sup>14</sup>

As the negotiations developed, important provisions were put into the Northwest Power Act for the Columbia Basin's fish and wildlife resources. Congress called for the creation of the Northwest Power Planning Council<sup>15</sup> and directed the Council to develop a fish and wildlife program to "protect, mitigate and enhance" fish and wildlife affected by the Columbia River hydroelectric system.<sup>16</sup> The Bonneville Power Administration was directed to use its funds and other authorities in a manner consistent with the Council's program,<sup>17</sup> and other federal agencies such as FERC were required to take the program into account "to the fullest extent practicable."<sup>18</sup> The federal agencies also were required to provide "equitable treatment" for fish and wildlife affected by the hydropower system.<sup>19</sup>

The tribes and the fish and wildlife agencies played a key role in making the Act's fish and wildlife provisions work. They joined together to develop and submit to the Council a coordinated set of recommendations for fish and wildlife measures.<sup>20</sup> They marshalled their data, they pushed, and they succeeded, in large part. The program is a comprehensive, system-wide program; it doesn't just focus on particular problems in particular places. It may be

9. See Sohappy v. Smith, 529 F.2d 570, 572 (9th Cir. 1976).

10. Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

11. See generally Symposium on the Northwest Power Act 13 Envtl. L. nos. 3-4 (1983).

12. See Blumm, Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System, 11 Envtl. L. 211, 216-17 (1981).

13. See Bodi, Protecting Columbia River Salmon Under the Endangered Species Act, 10 Envtl. L. 349 (1980).

14. See United States v. Washington (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980); Monson, United States v. Washington (Phase I): The Indian Fishing Conflict Moves Upstream, 12 Envtl. L. 469, 500 (1982).

15. 16 U.S.C. § 839b(a)(2)(A); see generally Hemmingway, The Northwest Power Planning Council: Its Origins and Future Role, 13 Envtl. L. 673 (1983).

16. 16 U.S.C. § 839b(h).

17. Id. § 839b(h)(10)(A).

18. Id. § 839b(h)(10)(A)(ii).

19. Id. § 839b(h)(11)(A)(i).

20. See Memo #16 (Jan. 1981).

the largest fish and wildlife restoration project on the planet. Over the next 20 years, the region will spend hundreds of millions of dollars on projects throughout Idaho, Montana, Oregon and Washington.

### III. Progress Under the Act and the Fish and Wildlife Program

Passage of the Northwest Power Act, and the development of the Council's Fish and Wildlife Program represent an important watershed. We have passed from divisive fights over a shrinking resource. We are now determining how to increase the fish runs. There is now a broad commitment that the power system will shoulder its part of the responsibility. These developments represent enormous progress from the fish wars of the 1970s, and offer unprecedented opportunities.

These opportunities have not been easy to capitalize on. For example, the centerpiece of the program--the effort to restore the anadromous fish runs, is a complex task because of the species' immense migrations, from Idaho, through Washington and Oregon, out into the ocean where they enter Canadian fishing grounds, to Alaska, then back.<sup>21</sup> It is complex politically because of the number of tribes, agencies, and interested parties involved. It is complex technologically and economically because any changes in the operation of the hydroelectric system inevitably have complex implications.

This combination of opportunity and complexity has itself had positive effects. The opportunities have encouraged cohesion among the states and the tribes. This is explained in part by the deep pocket of the hydroelectric system. In order to present a convincing case for funding, a cohesive position among fish and wildlife interests is a valuable asset. In part, the cohesion is explained by the program's legal impact on federal agencies operating hydroelectric dams.<sup>22</sup> The Council's program constrains federal agencies involved in the Columbia River hydroelectric system. When the fishery agencies and tribes make recommendations for fish and wildlife measures, they know the Act supplies a source of funding that can make those measures a reality, and also a measure of authority with respect to federal agencies that regulate the dams.

The complexity and difficulty of the process not only demand cohesion among the tribes and agencies, but also expertise of a very sophisticated kind. The Act is no pork barrel; the agencies' and tribes' recommendations must be based on the "best available scientific knowledge."<sup>23</sup> Without scientific rigor, the Fish

and Wildlife Program may not succeed. So cohesion alone is not enough. The program must also be based on good science.

The Act has produced important benefits beyond the Fish and Wildlife Program. The availability of funding makes it possible for the tribes and agencies to make reasonable concessions in related arenas. Because there is a realistic promise that the program's measures will produce significant increases in fish and wildlife resources, they may make short-term sacrifices they might not otherwise be willing to make. For example, in the U.S.-Canada treaty negotiations, the promise that the Columbia River runs will increase in the future made it more possible for both sides to make concessions.<sup>24</sup> The same thing happened in the United States v. Oregon settlement negotiations, to a degree.<sup>25</sup> The program then has produced real benefits beyond the confines of the Columbia River Basin.

### IV. The Next Chapters

That is the history to this point. We have come a long way in a short time, but we still have a long way to go. In the coming year, we will be taking on some extremely important issues, which will become part of this history.

#### A. System Planning

The Council is now beginning a systemwide planning effort, designed to produce a more coordinated approach to anadromous fish mitigation.<sup>26</sup> In other words, if we produce a fish in Idaho, how can we assure that all the jurisdictions that affect its migration along the way will coordinate their efforts so that we can rebuild those runs? This is a formidable problem--some states have several agencies regulating these fish, there are several states and two nations involved. At the same time, I think we have never been in a better position to tackle this problem. The U.S.-Canada treaty is in place, the U.S. v. Oregon negotiations have settled many in-river issues, and the parties appear to be ready to focus their energies on the river as a system. The system planning process is beginning this year, and it is expected to take several years. It is a very important and hopeful effort.

21. See Wilkinson & Connor, The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource, 32 U. Kan. L. Rev. 17, 23-26 (1983).

22. See above notes 17-19.

23. 16 U.S.C. § 839b(h)(6)(B).

24. See generally Jensen, The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview, 16 Env'tl. L. 363 (1986); Stevens, United States-Canada Salmon Treaty Negotiations: The Alaskan Perspective, 16 Env'tl. L. 423 (1986).

25. See generally Harrison, The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish, 16 Env'tl. L. 705 (1986).

26. Columbia Basin Program, above note 3, § 203.

### B. Mainstem Flows and Passage

The second set of issues we will work on this year concern whether additional changes should be made in the way the hydroelectric system is operated. We have something called the Water Budget, which is designed to provide flows to replace the lost spring freshet.<sup>27</sup> One problem with the Water Budget is that it just hasn't worked in the Snake River.<sup>28</sup> There is not enough storage water in the Snake to sustain flows in lower water years. We now are looking at ways of attacking this problem. We don't have answers yet, but the Council knows that this is an important part of the problem.<sup>29</sup>

How do we get juvenile fish past the dams? In the program, the Council called on the Corps of Engineers and other dam operators to build mechanical bypass facilities, to funnel fish through the dam rather than through the power turbines.<sup>30</sup> Funding and building these systems requires the cooperation of the U.S. Army Corps of Engineers. Unfortunately, the schedules for installation of those facilities have slipped.<sup>31</sup> Trying to maintain these schedules is sort of like trying to put your finger in the dike--there is always a new hole sprouting. We must hurry installation of these bypass systems along.

In the interim, while these systems are being authorized and constructed, spilling water at the dams is one of the means of ensuring that the fish survive the dams. Spills constitute a loss to the power system and a gain for fish, and so the question of how much water you spill is never going to be an easy one to resolve.<sup>32</sup> If you spill 100% of the river's flow, that would be best for fish; if you spilled no water at all, that would be best for the hydropower system. Striking a balance in between has not been easy. The parties now have agreed, more or less, as to how much water needs to be spilled in the lowest water year. The parties also have agreed that we must spill more than that in better water years.<sup>33</sup> What remains to be done is to figure out how much more that should be; that is, how high the water has to be before you start increasing spill, how high you go ultimately. We now are working on those issues.

27. Id. § 300.

28. See Blumm, Reexamining the Parity Promise: More Challenges Than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program, 16 Env'tl. L. 461, 494-501 (1986).

29. See Columbia Basin Program, above note 3, § 300(d) (program measure calling for an evaluation of the effectiveness of the Water Budget).

30. Id. §§ 404(a)-(b).

31. See Evans, The Benefits from Increased Spills, Memo #40 (Mar. 1987) at 15.

32. See generally Memo #40 (Mar. 1987).

33. Columbia Basin Program, above note 3, § 404(b)(1).

### C. Protected Areas

Having committed substantial hydropower funds to help rebuild fish and wildlife populations, how do we ensure that our investment is not undermined by future hydroelectric development? One approach is being taken in the Council's "Protected Areas" process, which identifies valuable fish and wildlife habitat that should be protected from development in the Federal Energy Regulatory Commission's decisions.<sup>34</sup> The Protected Areas process has been underway for some 3 years, coordinating studies and analysis by state and federal agencies, Indian tribes, the Bonneville Power Administration, the Council, public interest groups, and members of the public. The Council expects to issue proposed protected areas, and make its final decisions in the coming year.

### D. BPA Funding

The final issue involves the process by which we determine how much money is spent on fish and wildlife each year. As you know, the Council puts measures into the program, but doesn't spend the dollars. BPA spends dollars.<sup>35</sup> BPA also deals with the hard economic realities of running the hydroelectric system. BPA feels it has a legitimate role in assuring that the money is well spent; that there is only so much money that can be spent in a given year on fish and wildlife. One area that we all need to be more aware of is how those decisions are made. There is a lot of attention focused on how the Council makes its decisions, but helping BPA make budgeting decisions that are critical to the program hasn't received enough attention.<sup>36</sup>

### IV. Conclusion

There has been enormous progress by the Indian tribes, and by the fishery agencies as well, in getting on top of some of the problems that confront salmon and steelhead restoration efforts. For the first time, the Northwest is poised to reverse the declines of its anadromous fish runs. The Northwest Power Act has been a critically important part of that progress, helping to generate cohesion between Indian tribes and the states, providing significant funding, and helping to focus federal agency effort. We have come a great distance from the turbulent Indian fishing rights battles of the 1970s.

The story is not one of unmitigated success, however. The tough issues are still there; there are many political difficulties, many

34. Id. §§ 1204(a)-(c).

35. 16 U.S.C. § 839b(h)(10)(A) (BPA to use its authorities and funds "in a manner consistent" with the Columbia Basin Program).

36. See Blumm, Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program, 14 Env'tl. L. 277, 344-51 (1984).

scientific uncertainties, and it is never going to be easy to change the operations of the hydroelectric system. The tendency to balkanize management, with many different entities regulating a single species, is still a problem. All these problems require attention, including attention from a broad public. The more these problems are reduced to technical matters driven by data and computer models, the less satisfactory the answers are going to be. The public must be involved in working through these issues. I encourage all of you to join in.

**The Northwest Power Act's  
Institutional Innovations and  
Some Unfulfilled Promises**

by

**Michael C. Blumm  
Professor of Law  
Lewis & Clark Law School**

I also want to consider the Northwest Power Act and to amplify a bit on some of John's observations. The discussion will first focus on 5 institutional innovations occasioned by the Northwest Power Act. Then it will turn to 3 promises of the Act that the Northwest Power Planning Council has been unable to fulfill.

**I. The Institutional Innovations  
of the Northwest Power Act**

I thoroughly agree with John that one of the principal innovations of the Northwest Power Act was the elevation of the Indian tribes to co-equal status with the federal fish and wildlife agencies. The statute says so over and over.<sup>1</sup> So does the legislation that implements the Pacific Salmon Treaty.<sup>2</sup> In both Acts Congress effectively made Indian tribes co-equal managers with the states. That you couldn't possibly have imagined a decade ago.

A second institutional innovation occasioned by the Northwest Power Act is the Council itself. John referred to the Council as an arbitrator, and it's true that that's the way the Council thinks of itself. However, I think that view constitutes a misperception of the Council's responsibilities. Congress gave the Council the role of preserving and restoring the Columbia Basin's fish runs.<sup>3</sup> But the Council has assumed a role of a quasi-mediator: it attempts to decide what the utility community might accept in terms of preserving and restoring fish and wildlife populations. For example, former Council member Don Godard, who represented Oregon until recently, said not too long ago he thought we couldn't spill more water at mainstem dams because there wasn't a consensus in the utility community to do so.<sup>4</sup>

1. See 16 U.S.C. §§ 839b(h)(2), (4)(A), (5), (6), (7), (11)(B).

2. See 16 U.S.C. § 3632(a).

3. See 16 U.S.C. § 839b(h).

4. Godard, A Strategy for Enhancing Columbia River Salmon and Steelhead Runs, Memo

To my mind, the only consensus needed is the Northwest Power Act itself. Anyone who thinks that the Act is too protective of fish and wildlife ought to work to amend the Act. For now, the consensus is a congressional mandate to preserve and restore the basin's fish runs. While the Council represents an institutional innovation and has done mostly good things, today I'm going to fault the Council for failing to seize some important opportunities presented to it.

A third institutional innovation called for by the Act, one yet to occur, is the elevation of the agencies and tribes to a co-equal status with the power managers. That partnership is what the Northwest Power Act envisioned when its legislative history talked about making fish and wildlife "co-equal partners" with the hydroelectric system, to be treated "on a par" with other project purposes.<sup>5</sup> That vision isn't a reality yet, an unfortunate product of the Council's view of its role as umpire, perhaps more easily influenced by well-heeled utility lobbyists than fishery bureaucrats. The Council might be accused of calling more balls than strikes against the guys in the three-piece suits.

A fourth institutional innovation concerns public participation. The Northwest Power Planning Council's program shows that widespread public participation in the process can help minimize some of the influence of the three-piece suit types' computer models that purport to indicate how much fishery measures are going to cost. The assumptions under which these models operate are seldom disclosed. And if the only people who counter those computer models are your basic fish and wildlife agency civil service-type officials (not even the fish and wildlife agency directors), I think that the impression given to decision makers like the Council is that utility types have better technical data than the fishery types.<sup>6</sup> The basic problem

#40 (Mar. 1987) at 3.

5. House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 976, pt. I, 96th Cong., 2d Sess. 49, 56-57 (1980).

6. The Council supplied an important means of increasing the quality of technical data on mainstem passage issues when it created the Water Budget Center, now known as the Fish Passage Center. See Northwest Power Planning Council, Columbia Basin Fish and Wildlife Program § 304(b) (1982). This entity has been able to generate and analyze fish passage data unencumbered by the constraints power system managers historically imposed. As a result, the Center has been able to critically assess Water Budget implementation and mainstem passage problems. It has performed these functions well enough that BPA unsuccessfully attempted to gain control over the Center's activities. See generally Blumm, Reexamining the Parity Promise: More Challenges than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program, 16 Env'tl. L. 461, 494-501 (1986).

is, of course, that most of the important decisions that the Council must make -- for example, on interim spills and Water Budget flows -- are not technical decisions. They're political decisions. Any time you have less than complete technical information -- and this is commonplace in the area of fishery restoration -- the decision-makers' perception of how to deal with scientific uncertainty when the technical data doesn't dictate particular results becomes the key decision-making criterion. More effective participation in the process, especially from people whose livelihoods are dependent upon restored fish runs, can help remind the decision makers of the political nature of their decisions.

A fifth new institutional arrangement concerns how the Council's program is to be enforced. Congress directed the federal water management agencies (BPA, FERC, the Army Corps of Engineers, and the Bureau of Reclamation) to "take the program into account to the fullest extent practicable" at each stage of their decision-making processes<sup>7</sup> and (independent of the program) to produce "equitable treatment" for fish and wildlife.<sup>8</sup> The latter obligation is a substantive one that the courts have indicated they will enforce.<sup>9</sup> The former obligation is also designed to substantively alter agency decision making, according to a FERC administrative law judge.<sup>10</sup> And, as John indicated, the Act requires BPA to fund program measures.<sup>11</sup> So we really have an interesting innovation in federalism: a non-federal Council with substantial control (exactly how much isn't entirely clear) over federal water management agencies, a concept recently upheld by the courts.<sup>12</sup> However, the enforcement provisions of the Act, while innovative, are overly vague and have produced inconsistent results. I have referred to them as one of the Columbia Basin Program's Achilles heels,<sup>13</sup> and I'll amplify this in the remainder

of my talk.

## II. The Act's Unfulfilled Promises

Three issues reflect some of the Columbia Basin Program's unfulfilled promises: (1) spills, (2) program implementation, and (3) the role of the agencies and tribes vis-a-vis power system managers. This is now the fifth year of program implementation. At the beginning, I recall Dan Evans asking me and other would-be critics not to criticize what the Council said, but to evaluate what the Council did. That sounded like a reasonable proposition, and I spent nearly 5 years largely leading cheers for the Council. When I started to criticize some of the Council's decisions, I got letters from Council members accusing me of being an "advocate" for Columbia Basin fish and wildlife.<sup>14</sup> My answer is a confession: I am. But my response is: I thought Congress instructed the Council to be advocates, not simply arbitrators. That the Council views itself as an arbitrator is evident in its recent spill decisions.

The Council's program looks great on paper, it was formulated out of an open process, and has supplied a real lesson in public participation. Unfortunately, the results for some key provisions of the program, notably the Water Budget flows and interim spill levels, look a lot better on paper than they do in the river. I especially want to discuss spills. Spills are necessary to pass fish around the dams, while we figure out how best to design and finance the installation of mechanical bypass systems that are so expensive.<sup>15</sup> In a recent issue of the Fish Law Memo Dale Evans of National Marine Fisheries Service notes that the Corps of Engineers now says it isn't going to have bypass systems on The Dalles Dam until 1996.<sup>16</sup> That's 16 years after passage of the Act; 40 years after, as Dale put it, the dam began harvesting fish. That's a long time to wait.

Moreover, while we have screened some dams since the middle 1960s, the number of unscreened turbines is actually about the same as it was when we started screening turbines. That is because the power system has been continuously expanding, so the result is that we are screening turbine units just to keep up with the expanding power system. And now the Corps claims it will be 1996 before The Dalles Dam is screened. While we wait for mechanical bypass installation, the best way to get remedial relief is to spill water to keep the fish out of the power turbines. As John indicated, that's expensive. But, actually, nobody really knows how expensive

7. 16 U.S.C. § 839b(h)(11)(A)(ii).

8. *Id.* § 839b(h)(11)(A)(i).

9. Yakima Indian Nation v. FERC, 746 F.2d 466, 473 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1986).

10. Public Utility Dist. No. 1 of Chelan County, Wash., 34 F.E.R.C. ¶ 63,044 at 65,168 (1986) (rejecting a cost-benefit test for fish protection at Rock Island Dam).

11. 16 U.S.C. § 839b(h)(10)(A).

12. Seattle Master Bldrs. v. Northwest Power Planning Council, 786 F.2d 1359 (9th Cir. 1986), cert. denied, 107 S. Ct. 939 (1987). See Goble, The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council, 1 J. of Env'tl. L. & Lit. 10 (1986); Blumm, The Appointments Clause, Innovative Federalism and the Constitutionality of the Northwest Power Planning Council, 8 J. Energy L. & Pol'y 1 (1987).

13. See Memo #40 (Mar. 1987) at 10.

14. See A Colloquy on Columbia Basin Fish and Wildlife Program Implementation, Memo #39 (Feb. 1987) at 15.

15. See Reexamining Parity, above note 6, at 470.

16. Evans, The Benefits from Increased Spills, Memo #40 (Mar. 1987) at 16.

it is. I was on a panel a little while ago with former Council member Don Godard, who claimed it cost \$1,000 per adult fish to spill more water over the dams. Then, he sent me a paper that said it cost \$3,300,<sup>17</sup> so I don't know what Don might think it could cost. I do know that any number you come up with depends upon a lot of assumptions about markets and marginal costs that may or may not be true at a particular point in time. I'm not sure this audience would agree on the numbers for discount rates or non-quantifiable environmental values that produce those cost figures.

Spills are the most controversial aspect of Columbia Basin Program implementation, so a brief review of the history of the spill provisions is in order. This history should help illuminate how the Council views itself as a decision-making body. In the 1982 program, the Council instructed the Corps of Engineers to spill enough water at the dams to reduce fish mortalities to levels achieved by the "best available bypass systems."<sup>18</sup> That directive turned out not to be specific enough, so two years later in 1984, at the urging of the fishery agencies and tribes, the Council adopted a more specific standard. The Council said spill enough water to produce a 90% survival rate.<sup>19</sup> After dealing with that for a year, the agencies and tribes claimed that the 90% spill provision supplied no better protection than the situation before the Northwest Power Act passed.<sup>20</sup> Yet the Act says to "improve bypass."<sup>21</sup> Arguably, a result that produces no improvement is a violation of that statutory directive.

In response to the agencies' and tribes' request, the Council staff developed a "sliding scale" approach to spill: 92% in low water years; 94% in high water years. How much that cost, I really don't know, but the Council thought that the utilities wouldn't accept the additional cost. Consequently, in early 1986 the Council rejected its own staff's recommendations, as well as the agencies' and tribes' recommendations.<sup>22</sup> Thus, 1986 proved to be another year of no significant improvement in fish passage.

The Council's reasoning for rejecting high spill levels was not that it was too expensive to spill, but because it concluded there were "no significant biological benefits" from increasing spill from 90% to 94% in good water

years, and 90% to 92% in low water years.<sup>23</sup> Where the Council got that information, I don't know. I believe that, on the basis of a FISH-PASS computer model, some Council members (not all) felt not enough adult fish would return under certain scenarios envisioned by the computer model.

That February 1986 vote the Council took on the spill issue is an interesting one. It was a 4-to-4 vote, maybe the only 4-to-4 vote the Council has ever had. The two members from Oregon and the two members from Montana voted against increasing spills. The two members from Idaho (who really have the most to lose or gain, because those fish runs are the most imperiled) and the two members from Washington, voted for the spills. I can understand why Montana would vote against the spill proposal, because there aren't going to be anadromous fish returning to Montana under any circumstances. But I don't understand the Oregon votes at all. Even if you really believe the cost figures, the costs will be spread among all BPA customers. Oregon is shielded somewhat from BPA rate increases, since many of the state's ratepayers get their electricity from investor-owned utilities, which are not nearly as sensitive to BPA rates as are public utilities.

I think that 4-4 vote needs to be reconsidered sometime soon. We now have a new Oregon member on the Council, Norma Paulus, and I think that anyone who is interested in fish and wildlife issues should write to her and ask her to get involved in the spill issue, because spills are important to the livelihoods of people who fish off the runs of the Columbia Basin in Oregon.

This year, in the 1987 program amendments, the Council reaffirmed its rejection of increasing spills to produce survival rates of 92% in low water years and 94% in good water years. However, the Council did promise to increase the 90% survival rate via negotiations.<sup>24</sup> This, I think, speaks quite a bit about how the Council perceives its role. The Council said we won't promise anything specifically, but we'll negotiate something "reasonable" (i.e., something the utilities and BPA will accept). I think this decision reflects a failure of leadership. Fundamentally, the Council thinks of itself as an arbitrator, not a leader.

The second issue I want to address is program implementation. I've characterized program implementation as largely a case of "benign neglect."<sup>25</sup> The example I would cite is the Snake River Water Budget, which, as John noted, hasn't really worked. In 1985, an average water year (not really a low water year, but until

17. See Godard, above note 4, at 4.

18. 1982 Columbia Basin Program, above note 6, § 404(b)(3)(a)(ii).

19. Northwest Power Planning Council, Columbia Basin Fish and Wildlife Program, as amended §§ 404(b)(4)(A), (8)(A), (9)(A) (1984).

20. See Reexamining Parity, above note 6, at 482.

21. See 16 U.S.C. § 839b(h)(6)(E)(ii).

22. See Reexamining Parity, above note 6, at 483.

23. Id. at 483-84.

24. Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program, as amended § 404(b)(1) (1987).

25. See Memo #40 (Mar. 1987) at 10, 14.



this year, the lowest water year that we've had this decade), the Water Budget was met only 6 days in a 26-day period.<sup>26</sup> All sorts of reasons have been suggested for this failure. The Corps said something about what Idaho Power Company was doing; Idaho Power said something about what the Corps was doing; the Council talked to both. Nevertheless, the Water Budget flows weren't achieved.

Another example of the implementation policy of "benign neglect" concerns spills. When the Council rejected the spill levels proposed by the agencies and tribes last year, it also did something good. It said the fishery agencies and tribes would develop spill criteria to govern when the Corps will spill the amounts called for in the program.<sup>27</sup> But when the agencies and tribes sent the spill criteria they developed over to the Corps, the Corps said, well, we'll "consider" this. However, perhaps not surprisingly, the Corps developed its own spill criteria. Consistently throughout the 1986 downstream migrant season, the Corps used its own criteria to reject the Water Budget manager's spill requests.<sup>28</sup> As a result, the agencies and tribes went to the Council and said, "the Corps isn't doing what you said to do." I think a couple of Council members went over and talked with Corps officials, but not until the end of the season did the Council write a letter to the Corps, finding that the Corps failed to comply with the program.<sup>29</sup>

The amount of money we are talking about to implement the fish and wildlife program is about one-tenth the annual cost of maintaining the WPPSS plants. The program's benefits are a good deal more certain, widespread, and needed than the electricity produced by WPPSS Plant No. 2, the only WPPSS project to be completed. Moreover, BPA has delayed some Columbia Basin Program measures by questioning their "cost effectiveness."<sup>30</sup> Nevertheless, the agency found an energy efficiency program for its direct service industries to be "cost effective," despite widespread claims to the contrary.<sup>31</sup> I don't believe the program will succeed if BPA can second-guess the Council in this fashion.

Finally, I want to address the institutional role of the fishery agencies and Indian tribes. The Northwest Power Act promised they would be "co-equal partners" with the power system managers.<sup>32</sup> That hasn't happened yet. I believe a major reason for this failure is that the Council doesn't understand the kind of decision making that the Northwest Power Act calls for. The Act tells the Council to defer to the biological expertise of the fish and wildlife agencies and tribes because they are the experts.<sup>33</sup> Congressman Dingell, the chief architect of the Columbia Basin Program, said "don't be a super fish and wildlife agency."<sup>34</sup> Unfortunately, I believe the Council has (perhaps unwittingly) set itself up as a super fish and wildlife agency in its recent spill decisions. For example, I don't believe the National Marine Fisheries Service agrees that there are no "significant biological benefits" from increased spills. Neither does the Columbia River Inter-Tribal Fish Commission. So, who do you believe? I think Congress told the Council to defer to the agencies and tribes on biological issues. If the preferred biological approach is too expensive, the Council has the authority to reject that alternative for costing too much.<sup>35</sup> The Council, however, has never said that increased spills would be inconsistent with an economical power system. The Council's failure to perceive the institutional structure created by the Northwest Power Act has helped to deprive the agencies and tribes from the "co-equal partnership" the Act promised them.

### III. Conclusion

The Northwest Power Act's promise of parity remains a promise yet to be fulfilled. I think it will remain an unfulfilled promise until the Northwest Power Planning Council hears from a more diverse portion of the public than the usual characters who attend the Council's meetings. The Council needs to hear from more people whose livelihoods and identity depend on restored Columbia River Basin salmon runs and less from the utility people, the BPA people, and the Corps people who are paid to attend Council meetings. I also think it's time for the state fishery agency directors to start attending Council meetings, instead of sending staff representatives. There's simply too much at stake in the Columbia Basin Program not to participate.

26. See Reexamining Parity, above note 6, at 497.

27. Id. at 484 n.126.

28. See Memo #38 (Nov. 1986) at 5.

29. See Memo #40 (Mar. 1987) at 14.

30. See Chaney, The Last Salmon Ceremony: Implementing the Columbia River Basin Fish and Wildlife Program, 22 Idaho L. Rev. 561, 573-600 (1986) (case study of the difficulty of implementing Umatilla River program measures; BPA also delayed implementation on a variety of other grounds, including demanding the development of a comprehensive plan).

31. See Memo #40 (Mar. 1987) at 12 n.17.

32. See House Commerce Report, above note 5.

33. See 16 U.S.C. § 839b(h)(7).

34. 126 Cong. Rec. H10,683 (daily ed. Nov. 17, 1980) (remarks of Cong. Dingell).

35. See 16 U.S.C. § 839b(h)(5).

**Hydropower and Environmental  
Protection: Pacific Intertie Expansion  
and FERC Decision Making**

by

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I want to address two distinct, yet ultimately related issues: the proposed expansion of the Pacific Intertie lines that electrically connect the Northwest with California, and the Federal Energy Regulatory Commission's disregard of fishery issues in its hydroelectric licensing. Both issues serve to inextricably link fishery protection and restoration with expansion of the region's hydroelectric system.

**I. Expanding the Pacific Intertie**

In 1977, then BPA Administrator (now Secretary of the Interior) Don Hodel issued a "notice of insufficiency" to regional utilities saying that by the mid-1980's, we would be out of energy; we would have to start turning off the lights.<sup>1</sup> That sense of alarm induced BPA to fund a number of nuclear power plants (including Trojan and the first 3 WPPSS plants) and to encourage others, including WPPSS, to take on even more.

With many utilities and BPA rushing around in a "macho energy" kind of way, we eventually ended up with bankruptcy: near bankruptcy for the Northwest power system, and essential bankruptcy for some small utilities that believed the notice of insufficiency. We also got the Northwest Power Act passed in 1980 on the assumption that we were going to run out of electricity. That assumption was the underpinning of the power side of the Act.

The Act was designed to combat projected electric deficits. It authorized BPA to buy electricity from nonfederal power plants, giving new "acquisition" authority to an agency that had primarily been a marketing agency. WPPSS had simply been the product of creative financing, BPA didn't really have acquisition authority until 1980. The Northwest Power Act envisioned BPA as a sort of massive regional utility, one utility that would run the Northwest hydro-thermal system to meet those formidable deficits that Don Hodel and his BPA staff predicted for the region.

The environmental community also got something from the Northwest Power Act, largely because of people like Congressman John Dingell

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1. See Blumm, The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act, 58 Wash. L. Rev. 175, 228 (1983).

from Michigan and Jim Weaver of this district. They did a magnificent job of tying up the Northwest power bill until they actually achieved significant fish and wildlife and energy conservation concessions in the final Northwest Power Act.<sup>2</sup> The Act gives the Northwest Power Planning Council some clout and a directive to conserve, not just produce, energy for the region.<sup>3</sup> The Power Council's primary lever to shape the region's energy future is control over BPA's acquisition authority. In other words, BPA can only buy (or acquire) the electric output of large power stations, or large blocks of conservation, if it does so consistently with the Council's Northwest Conservation and Electric Plan.<sup>4</sup> Congress consciously subjected BPA's discretion to the Council's plan, a result that has been constitutionally sanctioned.<sup>5</sup>

About the same time the Northwest Power Act passed, however, we began to see the first glimmerings of what became a complete turn-around in the Northwest's energy picture: the deficit was turning into a surplus. The change had become obvious by 1981, when my organization and some others sued BPA for granting a new long-term power sales contract to the Alumax Pacific aluminum smelter.<sup>6</sup> We alleged that BPA had signed the contract illegally under the National Environmental Policy Act (NEPA) and the Northwest Power Act. We finally settled that case, partly because it was clear there was so much electricity in the region that no one cared whether Alumax got 300 megawatts or not. We were swimming in electricity in 1981 and 1982. Everyone had long forgotten Hodel's gloomy predictions of deficits only 5 years before.

That surplus will be around for 6 or 7 or more years. Regional utilities are now selling significant amounts of power on a long-term basis. If that doesn't tell you that the surplus is going to last even longer than 6 or 7 years, I don't know what does. Consider this: the utility community's reaction to a projected deficit 7 years from now is to sell power like crazy, develop new markets, and propose declining block rates. But in 1977, the reaction to a projected deficit in 7 years was to try building 5 WPPSS plants.

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2. See Blumm & Johnson, Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection, 11 *Envtl. L.* 497 (1981); Thatcher, The Pacific Northwest Electric Power Planning and Conservation Act: Fish and Wildlife Protection Outside the Columbia River Basin, 13 *Envtl. L.* 517 (1983).

3. 16 U.S.C. § 839b(e)(1).

4. *Id.* § 839b(d).

5. Seattle Master Builders v. Northwest Power Planning Council, 789 F.2d 1359 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 939 (1987).

6. National Wildlife Federation v. Johnson, 548 F. Supp. 408 (D. Or. 1982).

Another thing happened to the region in the early 1980's. Not only did we have a surplus, but rates started skyrocketing (thus ensuring that the surplus wouldn't quickly fade). Rising rates have encouraged many utilities to consider bailing out of the BPA system. Private utilities who thought they would soon turn to BPA began saying that maybe they wouldn't turn to BPA after all. And several public utilities have plans to reduce their BPA dependence. Tremendous centrifugal forces are now at work in the Northwest electric energy system. The one-utility concept that in 1980 the power interests told Congress they wanted (and the environmental community feared) is falling apart. Interestingly enough, the environmental community now wants the one-utility concept, and the utilities aren't very interested in it. A complete switch. Those of us on my side of the table have now discovered that the Northwest Power Act isn't so bad, that maybe it would be advantageous to have one utility running the region.

As a result of all this, we simply will not see BPA acquisitions of major, large blocks of power resources in the foreseeable future. We aren't talking about buying new coal and nuclear plants anymore. The Power Council's authority over BPA acquisitions has become, at least for a time, fundamentally irrelevant. And as a result, the Council has few ways to control what BPA does.

Unfortunately, if the region doesn't hang together, the end result will be greater economic and environmental cost. If we don't pursue a regional energy plan, (1) we're going to have bigger surpluses, (2) people who have to buy power from BPA are going to pay increased rates, and (3) private utilities are going to develop their own plans for the future. As a result, the region will not achieve the cost-effective, environmentally sensitive energy future that the Northwest Power Act envisioned.

I believe there is a way to draw the region back together. If we had the political courage to do it, we could use access to the transmission lines connecting California and the Northwest as the vehicle. Everybody wants access to the public transmission lines (known as the Pacific Intertie). The utilities want to sell power to California, California wants to buy Northwest power, and BPA controls access to those transmission lines. Thus, we can help hold the region together by saying "if you want to use the transmission lines, if you want the benefits of selling to California, you have to play by the regional rules set in the Northwest Power Planning Council's energy plan. If you don't want to play the game under the regional rules, you shouldn't be able to gain access to the Intertie."

In other words, in a time of surplus, the acquisition authority no longer provides the glue holding the region together. But access to the Intertie could. Nobody contemplated this turn of events in 1980, so the Act gives the Northwest Power Planning Council little explicit authority over Intertie access. Primary authority over the transmission lines rests with BPA,

so we face the difficult chore of trying to persuade BPA that it is both good for BPA and the region to manage the Intertie in an environmentally sound way.

There are several current proposals to increase the capacity of Intertie lines. The stakes are high right now, and I want to address some of these issues. A lot of changes will take place if we expand that line. The current lines have about 5200 megawatt total capacity. BPA has already approved an expansion of the direct current (DC) transmission line of about 1100 megawatts. That will make its capacity around 3100 megawatts. Another plan would expand the alternating current (AC) line another 1600 megawatts, bringing the AC line up to 4800 megawatts. These 2 proposals would bring total capacity to 7900 megawatts, rather than the 5200 we have now, more than a 50% increase. Some private utilities also are talking about putting in a whole new transmission line between Idaho and Arizona or New Mexico, which probably would be another couple of thousand megawatts. By the way, the public wouldn't have much control over such a line. Once constructed, it would be the private utilities who would control access to it.

The status of these proposed expansions are as follows: The AC expansion is being considered by BPA and the Western Area Power Administration, and there are two EISs out.<sup>7</sup> Western Power's EIS is about 5 volumes and discusses site-specific things like what happens when you build additional lines through California.<sup>8</sup> BPA's EIS talks about transmission access issues and operational impacts of expanding the line.

I should mention that BPA has already contracted to expand the DC line. And, despite the fact that there are numerous other Intertie activities going on simultaneously, BPA simply did an environmental assessment claiming it could proceed without considering the relationship of the DC expansion to the other activities or any cumulative environmental effects of all the proposals together.<sup>9</sup> BPA attempted to "segment" those issues in order to proceed rapidly with the DC expansion. The state of Idaho, the National Wildlife Federation, the Columbia River tribes, and citizen groups in Idaho recently sued BPA for failing to write an EIS on the DC

7. Bonneville Power Administration, Draft Environmental Impact Statement, Intertie Development and Use (DOE/ EIS-0125, Oct. 1986); Western Area Power Administration, Draft Environmental Impact Statement/Environmental Impact Report, The California-Oregon Transmission Project and the Los Banos-Gates Transmission Project (DOE/EIS-0128, Nov. 1986).

8. Western Power EIS, above note 7, § 4.0.

9. Bonneville Power Administration, Supplemental Environmental Assessment, Terminal Expansion (DOE/EIS-02625, July 1986).

expansion.<sup>10</sup>

There are several good things that could result from increased power sales to California, if done right. For example, we could use the current power surplus to make sales to California, supplying the region's ratepayers with rate relief. The more power we sell to California, the less we have to pay for the power that we buy. Selling power to California also reduces air pollution in California: if California utilities don't have to run oil and gas turbines in the Los Angeles Basin, air pollution can be reduced substantially. That's an advantage for local and perhaps global environmental concerns. If handled properly, environmentalists could support conservation efforts in this region to finance California power sales. The Natural Resources Defense Council (NRDC) has some very interesting proposals on that sort of creative financing for conservation. But although BPA creatively financed numerous nuclear plants, the agency has been fighting for 4 years all of NRDC's suggestions for creatively financing conservation. Done right, however, the Northwest could sell conservation to California and simultaneously increase regional control over the power system. Under the right kind of contract, there would probably be fewer resources developed overall, both in this region and in California, because we could trade energy back and forth. There might be substantial advantages up and down the West Coast from such arrangements. Some people think it might even be good for anadromous fish, because we could sell to California some of the excess power we produce in the spring when the fish flows are coming down, if we conditioned expansion properly.

The regrettable thing is that we are moving forward with an expanded Intertie, both DC and AC lines, without setting in place the mechanisms that would ensure such advantages. That ought to be of great concern to everyone in the Northwest. It may be a parochial concern because, no matter how you look at it, California is going to benefit from an expanded Intertie, but the Northwest may ultimately pay the environmental and economic costs.

The disadvantages of unwise Intertie expansion are also substantial. Coal burning in the Northwest would substantially increase if we expand the line without adequate controls. Right now, the coal plants in this region are run almost exclusively for export. If you look at how much electric power goes down the Intertie, and how much power is produced at the coal plants in this region, there is a very close connection. The more electricity that goes down the Intertie, the more coal we burn.

NRDC has suggested another idea: the development of an effective environmental dispatch program to use only the cleanest burning coal plants for power sales to California. Right

now, we burn the dirtiest. The plant that goes on first and off last is the Centralia plant in central Washington, the dirtiest coal plant in the region. This plant is primarily used to sell south because it has a small area to hold coal, so it burns all the time under a "take-or-pay" contract on the coal. If the region were well organized under an environmentally sensitive Intertie policy, maybe we could start shutting down Centralia and run less polluting plants.

Another disadvantage for the region's ratepayers of not having a sound Intertie policy is that they may end up paying for individual utilities' improvident power sales to California. BPA Administrator Jim Jura has noted that in this era of surplus, Northwest utilities can sell power to California and have a wonderful insurance mechanism: BPA must meet their loads.<sup>11</sup> Thus, if a regional utility wants to make short-term money, it can sell long-term power to California and get high rates; then when it runs out of power, it can just look to BPA and say "give us what the Northwest Power Act directs." In that event, BPA would have to go out and acquire new resources to supply that utility. Everyone who buys BPA power is going to see rates go up as a result of such sales.

A way to guard against such improvident sales is an effective Intertie policy. Such a policy would guarantee that each utility would "hold the region harmless." In other words, a participating utility would say: "if we get on the Intertie and sell power south, we aren't going to come back to the region and ask you to bail us out; we are only going to make wise sales to California." We could implement a policy like that, but BPA has yet to see the wisdom of such a policy.

Further, if we expand the Intertie, we may end up building resources in this region just to serve California loads. Not in the indirect way I just discussed, but a more direct way. A lot of entrepreneurs who want to build hydropower projects, like the City of Klamath Falls, want to gain access to the Intertie and sell to California. Also, there are utilities looking to the future and saying the way we'll finance expansion is to sell to California. In its own EIS, BPA has suggested that if there were no regional constraints on resource development and we proceed to increase the Intertie to the 7900 megawatt level, we could anticipate construction of an extra 1,000 megawatts of energy facilities to support sales to California.<sup>12</sup> Admittedly, there would be additional conservation included, but there would also be some 280 average megawatts of additional hydroelectric power. Moreover, there would be a new nuclear power plant; that is, they would finally finish WPPSS Plant No. 3. There would also probably be another coal plant.<sup>13</sup>

10. Idaho v. United States Dep't of Energy, Nos. 86-7704 and 86-7705 (9th Cir. 1986).

11. 16 U.S.C. § 839c(b).

12. BPA EIS, above note 7, § 4.2.3.3.3.

13. Id. § 4.2.3.3.

All this to support sales to California. This might in fact constitute wise environmental policy; maybe the Northwest, which is cleaner than California, should dirty itself a little bit in order to sell power to California. Maybe that's wise coastwide environmental policy, maybe those of us who disagree with that are being parochial. But at least we ought to be aware of the consequences of increasing the Intertie without adequate constraints on the kind of resources gaining access to the Intertie. The costs could be substantial.

If you care about the Northwest environment, there is a solution, at least a parochial solution. If a utility could get access to the Intertie only if its energy development program was consistent with the Northwest Power Planning Council's Northwest Power Plan, that would effectively hold the region "harmless." We just wouldn't build unless the Council's Plan said we should; but, at the same time, California could share in our current surplus. This suggestion, made repeatedly to BPA, has been entirely ignored in BPA's recently issued Intertie EIS, despite the bulk of that thick document. Now there is nothing illegal about such an alternative. And it doesn't go beyond BPA statutory authority. You don't have to worry about NRDC v. Morton or Vermont Yankee concerns.<sup>14</sup> The "hold harmless" alternative is obvious, it makes sense, and it should be considered. How can BPA claim any regional leadership when it fails even to consider the alternative of making energy resources in this region consistent with the congressionally mandated Northwest Conservation and Electric Power Plan?

With respect to fish and wildlife, the Intertie expansion has two potential impacts. First, it might make it harder to obtain flows in excess of those called for in the Water Budget,<sup>15</sup> because encouraging power system manipulation to sell power south makes fish flows harder to guarantee. Such sales may also make spills more problematic. As a matter of fact, we know from BPA's EA on the DC line, so-called involuntary spills will, in fact, occur less frequently.<sup>16</sup> As a result, we'll be left with the Council's minimum level spills, the biological adequacy of which has been criticized by every fish and wildlife agency and Indian tribe in the region. At present, fishery advocates hope to obtain fish spills above the Council's minimum when there is more water than energy demand. If we sell more power because of an expanded Intertie, we will reduce the level of what BPA and the Corps of Engineers call "over-

generation spills," water spilled because there is no market for the power the water could generate. Thus, an expanded Intertie will make it harder to obtain fish spills, because there will be less excess spill. The power system calls it "excess," the fishery agencies consider it "bare minimum."

An expanded Intertie is also going to make it harder to secure spill in a political sense, because spill is already expensive. If the hydroelectric system is selling a lot of power to California and making money from it, it is going to be much harder to obtain spill from the system as a political matter. So, whether the Council sees itself as an arbitrator or a leader, it's going to be bucking an increased economic incentive to reduce spill, rather than increase it.

In short, Intertie expansion could have a long-term detrimental impact on efforts to restore fish runs in the Columbia River system. Those problems could be overcome, however. For example, we could set spill levels that are biologically sound and Water Budget flows that are biologically sound, and we could say to utilities that want to sell power to California to sell it if they like -- but don't jeopardize those spills and flows. Unfortunately, the problem is that the spills and flows now contained in the Columbia Basin Program are simply too low to meet the biological needs of the fish.<sup>17</sup> In the last few years, we have been riding on some advantages of excess water, because of better than average water years. When we run out of those indirect advantages, we'll have a problem protecting the investments we've made under the Northwest Power Act.

I think an expanded Intertie could be good for both California and the Northwest, if it is properly planned. Unfortunately, there are tremendous incentives to ignore all these issues and just get on with building a bigger line. That's what led Idaho and the National Wildlife Federation to sue on the expansion of the DC line: BPA ignored a lot of these issues, segmenting the DC expansion from other Intertie expansion decisions.<sup>18</sup> BPA's attitude seems to be to build a power system, then try to retrofit it for fish; in other words, transmission line now, then worry later about how to make it work for the next 20 years. Unfortunately, there aren't a lot of legal handles here. If BPA stubs its NEPA toe, we can stop the line for awhile. But the Northwest Power Act was passed to take into account deficits, not a surplus. Consequently, we now have less control over our energy future than we might like. These are largely political

14. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

15. Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program, as amended, § 300 (1987).

16. BPA EA, above note 9, at § 2.1.1.2.1.

17. See Blumm, Reexamining the Parity Promise: More Challenges Than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program, 16 *Env'tl. L.* 461, 494-501 (1986).

18. See Jones, Idaho Expansion and Fish Protection: Idaho Objects to BPA's Draft EIS, Memo #39 at 2 (Feb. 1987).

issues, not legal issues. I have no optimistic predictions that we will do this any better than we developed the initial hydropower system, a system that entirely forgot about the world's largest anadromous fish runs.<sup>19</sup> I am fearful of the consequences.

## II. Protecting Northwest Fisheries Habitat In FERC Decision Making

The second subject I want to address is Federal Energy Regulatory Commission (FERC) decision making. For the last several years, I have represented the National Wildlife Federation and some of its affiliates and other organizations before FERC on hydropower issues. I admit to a prejudiced view of this agency. FERC is a difficult agency to deal with; one of the most recalcitrant on fishery issues. Ostensibly a regulatory agency with jurisdiction over a variety of energy resources, including interstate natural gas, interstate electric power rates and regulation of nonfederal hydropower development, my perception is that FERC is in fact a hydropower promoter, not a regulator.

Actually, there are historical reasons for this. FERC was established as the Federal Power Commission in 1920, one of the last Progressive Era agencies. The waning of the Progressive Era left the agency without the resources to carry out its congressional charter to promote the comprehensive development of the country's hydropower resources.<sup>20</sup> Progressives like Teddy Roosevelt, (the liberals of their time) thought that allowing rivers to flow free meant wasting water. They favored human use; not using natural resources was waste. If you recall, Gifford Pinchot was an opponent of wilderness; he believed that you should cut trees, not let them die on the stump. The same thing for rivers; rivers were for damming, trees were for cutting.

For over 50 years, since the 1935 amendments to the Federal Power Act adding "recreation" to the purposes of the federal hydroelectric licensing scheme, FERC has had the authority, if not the duty, to protect fish and wildlife resources, as well as the natural and cultural values in free flowing rivers.<sup>21</sup> With such a broad regulatory mandate, one would think that FERC decision making would be balanced, not tilted in favor of one particular use over another. As a matter of fact, the agency remains pro-hydropower; it is a hydropower promoter, not an even-handed regulator. Moreover, FERC is highly jealous of its prerogatives, fighting any poten-

tial encroachment on its turf by agencies with environmental protection mandates. A series of examples of the last few years, I think, supports this assertion.

A number of new laws were passed at the end of the 1970s in reaction to the energy crisis. One of those, the Public Utility Regulatory Policy Act (PURPA),<sup>22</sup> was passed with the support of many conservationists because it was not widely perceived that it would so dramatically increase new hydropower development. However, one of the things that PURPA established was a scheme whereby hydropower projects can obtain "exemptions" from licensing.<sup>23</sup> In order to build a dam, a developer must secure a federal license or be exempted from licensing. The exemption is sort of a fast-track process for small projects. PURPA explicitly limited these exemptions to certain projects, called "natural water feature" projects, that didn't need a new dam. PURPA simply didn't authorize exemptions for projects involving new dams. Nevertheless, FERC said that said that so long as a project doesn't involve constructing a dam over 10 feet high or doesn't impound over 2-acre feet of water, it really isn't a "dam," so the project could qualify for an exemption.<sup>24</sup> There was absolutely no support whatsoever for such an interpretation in the statutory language or the legislative history. FERC's interpretation was challenged by the Tulalip Indian tribe of Washington, by the National Wildlife Federation, by the Idaho Wildlife Federation, and others. In Tulalip Tribes v. FERC, the Ninth Circuit struck down that interpretation as wholly without support.<sup>25</sup> Here is an example of FERC choosing to interpret the statute as a hydropower promoter, rather than an even-handed regulator, and the court struck the agency's interpretation down.

Another example concerns FERC's interpretation of PURPA benefits. If a hydropower entrepreneur builds a project that is small enough, PURPA requires the local utility to buy that power at what is called the "avoided cost";<sup>26</sup> that is, basically, the cost of the utility's next planned energy facility. The idea was to encourage people to develop renewable resources. The law said that such benefits should only go to renewable resources, and the legislative history said that means only "existing" dams, not new dams.<sup>27</sup> However, FERC produced regulations

19. See generally Blumm, Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources For A Peaceful Coexistence With the Federal Columbia River Power System, 11 Envtl. L. 211, 223-49 (1981).

20. See Cole, Reviving the Federal Power Act's Comprehensive Plan Requirement: A History of Neglect and Prospects for the Future, 16 Envtl. L. 639, 659-63 (1986).

21. Id. at 662.

22. Public Utilities Regulatory Policies Act of 1978. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 30, 42 and 43 U.S.C.).

23. 16 U.S.C. § 2705.

24. See Blumm, A Trilogy of Tribes vs. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Env'tl. L. Rev. 1, 11-12 (1986).

25. 732 F.2d 1451 (9th Cir. 1984).

26. 16 U.S.C. § 824a-3(d).

27. H. Rep. No. 1750, 95th Cong., 2d Sess. 67, reprinted in 1978 U.S. Code Cong. & Admin. News 7797, 7823.

providing PURPA benefits for new dams as well.<sup>28</sup> Unfortunately, here the environmental community, including yours truly, was asleep at the switch. We failed to sue, letting these regulations go unchallenged. Nevertheless, it seems to me, FERC's interpretation is contrary to the intent of Congress. There has been a late challenge filed by the National Wildlife Federation and the Sierra Club, but that challenge may not be a timely one.<sup>29</sup> Once again, here was an opportunity for FERC to interpret the law in a balanced fashion; instead, it chose the pro-hydropower development option.

The new Electric Consumer Protection Act,<sup>30</sup> the 1986 amendments to the Federal Power Act and PURPA, changed this question of benefits in a way I will not try to explain in detail because it is an absolute mess. Basically, Congress took away some of the PURPA benefits for new projects, but it grandfathered old projects in such a manner that I suspect there isn't a dam out there that somebody cannot claim is grandfathered.

Yet another example of FERC's pro-hydropower bias concerns the issue of whether an exemption applicant for a small project must demonstrate that the project's power is needed. It only makes sense that we shouldn't be encouraging projects unless their power is needed, especially in the Northwest where we have a long-term surplus. FERC's decision on this issue should by now come as no surprise -- the agency decided it was unnecessary to show a need for power to qualify for an exemption.<sup>31</sup> FERC's first interpretation concerned what's called a "conduit" exemption -- an exemption for facilities with an irrigation-canal connection. The issue went to the Ninth Circuit in a suit by Idaho Power Company when FERC required that utility (which earlier had been denied a FERC license because of a lack of need for the power) to buy the power from exemption projects, despite the lack of any need for the power. Idaho Power lost that case,<sup>32</sup> but the utility did not raise what I felt would have been the best challenge, a NEPA-based challenge, alleging that FERC should have considered the need for the project under NEPA, quite apart from what PURPA might require.

Rob Lothrop and I handled a case recently where we might have been able to challenge the application of the "no need for power" for non-conduit exemptions (i.e., natural water feature exemptions).<sup>33</sup> For a variety of reasons, we

settled that case and therefore did not get to the "need for power" issue. Bill Kloos has a case on the North Umpqua where this may still be raised.<sup>34</sup> The Idaho Power situation is particularly interesting, since Idaho Power has a surplus until past the year 2000. The utility has now been denied a couple of licenses because it cannot show a need for power. Nevertheless, FERC is still granting exemptions to projects in Idaho, projects that are going to sell their power to Idaho Power. It not only doesn't make any legal sense, it makes no practical sense.

FERC has also interpreted the law creatively and, in my view, outrageously in an effort to protect its regulatory turf. Section 4(e) of the Federal Power Act requires FERC to incorporate conditions in licenses on federal land reservations recommended by the pertinent federal land manager (e.g., the Department of the Interior or the Forest Service).<sup>35</sup> In another imaginative reading of the law, FERC interpreted the word "shall" to mean the word "may" and rejected proposals by a federal land manager, in this case the Secretary of the Interior, since the project was on Indian land. That decision was appealed to the Ninth Circuit, where FERC lost, then to the Supreme Court. The U.S. Solicitor General refused to represent FERC, siding with the Interior Department. As a result, FERC had to represent itself. FERC lost again before the Supreme Court.<sup>36</sup>

Another provision in the Federal Power Act, section 18, directs FERC to require hydroprojects to install "fishways" as specified by fish and wildlife agencies.<sup>37</sup> Fortunately, FERC has seen the light and decided just recently that Section 18's "shall" means "shall."<sup>38</sup>

Numerous cases have held that all federal agencies have a trust responsibility to Indian tribes.<sup>39</sup> Yet FERC has announced that, unlike all other federal agencies, it has no federal trust responsibility to Indian tribes. That issue has been briefed twice but never finally decided in the Ninth Circuit.<sup>40</sup>

Further, FERC has said that although all

28. 18 C.F.R. § 292.204(b) (1987); see *A Trilogy of Tribes v. FERC*, above note 24, at 9.

29. *Sierra Club v. FERC*, No. 84-7720 (9th Cir., filed Oct. 31, 1984).

30. Pub. L. No. 99-495, 100 Stat. 1243 (1986).

31. *Magic Water Company, Inc.*, 28 FERC ¶ 61,165 (1984).

32. *Idaho Power Co. v. FERC*, 766 F.2d 1348 (9th Cir. 1985).

33. *National Wildlife Federation v. FERC*, No. 86-7202 (9th Cir. 1986).

34. The "need for power" may be raised in the Winchester Dam case. See Kloos, below at p. 20.

35. 16 U.S.C. § 797(e).

36. *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians*, 104 S. Ct. 2105 (1984). See *A Trilogy of Tribes v. FERC*, above note 24, at 20-34.

37. 16 U.S.C. § 811.

38. *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079 (1987).

39. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1973).

40. See *Confederated Tribes and Bands of the Yakima Indian Nation*, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985); *National Wildlife Federation v. FERC*, 801 F.2d 1505 (9th Cir. 1986).

other agencies are supposed to comply with the Council on Environmental Quality's (CEQ) regulations implementing NEPA, it does not feel so bound.<sup>41</sup> I've talked to some FERC people recently about the fact that in The Steamboaters case, one of Bill Kloos' cases, the Ninth Circuit ruled that the CEQ regulations are binding on FERC. But the FERC staffers said that was only in a footnote<sup>42</sup> and so could be ignored.

Another important PURPA issue had to do with whether FERC had to include conditions recommended by the National Marine Fisheries Service (NMFS) for exemption projects. When PURPA first passed in 1978, FERC said, "of course we must include NMFS' conditions, it's a fish and wildlife agency."<sup>43</sup> The law requires imposition of such terms and conditions in order to issue an exemption. It turned out that NMFS became the most vigorous supporter and protector of salmon habitat in the Northwest.<sup>44</sup> In my view, NMFS has done more in terms of habitat protection than any other federal or state agency in the region. Thus, it became inconvenient for FERC to interpret NMFS' conditions as mandatory. So in The Steamboaters case, FERC changed its mind, deciding it had misinterpreted the law in 1978 and it proceeded to reinterpret the statute to eliminate NMFS from the list of agencies with the power to insert mandatory terms and conditions on exemptions.<sup>45</sup> NMFS took this issue to the Ninth Circuit and unfortunately lost it, largely I think because the panel, especially Judge Sneed, was unimpressed by turf battles between federal agencies.<sup>46</sup> Recently, the 1986 Electric Consumer Protection Act reversed this decision.<sup>47</sup> Congressman John Dingell had NMFS' authority to insert binding conditions made explicit, yet FERC is now starting to issue opinions that sound like it is going to try to circumvent those terms and conditions once again.

The Columbia Basin Fish and Wildlife Program, promulgated by the Northwest Power Planning Council, is supposed to be "taken into account to the fullest extent practicable" by FERC.<sup>48</sup> Perhaps it will be, but FERC's initial reaction to that program was to ignore it altogether, never to mention it in its opinions. Later, FERC started taking it into account by

simply mentioning that it existed. In the Salmon River case that Rob Lothrop and I worked on, the Ninth Circuit said that FERC had violated the Northwest Power Act by ignoring the program's cumulative impact provisions.<sup>49</sup> Despite this clear judicial directive, FERC has interpreted the opinion to say that it really didn't violate the law, that it simply failed to produce "substantial evidence" indicating it could ignore the program. FERC seems bound and determined to interpret these numerous adverse judicial decisions in a way that justifies its current way of doing business.

Consider how FERC interprets its comprehensive planning obligation. In section 10(a) of the Federal Power Act, Congress required development of a "comprehensive plan" for a waterway before FERC issues a license.<sup>50</sup> Because developing comprehensive waterway plans would be difficult, since the 1920's, FERC and its predecessor, the Federal Power Commission, has never developed a comprehensive plan.<sup>51</sup> Yet it continues to issue licenses. However, there is good language in the NWF v. FERC case indicating that there must be comprehensive plans under section 10(a).<sup>52</sup>

I once had a conversation with FERC Commissioner Stalon about the comprehensive planning requirement, and he admitted to me that, "of course, we must have comprehensive plans, that's what the law says." But, he claimed, FERC didn't have the money to do it. I suggested that FERC could get the money to do it if it announced to the hydropower developers throughout the country that it couldn't issue any licenses until comprehensive plans were in place. The developers would then go to Congress and get FERC the money needed to develop comprehensive plans. His reaction was quite remarkable: he said, "well, we cannot deny licenses just because we don't have a comprehensive plan, because these applicants have a stake in hydropower development." I think that's a typical FERC reaction: the agency believes it must, except in very unusual circumstances, grant licenses and exemptions.

A provision in the 1986 Electric Consumer Protection Act, authored by Senator Evans, requires FERC, when deciding whether a license is consistent with the section 10(a) comprehensive plan requirement, to consider the extent which the project is consistent with state comprehensive plans or plans developed by agencies established by federal law to prepare such plans like the Northwest Power Planning Council.<sup>53</sup> Unfortunately, for Congress to tell FERC to "consider" seems to mean absolutely nothing. FERC can "consider" other comprehensive plans forever; it doesn't mean it will act consistently with such plans.

41. See A Trilogy of Tribes v. FERC, above note 24, at 4 n.9.

42. The Steamboaters v. FERC, 759 F.2d 1382, 1393 n.3 (9th Cir. 1985).

43. See Blumm & Kloos, Small Scale Hydropower and Anadromous Fish: Lessons and Questions from the Winchester Dam Controversy, 16 Env'tl. L. 583, 607 (1986).

44. See generally Bodi & Erdheim, Swimming Upstream: FERC's Failure to Protect Anadromous Fish, 13 Ecology L.Q. 7 (1986).

45. See Blumm & Kloos, above note 43, at 602.

46. The Steamboaters, 759 F.2d 1382, 1387-89 (9th Cir. 1985).

47. 16 U.S.C. § 803(j).

48. Id. § 839b(h)(11)(A)(i).

49. National Wildlife Federation v. FERC, 801 F.2d 1505, 1513-15 (9th Cir. 1986).

50. 16 U.S.C. § 803(a).

51. See Cole, above note 20.

52. 801 F.2d at 1508-13.

53. 16 U.S.C. § 803(a)(2).



For instance, FERC has begun issuing hydropower licenses in the Pacific Northwest. Its decisions identify the Northwest Conservation and Electric Power Plan of the Northwest Power Council as a plan it must consider under the new law. But then it goes on to announce that issuing the licenses presents "no conflict" with that plan.<sup>54</sup> But issuing any hydropower license today is inconsistent with the Council's power plan, because the plan calls for no new hydropower development until at least 1994.<sup>55</sup> FERC is not giving any deference to the Northwest Power Planning Council; its "need for power" analysis is laughable. The agency continues to grant licenses where there is no need.

An interesting thing may happen with respect to this issue under the 1986 Electric Consumer Protection Act, which requires FERC to give "equal consideration" to energy conservation.<sup>56</sup> It remains to be seen what that may mean, since FERC has never, in my experience, considered energy conservation as an alternative to hydropower project construction. In the EISs I have reviewed recently, FERC doesn't even mention energy conservation; its sort of background noise, not a viable alternative, even though CEQ regulations specifically mention it.<sup>57</sup> So far as I can tell, FERC's policy, enunciated in November 1986, is also not to consider alternative hydropower sites as alternatives to a proposed license.<sup>58</sup> FERC's view is that each hydropower project stands on its own; therefore, it will consider coal and wind and solar and all the things that FERC cannot make available, but the agency will not consider whether a hydroelectric project should be on this river rather than on that river. In other words, FERC claims that hydropower sites are exclusive and not comparable; that building one doesn't mean we don't have to build another.

FERC will not consider one hydropower project as perhaps better than another. The reason it cannot do that is because the agency basically ignores the need for power. However, if you read its EISs, FERC assumes there is an infinite need for power. That is really the bottom line. FERC says all projects will be needed eventually, so it would be silly to license one instead of another -- someday we will need both. These predictions justify certain, substantial adverse effects on river resources.

54. Examples are: Puget Sound Power & Light, 39 FERC ¶ 62,040 (1987) and Idaho Natural Energy Inc., 39 FERC ¶ 62,038 (1986).

55. Northwest Power Planning Council, Northwest Conservation and Electric Power Plan, as amended, ch. 8 (1986).

56. 16 U.S.C. § 797(e).

57. 40 C.F.R. § 1502.16(e).

58. Memorandum from Lee Emery, FERC Office of Hydropower Licensing, on Scoping of Environmental Issues Related to Four Snake River License Applications (Project Nos. 2899, 4797, 5797, & 8795) (Nov. 26, 1986).

Next, let me mention my favorite catch phrase: power first/fish last. In the Rock Island Dam case, the fallout of which Rob Lothrop is going to discuss, the Department of Commerce, the Yakima Indian Nation, the National Wildlife Federation and a whole lot of other people sued FERC over relicensing the dam while ignoring fishery concerns.<sup>59</sup> In that case, the Ninth Circuit told FERC that it had to stop what I have called "power first, fish last licensing," whereby it issues a power license, the licensee pours concrete, then later, maybe, FERC will study whether the project could be retrofitted to protect fish resources. You can imagine the obvious difficulties in such an approach. The Ninth Circuit said clearly, in the Rock Island case, that is illegal.<sup>60</sup>

But since the Ninth Circuit decision, to my knowledge there have been several, probably dozens, of Rock Island-type licenses issued that are illegal under that decision. The only way you can get FERC to comply with a decision like Rock Island, so far as I can tell, is to sue each time, a very expensive proposition. There probably won't be very many suits because often there are not many organized interests.

The Electric Consumer Protection Act added a new section 10(j) to the Federal Power Act,<sup>61</sup> which might be considered John Dingell's gift to the fish and wildlife interests. That provision requires FERC to adopt the recommendations of fish and wildlife agencies for any licensed project, unless FERC can determine in writing that adopting those terms and conditions would be inconsistent with the purposes of the Federal Power Act. During the lobbying on that bill, some of us tried to explain to Dingell's staff that this standard "consistency with the purposes of the Act" did not require very much. How can you tell if something is inconsistent with the purposes of the Act when the purposes of the Act are virtually everything -- water, fish, wildlife, recreation, hydropower, irrigation, navigation? What would be inconsistent with the purposes? Nevertheless, the legislative history of this bill demonstrates that FERC is supposed to defer to other agencies unless there is a compelling case against their positions.<sup>62</sup> The legislative history also says that just because the dam will produce less power because of fish and wildlife protection doesn't mean it is inconsistent with the purposes of the FPA.<sup>63</sup>

59. See A Trilogy of Tribes v. FERC, above note 24, at 34-46.

60. Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985).

61. 16 U.S.C. § 803(j).

62. See 132 Cong. Rec. H2006 (daily ed. Apr. 21, 1986) (remarks of Rep. Dingell).

63. See H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 21, reprinted in 1986 U.S. Code Cong. & Admin. News 2537, 2540-42.

The 1986 amendments ought to be considered as an announcement to FERC to defer to other agencies unless it has a really overwhelming argument against their positions. But the last time I met with FERC staff, we talked about section 10(j), which they have interpreted to change nothing; they believe it is business as usual. They think that section 10(j) merely requires FERC to balance all purposes of the rivers, and will decide whether fish and wildlife agency recommendations meet FERC's interpretation of the public interest. So, if FERC thinks fish and wildlife isn't as important as hydropower, the agency isn't going to determine that fish and wildlife concerns override maximum hydropower production. This interpretation essentially ignores the congressional sentiments that went into 10(j), and such an interpretation means FERC is going to get sued again. But that is the way FERC operates; it tries to get away with as much as it can until it gets sued, then it ignores the precedent until it gets sued again.

I was once quoted as saying that FERC was a "rogue" federal agency. I stand by that statement.

**On Being A Fish Advocate  
Before FERC**

by

**Bill Kloos**

**Partner, Johnson & Kloos  
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Terry said that FERC ignores federal law until it gets sued and, when it gets sued, it ignores the precedent. I'm a living example of that. I'm making a career out of suing FERC. I could do it forever, I think, over just one project. Actually, over the last 4 years I have been involved in 3 hydropower projects. The major one is the Winchester project on the North Umpqua River. I should say "was," because it has been shut down by a court order. The others are a small project in Bend on the Deschutes River, and one on Mill Creek, a tributary of the Walla Walla River in eastern Oregon and south-eastern Washington.

What I would like to do is primarily use Winchester as a short case study,<sup>1</sup> illustrating some of the points that Terry made. Some background on that project: It is a 1.5 megawatt project on the North Umpqua right about where the river crosses the I-5 expressway, just north of Roseburg. This was a retrofit of a hydropower project on an existing decrepit wooden dam, one which should have been taken out rather than saved by a hydropower project. The federal

1. See generally Blumm & Kloos, Small Scale Hydropower and Anadromous Fish: Lessons and Questions from the Winchester Dam Controversy, 16 Env'tl. L. 583 (1986) [hereinafter Winchester Dam Lessons].

exemption for this project was issued in early 1983.<sup>2</sup> My clients, The Steamboaters (a fishing organization), immediately filed suit in the Ninth Circuit, because that's where you must go under the Federal Power Act.<sup>3</sup> The project was constructed in 6 months. The developers were really anxious to get it in the river. Although we filed suit right after the exemption was issued, we didn't get a decision from the Ninth Circuit until two-and-a-half years later, well after the project was up and running. Then, after the court's decision, in May of 1985,<sup>4</sup> the project operator applied for rehearing, which automatically stayed the court's order. So the project continued to operate until the court decided the rehearing issue in December of 1985.<sup>5</sup> At the rehearing, all the developer basically said was, "we already have our project in, it's running, and we're going to feel a real financial pinch if we have to shut down while this matter is on remand to the federal agency. Why don't you let us keep running; we're really not that bad." Since the court found some straightforward NEPA violations, it wasn't too excited about the notion that lost revenue constituted irreparable harm, so it said "no" to the developer and shut down the project in December 1985. It took two-and-a-half years to get that final no from the court, however.

The court's decision covered 3 NEPA issues. First of all, the court ruled that a one-line "finding of no significant impact" (FONSI) will not satisfy NEPA.<sup>6</sup> Second, it held that FERC is in fact a federal agency and therefore must comply with the Council on Environmental Quality's NEPA regulations, and, at least do an environmental assessment (EA).<sup>7</sup> That was the footnote holding Terry noted that FERC thinks isn't a holding because it's in a footnote.

Incidentally, FERC doesn't publish EAs. Nor does it circulate them. And all EAs it produces read very much alike. Only the names of the projects seem to change. I once wrote for a copy of an EA on another project, and FERC accidentally sent me EAs for two different projects. They were nearly the same except for the project numbers. It is almost as if FERC has a key on its word processor that produces a standard EA form, and FERC staffers just fill in the blanks for the project number.

The third NEPA issue was a "connected action" decision of the hydropower project and the proposed reconstruction of the dam. The basic purpose of the hydropower project was to generate money to rebuild the dam. Yet, FERC

2. The exemption for this project was issued pursuant to 16 U.S.C. § 2705; see Thatcher, above at p. 14.

3. See 16 U.S.C. § 8251(b).

4. The Steamboaters v. FERC, 759 F.2d 1382 (9th Cir. 1985).

5. The Steamboaters v. FERC, 777 F.2d 1384 (9th Cir. 1985).

6. The Steamboaters, 759 F.2d at 1392.

7. Id. at 1393 n.3.

didn't look at the effect of dam rebuilding at all; it didn't make any attempt to weigh the environmental effects of replacing the dam rather than, say, taking it out. The Ninth Circuit ruled that FERC had to apply the court's precedents to determine whether the hydropower project and the new dam were "connected actions," thus requiring consolidated NEPA analysis.<sup>8</sup>

A fourth, non-NEPA holding, one that was potentially most devastating to efforts to protect Northwest anadromous fish runs, was the court's agreement with FERC that the National Marine Fisheries Service (NMFS) did not have statutory authority to impose binding terms and conditions on exemptions.<sup>9</sup> But in response to this ruling, as Terry pointed out, Congress reversed the court by including binding conditioning authority for NMFS in the Electric Consumer Protection Act of 1986.<sup>10</sup>

With respect to the Winchester project, we are now back on remand before FERC, where we have been since about January 1, 1986. Recently, FERC finally figured out it had to plod through the environmental analysis process to satisfy the court's order. As a result, it asked 17 questions of the developer on potential project impacts. The last of that information was filed last week (March 1987), consisting of documents about 2-1/2 inches thick. We now have 45 days to respond, then we will be off and running again in FERC's adjudicatory process.

What's really happening is that FERC is now doing an EA. We hope to convince it to do a full environmental impact statement (EIS). Note that this is for a project that has already been constructed and ran for 2 years. This raises a number of unique questions. When the project was running, it was always running at half speed or less because, when it ran at full speed, it inhaled fish. Mind you, this is a project exempted from licensing, supposedly a "clean" project. And the project was subjected to the terms and conditions of the federal and state fish agencies: Those conditions are supposed "to prevent the loss of or damage to" fish and wildlife resources, the standard for issuing an exemption.<sup>11</sup>

So we have an exempted project that's eating fish, and the state agency that polices the project (with the help of my clients who were policing the policemen), turned the screws on the project when it started inhaling too many fish. The result was that it never ran at more than about 50% of capacity. Thus, the 1.5 megawatt project is really now down to about a .7 megawatt project. Moreover, during about half of the 2-year period, the project didn't run at

all, because it was being retrofitted with devices to stop major fish disasters. Since FERC did neither an EA nor an EIS, it really had no idea what was going to happen when the project started running and it started eating fish.

The project had been reviewed by 3 fishery agencies: the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service, and the Oregon Department of Fish and Wildlife (ODFW). Each of those agencies imposed terms and conditions it thought necessary to prevent fish loss. ODFW submitted 44 conditions, about 6 pages, single spaced. NMFS imposed 12 conditions. The U.S. Fish and Wildlife had 21 conditions, but those mostly just incorporated the other agencies' conditions.

Altogether, there were about 60 or 70 conditions, yet these conditions just didn't cover the risks that actually occurred. For example, adult fish migrating back to spawn swam up the tailrace of the turbines into the turbines and had their vertebrae broken. That problem was discovered by my clients who saw an unusually high number of carcasses showing up downstream. This massive carnage went undiscovered until then because nobody was looking for this sort of problem. So the project had to be shut down while bar grates across the turbines were installed. This kind of problem was never examined by FERC and was overlooked by the fishery agencies. We had to find out about it the hard way.

When I look at my crystal ball and try to predict what's going to happen at FERC, I think the agency is going to go ahead and reissue the exemption for the project. We have a number of legal arguments but, as Terry said, FERC is disposed to approving hydropower projects, especially ones already built. I sense too that we are going to wind up with the same sort of terms and conditions from the fishery agencies. But I'm wondering whether, in light of the 2-year operational experience with the project, those conditions are going to be sufficient to avoid doing a full EIS on the project.

In theory, you can mitigate the severity of adverse impacts below the threshold level of an EIS through these terms and conditions. But based on the Winchester experience, I suggest those terms and conditions deserve a hard, long, slow look because it's really those conditions that determine what kind of impacts the project will have. For example, are the conditions specific enough? Or, do they simply call for a fishery agency to take a more careful look at the project after it is built and formulate specific standards somewhere down the road? In the Winchester case, a number of ODFW conditions required the developer to design and construct the project according to ODFW's standards.<sup>12</sup> But the conditions didn't spell out what those standards were. Well, when you argue to a court about whether an EIS needs to be done, it seems

8. *Id.* at 1394.

9. *Id.* at 1388-89.

10. 16 U.S.C. § 803(j).

11. See 16 U.S.C. § 2705(d), making licensing exemptions subject to the provisions of 16 U.S.C. §§ 823a(c)(1) (fish and wildlife conditioning authority).

12. See Winchester Dam Lessons, above note 1, at 599-600 n.70.

to me that these conditions aren't really conditions at all. They're simply promises to adopt conditions later, so they shouldn't count towards mitigating the risks below the threshold level for an EIS.

Another question to ask is: Are the conditions self-enforcing? Or do they depend on the effectiveness of a fishery agency to monitor the project closely, then drop the hammer if something is out of kilter? If the conditions aren't self-enforcing and rely on another agency to do something in the future, what's the guarantee that that agency is going to stay alert to changed conditions?

With Winchester, ODFW was supposed to have a full-time monitoring program the day the project started. Well, it took a month-and-a-half before ODFW showed up. Not until my clients started making a lot of noise did ODFW begin to monitor the project. When ODFW finally shut down the project and dried up the pen stocks to inspect it, we found 1,000 chinook fry beached on the screens. At that point, they said "gee, this isn't good," so they turned the power down. It never operated at more than half power after that. But somebody has to be on site watching. What's the assurance they're going to be there? What's the assurance that they are going to continue to monitor and enforce with vigor? The Winchester project's answers to those questions suggest that perhaps the fishery conditions don't always mitigate project risks to the point where an EIS on the project is unnecessary.

Another problem we encountered on this particular project had to do with the nature of the fishery conditions themselves. They really didn't include objective standards. Kather, they involved judgment calls by the fishery agencies. A condition that says this project shall shut down if it kills more than 50 fry is an objective standard. But the Winchester conditions usually read something like: if ODFW "reasonably" determines that fish loss exceeds an "appropriate" level, the project will be shut down.<sup>13</sup> Conditions like this invite everybody to argue about whether ODFW has made a "reasonable" determination, or whether 50 dead fry amounts to an "appropriate" level. In my opinion, such a condition is completely unenforceable, and this is the kind of condition you want to tell the court is not going to reduce risks to the resource.

All these suggestions are basically the kind of arguments that I expect to have to make again to the Ninth Circuit when FERC reissues this exemption. In the first Winchester decision, the court remanded to FERC for failing to comply with the rudiments of NEPA, such as failing to do an EA. However, the court also included some good language about our other allegations as to the adequacy of the conditions,<sup>14</sup> so I think we'll see all these issues again. For example,

13. *Id.*

14. The Steamboaters, 759 F.2d at 1394.

one of the NMFS conditions was: if this project in fact kills fish, the project must shut down and go through the full licensing process.<sup>15</sup> Assuming NMFS leaves its conditions intact, and the project continues to seek an exemption, does it still qualify for an exemption? I'm going to argue it doesn't because it's the same project that has a history of killing fish. I don't think it can possibly comply with this condition on the basis of its track record.

I'm also going to raise the "need for power" argument that Terry mentioned. I hadn't really thought about that in the context of a nonconduit exemption. The project operator does have a power sale agreement executed in 1982, but there is a power sale agreement only because PURPA requires the local utility to buy the power of exempted projects,<sup>16</sup> not because there's any need for that power.

I want to say a couple of words about the relationship between the federal litigation and the state litigation on these kinds of projects. Winchester has been through a lot of different state and federal approvals. We've been through the state water permitting process; every FERC project also has to stop at the state for a state water appropriation permit or a state hydropower license.<sup>17</sup> I've been involved, directly or indirectly, in 3 state proceedings for hydropower licenses or appropriation permits, and they've proved very disappointing. The state's standards for issuing these permits or licenses are extremely broad.<sup>18</sup> The situation has now been improved somewhat with the passage of House Bill 2990 in the 1985 Oregon legislature, but even under that bill -- which sets more rigorous standards for issuing permits and licenses for projects on anadromous fish rivers<sup>19</sup> -- if the state agency decides to issue the permit, it's really tough to have that decision reversed in court because the state agency has so much discretion to decide whether to issue the authorization.

However, the state water permit proceeding serves as a good vehicle for discovery and to identify issues that can later be developed further in subsequent federal proceedings. In my experience, the developer will typically go to the state first to get its state permits, then make its application to FERC, claiming that things are pretty well under control at the state level. So you really must walk through a lot of the state procedure before you hit the

15. See Winchester Dam Lessons, above note 1, at 600 n.71.

16. 16 U.S.C. §§ 824a-3(d); see Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 *Harv. Envtl. L. Rev.* 1, 8-12 (1986).

17. See Winchester Dam Lessons, above note 1, at 592-93.

18. See Or. Rev. Stat. § 537.170(5); see also Winchester Dam Lessons, above note 1, at 592-93 n.38 and accompanying text.

19. Or. Rev. Stat. § 543.017.

federal level. In Winchester, and also in the Deschutes and Mill Creek cases I have been involved in, the state proceeding produced disappointing results. But even though the state seems to be in a "let's approve this and get it done with" mode, the state process helps identify issues that can be developed later in the federal proceedings.

I'll close by noting that there is new hope for successful litigants who seek attorneys fees from FERC. The District of Columbia Circuit recently ruled that FERC is not prohibited by its language in its appropriations act from paying judgments for attorneys fees under the Equal Access to Justice Act (EAJA).<sup>20</sup> In recent years, several litigants with judgments against FERC under the EAJA were frustrated by FERC's refusal to pay the awards. Following the D.C. Circuit's ruling, FERC has begun paying the judgments. So this is good news for fishery advocates who successfully challenge FERC decisions.

### The Rock Island Dam Settlement

by

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I want to discuss the Rock Island Dam settlement. I learned some painful lessons in my first 2 FERC projects that proceeded to settlement. One was on the Middle Fork of the Hood River. We had worked out an agreement with the applicant whereby the applicant would (1) allow the National Marine Fishery Service (NMFS) to establish terms and conditions for the project, and (2) consult with the Columbia River Inter-Tribal Fish Commission and the Warm Springs Tribe after the issuance of the exemption. The applicant agreed; we agreed. The agreement hardly imposed an onerous burden on FERC. We submitted the proposal to FERC as an uncontested offer of settlement. FERC rejected it.<sup>1</sup> We were flabbergasted. Fortunately, the applicant has agreed to continue to work with us as if the agreement was accepted by FERC under the theory that we have a contract. We probably should have sued FERC, but we didn't.

The second settlement involved a small project in Idaho, where the U.S. Fish and Wildlife Service and the Idaho Department of Fish and Game essentially had already established terms and conditions for the project. The parties in that proceeding were the National Wildlife Federation and the Nez Perce Tribe.<sup>2</sup> In those

negotiations, learning from past experience, we involved FERC staff intimately in the negotiations to make sure whatever we came up with would be acceptable to FERC. I'm convinced that by involving FERC, we doubled the length of time it took to reach settlement because of various jurisdictional issues and FERC's unwillingness to accept conditions that the applicant was willing to accept. While that settlement worked out better than the Middle Fork settlement, I'm not sure that fully involving FERC in settlement discussions is the best idea. In my experience, parties submitting offers of settlement before FERC would be well-advised to consider including a provision making all terms of the agreement expressly contingent upon acceptance by FERC without material modification.

Building on those 2 experiences, both involving small exemption projects, I'd like to explain how we've dealt with a much larger project on the mainstem Columbia River, the Rock Island Dam.<sup>3</sup> The Rock Island settlement discussions proceeded differently because we worked directly with the utilities that own, operate, and purchase power from the dam. We now have something that seems acceptable to both sides in the form of a final draft settlement,<sup>4</sup> and we are jointly taking that to FERC and asking that the settlement be approved as a condition of Rock Island's license.

Rock Island Dam is located on the mainstem Columbia River, below areas accessible to anadromous fish in the Similkameen and Wenatchee River systems in the state of Washington. Those river systems produce significant amounts of summer chinook, spring chinook, sockeye, and steelhead. Initially licensed by the old Federal Power Commission in 1929, construction was completed at Rock Island by 1933. The 1929 license expired in 1979 and, the operator, Chelan County Public Utility District (PUD) sought a new license. FERC issued a 30-year license to Chelan PUD in 1981, prompting the National Wildlife Federation, the Yakima Indian Tribe, the Washington Department of Fisheries, and NMFS to file suit. The suit alleged, among other things, that FERC should have prepared an environmental impact statement (EIS) before issuing the license. We also wanted FERC to determine final fishery mitigation for that project prior to issuing the license. As Terry mentioned, the Ninth Circuit agreed with us and told FERC to write an EIS and develop final fishery mitigation before relicensing the project.<sup>5</sup>

settlement.

3. See generally Bodi, FERC's Mid-Columbia Proceeding: Ten Years and Still Counting, 16 *Env't. L.* 555, 572-77 (1986).

4. Rock Island Project Settlement Agreement, Public Utility Dist. No. 1 of Chelan County, Wash., Docket Nos. E-9569 et al. (Apr. 24, 1987) [hereinafter Settlement Agreement].

5. Confederated Tribes and Bands of the Yakima Indian Nation, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985).

20. Electrical Dist. No. 1 v. FERC, 813 F.2d 1246 (D.C. Cir. 1987).

1. Middle Fork Irrigation Dist., 30 FERC ¶ 61,258 (1985).

2. National Wildlife Federation v. FERC, No. 86-7202 (9th Cir. 1986) (petition for review of 34 FERC ¶ 61,205). The parties jointly moved to dismiss in 1986 after they reached a

At the same time that litigation was taking place, a separate case was proceeding through FERC administrative hearings.<sup>6</sup> This case, commonly known as the "Mid-Columbia Proceeding," involved all 5 FERC-licensed dams on the mid-Columbia, none of which have fish screens or mechanical bypass systems.<sup>7</sup> Those administrative proceedings sought to establish interim fishery protection, leading towards final determination of mitigation for all 5 dams. Those proceedings began in 1979, and, during their course, 2 interim settlements were reached by the parties.<sup>8</sup> In 1984-1985, we reached a second interim settlement for 4 of the dams, but not for Rock Island Dam.<sup>9</sup> Chelan County PUD maintained that its unscreened turbines didn't kill many fish. Of course, we disagreed. They wanted to go through formal adjudication on the issue, so we went through about 6 weeks of extensive hearings, 3 weeks in the Northwest and 3 weeks in Washington, D.C. Those hearings produced an administrative order in which we won on some issues and the PUD won on some issues.<sup>10</sup> One of the things we won was a directive to the PUD that it had to continue development of a mechanical bypass system for that project. Just after the administrative law judge issued the order, both sides filed appeals, and both essentially began settlement discussions.

I should acquaint you a little with the specific problems at Rock Island Dam. The project spans the river with two powerhouses and a spillway in the middle. The problem the tribes and fishery agencies were most concerned about was downstream passage of juvenile anadromous fish. At the first powerhouse, we estimated that about 15% of the fish passing through its power turbines perish. Perhaps more. We also estimated that about 11% of the fish at the second powerhouse perish. The PUD alleged that the figure was about 4% and claimed that level of mortality didn't necessitate the installation of a bypass system. To avoid the turbine mortalities, we requested that the PUD spill water over the spillway, where the mortalities are

much lower, during heavy periods of juvenile fish migrations. Until a suitable bypass system was developed, we wanted the PUD to spill roughly 68% of the river's flow over the spillway during the evening hours of the spring migration, the April-May period when most of the fish pass downstream. Spills of this magnitude would mean that roughly 40% to 50% of the fish passing by the project avoid the unscreened power turbines.

At the conclusion of hearings and after the submission of briefs, the administrative law judge ordered the PUD to develop a bypass system consisting of several components.<sup>11</sup> The most expensive component is probably the screen that sits on the turbine intake of the project and flushes downstream traveling fish into gatewell intakes and then into a channel going around the dam. The fish then exit on the lower side. The PUD appealed that portion of the judge's order. We appealed portions of the order establishing interim spill provisions.<sup>12</sup> We didn't think we got enough spill; the PUD didn't think it should have to build a bypass system.

What we ended up with in the proposed settlement is (1) installation of a bypass system, assuming certain conditions are met,<sup>13</sup> (2) provision of interim spill until the bypass system is completed,<sup>14</sup> (3) construction of a major new hatchery in the mid-Columbia,<sup>15</sup> and (4) expeditious dispute resolution proceedings, including an agreement that we would hold our appeals in abeyance.<sup>16</sup>

The agreement is unique in that it establishes what we call a "conservation account," which may be triggered at the option of the fishery agencies and tribes.<sup>17</sup> The conservation account is not actually money, it is a credit account established by the PUD for the agencies and tribes to purchase spill and studies leading to installation of a bypass system. Bypass systems on the two powerhouses are to be installed by 1992 and 1994. Those of you familiar with the Columbia Basin Fish and Wildlife program will note that those dates more or less follow what the Council has established as schedules for other dams on the river.<sup>18</sup>

The conservation account, as I said, can be used for bypass studies, installation and spill. Until the conservation account is triggered by the agencies and tribes, the PUD pays for the studies. The account can be triggered at any

6. Public Utility Dist. No. 2 of Grant County, Wash., Public Utility Dist. No. 1 of Chelan County, Wash., Public Utility Dist. No. 1 of Douglas County, Wash., State of Washington Department of Fisheries v. Public Utility Dist. No. 2 of Grant County, Wash., Docket No. E-9569 [hereinafter Mid-Columbia Proceeding].

7. The 5 dams, located below Grand Coulee and Chief Joseph Dams are: (1) Wells Dam, operated by Douglas PUD; (2) Rocky Reach Dam, operated by Chelan PUD; (3) Rock Island Dam, operated by Chelan PUD; and (4) Wanapum and Priest Rapids Dams, operated by Grant County PUD. See Bodi, above note 3, at 557-58.

8. See Bodi, above note 3, at 562-65.

9. *Id.* at 572-73.

10. Public Utility Dist. No. 1 of Chelan County, 34 FERC ¶ 63,044 (1986).

11. *Id.*

12. Joint Fishery Parties Brief on Exceptions, Mid-Columbia Proceeding, above note 6 (Apr. 1, 1986).

13. Settlement Agreement, above note 4, at § B.

14. *Id.* § D.

15. *Id.* § E.

16. *Id.* § A-6.

17. *Id.* § C.

18. See Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program, as amended, § 1500, Action Item 32 (1987).

time at the discretion of the tribes and fishery agencies. It then begins to pay for the studies. Otherwise, the utility is obligated to provide both spill and bypass studies. The fishery agencies and tribes would trigger the conservation account only if we felt we would secure a better deal than what we already negotiated in the way of spill and bypass studies.

Additionally, under the draft settlement, we have a guaranteed spill of 20% of the daily average flow at the project.<sup>19</sup> The agreement also provides summer spill for migrants that pass the river during the summer months,<sup>20</sup> principally summer and fall chinook. This issue was one of those that sent us into adjudication in the first place.

We also will get 250,000 pounds of hatchery fish.<sup>21</sup> The FERC administrative law judge specifically ordered the PUD to protect the genetics of the Columbia fish in its hatchery supplementation.<sup>22</sup> Protecting genetic integrity is certainly a major concern (the same concern is reflected in Oregon House Bill 2990), and substitution of hatchery fish for the loss of wild and natural production is not the intent of the agreement. Nonetheless, we have already lost 50 years of wild and natural production due to Rock Island Dam impacts. We hope to recoup some of that lost production with proper use of this hatchery. The Rock Island hatchery program will be different than many of the hatchery programs that we've seen in the past. It will separate individual stocks from the individual tributaries, keep those stocks separate throughout their residency in the hatchery, and then put them back into tributaries where they originated, so that they can come back and spawn naturally in the tributaries. These efforts will be coupled with an intensive monitoring effort structured to detect any changes in key traits of the salmon stocks.<sup>23</sup>

Provisions in the draft settlement also provide for increasing efficiency of adult fish ladders.<sup>24</sup> This will entail modifications at two of the ladders to improve flow conditions at each.

An extremely important provision establishes a dispute resolution process. Under the process, outlined by the agreement, the determination of the administrative law judge will be binding pending appeal for those issues where the differences between the parties amount to less than \$325,000.<sup>25</sup> This has been a real problem for us in the past. Whenever we've received a favorable ruling from the judge, the

PUD appeals and, under FERC's rules of procedure, any exceptions or appeals automatically stay the judge's order. So the utility always appeals, the fish migrate, and we don't get the relief we sought. The draft settlement agreement would give us an opportunity to obtain relief pending appeal so we could, for instance, protect spring outmigrations despite objections by the PUD. Consequently, we won't have the PUD dictating, in the event of a dispute, the sort of protection to be provided.

The draft settlement will be essentially a 13-year agreement.<sup>26</sup> In return, we will agree to waive fishery claims for a period from 1979 to the year 2000.<sup>27</sup> We will also agree to support the issuance of a new license by FERC.<sup>28</sup> The draft settlement is now back before FERC. We've explained it to the staff, asking that they consider it while the parties are giving it their final approval. FERC has informally expressed some concerns about making this 50-page settlement a condition of the license, despite agreement between the PUD and the fishery parties on this matter. Ironically, while we won the requirement for an environmental impact statement in the Yakima Indian Nation case,<sup>29</sup> FERC is now saying that the EIS it must do will "consider" the settlement as an alternative, but it might not be the alternative it chooses for fishery conditions in the new license.

FERC's position puts us in an interesting situation. From my perspective, I'd just as soon they didn't do the EIS, if instead they simply approved the settlement agreement. FERC's position appears to have the PUD very concerned, maybe more so than we are. Chelan PUD basically told FERC that if it changed one word or one comma in the draft agreement, we might all go back to war again.

Although I'm not really concerned if FERC writes an EIS, I don't want the settlement disrupted. I think FERC is willing to write an EIS, but the FERC staff doesn't like having parties out in the Northwest develop a settlement agreement, in which they weren't involved, which looks reasonable. We didn't involve FERC in each step of the settlement negotiations for the Rock Island project, and I think the settlement discussions went much more smoothly because of that. Now that we have something which is a pretty decent package, FERC doesn't like being confronted with a yes or no decision. Well, I should note that some people might not consider negotiations lasting for a year-and-a-half, including countless meetings, as "going smoothly." Even if the negotiations were time-consuming, I think we reached a settlement that, if adopted,

19. Settlement Agreement, above note 4, at § D.2(a).

20. Id. §§ D.2(b)-(c).

21. Id. § E.3(a).

22. Public Utility Dist. No. 1 of Chelan County, 34 FERC ¶ 63,044 (1986).

23. Settlement Agreement, above note 4, at § E.4(c).

24. Id. § F.

25. Id. §§ A.6(b), (d).

26. Id. § A.3. The duration of the settlement will be coextensive with the term of the Rock Island license. However, after a period of 13 years, the parties may reopen the fisheries provisions of the agreement and license.

27. Id. § A.8.

28. Id. § A.2.

29. 746 F.2d at 475.

may prove to be a useful model in other FERC projects in other areas of the basin and perhaps in other regions of the country.

### Question and Answer Session

Moderator. We will now open the discussion to questions from the audience, although before we do, one panel member has a question for another member of the panel.

#### Professor Blumm

I have a comment and a question for Bill Kloos. Both relate to FERC and NEPA. The comment is: I thought one of the most significant holdings of The Steamboaters case is what the Ninth Circuit said about the threshold standards for Environmental Assessments and EISs. The court said that an EA must supply a "convincing statement" that there will be no significant adverse effects.<sup>1</sup> The court also said that the agency had to demonstrate that it took a hard look at the evidence and, if "substantial questions" are raised by commenting agencies, the lead agency may have to do an EIS.<sup>2</sup> In my mind, what The Steamboaters stands for is if, for example, the Oregon Department of Fish and Wildlife raises questions in its comments to FERC, you probably have "substantial questions about whether or not there are significant effects," so an EIS would be required, at least in the Ninth Circuit. If a project has an administrative record that shows institutional disagreement, especially with agencies of expertise like fish and wildlife agencies, the burden would be on FERC to show there are no "significant effects." In such a situation I think a group like The Steamboaters can stop a project, maybe not forever, but probably long enough to make it economically impracticable. The lesson from The Steamboaters case, it seems to me, is the critical importance of getting fish and wildlife agencies to write comments that raise questions, because those comments may prove very useful later on.

My question is: Didn't Elektra Power breach its agreement with Pacific Power and Light (PP&L) at some point by not delivering the power as promised?

#### Bill Kloos

That question has come up in all FERC cases I mentioned. All these agreements read a little differently but they basically require the developer to be delivering a certain amount of power on a certain date and, once the developer starts delivering power, it must deliver at least a minimum amount each year thereafter. In both Winchester and the Deschutes project, the developers missed the date set in their agreements.

In the Winchester case, my clients went to

the local PP&L official and said "hey, what are you doing here? You are promising to pay 7¢ per kilowatt for power that nobody needs, and Elektra is in breach of the contract. At least renegotiate the contract. Bring it down to average system cost," which might be like 3¢ or so. If PP&L were to renegotiate the contract, project revenues might be cut by about 60%. The project, which is marginal now, would be economically infeasible. The ratepayers would be the winners. I think PP&L's attitude is that it doesn't want to appear to be coming down hard on these little projects. My clients responded by noting that such an attitude would give PP&L a bad reputation among the fishery community and its own ratepayers, because it's making possible a project that's inhaling fish and generating electricity we don't need. Nevertheless, PP&L essentially treats court injunctions as "acts of God," not causes for rescinding bad deals.

#### Question

There is a bill now in the Washington State Legislature that would establish a basin planning process in that state. Here we have a federal agency, FERC, that is so bad that we must create new regulatory programs in the states to overcome its insensitivity to river resources. Terry, do you think expanded state authority over hydropower siting is a good idea, or are there alternatives to that?

#### Terry Thatcher

I think you have put your finger on a dilemma that the environmental community has faced ever since we started talking about FERC's problems. No one has fully answered it yet. For awhile, it looked like Maine was enlightened enough to develop a comprehensive river basins plan that could effectively reign in FERC. As a comprehensive plan, Maine's plan looked real promising. Well, there has been a recent change of governors in Maine. Not long ago, I attended a conference in Washington, D.C., where the new hydropower regulator for Maine announced that Maine was "open for business" again.

Reliance exclusively on state planning has been a real concern for all of us. For example, it worries me that in Oregon the state's Water Resources Commission is the only agency that has attempted basinwide planning. I'm not at all sure that agency has the biological or land management expertise to develop adequate comprehensive plans. I still believe that FERC must have a comprehensive plan before it licenses projects.<sup>3</sup> But can you imagine what a comprehensive plan developed by FERC would look like?

My feeling has always been that a court could shut down FERC's licensing process for failure to promulgate comprehensive plans. In the Northwest, FERC would essentially be forced to adopt the Northwest Power Planning Council's plan. That plan calls for conservation as the priority resource and promises careful hydro-

1. The Steamboaters v. FERC, 459 F.2d 1382, 1393 (9th Cir. 1985).

2. Id. at 1392.

3. See 16 U.S.C. § 803(a).



power assessments like the ongoing program to rank rivers in the region.<sup>4</sup> If FERC were to adopt the Council's plan as the comprehensive plan that the Federal Power Act has long called for, we certainly would be better off in the Northwest.

Nationally, I don't know that the states have the experience or expertise to do what FERC cannot do. The only way it might work would be pursuant to state statute calling for the kind of planning the Northwest Power Planning Council has done on conservation, coupled with basinwide planning promising to rank hydropower sites and place restrictions on sites that don't rank high. But the typical kind of state statute, replete with New Deal faith in agency expertise -- simply calling for a state agency to go out and do good -- won't get the job done. Incidentally, the state of Oregon retains the New Deal model to a surprising degree for a state in which so many citizens claim to distrust bureaucrats of all sorts.

#### Question

I want to change the subject a bit. I'm interested in riparian management issues. I've been involved in a lot of land use litigation in Lane County, which has turned on the question of building setbacks for preserving more riparian vegetation along the McKenzie River. It's really sort of a small scale, local version of the arguments going on in the state legislature right now concerning the proposed amendments to the Forest Practices Act. What other riparian protection initiatives are underway?

#### Terry Thatcher

Well, in Oregon there is, of course, the riparian tax credit program that supplies tax breaks for those who implement sound riparian management practices. The National Forest Management Act promises at least a planning process that must consider riparian protection. The Forest Service regulations talk about riparian habitat protection, some of what they say isn't bad, but what the Forest Service does in its actual forest plans is different. The Fish Law Memo recently analyzed riparian management issues on Bureau of Land Management lands.<sup>5</sup>

In the state of Washington, the Indian tribes and the environmental community have recently reached a draft agreement with the timber industry to propose some changes in Washington's stream protection regulations. Washington also has a Hydraulics Act, administered by the Washington Department of Ecology, requiring permits for instream withdrawals, irrigation withdraw-

4. See Northwest Power Planning Council, Northwest Conservation and Electric Power Plan, as amended at 9-25 (1986).

5. Braun, Livestock Grazing in Riparian Zones: Ensuring Fishery Protection in Rangeland Management, Memo #37 (Oct. 1986).

als, or fills, activities like that.

At the local level in Oregon, all counties need to have their land use plans "acknowledged" by the Department of Land Conservation and Development and plans must have some riparian setbacks for riparian vegetation, but I think there are big holes in the system. For example, a lot of local plans don't even define the term "riparian vegetation."

#### Question

I have a comment and a question. I think Terry is very right to suggest that one of the problems of the Intertie going forward now is related to the concern that the surplus power situation in the Northwest makes this the best time to secure adequate fish protection from mainstem dams. After the Intertie expands, it will be more difficult, particularly in terms of refuting the inevitable BPA cost analyses.

My question has to do with uncertainty. It is simply amazing what we don't know about migrating salmon and steelhead. We do know we have problems with the upriver wild stocks, but we don't really know whether some of the measures in the Columbia Basin Program that have been implemented are going to allow these wild stocks to sustain themselves over the long term. I guess the question for John is: how does the Council deal with proposed fish and wildlife measures when there is this great uncertainty over the precise benefits that will be produced?

#### John Volkman

Well, there are different schools of thought on that. We have 8 Council members and, while there are some people who hold common views on the Council, there isn't a single view. One theory is that what we should be doing is taking risks, not pretending that we're ever going to know enough about the biology of fish or the economics of the power system to write out a formula that will give us answers. Under this theory, we should take risks. We should understand that we're taking risks and build in ways of quickly assessing results so that the next time we take a risk, maybe we've narrowed the range of uncertainty.<sup>6</sup> This learn-by-doing theory reduces the historically high burden of proof placed on fish.

Another school of thought is that, since we are spending ratepayer money, we want to look very carefully at the data we have; we want to run all kinds of computer models and understand now what the data tell us. In other words, until we have a certain threshold of data, we aren't going to take risks to restore the resource.<sup>7</sup> Which way the Council is going on

6. See generally Lee & Lawrence, Adaptive Management: Learning from the Columbia River Basin Fish and Wildlife Program, 16 Env'tl. 461 (1986).

7. See Godard, A Strategy for Enhancing Columbia River Salmon and Steelhead Runs, Memo cont.)

any given issue, it seems to me, is anyone's guess.

Question

I want to direct a question to Mr. Volkman and Professor Blumm. I don't fundamentally disagree with the notion that the Council ought to be going further than what they think they can develop a consensus position on. But as a political matter, my question is: is that possible? What we've got is an agency with essentially no power, except over BPA acquisitions. Let's say the Council directed the Corps of Engineers to achieve 96% survival, or 40% spill at every dam, which I would like to see it do. What would the Council do? Where is the Council's political base, particularly now that Dan Evans is gone?

Professor Blumm

Well, it's true that Dan Evans is no longer on the Council, but Dan Evans isn't gone.<sup>8</sup> If the Council began to think of itself as an advocate for fish and promulgated a 96% survival standard, maybe Senator Evans would help the Corps of Engineers see the wisdom of such a standard. I do not know how the Council would do against the Corps in court. I am sure it could require the Corps to begin to develop written records for their decisions. But perhaps the Corps could ultimately reject a fish protective standard. But that doesn't end the issue. I think such a court decision might prompt congressional action. Maybe it's time to write some enforcement language in the Northwest Power Act. What we have now doesn't seem to be working.

John Volkman

You don't really mean to suggest that there hasn't been any progress made under the Northwest Power Act?

Professor Blumm

No, I'm not saying progress hasn't been made. But the promise that the Act held is being left in some large measure unfulfilled -- I don't know whether it's 25% or 50% unfulfilled. I do know that if it remains unfulfilled for the next couple of years, it's never going to get fulfilled. The Act has been around for 7 years, the plans it spawned for 5. The Council is not going to suddenly do great fish and wildlife things once we consume the power surplus. The Council has to move while we're in surplus. The Council seems to think that because of the problems a surplus poses for BPA's revenues, we cannot afford to be too protective of juvenile migrants in the mainstem. If we cannot be protective in a surplus, we certainly aren't going to be able to afford to do so in times of shortage. You begin to wonder when we ever will be able to afford it.

While I don't discount the possibilities of some judicial enforcement of Council directives, particularly if the Council were joined by an Indian tribe asserting its fishing rights, perhaps it's time for some congressional oversight of Northwest Power Act implementation. I do think there's a strong political base out there for fish protection. I think that the utilities and BPA know there is. Every time people have gone out and asked the guy on the street, "would you pay more money for fish protection?" He says, "yes." If it becomes a political battle between the fish and wildlife community against the utility community, and the fish and wildlife community is halfway intelligent, the utilities know they'll lose.

John Volkman

When the Council was first getting started and the program was being developed, I am told that Council meetings had hundreds of people attending. I've read some of the transcripts of those meetings. Elders of Indian tribes talked about what salmon meant in real terms to them. There were lots of people from many organizations talking about these issues as though they really mattered. But you go to a Council meeting now, and all too often, there are 15 people there, one of whom is somebody advocating nuclear-powered fish screens.

The people just aren't there now. Maybe that's part of the Council's problem. But part of it is your problem, the public's problem. If the public were reinvigorated, I believe that would change the tone of the Council's work. The Council is a responsive organization. If the people attend and say things that make sense, Council members do think about these issues and try to generate solutions. In fact, I think the Corps of Engineers, surprisingly, is also politically responsive. If there is a groundswell of public feeling on an issue, the Corps is certainly not impervious to that groundswell.

The lack of public participation is a problem. I don't know if either litigation or congressional oversight will provide solutions. I guess congressional oversight doesn't necessarily lead to amending the Act, but if you ever start talking about amending the Act, you run the same sorts of risks that people worry about over amending the Constitution. You can lose ground as well as gain ground. So, I don't know about a congressional solution. I do know that the whole process would benefit if more people were involved.

Moderator. Our time is up. Thank you for a most enlightening discussion.

<sup>8</sup> See, e.g., Evans, Toward the Return of Pacific Salmon and Steelhead, 16 Env'tl. L. 359 (1986).

### Salmon Law Symposia

Environmental Law, the law journal of Lewis and Clark Law School and the Idaho Law Review have recently published entire issues devoted to salmon law. Volume 16, issue 3 of Environmental Law contains 14 articles and is available for \$8.00 from Environmental Law, Lewis and Clark Law School, 10015 S.W. Terwilliger Blvd., Portland, OR 97219 (503) 244-1181. Volume 22, issue 3 of the Idaho Law Review contains 7 articles and is available for \$7.50 from Idaho Law Review, University of Idaho, College of Law, Moscow, ID 83843 (208) 885-7241.

Below is a list of articles and authors.

#### 16 Envtl. L. no. 3 (1986)

- Salmon Is King - Or Is It? (John V. Byrne)
- Toward the Return of Pacific Salmon and Steelhead (Senator Dan Evans)
- The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview (Thomas C. Jensen)
- United States-Canada Salmon Treaty Negotiations: The Alaskan Perspective (Senator Ted Stevens)
- Adaptive Management: Learning from the Columbia River Basin Fish and Wildlife Program (Kai N. Lee and Jody Lawrence)
- Reexamining the Parity Promise: More Challenges than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program (Michael C. Blumm)
- The Misplaced Role of Cost-Benefit Analysis in Columbia Basin Fishery Mitigation (Robert C. Lothrop)
- FERC's Mid-Columbia Proceeding: Ten Years and Still Counting (F. Lorraine Bodi)
- Small Scale Hydropower and Anadromous Fish: Lessons and Questions from the Winchester Dam Controversy (Michael C. Blumm and Bill Kloos)
- Reviving the Federal Power Act's Comprehensive Plan Requirement: A History of Neglect and Prospects for the Future (D.H. Cole)
- Cumulative Impacts of Hydropower Development Under NEPA (David K. Eckberg)
- The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish (Penny H. Harrison)
- Salmon Interception on the High Seas: A Continuing Controversy Between the United States and Japan (Constance Sathre)

#### And a Postscript

- Chicken Law in an Eggshell: Part III--A Dissenting Note (James L. Huffman)

#### 22 Idaho L. Rev. no. 3 (1986)

- Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context (Dale D. Goble)
- Indiscreet Regulation of Indiscrete Sources: The Idaho Water Quality Standards and Control of Sediment Impacts on Salmon and Steelhead Spawning and Rearing Habitat (John J. Hockberger)
- Adequacy of FERC's Cluster Impact Assessment Procedure (Allen H. Sanders)
- The Role of States and Federal Agencies in Conditioning FERC Licenses (Scott W. Reed)
- The Last Salmon Ceremony: Implementing the Columbia River Basin Fish and Wildlife Program (Ed Chaney)
- The Legal Standards for Allocating the Fisheries Resource (Mason D. Morisset)
- Why Study Pacific Salmon Law? (Michael C. Blumm)

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