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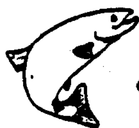

Anadromous Fish Law Memo

Issue 5 December 1979

THE COLUMBIA RIVER CONFERENCE: A SYNOPSIS

This issue of the Anadromous Fish Law Memo is devoted to a summation of the Columbia River Conference held at Lewis and Clark on November 9-10, 1979. The Conference, sponsored by the school's law review, Environmental Law, was made possible by a grant from the U.S. Department of Health, Education, and Welfare.

The purpose of the Conference was to encourage discussion and increase understanding of issues related to the conservation and wise use of the Columbia Basin's water resources. The Conference included 5 discussion panels comprised of 21 different speakers; the panels addressed a variety of issues of considerable importance to the future of the Pacific Northwest. Although an estimated 300 people attended the Conference sessions, we believe that a synopsis of the subjects discussed will prove valuable to the readers of the Anadromous Fish Law Memo, who number many times 300.

It should be noted that, in addition to this summary, the detailed papers presented at the Conference will be published by Environmental Law this spring. Information as to how to obtain copies is provided in this issue.

I. Lower Columbia River Panel

The Conference's initial panel addressed the general question of how anticipated growth along the lower Columbia should be planned and controlled, and also identified some of the trade-offs that must be made in accommodating such growth. Participants included attorney Joel Haggard, who discussed the interaction of legal and political decision-making in Columbia River controversies; economist Michael Martin, who addressed the benefits and costs of navigation; biologist Bob Moulton, who examined the value of estuary protection; coastal planner Neil Coenen, who discussed the relation of coastal zone management plans to the lower Columbia; and attorney John Breiling, who described some activities of the Corps of Engineers on the lower Columbia.

Joel Haggard emphasized that the demand for water for fish, power, and irrigation is steadily increasing, and that existing water supplies are not adequate to meet the expected instream and consumptive uses. He suggested that, rather than relying on the courts or on Congress to resolve future disputes as they arise, a comprehensive, integrated approach to resolving the Region's water use problems could be

Inside: "Fish Law Briefs" on Washington Supreme Court Decision Affirming State's Authority to Implement the Boldt Decision; Pending Federal Legislation Concerning Fisheries and Energy "Fast Track"; FERC Settlements Update; GAO Critique of Fisheries Enforcement; Potential Changes to Oregon's Fishery Management Plan and Minimum Flow Law; California and Yakima-initiated Litigation.

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pursued through an interstate compact. Mr. Haggard acknowledged that the choice of a decision-making system is necessarily a political choice that must be made by the states and by the federal government.

Michael Martin discussed the economic aspects of navigation on the lower Columbia, and identified the principal financial supporters and beneficiaries of navigation projects. Dr. Martin also noted that the cost of navigation includes potential fish losses due to dredging and spills of both oil and chemicals.

Bob Moulton, a biologist with the Pacific Northwest River Basins Commission, identified some of the major social values of the Columbia estuary, and emphasized the importance of controlling the use of land surrounding the estuary. He also discussed the PNRBC's Columbia River Estuary Development Plan. This six million dollar, five year plan, Moulton noted, will supply data that will contribute to better informed decisions in the management of the estuary.

Neil Coenen, coastal program coordinator for Oregon's Land Conservation and Development Commission, described the major provisions of the Coastal Zone Management Act of 1972. He also discussed the major goals of the coastal programs of Oregon and Washington as they relate to the Columbia estuary. Noting that Oregon's program is based primarily on statewide land use planning law, Coenen stated that fills of estuarine areas are largely reserved for water-dependent uses. He also observed that mitigation is required in connection with most dredging or filling activities. Concluding that Oregon and Washington's land and water use plans for the lower Columbia will prove to be of considerable benefit to the area, he suggested that similar plans be developed for the upper estuary where there is currently no comprehensive interstate planning taking place.

John Breiling, assistant district counsel for the Corps of Engineers, described the permit functions of the Corps, particularly its 404 permit program that regulates dredge and fill activities. Breiling identified fish and wildlife as both statutory goals of the Corps' regulatory programs and as authorized purposes of projects operated by the Corps. He also described modifications under way at Bonneville, The Dalles, and John Day dams that may reduce the mortality of juvenile fish during downstream migration periods.

II. Irrigation/Minimum Flows Panel

The irrigation panel focused on the impacts of further desert irrigation development in the Columbia River Basin and inherent conflicts between irrigation, hydroelectric power generation, and minimum instream flows needed for fish and wildlife and water quality. The panelists included Professor Norman Whittlesey, of Washington State University; Professor James Huffman, Director of the Natural Resources Law Institute and an Associate Dean of the Lewis and Clark Law School; and Mel Gordon, Chairman of the Pacific Northwest River Basins Commission.

Dr. Whittlesey began by analyzing the ecomonic costs and benefits of further irrigation development in the Basin. He explained that the major costs of irrigation involve (1) water tradeoffs and energy losses associated with diversions; (2) the potential for depressed crop prices resulting from increased food supplies; and (3) the overhead costs of population growth in remote areas of the Region. Whittlesey cited hydropower losses due to additional irrigation diversions and increased energy use by agriculture as a major concern if a planned 2.2 million acres of Eastern Oregon, Eastern Washington, and Idaho desert are irrigated. Estimating the energy costs of irrigation on the basis of the replacement value that would have to be paid by the average consumer through utility rates, he claimed that the amount of energy lost and consumed by further irrigation development would equal 90 percent of the annual output of two 1,000 megawatt capacity thermal power plants. When "social overhead" costs are included, Whittlesey calculated that the net annual energy cost of additional desert irrigation ranges from approximately $300 to $400 per acre, depending on the area within the Region.

On the benefits side, according to Whittlesey, increased irrigation develop-

ment would result in increased income and employment, greater tax revenues, higher land values, and additional food production. Of these, he suggested that employment created by economic development is probably the most obvious and desirable form of benefit. However, he estimated that each job created by new irrigation actually results in a net per capita cost of $8,000 to $13,000. In addition, he noted that most of the remaining irrigable acreage will require high lift irrigation. This will require the expenditure of about 600,000 kilowatt hours per direct job created, making it the second most energy-intensive source of employment in the Region (the aluminum industry requiring 1,873,600 KWH per job). Whittlesey concluded that these costs should be carefully considered before proceeding with further expansion of desert irrigation in the Columbia Basin.

Professor Huffman discussed the legal and institutional aspects of irrigation development as it relates to other Columbia River water uses, giving special emphasis to legal developments that have facilitated the maintenance of instream flows for fish habitat and water quality protection. He explained that western states water allocation has traditionally been based upon the private rights system of prior appropriation, which requires that water rights be based on putting water to "beneficial uses". Since traditional prior appropriation doctrine did not include streamflow protection as a beneficial use, and required that water be diverted from the stream for a valid right to exist, in the past western water law presented a significant obstacle to the establishment of minimum flows.

Huffman noted, however, that all of the states of the Columbia Basin have now amended their water laws to provide methods for instream flow protection. These range from Oregon's provision for state appropriation of minimum flows to Montana's comprehensive reservation system, under which most of the average annual flow of the Yellowstone River has been reserved for the instream uses of fish habitat and water quality control. He concluded that these legal developments that allow minimum flow protection present a significant challenge to those who seek to expand irrigated agriculture in the Columbia Basin.

Mel Gordon discussed the status and projections of further desert irrigation in the Northwest. He remarked that there were 7.5 million irrigated acres in the Columbia River Basin in 1970--a figure that he predicted would increase from 24% to 41% by the year 2020. Noting that this new acreage will require energy intensive high lift pumping, he observed that additional irrigation projects will not only be expensive, they will conflict with efforts to conserve hydropower. Gordon concluded by announcing the availability of the final draft of the Pacific Northwest River Basins Commission's Water Today and Tomorrow, a comprehensive evaluation of the problems and challenges that a new era of water resources scarcity will pose for the Pacific Northwest.

III. Keynote Speaker

The Conference's keynote speaker, Daniel Beard, the Department of the Interior's Deputy Assistant Secretary for Land and Water Resources, discussed at length the Carter administration's national water policy, which the President announced in a message to Congress in June of 1978. Beard explained that the national water policy was developed to replace the ad hoc approach that has generally characterized water resources decision-making. He also noted that some traditional solutions to water resources problems have become too expensive and, in some cases, socially unnacceptable.

Mr. Beard remarked that changing public attitudes toward the use of water resources have stimulated a national reassessment of water policy including: (1) a reexamination of the structure of the Water Resources Council; (2) possible changes in the Reclamation Act of 1902; and (3) a possible revision of the manner in which water projects are authorized and financed. According to Beard, the President's water policy focuses on the method of planning and evaluating projects and recognizes the important role of the states in these processes. He identified the major features of the administrations's water policy as:

1) Development of a single and coherent national policy, albeit at substantial political cost;

2) Recognition of the responsibility to address the nation's difficult water resource problems before they grow worse;

3) Reduction of unwise expenditures through the so-called "pork barrel" system, again at high political cost since the President has displayed the temerity to object to unnecessary projects;

4) Openness and honesty about how tax dollars are spent by displaying the true costs of water projects; and

5) Establishment of water conservation as the cornerstone of the national water policy.

IV. Energy Policymaking and Planning Panel

The energy panel directed its attention to how the Region's electric energy needs can be met now that demand has outstripped hydropower supply. In particular, the panel focused on the pending Northwest Energy Bill and its ramifications. (See Fish Law Memo #4 for a discussion of the potential impact of this legislation on fisheries). The panel was composed of Roy Hemingway, an assistant to the Oregon Public Utilities Commission; Marc Reis, Legislative Assistant to Congressman Jim Weaver; Marion Hemphill, Energy Advisor for the City of Portland; and Chris Attneave, Board member of the Eugene Future Power Committee and the founder of Keep Public Power Alive.

Roy Hemingway began by challenging those who oppose the Northwest Power Bill to suggest methods by which the energy problems of the Northwest could be solved without such a bill. He asserted that the bill would be of substantial benefit, in terms of energy cost and supply, to everyone in the Region. Hemingway cited several problems that have led to the need for regional energy legislation. Private utilities, he stated, can no longer depend upon substantial amounts of cheap hydropower from the Bonneville Power Administration (BPA), and are unable to develop thermal power sources as a means of meeting increasing loads. He contended that the lack of a regional power program is the reason why most Oregonians pay two to three times more for electricity than do Washington residents. He also stated that since conservation is the cheapest and most available way of making more power available, the need for a regional conservation program which the bill would create, is critical.

Hemingway asserted that the version of the pending legislation sponsored by Senator Jackson would solve many of these inequities. The most important and controversial provision of the bill, he noted, would create a power planning council that would formulate a regional power plan. According to Hemingway, the bill would give top priority to the most cost effective means of increasing the power supply; he explained that the bill would also allow the council to set standards that would encourage energy conservation.

Marc Reis expressed the view that the Jackson bill would create more problems than it would solve. Describing most utilities as bordering on bankruptcy, he contended that the utilities are to a large extent causing their own problems. He referred to the development of nuclear power as an example of utilities committing themselves to a technology which requires increasing subsidies in order to remain viable. Reis claimed that the Jackson bill would encourage unsound investments by (1) allowing BPA to underwrite construction costs of plants regardless of output; (2) exempting utilities from one of the antitrust laws; (3) melding high rates with low hydropower rates, thus hiding the true costs of new thermal power plants; and (4) effectively subsidizing capital costs with funds from the U.S. Treasury. Reis also expressed reservations about the veto power that the bill would vest in the BPA administrator; he contended that this would foreclose effective input from other interests.

To effectively resolve the Region's energy problems, Reis argued that it is necessary to move from nuclear power to conservation, solar, and other less capital-intensive and renewable energy sources. He noted that this is already happening to some extent--the Nuclear Regulatory Commission's projections of the number of nuclear plants in the

United States by the year 2000 has dropped from 1500 to 150 in the last 8 years. In contrast to Hemingway, Reis criticized the Jackson bill for having no teeth in its conservation goals, citing the bill's lack of mandatory conservation standards. He concluded that Congressman Weaver's version of the Northwest Energy Bill, while similar in structure to Senator Jackson's, was a superior alternative because it would provide stronger incentives to conserve and employ renewable energy sources.

Seeing no need for a regional energy bill, Chris Attneave voiced the concern that, if such a bill were to pass, almost total control over energy decisions would be turned over to, among others, Washington Governor Dixie Lee Ray, Oregon Governor Vic Atiyeh, and BPA Administrator Sterling Munroe--which she found unappealing. In addition, like Marc Reis, she was concerned that the bill would not encourage conservation, because it would decrease the utilities' costs of nuclear power plants by 40 percent. Attneave suggested that conservation measures could not effectively compete with nuclear power with such a subsidy.

Marion Hemphill viewed the pending legislation as being both necessary and desirable. He remarked that the power planning council created by the bill would provide for input into the decision-making process from all interests, and would encourage conservation by providing benefits to those who conserve while withholding benefits from those who do not.

V. Anadromous Fish Panel

The anadromous fish panel was convened to consider the role of the law in protecting and revitalizing the Columbia Basin's depleted anadromous stocks. The panel explored existing legal mechanisms that can be used for fish protection, the need to develop additional legal rights for fish, and institutional problems that must be overcome in providing greater fish protection.

The panel was composed of James Johnson, Assistant Attorney General of the State of Washington; Lorraine Bodi, attorney with the National Oceanic and Atmospheric Administration; John Vehlow, Deputy Attorney General for the State of Idaho; Scott Stafne, attorney in private practice; Beverly Hall, Assistant Attorney General for the State of Oregon; and Michael Blumm, professor at Lewis and Clark Law School.

Michael Blumm began the panel with an overview of the problems that the construction and operation of Columbia and Snake main-stem dams present for fish migration. Specifically focusing on the dam's two principal operational legacies, fish passage mortalities and flow manipulations, he noted that the great (and increasing) price differential between cheap hydropower and expensive nuclear and coal-generated substitutes will intensify pressures to operate the river to maximize power production, detracting from the multiple use ideal. Drawing a parallel from Norman Whittlesey's portrayal of the inherent conlficts between power production and additional water withdrawals (see above), he observed that one unaccounted for cost of additional power generation would be increased fish mortalities.

Blumm then surveyed the history of the main-stem projects, asserting that the series of federal statutes which created the federal dams does not reflect a congressional intention that power production be a dominant purpose of the system. On the contrary, he argued that, since power production was mentioned as project purpose in only 4 of 14 projects he studied, claims that federal law requires power production to be maximized at the expense of fish protection should not go unchallenged. He noted, however, that it is one thing to suggest that fish protection is required to be considered in power decisions and another to develop workable procedures to implement such a requirement.

Further, he questioned whether devising procedures alone would be enough. Although he conceded laws such as the National Environmental Policy Act and the Fish and Wildlife Coordination Act could be used to protect the fishery, he doubted that they would result in a comprehensive solution to the problem of striking a balance between fish needs and power demands. The most effective way to achieve this goal, he submitted, was to develop new institutional arrangements, such as an Anadromous Fishery Council

(recommended by the General Accounting Office--see Fish Law Memo #4), that would have broad authority to make fishery decisions on a regional basis and to ensure that fishery tradeoffs are considered in power production and water withdrawal decisions.

James Johnson spoke on the role of the Fish and Wildlife Coordination Act[1] in securing protection for Columbia Basin salmon and steelhead. He noted that concern over the impacts of Columbia River dams on anadromous fish was largely responsible for the enactment of the Coordination Act. After reviewing its consultation and mitigation requirements, he then assessed compliance with the Act in the Columbia Basin.

Johnson contended Coordination Act compliance was inconsistent at best, and generally arrived at only through litigation. He said that, due to the federal licensing procedures of the Federal Power Act (see Fish Law Memo #3), it was much easier to secure compliance of non-federal projects with Coordination Act provisions. He asserted that the Act's relative ineffectiveness with respect to federal dams illustrated the shortcomings of having to secure fish protection on a piece-meal, project-by-project basis. Finally, Johnson noted that a Federal district court in Washington has interpreted the Coordination Act as not only requiring <u>mitigation</u> of damages to fish resulting from water projects, but also <u>enhancement</u> of fishery resources--an interpretation he promised that the State of Washington will rely upon in future actions.

Lorraine Bodi addressed the potential applicability of the Endangered Species Act as a means to protect upriver paces of Columbia Basin salmon. She noted that the principal questions that ongoing federal review procedures must resolve include (1) what aspects of the salmon stocks can fulfill the Act's requirement of being "discrete population stocks which interbreed when mature" (e.g., all Columbia River salmon, upriver salmon, upriver chinook, etc.); (2) what is the biological threshold of "endangered" or "threatened" status; and (3) to what extent should hatchery-produced fish be taken into consideration in making a designation under the Act.

Although Ms. Bodi was unable to say when the present preliminary review procedures will be completed, she stated that if a tentative decision to proceed is reached, the public will be given significant opportunities to participate in any proposed designation, including opportunity to comment on draft and final environmental impact statements. She also remarked that some of the more onerous consequences of listing the upriver stocks as "endangered" (e.g., the prohibition against taking) could be avoided if the stocks were classified as "threatened." Such a designation would allow much greater flexibility in the development of regulations designed to protect the upriver stocks.

John Vehlow provided a summary of the status of the <u>Idaho v. Oregon and Washington</u> litigation now before the Supreme Court (oral argument was heard on November 26). The suit, which was first filed 4 years ago, was precipitated by the fact that, though it possesses over 3000 miles of anadromous fish habitat, Idaho has no effective means of ensuring that downriver actions do not jeopardize the continued viability of its fishery. Vehlow reviewed the findings of the Special Master that the Supreme Court commissioned to hear evidence submitted by the parties. The Special Master recommended that the Court dismiss the case because the federal government was an indispensible party to the litigation due to its roles as trustee for the Indian tribes, operator of the federal dams, and manager of the ocean fishery. Because the federal government had not consented to the suit, under the doctrine of sovereign immunity it could not be forced into the case as an unwilling party. And without the involvement of the federal government, the Special Master concluded that the Court could not provide Idaho an adequate remedy.

Vehlow advanced Idaho's belief that the federal government was not an indispensible party, since the state was asking only for relief that the Court might grant regarding the effects of regulation

[1]This law will be more closely analyzed in Fish Law Memo #6.

by Washington and Oregon on Idaho-bound fish. He also pointed out that the Special Master determined that the Idaho fishery was effectively subsidizing the downriver fishery, and that Idaho's claims were justiciable. Because of the pendency of the litigation, however, he could express no opinion as to the eventual outcome of the potentially ground-breaking suit.

Scott Stafne reviewed the goals of three major pieces of federal legislation that affect the Pacific Northwest's fisheries--the Fishery Conservation and Management Act (200 mile law), the Endangered Species Act, and the Marine Mammal Protection Act. He pointed out numerous ambiguities and inconsistencies involved in interpreting the laws and suggested that many potential conflicting provisions remained unresolved. Concluding that the existence of such uncertainties created a potentially large role for the courts in making determinations as to how fishery management decisions should be made, he questioned whether the courts are the proper forum to resolve such issues. Beverly Hall, however, opined that having the courts decide such matters was preferable to relying on new legislation that would create new and unfamiliar mechanisms to protect fish. She specifically objected to the creation of a regional Anadromous Fishery Council.

VI. Indian Fishing Rights Panel

The major question addressed by the Indian panel was whether treaty rights mandate the protection of the fishery resource itself. Participants on this panel included James Hovis, an attorney for the Yakima Indian Nation, Roy Sampsel, former chairman of the Columbia River Intertribal Fish Commission, and attorneys James Johnson, Scott Stafne, and Beverly Hall (each of whom participated in the Fish panel).

James Hovis expressed the view that two recent federal court decisions holding that a reservation of the right of taking fish carries with it a right to river flows sufficient to maintain the fishery resource may be used as a means of protecting the declining runs of salmon and steelhead in the Columbia Basin. Characterizing these cases (U.S. v. Anderson and U.S. v. Adair--see Fish Law Memos 3 and 4) as a "paddle," Mr. Hovis invited those in attendance "aboard the Yakima Canoe to help the Yakima Nation in its efforts."

Hovis also expressed the view that fisheries that take fish at "distant points" (such as ocean troll fisheries) are undesirable because they permit fishing on mixed immature stocks, as opposed to river fisheries that more effeciently take mature fish from specific stocks. In addition, he suggested that "we can no longer afford to ignore the resulting energy imbalance of marine fisheries."

Scott Stafne, who represents certain commercial fishing interests, took exception to Hovis' remarks about marine fisheries. Stafne specifically pointed out that troll fisherman have a legitimate right to preserve their lifestyle; preservation of the Indian culture, he argued, does not mandate abolishment of the troll fishery. He agreed, however, that the treaty right can be used to protect the fishery resource from destruction, and suggested that both Indians and non-Indians should be able to assert that right in court.

Also in agreement with the proposition that the treaty right to take fish carries with it a right to have the resource protected from harmful actions or inactions was James Johnson, who represents the Washington Departments of Fisheries and Game. While Johnson stated he still believes that the Indians reserved only the right to an "equal opportunity" fishery in signing the treaties, he said that he looked forward to using the treaty right as a means of protecting the resource. He remarked that the state would now be fighting with the tribes, rather than against them, and expressed a hope that there would be no litigation over the question of the amount of fish to which the Indians are entitled to maintain a "moderate living".[2]

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[2]In its July 2, 1979 decision, the Supreme Court ruled that the treaties secure to the Indians only the amount of fish "necessary to provide the Indians with a livelihood--that is to say, a moderate living." The State of Washington has already unsuccessfully litigated this issue by way of a petition for reconsideration of the Supreme Court's decision. The state essentially asked the Court to declare that, under current circumstances, the "moderate living" standard entitles the Indians to no more than 20% of the harvestable fish in the case area. (See Fish Law Memos 3 and 4).

Roy Sampsel also agreed that the treaties can provide a strong basis for protection of the fishery, but lamented that it may be too late to reverse the declining trend of the fishery resource. He observed that unilateral decisionmaking by the many state and federal agencies in the Basin, without input by Indians and others concerned with the fishery resource, is largely responsible for the precarious state of the Basin's anadromous fishery. Sampsel emphasized the need for an institutional mechanism whereby the streamflows necessary for the protection and enhancement of the fish runs could be established and made binding upon all water management entities. He also pointed out that even people who work with Columbia Basin fisheries problems on a day-to-day basis cannot rely on any single entity or source of information to keep them abreast of developments that affect the use and management of the Basin's anadromous fish resources.

The detailed papers presented at the Columbia River Conference will be published in the winter issue of Environmental Law. Copies of the issue may be reserved by forwarding $5.00 to Environmental Law, 10015 S.W. Terwilliger Blvd., Portland, Oregon 97219. Annual subscriptions (3 issues/year) are also available at $12.00 per year.

FISH LAW BRIEFS

Washington Supreme Court Affirms State's Authority to Implement "Boldt Decision"

In response to a motion filed by the State of Washington shortly after the U.S. Supreme Court's affirmance of the "Boldt decision", the Washington Supreme Court ruled on November 30 that the state "has the authority in managing the anadromous fish resource to do so in a manner which recognizes and gives full force and effect to the Indian treaty fishing rights as defined by the United States Supreme Court and [by subsequent federal court orders]." In so ruling, the Washington Supreme Court basically overruled two of its earlier decisions on Indian fishing (which were largely responsible for the U.S. Supreme Court's review of the "Boldt decision"), and also rejected a request by the Puget Sound Gillnetters Association that anadromous fish management authority be left with the federal district court[3] pending definition by the state legislature of the nature and extent of state responsibility for the implementation of treaty fishing rights.

In his opinion for the court, Washington Supreme Court Justice Horowitz also stated that any allocation of fish to treaty Indians must include artificially propogated fish because "the United States Supreme Court clearly intends the federal courts to resolve the issue of the inclusion of hatchery fish within the share guaranteed by treaty to signatory tribes." (The hatchery fish issue is now pending in federal district court in what is known as "Phase II" of U.S. v. Washington.) Justice Horowitz also interpreted the U.S. Supreme Court's July 2 opinion as holding that "the Indian treaties of the 1850's reserve to the signatory tribes a right to fish that non-treaty fisherman do not enjoy."

The Washington Supreme Court's decision emphasizes that state regulations implementing treaty fishing rights "are to be fully enforced by state officials; the courts of this State are always available for that purpose." The state supreme court warned that anyone interfering with state or federal efforts to comply with treaty obligations "will not be protected by the courts of this state."[4]

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[3]In its July 2 decision, the U.S. Supreme Court upheld Judge Boldt's assumption of fisheries management authority and the enforcement orders issued to carry out that authority following state court decisions which prohibited state officials from enforcing regulations that would implement the federal court decree. The Supreme Court stated: "The federal court unquestionably has the power to enter the various orders that state officials and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy violations of federal law found by the court."

[4]These remarks apparently signal the end to events such as the illegal non-treaty coho fishery that occurred in 1975. Although more than 300 citations for violations of state fishing regulations were issued, dismissal of the citations by local prosecutors and judges resulted in the imposition of sanctions against only one individual.

Federal Legislation to Aid Fish Under Preparation

Largely as a result of hearings held by Senator Magnusen (see Fish Law Memo #2), and partly in response to the Supreme Court's affirmance of the Boldt decision, federal legislation is now being prepared that would provide a system of federal loans and grants to help manage and enhance the salmon and steelhead resources of the State of Washington. Although the legislation is still in draft form and has not yet been introduced, a recent version of it would provide federal matching grants both for "enhancement projects" and for "buy-back" of commercial fishing vessels. The bill would also authorize loan guarantees to Indian fisherman to modernize and develop their fishing operations. One striking feature of the draft legislation is that its coverage is limited to the State of Washington--Oregon and Idaho are not included within the Act's defined "conservation area." The Anadromous Fish Law Memo will follow the progress of this bill, which is expected to be referred to the Senate Commerce Committee after it is formally introduced.

FERC Settlements Still Pending

Settlement agreements between federal and state fisheries agencies and FERC licensees on the mid-Columbia and lower Snake are still under consideration (see Fish Law Memo #3 for details). A formal settlement offer, which was submitted pursuant to FERC procedures by the fisheries agencies on November 20, was under consideration by the mid-Columbia Public Utility Districts as this issue went to press. The draft agreement would prescribe minimum flows, specify required spills, establish levels of hatchery production, and mandate a 4-year study to develop data to support or revise the agreement. Agreement has reportedly been reached on spills and flows, but unresolved issues involve hatchery production requirements, bypass system requirements, and the grounds on which the agreement may be modified. If a settlement is not reached, an FERC hearing will be convened early next year.

With respect to the lower Snake, an FERC hearing was held in Portland on November 16 to take testimony in support of a settlement that would define Idaho Power Company's fishery obligations with respect to the effects of the construction and operation of its lower Snake dams on anadromous fish. The formal settlement is expected to be transmitted to the FERC for consideration by the end of this month.

"Fast Track" Energy Legislation May Have Fish Impacts

Proposed federal legislation designed to expedite decision-making for priority energy projects may ultimately have significant impacts on Columbia Basin anadromous fish. The legislation, which has passed both the Senate and the House and is now under consideration by a conference committee, would set time deadlines within which all permit decisions on designated projects must be made and would authorize an Energy Mobilization Board to make decisions in cases where deadlines are missed. The link to anadromous fish concerns the pending legislation's inclusion of the modification of existing hydroelectric projects as among the projects eligible for the energy "fast track." It is therefore possible that actions such as the addition of generators to existing dams could qualify for the law's expedited procedures.

GAO Report Criticizes Fisheries Law Enforcement

A recent report of the General Accounting Office, after reviewing federal efforts to enforce limits established by two existing fishery management plans established under the 1976 Fishery Conservation and Management Act, concluded that enforcement may be a major stumbling block to achieving the Act's goals. The GAO concluded that domestic fishing regulations are confusing, require impracticable amounts of enforcement resources, and have not been sufficiently coordinated with state regulations. It also criticized the lack of overall enforcement goals and priorities, the slow processing and small fines resulting from enforcement actions, and the lack of coordination between the Act's two principal enforcement agencies--the National Marine Fisheries Service and the Coast Guard.

Problems with enforcement of foreign quotas were also cited in the report, including difficulties in verifying catch statistics, high turnover of observers, and slow processing and incomplete documentation of reported violations. The GAO made a number of recommendations to improve fisheries enforcement efforts in its report entitled <u>Enforcement Prob-</u>

lems Hinder Effective Implementation of New Fishery Management Activities, which was released on Sept. 12, 1979 (# CED-79-120). Copies are available by writing U.S. General Accounting Office, Distribution Section, Room 1518, 441 G Street, N.W., Washington, D.C. 20548.

Oregon Fish and Wildlife Commission Considering Fish Plan

The deteriorating condition of upriver Columbia River salmon and steelhead runs, coupled with dissatisfaction by Indian tribes with the 5-year fishery management plan entered into by the parties to U.S. v. Oregon, has led the Oregon Department of Fish and Wildlife to propose major changes in Columbia River fisheries management to the Oregon Fish and Wildlife Commission. In a preliminary draft to the Commission, the Department has reportedly[5] suggested (1) increasing hatchery releases of fall chinook below Bonneville Dam, which would primarily benefit non-Indian fisheries; (2) developing an early run of steelhead that would be available for harvest prior to the return of the depleted Idaho runs; (3) developing an early run of spring chinook that would return in time to avoid high river flows that may impede upstream migration; (4) developing a run of fall chinook that would return later than existing stocks, to the benefit of both Indians and non-Indians; and (5) releasing smolts in streams where existing spawning habitat can support increased numbers of fish.

Oregon Minimum Flow Law Under Scrutiny

The question of whether the State of Oregon's minimum streamflow law requires a minimum flow throughout the entirety of the stream or only at prescribed measuring stations has become the subject of controversy recently. The issue has been raised largely in response to complaints of residents along Clear Creek, near Oregon City, who object to water diversions by a trout farm that in summer months nearly drains a segment of the creek dry, but which returns sufficient flow downstream, so that at the measuring station there is no violation of the required minimum flow. (See Willamette Week, Nov. 26, 1979).

In an action that has significant implications in terms of the comprehensiveness of the Oregon minimum flow law, (under which nearly 400 minimum flow regulations have been established), the State's Water Policy Review Board on November 30 decided that the law was intended to protect streams in their entirety. The Board stated that future applications for water diversions will be scrutinized accordingly; however, it was unsure of the effect that such an interpretation would have on existing diversions. Consequently, the Board has decided to request an opinion of the State's Attorney General on the matter. Copies of a press release describing the Board's action may be obtained from the Oregon Water Resources Dept., 555 13th St. N.E., Salem, OR 97310.

California Commences Indian Fishery Litigation

In a complaint filed on October 23 in the federal district court for the Northern District of California against the Secretary of the Interior (No. C79-1969), the State of California has asserted a "compelling and legitimate interest in regulating, and if necessary prohibiting," fishing by members of the Yurok Indian Tribe in the lower 20 miles of the Klamath River. California asserts that anadromous fish migrate through that portion of the river on their way to the upper Klamath and Trinity Rivers and are "one of the most valuable such resources in the nation."

According to the complaint, the Department of the Interior has published regulations that purport to (1) establish the periods during which the Indians may fish commercially in the river; and (2) preempt state control over the fishing activities of Yurok tribal members. California contends that the Indians have no right to fish in the lower Klamath River, and that, in any event, state law may be applied and enforced against the Yurok tribal members where necessary to conserve the fishery resource.

Yakima Nation Seeks Order Halting Gravel Operations

Claiming that a gravel mining and barge loading facility operated by Columbia Materials Company has rendered useless one usual and accustomed fishing site and interfered with the use of other registered fishing sites of its members, the Yakima Indian Nation filed suit in

5 The plan is in draft form at this time and has not been made available to the public.

federal district court for the Eastern District of Washington on September 26, 1979 (No. C-79-162). The complaint seeks to (1) prohibit the Company from undertaking further operations in the area, at least during periods of fishing activity; and (2) require the removal of any pilings or other objects placed in the river in connection with the facility that in any way interfere with the use of the Yakima Fishing sites. In addition to the gravel mining company, the suit names as defendants the U.S. Army Corps of Engineers, which is using the gravel in connection with the construction of the second powerhouse at Bonneville Dam, and two firms conducting work for the Corps in connection with the powerhouse construction.

Michael Blumm

Brad Johnson

Frances McChesney

Janet Mongoven

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

Professor Michael Blumm
Natural Resources Law Institute
Lewis and Clark Law School
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 244-1181

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