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Anadromous Fish Law Memo

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THE CROWN ZELLERBACH SALMON HATCHERY PERMIT APPEAL: A CASE STUDY OF DECISION-MAKING IN THE FACE OF SCIENTIFIC UNCERTAINTY

Attempts to artificially enhance salmon and steelhead stocks -- prompted by the ever-decreasing size of the runs -- have increased in number and size in recent years. In Oregon (the only state with legislation sanctioning the operation of private salmon hatcheries) major private investments have been made in various "aquaculture" projects -- including salmon hatcheries. Predictably, most of these private fish hatcheries have been located well below major water projects in order to avoid mortality rates associated with dam passage. Many of those who depend upon viable anadromous fish runs for their livelihood, however, believe that the increasing numbers of artificially-produced fish that are being released into the estuaries by the private hatcheries may diminish the carrying capacity of the estuarine systems. In addition, some fear that the interbreeding of wild and naturally-produced stocks inevitably operates to the detriment of the wild stocks.

Some of these concerns surfaced recently in connection with an application filed by the Crown Zellerbach Corporation with the Oregon Fish and Wildlife Commission for permits to introduce two species of salmon (chinook and coho) into the Tillamook Bay estuary. This Fish Law Memo discusses the Crown Zellerbach permit application, the Commission's decision, and the impending disposition of an appeal of that decision to the Oregon courts.

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PROCEDURAL HISTORY OF THE APPLICATION

On December 18, 1977, Crown Zellerbach (Crown) applied to the Oregon Fish and Wildlife Commission for two permits that would enable it to operate a private salmon hatchery at Tillamook Bay, Oregon. In October, 1978 the Commission's Hearings Officer granted intervenor status to three interested parties to enable them to formally participate in the proceedings on Crown's application. The three intervenors were the All-Coast Fishermen's Marketing Association (All-Coast), the Federation of Independent Seafood Harvesters, and the Oregon Environmental Council (OEC). As a result of a contested case hearing in November, 1978, the Commission's staff recommended (on April 13, 1979) that Crown's application be denied. However, after hearing additional arguments, the Commission decided to issue the permits sought by Crown. The Commission did, however, attach a number of restrictions to its approval. OEC and All-Coast have appealed this decision to the Oregon Court of Appeals on three grounds. Because of this appeal, the Commission stayed issuance of the permits pending the appeals court's decision. The court heard oral argument on March 25, 1980, and a decision is expected in the immediate future.

THE ISSUES BEFORE THE COURT

There are three basic issues before the court of appeals. The first concerns whether the Commission exceeded its statutory authority when it issued the permits on the basis of the findings of fact that it made. Oregon law states that the Commission cannot issue a permit:

> (1) which may tend to deplete any natural population of anadromous fish or any population of resident game fish . . . [or]
>
> (2) if the proposed operation is not consistent with sound resource management . . . .[1]

The language "may tend to deplete" and "not consistent with sound resource management" is subject to various interpretations. The crucial question concerns allocation of the burden of proof in cases where scientific uncertainty exists as to the effects that a proposed hatchery operation would have. For example, must the applicant affirmatively prove that the operation of a salmon hatchery will not "tend to deplete" existing stocks of anadromous and game fish? Similarly, must the applicant affirmatively show that the hatchery operation is "consistent with sound resource management"? Or is it sufficient that the applicant merely demonstrate that there exists a lack of conclusive evidence regarding whether existing stocks will be "depleted" or whether the hatchery will be "consistent with sound resource management"?

In its final order granting the permits, the Commission stated:

> Because of the lack of conclusive evidence . . . it is impossible to determine at the present time whether or not the issuance of the proposed salmon hatchery permits would violate ORS 508.710(1),(4) . . . .[2]

Obviously, the Commission's action relieved the applicant of the burden of showing that the activity would not violate the statute. However, guided by other statutory language enabling it to attach conditions to permits,[3] the Commission included a number of restrictions in Crown's permit. These conditions are that (1) the Commission will limit and control all releases through separate permits for each release; (2) all releases will be closely monitored and evaluated; (3) Crown will pay all monitoring and evaluation costs; (4) releases of the salmon smolts will be adjusted or discontinued upon a showing that the releases are adversely affecting the biological resources of the Tillamook estuary; and (5) depending upon the outcome of these studies, the releases may never equal the total amount conditionally authorized.

One of the grounds on which the All-Coast/OEC appeal is based is that the use of the words "may" and "tend" in the statute reveals a legislative intent that in doubtful cases (which the appellants believe the Crown case to be) the permit must be denied. In essence, All-Coast and OEC contend that the Commission may not issue a hatchery permit where the impact of the hatchery fish on the marine resources cannot be ascertained. They also contend that, since the statute requires the Commission to find (1) that there will be no depletion of existing anadromous and game fish stocks, and (2) that the proposed operation will be consistent with sound resource management, no permit may be granted unless and until such findings are affirmatively made by the Commission.

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1. OR. REV. STAT. 508.710(1), (4).

2. Oregon Fish and Wildlife Comm'n, Findings of Fact, Conclusions of Law and Order Re: Crown Zellerbach Hatchery Application 5 (June 22, 1979).

3. OR. REV. STAT. 508.700(1) states in part:
> The Commission may issue a permit subject to such restrictions and regulations as the Commission deems desirable . . . .

A second question presented by the appeal concerns whether the Commission erred in deciding to issue the permit without articulating any standards to guide its administrative discretion. The Commission and Crown maintain that there is no need for additional standards because Oregon law calls for imposition of such "restrictions" as the Commission "deems desirable,"[4] which, they assert, the Commission did in this case. On the other hand, OEC (the principal proponent of this position) claims that the Commission must promulgate standards defining the meaning of phrases such as "may tend to deplete" and "sound resource mangement" before it can issue hatchery permits. In addition, OEC alleges that these standards must deal with both the degree of uncertainty that can be acceptable and the allocation of the burden of proof. (It is possible, however, that the court of appeals may never decide these issues, because Crown contends that OEC did not first present them to the Commission.)

Finally, All-Coast, OEC, and 1000 Friends of Oregon (which submitted a "friend of the court" brief) contend that the Commission's action violates Oregon's land use law, which requires state agencies to take actions "in accordance with" statewide land use planning goals.[5] The pertinent planning goal is the Oregon Land Conservation and Development Commission's Goal 16 on Estuarine Resources, which states in part:

> Estuary plans and activities shall protect the estuarine ecosystems, including its natural biological activity, habitat, diversity, unique features and water quality.

The Commission and Crown argue that the resolution of this question is directly related to the first. In other words, they assert that, unless All-Coast and OEC can show that the proposed hatchery "may tend to deplete" anadromous or game fish, or that it is inconsistent with "sound resource management," granting the permit is not a violation of Goal 16.

All-Coast and OEC contend, however, that the Commission's findings of fact on the Crown application do not satisfy Goal 16. These findings state in part:

> [I]t is impossible to determine at the present time whether or not the issuance of the proposed salmon hatchery permits would violate statewide planning Goal 16.[6]

The appellants assert that before the Commission issues a hatchery permit, it must first affirmatively find that such action would be consistent with Goal 16; that is, the Commission must determine that there will be no adverse effects on estuarine resources, not that such effects are impossible to ascertain.

POTENTIAL IMPLICATIONS OF THE CASE

The Oregon Court of Appeals's decision on these issues may affect the state's salmon ranching industry for years to come. Judicial interpretation of phrases such as "may tend to deplete" and "sound resource management" should not only clarify the statutory language but should also establish the degree of proof that will be demanded from future permit applicants. For example, the court's ruling may require permit applicants to undertake extensive advance study and field research to show that operation of a hatchery will not "tend to deplete" existing stocks of anadromous and game fish.

Conversely, the decision could establish that applicants must merely demonstrate that it cannot be persuasively demonstrated one way or the other that a hatchery would "tend to deplete" existing aquatic resources. The question is a close one because, on the one hand, the statutory language seems to require the adoption of a precautionary standard (warranting denial of the permits). On the other hand, administrative law principles require those challenging agency determinations to show that the agency acted arbitrarily or capriciously or that its action is not based on substantial evidence in the record (arguing for affirmance of the Commission's decision).

In addition to the narrow issues pending before the court of appeals, there remain a number of larger unanswered questions concerning salmon ranching. For example, is it "sound resource management" to proceed experimentally with small scale releases of salmon smolts? If so, what standards are appropriate to determine the size of the release, and how much monitoring is necessary to provide a firm analytical base? How far into the future should such monitoring and evaluation proceed? More generally, will Oregon's vital estuarine ecosystems truly be protected, as apparently mandated by Goal 16, by proceeding on what is essentially an experimental basis? Further, what impact will the resolution of the issues raised in this case have upon smolt releases from public hatcheries?

Obviously, some of these questions will not be resolved by the forthcoming court decision but will ultimately be left to the state legislature and the Oregon

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4. See note 3.

5. OR. REV. STAT. 197.180(1).

6. See note 2, above, at 5.

Fish and Wildlife Commission. Nevertheless, the decisions of the Oregon courts[7] may cast a more definitive mold upon the future of the state's salmon ranching industry.[8] By defining the relationship between scientific uncertainty and private hatchery licensing decisions, the courts will effectively determine who must bear the burden of developing the biological information necessary to assess the effects of activities that affect the health and stability of Oregon's estuaries.

In a larger sense, the Crown Zellerbach case serves as a reminder of the critical lack of information that exists concerning the impacts of ongoing efforts to artificially supplement the Pacific Northwest's depressed anadromous fish stocks. There are many more questions than answers concerning the effects of such efforts on estuarine ecosystems and on the vitality of the fish stocks themselves. Until such information is systematically developed and made available to decisionmakers, the ultimate effects of measures such as the Corps of Engineers' Lower Snake River Compensation Plan (see Fish Law Memo #6) and Senator Magnuson's pending enhancement legislation (see Fish Law Briefs) will remain in doubt.

7. Because of the nature of the issues involved in the appeal, the Oregon Supreme Court may ultimately render the final judgment.

8. For an overview of the regulatory controls that affect the industry, see the companion OSU Sea Grant publication, Ocean Law Memo #14 (July, 1979).

PLEASE NOTE

In each issue of the Anadromous Fish Law Memo, we have solicited comments on the publication from our readers. While we have received a number of encouraging responses, the limited feedback we have obtained leaves us in doubt as to whether continued publication of the Memo would be of genuine value to those interested in the use and management of the region's salmon and steelhead resources.

The Oregon State University Sea Grant Program, which funds this publication, is undergoing its biennial budget review. If publication of the Memo is to continue, funding for it must be included in the OSUSGP budget for fiscal year 1981-82. We therefore urge those of you who find this publication to be of utility (as well as those of you who do not) to communicate your feelings, and the reasons for them, to:

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FISH LAW BRIEFS

"MAGNUSON" ENHANCEMENT BILL PASSES SENATE

On May 5 a salmon and steelhead enhancement bill sponsored by Senator Warren Magnuson (S. 2163) passed the Senate. Designed to provide federal financial assistance for salmon and steelhead research, management, and enhancement prorams in the Pacific Northwest, the legislation's purposes are to (1) promote the economic well-being of the commercial and charter fishing industries and "improve the distribution of fishing power" between the treaty and nontreaty fisheries through the buy-back of commercial fishing vessels and coordinated fisheries research and enhancement; (2) assist commercial and sport fishermen affected by the "Boldt decision"; and (3) improve the quality of recreational fishing by, among other things, requiring that any benefits from

steelhead enhancement measures carried out under the Act accrue to the recreational fishery.

The bill would provide $42 million in federal matching funds for enhancement programs within the "Boldt case area" (i.e., Western Washington) over a period of eight years and an additional $30.5 million for operation, maintenance, and monitoring costs. In addition, the legislation would authorize $20 million (plus $10 million for operation and maintenance) over the same time period for enhancement projects within the Columbia River area. These funds would be used to implement "comprehensive enhancement plans" which would be developed by the states and the Indian tribes.

The bill requires the enhancement plans to include provisions designed to minimize significant adverse interaction between naturally spawning and artificially propagated stocks. It also requires the inclusion of restrictions and conditions necessary to ensure that all enhancement projects included in the plan are economically and biologically sound and supported by adequate scientific research. The enhancement plan would also have to "minimize the harvest of steelhead by non-recreational fisheries and . . . ensure that the benefits of steelhead enhancement projects included in the plan accrue solely to recreational fisheries." Further, any enhancement plan developed must "encourage" the Washington and Columbia River treaty tribes "to forego or limit their non-recreational fishing for steelhead . . . in return for the salmon enhancement projects embodied in the . . . plan . . . ."

It should be noted that both the Indian tribes and the U.S. Department of the Interior oppose the provisions of the bill that would curtail tribal steelhead fisheries. It is not yet clear what effect this opposition will have on the fate of the bill. It is likely, however, that an attempt will be made in the House to delete the Senate-passed language regarding steelhead "decommercialization." Hearings before the House Commerce Committee were scheduled for May 28 as this issue went to press.

COMMERCE DEPARTMENT APPROVES PACIFIC COUNCIL'S SALMON MANAGEMENT PLAN

On May 1, 1980, the U.S. Department of Commerce published emergency interim regulations to implement the Pacific Fishery Management Council's ocean salmon plan for 1980.[1] According to the preamble to the implementing regulations, the Assistant Administrator of the National Oceanic and Atmospheric Administration reviewed the PFMC's plan and found it to be consistent with both the provisions of the Fishery Conservation and Management Act and Indian treaty obligations.

As reported in the last issue, the PFMC's 1980 salmon plan calls for a slightly longer recreational season than in 1979, and authorizes an increase in the daily bag limit to three fish per person. However, this limit may be reduced back to two fish in waters off Oregon if the recreational catch is projected to exceed 240,000 coho before the September 14 closure date. The salmon plan established an ocean troll fishing season north of Cape Falcon, Oregon (i.e., largely waters off the coast of Washington) of about the same length as that which occurred last year, although the troll season south of Cape Falcon is scheduled to be two weeks shorter.

The troll fisheries off Oregon and Washington will be subject to curtailment, however, if in-season measurement of coho abundance indicates that fish required to meet spawning escapement or treaty obligations are being taken (or will be taken prior to the scheduled closure date). The earliest date that any such curtailment could become effective is Friday, August 22 (i.e., 17 days before the September 8 termination of the season called for by the plan).

Last year, the PFMC estimated that the inriver run of Columbia River fall chinook would be 233,000 fish. But the actual run size was only 169,000, only 79,000 of which escaped to spawning grounds -- 21,000 fish fewer than the 100,000 fish escapement figure set by the 1977 consent decree in United States v. Oregon and Washington. This year, the PFMC has estimated that 52,000 fall chinook will be caught by the ocean fishery -- the same number as last year -- and that 169,000 will escape to the Columbia River.[2] If these estimates prove accurate, then the ocean fishery will take about 42% of the harvestable fall chinook.

The PFMC's run size estimates have been attacked by Interior Secretary Cecil Andrus in a recent letter to Commerce Secretary Phillip Klutznick. In his letter, Andrus pointed out that "[t]he

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1. See 45 Fed. Reg. 29,250 (1980). Emergency regulations were issued to permit the season to begin on May 1, 1980 without awaiting public comment, as normally required by the Administrative Procedure Act. Public comments are due by July 1, and presumably the length of the season could be changed in response to these comments.

2. 45 Fed. Reg. 29,252.

PFMC has overestimated the ocean abundance of chinook salmon every year since enactment of the [FCMA] by an average of 27% . . . ."[3] Andrus observed that "the burden of compensating for [this] consistent over-optimism . . . is placed squarely on the inside fishery and, eventually, on the resource itself." Andrus therefore urged the Commerce Secretary to modify the PFMC's plan by imposing additional restrictions on the ocean fisheries and noted that it is difficult for the administration to justify expenditures for salmon enhancement programs "when our own management scheme continues to contribute to the depletion of the resource."

As this issue went to press, it was not clear whether the treaty Indian tribes would challenge in court, as they did successfully last year, the Commerce Department's decision to adopt the PFMC's salmon plan without modification. Commerce's action was, however, challenged by a commercial ocean fishing group and certain individual California troll fishermen in a suit filed May 13 in the U.S. District Court for the Northern District of California (No. 1856). The trollers allege that the PFMC and the Commerce Secretary failed to take economic considerations into account in establishing the commercial troll season off California. They also assert that the PFMC wrongfully established a management scheme providing for escapement of fish for harvest by Indian tribes of the Klamath River. The outcome of this litigation will be discussed in the next issue.

SOME THOUGHTS ON THE REGIONAL ENERGY LEGISLATION

In Washington, D.C. the Pacific Northwest Electric Power Planning and Conservation Act (S. 885/H.R. 6677) remains before its next legislative hurdle — the House Interior Committee's Subcommittee on Water and Power Resources. As this issue goes to press the Subcommittee has yet to set a date for mark-up of the bill. Meanwhile, efforts are underway in the Pacific Northwest to develop compromise language regarding the bill's fisheries provisions[4] that will be acceptable to both fishery and power interests.

Largely through the efforts of the Columbia River Fisheries Council and the Public Power Council, an Ad Hoc Pacific Northwest Power/Fisheries Committee has been formed and has drafted proposed modifications to the House Commerce Committee's language. Although the Ad Hoc Committee's draft[5] contains some unfortunate language regarding the economic costs of fish and wildlife compensation[6] and refrains from subjecting federal water managers to the kinds of administrative procedures that it prescribes for the proposed regional Power and Conservation Planning Council (thus inhibiting effective public participation in and judicial review of decisions pertaining to water project operations),[7] its suggested changes offer a number of helpful clarifications and refinements without materially changing the substance and structure of the bill reported by the House Commerce Committee. Perhaps of even more significance, the very existence of the Ad Hoc Committee demonstrates that it is indeed possible for fisheries and power interests to work together in a coordinated fashion -- something that must occur on a regular, systematic basis in the future if the pending legislation's overriding goal of effective multiple use decisionmaking is to be realized.

It may be a propitious time, as the bill awaits mark-up by the Water and Power Resources Subcommittee, to briefly reflect upon the evolution and potential impact of the legislation.

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3. Letter from Cecil D. Andrus to Phillip M. Klutznick (April 19, 1980).

4. See Fish Law Memo #7, pp. 6-7. For a detailed overview of the bill's fisheries provisions, see Columbia Basin Salmon and Steelhead Report #20, available from the Northwest Resource Information Center, P.O. Box 427, Eagle, Idaho 83616. Unfortunately, regular publication of the Report has been discontinued. The passing of this fine publication, long supported by the Pacific Northwest Regional Commission, leaves an information gap that Northwest fisheries interests will find difficult to replace.

5. Copies of the suggested provisions and an accompanying synopsis are available from the Columbia River Fisheries Council, Suite 250, 700 N.E. Multnomah, Portland, Oregon 97232.

6. Congress long ago rejected subjecting fish and wildlife compensation (with respect to water projects) to cost-benefit analyses. See the discussion of the 1946 amendments to the Fish and Wildlife Coordination Act in Fish Law Memo #6, p.2. This appears to be sound public policy, because fish and wildlife compensation is merely one means of ensuring that the entire costs of water projects are borne by those who enjoy their benefits (i.e., that externalities are internalized). Conditioning compensatory efforts on economic practicality overlooks that, until recently, damages to fish and wildlife attributable to water project construction and operation were rarely systematically accounted for.

7. On the need for articulated standards and reviewable procedures in water project operations, see Fish Law Memo #6.

When first introduced in the 95th Congress, the proposed regional energy legislation contained no mention at all of the critical interrelationship between hydroelectric energy production and the survival of the region's severely depleted upriver runs of salmon and steelhead. During the 96th Congress, the Senate in April, 1979 approved a version of the bill that contained a vague provision recognizing the importance of taking the fishery resource into account in regional energy planning. Most recently, in March, 1980, the House Commerce Committee reported a bill that expressly makes preservation and restoration of the fishery one of the fundamental purposes of the management and operation of the Federal Columbia River Power System. Further, the Commerce Committee's version of the legislation would establish a detailed administrative structure designed to ensure that fisheries protection is given parity with hydroelectric power production.

Clearly, the evolution of this legislation demonstrates surprising political strength on the part of the Northwest's fisheries and those who depend upon them. It also illustrates that Congress recognizes the inseparable linkage between energy planning and production and fishery protection in the Pacific Northwest. That, of course, is most emphatically not to say that the two are incompatible -- for they certainly are not. But because Pacific Northwest energy planning largely involves water use decisions, if the congressionally-mandated standard of multiple use management of the Columbia Basin's water resources is to be achieved, more systematic consideration must be given to the effects of hydropower decisionmaking on the fisheries than has occurred in the past.[8]

In order for critical linkages in the hydropower-fishery relationship to be identified and subjected to exacting and open scrutiny, fisheries interests must recognize that energy policies exert enormous influence over the vitality of the fishery resource. Therefore, fisheries representatives must begin to actively involve themselves in energy planning activities, such as basinwide demand projections and supply strategies. For example, since potential conflicts between power production and fisheries protection are most acute in the area of peak load demands, fisheries interests may wish to join the General Accounting Office in urging the Bonneville Power Administration to intensify its efforts in the area of electricity demand modification (e.g., by adopting measures such as variable pricing to discourage electric use at certain times, thereby permitting a reduction in the intensity of streamflow disruptions in the operation of the FCRPS).[9]

Passage of the regional energy bill will serve to heighten awareness of the power-fishery interdependence and will provide a structure within which tradeoffs can be made in an open, practical manner. But it should also be apparent that the pending legislation is not the only means of ensuring that the fisheries are made a coequal consideration with hydropower production. In fact, even those versions of the bill with the strongest fisheries language are designed largely to facilitate compliance with obligations already imposed by existing laws such as the Fish and Wildlife Coordination Act.

Thus, the regional bill might justifiably be classified as a process bill -- how successful it will be in achieving its multiple use objectives will depend greatly on the willingness and capability of fisheries interests to participate in and to effectively influence the administrative processes that the bill would establish.[10] It is therefore a mistake for fisheries advocates to characterize the pending legislation as a panacea for the ills of the Northwest's troubled anadromous fish resources. In reality, the bill would merely provide one means of reaching the multiple use goals that Congress long ago established for Columbia Basin water project operations.

Furthermore, it should be recognized that the bill's reliance on the administrative process may produce some unexpected difficulties for fisheries advocates. For one thing, the bill places a considerable amount of discretion in the regional Power and Conservation Planning Council to reach a balance between power and fisheries concerns. Moreover, in the past regional power interests have always possessed the funding and organization to dominate regional water use decisionmaking; there is little reason to expect that their influence will diminish in the future. Finally, with the establishment of a fairly elaborate administrative process to resolve the hydropower-fish balance, the prospects for active judicial review will likely be reduced.

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8. This paradigm exists apart from the proposed regional energy legislation. See, e.g., the Fish and Wildlife Coordination Act (Fish Law Memo #6), the Federal Power Act (Fish Law Memo #3), and the National Environmental Policy Act. See also the United States Supreme Court's decision on the proposed High Mountain Sheep Dam in Udall v. FPC, 387 U.S. 428 (1967).

9. U.S. Comptroller General, "Review of Peaking Power Needs in the Pacific Northwest," Rpt. No. EMD-80-46 (Jan. 4, 1980).

10. However, at least one new substantive standard would be established by the House Commerce Committee's bill -- that of requiring "equitable treatment" for fish and wildlife in the operation of water projects (section 4(h)(3)(A)(i)).

All of these uncertainties argue for a cautious approach on the part of fisheries interests in their support of the pending legislation. Attempts to weaken the substance of the House Commerce Committee's language should meet with stiff resistance. The benefits that the legislation would provide in new, open, and reviewable administrative processes would simply not be worth the price of any provisions that might be interpreted as reducing the existing (though seldom enforced) obligation of Columbia Basin water managers to embrace fisheries protection as one of their fundamental multiple use objectives. If Congress is unable to enact a regional energy bill, parity between energy production and fisheries protection may be realized through judicial enforcement of existing federal statutes. This potential option warrants a stern negotiating position on the part of fisheries interests regarding forthcoming consideration of the regional bill by the House Interior Committee, and, ultimately, by a joint Senate/House conference committee.

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