

Subsequent to the time the following remarks were presented to CBFWA members, the G.W. Bush Administration's 2004 Biological Opinion for the four Corps of Engineers dams on the lower Snake River was rejected by Federal District Court Judge James Redden. The judge granted salmon advocates' request for relief in the form of spill to aid juvenile migrant salmon. The U.S. Court of Appeals upheld that decision.

The following remarks provided the basis for an article in *Flyfisher*, magazine of the Federation of Fly Fishers, posted at www.nwric.org.

Remarks of Ed Chaney
Presented to Columbia Basin Fish and Wildlife Authority
Portland, Oregon
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These are interesting times.

I appreciate the opportunity to speak to CBFWA members at a time when you are deliberating the organization's future. This also is a pivotal point in time for the wild salmon and steelhead of the Snake River Basin which are at serious risk of extinction on our watch.

I assume you've all been keeping up with the news from NOAA.

—Hatchery salmon and steelhead are the same as wild salmon and steelhead.

—The Corps of Engineers' four lower Snake River dams are, in effect, part of the natural landscape and, therefore, exempt from the Endangered Species Act.

—The Endangered Species Act does not require that listed species actually be recovered, only that recovery plans must be written.

—Off-site measures—notably habitat improvements—can off-set chronic, devastating mortality of juvenile migrant salmon and steelhead at the lower Snake River dams thereby maintaining the current numbers of fish in the listed populations, which is good enough for purposes of ESA compliance.

This, of course, is a prescription for extinction of wild salmon and steelhead produced in the vast pristine habitats of the Snake River Basin.

I'm shocked! Shocked!

Not really. The current situation has long been a work in progress. NOAA's latest attempt to protect the four lower Snake River dams from the Endangered Species Act is just the latest chapter in this long-running tragedy.

As I was flying into Portland this morning I tried to work off my "road rage" at NOAA's latest betrayal of the public trust. I reflected on my nearly 40 years of experience with Columbia/Snake Rivers salmon and steelhead issues (40 years! How can that be?)

I decided that what we really need is a law. A powerful, by-god-you-will-do-this-or-else law that would once and for all time ensure the Federal Columbia River Power System would be brought into compliance with the salmon-protection will of the Nation.

—It would have to declare this is an “emergency” in order to seize public and political attention.

—In context of that emergency, it would have to set short deadlines for action, require that action be based on existing information (no more studying the fish to death), and rely heavily on the expertise of the fish agencies and tribes.

—It would have to set the immutable the goal of changing the FCRPS as necessary to substantially restore salmon and steelhead to formerly productive levels, and specifically include a requirement to provide river flows of sufficient quantity and quality at and between the dams.

—It would have to require that henceforth, fish would get equal treatment to power production in operating the FCRPS.

—It would have to specifically prohibit using economic considerations to defeat the salmon restoration intent of the act.

It was at this point I started thinking these things sounded familiar. Suddenly it dawned on me. There already is a law that does all of these things and more! It’s called the Pacific Northwest Electric Power Planning and Conservation Act of 1980.

December 5, 2005 is the 25th anniversary of what we commonly call the Northwest Power Act.

Imagine that: 25 years ago. What promise! What hope! At long last, the region would act in its own selfish best interest and bring the federal power system into compliance with the long-standing salmon-protection will of the Nation.

That was then.

This is now.

The wild salmon and steelhead of the Snake River Basin—whose plight provided the impetus for the fish and wildlife provisions of the Act—are far worse off now than they were when the Power Act was signed into law; in fact, now they are threatened with extinction.

How have we come to this? How is it *possible* to obtain this result from a law designed to ensure substantial restoration of salmon and steelhead populations decimated by the ill-designed federal dams?

It wasn’t easy. It took effort. But the killers of salmon and of the dependent tribal and non-tribal economies had lots of help.

How we got here and, more importantly, what we collectively can do about it going forward is the focus of my remarks here tonight.

Those of you primarily concerned with wildlife instead of salmon and steelhead, please bear with me. All, or virtually all, of you owe your jobs to the fish; if it weren't for Snake River salmon and steelhead, there would be no fish or *wildlife* provisions in the Power Act. Now it's pay-back time.

First, a brief history. Context counts.

In the waning years of The Gilded Age of giant pork barrel water projects, Congress authorized the Army Corps of Engineers to construct four pork-barrel dams on the lower Snake River in southeastern Washington.

The dams were authorized with the understanding that the Snake's valuable salmon and steelhead runs would be substantially protected. Congress subsequently authorized construction and operation of large hatcheries upstream of the dams to replace wild fish killed by the dams and reservoirs. The intent and the commitment were to maintain the runs at pre-project levels (which were far below the production potential; but that is another sad story for another time).

The Corps dutifully designed the dams with fish ladders to allow adult salmon and steelhead to migrate to upstream spawning areas. The Corps negligently failed to design the dams to allow their progeny to migrate downstream. This was not the result of inattention to detail. It took a lot of effort to pretend that what went up would not have to come down.

This pretense was particularly difficult to sustain because before the first of the lower Snake River dams was completed in 1960, Idaho Power Company closed Brownlee Dam just upstream in the Hells Canyon reach of the middle Snake River. Juvenile fish were unable to migrate through the reservoir; trapping and hauling failed; the vast spawning and rearing habitats above the dam were abandoned.

Even in the face of this telling disaster in its back yard, the Corps made no effort to change the design of its lower Snake River projects. The dams were completed. Disaster happened.

The Corps spent jillions of dollars trying to overcome the deadly flaws in the design of the dams. This was like trying to paste wings on pyramids hoping they could be made to fly.

Out of desperation the Corps finally started straining juvenile migrants out of the river at the dams (those that survived the reservoirs to reach the dams) and hauling them in trucks and barges to the Columbia River estuary for release.

The Corps and Bonneville Power Administration—which markets the power produced by the dams—fell in love at first sight with barging as the final solution to their problem. The Corps' engineering mistakes had made the river deadly for migrating juvenile salmon, so just take the fish out of the river. Voila! The dams don't harm the fish!

Unfortunately, as you know, wild salmon and steelhead didn't take well to this Draconian, Rube Goldberg intervention in their life-cycle. The runs continued to decline.

In the late 1970s, Herman McDevitt, an Idaho member of the Pacific Fishery Management Council, threatened to invoke the ESA to protect Snake River salmon and steelhead. National Marine Fisheries Service urged him not to do so and said it would do an informal review of the fishes' status, which it proceeded to do.

Meanwhile, around that time—which many of you must consider analogous to the Jurassic Period—I assisted in a Columbia River Basin-wide analysis of the salmon and steelhead situation. The product was a document that proposed and resulted in establishment of the Columbia River Fisheries Council, precursor to CBFWA.

Years later, I helped state, federal and tribal governments prepare a comprehensive plan for production and management of salmon and steelhead in the Columbia River Basin. The plan put highest basin-wide priority on resolving the disastrous mortality of juvenile migrant fish at the Corps' ill-designed main-stem dams, notably those on the lower Snake River.

On a parallel track I and many others were working hard to get protection for salmon and steelhead embedded in national legislation that started out to be exclusively about Northwest energy and evolved into the Pacific Northwest Electric Power Planning and Conservation Act of 1980.

What is commonly called the Northwest Power Act was signed into law on December 5, 1980. It had powerful fish and wildlife provisions.¹

NMFS quickly terminated its “informal ESA review” of Snake River salmon and steelhead and handed off the problem to the Northwest Power Planning Council established by the Act.

NMFS' rationale was that the Power Act required much more than the ESA, i.e., it required restoring to formerly productive levels salmon and steelhead runs impacted by the dams, whereas the ESA required only that the listed species not be allowed to go extinct. This is a significant difference that belatedly will get attention in the years ahead as the current ESA battle grinds to conclusion.

NMFS' hand-off to the Council made sense. In response to the perceived “emergency,” the Power Act directed the Council to quickly develop a plan to modify the federal power system as necessary

¹ It is a specific purpose of the Act:

To protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries. *Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No 96-501, § 4(h)(7), 94 Stat. 2697, 2709 (1980).

to substantially restore salmon and steelhead devastated by the federal dams,² and then to develop a complementary plan to mitigate the expected loss of power as necessary to maintain an adequate and reliable power supply. Note the sequence.

Who then would have thought the Council would simply refuse to do its job?³

It came to pass.

Seventeen years after the Power Act was signed into law, all Snake River salmon and steelhead—once numbering in millions of adult fish annually—were listed as threatened or endangered under the Endangered Species Act. Snake River coho were formally declared extinct.

Eventually the Council simply claimed it had been “preempted” by the ESA and dropped any pretense of doing the principal job conferred on it by the Power Act.

Now, going on 25 years after the Power Act became law, the region and nation are reaping the whirlwind of the Council’s failure.

Meanwhile, Bonneville—seeing the ESA handwriting on the wall—had circled the wagons to avoid responsibility for the fruits of its labor, and to preserve the status quo at the lower Snake River dams. It used its considerable political clout (read: \$) to stifle dissent among the federal agencies by arranging that the federal government would “speak with one voice”: Bonneville’s.

Bonneville hatched a plan of mass distraction called the “All-H Strategy/Paper,” then the “Conceptual Recovery Plan.” Bonneville’s spin doctors finally settled on “The Basinwide Salmon Recovery Strategy” into which the lower Snake River dams were subsumed.

The intellectual poverty of this hide-the-trees-in-the-forest strategy is manifest in the repetitive mantra of Bonneville, the Corps, and NOAA to the effect that “Breaching the four lower Snake River dams would not benefit other listed salmon and steelhead.” Duh. Neither would breaching dams in Botswana. So what? Unfortunately, the news media never ask that question.

² A plan that would:

Provide for improved survival of anadromous fish at hydroelectric facilities; and

Provide for flows of sufficient quantity and quality between these facilities to improve the production, migration, and survival of anadromous fish as necessary to meet sound biological objectives. *Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No 96-501, § 4(h)(5), 94 Stat. 2697, 2709 (1980).

³ There have been and are now many good, talented people associated with the Council. The plain fact is, however, that some council members take the public’s money, but use their position to prevent the Council from doing its job and to thwart achieving the intent of the law. In the private sector they would be summarily tossed out into the street, at least. Institutional reform is mandatory to ensure accountability.

The core purpose of Bonneville's PMD was to divert attention from and to forestall any effort to deal effectively with the mass destruction of fish at the Army Corps of Engineers' dams, particularly those on the lower Snake River.

Like any good con, the PMD had an element of truth. It correctly noted that sustained productivity of salmon and steelhead runs requires action on four fronts: habitat, hatcheries, harvest, and hydropower. Thus its common appellation as the "4-H Plan."

It was obvious to all but the severely impaired that Bonneville's PMD was designed to conceal the fact that while the other three Hs had contributed in varying degrees to diminishment of listed wild fish populations, only hydropower threatened them with extinction.

The PMD called for action in all the other Hs, reserving any serious action on the dams as a last resort only to pass the "red face test," according to a senior federal biologist who worked—and gagged—on the "plan." Thus earning the PMD a fifth H, horseshit.

Bonneville's PMD forms the heart of NMFS' November 2004 Biological Opinion the plain intent of which is to protect the four lower Snake River dams at any cost to wild Snake River salmon and steelhead, and at any cost to future generations.

For starters, the BiOp "disappears" the dams, claiming they are in effect legally "grandfathered," now part of the natural environment, and not within the purview of the ESA. Salmon and steelhead mortalities caused by current *operations* of the dams (as opposed to their physical presence) can be off-set enough by actions in all the other Hs to maintain the devastated populations at current levels. Therefore, operations of the disappeared dams do not jeopardize *survival* of the listed populations.

What the BiOp does not say is that the dams' and reservoirs' devastating effect on wild fish produced in pristine habitats would continue, thus putting at severe risk of extinction an evolutionary heritage tens of millions of years old, manifest in fish that in the 10,000 or so years since the Ice Age adapted to an infinite variety of environmental niches in the vast Snake River Basin.

And for what?

It is incontrovertible that it is costing the public far more to kill the fish off than it would cost to restore them to formerly productive levels.

So why is our government working so hard and spending so much of our money to evade the law and wreak such devastating environmental, economic, social, and cultural havoc on current and future generations?

Here's why:

—To protect four dysfunctional pork barrel dams on the lower Snake River and cover up the fact that the Corps negligently failed to design them to pass fish as Congress intended.

—To generate money to pay off Bonneville’s nuclear power plant gambling debts, and to cover its losses from gambling on energy futures and other poor business practices.

—To keep Bonneville’s customers and political supporters on the dole and on leash.

—To evade the discipline of the market.

—And most important, to preserve the parasitic regional culture of crony capitalism, monopolies, political hegemony, personal power, and sinecures.

A lot of people feed off the destruction of Snake River salmon and steelhead and dependent tribal and non-tribal economies.

That has to be a soul-rotting way to make a buck.

To add insult to the injury of its BiOp, NMFS elsewhere suggested that if people want the fish runs *restored*, as opposed to just not going extinct, they should pin their hopes on the Northwest Power Act, not the ESA. Thus continuing the 25-year endless circle of handoffs of responsibility between NMFS and the Council.

Salmon advocates quickly challenged the 2004 BiOp in federal court. Whatever the outcome of this latest court battle, the fight to restore Snake River salmon and steelhead will not be over any time soon. Litigation is a tactic, not an objective.

The root of the problem lies not in the law, but in the meltdown of governance and failure of public institutions. Salmon advocates will never be able to sleep until those institutions are reformed and held accountable to the salmon-protection will of the Nation.

And now, the good news.

The Power Council has no place left to hide.

It can’t defer to Bonneville’s bogus PMD (a.k.a. the *Basinwide Salmon Recovery Strategy*) which is plainly—and now admittedly—designed to preserve the deadly status quo at the lower Snake River dams. It can’t use the pretext of being “preempted” by the ESA to continue dodging its duty. The ESA does not trump the fish restoration mandates of the Power Act. Even NMFS agrees with that.

The upcoming 25-year anniversary of the Power Act is the ideal time to call the Council to account, and to aggressively seek legislative reform necessary to force the Council either to do its job or become extinct. (In event of the latter, the Northwest economy is resilient enough to withstand the concomitant reduction in greens fees and luxury hotel charges.)

You—collectively through CBFWA—have the power to make the Council choose between those two alternatives.

A lawsuit I won against the Council years ago codified that power, and affirmed that economic considerations may not be used to defeat the salmon restoration intent of the Act.⁴

Another lawsuit I filed and partially won, affirmed Bonneville's—and by extension all federal agencies'—duty to provide fish “equitable treatment” with power.⁵

The Council has never made any effort to employ or seek federal agency compliance with this pivotal provision of the Act. Ergo, Snake River salmon are going extinct; dependent local and regional economies long have been. All other uses of the hydrosystem, however, are unaffected, fat, and happy.

You have the law, the science, and—notwithstanding how Bonneville and the Corps cook the books—the economics, on your side.

Now, for the first time in history, you have serious political back-up. Salmon advocates wisely have been building political constituencies for the past decade. There is a growing army of citizens,

⁴ *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), cert. Denied, 116 S.Ct. 50 (1995).

As a result of the lawsuit the Council amended its *Columbia River Basin Fish and Wildlife Program* (1994, pp 5-25—5-32) to include provisions for drawing down to spillway crest the four lower Snake River reservoirs beginning in 1995, and for an examination of the need to breach them. The Corps “studied” drawdowns and quickly ditched the idea to focus on breaching which it cynically figured would be a political poison pill. The Corps cooked the books in a way that would put Enron to shame, and then declared the fish would be better off in barges than in a free-flowing river. I'm shocked! Shocked!

⁵ The Act confers on the Corps, Bonneville, National Marine Fisheries Service, and all other federal agencies, the duty—independent of the Council's program— “to adequately protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat” affected by the dams “in a manner that provides equitable treatment” to anadromous fish. *Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No 96-501, § 4(h)(11)(A)(I), 94 Stat. 2710 (1980).

It is uncontroverted in the legislative history of the Act that this provision of law “is aimed at placing fish and wildlife on a par with . . . other purposes and providing a means by which [covered agencies] will act to protect, mitigate, and enhance fish and wildlife.” 126 Cong. Rec. H10,683 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell).

The United States Court of Appeals, Ninth Circuit affirmed this independent duty. In addition, the court ruled that each agency covered by this provision of the Act, which includes Bonneville, the Corps, and NMFS, must “develop a mechanism for fulfilling its obligation” under this provision of the Act, and “will be required to demonstrate, by means that allow for meaningful review, that it has treated fish and wildlife equitably.” 1997 WL 359821 (9th Cir.)

organizations, and national legislators that can be brought to bear on reforming or extinguishing the Council.

The salmon killers and associated apologists for extinction can be made to heel to the will of the nation and to the rule of law if you do your job, and we—the public—do ours.

I realize many of you and the agencies you represent have to stay under the political radar of the Bush Administration's ruthless anti-environmental political enforcers. If you work in Idaho under the Kempthorne administration, as friends of mine do. . .well, you know the rest of that sorry story.

It's going to be a very rough ride for the next few years. The salmon killers and their apologists think this is their best shot ever at a Final Solution. They've demonstrated their ruthlessness. As they get ever more desperate, what we've seen so far may only be the tip of the iceberg.

But these environmental Dark Ages too shall pass. The Bush and Kempthorne Administrations soon will be footnotes in history. Take names now, because then it's going to be good hunting, with no season or bag limits on salmon killers and associated apologists for extinction.

In the meantime, and in the future, each of us must do what he or she can to help hold our government accountable to the will of the people and the rule of law. The last time I checked we can still do that in America.

So, as CBFWA ponders its future mission statement, I urge all of you to think creatively about how we collectively can reform and regain control of the public institutions that have failed in their duty to protect the public interest in the wild salmon and steelhead of the Snake River Basin—starting with the Power Council.

What more propitious time than the 25th anniversary of the Northwest Power Act?

2005 also is the 150th anniversary of many what are commonly referred to as the Stevens Treaties in which the nation pledged to honor the reserved rights of Native American Indian tribes to fish for salmon and steelhead, in large part produced in the Snake River Basin.

Coincidence? I don't think so. I think the gods are up to something. I think it is an augury that bodes well for the Salmon People.

As someone once said, "The Salmon are a patient people." Wild Snake River salmon and steelhead for more than a half-century have held out against everything the pork barrel apologists for extinction can throw at them. But they can't hold out forever without our aggressive support in this their darkest hour.

Having had a hand in CBFWA's creation many years ago, I appreciate this opportunity to exhort you all to seize this pivotal opportunity to fulfill the organization's great promise.

We've got the salmon killers and their pork barrel apologists surrounded and they're starting to sweat. The situation is excellent.