

Authority of Fish and Wildlife Managers Under the Northwest Power Act

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**Prepared for the
Columbia Basin Fish and Wildlife Authority**

by

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I. INTRODUCTION

The Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act)¹ established the Northwest Power Planning Council and directed the Council to develop a program to protect, mitigate and enhance Columbia Basin fish and wildlife resources. The Act reserved for the Basin's fish and wildlife management agencies and Indian tribes a significant role in the development of the Council's Columbia Basin Fish and Wildlife Program. This paper discusses the role of fish and wildlife managers and Indian tribes in developing amendments to the Columbia Basin Fish and Wildlife Program. The paper also discusses selected issues that may arise during consideration of the next round of Program amendments.

The Northwest Power Act envisions a participatory process that depends on the expertise of the fish and wildlife managers.² The Act requires the Northwest Power Planning Council to adopt the recommendations of federal, state and tribal fish and wildlife agencies as part of the Fish and Wildlife Program, unless the Council explains in writing that the recommendations are inconsistent with the Act or less effective than the adopted recommendations.³ The courts have interpreted the Act to afford a "high degree of deference" to the recommendations of the fish and wildlife agencies and tribes for measures to include in or to implement the Council's Program.⁴

II. BACKGROUND

The Bonneville Power Administration historically provided the bulk of the Pacific Northwest's electric power and energy. The generating resources of the Federal Columbia River Power System (FCRPS) were considered a limitless supply. By the 1970s, however, experts predicted the region would soon face a shortage of electricity. Political leaders from the region resolved to provide the Bonneville

¹ Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-839h (1998). The full text of the Northwest Power Act is available online at: <http://www.nwppc.org/library/poweract/default.htm>.

² See Northwest Environmental Defense Center v. Bonneville Power Administration, 477 F.3d 668 (9th Cir. 2007)(commonly referred to as "the Fish Passage Center case.").

³ Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

⁴ See Northwest Resource Information Center v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994)(commonly referred to as "the Tang decision.").

Power Administration with authority to acquire additional electric generating resources to satisfy its customers increasing demands.⁵

There was at the same time a growing concern about the decline of Pacific salmon, substantially caused by development and continued operation of the Columbia River's hydroelectric system. The inexorable decline of the Columbia River ecosystem, and extirpation of a number of species from major spawning areas, began after substantial areas of habitat were blocked by dams for Pacific salmon throughout most of the basin. Conventional efforts to protect fish and wildlife resources, including primarily hatcheries and harvest management, have failed to halt the decline.

The 1970s was a decade in which Congress and the region's state legislatures enacted a variety of environmental protection laws. Significantly, Congress passed the Endangered Species Act (ESA) to prevent the extinction of fish and wildlife species. The period of enactment of environmental laws coincided with the success of Indian tribes throughout the Pacific Northwest in asserting treaty fishing rights.⁶

Shortly after enactment of ESA, the National Marine Fisheries Service embarked on a status review of Columbia River salmon stocks. Advocates for protecting the Columbia Basin's once vast fish and wildlife resources saw the movement to expand Bonneville's authority as an opportunity to address the needs of the Basin's fish and wildlife species.

Congress passed the Northwest Power Act in this historical context. It was a classic case of legislative compromise. In the end, both sides got what they wanted. In its final form, the Act authorized the Bonneville Power Administration to acquire additional electric generating resources. But the final bill also required federal agencies -- subject to consistency with the plans and programs of an interstate agency -- to "protect, mitigate and enhance" fish and wildlife resources to the extent affected by hydroelectric development in the basin.

A. Overview of the Northwest Power Act

The Northwest Power Act marked an important shift in federal policy for the Columbia River Basin. The Act's treatment of the Basin's fish and wildlife resources emerged out of the realization that previous legislative efforts requiring that "equal consideration" be given to fish and wildlife did not reduce the decline of fish runs.⁷

⁵ See S. Rep. 96-272, at page 17 (July 30, 1979).

⁶ See e.g., Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969)(commonly referred to as "the Belloni decision"); United States v. Washington, 384 F. Supp. 312 (D. Wa. 1974)(commonly referred to as "the Boldt decision"), *aff'd* Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 684 (1979).

⁷ Northwest Resource Information Center, 35 F.3d at 1377.

Congress recognized that the Basin's hydropower system was "a major factor in the decline of some salmon and steelhead runs to the point of near extinction," and enacted fish and wildlife provisions of the Northwest Power Act with the hope of reviving the fish and wildlife populations of the Basin.⁸ The Act raised the standard, requiring that fish and wildlife be given "equitable treatment," on par with other uses of the Columbia River basin.⁹

The Northwest Power Act provides a unique regional solution to what its authors considered to be a regional problem.¹⁰ The Act provides the consent of Congress for an interstate compact between the states of Idaho, Montana, Oregon and Washington to form the Northwest Power Planning Council.¹¹ The Act requires the Council to develop a plan for the use and distribution of electric power and energy generated at federal facilities in the Columbia River Basin.¹² The Act gives BPA authority to acquire additional generating resources, but only as provided under the Council's Power Plan.¹³ The Northwest Power Act entrusts the Northwest Power Planning Council with the responsibility to develop a program to protect, mitigate and enhance fish and wildlife resources affected by the development of hydroelectric facilities in the Basin. The Act imposes consistency requirements on BPA for spending on fish and wildlife measures.¹⁴ Finally, the Act requires federal agencies to exercise their responsibilities in a manner that protects, mitigates and enhances fish and wildlife and their habitat, provides equitable treatment for fish and wildlife with other authorized purposes, taking into account "to the fullest extent practical" the Council's fish and wildlife program.¹⁵

Specifically, Section 4(h)(1) of the Northwest Power Act requires the Northwest Power Planning Council to develop and adopt "a program to protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries."¹⁶ Section 4(h)(2) requires the

⁸ *Id.* at 1376 (quoting 126 Cong. Record H10687 (daily ed. Nov. 17, 1980)(letter from Comptroller General)).

⁹ Northwest Power Act, Section 4(h)(11)(A)(i), 16 U.S.C. § 839b(h)(11)(A)(i); Northwest Resource Information Center, 35 F.3d at 1377 n.15.

¹⁰ See e.g., 126 Cong. Record H9845 (daily ed. Sept. 29, 1980)(Remarks of Rep. Lujan).

¹¹ Seattle Master Builders Assoc. v. Pacific Northwest Power Planning Council, 786 F.2d 1359 (9th Cir. 1986), *rev. denied* 479 U.S. 1059, 107 S.Ct. 939, 93 L.Ed. 2d. 989 (1987).

¹² Northwest Power Act, Section 4(d), 16 U.S.C. § 839b(d).

¹³ Northwest Power Act, Sections 6(a)(1), (b)(1), 16 U.S.C. §§ 839d(a)(1), (b)(1).

¹⁴ Northwest Power Act, Section 4(h)(10)(A), 16 U.S.C. § 839b(h)(10)(A).

¹⁵ Northwest Power Act, Section 4(h)(11)(A), 16 U.S.C. § 839b(11)(A).

¹⁶ Northwest Power Act, Section 4(h)(2), 16 U.S.C. § 839b(h)(2).

Council to request recommendations from Federal agencies and the region's State fish and wildlife agencies and appropriate Indian tribes for --

(A) measures ... to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries;

(B) establishing objectives for the development and operation of such projects on the Columbia River and its tributaries ... to protect, mitigate, and enhance fish and wildlife; and

(C) management coordination and research and development (including funding)¹⁷

The Northwest Power Act imposes requirements on the Bonneville Power Administration and other federal agencies to act in a manner consistent with the Council's Program. Bonneville is required to use the Bonneville Fund "to protect, mitigate, and enhance fish and wildlife" adversely affected by the production of hydroelectric power on the Columbia River "in a manner consistent with" the Council's Program.¹⁸ Bonneville and other federal agencies responsible for operating, or regulating federal or non-federal hydroelectric facilities are required to consider the Council's Program "at each relevant stage of decisionmaking," and exercise statutory responsibilities, "to the fullest extent practicable" consistent with the Council's Program.¹⁹

The Council is required to develop its fish and wildlife program on the basis of recommendations received from the fish and wildlife agencies, appropriate Indian

¹⁷ Northwest Power Act, Section 4(h)(2)(A)-(C), 16 U.S.C. § 839b(h)(2)(A)-(C).

¹⁸ Northwest Power Act, Section 4(h)(10)(A), 16 U.S.C. § 839b(h)(10)(A). The Act also mandates that expenditures from the Fund on fish and wildlife "shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law." *Id.* Section 4(h)(11) of Act also requires that Bonneville assume monetary costs and power losses (if any) resulting from imposition of fish and wildlife protection, mitigation or in enhancement measures on a nonfederal electric power project that are not attributable to the non-federal project. Northwest Power Act, Section 4(h)(11)(A)(ii), 16 U.S.C. § 839b(h)(11)(A)(ii).

¹⁹ Northwest Power Act, Section 4(h)(11)(A)(ii), 16 U.S.C. § 839b(h)(11)(A)(ii); *See Northwest Wildlife Federation v. Federal Energy Regulatory Commission*, 801 F.2d 1505, 1514 (9th Cir. 1986). The courts have explained that this relationship provides the Council with the ability to "guide, but not command, federal river management." *Northwest Resource Information Center*, 35 F.3d at 1379; *See* Northwest Power Act, Section 4(h)(10), 4(i), 4(j), 16 U.S.C. §§ 839b(h)(10), (i), and (j); John M. Volkman and Willis E. McConnaha, *Through a Glass, Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 *Envtl. L.* 1249, 1253 (1993).

tribes, the region's water management and power producing agencies and their customers and the public generally.²⁰ The Council is required to include the program measures that will -

(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

(B) be based on, and supported by, the best available scientific knowledge;

(C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

(D) be consistent with the legal rights of appropriate Indian tribes in the region; and

(E) in the case of anadromous fish--

(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.²¹

The Northwest Power Act requires the Council to resolve inconsistencies between program recommendations by "giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes."²² The Council may chose not to accept a recommendation of a fish and wildlife agency or tribe only if the recommendation is inconsistent with the statutory requirements, or is "less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife."²³

²⁰ Northwest Power Act, Section 4(h)(5), 16 U.S.C. § 839b(h)(5).

²¹ Northwest Power Act, Section 4(h)(6), 16 U.S.C. § 839b(h)(6).

²² Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

²³ Id.

B. Evolution of the Columbia Basin Fish and Wildlife Program

1982 Fish and Wildlife Program

Efforts to develop the first Columbia Basin Fish and Wildlife Program began immediately after enactment of the Northwest Power Act on December 5, 1980. The states moved quickly to enact enabling legislation and to appoint members to the Council. The Council was formed on April 28, 1981. On June 10, 1981, the Council issued its first request for program recommendations.²⁴ The fish and wildlife managers and tribes were already at work, having established an ad hoc “Executive Committee” in early April for the purpose of organizing and managing the recommendations.

The fish and wildlife managers and tribes responded to the Council’s call by submitting several hundred recommendations for program measures.²⁵ The Council held public hearings on the recommendations during March 1982, and received written comments until April 1, 1982. Council staff, in consultation with the Council’s scientific and statistical advisory committee and interested parties, reviewed the draft recommendations and comments and produced a draft program on September 16, 1982. The Council held extensive hearings on the draft program and received thousands of additional pages of written comments. On November 15, 1982, the Council adopted its first Columbia Basin Fish and Wildlife Program.²⁶

A centerpiece of the 1982 Program was the Council’s recommendation to establish specified mainstem flow levels, known at the time as the “water budget.”²⁷ The Program did not recommend minimum fixed flow levels, but instead adopted a “sliding scale” or volumetric approach. The Council based its water calculations on the amount of water required by the fishery coalition’s recommendations during what it thought was the peak downstream migration season (April 15 through June 15), then deducted the amount of water normally flowing during that period to serve

²⁴ 1982 Columbia Basin Fish and Wildlife Program, at 1-2.

²⁵ The recommendations and supporting material were reproduced and bound in four volumes totaling 2,200 pages, and were distributed throughout the Pacific Northwest states. 1982 Columbia Basin Fish and Wildlife Program, at 1-2. A compilation of recommendations received by the Council for the 1982 Program is available online at: http://www.cbfwa.org/RegionalIssues/Correspondence/NWPPC/1982_0122NWPPCF&W_Recomm.pdf.

²⁶ See generally Michael Blumm, *Sacrificing the Salmon: a Legal and Policy History of the Decline of Columbia Basin Salmon*, 136 (2002)(hereafter *Sacrificing the Salmon*).

²⁷ Northwest Resource Information Center, 35 F.3d at 1380.

power and other purposes. The 1982 Program initiated what would eventually become the Fish Passage Center.²⁸

1984 Program Amendments

Federal agencies moved slowly to implement the 1982 Program. The fish and wildlife managers and tribes were frustrated with the pace of funding, and also disagreed with hydrosystem managers over the scientific basis for taking action, and the anticipated biological consequences. The fish and wildlife managers pushed the Council for more specific direction as implementation efforts floundered.

In response, the Council substantially revised the program in 1984. Most of the amendments aimed to increase the specificity of program measures. The primary innovation of the 1984 amendments was a five-year action plan that established deadlines for implementing numerous program provisions.²⁹ The amendments also established three interim goals: 1) to increase the quality and quantity of Columbia Basin salmon through effective use of the water budget, 2) establish protections against new development, and 3) to increase systemwide production capacity. The principle program development in the 1984 Amendments was to improve fish passage of several mainstem dams by setting deadlines for the installation of bypass systems.³⁰

1987 Program Amendments

In 1987, the Council again significantly amended the Program. The 1987 amendments established a new framework for implementing the Program through subbasin planning.³¹ The Council intended for the focus on subbasin planning to more systematically identify and address effects on local fish and wildlife populations.

The 1987 amendments followed shortly after the Council produced a study showing that the hydroelectric system was responsible for losses of between five to ten million adult salmon annually.³² Nevertheless, the Council recognized the need

²⁸ Northwest Environmental Defense Center, 477 F.3d at 672.

²⁹ *Sacrificing the Salmon*, *supra* note 24, at 140-41.

³⁰ Michael C. Blumm and Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon and Endangered Species in the Columbia Basin*, 21 *Envtl. L.* 657, 680 (1991).

³¹ In fact, the federal, state and tribal fish and wildlife managers established the Columbia Basin Fish and Wildlife Authority in 1987 to coordinate the efforts of the agency and tribal fish and wildlife managers to participate in the subbasin planning effort.

³² Northwest Power Planning Council, *Compilation of Information on Salmon and Steelhead Losses in the Columbia River Basin* (March 1986); Northwest Power Planning

for more data to quantify anadromous fish losses at each stage of their life cycle.³³ In the interim, the 1987 Program articulated the Council's interim goal of "doubling" the existing Columbia basin salmon runs. The Council deferred setting a date for reaching the interim goal until completion of the subbasin planning process.³⁴

Finally, the Council's 1987 Program required Bonneville to fund the establishment and operation of the Fish Passage Center (FPC). The Council envisioned that the FPC would assist dam operators to plan and implement a smolt monitoring program, to develop and implement flow and spill requests, and to monitor and analyze research results to assist in implementing the water budget.

1992 Program Amendments: "Strategy for Salmon"

In 1991, notwithstanding planning and restoration efforts during the previous decade, the National Marine Fisheries Service resumed proceedings to list several species of Columbia River salmon and steelhead under the Endangered Species Act. In response, the Council embarked on a comprehensive overhaul of the 1987 Program.³⁵ Specifically, the Council adopted a four-phase decisionmaking process to consider further amendments to the Fish and Wildlife Program. The first three phases culminated in the Council's adoption of a comprehensive program revision, entitled *Strategy for Salmon*, in December 1992.³⁶

The Council received numerous proposals for amendments to the Program in connection with the *Strategy for Salmon*. Fish and wildlife managers emphasized two points during this process: 1) that substantial increases in Columbia River and Snake River spring and summer flows were necessary; and 2) biological objectives were necessary to measure the efficacy of restoration efforts. The Council disregarded

Council, Numerical Estimates of Hydropower-Related Losses (March 1986)(published as Technical Appendix D and Technical Appendix E, respectively, of the 1987 Program, and reprinted as Technical Appendix F, 2000 Program). The loss estimates are available online at <http://www.nwppc.org/library/2000/2000-19/TechAppF/Default.htm>.

³³ Northwest Resource Information Center, 35 F.3d at 1381.

³⁴ *Sacrificing the Salmon*, *supra* note 24, at 141-42.

³⁵ In 1998, the Council adopted minor amendments to its Northwest Electric Power Plan to restrict new hydropower development from "protected areas." See Northwest Power Planning Council, Protected Areas Summary and Response to Comments (1988). More information about the Council's Protected Areas Program is available online at <http://www.nwcouncil.org/fw/protectedareas/Default.htm>. In 1989, the Council amended the Fish and Wildlife Program to incorporate BPA's 1988 mainstem spill agreement. Blumm, *Sacrificing the Salmon* at 143.

³⁶ The *Strategy for Salmon* is available online at <http://www.nwppc.org/library/1992/Default.htm>.

many of the recommendations of the agencies and tribes without explanation.³⁷ The Yakama Indian Nation and several environmental organizations challenged the Council's decision to reject the tribes and fish and wildlife agencies' recommendations.

Northwest Resource Information Center v. Northwest Power Planning Council

In 1994, in Northwest Resource Information Center (NRIC) v. Northwest Power Planning Council,³⁸ the Ninth Circuit affirmed the Yakama Nation's legal challenges to the 1992 *Strategy for Salmon*.³⁹ The NRIC Court ruled that the Council failed to explain a statutory basis for its rejection of the fishery managers' recommendations. The Court ruled that section 4(h)(7) of the Act requires the Council to explain - in writing, in the Program -- a statutory basis for its rejection of [agency or tribal recommendations]."⁴⁰ Furthermore, the NRIC court ruled there are only three permissible statutory bases in section 4(h)(7) for the Council to reject a recommendation of the fishery managers. First, the Council may reject a recommendation if it is inconsistent with the purposes of the Act. Second, the Council may reject a recommendation of the fishery managers if it is "inconsistent with standards established for the [Columbia Basin Fish and Wildlife] Program." Third, the Council may reject a recommendation of the fishery managers if the recommendation is "less effective than an adopted recommendation in achieving protection, mitigation, and enhancement."⁴¹ Otherwise, the Council must incorporate the managers recommendations into the Program.

The NRIC court explained that the fish and wildlife provisions of the Northwest Power Act and the legislative history clearly required that the Council give a "high degree of deference" to fishery managers' interpretations and

³⁷ Northwest Resource Information Center, 35 F. 3d at 1385-86. The Council argued that its reasons for rejecting the fishery manager's recommendations for the 1992 amendments were embodied in various documents that comprise the administrative record for adoption of the Program. The Ninth Circuit rejected this argument, noting that "the Program itself fails to explain any basis, much less a statutory basis, for the Council's decisions rejecting recommendations of the fishery managers" Id.

³⁸ Northwest Resource Information Center, 35 F. 3d 1371.

³⁹ The case was the first legal challenge to a Council decision since the Seattle Master Builders challenged the Council's Electric Power Plan nearly a decade earlier. See Seattle Master Builders Association v. Northwest Power Planning Council, 786 F.2d 1359 (9th Cir. 1986)(affirming the constitutionality of the Council under the Compacts Clause).

⁴⁰ Northwest Resource Information Center, 35 F. 3d at 1386.

⁴¹ Northwest Resource Information Center, 35 F. 3d at 1384 (citing § 839b(h)(7)).

recommendations for program measures.⁴² The court reasoned that the decision by Congress to provide deference to the fishery managers resulted from their unique experience and expertise in fish and wildlife management. The court explained its position as follows:

In light of the NPA's legislative history and text, it follows that fishery managers, as well as the Council, be given deference in interpreting the fish and wildlife provisions of the Act. This conclusion is consistent with our holding in *Public Util. Dist. 1*, 947 F.2d at 390, that the BPA is due deference in interpreting the power plan provisions of the NPA because it was involved in the drafting of the Act. The role that fishery managers had in the promulgation of the NPA's fish and wildlife provisions demands no less of us here. Furthermore, the unique experience and expertise of fishery managers makes their interpretations of § 839b, especially § 839b(h)(6), particularly helpful. We find it inherently reasonable to give agencies and tribes, those charged with the responsibility for managing our fish and wildlife, a high degree of deference in the creation of a program and the interpretation of the Act's fish and wildlife provisions.⁴³

The Court remanded the 1992 *Strategy for Salmon* to the Council for reconsideration in light of its opinion.

1994-95 Program Amendments

The Council embarked on a comprehensive program revision in response to the NRIC decision. The Council approved Program amendments in December 1994. The Council directed Bonneville and the fish and wildlife managers to propose "an implementation work plan development process, which identifies measures to be funded ... [by BPA]." ⁴⁴ In 1995, the Council amended the 1994 Fish and Wildlife Program to formalize the annual implementation work plan (AIWP) process. Under the project funding process described in the 1995 Amendments, the Council and BPA first negotiated annual funding levels for Program implementation, including the amount available to fund fish and wildlife measures approved by the Council. Next, the agency and tribal fish and wildlife managers -- acting through CBFWA --

⁴² Northwest Resource Information Center, 35 F. 3d at 1388.

⁴³ Northwest Resource Information Center, 35 F. 3d at 1388-89.

⁴⁴ Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM 1-7 (§ 1.2C.1)(December 14, 1994). The 1994 Program is available online at: <http://www.nwppc.org/library/1994/Default.htm>. The Council also recognized the need for additional progress on efforts to restore wildlife, and in 1994 completed work on an Appendix to the Program to address wildlife issues. The 1994 Appendix was never adopted into the Program.

recommended to the Council criteria for prioritizing proposed projects for funding. After the Council approved prioritization criteria, the fish and wildlife managers were to develop each year a list of projects and estimated budgets “that represents the fish and wildlife managers’ views on what it will take to fully implement the Council’s program.”⁴⁵ The fish and wildlife managers then were to --

use the prioritization criteria adopted by the Council to prioritize all the projects on the project list and recommend funding for a set of projects that matches the funding level negotiated by the Council and Bonneville. The fish and wildlife managers will submit the recommended prioritized project list and a workplan to the Council for review and approval.⁴⁶

Finally, the Council stated its intention to review the prioritized project list and workplan for consistency with the program. If approved, the Council would forward the list to Bonneville for funding consistent with the negotiated budget. If not approved, the Council would revise and adopt an alternative project list and workplan for submission to Bonneville or send the list and work plan back to the fish and wildlife managers with comments.⁴⁷

1995 BPA Budget Agreement

By 1995, growing concerns in Congress about Bonneville’s long-term financial integrity led to efforts to limit the agency’s financial expenditures. Negotiations between representatives of Bonneville, the Council and the National Marine Fisheries Service (NMFS) produced a draft interagency agreement designed to provide both financial stability for Bonneville and sufficient fish and wildlife expenditures. The draft agreement called for a formal agreement between Bonneville, the Council, NMFS and other federal agencies to establish a multi-year budget.

On September 16, 1996, the federal agencies and the Council signed a Memorandum of Agreement (MOA) to establish a six-year “Budget” for Bonneville’s fish and wildlife expenditures. The Agreement also included an “Annex” that established a detailed management and accounting procedure, including a procedure for the annual prioritization of projects to be funded by Bonneville and review by an independent scientific advisory board (ISAB).⁴⁸ Under the MOA Annex, the Council

⁴⁵ Northwest Power Planning Council, AMENDMENTS TO THE COLUMBIA BASIN FISH AND WILDLIFE PROGRAM (1995 AMENDMENTS) 3-3 (§ 3.1B.3)(Sept. 13, 1995). The 1995 Program amendments are available online at <http://www.nwcouncil.org/library/1994/Default.htm>.

⁴⁶ 1995 AMENDMENTS 3-3 (§ 3.1B.3).

⁴⁷ 1995 AMENDMENTS 3-3 (§ 3.1B.4).

⁴⁸ MEMORANDUM OF AGREEMENT AMONG THE DEPARTMENT OF THE ARMY, THE DEPARTMENT OF COMMERCE, THE DEPARTMENT OF ENERGY, AND THE DEPARTMENT OF THE

was to forward projects and other proposals for program measures to CBFWA to coordinate fish and wildlife agency and tribal input. The CBFWA members were to review the proposals and return to the Council their recommendations. CBFWA's response was to recommend proposals to be funded and prioritize projects based on an evaluation of their relative merit by the fish and wildlife managers.

Section 512, Fiscal Year 1997 Energy and Water Appropriations Act

In 1996, Congress amended the Northwest Power Planning Act to establish an Independent Scientific Review Panel (ISRP) to review projects proposed for funding under the Columbia Basin Fish and Wildlife Program. Section 512 of the FY 1997 Energy and Water Appropriations Act directed the Council to appoint an eleven-member Independent Scientific Review Panel (ISRP) --

to review projects proposed to be funded through that portion of the Bonneville Power Administration's annual fish and wildlife budget that implements the Council's fish and wildlife program.⁴⁹

Congress also directed the Council to appoint Scientific Peer Review Groups to assist the Panel in making its recommendations. The Council was directed to select the ISRP and peer review groups from scientists nominated by the National Academy of Sciences, "provided that Pacific Northwest scientists with expertise in Columbia River anadromous and non-anadromous fish and wildlife and ocean experts shall be among those represented."⁵⁰

The peer review groups were to review projects proposed for funding through Bonneville's annual fish and wildlife budget and make recommendations to the Council no later than June 15th of each year. The ISRP and the peer review groups need not review every project. Instead, they were directed to review a "sufficient number of projects to adequately ensure that the list of prioritized projects recommended is consistent with the Council's program." Recommendations of the ISRP and the peer review groups are to be based on a "determination that projects are [1)] based on sound science principles; [2)] benefit fish and wildlife; and [3)] have a clearly defined objective and outcome with provisions for monitoring and evaluation of results."⁵¹ The ISRP and peer review groups also are directed to review annually "the results of prior year expenditures based upon these criteria," and to submit their findings to the Council.

INTERIOR CONCERNING THE BONNEVILLE POWER ADMINISTRATION'S FINANCIAL COMMITMENT FOR COLUMBIA RIVER BASIN FISH AND WILDLIFE COSTS (September 16, 1996).

⁴⁹ Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i).

⁵⁰ Northwest Power Act, Section 4(h)(10)(D)(i), (ii), 16 U.S.C. § 839b(h)(10)(D)(i), (ii).

⁵¹ Northwest Power Act, Section 4(h)(10)(D)(iv), 16 U.S.C. § 839b(h)(10)(D)(iv).

The panel's recommendations to the Council must be made available to the public for review and comment. The Council makes final recommendations to BPA "after consideration of the recommendations of the panel and other appropriate entities." The Council also must "consider the impact of ocean conditions" in making its recommendations, and "determine whether the projects employ cost effective measures to achieve program objectives." The Council must explain in writing if it decides not to incorporate a recommendation of the panel.

The Council appointed the eleven members of the ISRP in January 1997, and members of the peer review groups in April 1997. The ISRP's initial report, on FY 1998 expenditures, was largely programmatic in nature. In contrast to its report of the previous year, the ISRP's FY 1999 report focused almost exclusively on review of individual project proposals.⁵²

1999 Independent Scientific Review Panel Report

On June 15, 1999, the ISRP issued its Report for Fiscal Year 2000 Program funding. According to the ISRP Report, the task of the ISRP is --

to make recommendations to the Council on project priorities within the Columbia River Basin Fish and Wildlife Program (FWP) and to review the projects proposed for funding for their scientific merit and consistency with the program.⁵³

The ISRP evaluated over 400 project proposals submitted to the Council for funding in FY 2000. The ISRP agreed with CBFWA funding recommendations for approximately 60 percent of the projects proposed for BPA funding. The ISRP recommended funding for 66 new proposals, 36 of which CBFWA recommended against funding. Conversely, the ISRP recommended against funding 19 of the 49 new proposals recommended for funding by CBFWA. Disagreement between the two entities was even more pronounced with regard to funding for ongoing proposals. In this category, the ISRP recommended funding for 164 of 241 proposals, whereas CBFWA recommended funding for 227 ongoing proposals.⁵⁴

Not surprisingly, the fish and wildlife agencies and tribes reacted strongly against the ISRP Report. They saw the ISRP report as usurping their traditional role as Columbia Basin fish and wildlife managers.⁵⁵ The tribes in particular were

⁵² Independent Scientific Review Panel for the Northwest Power Planning Council (ISRP), *Review of the Columbia River Basin Fish and Wildlife Program for Fiscal Year 2000 as Directed by the 1996 Amendment of the Northwest Power Act (ISRP 99-2)* 5 (June 15, 1999).

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 12-14.

⁵⁵ An unattributed document entitled "A Proposal for Fish and Wildlife Funding Process Reform and the Foundational Underlying Principles" was circulated at CBFWA's 1998

frustrated by the ISRP's apparent hostility to their long-awaited plans for increasing upriver harvest opportunities through development of a wide-spread supplementation program.⁵⁶

2000 Fish and Wildlife Program

The Council began work on amendments to the Fish and Wildlife Program shortly after receiving the 1999 ISRP Report. In preparing the 2000 Fish and Wildlife Program, the Council solicited recommendations from the region's fish and wildlife agencies, Indian tribes, and others, as required by the Northwest Power Act. The agencies and tribes responded, and the Council also received proposals from other interested parties. In all, the Council received more than 50 recommendations, totaling more than 2,000 pages.

The Council prepared a draft of the revised program after reviewing the recommendations. Consistent with past practices, the Council conducted an extensive public comment period, and finalized the amended program in December 2000. The 2000 amendments to the Fish and Wildlife Program began what the Council intended eventually to be a complete revision of the program. In the first phase of the amendment process, the Council reorganized the program around a comprehensive framework of scientific and policy principles. The fundamental elements of the program as revised were the *vision*, which described what the program is trying to accomplish with regard to fish and wildlife and other desired benefits from the river; basinwide *biological objectives*, which described in general the fish and population characteristics needed to achieve the vision and the ecological conditions needed to support the population objectives; implementation *strategies*, which the Council intended to guide or describe the actions needed to achieve the desired ecological conditions; and a *scientific foundation*, which links these elements and explains why the Council believed certain kinds of actions should result in desired habitat conditions and why these conditions should improve fish and wildlife populations in the desired way.⁵⁷

Annual Members' Meeting. The document was highly critical of the Council, the ISRP, and U.S. Senator Slade Gorton, prime sponsor of Section 512 of the FY 1997 Energy and Water Appropriations Act. The "Proposal" drew a sharply-worded response from the Council's Fish and Wildlife Director. Letter to Dr. Brian Allee, Executive Director, Columbia Basin Fish and Wildlife Authority, from Jack Wong, Director, Fish and Wildlife, Northwest Power Planning Council (June 18, 1999).

⁵⁶ Several of the production facilities recommended by the tribes were included in the original 1981 fish and wildlife managers' program recommendations and in fact were included in the Council's 1982 Columbia Basin Fish and Wildlife Program.

⁵⁷ The 2000 Program is available online at <http://www.nwppc.org/library/2000/2000-19/Default.htm>.

The 2000 Program marked a significant departure from past versions which, according to the Council, consisted primarily of a collection of measures directing specific activities. The 2000 Program established a basinwide vision for fish and wildlife (i.e., the intended outcome of the Program) along with biological objectives and action strategies that are consistent with the vision. Ultimately, the Program was to be implemented through subbasin plans developed locally in the more than 50 tributary subbasins of the Columbia and amended into the Program by the Council. Those plans will be consistent with the basinwide vision and objectives in the Program, and its underlying scientific and ecological foundation.⁵⁸

The 2000 program amendments set the stage for subsequent phases of the program revision process, in which the Council adopted more specific objectives and action measures for the river's mainstem and the tributary subbasins, consistent with the framework elements already adopted. The Council incorporated these specific objectives and measures into the Program in locally-developed subbasin plans for the more than 50 subbasins of the Columbia River, and in a coordinated plan for the mainstem Columbia and Snake rivers.

In 2001 the Council requested recommendations for amendments to the 2000 Fish and Wildlife Program. The purpose of this round of amendments was to develop and adopt the Council's mainstem restoration plan into the program.⁵⁹ On August 12, 2002, the Council issued another call for amendments to the 2000 program. The Council requested recommendations for objectives and measures for the program at the subbasin level, to be submitted in the form of a subbasin plan for each subbasin or as possible elements for a subbasin plan. On May 28, 2004, the

⁵⁸ According to the Council, the 2000 program "addresses all of the 'Four Hs' of impacts on fish and wildlife – hydropower, habitat, hatcheries and harvest." Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, 7 Council Document 2000-19 (2000).

⁵⁹ As described in the 2000 Program, the mainstem plan contains the specific objectives and action measures that call on the federal operating agencies and others to implement in the mainstem Columbia and Snake rivers, including operations of the hydrosystem, to protect, mitigate and enhance fish and wildlife affected by the development and operation of the hydroelectric facilities. The plan includes objectives and measures for water management, flow regimes, spill, reservoir elevations, water retention times, adult and juvenile passage modifications at mainstem dams, fish transportation, systemwide coordination, protecting and enhancing mainstem spawning and rearing areas, and operational requirements to protect resident fish and wildlife. The hydrosystem objectives contained in the mainstem plan also should provide guidance to the Council's subbasin planning process, establishing for the subbasin planners the expectations of the program for mainstem survival of fish that spawn in tributaries but rear and migrate through the mainstem. Id.

Council received proposed subbasin plans for 59 subbasins of the Columbia River, formally recommended for amendment into the Council's fish and wildlife program. Following a lengthy public review process required by the Northwest Power Act, the Council formally adopted subbasin plans for 57 subbasins as amendments to the Program, based on the recommendations submitted.⁶⁰

2007-08 Fish and Wildlife Program Amendments

The Northwest Power Act requires the Council to review the Columbia River Basin Fish and Wildlife Program at least every five years.⁶¹ On April 17, 2007, the Council approved a schedule for another round of Program amendments. The schedule anticipates release of the Call for Recommendations on November 1, 2007, with responses due 90 days later.⁶² In anticipation of the Council's action, CBFWA Chair Daniel H. Diggs wrote to inform the Council of the plans of the Fish and wildlife managers for responding to the Call for Recommendations.⁶³

⁶⁰ Approved subbasin plans are available online at <http://www.nwcouncil.org/fw/subbasinplanning/Default.htm>.

⁶¹ In contrast to explicit direction to review and update the electric power plan, the Northwest Power Act does not explicitly require a periodic review and update to the fish and wildlife program. Nevertheless, Section 4(d)(1) of the 1980 Act requires the Council to prepare a regional conservation and electric power plan. The provision allows the Council to amend the adopted plan from time to time, but *requires* the Council to review the plan that less frequently than once every five years. 16 U.S.C. § 839b(d)(1). Section 4(h) of the Act requires the Council to adopt the Columbia River Basin Fish and Wildlife Program, and to include the program in the Electric Power Plan. 16 U.S.C. § 839b(h)(1)(A), (9). Section 4(h) also requires the Council to "request . . . prior to the development or review of the plan, or any major revision thereto," recommendations from the Fish and wildlife agencies and tribes. 16 U.S.C. § 839b(h)(2). Reference to "the Plan" in section 4(h)(2) is oblique, but the act does not use the terms "program" and "plan" interchangeably, so presumably reference to the "Plan" refers to the Regional Conservation and Electric Power Plan required under Section 4(d)(1).

⁶² On September 11, 2007, the Council considered and rejected requests by Bonneville customers groups and the Columbia River Intertribal Fish Commission to delay the amendment process to allow integration of the next FCRPS Biological Opinion into the Program amendments. The Council took under advisement, a staff recommendation that the Call for Recommendations be extended for an additional 90 days to allow consideration of the FCRPS Biological Opinion.

⁶³ Letter from Daniel H. Diggs, Chair, Columbia Basin Fish and Wildlife Authority, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council, and Stephen Wright, Administrator, Bonneville Power Administration (April 4, 2007). Chair Diggs' letter is available online at: http://www.cbfwa.org/RegionalIssues/Correspondence/CBFWA/2007_0404CBFWAtoNPCCandBPA.pdf.

The following section of this Paper will discuss selected issues that may arise during the amendment process.

III. SELECTED ISSUES

A. "Projects" vs. "Program Measures"

There has been a long-running debate about the appropriate legal relationship between the fish and wildlife agencies and tribes, the Council and the ISRP. As previously stated, the 1980 Act required the Council to solicit recommendations from the fish and wildlife managers, and required the Council to pay a high degree of deference to the managers' recommendations. The 1997 Appropriations Act required the ISRP to review "projects to be funded" by Bonneville to implement the Council's Fish and Wildlife Program.⁶⁴ The 1997 Appropriations Act directed the ISRP "to review *projects* proposed to be funded"⁶⁵ The Appropriations Act uses the term "projects proposed to be funded" or "projects to be funded" in four separate places.⁶⁶ In contrast, Section 4(h)(2)(A) of the 1980 Act, which requires the Council to seek recommendation from the fish and wildlife managers, refers to "measures which can be expected to be implemented by the [BPA] Administrator." Similarly, sections 4(h)(5) and 4(h)(6) refer to "program measures," and section 4(h)(7) refers to "recommendation[s] of the fish and wildlife agencies and Indian tribes as part of the program, or any other recommendation"⁶⁷

The Northwest Power Act does not include statutory definitions for the terms "program," "program measure" and "project," even though they are used repeatedly in section 4(h). Webster's Dictionary defines "program" as "an outline of work to be done; a prearranged plan of procedure."⁶⁸ The same dictionary defines "measure" as

⁶⁴ At the time this occurred, the fundamental question was whether the 1997 Appropriations Act, by amending the 1980 Northwest Power Act, specifically the development of the ISRP, changed the institutional relationship between the fish and wildlife managers and the Council as set forth in the original Act and explained in the Ninth Circuit's Northwest Resource Information Center decision.

⁶⁵ Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i)(*emphasis added*).

⁶⁶ Northwest Power Act, Section 4(h)(10)(D)(i), (ii), (iv), and (v), 16 U.S.C. § 839b(h)(10)(D)(i), (ii), (iv), and (v).

⁶⁷ Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

⁶⁸ Webster's New Twentieth Century Dictionary (2d ed. 1971). When there is no indication that Congress intended a specific legal meaning for the term, the courts will look to sources such as dictionaries for a definition. *See e.g., Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 1914-16, 141 L. Ed. 2d 111 (1998); United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999). Consequently, where a term is not defined in the statute, the

“means to an end; anything done as a preparatory step toward the end to which it is intended to lead; an act, step, or proceeding designed for the accomplishment of an object.” Thus a “program measure” is an act, step or proceeding designed for the accomplishment of a prearranged plan of procedure or an outline of work to be done. A “project” is defined as “an undertaking; as a unit of work done by one of the various governmental agencies.” Presumably, a “project” is undertaken in furtherance of a prearranged plan or outline of work. Thus the terms “program measures” and “projects” nearly are synonymous for purposes of reconciling the respective roles of the fish and wildlife agencies, the Council and the ISRP.⁶⁹

Courts often assume that where Congress uses different terms, a different result is intended.⁷⁰ This rule of statutory interpretation has been cited for the proposition that the fish and wildlife agencies and tribes are not entitled to deference with regard to “projects” to implement the Fish and Wildlife Program. If there is in fact a difference between the scope of authority implied by the different terminology used in section 4(h)(2), (5), (6) and (7) on the one hand, and section 4(h)(10) on the other, it works to limit the role of the ISRP, not the agencies and tribes. As previously shown, there is no practical difference between a “program measure” and a “project.” But there is a significant difference between a “program” (meaning “a plan of action”), and a “project,” (meaning “an undertaking to implement a plan of action”). Taking into account the ordinary meaning of the statutory terms, the Council is required to defer to agency and tribal recommendations both for the

courts accord the term its “ordinary meaning.” Northwest Forest Resource Council v. Glickman, 82 F. 3d 825, 833 (9th Cir. 1996).

⁶⁹ Merriam Webster’s WWWebster Dictionary provides definitions that are even less distinguishable. There, the term “program” is defined as “a plan or system under which action may be taken toward a goal.” The term “measure” is defined as “a step planned or taken as a means to an end.” The term “project” is defined as “a planned undertaking.” See <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary>. A review of the previous versions of the Council’s Columbia Basin Fish and Wildlife Program supports the view that the terms “program measures” and “projects” have the same meaning. For example, the 1982 Program, based in large part on the collective recommendations of the fish and wildlife agencies and tribes, does not distinguish between the two types of activities. In both the 1982 and the 1984 versions of the Program, many of the activities described in the ISRP’s Report as “projects” were in fact included under the heading: “Program Measures.” See e.g., Section, 704, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM at 7-4 (1982); Section 704, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM at 47 (1984). In fact, some of the very same “projects” reviewed by the ISRP (such as the Nez Perce Tribal Hatchery) consistently have been described in previous versions of the Council’s Fish and Wildlife Program under the heading “Program Measures.” So in terms of implementation of the Act, the Council and the agencies have not in the past treated “program measures” and “projects” any differently.

⁷⁰ Legacy Emanuel Hosp. and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996).

program⁷¹ and for measures to implement the program. Conversely, the ISRP's role is limited to review of projects, being undertakings to implement the program.

The FY 1997 Appropriations Act did not explicitly amend section 4(h) other than to add a new subsection. An elementary canon of statutory interpretation is that the courts will attempt to reconcile various enactments "to create a harmonious whole."⁷² Thus an interpretation of the two enactments that reconciles an apparent inconsistency will be favored over an interpretation that suggests the later enacted statute repeals by implication provisions contained in the former statute.⁷³

The amendments to the Northwest Power Act contained in Section 512 of the Energy and Water Appropriations Act add the ISRP as a participant in the review of projects to be funded by BPA to implement the Council's Program. The ISRP's role is limited to review of projects proposed to be funded by Bonneville to implement the Council's Program and does not include programmatic initiatives.⁷⁴ The ISRP may recommend against funding a project put forward by the fish and wildlife managers, but only under specified criteria. The Council may reject the ISRP's recommendations. If so, the Council must explain its decision in writing. Thus Section 4(h)(10)(D) imposes a procedural requirement that the Council explain its reasons for rejecting the ISRP's recommendations. But there are no substantive restrictions on the Council's ability to reject ISRP recommendations. This statutory provision stands in stark contrast to section 4(h)(7)'s substantive restrictions on the Council's ability to reject recommendations from the fish and wildlife managers.

B. Reconciling the Northwest Power Act with the Endangered Species Act

The Northwest Power Act represents a significant and comprehensive effort to address the effects of hydropower on anadromous fish in the Columbia Basin. The Act imposes on the Council a duty to "provide improved survival" of anadromous fish. Nevertheless, the Endangered Species Act provides an additional tool for

⁷¹ Under section 4(h)(2), the Council is required to solicit agency and tribal recommendations on the document, and to defer to their recommendations unless they fall within the three criteria for rejecting agency and tribal recommendations outlined in section 4(h)(7) and described at length in the Ninth Circuit's Northwest Resource Information Center decision.

⁷² Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

⁷³ Morton v. Mancari, 417 U.S. 535, 549-50, 94 S. Ct. 2474, 2482-83, 31 L.Ed.2d 290 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

⁷⁴ Likewise, the ISRP does not have authority to review implementation measures suggested for other federal agencies such as the Federal Energy Regulatory Commission, the Bureau of Reclamation or the U.S. Army Corps of Engineers.

species protection, representing a safety net below which draconian measures must be taken to prevent extinction. In 1991 and 1992 NMFS listed the Snake River sockeye and chinook populations.⁷⁵ The listings brought ESA requirements for the protection and recovery of anadromous fish. Furthermore, the listings also provided the full legal enforcement provisions of the ESA.

The federal fish and wildlife agencies are in the process of preparing a Biological Opinion (BiOp) for the Federal Columbia River Power System (FCRPS). The FCRPS BiOp will constrain river operations and will require expenditures to address the impacts of the FCRPS on listed species. Nevertheless, implementation of the FCRPS BiOp will not excuse federal agencies from their responsibilities under the Northwest Power Act to implement the Council's fish and wildlife program.

The Ninth Circuit Court has on several occasions ruled that compliance with other federal laws does not relieve a federal agency of its responsibilities under the Endangered Species Act. In Northwest Resource Information Center v. Northwest Power Planning Council, the Court noted the Northwest Power Act "adopted several innovations," including a provision in the purposes section of the Act⁷⁶ that expressly required consistency "with applicable environmental laws."⁷⁷ These include the Endangered Species Act. In Aluminum Co. of America v. Bonneville Power Administration, the Ninth Circuit interpreted this provision to mean that "the Northwest Power Act's goal of providing economical power ... does not supplant the BPA's obligation to comply with environmental mandates."⁷⁸ In Defenders of Wildlife v. Environmental Protection Agency, the Ninth Circuit Court ruled that compliance with a complementary statute does not relieve a federal agency of its responsibilities under the Endangered Species Act.⁷⁹ In National Wildlife Federation v. National Marine Fisheries Service, the Court went one step further, ruling that

⁷⁵ 56 Fed. Reg. 58619 (1991) (Endangered status for Snake River sockeye); 57 Fed. Reg. 14653 (1992) (Threatened status for Snake River Spring/Summer and Fall chinook); 56 Fed. Reg. 29553 (1991) (Lower Columbia River coho).

⁷⁶ 16 U.S.C. § 839.

⁷⁷ Northwest Resource Information Center v. Northwest Power Planning Council, 35 F. 3d 1371, 1378 (9th Cir. 1994).

⁷⁸ Aluminum Co. of America v. Bonneville Power Administration, 175 F. 3d 1156, 1163 (9th Cir. 1999).

⁷⁹ Defenders of Wildlife v. Environmental Protection Agency, 420 F. 3d 946, 971 (9th Cir. 2005); Washington Toxics Coalition v. Environmental Protection Agency, 413 F. 3d 1024, 1032-34 (9th Cir. 2005).

federal agencies have a responsibility to satisfy ESA requirements “as a first priority.”⁸⁰

The question that hasn’t yet been addressed by the federal courts is whether compliance with the ESA relieves an agency with its responsibilities to comply with other federal laws, namely the Northwest Power Act’s mandate to protect, mitigate and enhance non-listed fish and wildlife species. An elementary canon of statutory interpretation, however, is that the courts will attempt to reconcile various enactments “to create a harmonious whole.”⁸¹ Thus an interpretation of the two enactments that reconciles an apparent inconsistency will be favored over an interpretation that suggests the later enacted statute repeals by implication provisions contained in the former statute.⁸²

The legislative history of the Northwest Power Act clearly indicates that Congress considered the Act’s fish and wildlife provisions as “a new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife.”⁸³ Furthermore, statements by the bill’s floor managers make clear their intention to prevent “a duplication of measures already being implemented.”⁸⁴ Clearly the Act was intended to complement existing environmental laws. That being the case, it is hard to believe the Ninth Circuit would conclude that compliance with existing environmental laws also relieves Bonneville of its responsibilities to protect, mitigate and enhance fish and wildlife, especially non-listed species.

The Endangered Species Act provides an additional safety net to protect the Basin’s fish and wildlife species from extinction. The Endangered Species Act and the Northwest Power Act play complementary roles. Federal agency compliance with one environmental law, however, does not excuse performance under the other.⁸⁵ Clearly the Northwest Power Act imposes a broader mandate than does the ESA. The fact that Bonneville is required to protect listed species from harm does not excuse the agency its obligations to protect, mitigate and enhance non-listed species,

⁸⁰ National Wildlife Federation v. National Marine Fisheries Service, 481 F. 3d 1224, 1234 (9th Cir. 2007).

⁸¹ Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

⁸² Morton v. Mancari, 417 U.S. 535, 549-50, 94 S. Ct. 2474, 2482-83, 31 L.Ed.2d 290 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

⁸³ See 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

⁸⁴ 126 Cong. Record at H9846.

⁸⁵ Accord, Washington Toxics Coalition, 413 F. 3d at 1033; Headwaters, Inc. v. Talent Irrig. Dist., 243 F. 3d 526, 532 (9th Cir. 2001).

nor does it excuse BPA from its obligation to restore listed species to population levels unaffected by hydroelectric development.

C. In-Lieu Funding Prohibition

The Northwest Power Act requires BPA to use the Bonneville Fund consistent with the Council's program. But the Act prevents Bonneville from making expenditures that merely substitute ratepayer funding for other sources. Specifically, section 4(h)(10)(A) requires that –

Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.⁸⁶

At the Council's request, BPA has spent the past year developing a policy to identify "in-lieu" funding issues. According to a letter from BPA's Vice President Gregory Delwiche, BPA will consider the FY 2007-09 funding cycle as a "transitional period," after which BPA may not support funding for proposals that previously have been funded.

Bonneville has taken the position that an in-lieu problem may arise whenever an agency is authorized to undertake an action, regardless of whether funding is actually available.⁸⁷ BPA's reading of the in-lieu provision would prohibit BPA from funding nearly every project recommended in the Columbia Basin Fish and Wildlife Program. That is because Bonneville's responsibilities under the Northwest Power Act and the statutory responsibilities of the region's fish and wildlife management entities create an overlapping authority. Several federal laws provide blanket authority to agencies to undertake actions to protect and restore fish and wildlife.

Another interpretation would suggest that the prohibition applies more narrowly (i.e., when funding actually is available to undertake the same activity as is recommended by the Council for funding by BPA, or when another entity, such as a non-federal hydroelectric license holder, is legally required to undertake an expenditure). The statutory language regarding in-lieu funding restrictions is ambiguous and, unfortunately, the legislative history of the Northwest Power Act reveals little about congressional intent behind this provision. However, during the

⁸⁶ 16 U.S.C. §839b(h)(10)(A).

⁸⁷ See e.g., Letter from Gregory K. Delwiche, Vice President, Environment, Fish and Wildlife, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (August 3, 2006) available online at:

http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_0803BPAToNPCC.pdf;

Letter from William C. Maslen, Fish and Wildlife Director, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (October 6, 2006) available online at:

http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_1006BPAToNPCC.pdf.

final passage of the bill on the House floor, Congressman Lujan described the problem of fish enhancement as “one of the touchiest problems involved in the bill.”⁸⁸ Congressman Lujan was the primary sponsor of the committee amendments to balance fish and wildlife and power interests. Lujan stated –

The job of both committees to whom the bill was referred was to bring out a bill that provides a regional answer to this regional problem and to make certain that none of the other States will have to pay, in any way, for that regional solution.⁸⁹

Congressman Lujan was one of the floor managers of the House bill. His remarks, as well as those of the bill’s sponsors, indicate that they saw the responsibility as a “new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife.”⁹⁰ Yet this was an obligation to be borne by the region’s ratepayers, not by the federal taxpayers.

The more narrow interpretation means that the in-lieu prohibition applies only when money is actually available, or is required of an entity as a non-discretionary expenditure. This reading of the statute suggests in-lieu problems arise only if expenditures are available, having already been appropriated, or where legally required.

D. Wildlife Crediting

Development of hydropower in the Columbia River basin has affected many species of wildlife as well as fish. Reservoirs inundated important floodplain and riparian habitats. Construction of roads and facilities, draining and filling of wetlands, stream canalization and shoreline riprapping, and construction and maintenance of power transmission corridors have altered or destroyed additional habitat. Fluctuating water levels caused by dam operations also have created barren vegetation zones, resulting in additional habitat loss. Development of the hydropower system, however, also has resulted in beneficial effects. Reservoirs provide waterfowl habitat. Multipurpose projects also result in incidental habitat benefits resulting from irrigation of otherwise arid land.

In 1994, the Council adopted a wildlife program strategy designed to achieve and sustain levels of habitat and species productivity as a means of fully mitigating wildlife losses caused by hydroelectric project construction and operation. The Council's program considers the net effect on wildlife associated with hydropower development. Furthermore, the Council noted that FCRPS dams serve multiple purposes, including flood control, navigation, irrigation and recreation. The Council

⁸⁸ 126 Cong. Record H9845 (daily ed. Sept, 1980)(Remarks of Rep. Lujan).

⁸⁹ *Id.*

⁹⁰ See 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

noted that Congress encouraged a comprehensive approach to wildlife mitigation, while at the same time, directing that consumers of electric power pay only the cost of measures to deal with the effects of hydropower development.⁹¹

The 1994 Program incorporated a comprehensive strategy to identify the extent of hydropower-related wildlife losses. The program defined "mitigation" as - achieving and sustaining the levels of habitat and species productivity for the habitat units lost as a result of the construction and operation of the federal and non-federal hydropower system.⁹²

The Council's Program included a table of loss estimates for each federal project. Bonneville was directed to allocate wildlife mitigation expenditures to various project purposes in accordance with existing accounting procedures. BPA also was directed to coordinate ratepayer-funded measures with measures to deal with impacts unrelated to hydropower development and operations and to develop a comprehensive coordinated wildlife mitigation strategy. BPA, the Corps of Engineers, the Bureau of Reclamation and wildlife managers were directed to determine the appropriate allocation of expenditures by federal agencies as needed to achieve full mitigation of wildlife losses.

The Program called for the development of a consistent, system-wide method for crediting new projects. The Council endorsed the use of habitat units as the preferred unit of measurement for mitigation accounting.⁹³

In its 2000 Program, the Council revised its approach to wildlife mitigation by treating a given habitat as an ecosystem that includes both fish and wildlife. The Council noted there had not yet been agreement on how to credit wildlife benefits resulting from riparian habitat improvements undertaken to benefit fish. The Council recommended that, in the future, wildlife mitigation projects should be integrated with fish mitigation projects. To aid in this transition, the Council directed Bonneville and fish and wildlife managers to complete mitigation agreements for the remaining habitat units, which should equal 200 percent of the habitat units (2:1 ratio) identified as annualized losses of wildlife habitat from hydropower construction and resulting inundation. The Council directed that habitat enhancement credits be provided to Bonneville one habitat management activities funded by a Bonneville lead to a net increase in habitat value when compared to the level it identified in a baseline habitat inventory. The determination of habitat enhancement credits should be made through the periodic monitoring of the project site using the Habitat Evaluation Procedure (HEP) methodology.. The Council ordered that Bonneville receive credit for habitat enhancement efforts at a

⁹¹ 1994 Program at 11--1.

⁹² 1994 Program at 11-2.

⁹³ 1994 Program at 11-8.

ratio of one habitat unit created for every habitat unit gained. Finally, the program called for an assessment of direct operational losses. The Council expected some basin plans to serve as a vehicle to provide mitigation planning for operational losses.⁹⁴

There is substantial disagreement between Bonneville and the fish and wildlife managers over how to credit Bonneville's expenditures against losses caused by construction and operation of the basin's hydroelectric projects. The fish and wildlife managers take the position that existing assessments do not fully quantify losses. Nevertheless, Bonneville has insisted on signing agreements that recognize a ratio of 1:1 as credit against hydroelectric losses, and has argued that the fish and wildlife managers are bound by these agreements. This issue, almost assuredly will become the subject of considerable debate and controversy during the amendment process.

Another issue for debate is the continued validity of the Habitat Evaluation Procedure (HEP) as the basis for estimating wildlife habitat values. HEP has been under considerable criticism in recent years.⁹⁵ The fish and wildlife managers question, the applicability of this procedure to establish BPA's responsibilities to address wildlife habitat losses.

E. The Fish Passage Center

In 1982, the Council called for the creation of what would eventually become the Fish Passage Center (FPC). The FPC provides technical assistance and information to fish and wildlife managers -- and the public generally -- on matters related to anadromous fish passage through the mainstem hydroelectric system. The Council's 1987 Program required Bonneville to fund the establishment and operation of the Fish Passage Center.⁹⁶

The Council's 2000 Program continued the operation of the Fish Passage Center.⁹⁷ Likewise, the 2003 mainstem amendments to the Program called for the continued operation of the Fish Passage Center. Nevertheless, in response to

⁹⁴ 2000 Program at 31.

⁹⁵ See e.g., P. Whitney, A. Neal and B. Baber, *Audit of Wildlife Loss Assessments for Federal Dams on the Columbia River and Its Tributaries* (Beak Consultants 1993); Memorandum from Northwest Power and Conservation Council, to Council Members, Northwest Power and Conservation Council (May 31, 2007), available online at: http://www.nwcouncil.org/news/2007_06/fw7.pdf.

⁹⁶ For a history of the Fish Passage Center, see Northwest Environmental Defense Center v. Bonneville Power Administration, 477 F.3d 668, 672-676 (9th Cir. 2007); Public Utility Dist. No. 1 v. Bonneville Power Administration, 947 F.2d 386, 389 (9th Cir. 1991).

⁹⁷ 2000 Program at 28.

congressional committee report language, BPA discontinued its contract with the Pacific States Marine Fisheries Commission (PSMFC) and contracted instead to divide functions of the FPC between the PSMFC and the Battelle Pacific Northwest Laboratory.

Bonneville's decision to discontinue funding for the FPC drew appeals from several conservation and sports fishing groups and the Yakama Indian Nation. In Northwest Environmental Defense Center v. Bonneville Power Administration,⁹⁸ the Ninth Circuit overturned BPA's decision. The court ruled that BPA acted contrary to law and concluding that congressional committee report language carry the force of law and downed BPA to transfer the functions of the FPC. Consequently, the Court ruled that BPA's decision to transfer the functions of the FPC to PSMFC and Battelle was arbitrary, capricious, and contrary to law. The court ordered that "BPA continue its existing contractual arrangement to fund and support the FPC unless and until it has established a proper basis for displacing the FPC."⁹⁹

The Northwest Environmental Defense Center case was seen as a victory for proponents of the FPC. Clearly the case affirms the primacy of the Fish and Wildlife program over congressional committee report language, unconnected to the text of an enacted statute. Nevertheless, there court left open the possibility that BPA could develop an alternative basis for a decision to discontinue funding for the FPC that would pass judicial muster.¹⁰⁰ The decision did not and the controversy over the continued existence of the FPC. It is likely that BPA or another entity may provide recommendations to the Council during the upcoming amendment process to discontinue funding for the FPC. In the meantime, the Council has called for the formation of a FPC Oversight Board, and is attempting to address the concerns of the FPC's critics through additional oversight.¹⁰¹

⁹⁸ Northwest Environmental Defense Center v. Bonneville Power Administration, 477 F.3d 668, (9th Cir. 2007).

⁹⁹ Northwest Environmental Defense Center, 477 F.3d at 691.

¹⁰⁰ See Northwest Environmental Defense Center, 477 F.3d at 690, n. 19.

¹⁰¹ According to the Council, "the general purpose of the Board is to provide policy guidance for the Center and to ensure that the Center carries out its functions in a way that ensures regional accountability and compatibility with the regional data management system." See <http://www.nwppc.org/fw/fpcob/Default.htm>. See also Letter from Daniel H. Diggs, Chair, Columbia Basin Fish and Wildlife Authority, to Jim Ruff, Northwest Power and Conservation Council (April 4, 2007), available online at http://www.cbfwa.org/RegionalIssues/Correspondence/CBFWA/2007_0404CBFWAtoNPCC.pdf.

F. Relationship of Fish and Wildlife Program and BPA Rate Case

Section 7(a) of the Northwest Power Act requires the BPA Administrator to establish and periodically review and revise power rates, in accordance with sound business principles, to recover total system costs.¹⁰² The Northwest Power Act requires BPA and other federal agencies to provide equitable treatment for fish and wildlife with the other for which the FCRPS is managed.¹⁰³ BPA is required to equitably allocate to power rates all costs of fish and wildlife measures.¹⁰⁴ Rates must be high enough to ensure that BPA will recover its total cost, including costs associated with fish and wildlife measures.¹⁰⁵

Section 7(i) sets forth in detail the procedures applicable to BPA ratemaking, and provides for confirmation and approval of BPA rates by the Federal Energy Regulatory Commission (FERC) BPA's rates before they become effective.¹⁰⁶ EPA is required to estimate its fish and wildlife costs for the rate before setting its rates. BPA establishes its program costs through a process it calls the Power Function Review (PFR). Technically, the PFR precedes the rate case proceeding. Program costs from the PFR become part of the revenue requirements for BPA's initial power rate proposal.

BPA's current rates took effect on October 1, 2006, and will continue through September 30, 2009. This is known as the FY 2007-09 rate period. Like its immediate predecessor, the FY 2007-09 rate is an "adjustable" rate.¹⁰⁷ The FY 2007-09 rate includes three power rate adjustment clauses. The Cost Recovery Adjustment Clause (CRAC) allows an annual adjustment to the base rates.¹⁰⁸ The NFB¹⁰⁹ Adjustment

¹⁰² 16 U.S.C. §839e(a)(1). These included costs associated with acquisition and transmission of electric power, amortization of the federal investment in the Federal Columbia River Power System (FCRPS), and costs and expenses incurred by the Administrator under the Act and other provisions of law. 16 U.S.C. §839e(a)(1).

¹⁰³ 16U.S.C. §839b(h)(11)(A)(I).

¹⁰⁴ 16 U.S.C. §839e(g).

¹⁰⁵ Golden Northwest Aluminum, Inc., v. Bonneville Power Administration, ___ F.3d 9 (9th Cir. 2007).

¹⁰⁶ 16 U.S.C. § 839e(i)(6).

¹⁰⁷ Bonneville Power Administration, Issue Alert: Highlights of BPA's FY 2007-2009 Power Rate Case (November 2005).
<http://www.bpa.gov/corporate/pubs/issue/05ia/ia110305.pdf>.

¹⁰⁸ Bonneville's annual collection amount under the CRAC is limited to \$300 million. The FY 2007-09 rate also includes a Dividend Distribution Clause (DDC), which requires BPA to refund its customers in the event financial reserves exceed the amounts needed to meet the BPA's financial obligations. The DDC clause allows for an annual downward

Clause increases the maximum recovery amount (i.e., cap) on the CRAC to allow recovery of increased ESA-related costs or reduced revenues. Finally, the Emergency NFB Surcharge is designed to recover unanticipated, ESA-related costs in a year when BPA's financial reserves may be inadequate for BPA to make federal treasury payments.¹¹⁰

On July 17, 2006, BPA decided to approve the 2007-09 rate.¹¹¹ On May 3, 2007, the Ninth Circuit Court of Appeals issued its ruling in Golden Northwest Aluminum, Inc. v. Bonneville Power Administration. In Golden Northwest Aluminum, the Court ruled that BPA had failed during the FY 2002-06 rate period to impose rates designed to recover its true fish and wildlife costs. The Court ruled that BPA was required to develop a "realistic projection of fish and wildlife costs that accurately reflected the information available at the time the rates were set and the cost recovery mechanisms adopted."¹¹² The Golden Northwest Aluminum court noted that fisheries managers and agencies responsible for managing fish and wildlife possess "unique experience and expertise," which requires that their analysis be given substantial weight.¹¹³ The Court ruled that BPA's rate determination was not supported by substantial evidence in the rulemaking record since BPA had ignored agency testimony that its fish and wildlife costs were unrealistically low.¹¹⁴

BPA's power rates must generate sufficient revenue to cover its power program costs. These include both expense and capital costs to implement the fish and wildlife program. The extent of BPA's obligations is determined with reference to the Council's Columbia Basin Fish and Wildlife Program, together with Bonneville's obligations under other environmental laws including, in particular, the Endangered Species Act. In light of the Golden Northwest Aluminum case, cost

adjustment of energy charges. There is no limit to the annual distribution amount under the DDC. http://www.bpa.gov/power/psp/rates/2007-2009_adjustments/CRAC_2007-2009/.

¹⁰⁹ "NFB" stands for "N"ational Marine Fishery Service "F"ederal Columbia River Power System "B"iological Opinion. As their names imply, BPA considers the NFB rates to be available only to cover unanticipated costs for court-ordered ESA recovery.

¹¹⁰ http://www.bpa.gov/power/psp/rates/2007-2009_adjustments/NFB-a_2007-2009/.

¹¹¹ Letter from Stephen J. Wright, Administrator, Bonneville Power Administration (July 17, 2006), available online at http://www.bpa.gov/power/pfr/rates/ratecases/wp07/07-17-2006_letter.pdf.

¹¹² Golden Northwest Aluminum, Inc. v. Bonneville Power Administration, ___ F.3d 9 (9th Cir. 2007).

¹¹³ Golden Northwest Aluminum, Inc., ___ F.3d at ____, quoting Northwest Resource Information Center, 35 F. 3d at 1388.

¹¹⁴ Golden Northwest Aluminum, Inc., ___ F.3d at ____.

estimates from the fish and wildlife managers for implementing the Fish and Wildlife Program and for BPA to fulfill its ESA obligations will be difficult to disregard.

IV. CONCLUSION

As explained in the Ninth Circuit's Northwest Resource Information Center opinion, the Northwest Power Act provides a clear framework for the relationship between the Northwest Power and Conservation Council, the ISRP and the fish and wildlife managers. The Act requires the Council to solicit from the fish and wildlife managers recommendations for measures to include in the Fish and Wildlife Program. The fish and wildlife managers may respond with both programmatic and project-specific recommendations. The Council also may receive proposals from others, including the water and hydroelectric managers, their customers, and the public generally. The Act requires the Council to provide deference to recommendations from the agency and tribal fish and wildlife managers. The Act requires the Council to set forth in writing its reasons for rejecting recommendations of the agency and tribal fishery managers. The Act limits the basis upon which the Council may reject agency and tribal recommendations.

The so-called Gorton amendment to the Act does not significantly alter the institutional relationship between the agencies and tribes and the Northwest Power and Conservation Council. The statutory criteria under which the Council may reject the managers' recommendations for Program measures are described in section 4(h)(7) of the Act. There is nothing in the 1996 amendment, however, to provide a statutory basis for the Council to ignore the recommendations of the fish and wildlife managers, regardless of whether suggested program measures are project-specific proposals for Bonneville funding or programmatic recommendations.¹¹⁵ Congress intended for the Council to rely heavily on the fish and wildlife agencies to develop the Program "and not try to become a super fish and wildlife entity."¹¹⁶ Instead, the Northwest Power Act requires the Council to develop the Columbia Basin Fish and Wildlife Program based primarily on the expertise of those entities interested by law with managing the fish and wildlife resources.¹¹⁷

In no way does the Gorton amendment alter the relationship between the fish and wildlife managers and the Bonneville Power Administration. In the recent words of the Ninth Circuit Court of Appeals, the Northwest Power Act "contemplates a participatory process in which the varied constituencies of the

¹¹⁵ See Section 512 of the 1997 Energy and Water Appropriations Act, *codified in* Section 4(h)(10)(D) of the Northwest Power Act, 16 U.S.C. § 839b (h)(10)(D).

¹¹⁶ 126 Cong. Rec. E10683 (1980)(Remarks of Rep. Dingell), *quoted in* Northwest Resource Information Center, 35 F. 3d at 1388.

¹¹⁷ Northwest Resource Information Center, 35 F. 3d at 1387.

Pacific Northwest advise BPA on how it should exercise its discretion.”¹¹⁸ The unique experience and expertise of the fish and wildlife managers is entitled to substantial weight.¹¹⁹

Once the agencies and tribes have recommended a program measure, the Council must adopt the recommendation unless the Council determines they are inconsistent with section 4(h)(7). The Council then must explain in writing its reasons for rejecting the recommendation. The fact that the ISRP recommended against funding a project, standing alone, does not justify Council rejection of a recommended program measure, even if the measure relates to an individual project. The reasons also must fit within the statutory framework provided by section 4(h)(7). Conversely, the Council may reject an ISRP recommendation for any reason, so long as the Council’s reason is explained in writing. The agencies and tribes may have acquiesced in the current project funding process. Nevertheless, neither the 1996 amendment to the Northwest Power Act, nor subsequent budget agreement, diminishes the statutory deference owed by the Council to the fish and wildlife managers. The role of the agencies and tribes regarding program measures remains intact, a fact consistently -- and repeatedly -- confirmed by the Ninth Circuit Court of Appeals.

Despite the efforts of the last few decades, population levels of the Columbia Basin’s fish and wildlife resources remain far below what they would be absent the hydropower system. The upcoming amendment cycle for the Council's fish and wildlife program provides yet another opportunity to revisit biological objectives and to consider measures designed to meet these objectives. The region’s fish and wildlife managers are entitled to great deference in the formation of the Council's Fish and Wildlife Program. BPA has an obligation under the Northwest Power Act to set its rates at levels that are sufficient to recover costs to implement the Program. The process for amending the Columbia Basin Fish and Wildlife Program sets the stage for BPA's next rate case. Fundamental to this effort are the recommendations of those agencies and tribes entrusted with managing the Basin’s once plentiful fish and wildlife resources.

¹¹⁸ Northwest Environmental Defense Center, 477 F.3d at 685.

¹¹⁹ Golden Northwest Aluminum, ___ F. 3d at ____; Northwest Resource Information Center, 35 F.3d at 1388.