

# **Authority of Fish and Wildlife Managers Under the Northwest Power Act**

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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) establishes the Northwest Power Planning Council and directs the Council to develop a program to protect, mitigate and enhance Columbia Basin fish and wildlife resources.<sup>1</sup> This paper explains the role and authorities of the Columbia Basin fish and wildlife management agencies and Indian tribes under the Northwest Power Act. Specifically, the paper discusses the legal relationship between the Northwest Power Planning Council, its Independent Science Review Panel and the fish and wildlife managers.

In summary, the Northwest Power Act envisions a participatory process that depends on the expertise of the fish and wildlife managers.<sup>2</sup> The Act requires the Northwest Power Planning Council to afford a “high degree of deference” to the recommendations of Columbia Basin fish and wildlife agencies and tribes for measures to include in or to implement the Council’s Columbia River Basin Fish and Wildlife Program.<sup>3</sup> The Northwest Power Act was amended in 1996, requiring the Council to establish and consult with an “Independent Science Review Panel.”<sup>4</sup> The FY 1997 Appropriations Act imposed additional procedural requirements on the Council, but did not diminish the statutory deference owed by the Council to the fish and wildlife agencies and tribes. Claims to deference for project funding recommendations essentially were conceded by the agencies and tribes under a 1996 Memorandum of Agreement between several federal agencies concerning Bonneville Power Administration (BPA) funding for Columbia River fish and wildlife restoration and enhancement.<sup>5</sup> Nevertheless, the role of the agencies and tribes regarding program measures remains intact.

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<sup>1</sup> Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-839h (1998).

<sup>2</sup> See Northwest Environmental Defense Center v. Bonneville Power Administration, No. 06-70430, slip op. 939, 967 (9th Cir., Jan. 24, 2007)(commonly referred to as “the Fish Passage Center case.”).

<sup>3</sup> See Northwest Resource Information Center v. Northwest Power Planning Council, 35 F. 3d 1371 (9th Cir. 1994)(commonly referred to as “the Tang decision.”).

<sup>4</sup> Section 512, *Energy and Water Appropriations Act for Fiscal Year 1997* (commonly referred to as “the Gorton amendment.”).

<sup>5</sup> An Annex to the Memorandum of Agreement called for the fish and wildlife managers to review project proposals from other entities, such as universities and non-governmental fish and wildlife enhancement groups.

## II. BACKGROUND

### Northwest Power Planning Act of 1980

The Northwest Power Act<sup>6</sup> 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. 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.<sup>7</sup> The Act also 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.

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. Section 4(h)(2) requires the Council to request recommendations from Federal agencies and the region's State fish and wildlife agencies and appropriate Indian tribes for --

measures ... to protect, mitigate and enhance fish and wildlife, including relating spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries ... .<sup>8</sup>

The Council is required to develop its program on the basis of recommendations received from the fish and wildlife agencies, appropriate Indian tribes, the region's water management and power producing agencies and their customers and the public generally.<sup>9</sup> The 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."<sup>10</sup> 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."<sup>11</sup>

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<sup>6</sup> Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-839h (1998).

<sup>7</sup> Northwest Power Act, Section 4(d), 16 U.S.C. § 839b(d).

<sup>8</sup> Northwest Power Act, Section 4(h)(2)(A), 16 U.S.C. § 839b(h)(2)(A).

<sup>9</sup> Northwest Power Act, Section 4(h)(5), 16 U.S.C. § 839b(h)(5).

<sup>10</sup> Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

<sup>11</sup> Id.

## **1982 Columbia Basin 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. By April 1981, the region's fish and wildlife agencies and Indian tribes had established an ad hoc "Executive Committee" for the purpose of organizing and managing the recommendations.

The Council was formed on April 28, 1981, and issued its request for program recommendations on June 10, 1981.<sup>12</sup> The fish and wildlife managers responded by submitting several hundred recommendations.<sup>13</sup> 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.<sup>14</sup>

### **1984 Program Amendments**

Federal water managers disagreed with fish and wildlife managers over the pace of funding, the scientific basis for taking action, and the anticipated biological consequences. As a result, 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.<sup>15</sup>

### **1987 Program Amendments**

In 1987, the Council again amended its program to establish a systematic program of subbasin planning to guide future restoration efforts. Thus the 1987 amendments established a new framework for implementing the Program.<sup>16</sup> The

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<sup>12</sup> 1982 Columbia Basin and Wildlife Program 1-2.

<sup>13</sup> The recommendations and supporting material were reproduced and bound in four volumes totaling 2200 pages, and were distributed throughout the Pacific Northwest states. 1982 Columbia Basin and Wildlife Program 1-2.

<sup>14</sup> See generally M. Blumm, *Sacrificing the Salmon: a Legal and Policy History of the Client of Columbia Basin Salmon* 136 (2002)(hereafter *Sacrificing the Salmon*).

<sup>15</sup> *Sacrificing the Salmon*, *supra* at 140-41.

<sup>16</sup> 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.

Council also declared an interim goal of doubling existing Columbia basin salmon runs. The Council deferred setting a date for reaching the interim goal until completion of the subbasin planning process.<sup>17</sup>

### **1992 Program Amendments: "Strategy for Salmon"**

The Council adopted minor amendments to the program in 1988 and in 1989 to restrict new hydropower development from "protected areas" and to incorporate BPA's 1988 mainstem spill agreement, respectively.<sup>18</sup> 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 program. Specifically, the Council adopted a four-phase decision making process to consider further amendments to the Fish and Wildlife Program. The first three phases culminated in the Council's adoption of its *Strategy for Salmon* in December 1992.

The Council had received numerous proposals for amendments to the Program in connection with adoption of the *Strategy for Salmon*. The Council disregarded many of the recommendations of the agencies and tribes without explanation.<sup>19</sup> The Yakama Indian Nation and several environmental organizations challenged the Council's actions.

### **Northwest Resource Information Center v. Northwest Power Planning Council**

In Northwest Resource Information Center (NRIC) v. Northwest Power Planning Council,<sup>20</sup> the Ninth Circuit Court of Appeals affirmed the Yakama Nation's legal challenges to the 1992 *Strategy for Salmon*.<sup>21</sup> According to the NRIC

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<sup>17</sup> *Sacrificing the Salmon, supra* at 141-42.

<sup>18</sup> *Sacrificing the Salmon, supra* at 143.

<sup>19</sup> The Council argued that its reasons for rejecting the fishery managers 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 ... ." Northwest Resource Information Center, 35 F. 3d at 1385-86.

<sup>20</sup> Northwest Resource Information Center v. Northwest Power Planning Council, 35 F. 3d 1371 (9th Cir. 1994).

<sup>21</sup> 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*, 479 U.S. 1059, 107 S. Ct. 939, 93 L. Ed. 2d 989 (1987).

Court, "Section 4(h)(7) requires the Council to explain, in the Program, a statutory basis for its rejection of [agency or tribal recommendations]." <sup>22</sup> 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."<sup>23</sup>

The Court ruled the Council failed to explain a statutory basis for its rejection of the fishery managers' recommendations. The Court also noted its concern that the Council "may have failed to give proper deference to fishery managers and to fully comply with other substantive criteria for program measures."<sup>24</sup> The Ninth Circuit remanded the 1992 *Strategy for Salmon* to the Council for reconsideration.

### **1994-95 Program Amendments**

Once again, the Council embarked on a comprehensive program revision, which was approved in December 1994. The Council directed Bonneville and the fish and wildlife agencies and tribes to enter discussions to "explore an implementation work plan development process, which identifies measures to be funded ... ." <sup>25</sup>

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 Bonneville first negotiate annual funding levels for the fish and wildlife program, including the amount available to fund fish and wildlife measures approved by the Council. Next, the fish and wildlife agencies and tribes (acting through CBFWA) recommend to the Council criteria for prioritizing proposed projects for funding. After the Council approves prioritization criteria, the fish and wildlife agencies and tribes annually develop a list of projects and estimated budgets "that represents the fish and wildlife

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<sup>22</sup> Northwest Resource Information Center, 35 F. 3d at 1386.

<sup>23</sup> Id.

<sup>24</sup> Northwest Resource Information Center, 35 F. 3d at 1395.

<sup>25</sup> Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM 1-7 (§ 1.2C.1)(December 14, 1994).

managers' views on what it will take to fully implement the Council's program.<sup>26</sup> The fish and wildlife managers then --

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.<sup>27</sup>

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.<sup>28</sup>

### **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 procedures, including a procedure for the annual prioritization of projects to be funded by Bonneville and review by an independent scientific advisory board (ISAB).<sup>29</sup> Under the MOA Annex, the Council was to forward projects and other proposals for program measures to CBFWA to coordinate fish and wildlife agency and tribal input. The

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<sup>26</sup> Northwest Power Planning Council, AMENDMENTS TO THE COLUMBIA BASIN FISH AND WILDLIFE PROGRAM (1995 AMENDMENTS) 3-3 (§ 3.1B.3)(September 13, 1995).

<sup>27</sup> 1995 AMENDMENTS 3-3 (§ 3.1B.3).

<sup>28</sup> 1995 AMENDMENTS 3-3 (§ 3.1B.4).

<sup>29</sup> MEMORANDUM OF AGREEMENT AMONG THE DEPARTMENT OF THE ARMY, THE DEPARTMENT OF COMMERCE, THE DEPARTMENT OF ENERGY, AND THE DEPARTMENT OF THE INTERIOR CONCERNING THE BONNEVILLE POWER ADMINISTRATION'S FINANCIAL COMMITMENT FOR COLUMBIA RIVER BASIN FISH AND WILDLIFE COSTS (September 16, 1996).

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 agencies and tribes.

### **Section 512, FY 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 Fiscal Year 1997 Energy and Water Appropriations Act adds a new Section 4(h)(10)(D) to the Northwest Power Act. The new section 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.<sup>30</sup>

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."<sup>31</sup>

The peer review groups, "in conjunction with the Panel," 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."<sup>32</sup> 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.

The panel's recommendations to the Council must be made available to the public for review and comment. The Council makes final recommendations to Bonneville "after consideration of the recommendations of the panel and other

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<sup>30</sup> Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i).

<sup>31</sup> Northwest Power Act, Section 4(h)(10)(D)(i), (ii), 16 U.S.C. § 839b(h)(10)(D)(i), (ii).

<sup>32</sup> Northwest Power Act, Section 4(h)(10)(D)(iv), 16 U.S.C. § 839b(h)(10)(D)(iv).

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 403 individual project proposals.<sup>33</sup>

### **1999 Independent Scientific Review Panel Report**

On June 15, 1999, the ISRP issued its Report on Fiscal Year 2000 Program Measures. 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."<sup>34</sup> The ISRP evaluated 397 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 Bonneville 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.<sup>35</sup>

The agencies and tribes, the Council and the ISRP fundamentally and vehemently disagreed about the nature of their relationship and about their respective authorities under the 1980 Northwest Power Act and the FY 1997 Appropriations bill's Northwest Power Act amendments. Not surprisingly, the fish and wildlife agencies and tribes reacted strongly against what they saw as the usurpation by the ISRP of their traditional role as Columbia Basin fish and wildlife managers. The tribes in particular were frustrated by the ISRP's apparent hostility to their long-awaited plans for increasing upriver harvest opportunities through

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<sup>33</sup> 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).

<sup>34</sup> ISRP FY 2000 *Review*, *supra* at 2.

<sup>35</sup> ISRP 99-2 at 12-14.

development of a wide-spread supplementation program.<sup>36</sup> An unattributed document entitled "A Proposal for Fish and Wildlife Funding Process Reform and the Foundational Underlying Principles" was circulated at CBFWA's 1998 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.<sup>37</sup>

## 2000 Fish and Wildlife Program

The Northwest Power Act requires the Council to review the Columbia River Basin Fish and Wildlife Program at least every five years.<sup>38</sup> 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. After reviewing the recommendations, the Council prepared a draft program. 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

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<sup>36</sup> 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.

<sup>37</sup> 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, 1998).

<sup>38</sup> 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 USC § 839b(d)(1). Section 4(h) of the Act requires the Council to adopt the Columbia River Basin Fish and wildlife program (Program), and to include the program in the electric power plan. 16 USC § 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 USC § 839b(h)(2)(emphasis added). 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).

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 believes certain kinds of actions should result in desired habitat conditions and why these conditions should improve fish and wildlife populations in the desired way.

The 2000 program marked a significant departure from past versions which, according to the Power Planning Council, consisted primarily of a collection of measures directing specific activities. The 2000 Program established a basinwide vision for fish and wildlife – the intended outcome of the program – along with biological objectives and action strategies that are consistent with the vision. Ultimately, the program will 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 foundation of ecological science.<sup>39</sup>

The 2000 program amendments set the stage for subsequent phases of the program revision process, in which the Council will adopt more specific objectives and action measures for the river’s mainstem and the tributary subbasins, consistent with the framework elements already adopted. The Council intends to incorporate these specific objectives and measures into the program in locally developed subbasin plans for the more than fifty subbasins of the Columbia River and in a coordinated plan for the mainstem Columbia and Snake rivers. In 2001 the Council issued a call for amendments to the 2000 program. The purpose of this call for amendment recommendations is to begin the process for developing and adopting the Council’s mainstem restoration plan into the program.<sup>40</sup>

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<sup>39</sup> According to the Council, the 2000 program “addresses all of the ‘Four Hs’ of impacts on fish and wildlife – hydropower, habitat, hatcheries and harvest.”

<sup>40</sup> As described in the 2000 program, the mainstem plan contains the specific objectives and action measures that the program calls 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

On August 12, 2002, the Council requested recommendations for amendments to the 2000 Fish and Wildlife 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 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 Power Act, the Council formally adopted as amendments into the program subbasin plans for 57 subbasins, based on the recommendations submitted.

### III. ANALYSIS

Discerning the appropriate legal relationship between the fish and wildlife agencies and tribes, the Council and the ISRP essentially is a matter of statutory interpretation. 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 requires the ISRP to review "projects to be funded" by Bonneville to implement the Council's Fish and Wildlife Program. A fundamental question is whether the 1997 Appropriations Act, by amending the 1980 Northwest Power Act, changes 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.

A threshold issue to resolve is whether the two enactments refer to the same activity. The 1997 Appropriations Act directs the ISRP "to review *projects* proposed to be funded ... ." <sup>41</sup> The appropriations act uses the term "projects proposed to be funded" or "projects to be funded" in four separate places. In contrast, Section 4(h)(2)(A) of the 1980 Act refers to "measures which can be expected to be implemented by the [BPA] Administrator." Sections 4(h)(5) and 4(h)(6) refer to "program measures." Section 4(h)(7) refers to "recommendation[s] of the fish and

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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. The Council will also analyze mainstem recommendations to ensure that the Council adopts objectives and measures for mainstem system operations that protect, mitigate and enhance fish and wildlife while also assuring the region an adequate, efficient, economical and reliable power supply.

<sup>41</sup> Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i)(*emphasis added*).

wildlife agencies and Indian tribes as part of the program, or any other recommendation ... .”<sup>42</sup>

The Northwest Power Act does not define the terms “program,” “program measure” and “project,” even though they are used repeatedly in section 4(h). 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.<sup>43</sup> Consequently, where a statutory term is not defined in the statute, the courts accord the term its “ordinary meaning.”<sup>44</sup> Webster’s Dictionary<sup>45</sup> defines “program” as “an outline of work to be done; a prearranged plan of procedure.” The same dictionary defines “measure” as “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.<sup>46</sup>

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,<sup>47</sup> 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

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<sup>42</sup> Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

<sup>43</sup> 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, \_\_\_ F. 3d \_\_\_, No. 98-10009, slip op. at 5 (9th Cir. June 29, 1999).

<sup>44</sup> Northwest Forest Resource Council v. Glickman, 82 F. 2d 825, 833 (9th Cir. 1996).

<sup>45</sup> Webster’s New Twentieth Century Dictionary (Second Ed. 1971).

<sup>46</sup> 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 [www.m-w.com/cgi-bin/dictionary](http://www.m-w.com/cgi-bin/dictionary).

<sup>47</sup> Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM 1-2 (1982).

“projects” were in fact included under the heading: “Program Measures.”<sup>48</sup> 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.

Courts often assume that where Congress uses different terms, a different result is intended.<sup>49</sup> 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 program<sup>50</sup> 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 next question is whether the FY 1997 Appropriations Act by implication erodes the deference otherwise due to the fish and wildlife managers, at least with regard to “projects to be funded” by Bonneville. The appropriations act does 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.”<sup>51</sup> Thus an interpretation of the two

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<sup>48</sup> 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.”

<sup>49</sup> Legacy Emanuel Hosp. and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996).

<sup>50</sup> Recommendations on the program itself include recommendations that are broader in scope than individual undertakings. An example of a programmatic initiative is the Council’s recently proposed “Desired End State,” which calls for subbasin planning and multi-year budgeting. Depending on how the Council intends to use the Desired End State document, it probably will constitute an amendment to the Fish and Wildlife Program. 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.

<sup>51</sup> Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

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.<sup>52</sup>

Here, the statutory scheme is fairly straightforward, and relatively easy to reconcile. The Northwest Power Planning Act requires the Council to solicit both programmatic and project-specific recommendations from the fish and wildlife managers. 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 the agency and tribal fish and wildlife managers in the event the recommendations are inconsistent with each other. 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 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 Bonneville to implement the Council's Columbia River Basin Fish and Wildlife 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.<sup>53</sup> The ISRP may recommend against funding a project put forward by the fish and wildlife agencies and tribes, 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 agencies and tribes.

#### IV. CONCLUSION

The Northwest Power Act, the Fiscal Year 1997 Energy and Water Appropriations Act, and the Ninth Circuit's Northwest Resource Information Center opinion provide a reconcilable framework for the relationship between the Northwest Power Planning Council, the ISRP and the CBFWA Members. Section 512 of the Appropriations Act does not alter significantly the institutional relationship

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<sup>52</sup> Morton v. Mancari, 417 U.S. 535, 549-50, 94 S. Ct. 2474, 2482-83, 31 L.Ed.2d 290 (1974) ("When 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.").

<sup>53</sup> 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.

between the agencies and tribes and the Northwest Power Planning Council. 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 Pacific Northwest advise BPA on how it should exercise its discretion."<sup>54</sup> 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."<sup>55</sup> Instead, the Northwest Power Act requires the Council to develop the Columbia Basin Fish and Wildlife Program from sources external to the Council.<sup>56</sup>

Congress established the ISRP to assist the Council in its efforts to evaluate the merits of recommendations for projects to be funded by Bonneville to implement the Council's Fish and Wildlife Program. The establishment of the ISRP, however, does not change the fundamental relationship between the Council and fish and wildlife managers. 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. Section 512 of the 1997 Energy and Water Appropriations Act provides criteria, now codified in section 4(h)(10)(D) of the Northwest Power Act, under which the ISRP is to review projects proposed for Bonneville funding. But these are grounds for the ISRP to recommend against funding and for the Council to reject recommendations of the fish and wildlife agencies and tribes. They do not provide a statutory basis for the Council to ignore the recommendations of the fish and wildlife managers for projects proposed for Bonneville funding or other project-specific or programmatic recommendations.

Once the agencies and tribes have recommended a program measure, the Council must adopt the recommendation unless the Council finds it to be inconsistent with section 4(h)(7). The Council then must explain in writing its reasons for rejecting the recommendation. The reasons may include the fact the ISRP recommended against funding the project, but that fact alone does not justify Council rejection of the recommendation. 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 conceded arguments about deference for project funding recommendations essentially were conceded by the agencies and tribes in favor of the current project funding process. Nevertheless, neither the 1996 amendment to the Northwest Power Act, nor subsequent budget agreement, diminish the statutory deference owed by the Council to the fish and wildlife

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<sup>54</sup> Northwest Environmental Defense Center v. Bonneville Power Administration, No. 06-70430, slip op. 939, 967 (9th Cir., Jan. 24, 2007).

<sup>55</sup> 126 Cong. Rec. E10683 (1980)(Remarks of Rep. Dingell), *quoted in* Northwest Resource Information Center, 35 F. 3d at 1388.

<sup>56</sup> Northwest Resource Information Center, 35 F. 3d at 1387.

agencies and tribes. The role of the agencies and tribes regarding program measures remains intact.