

Authority of Fish and Wildlife Managers Under the Northwest Power Act

February 18, 2008

**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 Council² 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 lead role in the development of the Council's Columbia Basin Fish and Wildlife Program. This paper discusses the role of fish and wildlife management entities 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.³ 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.⁴ 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.⁵

II. BACKGROUND

The Bonneville Power Administration (BPA) provides the bulk of the Pacific Northwest's electric power and energy. Historically, 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 BPA with

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

² In July 2003 the Council changed its name to the "Northwest Power and Conservation Council." During much of its existence, however, the Council was referred to as the "Northwest Power Planning Council," and indeed is referred to as such in the Act itself. *See* Northwest Power Act at § 4(h)(10)(D), 16 U.S.C. § 839b(h)(10)(D)(1998). To avoid confusion with sources, this paper refers to the Council by its historic nomenclature.

³ *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."*).

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

⁵ *See Northwest Resource Information Center v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994)(*commonly referred to as "the Tang decision."*).

authority to acquire additional electric generating resources to satisfy its customers' increasing demands.⁶

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 dams blocked substantial areas of salmon habitat throughout most of the basin. Efforts to protect and restore fish and wildlife resources, including primarily hatcheries and harvest management, have failed to reverse the decline.

The decades of the 1960s and 1970s were a time during which Congress and the region's state legislatures enacted a host of environmental protection laws. On the federal level, these included (among several others), the Clean Water Act, the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).⁷ On the state level, they included Washington's Shoreline Management Act and State EPA, and Oregon's litter law. The period of enactment of environmental laws coincided with the success of Pacific Northwest Indian tribes asserting treaty fishing rights.⁸

Concurrently, the federal government was moving to join states – and Indian tribes – as partners to address a wide range of issues on a regional or local level. This era of “cooperative federalism” produced a number of laws delegating responsibilities to states and tribes and requiring federal agency consistency with nonfederal plans and regulatory programs. Notable examples included the Clean Water Act, the Coastal Zone Management Act, the Indian Self-Determination Act, and a variety of federal highway and housing programs.

Significantly, Congress passed the ESA to prevent the extinction of fish and wildlife species. Shortly after enactment of ESA, the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service embarked on a status review of Columbia River salmon stocks.⁹ Advocates for protecting the Columbia Basin's once vast fish and wildlife resources saw the movement to expand BPA's authority as an opportunity to address the needs of the Basin's fish and wildlife species.

⁶ See S. Rep. 96-272, at page 17 (July 30, 1979).

⁷ Federal Water Pollution Control Act (*commonly referred to as the Clean Water Act*), 33 U.S.C. §§ 1251-1387; Endangered Species Act, 16 U.S.C. §§ 1531-1544; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347.

⁸ 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).

⁹ <http://www.nwcouncil.org/history/EndangeredSpeciesAct.asp>.

Congress passed the Northwest Power Act in this historical context. Power interests wanted the federal government to continue to satisfy the region's electricity needs. Others wanted a commitment to address fish and wildlife needs. In its final form, the Act authorized the BPA to acquire additional electric generating resources. But the final bill also required federal agencies -- subject to consistency with direction from an interstate compact agency referred to in the statute as the Pacific Northwest Electric Power Planning and Conservation Council -- to "protect, mitigate and enhance" fish and wildlife resources to the extent affected by hydroelectric development in the Basin. It was a classic case of legislative compromise. In the end, both sides appeared to get what they wanted.

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 raised the standard, requiring that federal agencies provide "equitable treatment" for fish and wildlife, on par with other uses of the Columbia River basin.¹⁰ 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.¹¹ 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 expectation of reviving the fish and wildlife populations of the Basin.¹²

The Northwest Power Act provides a unique regional solution to what at the time of its enactment was widely considered to be a regional problem.¹³ At the same time, the Act reflected principles of cooperative federalism that were in vogue at the time the law was drafted. Specifically, it 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.¹⁴ The Northwest Power 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.¹⁵ The Act gives BPA

¹⁰ 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.

¹¹ Northwest Resource Information Center, 35 F.3d at 1377.

¹² Id. at 1376 (quoting 126 Cong. Record H10687 (daily ed. Nov. 17, 1980)(letter from Comptroller General)).

¹³ See e.g., 126 Cong. Record H9845 (daily ed. Sept. 29, 1980)(Remarks of Rep. Lujan).

¹⁴ 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).

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

authority to acquire additional generating resources, but only as provided under the Council's Power Plan.¹⁶

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. 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.”¹⁷ 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 --

(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)¹⁸

The Northwest Power Act imposes requirements on BPA and other federal agencies to act in a manner consistent with the Council’s Program. First, BPA 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.¹⁹ Bonneville and other federal agencies responsible for operating or regulating federal or non-federal hydroelectric facilities are also required to –

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

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

¹⁸ Northwest Power Act, Section 4(h)(2)(A)-(C), 16 U.S.C. § 839b(h)(2)(A)-(C).

¹⁹ 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 the 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).

exercise such responsibilities consistent with the purposes of [the Act] and other applicable laws to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated.²⁰

They also must 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.²¹

The Northwest Power Planning Council is required to develop its Fish and Wildlife 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.²² The Council is required to include in 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--

²⁰ Northwest Power Act, Section 4(h)(11)(A)(i), 16 U.S.C. § 839b(h)(11)(A)(i).

²¹ 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 Volkman and McConnaha, Through a Glass, Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 *Envtl. L.* 1249, 1253 (1993). This "qualified" consistency provision was often referred to by founding Council Chairman Daniel J. Evans as the source of "creative tension" that existed between the federal government and the States (acting through the Council). It is significant that this standard - which applies to all federal agencies and to all agency decisions - exists independent of the consistency requirement found in Section 4(h)(10)(A), which is applicable only to BPA and which appears unqualified. No courts have yet considered the distinction.

²² Northwest Power Act, Section 4(h)(5), 16 U.S.C. § 839b(h)(5).

- (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.²³

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.”²⁴ The Council may reject 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.”²⁵

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 Pacific Northwest 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.²⁶ 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 responded to the Council’s call by submitting several hundred recommendations for program measures.²⁷ The Council held public hearings on the recommendations during March 1982, and received written comments

²³ Northwest Power Act, Section 4(h)(6), 16 U.S.C. § 839b(h)(6).

²⁴ Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

²⁵ *Id.*

²⁶ Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, at 1-2 (1982).

²⁷ 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&WR_ecomm.pdf.

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.²⁸

The 1982 Program included a host of projects and activities identified as "Program measures." A notable feature of the 1982 Program was the Council's recommendation to establish a "water budget" to maintain specified mainstem flow levels.²⁹ The Program did not recommend minimum fixed flow levels, but instead adopted a "sliding scale" or volumetric approach. The Council based its 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 power and other purposes. The Council also called for BPA to fund two "Water Budget Manager" positions, to provide expert assistance to fishery managers and to serve as their primary points of contact on matters relating to administration of the water budget.³⁰

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 implementation and the lack of funding. They 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 previous 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 amendments established three interim goals: 1) to increase survival of downstream migrating juvenile salmon through effective use of the water budget,³¹ 2) to increase systemwide

²⁸ 1982 Columbia Basin Fish and Wildlife Program; *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*).

²⁹ 1982 Columbia Basin Fish and Wildlife Program, at 300; Northwest Resource Information Center, 35 F.3d at 1380.

³⁰ 1982 Columbia Basin Fish and Wildlife Program, Section 300(a) through (c). Thus the 1982 Program initiated what would eventually become the Fish Passage Center. Northwest Environmental Defense Center, 477 F.3d at 672.

³¹ *See generally*, Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, Section 300 (1984).

productivity generally,³² and 3) to establish protections against future hydroelectric development.³³ The primary innovation of the 1984 amendments was a five-year action plan that established deadlines for implementing numerous program provisions.³⁴ These included deadlines for the installation of bypass systems designed to improve fish passage at several mainstem dams.³⁵ They also included a variety of offsite mitigation measures.³⁶

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.³⁷ 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.³⁸ Nevertheless, the Council recognized the need for more data to quantify anadromous fish losses at each stage of their life cycle.³⁹ In the meantime, 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.⁴⁰

Another notable feature of the Council's 1987 Program was the requirement that BPA fund the establishment and operation of the Fish Passage Center (FPC). The FPC

³² See generally 1984 Columbia Basin Fish and Wildlife Program, Section 700.

³³ See generally 1984 Columbia Basin Fish and Wildlife Program, Section 1200.

³⁴ *Sacrificing the Salmon*, *supra* note 28, at 140-41.

³⁵ Michael C. Blumm and Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon and Endangered Species in the Columbia Basin*, 21 *Env'tl. L.* 657, 680 (1991).

³⁶ 1984 Columbia Basin Fish and Wildlife Program, Section 700.

³⁷ 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.

³⁸ Northwest Power Planning Council, *Compilation of Information on Salmon and Steelhead Losses in the Columbia River Basin* (1986); Northwest Power Planning 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*), available online at: <http://www.nwppc.org/library/2000/2000-19/TechAppF/Default.htm>.

³⁹ Northwest Resource Information Center, 35 F.3d at 1381.

⁴⁰ *Sacrificing the Salmon*, *supra* note 28, at 141-42.

assumed the responsibilities of the 1982 Program's Water Budget Managers to develop and implement flow and spill requests, and to monitor and analyze research results to assist in implementing the water budget.⁴¹ The FPC also was directed to plan and implement the annual smolt monitoring program called for in the Council's Program.

1992 Program Amendments: "Strategy for Salmon"

Planning and restoration efforts during the previous decade failed to halt the decline of Columbia River salmon stocks. On June 7, 1990, NMFS received a petition from Oregon Trout and five co-petitioners to list Snake River spring-run chinook salmon, Snake River summer-run chinook salmon, and Snake River fall-run chinook salmon under the ESA. In 1991, the National Marine Fisheries Service resumed proceedings to list several species of Columbia River salmon and steelhead under the Endangered Species Act. NMFS announced a final rule on April 22, 1992, in which the federal agency determined that Snake River chinook salmon should be listed as threatened under the ESA.⁴²

In response to the ESA listing petitions, the Council embarked on a comprehensive overhaul of the 1987 Program.⁴³ 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 a comprehensive program revision, entitled *Strategy for Salmon*, in December 1992.⁴⁴ 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 needed to measure the success or failure of restoration efforts.

⁴¹ See Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, Section 300(b)(1) (1987).

⁴² National Marine Fisheries Service (NMFS), Endangered and threatened species; threatened status for Snake River spring/summer chinook salmon, threatened status for Snake River fall chinook salmon. 57 Fed. Reg. 14653-14662 (April 22, 1992).

⁴³ In 1988, 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*, *supra* note 28 at 143.

⁴⁴ Northwest Power Planning Council, STRATEGY FOR SALMON (1992), available online at: <http://www.nwppc.org/library/1992/Default.htm>.

Northwest Resource Information Center v. Northwest Power Planning Council

Without explanation, the Council disregarded many of the recommendations of the agencies and tribes for *Strategy for Salmon*.⁴⁵ The Yakama Indian Nation and several environmental organizations challenged the Council's decision to reject fish and wildlife managers' recommendations. In 1994, in Northwest Resource Information Center (NRIC) v. Northwest Power Planning Council,⁴⁶ the Ninth Circuit affirmed the Yakama Nation's legal challenges to the 1992 *Strategy for Salmon*.⁴⁷ The NRIC 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]."⁴⁸ Furthermore, the 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."⁴⁹ 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 recommendations for program measures.⁵⁰ 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

⁴⁵ 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.

⁴⁶ Id. at 1371.

⁴⁷ 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).

⁴⁸ Northwest Resource Information Center, 35 F. 3d at 1386.

⁴⁹ Id. at 1384 (citing § 839b(h)(7)).

⁵⁰ Id. at 1388.

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 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.⁵¹

The NRIC Court ruled that the Council failed to explain a statutory basis for its rejection of the fishery managers' recommendations.⁵² 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 yet another comprehensive program revision in response to the NRIC decision. The Council approved Program amendments in December 1994. Significantly, the Council directed BPA to fund continued operation of the FPC, including a Fish Passage Center Manager position designated by the fishery managers. The Council also directed BPA and the fish and wildlife managers to propose "an implementation work plan development process, which identifies measures to be funded ... [by BPA]."⁵³

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 -- 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

⁵¹ Id. at 1388-89.

⁵² Id. at 1385.

⁵³ Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM 1-7 § 1.2C.1 (1994), 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.

projects and estimated budgets “that represents the fish and wildlife managers’ views on what it will take to fully implement the Council’s program.”⁵⁴ 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.⁵⁵

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 project list to BPA 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 BPA or send the list and work plan back to the fish and wildlife managers with comments.⁵⁶

1995 BPA Budget Agreement

By 1995, growing concerns in Congress about BPA’s long-term financial condition led to efforts to limit the agency’s financial expenditures. Negotiations between representatives of BPA, the Council and NMFS produced a draft interagency agreement designed to provide both financial stability for BPA and sufficient fish and wildlife expenditures. The draft agreement called for a formal agreement between BPA, 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 BPA’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 BPA and review by an independent scientific advisory board (ISAB).⁵⁷ Under the MOA Annex, the Council was to forward projects and other proposals for program measures to the Columbia Basin Fish and Wildlife Authority (CBFWA) to coordinate fish and wildlife agency and tribal input.

⁵⁴ Northwest Power Planning Council, AMENDMENTS TO THE COLUMBIA BASIN FISH AND WILDLIFE PROGRAM (1995) 3-3 § 3.1B.3 (Sept. 13, 1995), *available online at*: <http://www.nwcouncil.org/library/1994/Default.htm>.

⁵⁵ 1995 Amendments 3-3 § 3.1B.3.

⁵⁶ 1995 Amendments 3-3 § 3.1B.4.

⁵⁷ 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's 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 Council's Program. Section 512 of the FY 1997 Energy and Water Appropriations Act, referred to as the "Gorton Amendment" after its sponsor U.S. Senator Slade Gorton, 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.⁵⁸

The Gorton Amendment 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."⁵⁹

The peer review groups were to review projects proposed for funding through BPA'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.⁶⁰

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.

⁵⁸ Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i).

⁵⁹ Northwest Power Act, Section 4(h)(10)(D)(i), (ii), 16 U.S.C. § 839b(h)(10)(D)(i), (ii).

⁶⁰ 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.⁶¹

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.⁶²

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, while CBFWA recommended funding for 227 ongoing proposals.⁶³

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.⁶⁴ The tribes, in particular, were frustrated

⁶¹ 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*, 5, ISRP 99-2 (June 15, 1999).

⁶² *Id.* at 2.

⁶³ *Id.* at 12-14.

⁶⁴ 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

by the ISRP's apparent hostility to their long-awaited plans for increasing upriver harvest opportunities through development of a wide-spread supplementation program.⁶⁵

2000 Fish and Wildlife Program

Coincidentally, 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 recommendations from more than 50 entities and individuals, totaling more than 2,000 pages.⁶⁶

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 Council explained its work as follows:

The fundamental elements of the program are:

The vision, which describes what the program is trying to accomplish with regard to fish and wildlife and other desired benefits from the river;

The biological objectives, which describe the ecological conditions needed to achieve the vision; and

The implementation strategies, procedures and guidelines, which guide or describe the actions leading to the desired ecological conditions.

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).

⁶⁵ 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.

⁶⁶ Northwest Power Planning Council, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, at 8, Council Document 2000-19 (2000), *available online at*: <http://www.nwppc.org/library/2000/2000-19/Default.htm>.

In other words, the vision implies biological objectives that set the strategies. In turn, strategies address biological objectives and fulfill the vision. The scientific foundation links the components of the framework, explaining why the Council believes certain kinds of management actions will result in particular physical habitat or ecological conditions of the basin, or why the ecological conditions will affect fish and wildlife populations or communities.⁶⁷

The 2000 Program marked a significant departure from past versions which, according to the Council, were criticized as consisting primarily of a collection of measures directing specific activities, without a clear scientific foundation.⁶⁸ 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. The Program was purposefully short on project specific measures. Instead, Program implementation was left to subbasin plans developed locally in the more than 50 tributary subbasins of the Columbia and later adopted by reference into the Program by the Council. Those plans were to be consistent with the basinwide vision and objectives in the Program, and its underlying scientific and ecological foundation.⁶⁹

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 mainstem Columbia and Snake rivers. For the tributary subbasins, consistent with the framework elements already adopted, the Council incorporated specific objectives and measures into the Program through approval of locally-developed subbasin plans for the more than 50 subbasins of the Columbia River.⁷⁰

⁶⁷ 2000 Columbia Basin Fish and Wildlife Program, at 10.

⁶⁸ *Id.* at 9.

⁶⁹ According to the Council, the 2000 program “addresses all of the ‘Four Hs’ of impacts on fish and wildlife – hydropower, habitat, hatcheries and harvest.” *Id.*

⁷⁰ 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. 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. The Council adopted the Mainstem Amendments in April 2003. Northwest Power and Planning Council, Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program, Council Document 2003-11 (2003). The Mainstem Amendments incorporated the biological objectives of the 2000 FCRPS Biological Opinions (BiOp) issued by NOAA Fisheries and the U.S. Fish and Wildlife Service. *Id.* at 11. The Amendments further defined the role of the Fish Passage

The Council adopted the 2000 Fish and Wildlife Program in November 2000. One month later, the National Marine Fisheries Service issued its Biological Opinion covering operation of the Federal Columbia River Power System (2000 Biological Opinion or BiOp).⁷¹ The 2000 Biological Opinion concluded that jeopardy of listed salmon and steelhead could be avoided if certain conservation measures identified as reasonable and prudent alternatives were implemented by the Bonneville Power Administration, U.S. Army Corps of Engineers, and U.S. Bureau of Reclamation (known as the FCRPS Action Agencies) over a ten-year period.

The 2000 BiOp's reasonable and prudent alternatives (RPA) contained 199 actions. The RPA defined a rolling annual and five-year planning, implementation and review process. The FCRPS Action Agencies were to produce annual and five-year implementation plans, describing progress to date, laying out details of the short- and long-term plans for achieving performance standards, proposing adjustments to the RPA Actions, and describing the rationale for those adjustments. NOAA Fisheries (NMFS) was to review each year's annual Implementation Plan through the issuance of a "findings letter" to the Action Agencies.⁷² In May 2001 a coalition of environmental organizations sued NOAA Fisheries challenging its reliance on the 2000 BiOp as the basis for a no-jeopardy determination for ongoing FCRPS operations.

The FY 1996-2001 Budget Memorandum of Agreement expired in September 2001. On December 3, 2001, BPA announced its intention to integrate BPA funding for the 2000 BiOp's implementation plans with funding for implementation of the Council's Fish and Wildlife Program.⁷³ To accomplish this "integrated approach" BPA announced it would undertake four specific activities:

Center by stating that it was responsible for planning and implementing the smolt monitoring program, collecting and storing data and providing technical assistance and recommendations to the fish and wildlife agencies. *Id.* at 27 The Amendments also called for changes to the FPC by establishing an oversight board and specifying that the FPC's manager "will be selected by, and subordinate to, the Executive Director of the Columbia Basin Fish and Wildlife Authority (Authority) in consultation with the oversight board." *Id.* at 28; *See also Northwest Environmental Defense Center*, 477 F.3d at 676.

⁷¹ National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Biological Opinion: Reinitiation of Consultation on Operation of the Federal Columbia River Power System (Dec. 21, 2000)(hereafter 2000 BiOp).

⁷² Testimony of D. Robert Lohn, Regional Administrator, Northwest Region, National Marine Fisheries Service, National Oceanic And Atmospheric Administration U.S. Department of Commerce, Before the Subcommittee on Fisheries, Wildlife and Water, U.S. Senate Committee on Environment and Public Works: Federal Columbia River Power System Biological Opinion (June 24, 2003).

⁷³ Letter from Stephen J. Wright, Bonneville Power Administration, to Frank J. Cassidy, Jr., Northwest Power Planning Council (Dec. 3, 2001), *available online at*:

1. Developing one set of regional criteria for Research, Monitoring and Evaluation;
2. Developing criteria for prioritizing ESA measures within the Council's Program;
3. Developing a crediting mechanism for action taken under the Council's Program and BiOps; and
4. Developing sub-basin plans and their relationship to recovery planning efforts under ESA.⁷⁴

For planning purposes, BPA also estimated an aggregate fish and wildlife spending estimate for FY 2002-06. The estimate included an annual average of \$36 million for capital projects, and an average annual expenditure of \$150 million for non-capital expenses to implement the 2000 FCRPS BiOp and the Council's Program.⁷⁵

Bonneville's 2001 cost estimate for implementing the integrated fish and wildlife program was short lived. By the following year BPA plunged into a serious financial crisis, the result of dislocations from energy deregulation⁷⁶ combined with a drought that hindered hydroelectricity production.⁷⁷ By late 2002, BPA projected a \$1.2 billion revenue shortfall for the 2002-2006 rate period.

http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/Fy02-06FundingBPALetter2001_1203.pdf.

⁷⁴ *Id.*

⁷⁵ *Id.* The letter explained that the estimate for non-capital expenses was consistent with BPA's projection of an annual average of \$139 million in accruals for non-capital expenditures, developed for purposes of setting BPA's revenue requirements for the FY 2002-06 rate period. The letter noted this amount represented "a weighted average" of the thirteen modeled alternatives having a range of \$109-179 million.

⁷⁶ *BPA Says Enron Bust Not Affecting Finances*, Columbia Basin Fish and Wildlife News Bulletin (Feb. 1, 2002), *available at*: <http://www.cbbulletin.com/Archive/02012002+/2096.aspx> Enron was BPA's largest electricity trading partner until the Company's collapse in 2001. For reasons that go beyond the scope of this paper, BPA purchased electricity on the open market and sold it at a loss to satisfy contractual commitments to its customers. *See* United States General Accounting Office, *Testimony Before the Committee on Indian Affairs, U.S. Senate*, GAO-03-844T (June 4, 2003).

⁷⁷ *Drought Declaration Could Hit AG Water Users Hard*, Columbia Basin Fish and Wildlife News Bulletin (March 16, 2001), *available at*: <http://www.cbbulletin.com/Archive/03162001+/1715.aspx> (Washington Governor Locke authorized the State Department of Ecology to declare a statewide drought emergency); *Water Conditions Worsen for Migrating Fish*, Columbia Basin Fish and Wildlife News Bulletin (July 13, 2001), *available at*: <http://www.cbbulletin.com/Archive/07132001+/1807.aspx> (explaining that many areas are experiencing 35 to 45 percent of normal flows).

Notwithstanding its December 2001 budget estimates and new ESA obligations, BPA began a concerted effort to reduce fish and wildlife expenditures by reducing the budget amounts and establishing a new accounting procedure designed to reduce fish and wildlife costs.⁷⁸ First, BPA established a multiyear budget for the program, which was not to exceed an average of \$139 million annually and a total of \$556 million during the FY 2003-06 rate period. Bonneville allowed fluctuations between years, but only plus or minus up to 10 percent. Furthermore, BPA no longer allowed programmatic carry-over.⁷⁹

On December 10, 2002, BPA requested the Council to “ensure that spending for the Integrated Program does not exceed \$139 million in expense accruals in FY 2003,” and to “[p]rioritize program spending to create the opportunity to spend less than \$139 million in expense annually through the 2003-2006 period.”⁸⁰ Furthermore, BPA announced that it would eliminate inflation adjustments, prohibit carry over contract project balances, and would suspend all land or easement purchases.⁸¹

In response to BPA’s request, the Council worked throughout January and February 2003 to significantly reduce Program implementation costs.⁸² The Council agreed to cut nearly \$21 million from non-capital expenditures (reducing the budget to under \$139 million), but not without grave reservations. In fact, in its letter establishing how the Fish and Wildlife Program could meet a \$139 million budget for 2003, the Council warned that the Program could not withstand significant reductions in later years. The Council also criticized BPA’s new accounting rules. According to the Council, “the current accounting methods employed by Bonneville cannot ensure that sufficient funds are available to cover its contracted fish and wildlife

⁷⁸ Letter from Stephen J. Wright, Administrator and Chief Executive Officer, Bonneville Power Administration, to BPA customers, tribes, constituents and interested parties (Nov. 22, 2002), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2002_1122BPANewsletter.pdf

⁷⁹ Letter from Sarah McNary, Fish and Wildlife Division Manager, Bonneville Power Administration, to Northwest Power Planning Council and Columbia Basin Fish and Wildlife Authority (Nov. 20, 2002); *See also* Letter from Stephen J. Wright, Administrator, Bonneville Power Administration, to Judi Danielson, Chair, Northwest Power and Conservation Council (Oct. 3, 2003), *available online at* http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2003_1003BPAtoNWPPC.pdf. BPA Continued to allow rescheduling of work on a particular project.

⁸⁰ Letter from Stephen J. Wright, Administrator, Bonneville Power Administration to Frank L. Cassidy, Chairman, Northwest Power Planning Council (Dec. 10, 2002), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2002_1210BPAtoNPPC.pdf.

⁸¹ *Id.*

⁸² *Id.*

obligations.”⁸³ The Council stated that part of the reason that the fish and wildlife program had experienced a “crisis” and was perceived to be over-allocated was because of the after-effect of the transition to BPA’s new accounting methods. The Council explained as follows:

Failure to join obligations with funds within the fish and wildlife program has caused much of the disruption and pressure that we are experiencing. By its own accounting, Bonneville carried over \$40 million in fish and wildlife obligations from the last rate period that ended in Fiscal Year 2001 into the current rate period. The remaining revenues collected in the last rate period, however, were not made available in the current rate period. With Bonneville’s currently imposed accounting rules, the fish and wildlife program must absorb that \$40 million within the \$139 million that already was fully allocated for Fiscal Year 2003 work.⁸⁴

Shortly thereafter, on May 7, 2003, the Federal District Court for Oregon issued its ruling rejecting the 2000 BiOp as the basis for a no-jeopardy determination for FCRPS operations. In National Wildlife Federation v. National Marine Fisheries Service,⁸⁵ the court found that NOAA Fisheries lacked authority to direct nonfederal entities to take any particular action to protect endangered salmon runs. Therefore, the court ruled, many of the mitigation measures described in the 2000 BiOp as “reasonable and prudent alternatives” were not “reasonably certain to occur,” as required under the ESA.⁸⁶ Nevertheless, District Court Judge Redden denied Petitioner’s motion to vacate the 2000 FCRPS BiOp. Instead, he instructed NOAA Fisheries to cure deficiencies within one year of his decision.⁸⁷

Meanwhile, two mid-Columbia tribes initiated legal action under the “equitable treatment” provision of the Northwest Power Act. The Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe filed a challenge directly with the Ninth Circuit Court of Appeals. In Confederated Tribes of the Umatilla Indian

⁸³ Letter from Judi Danielson, Chair, Northwest Power Planning Council to Steve Wright, Administrator, Bonneville Power Administration (Feb. 21, 2003), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/NWPPC/2003_0221NWPPCtoBPA.pdf.

⁸⁴ Id.

⁸⁵ National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp. 1196 (D. Ore. 2003).

⁸⁶ National Wildlife Federation, 254 F. Supp. at 1215.

⁸⁷ National Wildlife Federation, 254 F. Supp. at 1215; Blumm, Thorson and Smith, *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 *Envtl. L.* 709 (2006).

Reservation et al. v. Bonneville Power Administration, the petitioners alleged that BPA failed to treat fish and wildlife on par with power and therefore failed to provide “equitable treatment” as required under the Northwest Power Act.⁸⁸ The case was the culmination of nearly 22 years of frustration for the tribes, and they cited a litany of examples where BPA allegedly failed to fulfill its statutory mandate. The tribes acknowledged that they were not challenging any of the examples cited, but instead claimed that BPA had unreasonably delayed creating a plan or strategy to provide equitable treatment.⁸⁹ The Ninth Circuit Court dismissed all the petitioners’ claims – some based on lack of subject matter jurisdiction and denying others on the merits. The court recognized that the Northwest Power Act requires BPA to provide “equitable treatment” for fish and wildlife, but the court held that the equitable treatment mandate “does not require every BPA decision to treat fish and wildlife equitably.”⁹⁰ Instead, the Court ruled that a petitioner must show that, overall, BPA “treats fish second to power.”⁹¹

Emboldened perhaps by its victory in the Umatilla case, BPA continued on its quest to reduce fish and wildlife program expenditures. On July 12, 2004, BPA informed the Council of its accounting guidelines for the capital portion of the integrated fish and wildlife program.⁹² First, the guidelines allow for an annual average capital investment of \$36 million, not to exceed \$108 million for the remaining years of the rate period. Furthermore, BPA allowed for facilities to be capitalized only if they have a useful life of 15 years or more *and* cost \$1 million or more each. Bonneville agreed to capitalize land acquisition projects, but only if costs exceed \$1 million for each parcel acquired, *and* if the investment provides a creditable and quantifiable benefit against an FRCPS legal obligation.⁹³

⁸⁸ Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Administration, 342 F.3d 924 (9th Cir. 2003). This is similar to an earlier case where environmental groups alleged that BPA had failed to provide “equitable treatment” by not dedicating a portion of the 2.25 million acre-feet of non-Treaty storage capacity water to benefit fish and wildlife interests. Northwest Environmental Defense Center v. Bonneville Power Administration, 117 F.3d 1520 (9th Cir. 1997); *See also* Bodi, Colloquim: Who Runs the River, 25 *Envtl. L.* 365 (1995).

⁸⁹ Umatilla Tribes v. Bonneville Power Administration, 342 F.3d at 928.

⁹⁰ Umatilla Tribes v. Bonneville Power Administration, 342 F.3d at 931.

⁹¹ Umatilla Tribes v. Bonneville Power Administration, 342 F.3d at 931.

⁹² Letter from Gregory K. Delwiche to Judi Danielson (July 12, 2004), *available online at* http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2004_0712BPAtoNPCCCapitaIBudget.pdf.

⁹³ Since the adoption of its new accounting measures, BPA has spent considerably less than the amount budgeted for capital investments in the fish and wildlife program. In 2002

Meanwhile, the federal agencies continued to struggle in their efforts to satisfy ESA requirements. Rather than correct the 2000 BiOp, NMFS issued an entirely new biological opinion on November 30, 2004 (the "2004 BiOp"). The 2004 BiOp formed the basis of the federal agencies' operating plans for the FCRPS during the summer of 2005. Environmentalists immediately challenged the legality of the 2004 BiOp. Once again, the federal district court invalidated the approach taken by NMFS to reconcile FCRPS operations with ESA requirements.⁹⁴

Despite the remand, BPA refused to increase its Fish and Wildlife Program Budget for the rate period above levels set by the Council – under protest -- in 2003.⁹⁵

BPA spent only \$6.1 million, representing just under 17 percent of the amount budgeted. In 2004, BPA spent only \$8.5 million, or 23 percent of the amount budgeted. It was not until 2006 that BPA reached \$36 million in capital expenditures to implement the Fish and Wildlife Program. Bonneville Power Administration, FY 2009 Budget Submission for Congress 87 (February 2008) *available online at*: http://www.bpa.gov/Corporate/Finance/Budget/09/FY_2009_Budget_Submission_for_Congress.pdf.

⁹⁴ See National Wildlife Federation v. National Marine Fisheries Service, 422 F. 3d 782 (9th Cir. 2005). In the 2004 BiOp, NMFS conducted a jeopardy analysis which utilized the novel approach of including in the environmental baseline the existing FCRPS, the nondiscretionary dam operations, and all past and present impacts from discretionary operations. As opposed to assessing whether the salmon and steelhead would be jeopardized by the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species, NMFS instead evaluated whether the proposed agency action, consisting of only the proposed discretionary operation of the FCRPS, would have no net effect on a species when compared to the environmental baseline. By using this comparative approach rather than the aggregate approach, NMFS was able to conclude that the proposed action would not jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat for three of these species. National Wildlife Federation, 422 F. 3d at 792.

⁹⁵ Bonneville has not adjusted its Fish and Wildlife Program expenditures for inflation, even though the Council had initially suggested in the draft 2000 Program “that Bonneville should, on an interim basis, increase the direct program budget in an amount sufficient to accommodate inflation since the current budget was established in the 199[6] Memorandum of Agreement.” Northwest Power Planning Council, Draft 200 Fish and Wildlife Program, at 67-68, Council Document 2000-14 (Aug. 16, 2000), *available online at*: <http://www.nwcouncil.org/library/2000/2000-14.htm>; See also Letter from Sarah R. McNary, Director, Fish and Wildlife Division, Bonneville Power Administration to Mark Walker, Director of Public Affairs, Northwest Power Planning Council (Oct. 31, 2000) (“We encourage the Council . . . to refrain from adopting the proposed budget categories and budget amounts into the Program.”). The result has been a significant decrease in the purchasing power of Program expenditures. Inflation has been the major culprit. During 2002 through 2006 the nation experienced a dramatic increase in the cost of construction materials. M. Chupka and G. Basheda, Rising Utility Construction Costs: Sources and Impacts (Edison Foundation, Sept. 2007); U.S. Census Bureau, Annual Construction Cost Indexes, *available at*:

In early 2005 BPA announced that it was initiating the Power Function Review (PFR) that would establish the Fish and Wildlife Program budget from 2007 to 2009.⁹⁶ Finally, in its Power Function Review Closeout report, BPA proposed to increase Fish and Wildlife Program expenditures for the 2007-09 rate period, but only to \$143 million annually.⁹⁷ The Council again protested, and in a letter to BPA explained that it did “not believe that this level of expense funding will support the most fundamental work of the program.”⁹⁸ The Council went on to explain that BPA’s budget should begin with an annual expense budget of \$161 million in 2007.⁹⁹

On February 9, 2007, BPA issued a Record of Decision for its 2007-09 funding decision. Once again, BPA disregarded the Council’s concern about inadequate

www.census.gov/pub/const/c30/annindex.pdf; McGraw Hill Construction Engineering News Report, Building Cost Index (Jan. 4, 2008); Bureau of Reclamation, Construction Cost Trends (2007); U.S. Army Corps of Engineers, Civil Works Construction Cost Index System, EM 1110-2-1304 (Rev. Sept. 30, 2007), *available at*: www.usace.army.mil/publications/engine-manuals/em1110-2-1304/entire.pdf. Construction costs increased anywhere from 2.00 percent to 6.65 percent per year, and cumulatively, 23 percent by 2006. *Id.* Therefore, for each year that the Fish and Wildlife Budget stayed the same, its purchasing power decreased. Cumulatively, Program expenditures declined in purchasing power by at least 23 percent. Adjusted for inflation, by 2006 BPA’s Capital Expense Budget was worth only \$27.7 million, and the Program Expense Budget was worth \$106.9 million (2002 dollars). In contrast, BPA’s budget for its own Fish and Wildlife Division has risen steadily. Furthermore, BPA has accelerated repayments to the Federal Treasury under its “Debt Optimization Program.” In FY 2007 alone, BPA made “advanced amortization” payments (i.e., payments over the amount required) of \$289 million. *See* Bonneville Power Administration FY 2009 Budget Submission at 16.

⁹⁶ Letter from Gregory K. Delwiche, Vice President, Bonneville Power Administration (Jan. 14, 2005), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2005_0114BPAtoInterestedParties.pdf

⁹⁷ Letter from Melinda Eden, Chair, Northwest Power and Conservation Council to Steve Wright, Administrator, Bonneville Power Administration (May 20, 2005), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/NWPPC/2005_0520NPCCtoBPA.pdf

⁹⁸ *Id.*

⁹⁹ BPA’s budget amount is a 2.8 percent increase from 2002, even though construction costs over the same period of time have increased 23 percent. *See supra* note 95. If the budget had been adjusted to keep pace with inflation for construction costs (from the \$139 million budgeted in 2002), the budget should have been \$171 million in 2007. *Id.*

funding for Program implementation and established the 2007-09 Fish and Wildlife Program Budget at \$143 million expense and \$36 million in capital expenditures.¹⁰⁰

2007-2008 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.¹⁰¹ On April 17, 2007, the Council approved a schedule for another round of Program amendments.¹⁰² The Council issued its Call for Recommendations on November 1, 2007, with responses due 90 days later. 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.¹⁰³ On January 15, 2008, the Council

¹⁰⁰ Bonneville Power Administration, Power Business Line's Power Function Review II Final Closeout Report (June 1, 2006), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_0601BPAToInterestedParties2.pdf. Bonneville has taken the position that its 2007-09 funding decision was a final decision for purposes of appeal, and that the appeal period to challenge its decision has expired. See letter from Gregory K. Delwiche, Bonneville Power Administration, to Brian Lipscomb, Executive Director, Columbia Basin Fish and Wildlife Authority (Dec. 31, 2007), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2007_1231DelwicheBPAToLipscombCBFWA.pdf.

¹⁰¹ 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 no 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). 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(h) also requires the Council to request "prior to the development or review of the [electric power] plan, or any major revision thereto," recommendations for the Fish and Wildlife Program amendments from the fish and wildlife managers. 16 U.S.C. § 839b(h)(2).

¹⁰² Technically, the Council already has amended the 2000 Program. As previously stated, the Council added the Mainstem Program in 2003. 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 Northwest Power Act, the Council formally adopted subbasin plans for 57 subbasins as amendments to the Program, based on the recommendations submitted. Approved subbasin plans are available online at: <http://www.nwcouncil.org/fw/subbasinplanning/Default.htm>.

¹⁰³ 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,

voted to extend the call for amendments for an additional 60 days, until April 4, 2008.¹⁰⁴

III. SELECTED ISSUES

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

A. "Projects" vs. "Program Measures"

A central issue in the discussion about amending the Fish and Wildlife Program will be the extent to which the Council should include project-specific recommendations in the Fish and Wildlife Program. To grasp the nature of this discussion it is appropriate to consider the evolution of the Council's treatment of project-specific recommendations, and to consider the relationship under the Act between program recommendations and the Independent Science Review Panel (ISRP). 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 added a new provision requiring the ISRP to review "projects proposed to be funded" by BPA to implement the Council's Fish and Wildlife Program.¹⁰⁵ The Appropriations Act used the term "projects proposed to be funded" or "projects to be funded" in four separate places.¹⁰⁶ In contrast, Section 4(h)(2)(A) of the 1980 Act, which requires the

Administrator, Bonneville Power Administration (April 4, 2007). Chair Diggs' letter is available online at:

http://www.cbfwa.org/RegionalIssues/Correspondence/CBFWA/2007_0404CBFWAtoNPCCandBPA.pdf.

¹⁰⁴ On September 11, 2007, the Council considered and rejected requests by BPA customer 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. The Council decision to extend the call for amendments was taken after both BPA and CBFWA requested an extension.

¹⁰⁵ 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.

¹⁰⁶ 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).

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”¹⁰⁷

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.”¹⁰⁸ 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.¹⁰⁹

¹⁰⁷ Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

¹⁰⁸ 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 courts accord the term its “ordinary meaning.” *Northwest Forest Resource Council v. Glickman*, 82 F. 3d 825, 833 (9th Cir. 1996).

¹⁰⁹ Merriam Webster’s Webster 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.*, 1982 Columbia Basin Fish and Wildlife Program, Section, 704; 1984 Columbia Basin Fish and Wildlife Program, Section 704 at 47. 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.”

Courts often assume that where Congress uses different terms, a different result is intended.¹¹⁰ This rule of statutory interpretation has led to arguments that the fish and wildlife agencies and tribes are no longer entitled to deference for project-related recommendations 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 program¹¹¹ 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.”¹¹² 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.¹¹³

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 BPA to implement the

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.

¹¹⁰ Legacy Emanuel Hosp. and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996).

¹¹¹ 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.

¹¹² Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

¹¹³ 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.”).

Council's Program and does not include programmatic initiatives.¹¹⁴ 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 species protection, representing a safety net below which extraordinary measures must be taken to prevent extinction.¹¹⁵ In 1991 and 1992 NMFS listed the Snake River sockeye and chinook populations.¹¹⁶ 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 for the Federal Columbia River Power System. 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 Act¹¹⁷ that expressly

¹¹⁴ 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.

¹¹⁵ Under ESA section 7, however, neither NMFS nor the U.S. Fish and Wildlife Service can require actions outside the authority of action agencies. 16 U.S.C. § 1536.

¹¹⁶ 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).

¹¹⁷ 16 U.S.C. § 839.

required consistency “with applicable environmental laws.”¹¹⁸ 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 BPA’s obligation to comply with environmental mandates.”¹¹⁹ In National Wildlife Federation v. National Marine Fisheries Service, the Court went one step further, ruling that federal agencies have a responsibility to satisfy ESA requirements “as a first priority.”¹²⁰

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, in particular, 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.”¹²¹ 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.¹²²

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.”¹²³ Furthermore, statements by the bill’s floor managers make clear their intention to prevent “a duplication of measures already being implemented.”¹²⁴ 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 BPA of its responsibilities to protect, mitigate and enhance fish and wildlife, especially non-listed species.

¹¹⁸ Northwest Resource Information Center, 35 F. 3d at 1378.

¹¹⁹ Aluminum Co. of America v. Bonneville Power Administration, 175 F. 3d 1156, 1163 (9th Cir. 1999).

¹²⁰ National Wildlife Federation v. National Marine Fisheries Service, 481 F. 3d 1224, 1234 (9th Cir. 2007).

¹²¹ Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

¹²² 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.”).

¹²³ See 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

¹²⁴ 126 Cong. Record at H9846.

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.¹²⁵ Clearly the Northwest Power Act imposes a broader mandate than does the ESA. Furthermore, the ESA doesn't require consistency with other provisions of the Northwest Power Act.¹²⁶ The fact that BPA is required to protect listed species from harm does not excuse the agency from meeting its obligations to protect, mitigate and enhance non-listed species, 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 to protect, mitigate and enhance fish and wildlife to the extent adversely affected by hydroelectric development, consistent with the Council's program. But the Act prevents BPA 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.¹²⁷

At the Council's request, BPA has spent the past year developing a policy to identify "in-lieu" funding issues. Bonneville has taken the position that an in-lieu problem may arise whenever another agency is authorized to undertake an action, regardless of whether funding is actually available.¹²⁸ BPA is proposing to use the FY

¹²⁵ *Accord, Washington Toxics Coalition*, 413 F. 3d at 1033; *Headwaters, Inc. v. Talent Irrig. Dist.*, 243 F. 3d 526, 532 (9th Cir. 2001).

¹²⁶ For example, the Northwest Power Act requires the Council to establish a balance between fish and wildlife needs and the region's needs for balancing adequate, efficient and reliable power supply. The ESA has no such requirement.

¹²⁷ 16 U.S.C. § 839b(h)(10)(A).

¹²⁸ 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)(Delwiche letter), *available online at*: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_0803BPAtNPCC.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_1006BPAtNPCC.pdf.

2007-09 funding cycle as a “transitional period,” after which BPA may not support funding for proposals that previously have been funded.¹²⁹

BPA’s reading of the in-lieu provision would implicate nearly every project recommended in the Columbia Basin Fish and Wildlife Program. That is because of the substantial overlap between BPA’s responsibilities under the Northwest Power Act and the statutory responsibilities of the region’s fish and wildlife management entities.¹³⁰ According to a recent study by the U.S. General Accounting Office, a “multilayered collection” of federal laws define federal responsibilities for Columbia Basin fish and wildlife.¹³¹ Numerous federal laws create nationwide responsibilities.¹³² Many of these authorize federal agency funding for fish and wildlife protection.¹³³

¹²⁹ Delwiche letter, *supra* note 128.

¹³⁰ In fact, other federal agencies are prohibited under the Anti-deficiency Act (31 U.S.C. § 1341) from accepting funds from other sources for otherwise unauthorized activities. Several federal laws provide blanket authority to agencies to undertake actions to protect and restore fish and wildlife. For example, the Fish and Wildlife Coordination Act of 1946 added fish and wildlife protection as an authorized project purpose for all federal water resource projects constructed or modified after the date of enactment of the Act. *See* 16 U.S.C. § 663. Furthermore, the Act authorizes agency appropriations in “such amounts as may be necessary to carry out the provisions of this Act.” 16 U.S.C. § 666. The Multiple-Use Sustained-Yield Act directs the Forest Service to administer national forests for “wildlife and fish purposes.” 16 U.S.C. §§ 528-31. The Mitchell Act directs the Secretary of Commerce to carry on activities for the conservation of fishery resources in the Columbia River Basin. 16 U.S.C. § 755. The Fisheries Restoration and Irrigation Mitigation Act of 2000 directs the Secretary of the Interior to establish a program to implement projects, such as installation of fish screens and fish passage devices, to mitigate impacts on fisheries associated with basin irrigation projects. *See* 16 U.S.C. § 777. The National Indian Forest Resources Management Act directs the Interior Secretary to undertake management activities on Indian forest lands with tribal participation. 25 U.S.C. § 3101 *et seq.* Indian tribal governments and the Bureau of Indian Affairs are authorized to acquire land and undertake projects to protect and enhance fish and wildlife, both within the boundaries of Indian reservations and in many instances even in ceded areas. Furthermore, fish and wildlife and land management agencies in the four Pacific Northwest states all are authorized to undertake programs to protect and enhance fish and wildlife and to protect and restore habitat.

¹³¹ U.S. General Accounting Office (GAO), *Columbia River Basin: A Multilayered Collection of Directives and Plans Guides Federal Fish and Wildlife Activities*, GAO-04-602 (June 2004)(2004 GAO Report).

¹³² *E.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1544; Federal Water Pollution Control Act (*i.e.*, Clean Water Act), 33 U.S.C. §§ 1251-1387; Fish and Wildlife Coordination Act of 1946, 16 U.S.C. §§ 661-666c; Federal Water Project Recreation Act, 16 U.S.C. §§ 4601-12 to 1-21.

¹³³ *See* 2004 GAO Report, *supra* note 131.

Other federal laws provide basin-specific directives and authority.¹³⁴ Many federal laws provide agency-mission specific authority.¹³⁵ Finally, some federal laws provide project-specific authority.¹³⁶

Another interpretation would suggest that the prohibition applies more narrowly, 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. During 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.”¹³⁷ Congressman Lujan was the primary sponsor of the committee amendments to balance fish and wildlife and power interests. In his floor statement on final passage, Congressman Lujan explained that –

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.¹³⁸

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.”¹³⁹ Yet this was an obligation to be borne by the region’s ratepayers, not by the federal taxpayers.

The more narrow interpretation suggests 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

¹³⁴ E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. § 777; Mitchell Act, 16 U.S.C. §§ 755-757.

¹³⁵ E.g., National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd, 668ee;

¹³⁶ Tualatin Federal Reclamation Project Act, Pub. L. No. 89-596, 80 Stat. 822; Yakima River Basin Water Enhancement Project Act, Title XII, Act of October 31, 1994; 108 Stat 4550, 5 Federal Reclamation and Related Laws Annotated 4039 (prelim. ed. 2001).

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

¹³⁸ Id.

¹³⁹ See 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

required. There are several permutations. The first is where an entity is required to make expenditures. Mandatory funding requirements could arise under a license condition for a non-federal hydroelectric project, an enforcement order under the Clean Water Act, or under legislative mandate.¹⁴⁰ The second is where a specific earmark is included in an appropriations bill. Third is where a non-specific basin or mission-specific appropriation is provided, but a specific project or project is described in a congressional committee report. Fourth is where an agency's budget justification identifies a specific measure to support a budget request. Finally, the situation may arise where legislative history and the agency's budget request are silent, but where an appropriations request is made by an individual member of Congress or other extrinsic evidence clearly indicates that an appropriation has been justified to support a project or program for which BPA otherwise would provide funding.

D. Wildlife Crediting

Hydropower development 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.¹⁴¹ Efforts to restore the Basin's wildlife populations have focused primarily on acquiring replacement habitat. In contrast with the difficulties inherent in quantifying BPA's fish-related obligations, quantification of wildlife habitat losses due to construction and inundation has appeared to be relatively straightforward. Nevertheless, there has been controversy. In 1993, the Council received an audit report from a team from Beak Consultants for the wildlife mitigation program. The so-called Beak Report identified annualization as the greatest source of bias associated with loss assessments.

The Council's 1994 Program incorporated a comprehensive strategy to identify the extent of hydropower-related wildlife losses.¹⁴² The Council quantified wildlife

¹⁴⁰ E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. § 777; Mitchell Act, 16 U.S.C. §§ 755-757.

¹⁴¹ The Beak Report noted that in some instances development of the hydropower system has resulted in beneficial effects for several species of wildlife. P. Whitney, A. Neal and B. Baber, Audit of Wildlife Loss Assessments for Federal Dams on the Columbia River and Its Tributaries, Project No. 73485 (February 1993) (referred to as the "Beak Report."). The Beak Report observed that many reservoirs provide habitat for waterfowl. The Report also explained that some reservoirs provide "significant benefits" while others provide "little benefit." *Id.* at 59. According to the Beak Report, multipurpose projects also result in incidental habitat benefits resulting from irrigation of otherwise arid land.

¹⁴² 1994 Columbia Basin Fish and Wildlife Program at 11-2.

impacts by completing loss assessments for each dam managed as part of the FCRPS.¹⁴³ The Council noted that FCRPS dams serve multiple purposes, including flood control, navigation, irrigation and recreation. Consequently, the Council directed BPA and wildlife managers to allocate wildlife mitigation expenditures to various project purposes in accordance with existing accounting procedures. Bonneville 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. Bonneville, 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.¹⁴⁴

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. Nevertheless, 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 BPA and fish and wildlife managers to complete mitigation agreements for the remaining habitat units, which should equal 200 percent of the habitat units (i.e., a 2:1 ratio) identified as unannualized losses of wildlife habitat from hydropower construction and resulting inundation. The Council directed that habitat enhancement credits be provided to BPA when its funding for habitat management activities leads to a net increase in habitat value when compared to the level identified in a baseline habitat inventory. The Council recommended that the determination of habitat enhancement credits be made through the periodic monitoring of the project site using the Habitat Evaluation Procedure (HEP) methodology. The Council agreed that BPA should receive credit for habitat enhancement efforts at a ratio of one habitat unit created for every habitat unit gained. Finally, the Program called for an assessment of

¹⁴³ The Council 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. The Council's Program included a table of loss estimates for each federal project.

¹⁴⁴ 1994 Columbia Basin Fish and Wildlife Program at 11-8. 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.

direct operational and secondary losses.¹⁴⁵ The Council expected some subbasin plans to serve as a vehicle to provide mitigation planning for operational losses.¹⁴⁶

Notwithstanding relevant Program language, there is substantial disagreement between BPA 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, BPA has insisted on signing agreements that establish its mitigation responsibilities at a 1:1 ratio to unannualized losses, and has argued that the fish and wildlife managers are bound by these agreements.¹⁴⁷ The wildlife managers reply that the mere change in ownership doesn't protect or restore habitat, nor does it necessarily prevent future adverse impacts. They add that a "futures analysis is needed to get an accurate assessment of effectiveness." 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 as the basis for estimating wildlife habitat values. The use of HEP has been the source of considerable criticism in recent years.¹⁴⁸ The fish and wildlife managers question the use 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. The FPC provides technical assistance and information to fish and wildlife managers -- and the public generally -- on matters related to anadromous

¹⁴⁵ 2000 Columbia Basin Fish and Wildlife Program at 31.

¹⁴⁶ *Id.*

¹⁴⁷ The agreements typically include a provision to the effect that the issue could be reopened in the future. The fish and wildlife managers believe this allows for conversion to a 2:1 credit ratio so long as that ratio is included in the Program or established by a court. BPA takes the position this merely reflects existing law and is not a "reopener clause." See letter from Stephen Wright.

¹⁴⁸ 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.

fish passage through the mainstem hydroelectric system. The Council's 1987 Program required BPA to fund the establishment and operation of the Fish Passage Center.¹⁴⁹

The Council's 2000 Program continued the operation of the Fish Passage Center.¹⁵⁰ Likewise, the 2003 mainstem amendments to the Program called for the continued operation of the Fish Passage Center. Nevertheless, in response to 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,¹⁵¹ the Ninth Circuit overturned BPA's decision. The court ruled that BPA acted contrary to law in 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."¹⁵²

The Northwest Environmental Defense Center case was seen as a victory for the FPC's defenders. 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, the 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.¹⁵³ The decision did not end the controversy over the continued existence of the FPC. It is likely that the Council may receive a recommendation during the upcoming amendment process to discontinue funding for the FPC. The fish and wildlife managers almost certainly will recommend that funding be continued. In the meantime, the Council has called for the formation of a FPC Oversight Board, and

¹⁴⁹ For a history of the Fish Passage Center, see Northwest Environmental Defense Center, 477 F.3d at 672-676; Public Utility Dist. No. 1 v. Bonneville Power Administration, 947 F.2d 386, 389 (9th Cir. 1991).

¹⁵⁰ 2000 Columbia Basin Fish and Wildlife Program at 28.

¹⁵¹ Northwest Environmental Defense Center, 477 F.3d 668.

¹⁵² Id. at 691.

¹⁵³ See Id. at 690, n. 19.

is attempting to address the concerns of the FPC's critics through additional oversight.¹⁵⁴

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

Section 7(a) of the Northwest Power Act requires BPA Administrator to establish and periodically review and revise power rates, in accordance with sound business principles, to recover total system costs.¹⁵⁵ The Northwest Power Act requires BPA and other federal agencies to provide equitable treatment for fish and wildlife with the other purposes for which the FCRPS is managed.¹⁵⁶ Bonneville is required to equitably allocate to power rates all costs of fish and wildlife measures.¹⁵⁷ Rates must be high enough to ensure that BPA will recover its total cost, including costs associated with fish and wildlife measures.¹⁵⁸

Section 7(i) sets forth in detail the procedures applicable to BPA ratemaking. The Act provides for confirmation and approval of BPA rates by the Federal Energy Regulatory Commission (FERC) before they become effective.¹⁵⁹ EPA is required to estimate its fish and wildlife costs for the rate before setting its rates. Bonneville establishes its program costs through a process it calls the Power Function Review (PFR). The PFR precedes the rate case and is not technically a part of the rate case proceeding. Instead, program costs from the PFR become part of the revenue requirements for BPA's initial power rate proposal.

Bonneville'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

¹⁵⁴ 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.cbfgwa.org/RegionalIssues/Correspondence/CBFGWA/2007_0404CBFGWAtoNPC C.pdf.

¹⁵⁵ 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).

¹⁵⁶ 16 U.S.C. § 839b(h)(11)(A)(I).

¹⁵⁷ 16 U.S.C. § 839e(g).

¹⁵⁸ Golden Northwest Aluminum, Inc., v. Bonneville Power Administration, 501 F. 3d 1037 (9th Cir. 2007).

¹⁵⁹ 16 U.S.C. § 839e(i)(6).

immediate predecessor, the FY 2007-09 rate is an "adjustable" rate.¹⁶⁰ 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.¹⁶¹ The NFB¹⁶² Adjustment 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.¹⁶³

On July 17, 2006, BPA approved the 2007-09 rate.¹⁶⁴ On May 3, 2007, the Ninth Circuit 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."¹⁶⁵ 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.¹⁶⁶ The Court ruled that BPA's rate determination was not supported by substantial evidence in the rulemaking

¹⁶⁰ Bonneville Power Administration, Issue Alert: Highlights of BPA's FY 2007-2009 Power Rate Case (November 2005), *available online at*: <http://www.bpa.gov/corporate/pubs/issue/05ia/ia110305.pdf>.

¹⁶¹ 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 BPA's financial obligations. The DDC clause allows for an annual downward adjustment of energy charges. There is no limit to the annual distribution amount under the DDC. *See* http://www.bpa.gov/power/psp/rates/2007-2009_adjustments/CRAC_2007-2009/.

¹⁶² "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.

¹⁶³ http://www.bpa.gov/power/psp/rates/2007-2009_adjustments/NFB-a_2007-2009/.

¹⁶⁴ 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.

¹⁶⁵ Golden Northwest Aluminum, Inc., v. Bonneville Power Administration, 501 F. 3d 1037, 1051 (9th Cir. 2007).

¹⁶⁶ Id. at 1051 (quoting Northwest Resource Information Center, 35 F. 3d at 1388).

record since BPA had ignored agency testimony that its fish and wildlife costs were unrealistically low.¹⁶⁷

Bonneville's power rates must generate sufficient revenue to cover its total system costs.¹⁶⁸ 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 BPA's obligations under other environmental laws including, in particular, the Endangered Species Act. In light of the Golden Northwest Aluminum case, cost 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 recommendations from the fish and wildlife managers 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.¹⁶⁹ Congress intended for the Council to rely heavily on the fish and wildlife agencies to develop the Program "and

¹⁶⁷ Golden Northwest Aluminum, Inc., 501 F.3d at 1051.

¹⁶⁸ Section 7(a), 16 U.S.C. § 839e(a).

¹⁶⁹ 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).

not try to become a super fish and wildlife entity.”¹⁷⁰ 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.¹⁷¹

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 Pacific Northwest advise BPA on how it should exercise its discretion."¹⁷² The unique experience and expertise of the fish and wildlife managers is entitled to substantial weight.¹⁷³

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.

By removing project selection from the 2000 Program, the Council inadvertently opened the door to several years of conflict over implementation by removing specificity about costs.¹⁷⁴ Perhaps unintentionally, the Council also abdicated its

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

¹⁷¹ Northwest Resource Information Center, 35 F. 3d at 1387.

¹⁷² Northwest Environmental Defense Center, 477 F.3d at 685.

¹⁷³ Golden Northwest Aluminum, 501 F.3d at 1051; Northwest Resource Information Center, 35 F.3d at 1388.

¹⁷⁴ On December 31, 2007, BPA wrote to the Council declaring that, in the federal agency's view, "it would be a serious mistake to identify particular projects, funding allocations or funding levels in the Program language." See letter from Gregory K. Delwiche, Bonneville Power Administration, to Dr. Tom Karrier, Northwest Power and Conservation Council (December 31, 2007) *available online at*:

http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2007_1231BPAtNPCC.pdf.

statutory deference. The Northwest Power Act includes a carefully-crafted statutory scheme, involving fish and wildlife managers and, to a lesser extent, river operators and customers, in an extensive process to develop the Fish and Wildlife Program. Outside that process, the Council's recommendations are entitled to little weight. As a result, efforts to compel funding for program implementation have languished in the face of a determined effort by BPA to hold down costs and to avoid rate increases.

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. Successful implementation of a systemwide approach to mitigation and recovery necessarily will require close coordination between planners and implementers of the Program throughout each level -- subbasin, ecological province, and basinwide -- and through each step of the implementation process. Congress anticipated the need for close coordination of implementation efforts, as well as the special expertise of the fish and wildlife managers in this regard.¹⁷⁵

The region's fish and wildlife managers are entitled to considerable deference in the formation of the Council's Fish and Wildlife Program. The Act requires the 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. Through the amendment process, fish and wildlife managers can provide the greatest amount of impact for the success of the Program and the welfare of fish and wildlife throughout the Columbia Basin. The 2000 Fish and Wildlife Program cycle demonstrated that the Program will be severely undermined by Bonneville's new budget establishing process and accounting procedures if the Program does not list specific projects to be funded, does not establish specific standards that are to be met, and does not proscribe the funding levels that are needed for implementation. Bonneville is obligated 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 process are the recommendations of the agencies and tribes entrusted with managing the Basin's fish and wildlife resources.

¹⁷⁵ Section 4(h)(11)(B) directs BPA and federal hydroelectric managers and regulators to consult with the fish and wildlife agencies and tribes "in carrying out the provisions of this paragraph and shall, to the greatest extent practicable, coordinate their actions."