

Report to Congress:

Fish and Wildlife Governance and
the Columbia River Hydropower System

May 15, 1996

96-10

CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. Introduction and summary | 1 |
| II. Governance of the Columbia River | 2 |
| A. Legal and institutional background | 2 |
| B. Institutional questions | 4 |
| III. Recent developments in decision-making and management | 6 |
| A. The emergence of an action agenda | 6 |
| B. The role of science and independent scientific advice | 7 |
| C. Budget planning and prioritization | 8 |
| D. More effective implementation | 11 |
| E. Dispute resolution | 12 |
| IV. Recommendations | 12 |
| A. Non-legislative recommendations | 13 |
| 1. Work with sovereigns | 13 |
| 2. Ensuring accountability | 14 |
| B. Legislative recommendations | 15 |
| 1. Amendments to the Northwest Power Act to require consistency with the Council program | 15 |
| 2. Other matters that could be formalized by executive order or limited legislation | 17 |
| a. Binding and non-binding dispute resolution | 17 |

| | | |
|----|---|----|
| b. | Managing federally appropriated funds with Bonneville fish and wildlife funds in an integrated manner | 18 |
|----|---|----|

| | | |
|-----------|------------------------|----|
| V. | Broader changes | 19 |
|-----------|------------------------|----|

APPENDICES:

1. Procedure
2. Background materials for the workshop
3. The Workshop Report
4. Council issues and alternatives
5. Summary of comments
6. Glossary

I. Introduction

A. Background and findings

In the energy and water appropriations legislation for 1996, adopted November 13, 1995, Congress directed the Northwest Power Planning Council to report to Congress within 180 days “regarding the most appropriate governance structure to allow more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife within the Federal Columbia River Power System.” The Council has engaged the region in an extensive discussion regarding this matter. This report provides the Council’s findings and recommendations. The report’s appendices describe the process the Council followed to carry out Congress’s charge; discuss the issues and alternatives in detail; and summarize in detail the comments the Council received in its review.

It merits particular emphasis that the Council heard widespread agreement on the following themes:

- There is a need for a single fish and wildlife recovery plan, not multiple plans.
- The region needs an implementation structure in which there are: clear and logical rules; clear responsibility and accountability for decisions; opportunities for interested parties to offer information and understand how and why decisions are made.
- The region needs a way to evaluate the results of decisions (were they implemented, did they produce results?).
- Independent scientific advice is needed in decision-making and evaluation.
- Decision-making should be more watershed-up than top-down.

B. Recommendations

To summarize the Council’s findings and recommendations:

Several initiatives are underway to improve the region’s voice in management of the Columbia River hydropower system. For example, significant progress is being made in building independent scientific review into the decisionmaking process, in budget planning and prioritization and in coordinating implementation activities. Moreover, in part as a result of the dialogue generated by this review, a broad consensus has emerged on the steps the region needs to take to improve the way decisions are made and implemented.

The Council believes that the region can capitalize on these efforts by taking several further steps:

First, there is broad consensus that federal, state and tribal fish and wildlife efforts should be consistent with each other. The Council supports and will continue to help facilitate efforts to bring sovereigns together periodically, on a basis of equality, to work toward a single fish and wildlife program, and to coordinate technical and policy aspects of implementation. Over the last year, federal, state and tribal entities have been working together in a more constructive manner. If these collaborative efforts fail, legislation will be needed. The Council recommends that an executive order be developed to help cement cooperation and greater consistency. An executive order should direct the federal agencies to implement the Council's fish and wildlife program insofar as permitted by their statutory responsibilities, and to provide detailed, written explanations if they diverge from the program.

Second, if legislation is needed, the Council recommends that the federal agencies that govern operations of the hydropower system -- the Army Corps of Engineers, the Bureau of Reclamation, the Federal Energy Regulatory Commission and the federal fish and wildlife agencies (the National Marine Fisheries Service and the U. S. Fish and Wildlife Service) insofar as their activities affect hydropower operations -- be required to act consistently with the Fish and Wildlife Program developed under the Northwest Power Act. Importantly, this change would not modify the Endangered Species Act.

Third, the Council commits to play an active role in monitoring implementation of fish and wildlife mitigation measures. Based in part on the requirements of the Northwest Power Act, mitigation funding can be linked to progress in implementing a monitoring and evaluation program.

On several other matters, particularly dispute resolution and integrated fish and wildlife budget management, the Council will continue to work with interested parties and report further to the Congress this fall.

II. Governance of the Columbia River

A. Legal and institutional background

Over the past several decades, a constellation of agencies, courts and other entities has shaped the development and management of the Columbia River. Authority has shifted among them with the passage and interpretation of various laws and treaties. Since the 1930s, one of the largest influences on the river has been the construction and operation of dams owned or licensed by the federal government. During the late 1960s and 70s, salmon policy in the Northwest was strongly shaped by a series of federal court decisions interpreting the United

States' treaties with four Columbia River tribal groups, the Yakama, Nez Perce, Warm Springs and Umatilla. This litigation aimed primarily at identifying an equitable balance between Indian and non-Indian harvesters. Salmon harvest management in the river remains rooted in processes developed by the ongoing federal court litigation, *U. S. v. Oregon*. Environmental conditions affecting salmon populations have been at issue in this litigation, and federal hydropower and other activities have been a concern insofar as they impinge on fish passage and habitat. However, the treaty litigation did not develop processes for river and dam operations. By 1980, it was fair to say that Columbia River fish and wildlife policy was in large part federal. Although not necessarily a coordinated policy, it was driven by federal decisions about dams, harvest management, and mitigation policy.

With the passage of the Northwest Power Act in 1980, the Magnuson Fishery Conservation and Management Act, the U.S.-Canada Pacific Salmon treaty, and a settlement in the *U. S. v. Oregon* litigation, the states and the region's Indian tribes exerted greater influence on the Columbia River and especially its salmon runs.

The Northwest Power Act created the Northwest Power Planning Council and gave it authority to plan for the region's electric power system, including the Columbia River hydropower system. As the first step in preparing this plan, the Council was directed to develop a program to mitigate the effects of the Columbia River dams on fish and wildlife. Through their membership on the Council, the region's four states acquired a significant voice in management of the hydropower system for power production and fish and wildlife rehabilitation. The program must be based on the recommendations of Indian tribes, fish and wildlife agencies and others. The Council is also charged with developing a program that, to the greatest extent possible, is designed to deal with the Columbia River and its tributaries as a system. Accordingly, the Council makes its own proposals to bring individual fish and wildlife recommendations into a systemwide framework.

It is worth noting that the Northwest Power Act requires the Council to consider certain economic factors in its fish and wildlife decisions (*Columbia River Basin Fish and Wildlife Program*, section 1.3). The Fish and Wildlife Program must assure an adequate, efficient, economical and reliable power supply for the region (16 U.S.C. § 839b(h)(5); *Columbia River Basin Fish and Wildlife Program*, section 1.8 (1994)). Fish and wildlife measures must "utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost" (16 U.S.C. § 839b(h)(6)(C)). These matters will continue to play an important role in the Council's consideration of Fish and Wildlife Program amendments. As the region faces bigger and bigger investments in fish and wildlife recovery, an evaluation of economic impacts and a program of economic mitigation will be needed. In section 9 of its Fish and Wildlife Program, the Council has called for efforts to develop such a program (*Columbia River Basin Fish and Wildlife Program*, section 9 (1994)).

The primary implementors of the Council's program are federal agencies. The Northwest Power Act requires the Bonneville Power Administration to use its fund and other authorities "in a manner consistent with" the Council's fish and wildlife program. It also requires all federal agencies that manage, operate or regulate hydroelectric facilities on the river, which includes the Corps of Engineers, the Bureau of Reclamation, Bonneville and the Federal Energy Regulatory Commission, to take the program into account "at every stage of decision making to the fullest extent practicable." These obligations can help integrate federal agency activities in support of a regionally supported fish and wildlife program. The seriousness with which federal agencies have implemented the Council's program, however, has varied from agency to agency and time to time.

In 1990, Endangered Species Act petitions were filed to list Snake River salmon. When these populations came under the Act's protection, much of the responsibility for salmon policy shifted back to the federal government. In the four years that followed the decision to list Snake River salmon more and more federal decisions -- critical decisions on dam operations, forest management (driven in part by independent efforts to protect another endangered species, the northern spotted owl), grazing, mining and salmon production -- have been focused on complying with the Endangered Species Act.

B. Institutional questions

The fact that the salmon declines resumed even after passage of the Northwest Power Act, the Magnuson Act, the Salmon and Steelhead Conservation Act and the U. S. - Canada Salmon Treaty inevitably raises questions about the efficacy of these remedial measures. For purposes of this review, it is important to focus specifically on institutional questions that arise in fish and wildlife governance on the river:

1. The Northwest Power Act addresses energy, fish and wildlife in the Columbia River. Yet salmon, for example, are also affected by fishing, timber harvest, grazing, irrigation, ocean conditions, hatcheries and any number of human activities that are largely left out of the Northwest Power Act. To what extent are continuing species declines due to lack of progress in these other parts of the fish and wildlife ecosystem?

2. The Council is composed of state representatives. Tribes and federal agencies have vital interests in river and fish management. Does the absence of federal and tribal representation on the Council limit the Council's authority in principle and make implementation of remedial measures harder in practice?

3. The Northwest Power Act's Fish and Wildlife Program development process is based on fish and wildlife agency and tribal recommendations. This can bring conflicting perspectives to the process: aggressive action on habitat issues and flows; support for hatchery production; focus on harvestable populations rather than wild fish. Are these perspectives appropriately balanced?

4. The Act gave the region a bigger voice in river management, but also diffused responsibility for policy formulation and implementation. In principle, planners defer to fishery managers' recommendations and federal implementers defer to planners. Does this diffusion of responsibilities breed implementation problems?

5. The Fish and Wildlife Program itself has limited authority. Bonneville must be consistent with the program. Other federal river management agencies must take the program into account to the fullest extent practicable. In practice, is the program too easily balanced against other federal agency obligations so that implementation suffers?

6. The states and tribes are not bound by the Council program (except in Oregon, where a state law requires some agencies to comply with the program in some matters). It is often assumed that state fish and wildlife agencies and Indian tribes support a plan based on their recommendations. In fact, the Council does not always adopt these recommendations and the agencies and tribes may sharply disagree with the program's measures. A regional perspective sometimes requires that the Council adopt controversial recommendations. How much does this contribute to implementation problems?

7. One of the realities of Columbia River salmon recovery is that the Council knows of no sure solutions. A comprehensive monitoring and evaluation program is essential so that we can identify effective measures. Yet monitoring and evaluation require measurement at many different points in the life cycle. Measurements may be needed in headwater areas, various points in downstream and upstream migration in the river, in the estuary and in the ocean. Each of these points may require the cooperation of several jurisdictions. Without a way to ensure cooperation by all jurisdictions, can the region identify effective fish and wildlife measures?

The Endangered Species Act listings have highlighted some other issues for the region to consider:

1. Endangered Species Act decisions can be made in closed meeting rooms from which all but federal agencies are excluded. These decisions can neglect important perspectives and breed mistrust. In contrast, the Northwest Power Act calls for an extensive public process in which issues are debated and decisions are made in the open.

2. Unlisted species may receive little consideration in Endangered Species Act decisions. When a choice must be made between the interests of listed species and other species, listed species must be preferred whether or not this makes sense for the larger ecosystem. The Northwest Power Act aims to protect all fish and wildlife populations affected by the hydropower system and to treat the river and its tributaries as a system. In this sense, the Northwest Power Act may offer better protection for biodiversity and ecosystems than does the Endangered Species Act.

3. Community and economic impacts receive little attention in Endangered Species Act processes. This can generate opposition and overlook solutions that may be good for species and communities. Under the Northwest Power Act, the Northwest has had the ability to search for fish and wildlife solutions that account for the concerns of the energy system and energy solutions that accommodate fish and wildlife.

4. Indian legal rights can be threatened by Endangered Species Act decisions. While there is still debate about whether the Endangered Species Act overrides treaty and other commitments to tribes, it is true that the ESA has no explicit provision for respecting these commitments. In contrast, the Northwest Power Act accords tribes a special place in the policy development process and requires that fish and wildlife measures are consistent with the tribes' legal rights.

Different conclusions can be drawn from these areas of discussion. Some conclude that the Endangered Species Act and the Northwest Power Act can complement each other, each shoring up the other's weak points. From this perspective, the question is not whether one law should be implemented at the expense of the other but how to make the two work better together.

Others conclude that the Endangered Species Act listings have knocked things out of balance. They argue that regardless of whether the two laws could work together in principle, in fact the Endangered Species Act dominates decisions on the river and leads to decisions that insufficiently reflect the region's values and concerns. These voices do not necessarily argue for changes in the Endangered Species Act, but they do suggest that the region play a more prominent role in Endangered Species Act decisions.

Yet a third possibility is that neither the Endangered Species Act nor the Northwest Power Act strikes the right balance among species, ecosystems and economic development. They should be replaced by a single law that properly accounts for these interests.

Since the Endangered Species Act listings, the region has developed a variety of new tools with which to address fish and wildlife issues. Several of these developments occurred after Congress called for this fish and wildlife governance report. It is important to provide a detailed picture of these arrangements.

III. Recent developments in decision-making and management

Since Congress called for this review last fall, a number of developments have occurred that affect the way fish and wildlife decisions are being made in the Columbia River Basin. In this section, we review some of those developments.

A. The emergence of an action agenda

In recent months, it has become clear that there is a surprising level of agreement about many steps that could be taken to improve fish and wildlife management on the River. The Report of the Workshop on Fish and Wildlife Governance elaborates on these steps (see Workshop Report pp. 10-11). For example, there is widespread agreement on the need to bring sovereign entities together to address important fish and wildlife issues; on the need for a dispute resolution mechanism; and on the need to ensure consistency between regional and federal agency activities; and in other areas. Not only is there a surprising level of agreement about the need to take such steps, parties have begun to take them. The next sections describe some of these developments.

B. The role of science and independent scientific advice

One of the most basic requirements of both the Northwest Power Act and the Endangered Species Act is that decisions be based on the best available scientific information (Northwest Power Act, section 4(h)(6)(B); Endangered Species Act, section 4(b)(1)(A)). Under the Endangered Species Act, the agencies that administer the Act are accorded deference in determining what the best available scientific information is. The Northwest Power Act creates a more ambiguous situation. The Power Planning Council must determine whether fish and wildlife recommendations satisfy certain requirements, including the “best available scientific knowledge” requirement. When the Council receives conflicting fish and wildlife recommendations, it must resolve the inconsistency “giving due weight to the recommendations, expertise, and legal rights and responsibilities” of the fish and wildlife managers. (Northwest Power Act, section 4(h)(6)(D)). This does not mean that the fish and wildlife managers are the final arbiters of the “best available scientific knowledge.” The Northwest Power Act requires the Council to make this determination. However, in doing so the Council must rely heavily on the fish and wildlife managers.

At the same time, because there is so much uncertainty about how to rehabilitate fish and wildlife populations, improving the level of scientific knowledge is critical. In the early 1980s, the Power Planning Council adopted a strategy called “adaptive management,” which is premised on the idea that fish and wildlife recovery measures should be structured as experimental probes, so that the region can learn from them. While there are institutional problems in making this idea work, there have been gains. For example, throughout the 1980s, the Council and others worked in a highly-charged atmosphere to focus evaluation efforts on the relationship between river flows and salmon survival. Progress was frustratingly slow, but by the turn of the decade, a consensus began to emerge on a research strategy. Over the past five years, important new data have been generated to help us begin to answer these important questions. The Council’s 1994 Fish and Wildlife Program was premised on a proposed head-to-head evaluation of different mainstem measures. There is reason to hope that by the beginning of the next decade, the region will have significantly better information with which to make decisions about river operations.

The fervor that has pervaded the policy debate over salmon recovery in the 1990s has only underscored the need for independent scientific advice in fish and wildlife policy development, monitoring and evaluation. With this in mind, the Council's 1992 *Strategy for Salmon* called for the formation of an Independent Scientific Group to advise decision makers on critical uncertainties facing recovery efforts, evaluation strategies and ways of measuring progress. After the Council adopted its 1994 Fish and Wildlife Program, a number of parties -- including some Council members -- raised questions about the scientific merits of the more controversial features of the program. Accordingly, the Council asked the Independent Scientific Group to review the program, its conceptual foundations, and the extent to which its measures are based on the best available scientific knowledge. While reliance on the expertise of the fish and wildlife managers will continue, independent scientific review is an important aid in determining the best available scientific knowledge.

The importance of independent scientific advice in fish and wildlife policy has also been recognized by the National Marine Fisheries Service, its Recovery Team, and the National Research Council panel on salmon recovery. Recognizing that this need is common to the Northwest Power Act and the Endangered Species Act processes, the National Marine Fisheries Service and the Council worked together in late 1995 to form a single scientific group. With advice from the National Academy of Sciences, the Council's Independent Scientific Group is being expanded to bring in new areas of expertise. A new charter has been developed for the expanded group, which will be called the Independent Scientific Advisory Board. The Council and NMFS anticipate that the Independent Scientific Advisory Board will play a crucial role in ensuring that the best available scientific information is used in decisionmaking and implementation and that effective monitoring and evaluation mechanisms are developed.

C. Budget planning and prioritization

In 1995, the region undertook for the first time to prioritize fish and wildlife projects for Bonneville Power Administration funding to meet an established budget. The fishery managers, the Northwest Power Planning Council, Bonneville and others continue to develop the prioritization process. Also in 1995, the Clinton Administration established a multi-year agreement for Bonneville's fish and wildlife funding. While the specific details of the budget agreement are still under discussion, in general it provides for Bonneville to pay for the cost of river operations to meet flow and spill levels called for in the National Marine Fisheries Service's Biological Opinion on hydropower operations. The agreement also provides that Bonneville will expend a certain sum of money for other fish and wildlife activities, and affords access to a contingency fund under certain circumstances. The federal agencies, in consultation with the Council and the region's tribes, are in the process of negotiating a Memorandum of Agreement that is to describe the accounting and other financial workings of the budget. How these two developments -- an administrative budget and the prioritization process -- work together is a matter of great importance to the Council and the region.

Beginning with the budget, Bonneville takes the following approach to allocation of its fish and wildlife funds:

- Bonneville assigns first priority to funding for measures that must be implemented to meet the requirements of the Biological Opinion's reasonable and prudent alternative (as distinguished from other Endangered Species Act-related measures such as the Recovery Plan and as distinguished from measures in the Council's program developed under the authority of the Northwest Power Act). This includes the cost of river operations, which is not discussed further here, as the budgeting for this item operates in a way different from the other Bonneville expenditures. Other costs in this category are capital investment costs (such as dam modifications by the Corps) identified in the Biological Opinion, which are funded originally by Congressional appropriations and then reimbursed by Bonneville. Other Biological Opinion measures will be funded directly by Bonneville (such as research activities and supplementation measures). Despite the essentially non-discretionary nature of these Biological Opinion projects, Bonneville, the Council, and the fish managers include them in the regional prioritization process (described below) for purposes of management and public review. Bonneville retains authority for project procurement and budgeting.
- Bonneville also accords top priority to funding mitigation activities for which Congress has appropriated the money and then imposed reimbursement obligations on Bonneville, whether or not related to the Biological Opinion and the ESA. Thus repayment of capital investments by the Corps of Engineers under the Biological Opinion fits into this priority category as well as the last, but this priority category also includes other capital investments and operation and maintenance expenditures that come from Congressional authorizations and appropriations, including mitigation activities by the Corps and U. S. Fish and Wildlife Service under the Lower Snake River Compensation Plan.
- Finally, Bonneville expends funds as called for under the Northwest Power Act, to implement measures in the Council's Columbia River Basin Fish and Wildlife Program. The Council's program is developed on the basis of recommendations of the region's fish and wildlife agencies and Indian tribes, and represents measures to mitigate for the adverse impact of hydropower operations on fish and wildlife species in the basin, whether or not the species are listed under the Endangered Species Act. Bonneville directly funds both capital and non-capital measures in the Council's program.

Bonneville's non-operational fish and wildlife budget can also be divided into three functional categories for accounting and prioritization purposes:

1. Repayment of capital investments (e.g., dam modifications and hatcheries) -- capital investments either funded by Congressional appropriations and then reimbursed by Bonneville (primarily Corps of Engineers projects, whether from the Biological Opinion, the Council's program or other sources) or directly funded by Bonneville (primarily measures in the Council's program that call for capital investments directly by Bonneville);

2. Reimbursable costs -- fishery mitigation operation and maintenance expenses funded by Congress with a statutory reimbursement obligation on Bonneville (e.g., Lower Snake River Compensation Plan hatchery operation and maintenance costs); and

3. Direct program costs -- non-capital fish and wildlife mitigation expenditures directly funded by Bonneville (primarily measures in the Council's program and non-operational measures in NMFS' Biological Opinion on hydropower operations and, when finalized, Recovery Plan).

An initial allocation of the total budget into these three categories was made as part of the Administration-approved budget, reflecting an estimate of how much money Bonneville will need to expend to satisfy its funding obligations over the next six years. The expectation is that the amounts allocated to the three categories will remain in those categories unless there is a re-allocation agreement. There is also an expectation that the processes to prioritize and allocate the money assigned to each category will be refined. These expectations must be tempered, however, by Bonneville's understanding of its funding obligations, as described above. That is, the amount of money available for direct funding of the measures in the Council's program depends in part on what is left after Bonneville funds the Biological Opinion's "reasonable and prudent alternative" under the ESA and the Congressionally-imposed reimbursement obligations. Thus a high degree of coordination among implementing agencies, the Council and Congress is essential to ensure that funds are efficiently invested in rebuilding the region's listed and unlisted fish and wildlife populations. Otherwise, inefficient expenditures or insufficient estimates for ESA and Congressionally-imposed obligations could threaten the funding of vital mitigation obligations identified pursuant to the Power Act.

This dynamic is important across the budget categories. For example, budgeting and management of funding in the reimbursable cost category must be adequate to ensure that reallocation of funds from the direct program category is unneeded. The budget agreement includes the concept, still being fleshed out, that the federal agencies that fund fish and wildlife activities by Congressional appropriations which are then reimbursed by Bonneville will coordinate their budget requests with the other entities in the region to ensure consistency with the budget allocations. This dynamic is also important within categories. For example, in the direct program funding category, NMFS' non-discretionary direct funding needs under the Biological Opinion must make room for direct program funds for Northwest Power Act program activities. It is in the prioritization process that the Council expects to find the necessary budget discipline to make the budget allocations work.

The eventual aim is to include all Columbia River fish and wildlife mitigation activities in one prioritization process. At present the prioritization process has dealt with projects within budget categories or sub-categories. Thus one group (the System Configuration Team) is developing prioritization criteria and ranking projects for the Corps of Engineers' Congressionally-appropriated capital investments. Within the direct funding category, separate

teams of fish and wildlife managers are developing prioritization criteria and ranking projects for resident fish activities, wildlife activities, and anadromous fish activities, including mainstem measures in the Council's program, mainstem research measures and production, and habitat activities (divided into subregional units). Projects that NMFS identifies as a non-discretionary requirement of the Biological Opinion will be funded, of course, but will also go through the prioritization process for review as to their overall and relative merits.

As part of this prioritization process, the relevant fish and wildlife managers develop criteria for evaluating project proposals, which the Council reviews for consistency with the Council's program. The fish and wildlife managers then rank projects according to the criteria and propose priorities for funding. The Council reviews these recommendations and submits its own recommendations to the Bonneville Power Administration. The region's anadromous fish managers make recommendations regarding anadromous fish priorities, resident fish managers make recommendations regarding resident fish priorities and wildlife managers make recommendations regarding wildlife.

In early 1996, partly in connection with this fish and wildlife governance review, the region clarified a number of implementation issues. For budget purposes, one of the most important understandings was that a multi-year work plan should be developed to guide budget planning and prioritization. Such a work plan should provide the region with a valuable fish and wildlife management tool. The regional entities have also recognized the need to bring the rest of the mitigation activities funded by Bonneville into the prioritization process; to devise some mechanism for a broader prioritization review across budget categories and groups, to ensure that we have the appropriate allocations for each category; and to figure out a way to integrate the non-Bonneville fish and wildlife mitigation activities and funds into the prioritization process.

D. More effective implementation

One of the key findings of the Fish and Wildlife Governance Workshop was on the need for a more effective implementation process:

The greatest failing in regional governance of fish and wildlife, expressed repeatedly by workshop participants, has been the failure to implement plans. It was generally agreed that *actions* must be taken if salmon recovery is to be effective. For this to occur, the objectives of plans must be *simplified*. Those charged with carrying out plans should be *accountable* for doing so promptly and effectively.

In recent months, the National Marine Fisheries Service has proposed an implementation process for its recovery plan. The Council is working with the Service to see if this proposal can be expanded to serve both the Service's and the Council's needs. One feature of the Service's proposal is the creation of an Executive Committee composed of representative of all federal, state and tribal sovereigns involved in salmon rehabilitation. As this

report is written, the implementation structure is still being discussed by the Executive Committee.

E. Dispute resolution

Without fair and efficient ways to resolve them, fish and wildlife disputes can lead to gridlock. One of the themes that emerged from the Council's Fish and Wildlife Governance Workshop was the need for "[f]air and efficient means of dispute resolution . . . to avoid paralyzing planning and implementation of fish and wildlife mitigation." The workshop explored several different models of dispute resolution.

For years, harvest disputes have been governed by the federal court in *United States v. Oregon*. The settlement agreement in that case has dispute provisions that use technical and policy groups to define and resolve issues without further judicial intervention whenever possible. The hydropower projects owned by the Mid-Columbia public utility districts in Washington have for years been involved in a settlement-based dispute resolution process that many parties find effective. That process, too, involves a series of technical and policy groups that define and attempt to resolve issues short of judicial intervention. In recent years, the court has been involved in reviewing the National Marine Fisheries Service's biological opinions for operation of the hydropower system. One of the court's opinions prompted the federal government to convene a large-scale collection of states, tribes and federal agencies to review salmon recovery issues and information. The biological opinion that resulted from this opinion is nevertheless being challenged.

In recent months, lawyers for the National Marine Fisheries Service, the Council, the tribes and the states have been working to refine these alternatives. Efforts to develop a process that will allow parties to take a dispute to an authoritative decision-maker on fairly short notice are underway.

IV. Recommendations

In this section, the Council makes a number of recommendations, some of which would not require legislation and some that would:

First, over the last year, federal, state and tribal entities have been working together constructively. The Council is encouraged by this cooperation and is committed to help facilitate it.

Second, the Council recommends that an executive order be developed to help cement cooperation and greater consistency. An executive order should direct the federal agencies to implement the Council's fish and wildlife program insofar as permitted by their statutory responsibilities, and to provide detailed, written explanations if they diverge from the program.

Third, if collaboration fails, legislation will be needed. Such legislation should require the federal agencies that govern operations of the hydropower system -- the Army Corps of

Engineers, the Bureau of Reclamation, the Federal Energy Regulatory Commission and the federal fish and wildlife agencies (the National Marine Fisheries Service and the U. S. Fish and Wildlife Service) insofar as their activities affect hydropower operations -- be required to act consistently with the Fish and Wildlife Program developed under the Northwest Power Act.

Finally, the Council commits to play an active role in monitoring implementation of fish and wildlife mitigation measures.

A. Non-legislative recommendations

Since last fall, when Congress called for this review, a number of developments have changed the way fish and wildlife decisions are being made in the Columbia River Basin. For example, significant progress is being made in collaborative review of potential dam modifications; in building independent scientific review into the decisionmaking process; in budget planning and prioritization and in coordination of river operations; and in implementation generally. Moreover, in part as a result of the dialogue generated by this review, a broad consensus has emerged on the steps the region needs to take to improve the way decisions are made and implemented.

In this section, we provide the Council's recommendations for how the region can build on these positive developments without additional legislation.

1. Work with sovereigns

There is widespread agreement on the need for a collaborative decision-making process in which sovereign entities participate on a basis of equality. Some of the basin's Indian tribes have submitted a version of one possible process (see Appendix 5, pages 21-23). While other approaches are also possible, the Council will work with the sovereigns to organize a process as soon as practicable.

The details of the process will need to be worked out with the sovereign interests. However, there is one obvious way in which to mesh the requirements of the Northwest Power Act, the Endangered Species Act, Indian treaties and other obligations: The sovereigns could be convened to develop a cohesive set of recommendations to serve as the basis for amendments to the Council's Fish and Wildlife Program. The National Marine Fisheries Service and U. S. Fish and Wildlife Service would be asked to determine whether the Council program satisfies the Endangered Species Act. If either Service finds the program does not satisfy the Endangered Species Act, the Council will engage the region in focusing on the specific statutory requirements at issue and determine the most appropriate regional response.

There is ample precedent for such an approach. For example, in the Upper Colorado River Endangered Species Act proceeding, three states, the Bureau of Reclamation, the U. S.

Fish and Wildlife Service, the Western Area Power Administration and representatives of environmental and water user groups have developed a recovery agreement. The agreement became a “reasonable and prudent alternative” for operations of Bureau facilities, and which permits certain kinds of water development. The agreement also contains a Recovery Action Plan for the funding of specific fish and wildlife rehabilitation projects. The Fish and Wildlife Service monitors compliance with the agreement and makes an annual determination whether it still satisfies Endangered Species Act requirements, based on how well the Recovery Action Plan is being implemented.

Such an effort would require no legislation. It could be formalized by interagency agreement or in a federal executive order.

2. Ensuring accountability

Based on discussions throughout the region, the Council is convinced of the need to improve accountability. The Council believes there are several ways the region should go about this. One is for the Council to conduct more frequent and more formal reviews of agency and tribal implementation of the fish and wildlife program. This should be coupled with even more emphasis on the type of performance monitoring that the Council’s Fish and Wildlife Division has done in monitoring reports. The Council proposes to adopt a practice of making findings on consistency or inconsistency with the program as a way of putting more teeth into such a process. The Council also proposes to publish a periodic “report card” summarizing the performance of implementing agencies. This report card will be shared regionally and with Congress. Finally, the Council will hold annual meetings reviewing progress with implementers and interested parties.

Second, the region badly needs an effective biological monitoring and evaluation program. The Council’s Fish and Wildlife Program contains a fairly extensive set of monitoring and evaluation measures. To date, success in implementing these measures has been limited. Implementation requires a higher degree of cooperation from the fish and wildlife managers than we have received and probably a heavier commitment of Council and staff effort. There has been recent progress in some areas, however. The Council believes that the region is now at a point at which the region is prepared to make a significant commitment to monitoring and evaluation. For its part, the Council makes such a commitment.

The Council’s commitment is in part based on the requirements of the Northwest Power Act. Under the Act, the Council must determine that program measures are based on the best available scientific knowledge. Moreover, the Council must report annually to Congress on the effectiveness of the Fish and Wildlife Program. To determine whether program measures are effective, the Council proposes to adopt a general rule that: a) all but proven measures should include a monitoring and evaluation component; and b) as a condition of receiving continued funding, all implementers must cooperate in a monitoring and evaluation program. The purpose is to determine which measures are effective and merit continued funding, and

which do not. The Council will review monitoring and evaluation information on a regular basis and make a determination whether specific measures were generating the kind of information needed to evaluate their effectiveness.

B. Legislative recommendations

There is broad consensus in the region that federal, state and tribal fish and wildlife efforts should be consistent with each other. As discussed above, federal, state and tribal entities are currently working together in a constructive manner. If these collaborative efforts fail, legislation will be needed. The Council does recommend that an executive order be developed to help cement cooperation. If legislation is proposed, however, we recommend the following.

1. Amendments to the Northwest Power Act to require consistency with the Council program

Amending the Northwest Power Act to require consistency with the Council program could improve implementation by giving the region more influence over river operations and other key recovery measures. Depending on the scope of the provision, a consistency requirement could bring more of the ecosystem under regional control. Consistency alternatives could work in combination with a Council position on the two foregoing issues.

For all consistency alternatives, we assume no changes in the Endangered Species Act or other environmental laws. That is, if there were a conflict between the Council's fish and wildlife program and the Endangered Species Act, the Endangered Species Act would govern. This could be made clear by adding a savings clause to section 10(j) of the Northwest Power Act: "Nothing in this Act shall be construed to affect or modify the Endangered Species Act or other federal laws."

As we mention above, it is possible that a result similar to a consistency requirement could be achieved without legislation, through a federal executive order. The Administration could direct affected agencies to use their discretion to act consistently with the Council's program unless there was a clear conflict with the Endangered Species Act or other laws. Such an order would in effect help carry out the agencies' current obligations to take the Council's program into account to the fullest extent practicable. An executive order could commit the agencies to use the Council's program as the baseline for implementation, and spell out specific impediments if any measure cannot be implemented. While an executive order would not be as durable or effective as legislation, it may be more achievable in the short term.

Currently, only one federal agency -- the Bonneville Power Administration -- is required to act consistently with the Council's Fish and Wildlife Program. Certain federal agencies have other obligations with respect to the program, and many others do not. Because these agencies have different authorities and responsibilities, they may take varying approaches to fish and

wildlife mitigation. In these circumstances, a consistent direction in fish and wildlife policy can be difficult to achieve (see Report of the Workshop on Fish and Wildlife Governance (Appendix 3), page 9).

This subject can be approached in several different ways. These options run from the most limited (covering federal hydropower agencies only) to the relatively broad, designed to approximate a jurisdictional scope that encompasses all federal, state and tribal agency activities that affect species addressed by the Council’s program. The Council recommends that if legislation is sought, it be focused on hydropower operations, as follows.

The consistency obligation that now applies only to Bonneville could be extended to the other federal agencies that operate federal hydropower facilities (the Army Corps of Engineers and the Bureau of Reclamation) or regulate non-federal hydropower facilities (the Federal Energy Regulatory Commission) and to the federal fish and wildlife agencies insofar as their activities affect hydropower operations and management. Section 4(h)(11)(A) of the Act could be amended as follows:

4(h)(11)(A) The Administrator and all other Federal agencies **whose decisions affect the responsible for** management, operation, or regulation of Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall--

* * *

(ii) exercise such responsibilities, ~~taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, in a manner consistent with~~ the program adopted by the Council under this subsection.

These agencies would be required to act consistently with the regional program unless the Endangered Species Act or other federal laws require otherwise.

It is worth noting that the constitutional questions that concerned Congress in drafting the Northwest Power Act are less pressing today. The court opinion that validated the Northwest Power Act, *Seattle Master Builders v. Pacific Northwest Power Planning Council*, 786 F.2d 1359 (9th Cir. 1986), cert. denied 107 S. Ct. 939 (1987), would clearly sanction an extension of the consistency obligation to a broader collection of federal agencies.

This change would not affect the Council’s planning process, but could improve implementation of the program. Rather than taking the Council’s basin-wide program into account “to the fullest extent practicable,” these federal agencies would have to act “consistent with” the Council’s program.

Although such an amendment would in some ways be a small change in the Northwest Power Act, it could make a significant difference. The casual approach the federal agencies have sometimes taken to implementation of the Council’s program in the past would be much

less likely with such a consistency obligation. Although the Council has had disagreements with Bonneville over the years, the consistency obligation has joined the Council and Bonneville into a relatively close relationship. A similar obligation could be expected to do something similar with the Corps, the Bureau, the FERC and the federal fish and wildlife agencies.

The region did explore broader consistency obligations, for example, a provision extending consistency obligations to the Forest Service, the Bureau of Land Management and state fish and wildlife activities. If one of the concerns about the Northwest Power Act is that it does not account for enough of the causes that contribute to species declines, this option would address the concern. By bringing production, habitat and harvest into the picture, the region could consider many more of the factors that affect fish and wildlife. Scientists increasingly take the view that this broader approach to habitat management is necessary if species recovery plans are to be effective. This change could make it more possible to develop an effective program.

However, at this point we do not see regional consensus on the advisability of such an approach. It is likely that such broad changes in the regional compact would require new action by the four states' legislatures. Absent a broader sense in the region that these changes are advisable, the Council does not recommend them.

In summary, if legislation is sought, the Council recommends that Congress extend a consistency obligation to the federal hydropower operators and fish and wildlife managers insofar as their decisions affect hydropower operations and management. This would be the simplest way to improve the likelihood of effective implementation and forge a link with the Endangered Species Act process without broadly expanding the Council's responsibilities.

2. Other matters that could be formalized by executive order or limited legislation:

The Council, workshop participants and commenters explored several other areas in which limited legislation could be useful:

a. Non-binding and binding dispute resolution processes

The risk inherent in a broadly collaborative process of the kind that prevails in the Northwest is that gridlock can arise at virtually any point in the collaboration. Absent a dispute resolution process of some kind, agencies with particular responsibilities must decide how to proceed and litigation may follow.

The need for fair and efficient dispute resolution is widely perceived and we believe this is an area in which progress can be made. There are several ways to resolve these kinds of disputes:

One is the *status quo*: each agency makes a decision that can be challenged in litigation. Examples of such processes include the Federal Energy Regulatory Commission licensing process for the Mid-Columbia dams and the *U. S. v. Oregon* harvest management process. Both these processes emerged from longstanding litigation. It is possible that a similar dispute resolution process would emerge from litigation over hydropower operations. However, litigation can be slow and settlements are crafted by the parties to the litigation. Those who are unwilling to intervene in the litigation may not be heard. For these reasons, it makes sense to think about other forms of dispute resolution.

Second, a dispute resolution process could be created in which a neutral decisionmaker resolves factual and legal issues without litigation. As mentioned above, there is interest in creating this kind of dispute resolution process. In discussions to date, the parties have urged that technical and policy panels should try to resolve disagreements in the first instance. An authoritative decision-maker could be called in if resolution by technical and policy groups fails. However, it is not clear that a binding result could be produced under current law. If not, the question is whether non-binding dispute resolution processes would be sufficient.

Finally, a binding dispute resolution process could be created legislatively. There are many possible models. Some overlap with the broader legislative changes discussed below (e.g., a broad Council that makes Northwest Power Act and Endangered Species Act decisions, subject to judicial review). Others could be focused more narrowly on dispute resolution *per se*.

At this point the Council does not recommend new legislation establishing a special dispute resolution process. The Council and other policy makers will continue to develop dispute resolution alternatives for consideration. Once this is done, it should be clearer whether legislation is needed. The Council proposes to report back to Congress on this matter in the fall.

b. Managing federally appropriated funds with Bonneville fish and wildlife funds in an integrated manner

As noted above, the amount of money available to fund the Council program depends on what is left after funding the Endangered Species Act “reasonable and prudent alternative” and congressionally imposed obligations. A high degree of coordination among implementing agencies, the Council and Congress is essential to ensure that funds are efficiently invested in rebuilding the region’s listed and unlisted fish and wildlife populations. At this point, the Army Corps of Engineers and others have given helpful commitments to coordinate their budget processes with the regional budget process. The Council and the federal agencies are still working to formalize these commitments in a memorandum of agreement. At this point, the Council’s recommendation is that the discussions be allowed to proceed for another few months. However, we do think it will be important to formalize agency commitments and an

executive order may be the best mechanism. Integrated management of funding for mitigation efforts could lead to substantial efficiencies in the mitigation program.

V. Broader changes

During this process, the Council explored a number of ideas for more significant change in fish and wildlife governance, which the Council does not recommend at this time. The Report of the Workshop on Fish and Wildlife Governance (Appendix 3) provides a detailed analysis of many of these ideas. Several commenters suggested that broad institutional reform is needed. Many others counsel that broader changes should be tested through incremental changes in the short term, either within existing legal authority or with limited legislation. Among the issues that were explored:

- Should the Council be expanded?

At the beginning of this process, a number of parties were interested in the idea of expanding the Council to include federal and tribal representation. During the Fish and Wildlife Governance Workshop these ideas were discussed in detail and several issues arose.

It is critical to remember that the region's Indian tribes play a significant role in fish and wildlife management in the Northwest, especially with regard to salmon. There are thirteen tribes in the basin, each with different legal rights. How would tribal representation be determined? Would each tribe have a representative (or two, like the states?). Would some tribes, e.g., those with judicially defined treaty rights, be entitled to more representation than others? One formula among many discussed in the Fish and Wildlife Governance Workshop would be to appoint four state members, four tribal members and two federal members. However, many other approaches are possible.

Ultimately, the tribes did not urge legislative expansion of the Council at this time. Rather, they and many other parties urged smaller, incremental improvements in the short term. Other questions of representation were also explored but not resolved during this review: should non-sovereign parties be represented (environmental, utility or industrial interests)? Further expansions in Council membership would be needed in order to address harvest issues. Alaskan membership on the Council could be considered. What role should Canada play?

It should be noted that all of these broad changes in the regional compact would likely require ratification by the four states.

- Does the region need a new "Columbia River Basin" statute?

There is a case to be made that the Columbia River Basin merits its own law, adapted to the unique characteristics of its rivers, species and communities. The Basin provides the bulk of the financing for species recovery from hydropower revenues; the region is highly dependent on the energy output of the hydropower system; and the region has deep ties to its fish and wildlife. However, no party during this review urged amendment of the Endangered Species

Act insofar as it applies to the Basin, and few urged amendment of the Northwest Power Act. Indeed, there was an almost unanimous sense that amending the Endangered Species Act or deeming compliance with other laws as satisfying the Endangered Species Act should not even be part of this debate. Most of the debate over broader changes concerned the prospect that the Endangered Species Act process and the Northwest Power Act process can lead to different results. Without legislative amendments, can recovery plans under these mandates be reconciled? Should legislation attempt to reconcile the two laws?

The Fish and Wildlife Governance Workshop focused attention on these questions. In one of the models discussed at the workshop, all decisions of an expanded Council would have to satisfy the standards of the Endangered Species Act, where applicable, and the Northwest Power Act. The premise is that although the obligations of these two statutes sometimes overlap, they are not inconsistent. Decisions would also have to be consistent with the Indian tribes' legal rights, as now. Because the expanded Council would be both a planning and implementing agency, it would be responsible for compliance with the National Environmental Policy Act. Financing would be shared between hydropower revenues and federal appropriations in the same proportion as currently exists.

The expanded Council would facilitate the integration of local watershed planning processes with Endangered Species Act and other requirements. The expanded Council would administer the Endangered Species Act's habitat conservation planning process and administer Bonneville funds consistent with the current Council program's emphasis on local, watershed-based habitat restoration programs. The authority of the expanded Council suggests local, watershed conservation efforts would be geared to Endangered Species Act standards, at least where listed species are present.

The workshop was unable to arrive at a resolution of these issues. The model discussed above was a step that few are willing to take. Again, such broad changes in the regional compact would likely require ratification by the four states.

- Should the region take an ecosystem approach to the rehabilitation of river basin ecosystems?

Scientists increasingly take the view that a broader, ecosystem approach is necessary if species recovery plans are to be effective. There is strong support in the region for the idea of ecosystem management -- the idea that fish and wildlife policy should make sense in the context of the entire watershed, and meet the needs of diverse species and resources.

The Fish and Wildlife Governance Workshop explored the idea of relying more on local, watershed-based efforts to implement fish and wildlife policy. In general, there was not a strong sense that watershed efforts should invest more time in planning, or that changes in legislation were needed for watershed groups to be more active in implementation. At present, watershed efforts play a key role under the Council's program, which calls for systematic

coordination of fish and wildlife habitat and production activities at the watershed level. There are also opportunities to gear watershed efforts to the habitat conservation planning provisions of the Endangered Species Act.

Beyond this, the idea of an “ecosystem trust” arrangement could be explored. Under such an arrangement, ecosystem conservation and management goals could be developed at the federal level and regional interests would develop a plan to achieve these goals for an entire river basin. Federally appropriated funds and regional hydropower funds would be used to leverage funding from corporations, interest groups, states and municipalities. The workings of such a process are not entirely clear, however, and the Council is unable at this time to make a recommendation regarding this approach.

APPENDIX 1

Procedure followed in the 180-day review

To respond to Congress's charge the Council: 1) Sought advice on alternative approaches that might be taken to fish and wildlife governance reform and issued a background paper (Appendix 2); 2) Conducted a facilitated workshop in which key alternatives were probed, elaborated and evaluated; 3) Considered a report and the recommendations resulting from the workshop (Appendix 3); 4) Circulated a set of issues and proposals (Appendix 4); 5) Invited public comment and consulted with a range of parties (Appendix 5); and 6) Prepared this report. The schedule for accomplishing the work was as follows:

November 30, 1995 to early January 1996: Discussions with interested parties on a range of approaches.

February 1-2, 1996: Workshop on alternative approaches.

February 9, 1996: Workshop transmitted report to Council.

February 20-22, 1996: Council developed draft proposal(s).

February 23-April 1, 1996: Circulation of proposals and public comment and consultations.

April 5 - May 14-16, 1996: Preparation of final report to Congress.

During the first phase of this process, discussions were held with a number of interested parties in December 1995. Five different approaches to fish and wildlife governance emerged. These approaches are summarized in the following table:

Table 1

| Approach | Authority/structure | Standards to guide decision making |
|--|---|---|
| Approach 1 - No legislation; inter-agency agreement; Council program as baseline for implementation | No legislative change; federal agencies implement program or explain why not; inter-agency agreement creates management structure that facilitates implementation. | No change in current law. |
| Approach 2 - All federal agencies act consistently with Council program | Federal agencies must act consistently with Council program; disputes referred to Congressional committees. | Northwest Power Act changed to require federal agencies to act consistently with Council program; no change in standards used to develop Council program (sections 4(h)(5) & (6)). |
| Approach 3 - State/tribal/federal council with ESA and Northwest Power Act responsibilities | Northwest Power Planning Council is replaced. An expanded state, federal and tribal council exercises Endangered Species Act and Northwest Power Act responsibilities and administers and prioritizes hydropower fish and wildlife funds. | Expanded council's program is based on both Endangered Species and Northwest Power Act standards. |
| Approach 4 - Watershed, not species focus for decisions | Endangered Species Act and Northwest Power Act focused on watershed conditions needed by fish and wildlife. | Rehabilitate watersheds' biological functions measured by needs of key species; satisfy ESA habitat conservation standards. Unclear whether this could be accomplished under current law. |
| Approach 5 - Management by fish and wildlife managers aimed at sustainable harvest | Fish and wildlife managers coordinate activities to manage fish and wildlife resources, funds and programs in groups appropriate to the resource being managed; disputes resolved by courts, Council or other processes. | ESA and Northwest Power Act are not amended, but are interpreted to achieve sustainable harvest objectives. |

To explore the strengths and weaknesses of these approaches, the Council invited 40-50 representatives of federal, state, tribal, industrial, agricultural, environmental and other sectors to meet in Portland, Oregon on February 1 and 2. The full list of workshop attendees is attached to the report (Appendix 3). The Council provided attendees with background on the task assigned by Congress, the fish and wildlife governance problem, the alternative approaches outlined above, and a proposed list of criteria with which to evaluate these alternatives.

At the workshop, a point-counterpoint presentation and critique of each alternative was conducted. Next, the group developed a list of criteria with which to evaluate the alternatives presented to the group as well as any other approach to regional governance of fish and wildlife (see section IV, Appendix 3). Following this, small groups were formed to consider each alternative extensively. The small groups discussed strengths and weaknesses of the alternatives and determined what changes should be made in the alternative to make it better fit the criteria and to respond to the region's needs. Following the small group sessions, the full group of participants reviewed the work of the small groups and discussed the merits of the revised alternatives. Finally, the workshop identified several themes that pervaded the workshop and a series of short- and long-term steps that can be taken to move ahead in fish and wildlife mitigation.

The workshop participants stressed the practical, political, and legal feasibility of improving Basin governance of fish and wildlife without the inevitable delays and uncertainties inherent in developing and pursuing broad, systemic changes. Thus, the group, sometimes sub-groups or individuals, suggested several short-term strategies. This does not imply a negative attitude toward all long-range or fundamental changes. Indeed, most people felt that the best way to identify and develop significant legislative changes would be through further debate. These concepts could be tested through incremental changes in the short term and effected so far as possible within existing legal authority.

Longer term issues to be considered include expansion of the Council, merging the legal requirements for planning and species recovery into a single plan, and establishing a dispute resolution mechanism. One of the major issues regarding systemic change in legal authority is in the composition of the Council: should it include representatives of the tribes and federal government? Should there be a role for Canada? For the time being this widely perceived issue can be addressed through voluntarily convened technical and policy groups.

Drawing on the workshop report, the Council posed a series of issues and proposals concerning fish and wildlife governance reform. Specifically, after describing the results of the workshop, the Council set out three general proposals: 1) A non-legislative strategy in which various steps would be taken to use existing authorities more effectively; 2) a strategy in which the Northwest Power Act would be amended to require all federal agencies to act consistently with the Council's Fish and Wildlife Program; and 3) a strategy in which broad changes to the Council's composition and authorities would be sought. The Council raised a variety of

questions for commenters to consider regarding the results of the workshop and the alternatives proposed by the Council. The comments are summarized in Appendix 5.

Z:\180\180DYFIN.DOC