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# COLUMBIA BASIN SALMON AND THE COURTS: REVIVING THE PARITY PROMISE

By  
MICHAEL C. BLUMM\*

*Professor Blumm discusses two landmark judicial decisions of 1994: Idaho Department of Fish & Game v. National Marine Fisheries Service and Northwest Resource Information Center v. Northwest Power Planning Council. Despite agency attempts to restore depleted salmon runs in the Columbia River system caused by hydroelectric development and operations, both decisions held that the agencies violated the law by not acting fast enough or going far enough in restoration efforts. Professor Blumm explains how the decisions and their aftermath could have a significant effect on efforts to preserve and restore beleaguered Columbia River salmon runs.*

## I. INTRODUCTION

This is the first conference of the Northwest Water Law and Policy Project, a three-year project dedicated to the preservation and wise use of the Northwest's most precious resource—its water. Over the next three years, we intend to examine water law from a Columbia Basin-wide perspective, unconfined by state boundaries or artificial distinctions like water quality and water quantity. Our goal is to further sustainable water use on a region-wide basis.<sup>1</sup> Today, we come together to examine two landmark judicial decisions of 1994 that may signal significant changes in the operation of the Federal Columbia River Power System, one of the largest interconnected hydroelectric systems in the world.<sup>2</sup>

The first case is the March 28, 1994 decision of Judge Marsh in *Idaho Department of Fish & Game v. National Marine Fisheries Service*,<sup>3</sup> which struck down the National Marine Fisheries Service's (NMFS) 1993 biological opinion for being inconsistent with the Endangered Species Act

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<sup>1</sup> See 1-3 BIG RIVER NEWS (Northwest Water Law and Policy Project, Portland, Or. 1994-95).

<sup>2</sup> BONNEVILLE POWER ADMIN., U.S. DEP'T OF ENERGY, THE COLUMBIA RIVER SYSTEM: THE INSIDE STORY 6 (1991).

<sup>3</sup> Idaho Dep't of Fish & Game v. National Marine Fisheries Serv. (*IDFG*), 850 F. Supp. 886 (D. Or. 1994).

(ESA).<sup>4</sup> The second is the September 9, 1994 decision of the Ninth Circuit in *Northwest Resource Information Center v. Northwest Power Planning Council*,<sup>5</sup> where the court found the Northwest Power Planning Council's "Strategy for Salmon"<sup>6</sup> to be inconsistent with the Northwest Power Act.<sup>7</sup> Both of these decisions are remarkable in that the agencies found to be violating the Northwest Power Act<sup>8</sup> and the Endangered Species Act<sup>9</sup> were, in fact, implementing programs designed to expand efforts to protect and restore salmon runs. They were attempting to make the Columbia River hydroelectric system more salmon friendly, if you will. But the courts ruled that the agencies had not gone far enough or fast enough, and both decisions criticized the agencies' slow, incremental pace of change.<sup>10</sup>

## II. BACKGROUND

I want to start with a very brief historical perspective on where we are in late 1994. Thirty years ago, in 1964, we were about to elect Lyndon Baines Johnson; that now seems more a lifetime removed, but actually it was only seven-and-a-half chinook salmon generations ago. That year the Columbia River Treaty<sup>11</sup> and the Pacific Northwest Coordination Agreement were signed.<sup>12</sup> The year 1964 witnessed the maturation of the Columbia River system, although it took nine more years to complete the physical development of the Columbia River system—the last mainstem dam went on line in 1975.

<sup>4</sup> *Id.* at 900.

<sup>5</sup> *Northwest Resource Info. Ctr. v. Northwest Power Planning Council (NRIC)*, 35 F.3d 1371 (9th Cir. 1994).

<sup>6</sup> *Id.* at 1395; see NORTHWEST POWER PLANNING COUNCIL, DOC. NO. 91-20, AMENDMENTS TO THE COLUMBIA BASIN FISH AND WILDLIFE PROGRAM (PHASE FOUR) (Nov. 10, 1993) (referred to as the "Strategy for Salmon"); see also 58 Fed. Reg. 64,017 (Dec. 3, 1993) (notice of the amendments).

<sup>7</sup> Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 837, 838(i), 838(k), 839-839h (1988 & Supp. V 1993) (commonly referred to as the Northwest Power Act).

<sup>8</sup> 16 U.S.C. § 839 (1988).

<sup>9</sup> 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

<sup>10</sup> See *IDFG*, 850 F. Supp. at 893 (criticizing NMFS for focusing more "on the system capabilities tending to [favor] the status quo rather than stabilization of the species"); *NRIC*, 35 F.3d at 1395 (criticizing the Council for assuming "that only small steps are possible, in light of entrenched river user claims of economic hardship" and for "sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator acceptable to power interests").

<sup>11</sup> Treaty Relating to Cooperative Development of Water Resources of the Columbia River Basin, Jan. 22-Sept. 16, 1964, U.S.-Can., 15 U.S.T. 1555; see Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 243-245 (1981) [hereinafter *Hydropower vs. Salmon*] (discussing the Columbia River Treaty).

<sup>12</sup> Pacific Northwest Coordination Agreement, Agreement for Coordination of Operations Among Power Systems of the Pacific Northwest, Contract No. 14-02-4822 (1964); see *Hydropower vs. Salmon*, *supra* note 11, at 245-46; Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 704-06 (1991) [hereinafter *Unraveling Parity*].

The year before, in 1974, modern salmon law may have been born when Judge Boldt issued his historic decision that Indian tribes are entitled to fifty percent of the harvest.<sup>13</sup> In 1978, three years after the last of the Snake River dams went on line and some four chinook generations ago, the National Marine Fisheries Service instituted Endangered Species Act proceedings.<sup>14</sup> Two years after that, in 1980, Congress enacted and President Carter signed the Northwest Power Act,<sup>15</sup> a statute that promised "parity" between hydroelectric operations and fish and wildlife protection.<sup>16</sup> Some six months later, the regional fish and wildlife agencies and Indian tribes submitted comprehensive recommendations for changing the hydroelectric system.<sup>17</sup> Today, fifteen years later, the fish and wildlife agencies and tribes recommend essentially the same kinds of changes.<sup>18</sup> But their original recommendations were not adopted by the Northwest Power Planning Council in its initial *Fish and Wildlife Program* in 1982,<sup>19</sup> nor were their recent recommendations adopted by the Council in its 1992 "Strategy for Salmon."<sup>20</sup> And interestingly enough, those recommendations have yet to be adopted in the ESA proceedings of the last few years.<sup>21</sup>

### III. IDAHO DEPARTMENT OF FISH & GAME V. NATIONAL MARINE FISHERIES SERVICE

We ought to turn first to the ESA because the initial decision under consideration today is an outgrowth of the listing of chinook and sockeye salmon as endangered species in 1991 and 1992,<sup>22</sup> which some people

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<sup>13</sup> *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Washington v. Washington State Commercial Passenger Fisheries Ass'n.*, 443 U.S. 658 (1979).

<sup>14</sup> Biological Status Review, 43 Fed. Reg. 45,628, 45,628 (Oct. 3, 1978). See generally F. Lorraine Bodi, *Protecting Columbia River Salmon Under the Endangered Species Act*, 10 ENVTL. L. 349 (1980) (discussing potential impacts of listing under the ESA on Columbia Basin Fisheries).

<sup>15</sup> See *supra* note 7.

<sup>16</sup> See *Unraveling Parity*, *supra* note 12, at 662-70. The legislative history referred to power production and fish and wildlife protection as "co-equal" partners and instructed federal water managers to treat fish and wildlife "on a par" with other purposes served by Columbia Basin dams. H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 1, at 49, 56-57 (1980).

<sup>17</sup> See *Unraveling Parity*, *supra* note 12, at 670-74.

<sup>18</sup> See NORTHWEST POWER PLANNING COUNCIL, RECOMMENDATIONS TO AMEND THE ANADROMOUS FISH SECTIONS OF THE COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM (1994).

<sup>19</sup> See *Unraveling Parity*, *supra* note 12, at 674-76 (analyzing NORTHWEST POWER PLANNING COUNCIL, 1982 COLUMBIA RIVER BASIN PROGRAM (1982)).

<sup>20</sup> See Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 694 (1992) [hereinafter *Saving Salmon*]; NORTHWEST POWER PLANNING COUNCIL, DOC. NO. 91-21A, AMENDMENTS TO THE COLUMBIA BASIN FISH AND WILDLIFE PROGRAM (PHASE THREE) (Nov. 19, 1992).

<sup>21</sup> See *Saving Salmon*, *supra* note 20, at 713.

<sup>22</sup> 56 Fed. Reg. 58,619 (Nov. 20, 1991) (listing Snake River sockeye salmon as "endangered"); 57 Fed. Reg. 14,653 (Apr. 22, 1992) (listing Snake River chinook salmon as "threatened"); see also 59 Fed. Reg. 42,529 (Aug. 18, 1994) (interim rule) (reclassifying Snake River chinook salmon as "endangered").

think was the result of the Council's failure to adopt the recommendations of fish and wildlife agencies and tribes some ten years earlier. In *Idaho Department of Fish & Game v. National Marine Fisheries Service (IDFG v. NMFS)*, both Idaho and Oregon sued NMFS, claiming that its biological opinion on the 1993 plan of operations for the Columbia Basin hydroelectric dams<sup>23</sup> failed to satisfy the ESA.<sup>24</sup> Numerous other interested entities in the region also joined in the suit.<sup>25</sup>

The NMFS biological opinion adopted a two-step process for determining whether the 1993 system operations plan would produce jeopardy. NMFS first asked whether the 1993 operations would achieve an interim goal of reducing mortalities in relation to a selected base year period.<sup>26</sup> The base year period NMFS chose was 1986 to 1990. Second, NMFS asked whether all proposed activities—including not just hydroelectric operations but also harvest management, hatchery releases, and habitat modifications, taken together—would be likely to stabilize salmon populations over the long run—defined as four salmon generations, or by 2008.<sup>27</sup> In other words, NMFS asked whether salmon populations would rebound to 1990 levels by 2008.

The NMFS biological opinion concluded that there was no jeopardy to Snake River salmon because it answered both of those questions in the affirmative. According to NMFS, 1993 operations would reduce mortalities by three to eleven percent.<sup>28</sup> And the goal of stabilizing salmon populations at 1990 levels by 2008 would be possible, NMFS concluded, with a sixty to seventy percent likelihood.<sup>29</sup>

This biological opinion was challenged in *IDFG v. NMFS*. In the first reported court case to reverse an ESA biological opinion, Judge Marsh held NMFS's biological opinion to be arbitrary and capricious.<sup>30</sup> First, Judge Marsh ruled that NMFS's decision to pick the baseline at 1986-1990—years of drought and low salmon returns—was arbitrary because NMFS failed to articulate a rational connection between the factors that led to the decline of populations and its choice of a baseline.<sup>31</sup> He concluded that the chosen baseline seemed to be focused more on system

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<sup>23</sup> Under the Pacific Northwest Coordination Agreement, *supra* note 12, federal and nonfederal dam operators prepare an annual plan that coordinates system operations. See *Hydropower vs. Salmon*, *supra* note 11, at 245-46.

<sup>24</sup> See *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv. (IDFG)*, 850 F. Supp. 886, 888 (D. Or. 1994).

<sup>25</sup> Participating as amicus supporting the plaintiff states were the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, the Yakama Indian Nation, and the State of Alaska. Intervening on the side of NMFS were the Pacific Northwest Generating Cooperative, the Pacific Power Council, and the Direct Service Industries (DSIs).

<sup>26</sup> See *IDFG*, 850 F. Supp. at 892.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 897.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 893.

<sup>31</sup> *Id.*

capabilities, on maintaining the status quo, than on the needs of salmon.<sup>32</sup> Although he did not tell NMFS what to do on remand, he did suggest that the agency ought to consider alternative baselines.<sup>33</sup> He also specifically refused to draw a line between construction-related losses that the dams caused and operational-related losses.<sup>34</sup>

Second, Judge Marsh faulted NMFS for its use of models. Life-cycle models were the basis for the agency's prediction of what would happen in 2008.<sup>35</sup> Judge Marsh criticized NMFS for rejecting pessimistic assumptions in certain models.<sup>36</sup> Most of those pessimistic assumptions came from models used by the fishery agencies and tribes. Marsh noted that all the models contained considerable uncertainty, calling them "educated guesses premised upon 'crude assumptions.'"<sup>37</sup> He determined that discounting pessimistic assumptions was unwarranted and arbitrary because it failed to account for factors such as the risks of inbreeding and what is called the "extinction vortex," where population numbers become so small as to create a risk that environmental catastrophes may extirpate the species.<sup>38</sup>

Judge Marsh concluded, in words that have been widely reported in the press, that the biological opinion process in this case—although he could have been speaking to the entire process of managing the Columbia Basin hydroelectric system—"is seriously, 'significantly,' flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation."<sup>39</sup> He said that the result has produced "relatively small steps, minor improvements and adjustments—when the situation literally cries out for a major overhaul."<sup>40</sup> On remand he suggested that NMFS consider alternative baselines,<sup>41</sup> and he made clear that NMFS could not satisfy the ESA by making scientific decisions in a vacuum. Judge Marsh interpreted NMFS's principal marching order—which is to base its decisions on best available scientific knowledge<sup>42</sup>—to impose a substantive obligation on NMFS to consider "significant information and data from well-qualified scientists such as the fisheries biologists from the states and tribes."<sup>43</sup> This sentiment is remarkably similar to that

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<sup>32</sup> *Id.* ("NMFS focussed on the system capabilities tending to the status quo rather than stabilization of the species.")

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 895 ("Based upon my analysis of the ESA and its legislative history, I expressly reject any attempt to impose bright-line definitions upon the hydrosystem's 'existence' vs. 'operations' or the terms 'survival' vs. 'recovery.'")

<sup>35</sup> *See id.* at 896.

<sup>36</sup> *Id.* at 898 ("Given the admitted high degree of uncertainty in the jeopardy analysis, there is no rational explanation for [NMFS] to disregard only the low end, worst case assumptions.")

<sup>37</sup> *Id.* at 897.

<sup>38</sup> *Id.* at 898-99.

<sup>39</sup> *Id.* at 900.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 893.

<sup>42</sup> *See* 16 U.S.C. § 1536(a)(2) (1988).

<sup>43</sup> *IDFG*, 850 F. Supp. at 900.

expressed by the Ninth Circuit in the second case we consider today, *NRIC v. NPPC*.

IV. *NORTHWEST RESOURCE INFORMATION CENTER V.  
NORTHWEST POWER PLANNING COUNCIL*

In *Northwest Resource Information Center v. Northwest Power Planning Council (NRIC v. NPPC)*, the Ninth Circuit, in an opinion by Judge Tang, struck down the Northwest Power Planning Council's 1992 "Strategy for Salmon"<sup>44</sup> for failing to meet two Northwest Power Act requirements: 1) it failed to meet the Act's standards for setting biological objectives,<sup>45</sup> and 2) it failed to explain how its decisions regarding the 1992 "Strategy" satisfied the statute's criteria for program measures, especially criteria that required the Council to explain its reasoning in the program when rejecting program measures recommended by the region's agencies and tribes.<sup>46</sup> The court went on to declare that those recommendations by the agencies and tribes were entitled to "a high degree of deference."<sup>47</sup> Along the way, the court rejected industrial customers' suggestion that program measures had to satisfy a cost-benefit test.<sup>48</sup>

This result—judicial rejection of the Council's program—is surprising because the program has been touted as the largest biological restoration program on the planet.<sup>49</sup> The 1992 amendments were, in fact, remedial in many ways, and offered the first substantial improvement in river flows and system operations since 1982.<sup>50</sup> But in the "Strategy for Salmon," the Council failed to adopt the recommendations submitted by the agencies and tribes, just as it had ten years earlier. The Council's reasoning for rejecting those recommendations was scattered throughout the administrative record, although it appeared largely in an appendix entitled "Response to Comments for Phase Three."<sup>51</sup> The court, however, rejected the Council's invitation to search those parts of the record for the Council's justification because it interpreted section 4(h)(7) of the Northwest Power Act<sup>52</sup> to require the Council to explain "in writing, as part of the program," not as part of an appendix, why the recommendations satisfied the statutory criteria.<sup>53</sup>

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<sup>44</sup> The Council's "Strategy for Salmon" was the name the interstate agency gave to the 1992 amendments to its Columbia Basin Fish and Wildlife Program, which the Council first promulgated in 1982. The amendments are discussed in *Saving Salmon*, *supra* note 20, at 690-96 (referring to them as the "1991 amendments").

<sup>45</sup> *Northwest Resource Info. Ctr. v. Northwest Power Planning Council (NRIC)*, 35 F.3d 1371, 1391-92 (9th Cir. 1994) (interpreting 16 U.S.C. § 839b(h)(6)(C), (E)).

<sup>46</sup> *Id.* at 1384-86 (interpreting 16 U.S.C. § 839b(h)(7)).

<sup>47</sup> *Id.* at 1388-89, 1392.

<sup>48</sup> *Id.* at 1394-95.

<sup>49</sup> NORTHWEST POWER PLANNING COUNCIL, 1987 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM 5 (1987) ("[The program is] possibly, the most ambitious effort in the world to save a biological resource.").

<sup>50</sup> See *Saving Salmon*, *supra* note 20, at 692.

<sup>51</sup> *NRIC*, 35 F.3d at 1386.

<sup>52</sup> 16 U.S.C. § 839b(h)(7) (1988).

<sup>53</sup> *NRIC*, 35 F.3d at 1385-86 (citing 16 U.S.C. § 839b(h)(7)).

The Ninth Circuit concluded that it was important for the Council to put its reasoning in the program and to tie its reasoning to the statutory criteria for two reasons. First, such reasoning promotes effective public participation,<sup>54</sup> which after all is one of the Northwest Power Act's purposes.<sup>55</sup> Second, it facilitates judicial review of the Council's actions, and judicial review can ensure that the Council gives the statutorily-required deference to the recommendations of the fishery agencies and tribes.<sup>56</sup>

In a sense, we might interpret the court as simply saying that the Council made a procedural error—that it failed to explain itself in the proper place in the record. But such an interpretation is not even technically true because, as the court noted, nowhere had the Council explained itself in terms of complying with the statutory criteria for rejecting fishery agencies' and tribes' recommendations.<sup>57</sup> And, in a larger sense, this decision cannot be confined to a procedural basis because, as the court said, the guts of the issue that it had to decide was statutory interpretation.<sup>58</sup> Statutory interpretation was central to all the challenges levied against the Council's program. The court left little doubt that the Council had misinterpreted the statute by failing to give proper deference to the recommendations of the agencies and tribes,<sup>59</sup> concluding that these recommendations were entitled to "a high degree of deference."<sup>60</sup> This deference was owed not only to the program recommendations but also to the agencies' and tribes' statutory interpretation of terms such as "best available scientific knowledge" and river flows necessary to meet sound biological objectives.<sup>61</sup>

It is this deference principle, I believe, that will be the opinion's most enduring legacy. Deference comes from section 4(h)(7) of the Act, among other places, where Congress required the Council to give "due weight" to

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<sup>54</sup> *Id.* at 1385.

<sup>55</sup> *See* 16 U.S.C. § 839(3) (1988).

<sup>56</sup> *NRIC*, 35 F.3d at 1385.

<sup>57</sup> *Id.* at 1386.

<sup>58</sup> *Id.* ("[M]ost of the parties' remaining contentions relate more to statutory interpretation of the fish and wildlife provisions of the Act, rather than the Council's substantive decisions. We recognize that many of these statutory construction issues have plagued efforts to finalize the Strategy for Salmon. Therefore, we carefully consider the statutory interpretation issues with the expectation that our effort will aid the parties' efforts on remand.")

<sup>59</sup> *See id.* at 1389 ("[W]e do not decide here whether the Council abused its discretion in giving or failing to give proper deference to fishery managers because the record as it stands precludes such an inquiry. We note again that the Council failed to explain, in the Program, its reasons for rejecting the recommendations of the fishery managers. This failure of the Council is disturbing given that it adopted, for the most part, the flows and measures recommended by power interests and DSIs, despite the overwhelming consensus among agencies and tribes in favor of significantly higher flows and more scientifically-based biological objectives.")

<sup>60</sup> *Id.* at 1388-89, 1392.

<sup>61</sup> *Id.* at 1389 ("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.")

these recommendations.<sup>62</sup> The court gave a number of reasons for concluding that "due weight" meant "a high degree of deference."<sup>63</sup> These reasons included the statute's legislative history<sup>64</sup> and the fact that the agencies and tribes were involved in drafting the statute.<sup>65</sup> But most importantly, the court drew this conclusion from a structural analysis of the Act. Comparing the power provisions of the Northwest Power Act to the statute's fish and wildlife provisions, the court determined that the former were open-ended provisions, giving the Council considerable flexibility to make quasi-legislative decisions, but because the latter contain more detailed criteria and procedures, they narrowed the Council's discretion considerably.<sup>66</sup> The court concluded that the fish and wildlife provisions stand "in stark contrast" to the power plan provisions; the result is "bound discretion" on the part of the Council, requiring "a high degree of deference" to the recommendations of the region's fishery agencies and Indian tribes.<sup>67</sup>

A second legacy of the *NRIC v. NPPC* decision will be the court's determination that the statute's criteria governing the suitability of program measures are substantive.<sup>68</sup> The court ruled that these criteria are no less substantive than the "equitable treatment" standard that the Ninth Circuit earlier interpreted as being a substantive standard.<sup>69</sup> This means that other courts will be willing to review program measures on the merits for consistency with the statutory criteria and in light of the deference principle that the court articulated.

A third legacy of this decision will be the court's rejection of the industrial customers' argument that the benefits of each program measure had to exceed its costs.<sup>70</sup> Instead, the court said that cost considerations cannot preclude biologically sound restoration measures.<sup>71</sup> Economic factors are relevant only where there exists a cheaper way of achieving the same sound biological objective. Economics can lead to a rejection of a program measure, but only where the overall costs of the program are unreasonable; that is, if costs would jeopardize the Northwest Power Act's guarantee of "an adequate, efficient, economical, and reliable power supply."<sup>72</sup> The court emphasized, however, that the Act referred to a power supply, not a hydropower supply,<sup>73</sup> and cited legislative history to the effect that Congress anticipated that customers would pay all the costs of

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<sup>62</sup> 16 U.S.C. § 839b(h)(7) (1988).

<sup>63</sup> *NRIC*, 35 F.3d at 1388.

<sup>64</sup> *Id.* (citing 126 CONG. REC. E10,683 (1980) (remarks of Rep. Dingell), and H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 1, at 57 (1980)).

<sup>65</sup> *Id.* at 1389.

<sup>66</sup> *Id.* at 1387.

<sup>67</sup> *Id.* at 1387-88.

<sup>68</sup> *Id.* at 1389.

<sup>69</sup> *Id.* (citing *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 473 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985)).

<sup>70</sup> *NRIC*, 35 F.3d at 1393-95.

<sup>71</sup> *Id.* at 1394.

<sup>72</sup> 16 U.S.C. § 839b(h)(5) (1988).

<sup>73</sup> *NRIC*, 35 F.3d at 1378 n.13.

hydroelectric operations, and that such costs should not be a deterrent to meeting fish and wildlife needs simply because they were high.<sup>74</sup>

The court concluded its analysis by declaring that fish and wildlife restoration was a primary goal of the Act,<sup>75</sup> and by calling fish and wildlife "a co-equal partner" with power generation.<sup>76</sup> In addition, the court explained that the Act, 1) "placed a premium on prompt action," 2) prescribed a limited role for economic considerations, and 3) recognized that fish and wildlife were irreplaceable natural resources.<sup>77</sup> Moreover, just like Judge Marsh,<sup>78</sup> the Ninth Circuit criticized the Council's approach of small, incremental steps—which the court said was the result of entrenched users' claims of economic hardship.<sup>79</sup> The court also faulted the Council for assuming that its proper role was that of consensus builder, instead of regional leader, and for its willingness to sacrifice fish and wildlife goals for what the court called "the lowest common denominator" of salmon protection.<sup>80</sup>

This case replaces freewheeling Council discretion with deference to the biological judgment of the region's fishery agencies and Indian tribes, but raises a number of questions. For example, what deference is owed when the fishery agencies and tribes disagree? What exactly is "an adequate, efficient, economical, and reliable power supply"? Also, I should note that giving deference to the agencies and tribes might not necessarily improve prospects for the salmon. After all, NMFS spent ten or fifteen years clamoring for high flows in the river until it got decision-making authority under the Endangered Species Act;<sup>81</sup> then the agency failed to prescribe those flows under its ESA authority.<sup>82</sup>

## V. THE LEGACY

I am struck by the similarity between the Marsh decision and the Ninth Circuit decision. Both opinions say that lead agencies under the ESA and under the Northwest Power Act cannot ignore biological opinions of fish and wildlife agencies and Indian tribes. Of course, the Council owes a high degree of deference, but NMFS cannot ignore biological opinions of the agencies and tribes either.<sup>83</sup> Both opinions decry the small, incremental steps approach that has always characterized efforts to restore Colum-

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<sup>74</sup> *Id.* at 1394 (citing H.R. REP. No. 976, 96th Cong., 2d Sess., pt. 1, at 49, 57 (1980)).

<sup>75</sup> *Id.* at 1395.

<sup>76</sup> *Id.* at 1378.

<sup>77</sup> *Id.* at 1395.

<sup>78</sup> See *supra* text accompanying notes 39-40.

<sup>79</sup> *NRIC*, 35 F.3d at 1395.

<sup>80</sup> *Id.*

<sup>81</sup> See *Unraveling Parity*, *supra* note 12, at 707-08 (discussing the Columbia Basin Fish and Wildlife Authority's fish flow proposal; NMFS is a member agency of the Authority).

<sup>82</sup> See *Saving Salmon*, *supra* note 20, at 713; see also Michael C. Blumm & Janice M. Schneider, *Saving Idaho's Salmon: A History of Failure and a Dubious Future, Part II*, in *WATER LAW: TRENDS, POLICIES, AND PRACTICE* 293, 298 (Kathleen Marion Carr & Michael D. Crammond eds., 1995) (discussing agency failure to prescribe necessary flows for salmon).

<sup>83</sup> *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv. (IDFG)*, 850 F. Supp. 886, 900 (D. Or. 1994).

bia River salmon.<sup>84</sup> But neither opinion demands that NMFS or the Council do anything specific to save the Columbia River salmon.

No doubt some will complain that these two decisions represent unwarranted judicial intrusion into complex matters better left in the hands of administrators. But it seems to me that the courts are not attempting to become river masters or fish masters the way Judge Boldt was forced to some twenty years ago<sup>85</sup>—that is not the judicial function. Courts have neither the institutional competency nor the interest to manage this system that has become such a headache for so many. But the judicial role *is* to signal when the system is broken, and most people who are close to these issues know that it is in fact broken. Whether it can or will be fixed is largely in the hands of agencies like the Council, NMFS, and Bonneville Power Administration that will have to implement these judicial directives. But these cases mean that those future decisions are only *largely* in the hands of the agencies; they are not exclusively in their hands. There is now a promise of subsequent judicial review. That prospect is unlikely to damage salmon restoration efforts; whether it will help them only time will tell.

We will know fairly soon whether or not the kinds of changes that the courts urged will take place in 1995. The Northwest Power Planning Council is scheduled to adopt new amendments to its Fish and Wildlife Program in December 1994, and NMFS is due to adopt a revised biological opinion in early 1995. In a very real sense, the results of those two decisions will determine the fate of some runs of Columbia Basin salmon. If the Council and NMFS adhere to the deference and anti-incremental principles articulated by the courts, it may not be too late to save the Snake River salmon.

## VI. EPILOGUE

On December 14, 1994, the Northwest Power Planning Council adopted amendments to its *1994 Columbia Basin Fish and Wildlife Program* that included a phased lowering, or drawdown, of several reservoirs to improve spring flushing flows for juvenile salmon migrating to the sea.<sup>86</sup> The amendments aimed to achieve a minimum monthly average flow or velocity equivalent during the spring at Lower Granite Dam (the uppermost dam on the Snake that salmon must pass, just west of Lewiston, Idaho) of 85 kcfs (thousand cubic feet per second) in dry water years and 140 kcfs in wet years; in the summer, the Lower Granite minimum average monthly flow goal is 50 kcfs in dry years.<sup>87</sup> On the lower Colum-

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<sup>84</sup> *Id.*; *NRIC*, 35 F.3d at 1395.

<sup>85</sup> See, e.g., FAY COHEN, *TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS* 3-18 (1986) (discussing *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom. Washington v. Washington State Commercial Passenger Fisheries Ass'n.*, 443 U.S. 658 (1979)).

<sup>86</sup> NORTHWEST POWER PLANNING COUNCIL, *1994 COLUMBIA BASIN FISH AND WILDLIFE PROGRAM* (1994) [hereinafter 1994 PROGRAM].

<sup>87</sup> *Id.* at 5-20.

bia, the Council's goals for peak spring flows at The Dalles Dam ranged from 220 kcfs to 300 kcfs, depending on available storage.<sup>88</sup> The peak flows of 140 kcfs and 300 kcfs corresponded to the fishery agencies' 1991 flow proposal.<sup>89</sup>

To achieve these goals, the amendments called for Lower Granite reservoir to be partially drawn down for two months in 1995, and for a lower drawdown—to near spillway level—beginning in 1996.<sup>90</sup> Under the amendments, Little Goose reservoir (the reservoir immediately downstream of Lower Granite) would also be drawn down to near spillway crest by 1999.<sup>91</sup> On the lower Columbia, the amendments called for a year-round lowering of John Day reservoir (at 78 miles, it is the longest reservoir on the lower Columbia) to near minimum operating pool by 1996, and a decision whether to draw down to near spillway crest—a 48-foot drawdown—by December 1996.<sup>92</sup> In essence, to speed salmon migration, the Council partially adopted the “Idaho drawdown plan,” championed by outgoing Idaho Governor Cecil Andrus.<sup>93</sup>

Other 1994 amendments called for the purchase of an additional one million acre-feet of water (in addition to an earlier requirement of nearly a half million acre-feet) from willing sellers in the upper Snake Basin to boost river flows,<sup>94</sup> and spills at mainstem dams so that eighty percent of juvenile salmon avoid going through power turbines.<sup>95</sup> Trucking and barging of juvenile fish would be limited to “extremely adverse” river conditions, as judged by the region's fishery agencies and tribes.<sup>96</sup>

Upon initial analysis, the Council's amendments appear to respond to the Ninth Circuit's criticism that the Council must take more than small, incremental steps that represent “the lowest common denominator” of salmon protection.<sup>97</sup> The Council's scientific analysis indicated that its amendments will begin a slow process of rebuilding salmon runs to harvestable levels.<sup>98</sup> Whether the amendments will be implemented remains an open question at this writing,<sup>99</sup> particularly because the federal plan

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<sup>88</sup> *Id.* at 5-29.

<sup>89</sup> See *Unraveling Parity*, *supra* note 12, at 708 (listing the recommended flows).

<sup>90</sup> See 1994 PROGRAM, *supra* note 86, at 5-25.

<sup>91</sup> *Id.* The Council also promised to decide whether to draw down the two remaining Snake River reservoirs to near spillway crest in 2002. *Id.* at 5-26.

<sup>92</sup> *Id.* at 5-32.

<sup>93</sup> See *Unraveling Parity*, *supra* note 12, at 725; *Saving Salmon*, *supra* note 20, at 688.

<sup>94</sup> See 1994 PROGRAM, *supra* note 86, at 5-21.

<sup>95</sup> *Id.* at 5-36. This 80% rate reflects a marked increase in spill efficiency. Previously, the overall rate was 70%, and just 50% for spring and summer migrants. *Id.* at 5-26.

<sup>96</sup> *Id.* at 5-47. The Council anticipated that “significantly fewer than half” of juvenile salmon would be transported. *Id.* No transportation would occur at drawdown reservoirs. The Council made clear that “[t]ransportation should not be used as a device to delay substantial improvements in in-river survival conditions.” *Id.* at 5-46.

<sup>97</sup> See *supra* text accompanying note 80. The Council also included detailed statutory findings in response to the court's directive. 1994 PROGRAM, *supra* note 86, at 15-1 to 15-165.

<sup>98</sup> See 1994 PROGRAM, *supra* note 86, at 15-1 to 15-165.

<sup>99</sup> The Northwest Power Act requires the federal Bonneville Power Administration to act “in a manner consistent” with the Council's program, 16 U.S.C. § 839b(h)(10)(A), and all federal water managers, including the U.S. Army Corps of Engineers, the Bureau of Recla-

subsequently endorsed by NMFS is inconsistent with the Council's program in some important respects.

On March 2, 1995, the National Marine Fisheries Service released its biological opinion for the 1995-1998 operation of the Federal Columbia River Power System.<sup>100</sup> The opinion concluded that the operation of the hydroelectric system would likely jeopardize the continued existence of the listed salmon species unless the federal water managers adopt a "reasonable and prudent alternative" which included immediate actions to improve mainstem salmon survival such as improved bypass, increased spills and flows; and better operation of the barging and trucking program to transport juvenile salmon.<sup>101</sup>

Perhaps the biggest difference from the Council's program concerned the fact that the NMFS opinion made no commitment to Snake River reservoir drawdowns beyond the minimum operating pool level. Instead, NMFS directed the Corps of Engineers to undertake a drawdown feasibility study, postponing a decision on whether to proceed with drawdowns until 1999.<sup>102</sup> Under the biological opinion, drawdowns at John Day reservoir would be similar to the Council's program, reaching near minimum operating pool by 1996, but further drawdowns would await the Corps' study.<sup>103</sup> Instead of drawdowns, the opinion relied on a set of detailed operational changes that would, NMFS claimed, "substantially alter[ ] the operation of the reservoirs . . . increas[ing] the priority for the use of the reservoirs for fish flow augmentation relative to power production."<sup>104</sup> NMFS asserted that, had its operational charges been in effect during 1992-1994, approximately 13 to 16 million acre-feet of water would have been released for salmon migration, instead of the 10 to 11 million acre-feet that the Bonneville Power Administration claimed was devoted to salmon flows.<sup>105</sup> However, the NMFS opinion set more modest flow targets than did the Council's program: spring peak flows of 85 to 100 kcfs in the Snake River (versus 85 to 140 kcfs in the Council's program) and 220 to 260 kcfs in the lower Columbia (versus 220 to 300 kcfs in the Coun-

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mation, and the Federal Energy Regulatory Commission, to take the program into account "to the fullest extent practicable." *Id.* § 839b(h)(11)(A)(ii). The Council has interpreted the latter requirement to mean that these agencies must either implement its program or provide a written explanation "why it will not be physically, legally, or otherwise practicable to implement the program measures, including a description of all possible allowances available to permit implementation." 1994 PROGRAM, *supra* note 86, at 1-14. No court has interpreted the meaning of either of these provisions, although the Supreme Court construed language similar to "the fullest extent" in the National Environmental Policy Act to require compliance absent an unavoidable conflict with other statutory authorities. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88 (1976).

<sup>100</sup> NATIONAL MARINE FISHERIES SERV., BIOLOGICAL OPINION: REINITIATION OF CONSULTATION ON 1994-1998 OPERATION OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM AND JUVENILE TRANSPORTATION PROGRAM IN 1995 AND FUTURE YEARS (Mar. 2, 1995) [hereinafter 1995 BIOLOGICAL OPINION].

<sup>101</sup> *Id.* at 91.

<sup>102</sup> *Id.* at 92-94.

<sup>103</sup> *Id.* at 113-14.

<sup>104</sup> *Id.* at 96.

<sup>105</sup> *Id.*

cil's program).<sup>106</sup> The opinion also called for a more modest water purchasing program in the upper Snake Basin, seeking less than a half million acre-feet of water annually in 1995-1997, one million acre-feet less than the Council's program, because the Bureau of Reclamation and Idaho apparently convinced NMFS that it would not be realistic to expect that more water could be purchased absent condemnation authority.<sup>107</sup>

Unlike the Council's program, the NMFS opinion directed the Corps to continue use of fish barging and trucking at all dams, unless directed otherwise by a "technical management team" composed of representatives of NMFS, the Corps, Bonneville Power Administration, and the Bureau of Reclamation.<sup>108</sup> Like the Council's program, spill would be designed to achieve eighty percent fish passage efficiency, although spill would be restricted where necessary to control dissolved gas levels.<sup>109</sup> Because NMFS endorsed spills at all dams, fewer fish would be trucked or barged than previously. But no spills would occur at dams used to collect fish for barge and truck transport when river flows fall below the target of 85 kcfs because NMFS concluded barging and trucking was safer for the fish than in-river migration at low flows.<sup>110</sup> Thus, no spills would be provided for summer migrants, principally fall chinook, which would remain completely dependent on improved barge and truck transportation.<sup>111</sup>

A detailed evaluation of the contrasting approaches in the Council's program and the NMFS opinion is premature at this point.<sup>1</sup> However, NMFS's heavier reliance on trucking and barging juvenile fish seems questionable in light of the uncertain track record of artificial transportation over the last fifteen years.<sup>112</sup> It also seems unlikely that NMFS can, without reservoir drawdowns, increase river flow velocities to the target level it established and begin rebuilding the beleaguered Snake River salmon runs.

Although there are some uncertainties surrounding the details of reservoir drawdowns, they do make possible the flow velocities fishery managers have advocated for more than fifteen years<sup>113</sup> without as severe an effect on upstream reservoirs and their resident fish and wildlife, recrea-

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<sup>106</sup> *Id.* at 104. NMFS's summer flow targets were 50 to 55 kcfs on the Snake, and 200 kcfs on the Columbia. *Id.*

<sup>107</sup> *Id.* at 99-100.

<sup>108</sup> *Id.* at 110. The opinion stipulated that technical management team recommendations would be by consensus, "except that when no consensus is reached, NMFS shall make the recommendation." *Id.* at 101.

<sup>109</sup> *Id.* at 104-10.

<sup>110</sup> *Id.* at 110-12. NMFS concluded, however, that spill is the safest means of dam passage, generally producing 0-3% mortalities per dam. *Id.* at 109.

<sup>111</sup> *Id.* at 112. While all fall chinook would be barged or trucked, NMFS estimated that a majority of spring/summer chinook would be as well: 74% at flow levels of 85-100 kcfs, and 56% at flows above 100 kcfs. *Id.*

<sup>112</sup> See, e.g., 1994 PROGRAM, *supra* note 86, at 5-12 to 5-13, 15-116 to 15-123 (discussing various artificial transportation studies).

<sup>113</sup> See *supra* note 89 and accompanying text.

tional activities, and irrigation supplies.<sup>114</sup> According to the Northwest Power Planning Council, drawdowns will produce increased salmon runs and salmon recovery,<sup>115</sup> something the NMFS approach may be unable to supply. Since the estimated cost of the Council's program is virtually the same as the cost of the NMFS approach,<sup>116</sup> it may be that reservoir drawdowns are the only effective salmon strategy that is also economically and politically realistic.

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<sup>114</sup> For example, the 11-foot drawdown of John Day reservoir would decrease smolt travel time through the reservoir by 14% to 17%. Achieving a similar reduction in water particle from flow augmentation would require 3.1 million acre-feet of storage. 1994 PROGRAM, *supra* note 86, at 15-90.

<sup>115</sup> *Id.*

<sup>116</sup> Both plans are estimated to cost about \$160 million annually. The Council estimated that this would require a 6% increase in BPA's wholesale rates by 1997, and a 9% increase by 2015, about \$2.00 per month for the average residential customer in 1997, \$3.00 in 2015. *Id.* at 1-12 to 1-13, app. B. *Cf.* U.S. Dep't of Commerce, Press Release 2 (Mar. 1, 1995) (estimating the cost of the NMFS plan to be \$160 million).