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Michael Blumm

Lewis & Clark Law School, blumm@lclark.edu

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SALMON LAW AND POLICY IN 1995: A BRIEF OVERVIEW

By
MICHAEL C. BLUMM*

Last year, when we gathered to discuss who runs the river, we did so in the wake of two significant federal court decisions, and the speakers addressed those decisions in some detail.¹ The first decision was *Idaho Department of Fish & Game v. National Marine Fisheries Service*,² where Judge Malcolm Marsh struck down the biological opinion of the National Marine Fisheries Service (NMFS) because it failed to explain a number of key assumptions in NMFS's conclusion that Columbia Basin hydroelectric operations for 1993 would not jeopardize listed Snake River salmon runs.³ Judge Marsh was especially critical of NMFS's failure to consider significant information and data submitted by the regional fish and wildlife agencies and Indian tribes, which he considered to be part of NMFS's statutory obligation to base its decisions on "best available scientific knowledge."⁴

The second decision was that of the Ninth Circuit in *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*,⁵ where the court struck down the 1992 amendments to the Northwest Power Planning Council's Fish and Wildlife Program. The court determined that the amendments violated the Northwest Power Act⁶ by failing to set biological objectives and failing to explain how the amended program satisfied the Act's criteria, including giving due weight to the recommendations of the region's fish and wildlife agencies and Indian tribes.⁷ Importantly, the court concluded that the Council had to give those recommendations a "high degree of deference."⁸ Last year, I indicated that we

* Professor of Law, Northwestern School of Law of Lewis & Clark College; Director, Northwest Water Law & Policy Project. Adapted from remarks delivered on October 27, 1995, at the Second Annual "Who Runs the River?" Colloquium in Portland, Oregon, sponsored by the Northwest Water Law & Policy Project. Thanks to Michael Schoessler for assistance with the footnotes.

¹ See Colloquium, *Who Runs the River?*, 25 ENVTL. L. 349 (1995).

² 850 F. Supp. 886 (D. Or. 1994).

³ *Id.* at 893-900.

⁴ *Id.* at 900 (interpreting § 1536(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994)).

⁵ 35 F.3d 1371 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 50 (1995).

⁶ Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-839h (1994).

⁷ *Northwest Resource Info. Ctr., Inc.*, 35 F.3d at 1385-89 (interpreting 16 U.S.C. § 839b(h)(6)-(7) (1994)).

⁸ *Id.* at 1388-89, 1392.

would know in the short-run whether those provisions effected a significant change in the operation of the system.⁹ We can now say this year that the court decisions were in fact taken seriously by the implementing agencies. In December 1994, the Council approved an amended Columbia Basin Fish and Wildlife Program¹⁰ that made significant changes, including setting flow targets,¹¹ establishing a phased schedule for reservoir drawdowns,¹² including an aggressive water leasing program,¹³ and limiting artificial transportation of juvenile salmon by barge and truck to "extremely adverse conditions," as determined by the region's agencies and tribes.¹⁴

Then, three months later, in March 1995, in response to Judge Marsh's decision, NMFS released its 1994-98 biological opinion,¹⁵ which set flow targets similar to those of the Council¹⁶ but did not promise a phased drawdown approach, at least not immediately.¹⁷ Instead, NMFS relied on flow augmentation¹⁸ and established a much more modest leasing program.¹⁹ Under the biological opinion, barging and trucking of juvenile salmon was to continue, unless a technical management team, established by the biological opinion, directed otherwise.²⁰ This technical management team is comprised of representatives of federal water managers and NMFS but contains no representatives of state fish and wildlife agencies or Indian tribes.²¹

As predicted by a number of speakers at last year's conference, the answer to the question of "Who runs the river?" would be the NMFS biological opinion, not the Council's Fish and Wildlife Program.²² But implementation has hardly been smooth. For example, spill levels called for in

⁹ Michael C. Blumm, *Columbia Basin Salmon and the Courts: Reviving the Parity Promise*, 25 ENVTL. L. 351, 360 (1995).

¹⁰ NORTHWEST POWER PLANNING COUNCIL, 1994 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM (Dec. 14, 1994).

¹¹ *Id.* at 5-20, 5-29 (Spring flows on the Snake River would range from 85 kcfs (thousand cubic feet per second) to 140 kcfs, while flows on the Columbia River would range from 220 kcfs to 300 kcfs.).

¹² *Id.* at 5-24 to 5-32 (Drawdowns would occur on the Snake from 1995 to 2002 and at John Day Dam on the Columbia from 1994 to 2002.).

¹³ *Id.* at 5-21 to 5-22 (The Council authorized the purchase of 1.427 million acre-feet of water in the Snake River Basin.).

¹⁴ *Id.* at 5-47.

¹⁵ NATIONAL MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, BIOLOGICAL OPINION: REINSTITUTION OF CONSULTATION ON 1994-1998 OPERATION OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM AND JUVENILE TRANSPORTATION PROGRAM IN 1995 AND FUTURE YEARS (Mar. 1995) [hereinafter 1995 BIOLOGICAL OPINION].

¹⁶ See *id.* at 104; NORTHWEST POWER PLANNING COUNCIL, *supra* note 10, at 5-20, 5-29.

¹⁷ 1995 BIOLOGICAL OPINION, *supra* note 15, at 92-94, 116 (targeting the year 2000 for potential drawdowns).

¹⁸ *Id.* at 95-99.

¹⁹ *Id.* at 99-100.

²⁰ *Id.* at 110.

²¹ *Id.* at 102.

²² See, e.g., Al Wright, *Should the Courts Run the River?*, 25 ENVTL. L. 403, 405 (1995); Harvey Spigal, *The Implications of Salmon Recovery for the Bonneville Power Administration and the Region*, 25 ENVTL. L. 407, 407 (1995).

the biological opinion have been cabined by state water quality requirements.²³ The State of Montana also objected to the drafting of Montana reservoirs for flow augmentation;²⁴ as a result, NMFS reduced releases from Libby Dam by about twenty percent, causing some flow targets to not be met.²⁵ And a coalition of environmental groups recently filed suit charging that the biological opinion did not satisfy the Endangered Species Act (ESA).²⁶

Meanwhile, the last year witnessed a host of other court cases that enlarged salmon law and policy. For example, the Ninth Circuit rejected a challenge to artificial transportation brought by my colleague Dan Rohlf as moot.²⁷ The court also concluded, in the same mystifying opinion, that flow augmentation and artificial transportation were "unconnected" actions under the National Environmental Policy Act.²⁸ In another case, the Ninth Circuit granted standing to aluminum companies and other industrial customers of the Bonneville Power Administration (BPA) to raise alleged ESA violations.²⁹ And, in a third case, the Ninth Circuit declared that a Direct Service Industry challenge to the *Idaho Department of Fish & Game* decision was also moot because that opinion was no longer in effect; there was a new biological opinion that could be challenged.³⁰ The Supreme Court rejected review of the *Northwest Power Planning Council* case,³¹ and it also rejected review in a case in which the Ninth Circuit said that ESA consultation was required for forest plans, as well as for actions implementing those forest plans.³² Recently, in a district court case, Judge Barbara Rothstein enjoined salmon harvests off the coast of Alaska for violating the Pacific Salmon Treaty.³³ This heavy case load is keeping lawyers and judges quite busy, as well as those of us who try to follow the rapidly changing legal landscape.

²³ See MICHELE DEHART, FISH PASSAGE CTR., SUMMARY OF THE 1995 SPRING AND SUMMER JUVENILE PASSAGE SEASON 9 (Oct. 13, 1995); see also Lynn Francisco, *High Nitrogen Gas Levels Force Feds to Change Spill Operations*, CLEARING UP, May 22, 1995, at 6; Cyrus Noë, *Spill: Team Says No; Water, Gas at High Levels*, CLEARING UP, June 5, 1995, at 8.

²⁴ See Lynn Francisco, *Doubt Over Spill and Salmon Flows Plague Idaho and Montana*, CLEARING UP, May 8, 1995, at 6, 6-7.

²⁵ See Pamela Russell, *High Fall Chinook Counts on Snake Keep Dworshak Flows Running*, CLEARING UP, Aug. 14, 1995, at 6.

²⁶ *American Rivers v. National Marine Fisheries Serv.*, No. 96-384MA (D. Or. filed Mar. 13, 1996).

²⁷ *Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1069-70 (9th Cir. 1995).

²⁸ *Id.* at 1068-69 (interpreting 40 C.F.R. § 1508.25(a)(1) (1995), promulgated under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994)).

²⁹ *Pacific N.W. Generating Coop. v. Brown*, 38 F.3d 1058, 1065-66 (9th Cir. 1994), *superseding and amending* 25 F.3d 1443 (9th Cir. 1994).

³⁰ *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071, 1074-75 (9th Cir. 1995).

³¹ *Pacific N.W. Generating Coop. v. Northwest Power Planning Council*, 116 S. Ct. 50 (1995) (denial of petition for certiorari).

³² *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (mem.).

³³ *Confederated Tribes & Bands of the Yakama Indian Nation v. Baldrige*, 898 F. Supp. 1477, 1488-89 (W.D. Wash. 1995).

Unfortunately, the upshot has not been a material improvement in the fish runs, at least not immediately. Both the States of Oregon and Washington again had to ban in-river harvests in an effort to protect the listed salmon runs from the Snake River.³⁴ The biggest news, however, has probably not been made in court but has been made by BPA, which has been feeling the effects of a new competitive electrical power world, ushered in by the 1992 Energy Policy Act.³⁵ As a result, in an attempt to control its costs, BPA has been lobbying Congress to impose a cost cap on its fish and wildlife expenditures.³⁶ Actually, some allege that it imposed an administrative cost cap through its recently promulgated business plan.³⁷ At the same time, BPA has issued new contracts for its industrial customers that some claim effectively exempt those industrial purchasers from the stranded costs of the system, including the cost of failed nuclear plants, as well as fish and wildlife costs.³⁸ Those contracts are now under challenge in a case brought by Idaho Rivers United and Indian tribes as violating both the Northwest Power Act and the National Environmental Policy Act.³⁹

Those who wish to follow this burgeoning case law can consult the Northwest Water Law and Policy Project's publication, *Big River News*, where we try to keep up with developing salmon law and policy.⁴⁰ Even more current than the latest issue of *Big River News* is the recent headline news, indicating that members of Congress and the Clinton Administration apparently responded to the concerns of BPA about escalating costs and established what appears to be a budget for fish and wildlife expenditures without so-called sufficiency language that would effectively exempt BPA from a host of environmental laws.⁴¹ The details of this budget, which will apparently be part of a Memorandum of Agreement, are

³⁴ See *States Again Ban Columbia Fishing*, THE OREGONIAN, Aug. 5, 1995, at D1.

³⁵ Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-722, 106 Stat. 2776, 2915-19 (1992) (codified at 16 U.S.C. §§ 824j-824k (1994), amending § 211 of the Federal Power Act).

³⁶ See Lynn Francisco, *Cap Could Curb BPA's Fish Costs: \$435 Million Limit Proposed*, CLEARING UP, Sept. 11, 1995, at 5, 5-6.

³⁷ In 1995, BPA announced its commitment to "stable funding" of its fish and wildlife program. BONNEVILLE POWER ADMIN., BUSINESS PLAN 1995, at 43 (1995). Apparently, BPA planned to negotiate multi-year agreements with regional entities for a base level of funding—indexed to BPA's maximum sustainable revenue level—for fish and wildlife costs. See BONNEVILLE POWER ADMIN., BUSINESS PLAN: FINAL ENVIRONMENTAL IMPACT STATEMENT, VOLUME 1—ANALYSES 2-13 (June 1995) (describing the policy choice for fish and wildlife considerations contained in the proposed action of the final EIS for BPA's Business Plan). However, BPA's plan seems now to be superseded by the recent "fish and wildlife budget." See *infra* note 43 and accompanying text.

³⁸ See Proposed Wholesale Power Rate Adjustment, Public Hearing, and Opportunities for Public Review and Comment, 60 Fed. Reg. 8496 (Feb. 14, 1995).

³⁹ Idaho Rivers United v. Bonneville Power Admin., No. 95-70340 (9th Cir. filed Feb. 7, 1995).

⁴⁰ See 1, 2 BIG RIVER NEWS (Northwest Water Law & Policy Project, Portland, Or. 1994-96).

⁴¹ Brent Walth & Joan Laatz Jewett, *Clinton, Hatfield Announce Salmon Deal*, THE OREGONIAN, Oct. 24, 1995, at A1.

still left largely to the imagination.⁴² However, it seems safe to predict that this new ceiling on fish and wildlife expenditures, if implemented, will produce considerable changes in the process of prioritizing measures to restore Columbia Basin salmon runs and will make economics, not biology, the overriding factor in decision making.⁴³ The new budget may help save the BPA from insolvency;⁴⁴ whether it will cripple salmon restoration remains to be seen.

⁴² See, e.g., Office of the Vice President, Statement by Vice President Al Gore (Oct. 23, 1995) (announcing the agreement); Press Release from Sen. Mark O. Hatfield (Oct. 23, 1995) (same); Letter from Alice M. Rivlin, Director, Office of Management and Budget, to Senator Mark Hatfield (R-Or.), Chairman, Senate Committee on Appropriations (Oct. 24, 1995) (outlining the agreement's two major elements: 1) a stable, multi-year fish and wildlife expenditure budget for BPA, averaging no more than \$435 million per year over the next six years; 2) a "fish cost contingency fund" consisting of approximately \$325 million to cover additional fish and wildlife costs above the \$435 million average annual level, including costs imposed by court decisions) (all reprinted in Northwest Water Law & Policy Project and Northwestern School of Law of Lewis & Clark College CLE Office, Second Annual Who Runs the River Conference: The Columbia River Hydropower System (Oct. 27, 1995) (conference materials on file with the Northwest Water Law & Policy Project)).

⁴³ The fish and wildlife budget is therefore inconsistent with § 4(h)(6)(B) of the Northwest Power Act, 16 U.S.C. § 839b(h)(6)(B) (1994), which makes economic considerations secondary to biological considerations. See Michael C. Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 ENVTL. L. 103, 131-32 (1982). While the budget itself may be inconsistent with the Northwest Power Act, decision making within the \$435 million annual budget ought to be freed from nonbiological considerations. In other words, BPA and its industrial allies, having succeeded in limiting total fish and wildlife expenditures, ought to be indifferent as to how those expenditures are made, so long as they stay within the budget. This may mean that, ironically, the budget may produce increased biologically based decision making. See, e.g., Bob Baum, *Salmon Spill Foes Quiet at Hearing*, THE OREGONIAN, Feb. 17, 1996, at B4 (reporting that Columbia River Alliance, an industrial group, decided not to object to increased spills for mainstem dams to facilitate salmon smolt migration).

⁴⁴ Note, however, that there is some doubt whether the region needs a large federal electric power wholesaler in the new free market for electricity that seems upon us. See Al Alexanderson, *Rethinking the Federal Role in a Competitive Electric Market*, 26 ENVTL. L. 657 (1996); Roy Hemmingway, *Restructuring the Northwest Power System*, 26 ENVTL. L. 669 (1996).

