



Northwest Resource Information Center

Box 427, Eagle, Idaho 83616 USA ■ VOICE & FAX 208.939.0714 ■ edchaney@nwrlic.org

11/20/2012

URGENT OPEN CALL FOR HELP IN THE SEARCH FOR LIGHTNING BOLDT II Uncommon Opportunity to Defeat Epic Betrayal of the Public Trust

The attached memorandum is an urgent open call for help in formulating a bold new legal attack against an epic betrayal of the public trust by corrupt government agencies which for decades subverted multiple laws and drove Snake River salmon onto the List of Endangered Species.

The State of Oregon, Nez Perce Tribe of Idaho and a coalition of environmental organizations led by the National Wildlife Federation (represented by Earth Justice) sued in federal court to stop the agencies' craven attempt to subvert the Endangered Species Act. This litigation has been ongoing for more than a decade and is very much a work in progress with no foreseeable end or assured result.

With unlimited resources and no accountability, salmon killers in upper management of Bonneville Power Administration, Army Corps of Engineers, NOAA Fisheries and Northwest Power and Conservation Council are adept at gaming administrative law and its "deference doctrine." They use their command of the *process* to subvert the intended *results* of the law. In this instance the agencies have egregiously overreached; the seamy underbelly of their betrayal of the public trust is exposed as never before.

The attached memo argues that right now, in Snake River salmon's darkest hour, is the time to boldly invoke the public trust doctrine to force these scofflaw government agencies to heel to the rule of law. It poses the following thought problem:

How to achieve justice, i.e., how to deliver what the law requires vis-à-vis Snake River salmon and dependent economies, when corrupt federal agencies exploit administrative law and its "deference doctrine" to serially defeat the intent of law?

In a first attempt to answer that question, the memo contains a preliminary worksheet of potential targets for litigation under the public trust doctrine. It also identifies potential complementary actions under other legal doctrines. This is not the product of legal training; the objective is to encourage attorneys to think creatively about how to convert the thought problem into a bold new legal action plan.



URGENT OPEN CALL FOR HELP IN THE SEARCH FOR LIGHTNING BOLDT II Uncommon Opportunity to Defeat Epic Betrayal of the Public Trust

11/20/2012

This is an urgent open call for creative thinking on a bold new legal strategy to redress an egregious betrayal of the public trust that has made a mockery of the law and wreaks ecological, economic and social damage of epic proportions.¹

For four decades we have been eyewitness to an epic betrayal of the public trust by Bonneville Power Administration, Army Corps of Engineers, NOAA Fisheries and the Northwest Power and Conservation Council.² Individuals in upper management of these agencies successfully subverted multiple laws designed to protect salmon produced in the vast pristine habitats of the Snake River Basin. They eventually drove the salmon onto the List of Endangered Species. Now they strive to keep them there with what may be the greatest scientific hoax of all time—a scientifically, legally and ethically corrupt Biological Opinion produced pursuant to the Endangered Species Act.³

The upper management of these organizations is composed of a self-perpetuating cult of political hacks⁴ cognitively captured by the region's notorious pork barrel culture.⁵ They are obsessed with protecting four dysfunctional salmon-killing Corps hydroelectric dams on the lower Snake River in southeastern Washington, no matter what the law, and no matter what the cost to society now and in the future. The resulting ecological, economic and social damage extends throughout the migratory range of the salmon, 700 miles into the Columbia River Basin and thousands of miles along the Pacific coast.

COMMON PROBLEM; UNCOMMON OPPORTUNITY

Government agencies gaming administrative law and its deference doctrine to defeat the intent of laws is a common problem. The instant issue presents a very uncommon window of opportunity to legally outwit/trump the rigged game.

The stakes are uncommon. Snake River salmon are unique in the world, providing perpetually renewable ecological, economic and social benefits throughout their many thousand-mile migratory range.

There's more. The present instance is also extraordinarily uncommon in that compliance with the law would produce enormous net social benefits for the region and nation. The salmon killing agencies and their shills, of course, have spent untold millions of dollars to propagate the lie that complying with salmon protection laws would have Draconian economic consequences; they've been quite successful. Their lies hide the fact

¹ For a brief summary and a more detailed overview of this issue go to www.lastsalmonceremony.blogspot.com.

² Bonneville Power Administration is the Machiavellian ringleader. The Bureau of Reclamation is implicated in the plight of Snake River salmon largely only by association with the named agencies.

³ Remanded in 2011 for the fourth time, due back no later than January 1, 2014.

⁴ **political hack**, *n.* a person on the public payroll who hides behind the Nuremberg and Mob Lawyer Defenses to betray the public trust by subverting the intent of law for political purposes and personal gain. There is a robust scientific literature on how the lack of personal accountability for one's actions spawns unethical and immoral behavior. In the present instance these political hacks were instrumental in developing the policies they then use as cover to escape personal accountability for the societal damage they cause.

⁵ Notably excepting for the most part the Oregon members of the NPCC.

that their betrayal of the public trust and subverting of the law has cost the region and nation untold billions of dollars to date, and unless they are forced to heel to the rule of law, the damage will compound in perpetuity.

Importantly, in passing the Northwest Power Act of 1980,⁶ congress anticipated the salmon killers' hoary economic scare tactics; in a suit brought by NRIC the Ninth Circuit Court of Appeals in 1995 held:

[the Act prevents] power losses and economic costs . . . from precluding biologically sound restoration of anadromous fish in the Columbia River Basin . . . so long as an adequate, efficient, economical and reliable power supply is assured.⁷

The laws in play are uncommon. Notwithstanding the 1973 ESA's nation-wide provenance, it has uncommon legal features. The Northwest Power Act of 1980 is extraordinarily uncommon. It was very deliberately designed to remedy past failures of salmon protection laws. It contains sweeping, unambiguous directives that salmon decimated by the Federal Columbia Power System are to be restored, while maintaining a reliable and economical regional power supply. The named federal agencies to date have successfully gamed the administrative deference doctrine in their efforts to defeat the intent of both laws.

The legal record is uncommon. In spite of the corrupt agencies' successes to date, the legal record is uncommonly ripe for a landmark judicial smackdown.

With a blank check on electric ratepayers' account, no oversight, no accountability, political cover of powerful elected officials, and contempt for the rule of law and the public interest, the federal salmon killers and their pork barrel skills are intoxicated with their power and have egregiously over-reached. Their seamy underbelly is exposed as never before in history. We will never have a better set of facts or a better opportunity to hoist them on their own petards for their betrayal of the public trust.

Three times [or four depending on how you count the 2008/2011 decisions] the federal district court rejected the agencies' Biological Opinions which were designed not to protect salmon, but to protect four dysfunctional Corps pork barrel dams on the lower Snake River at the expense of the salmon whose survival they threaten. U.S. District Court Judge James Redden (ret) in his 2011 remand characterized the 2004 BiOp as a "...cynical and transparent attempt to avoid responsibility for the decline of listed Columbia and Snake River salmon and steelhead."⁸

In regard to Snake River salmon, the current version of the Biological Opinion is based on the transparently preposterous claim that relatively pin point-size habitat enhancement projects within the vast pristine waters of the Snake River Basin can offset the deadly effect of the four lower Snake River dams; this while proposing to eliminate the tenuous life-line of court-ordered spill at the dams.⁹ At one point Bonneville and the Corps were caught deliberately violating the court order on spill.

⁶ *Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No. 96-501. (1980)

⁷ *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), cert. Denied, 116 S.Ct. 50 (1995).

⁸ http://www.nwric.org/documents/lastsalmonceremony_reddenaug2011order.

⁹ Spilling water and downstream migrant salmon past the dams has long proven to be the best of the poor available options to increase survival so long as the dams remain in place. Bonneville's salmon killers hate spill because it reduces energy revenue it uses to cover up the cost of their mismanagement, to bribe state and tribal governments and NGOs and to keep its pork barrel customers fat and happy.

In its 1995 response to NRIC's first suit against the then Northwest Power Planning and Conservation Council, the Ninth Circuit's remand nailed the root cause of the Council's then 15-year failure to do its duty in response to what congress in 1980 characterized as "an urgent priority":

The Council's approach seems largely to have been from the premise that only small steps are possible, in light of entrenched river user claims of economic hardship. Rather than asserting its role as a regional leader, the Council has assumed the role of a consensus builder, sometimes sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator acceptable to power interests . . .¹⁰

The Council feinted as if it were going to follow court direction, but it was a bait and switch. While no salmon advocate watchdog was on station, the Council instead adopted the legally, ecologically and ethically corrupt Biologic Opinion produced by the very agencies which had driven Snake River salmon onto the List of Endangered Species. Today, 18 years after it was first chastened by the Ninth Circuit, the Council's Sixth Power Plan—which NRIC currently has before the Ninth Circuit¹¹—is still based on the serially rejected Biological Opinion.

An ethical person couldn't make this stuff up with a straight face.

The need is uncommonly urgent. The salmon killers in upper management at Bonneville, notably Administrator Steve Wright and V.P. for Fish and Wildlife Lorri Bodi, and NOAA Fisheries Northwest Regional Administrator Will Stelle, are guilty of many things, being stupid is not one of them. They know the BiOp vis-à-vis Snake River salmon is a transparent con. Judge Redden repeatedly warned them that was obvious. After the remand they are sparing no public expense to make the hoax opaque enough to be able to argue without a red face that, in effect, the judge can't prove them wrong, so agency discretion trumps judicial skepticism and common sense.

On a parallel track, Bonneville's salmon killers and their pork barrel skills are ramping up their propaganda campaign. They seek to influence Judge Redden's successor, District Court Judge Michael Simon; to increase the political pressure on the plaintiffs in the ESA suit to capitulate (a.k.a "collaborate" in BPAspeak); and to set the stage for congressional intervention in the event the new BiOp is thrown out and the current interim relief, i.e., spill, is made permanent, or even harsher sanctions are imposed.

This accelerated propaganda initiative is in play against an already grim political backdrop. Organized salmon advocates largely abandoned the regional political and administrative process 20 years ago; they lacked the will to aggressively confront the federal salmon killers, their powerful political enablers and their pork barrel skills. The political battle over the fate of Snake River salmon was decisively lost by default.

The incoming Obama Administration was politically pressured into keeping G.W. Bush appointee Steve Wright as Administrator of the Bonneville Power Administration; Wright was a principal architect of the Biological Opinion which for the Snake River is perhaps the most costly scientific hoax of all time. Wright and his minions then duped the Obama Administration into adopting the legally, ecologically and economically corrupt ESA policies of the G.W. Bush Administration.

¹⁰ *NRIC v. NPPCC*; see FN 7.

¹¹ *Northwest Resource Information Center v. Northwest Power and Conservation Council*, Ninth Circuit No. 10-72104. September 21, 2012.

NEEDED: A BOLD NEW LEGAL ATTACK

As noted, Snake River salmon for four decades have been legally processed to the cusp of extinction in spite of multiple laws designed to ensure their protection. Currently in play are legal actions under the ESA¹² and NRIC's suit in the Ninth Circuit against the Northwest Power and Conservation Council's Sixth Power Plan.¹³ The records of these actions provide quintessential examples of how politically corrupt scofflaw agencies game administrative law and its deference doctrine to betray the public trust by using their control of the *process* to trump the intended *results* of laws.

While continuing to aggressively press ongoing litigation, it is imperative to dramatically ramp up the legal and political pressure on the salmon killers. In this long-running David and Goliath battle we need game-changing actions; bold, aggressive initiatives that demand the full promise of the law now and accountability for the government agencies and individuals within those agencies. We need actions that will rock the region and change both the legal and political dynamic.¹⁴ Otherwise, Snake River salmon could end up on perpetual ESA life support.

It is time to invoke the legal doctrine of last resort: the public trust doctrine. The following thought problem was designed to identify potential targets ripe for invoking the public trust doctrine. To a legally untrained eye there appear to be good candidates.¹⁵

¹² *National Wildlife Fed'n v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008)

¹³ The opening brief in *NRIC v. Northwest Power and Conservation Council* was filed by Earth Justice September 21, 2012.

¹⁴ It is difficult not to notice that the current legal situation is the product of the grim political situation. Many have made the necessary effort.

¹⁵ My (mis)use of legal terms and naiveté about the vagaries of the law—notably including what kind of relief can be sought under what legal doctrine—despite having initiated a dozen or more suits in the federal courts since *Calvert Cliffs v. AEC* so long ago—will be immediately apparent and may provide some comic relief from the depressing context.

THE SEARCH FOR LIGHTNING BOLDT II

In the mid-1970s it was clear Snake River salmon were in peril due to the Army Corps of Engineers' negligence in constructing four pork barrel dams on the lower Snake River in southeast Washington. Congress responded with the sweeping salmon restoration mandate of the 1980 Northwest Power Act. The regional Council of states created by the Act was given a very short deadline to prepare a plan to restore salmon decimated by the Federal Columbia River Power System while maintaining an economical and reliable power supply.

The self-perpetuating cult of salmon killers in the upper management of Bonneville Power Administration—which markets the power produced by the Federal Columbia River Power System—and its pork barrel skills had subverted all other salmon protection laws.¹⁶ They immediately set out to subvert the Power Act. They succeeded, eventually driving Snake River salmon onto the List of Endangered Species. For more than two decades to date Bonneville, the Corps, NOAA Fisheries and the Idaho, Washington and Montana members of the Council have labored to subvert the ESA.

The ESA was officially invoked in the early 1990s.¹⁷ The legal battle has been underway in federal court for more than a decade with no foreseeable end or assured result. NRIC won its 1995 Power Act suit against the Northwest Power and Conservation Council, but the court's direction was never fulfilled. It is incredible but true: the Council instead adopted the ESA biological opinions serially rejected by the federal court. Eighteen years following its first victory against the Council's betrayal of the public trust, NRIC in July 7, 2010 again filed suit against the Council for its three-decade and continuing refusal to produce the required plan to restore salmon and maintain an economical and reliable power supply.

Given the federal agencies' success to date at subverting the ESA and the Power Act, and given the grim regional political dynamic, it is imperative to aggressively ramp up the pressure on the salmon killers by opening bold new legal fronts and changing the political dynamic from one where salmon advocates currently are pleading for collaboration with the salmon killers to one where salmon killers are pleading for mercy.

THE THOUGHT PROBLEM

How to achieve justice, i.e., how to deliver what the law requires vis-à-vis Snake River salmon and dependent economies, when corrupt federal agencies¹⁸ exploit administrative law and its “deference doctrine” to serially defeat the intent of law?

¹⁶ Clean Water Act, Fish and Wildlife Coordination Act (e.g., the Lower Snake River Compensation Plan) and laws establishing wild and scenic rivers, wilderness areas and national recreation areas with salmon protection as a purpose; statues establishing Forest Service and Bureau of Land Management policies including native species protection such as The National Forest Management Act, The Multiple Use and Sustained Yield Act, Federal Land Management Policy Act, etc. See also FN 34 which speaks to the Corps subverting the legislation authorizing construction of the four lower Snake River dams.

¹⁷ NOAA Fisheries (then National Marine Fisheries Service) was threatened into conducting a half-hearted “informal review” of the status of Snake River salmon vis-à-vis the ESA in the mid-late 1970s. It threw in the towel when the NW Power Act was signed into law claiming the Act required much more than the ESA and, therefore, was the most appropriate venue. The regional council formed to implement the Act eventually abdicated its duties and returned the favor, claiming it had been “preempted” by the ESA. And so it goes to this date.

¹⁸ Northwest Power and Conservation Council is not a federal agency. Its members are not federal employees except for purposes of the Ethics in Government Act.

The public trust doctrine appears to be the only way to meet this challenge. The following worksheets are the first iteration of an effort to identify potential lines of attack under the public trust doctrine. The “kitchen sink doctrine” also was employed to identify actions under other legal doctrines which might obliquely attack the betrayal of the public trust under the umbrella of a public trust doctrine strategy.

Following is a representative suite of initiatives by agency drawn from the worksheets to illustrate the proposed strategy of coming at the problem from all legal and administrative angles, including attacking the underlying corrupt political dynamic.

Bonneville and/or Corps

1—Public trust doctrine suit(s) against Bonneville, the Corps or both (there may be legal or strategic reasons for consolidation or segmentation) for failing to protect the trust asset and, in fact, striving to drive it to the cusp of extinction and keep it there.

3—Suit(s) against individuals within the Bonneville Power Administration and/or against the agency for illegally using federal funds to improperly influence the federal court, state and tribal governments and private economic interests to support the Biological Opinion and oppose compliance with the Northwest Power Act.

4—Seek Inspector General and/or GAO investigations, file whistle blower complaints and exploit any other available administrative/investigative opportunities.

5—A suit seeking recovery of monetary damages for the loss suffered due to Bonneville and the Corps failing to comply with the salmon restoration provisions of the Northwest Power Act and stealing Snake River salmon’s share of Snake River water. In the Power Act salmon were—I assert—granted half the unappropriated flow the lower Snake River [and an amount to be determined] of the main stem Columbia River below their confluence.

13—A mandamus suit against the Corps for its 30-year failure to give Snake River salmon equitable treatment with all other uses of the FCRPS as required by the Power Act.

Environmental Protection Agency

15—A mandamus suit against the Environmental Protection Agency for its failure to apply and enforce Clean Water Act standards on the lower Snake River.

Northwest Power and Conservation Council

17—A suit alleging that power council members accepted public funds to implement the salmon protection provisions of the Act but instead illegally used those funds to subvert implementation of those provisions.

Idaho and Washington

20—Public trust doctrine suit(s) against the states of Idaho and/or Washington for refusing to do their duty to protect the trust asset, indeed, for collaborating to harm the trust asset.

WORKSHEETS

The following worksheets contain 20 potential actions winnowed from a much larger number that was passed through four screens:

1. Does the proposed action provide a remedy that cannot be provided by ongoing litigation under the ESA and Power Act? I.e., does it avoid the threat of “preemption” or “displacement”? Alternatively, is the record so egregious and the harm so great the public trust doctrine trumps the administrative deference doctrine?
2. Does the proposed action complement/reinforce the ongoing ESA and Power Act litigation?
3. Does the proposed action have potential for invoking criminal law against individuals and/or the agencies and organizations that employ them?
4. Does the proposed action have potential for complementing public trust doctrine litigation?

ASSUMPTIONS¹⁹

1] The Endangered Species Act over an indeterminate period of time can be employed to prevent extinction of Snake River salmon.

Barring a judicial lightning bolt (not bad spelling, bad pun) upon court review of the next biological opinion, due no later than January 1, 2014, within the foreseeable future the ESA may only deliver a biological opinion and recovery plan which purport to protect Snake River salmon from the prospect of extinction.²⁰ I say “purport” because Bonneville’s strategy (implemented through its NOAA hand puppet) is to pile up enough junk “science” and buy/intimidate enough biostitutes that the court will be reluctant to substitute its judgment for that of the agency. Bonneville may eventually succeed, at least in buying another decade or more of time, which has long been the thus-far successful shadow default objective.²¹

Meanwhile, Bonneville with the complicity of the Power Council and NOAA is busily taking actions—notably funding hatcheries—to further erode the genetic integrity of and, thereby, public/political/legal support for the listed fish. Nonetheless, for the instant purpose of seeking remedies that cannot be provided by ongoing litigation, thereby dodging the preemption bullet, it is assumed here that the ESA eventually can compel recovery to the point of eventually (possibly decades in the future) eliminating the threat of extinction.

2] The Northwest Power Act may or may not be successfully employed to restore to productive levels Snake River salmon decimated by operations of the Federal Columbia River Power System.

¹⁹ It is assumed the ongoing ESA litigation cannot be used as the pretext for a preemption argument against litigation under the Power Act and vice versa.

²⁰ NOAA, as Bonneville’s hand puppet, has argued that the ESA requires only that a recovery plan must be produced, not that the species must actually recover.

²¹ Can this go on forever? Is there no legal remedy for perpetual gaming of the law by agencies charged with implementing it? Judges have been known to threaten agency officials with jail time for systematic disregard for the rule of law. A district court judge threatened a G.W. Bush department of agriculture official with jail time for the agency’s systematic flaunting of the law. Why aren’t NOAA, the Power Council, et al. ripe for the same treatment? The agriculture department’s scofflaw behavior pales in comparison.

With the caveat noted in 1] above, eliminating the threat of extinction is not the same thing as the Northwest Power Act objective of mitigating the effects of the Federal Columbia River Power System (i.e., restoring the runs and the productive fisheries they once supported). According to the \$20 million COE study commissioned by the Northwest Power and Conservation Council in response to NRIC's 1995 successful suit in the Ninth Circuit,²² the latter objective can only be achieved by breaching the four lower Snake River dams and recreating a free-flowing river.

The ongoing NRIC suit against the Council's Sixth Power Plan has the potential to deliver *a plan* that purports to achieve the Act's primary objective of mitigating the effect of the Federal Columbia River Power System on Snake River salmon while maintaining an economical and reliable regional energy supply. Operating agencies Bonneville, Corps and Bureau of Reclamation (the latter a bit player vis-à-vis Snake River salmon) are supposed to act in ways that are "consistent" with the plan.

There is no assurance the operating agencies could be forced to comply with the plan (unless we were able to get the court to very narrowly define "consistent"; good luck on that). The Council would certainly argue it had no duty or power to compel compliance and the operating agencies would agree. These uncertainties and the 30-year record to date suggest that the salmon restoration provisions of the Power Act may be illusionary and should not be allowed to stand as a preemption bar to other lawsuits which might actually be able to deliver relief. The record instead provides compelling justification for invoking the public trust doctrine.

Importantly, the Act gives the federal operating agencies the *independent duty* to meet the fish restoration mandate of the Act, i.e., independent of the Council's duty to *produce a plan* to do so.

The plight of Snake River salmon was the impetus for the Act's salmon restoration mandate enacted in December 1980. The Council formed to fulfill that mandate has been captured by Bonneville and subsumed into the regional pork barrel culture. In 2012 the Council is an existential threat to Snake River salmon.

The chances of reforming the Council are slim at best. It may simply be too late; the opportunity may have been forever lost through neglect of the organized salmon advocates over the past 20 years or so. The political rot of the Council is deep and inextricably embedded in the regional pork barrel culture. Reform might be possible if we were able to dramatically shake up the Council, e.g., remove members for violating their trust duty, for taking the public's money under false pretenses (fraud), etc. If a discrete regional coordination institution is useful, which is highly questionable,²³ one solution would be to dissolve the Council in its present form and reconstitute it as a federal agency as provided for in the Power Act. Otherwise, the Act should be amended to eliminate the Council.

It is unclear whether it would benefit Snake River salmon more to *decisively win* or to *decisively lose* NRIC's current suit against the Council in the Ninth Circuit. The latter would put the court's imprimatur on the need for drastic reform or elimination of the Council. Either way, it must be a do-or-die, either-or decision. Getting that unequivocal decision from the court is the challenge. As noted, even if we win decisively, and the Council were to develop the legally required plan, it does not necessarily follow that the operating

²² *Draft Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement*, U.S. Army Corps of Engineers, December 1999.

²³ This is not the first bankrupt attempt at multi-state federalism in the Columbia River Basin. E.g., see Pacific Northwest River Basin Commission, Pacific Northwest Regional Commission and National Salmon and Steelhead Advisory Commission.

agencies can be legally compelled by the Power Act to follow it. It almost certainly would require more decades of litigation subject to the administrative deference doctrine.

POTENTIAL ACTIONS

Bonneville and/or the Corps of Engineers

1—Public trust doctrine suit(s) against Bonneville, the COE or both (there may be legal or strategic reasons for consolidation or segmentation) for failing to protect the trust asset and, in fact, striving to drive it to the cusp of extinction and keep it there.

Note that this proposed action highlights a fundamental question: at what point in dilatory behavior and concomitant damage to society can the public trust doctrine be invoked without running afoul of preemption by the law(s) systematically being flaunted? Are we there yet?

The justification for the action proposed here is that the agencies have demonstrated for 30 years they have no intention of complying with the Northwest Power Act and numerous other salmon protection laws including the 1945 legislation that authorized constructing the dams,²⁴ therefore compelling invoking the public trust doctrine.

Professor Grant provides a reasonable approach for distinguishing the instances that call for a judicial veto rather than a deferential remand. A remand is appropriate, he argues, “[w]here a legislative [or] administrative grant of a trust resource causes harm that is fully reparable reasonably quickly.” But where the harm is “irreparable or not reparable within a reasonable time,” he contends, a judicial veto is warranted. The approach is well grounded in trust law’s prohibition against waste. While a trustee may allow an asset to be utilized, she or he may not allow destruction or permanent impairments of corporeal hereditaments that beneficiaries are entitled to in the future.²⁵ [Internal citations omitted.]

In the late 1970s Snake River salmon were in peril due to the Corps’ negligence in failing to design the four lower Snake River dams to pass juvenile Snake River salmon. Their plight provided the impetus for the truly extraordinary salmon restoration provisions of the Power Act.

“ . . . conservation and enhancement of the great migratory fish and wildlife populations of the Pacific Northwest, something of great concern to the sportsmen and conservationists of this Nation, are for the first time, a matter of urgent priority under this legislation. They are placed on a par with other purposes for Federal facilities in this area. If the fish populations of the Pacific Northwest are to be restored to the sportsmen, the Indians and the commercial fishermen, this is the mechanism which will do it.”²⁶

The Northwest Power Act has two primary and interrelated purposes: 1] restore salmon decimated by the Federal Columbia River Power System, while 2] ensuring an economical and reliable regional energy supply.

²⁴ See FN 34 re *Rivers and Harbors Act of 1945*. See list of other laws violated at FN 16.

²⁵ *Advancing the Sovereign Trust of Government to Safeguard the Environment For Present and Future Generations (Part I): Ecological Realism and the Need For a Paradigm Shift*, p. 77. Mary Christina Wood, *Environmental Law Vol.* 39:43. (2009)

²⁶ 126 Cong. Rec. H10680 (Rep. Dingell).

The law specifies that salmon must be provided with water flows in the mainstem Columbia and Snake Rivers of adequate quantity and quality as necessary to achieve the salmon restoration objective.

Thirty years after the Act's mandate for "equitable treatment" and congressional intent that salmon be treated "on a par", and "co-equal" with other uses of the FCRPS, Snake River salmon populations have not been restored; instead they were driven onto the List of Endangered Species. NOAA Fisheries, Bonneville and the Corps are striving to keep them there in their fanatical zeal to protect the four dysfunctional lower Snake River dams at any cost.

Concurrently, at the very time of year Snake River salmon need safe river passage conditions, the region has a glut of power; Bonneville literally is giving power away and paying non-federal wind generators to reduce production; Snake River salmon are threatened with extinction due to federal hydropower operations. No other user of the FCRPS has been inconvenienced in any way.

To date, "equitable treatment," "on a par" and "co-equal" with other uses of the power system is a particularly cruel legal joke. So far. If granted, the relief proposed below would give the salmon the last laugh; this would be analogous to the federal court decision giving Native American Indian tribes the right to 50 percent of the available harvest of salmon that would pass their traditional fishing areas in the absence of non-tribal fisheries.

Relief

The relief requested must be Draconian, or more appropriately, Boltonian, due to the agencies' long-standing egregious flaunting of the law and the disastrous, far-reaching ecological, economic and social consequences which are continuing.

Because federal agencies refused for thirty years to comply with the salmon restoration mandate of the Act, request that the court follow the punitive "in common" precedent and find that the record on its face compels it to declare that salmon are entitled to 50 percent of the unappropriated water in the main-stem Snake and Columbia Rivers below their confluence until such time as the water volume, quality and timing necessary to deliver "equitable treatment" "on a par" as "coequal partner" including the mandated "flows of adequate quantity and quality" to mitigate the effects of the FCRPS is determined and a specific time-certain strategy to fully comport with those provisions of law is submitted to the court for approval.

Hold the eye rolling; consider that Judge Boldt defined "in common with" as 50/50. Our facts are no less compelling, plus we have Boldt as precedent and we have much stronger language in the law than what he had to work with. Also, channel Redden's characterization of the feds' 2004 BiOp as a ". . . cynical and transparent attempt to avoid responsibility for the decline of listed Columbia and Snake River salmon and steelhead."

We must be willing to shoot the moon in Snake River salmon's darkest hour. Filing such a suit would rock the region and the nation and create a seismic shift in the current hopeless and threatening political dynamic. If not now, when? When Snake River salmon are all listed as "endangered" rather than "threatened"? Recall that 30 years ago the Northwest Power Act was touted to keep Snake River salmon off the List of Endangered Species.

2—Instead of invoking the public trust doctrine against Bonneville and/or the Corps as in 1] above, file suit under the Power Act for their failure to comply with the Act's requirement that these agencies have the independent duty to ensure salmon are restored.

This action does not seem to have the same potential as the public trust doctrine to get a punitive game-ending declaratory judgment. It does not appear to avoid the trap of the endless feedback loop of the administrative deference doctrine.

Note that here I'm making a distinction between a suit challenging the agencies' failure to fulfill the salmon restoration purpose of the Act, and a suit challenging their failure to provide "equitable treatment."²⁷ See action item 13.

The Ninth Circuit held in the equitable treatment suit that NRIC instigated that Bonneville [and presumably the Corps] has the duty to do what is necessary to comport with the salmon restoration provisions of the Act *that is independent of what the Council does in its Fish and Wildlife Program should that program prove inadequate to the task.*

"In Public Utility Dist. No. 1 of Douglas County, we explained one additional element of BPA's responsibilities under paragraph (i). We explained for the first time that a federal agency could not satisfy its equitable treatment responsibilities under paragraph (i) simply by adopting the Council's program under paragraph (ii). 947 F.2d at 392. *We recognized that if the Council's Program fails to ensure adequate fish survival, BPA would be required to take additional measures under paragraph (ii).* *Id.*²⁸ [Emphasis supplied.]

Note too that the Council's duty is to *produce a plan*, which it has no authority to implement; the agencies are required to act in ways that are "consistent" with the plan. I read the agencies' independent duty is not to *plan*, but to *implement actions* as necessary to achieve the salmon restoration intent of the Act.

Does it follow that this independent duty removes the threat of the current NRIC suit against the Council preempting a separate suit against the operating agencies' independent duty?

Relief

Same as action item 1.

Bonneville Power Administration

3—Suit(s) against individuals within the Bonneville Power Administration and/or against the agency for illegally using federal funds to improperly influence the federal court, state and tribal governments and private economic interests to support the Biological Opinion and oppose compliance with the Northwest Power Act.

Federal funds were used to:

a. Influence Native American Indian and state governments to publicly, politically and legally support Bonneville policies vis-à-vis the federal biological opinion and therefore, to improperly influence the U.S. District Court;

²⁷ The "equitable treatment" obligation applies to the operating agencies, not the Northwest Power and Conservation Council. As I recall, in one "equitable treatment" case the Ninth virtually invited a writ of mandamus.

²⁸ *N.W. Env'tl. Def. Ctr. v. Bonneville Power Ass'n*, 117 F.3d 1520 (9th Cir. 1997).

- b. Influence tribal and state governments to suppress science in technical forums seeking to mitigate the effects of the Federal Columbia River Power System on salmon;
- c. Influence tribal governments to foreswear their sovereign right to seek redress from federal actions under the Clean Water Act and Northwest Power Act;
- d. Influence state and tribal governments and Northwest Power and Conservation Council state representatives to collaborate in subverting the salmon restoration provisions of the Northwest Power Act and the public process established to implement those provisions;
- e. Collaborate with economic interests and get them to act in Bonneville's behalf to influence the President of the United States, members of congress and elected officials of public cooperatives, cities, counties and states to support Bonneville actions and oppose contrary legislation, laws, policies and appropriations.²⁹

Bonneville largely dictates how the federal dams are operated. The agency uses the salmon blood money produced by the four lower Snake River dams to pay the costs of its mismanagement of the power system, to help pay its nuclear power plant, energy futures and aluminum industry gambling debts and to help keep its subsidized rates low and its pork barrel customers happy. A handful of political hacks at the helm of Bonneville maintains a political iron grip on the region by using the agency's extraordinary power of the purse to buy hearts, minds, testosterone levels, states, tribes, NGOs and blind eyes among decision makers and the news media—and thus the political power to maintain the status quo.

Bonneville is blatantly attempting to influence the U.S. district court with \$1 billion in federal funds for a "Godfather bribe", a.k.a. the "Columbia Basin Fish Accords", that enticed Native American Indian governments to withdraw their support for plaintiffs' suit against NOAA Fisheries' Biological Opinion and to support it in public, political and legal venues.

Bonneville reportedly claimed the money was payment to "settle a lawsuit". It settled nothing; the recipients were not plaintiffs. It was a blatant attempt to influence the district court, political decision makers and the public. In the process Bonneville also bought protection against future lawsuits under other federal laws (e.g., Clean Water Act and Northwest Power Act) and the promise of legal/public/political support for the BiOp. There is evidence Bonneville used the threat of withholding funds for ongoing and/or proposed tribal fish and wildlife programs funded by Bonneville if tribal governments refused the bribe. The Power Council was complicit in this odious activity.

The Accords also contractually prohibit state and tribal fish scientists from discussing in technical forums salmon mitigation measures other than those in the BiOp which might affect FCRPS operations. Federal scientists are politically muzzled and risk disciplinary action for deviating from the script of Bonneville's "scientific" hoax.

Relief

Declare Accords contrary to law. Require Bonneville continue to fund the projects. Void all conditions unrelated to performance of the work funded. Impose whatever penalties/sanctions are possible under criminal (or other) law. Prohibit Bonneville's future involvement in directing how funds are spent on fish and

²⁹ Can the *Anti-Lobbying Act* (18 USC § 1913) be invoked here? It applies to federal employees. [it is illegal to use federal funds] "to influence in any manner. . . an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation."

wildlife programs in the Columbia River Basin. Require Bonneville to eliminate its fish and wildlife staff and stick to the power business.

4—Seek Inspector General and/or GAO investigations, file whistle blower complaints and exploit any other available administrative/investigative opportunities.

Bonneville

5—A suit seeking recovery of monetary damages for the loss suffered due to Bonneville and the Corps failing to comply with the salmon restoration provisions of the Northwest Power Act and stealing Snake River salmon's share of Snake River water. In the Power Act salmon were (I assert) granted half the unappropriated flow the lower Snake River [and an amount to be determined] of the mainstem Columbia River below their confluence.³⁰ [See action item 1.]

The Ninth has held that Bonneville must compensate private interests harmed by its salmon protection measures. Can that be read as making Bonneville (and/or the Corps) liable for damage caused to private interests by *its failure to undertake protection measures required by law*? The congressional record has language to the effect that the Act did not provide for liability for damage from the hydrosystem prior to its passage, i.e., retroactive. Does that support an assertion of liability for damages due to failure to act since the Act's passage?

The court was simply interpreting the second sentence of 16 U.S.C. s 839b(h)(11)(A)(ii), which requires BPA to compensate private losses resulting from its imposition of fish protection "measures." 947 F.2d at 391. The court rejected BPA's construction that the Act should be read to distinguish between Program measures and non-Program measures. *Id.* at 392. The court held that BPA may undertake protection measures under the Program, or in addition to the Program if the Program is insufficient. *Id.* In either case, we held, BPA was required to compensate for losses.³¹

Relief

Declaration that effective upon the date it became law, the Act granted Snake River salmon a proprietary interest in one-half the unappropriated water in the lower Snake River and [an amount to be determined] in the Columbia River below their confluence.

Recovery of monetary damages equal to one-half the gross energy revenue generated by the four lower Snake River dams since the December 1980 passage of the Act, and one-half future gross energy revenue

from the dams until such time as the salmon restoration provisions of the act have actually been *implemented*—as opposed to having been *promised* in a plan.

³⁰ "It is not the Committee's intention to make fish and wildlife superior to power or other recognized needs. But it is the intention of the Committee to treat fish and wildlife as a co-equal partner with other uses in the management and operation of hydro projects of this region." Representative John Dingell in Congressional Record December 1, 1980, Extension of Remarks. See also "on a par" and "equitable treatment".

³¹ 117 F.3d 1520

Pork Barrel Lobbies

6—Suit against pork barrel lobbying organizations for “dishonest assistance” to Bonneville’s breach of trust by refusing to do its independent salmon restoration duty and stealing the salmon’s water, thereby causing enormous ecological, economic and social damage.

Pork barrel lobbies like River Partners and Public Power Council collaborate with Bonneville to subvert the Power Act and the ESA and steal the salmon’s water. They receive monetary benefits, e.g., subsidized power rates, subsidized water transportation, etc.

“Dishonest assistance is a third party liability under trust law. It is also known as knowing assistance. When a person dishonestly assists other in a breach of trust, that dishonest assistant will be directly liable. In order to constitute dishonest assistance,

1. There should be a breach of trust or fiduciary duty by a third party. 2. Third party commits the breach with the defendant’s assistance. 3. Defendant assisted the third party with a dishonest mind.

Defendant and the third party are severally liable. The liability for dishonest assistance is secondary which means that the *dishonest assistant will be liable for the gains of the defaulting fiduciary or trustee*, while the fiduciary or trustee will not be liable for secret profits of the dishonest assistant. Dishonest assistance is a third party liability under trust law. It is also known as knowing assistance.”³² [Emphasis supplied.]

Relief

Recovery of monetary damages from lobby organizations as in action item 5.

Bonneville

7—Invoke whatever legal doctrine(s) apply to Bonneville’s lying to the incoming Obama Administration’s Council on Environmental Quality vis-à-vis the energy/economic effects of breaching the four lower Snake River dams. Ethics In Government Act? Other?

Bonneville personnel (and perhaps personnel of other agencies) lied (not dissimulate or weasel-word, lied) to the incoming Obama Administration’s Council on Environmental Quality, and were otherwise deceitful, thereby duping the Administration into adopting as its own the legally, ecologically and morally corrupt ESA policy and BiOp of the outgoing G.W. Bush Administration.³³

Relief

Whatever sanctions/penalties are available.

³² <http://definitions.uslegal.com/d/dishonest-assistance/>

³³ We have documentation of the lies via FOIA. “Who duped the President and how they did it” is the subject of a white paper for which NRIC momentarily will start trying to raise funds. This analysis needs to be completed well in advance of the January 1, 2014 deadline for the next iteration of the BiOp if it is to have any chance of influencing same.

Bonneville, Corps and NOAA

8—Administrative/legal action against Bonneville, Corps and NOAA and responsible individuals within those agencies for egregiously violating Obama Administration policies vis-à-vis science and ethics in government. Inspector General investigation? GAO investigation?

These “action agencies” created the corrupt Biological Opinions serially rejected by the federal court. They tortured science to make it confess what they wanted to hear. They used secret panels of “scientists” to create the illusion of broad scientific support. As noted in the narrative preface to Action item 1, the agencies collaborated under Bonneville’s leadership to bribe/blackmail Native American Indian tribes and muzzle state, tribal and federal scientists. See also Bonneville’s collusion with then Idaho Senator Larry Craig’s effort to defund the Fish Passage Center; which was blocked by the court.

Relief

Whatever sanctions/penalties are available.

Bonneville

9—Administrative and/or legal action against Bonneville for subverting the public process established to develop a regional fish and wildlife program through the power Council and using its power of the purse to become the defacto “super fish and wildlife agency” proscribed by congress in passing the NW Power Act.

Somewhere in the legislative history of the Power Act congress explicitly stated something to the effect that the Act was not intended to create a “super fish and wildlife agency” that would in effect usurp the authority of state, tribal and federal fish and wildlife agencies. Bonneville has used its power of the purse to do exactly that.

Bonneville has basically taken over the Council’s Fish and Wildlife Program. Bonneville tells the Council what it will and will not fund through the Program and what projects have priority for funding, i.e., those that support the corrupt Accords and BiOp. Bonneville tells the tribal, state and federal agencies what will and will not be discussed in technical forums, i.e., anything that is not in the BiOp is banned by written contract in the Accords. [See narrative in action item 3.]

Relief

Whatever sanctions/penalties are available, including stripping Bonneville of its power of the purse to dictate the fish and wildlife program and stripping it of all fish and wildlife staff so the agency can devote its full attention to doing a better job of marketing power and to finally start integrating same with its public trust duty vis-à-vis salmon.

Bonneville

10—A suit or administrative action against Bonneville for using public funds to suppress science and muzzle scientists with the Accords.

Bonneville uses public funds to suppress science and muzzle scientists. Here I’m making a distinction between using public funds to suppress science per se, and illegally using public funds for political purposes and to improperly influence the federal court, suppress science, etc. as in action Item 3.

Relief

Relief sought in action item 9.

Army Corps of Engineers

11—Suit against COE for failing to construct and operate the four lower Snake River dams to afford salmon “free access to [and from] their natural spawning grounds” as congress intended in authorizing their construction,³⁴ and for failing in its independent duty to do what is necessary to comport with the agency’s salmon restoration mandate of the Power Act.

Contrary to congressional intent in authorizing the four lower Snake River dams, the Corps of Engineers’ design negligently made no provision for juvenile Snake River salmon to migrate from the vast pristine headwaters of the Snake River Basin to the ocean.³⁵ Disaster happened. It continues despite the expenditure of untold hundreds of millions of dollars retrofitting the dams in an effort to make them less lethal. The Corps’ Final Solution: remove the fish from the river and have them “migrate” in barges and trucks. Thirty years of that hasn’t worked out so well, i.e. all Snake River salmon are on the List of Endangered Species. Note that the Power Act requires “flows [not barges] of adequate quantity and quality.” [Emphasis supplied.]

NOAA, as Bonneville’s hand puppet, does not claim dam modifications contained in the BiOp will meet the salmon restoration intent of the Power Act, only that when combined with tiny tributary habitat improvements upstream within the vast pristine waters of the Snake River Basin, the dams will not jeopardize the existence of salmon, thereby satisfying the ESA. This is a transparently preposterous claim on its face; even without considering that the BiOp proposes to terminate the court-ordered spill life-line.

The Corps claims the four lower Snake River dams and their operations cannot be modified to comport with the salmon restoration requirements of the Power Act; the dams would have to be breached.³⁶

Relief

³⁴ See *Rivers and Harbors Act of 1945*, ch. 19, § 2, 59 Stat. 10, 22 (requiring that “[i]n the design, construction, and operation of the Dam [McNary Dam, originally known as the Umatilla Dam] adequate provision shall be made for the protection of anadromous fishes by affording free access to their natural spawning grounds or by other appropriate means.” Section 2 of the same statute also authorized the four Lower Snake River dams. It should not be a great leap to infer that what applied to McNary would apply to the four lower Snake River dams as well; if not, it would be pointless to require fish passage at McNary. Congress authorized providing upstream fish passage at the Snake River dams; the Corps included adult fish ladders—which would have been pointless if it was not intended their resulting progeny would be able to migrate to the ocean. Pursuant to the LSRCP congress has appropriated \$300 million or so to date for hatcheries upstream of the dams which would be pointless if there was no intent juvenile fish could migrate to the ocean. Congress appropriated many more hundreds of millions for various modifications to the dams in the effort to make them less lethal for downstream migrants. See also FN 16.

³⁵ Prior to constructing the dams the Corps was officially warned early and often of the potential danger to salmon even under the best of conditions [e.g., USFWS, 1946]; those warnings were ignored. The Corps also ignored the pre-construction demonstration of impending disaster at its dams that was provided by Idaho Power’s complex of dams just upstream on the Snake River.

³⁶ *Draft Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement*, U.S. Army Corps of Engineers, December 1999.

Instruct the Corps to identify within 180 days what must be done to the dams to comport with the authorizing legislation and the Power Act. Identify within a time certain how the Corps plans to take the required action on an emergency time line, what interim relief will be provided, etc. Given the egregious record, relief should be declaratory and punitive.

Corps of Engineers

12—Suit to force the Corps to deliver on the promise of the Lower Snake River Compensation Plan.³⁷

In the LSRCP the COE committed to build hatcheries to replace the [grossly underestimated] number of adult salmon that would be lost due to inundation of habitat and loss of fish attempting to pass the dams. Toward that end, more than \$300 million to date has been spent on hatcheries upstream of the four lower Snake River dams. The Fish and Wildlife Service recently reported that the spring/summer chinook component of that hatchery fish mitigation has never been met and likely never will be [implied: due to juvenile salmon mortalities at the dams]. Of course, due to the negligence noted above, the wild fish component of the runs was decimated and driven onto the List of Endangered Species. The public got screwed both ways. The Fish and Wildlife Coordination Act was made a mockery.

Relief

Monetary damages for the net loss of hatchery and wild fish to date.³⁸ Establish a formula for determining the annual damages to be paid in the future until the problem is solved.

Require that the COE demonstrate specifically how and when it intends to fulfill its commitment to achieve and protect indefinitely the number of *wild* adult salmon and steelhead used as the basis for the LSRCP. [We don't want more hatchery fish; they not only are not the same as wild fish, they threaten the long term sustainability of wild fish.]

Note that the COE will argue that new hatcheries are proposed and pending through the Council's program....actually BPA's program. Also, the relief requested here in numbers of fish is less than the salmon restoration mandate in the Power Act.

13—A mandamus suit against the Corps for its 30-year failure to give Snake River salmon equitable treatment with all other uses of the FCRPS as required by the Power Act.³⁹

Bonneville to date has quite amazingly dodged the equitable treatment mandate of the Act in court. This may be in part because its marketing role is regional in scope and it is difficult to get an equitable treatment rope around discrete actions. The Corps may be more vulnerable to an equitable treatment suit focused narrowly on the four lower Snake River dams.

14—Suit against the Corps for violating the salmon protection intent of laws establishing Wilderness and National Recreation Areas and Wild and Scenic Rivers with a purpose of protecting salmon.

³⁷ *Lower Snake River Fish and Wildlife Compensation Plan*, Army Corps of Engineers, 1975. Authorized by Congress as part of the Water Resource Development Act of 1976, P.L. 94-587.

³⁸ In 2002 NRIC estimated the cumulative loss to Idaho to that date was \$1.6 billion. *Idaho Economic Effects of Breaching/Not Breaching the Army Corps of Engineers' Snake River Dams in S.E. Washington*, NRIC. 2002.

³⁹ As I recall, in one "equitable treatment" case the Ninth virtually invited a writ of mandamus.

The Central Idaho Wilderness Act of 1980, for example, states:

...these wildlands and a segment of the Salmon River should be incorporated within the National Wilderness Preservation System and the National Wild and Scenic Rivers System in order to provide statutory protection for the lands and waters and the wilderness-dependent wildlife and the resident and anadromous fish which thrive within this undisturbed ecosystem...⁴⁰

Legislation establishing the Sawtooth National Recreation Area has as its first purpose "the protection and conservation of the salmon and other fisheries."⁴¹

While NOAA's (Bonneville's) BiOp seeks a bump in total population size via relatively postage stamp-size habitat improvements elsewhere, fish produced in pristine wilderness, national recreation areas and wild and scenic rivers will continue to be subjected to extinction-threatening levels of mortality at the four lower Snake River dams.

Allowing the four lower Snake River dams or, alternatively, the barges, to continue killing most of the fish produced in these statutorily protected areas while Bonneville/NOAA seek to improve fish habitat elsewhere plainly conflicts with the intent of these and similar laws.

Relief

Theoretically the statutory purposes of these areas could be achieved through the Power Act. However, not through the ESA as it is being gamed by the federal agencies. Is this another instance of the history of dilatory action under the Power Act, and the uncertainty that the Act is capable of delivering the relief promised, could make moot the threat of preemption?

U.S. Environmental Protection Agency

15—A mandamus suit against the Environmental Protection Agency for its failure to apply and enforce Clean Water Act standards on the lower Snake River.

The reservoirs behind the four lower Snake River dams contribute to heating the river—always a problem in summer/fall—during drought conditions, as now, to lethal levels for salmon. Before the G.W. Bush Administration and darkness fell on the Snake River Commons, EPA was contemplating action under the Clean Water Act. BPA is nervous about the CWA, that's why the odious Accords, a.k.a. BPA's billion-dollar "Godfather bribe" that several Native American Indian tribes couldn't refuse, proscribe the tribes from invoking or supporting the invoking of the CWA or the Power Act.

Relief

Enforce CWA on lower Snake River.

NOAA

16—Suit against NOAA for unlawfully failing to protect other listed species dependent on Snake River salmon, such as bull trout, killer whales and sea lions, by failing to restore Snake River salmon.

⁴⁰ *Central Idaho Wilderness Act of 1980*, PL 96-312, sec. 2(a)(2).

⁴¹ *Sawtooth National Recreation Area Act*. 86 Statute 612. PL 92-400. August 22, 1972.

The first two are being nutrient deprived. The latter are being killed to reduce their minor predation on listed Snake River salmon; to date the court has approved this.⁴² The current litigation brought by The Humane Society, Sea Shepard, et al. is not focused on how NOAA's BiOp proposes to elevate the threat to sea lions or to other listed species.

NOAA in its BiOp actions would make things much worse than current conditions for Snake River salmon, i.e., by reducing spill. So, if NOAA prevails it will approve killing even more innocent sea lions? Bull trout and killer whales will become even more nutritionally impoverished?

Relief

Force NOAA to formally acknowledge and act on these secondary effects of its actions vis-à-vis Snake River salmon proposed in the BiOp.

Northwest Power and Conservation Council

17—A suit in criminal court alleging that power Council members accepted public funds to implement the salmon protection provisions of the Act but instead illegally used those funds to subvert implementation of those provisions.⁴³

The betrayal of the public trust and egregious subverting of law by this organization, notably excluding its Oregon members for the most part, cannot be overstated. The ecological, economic and social damage resulting from the Council's betrayal of the public trust by evading the law for 30 years is almost incomprehensible.⁴⁴

In short, for thirty years the Council simply refused to do the job for which it was created: on an extraordinarily short time-line reflecting the urgency of the situation, to produce a plan that when implemented would result in mitigating the effects of the FCRPS on salmon while maintaining an adequate, reliable and economical regional power supply.

The plight of Snake River salmon in the mid 1970s was the impetus for the fish and wildlife provisions of the Act. Thirty years after passage of the Act the Council has become an existential threat to the existence of Snake River salmon. The Council has turned their fate over to the federal agencies responsible for driving them to the brink of extinction, notably Bonneville Power Administration. In its Sixth Power Plan, which includes the salmon plan, the Council formally abdicated its duty under the Power Act and changed its job description to that of providing a regional forum for others to figure out what to do about the salmon problem. It actually adopted the serially court-rejected BiOp as the "new baseline" for its salmon program relevant to the Snake River.

As noted previously, NRIC currently has the Council before the Ninth Circuit; this is the second time around. The intent is to get the court to force the Council to do its duty, or to rule that the Council can't be forced to

⁴² I repeatedly attempted to contact the organizations litigating the sea lion killing. I wanted to offer what I thought would be useful insight into the salmon back story they did not possess. No one ever deigned to respond to my calls or emails.

⁴³ Years ago I wrote the Idaho Attorney General asking his office to issue an AG Opinion on whether or not this action by Idaho Council members was legal. He hasn't got back to me yet. Is there any legal doctrine to compel the states to investigate reported illegal activity?

⁴⁴ For an overview see <http://www.nwrp.org/documents/StatementofEdChaneytoNPCCApril132010.pdf>

do its duty, thereby putting the court's imprimatur on a subsequent effort to amend the power act to abolish the Council. Either way the salmon win. Frankly, the latter may be in their long-term best interest. The Council is so corrupt and so embedded in the region's anti-salmon pork barrel culture it is likely beyond reform; nothing less than dissolution and fundamental restructuring is likely to produce compliance with the law.

Relief

Remove members from Council; request jail time;⁴⁵ recover salaries and expenses paid; dissolution of the Council and replacement with a federal agency with members appointed by the Secretary of Interior and formally vested with fiduciary responsibility to produce within 180 days a plan which would fulfill the salmon restoration intent of the Act.⁴⁶

18—Concurrent with the current NRIC suit against the Council in the Ninth, file suit against the Council under the public trust doctrine for abdicating its fiduciary duty under the Power Act.

Invoke the “Bernard Goetz Doctrine.” Pile on the Council while its perfidy is nakedly exposed. Confront the preemption issue head on. Assert that the Council's dilatory behavior and the resulting ecological, economic and social damage are so egregious that they compel invoking the public trust doctrine. Let the Council, Bonneville and their shills argue that the Power Act preempts the public trust doctrine because the Act can deliver the same relief, i.e., restored Snake River salmon populations (in less than another century).

Relief

Secretary of the Interior reconstitute the Council as a federal agency.

19—Action against Council members for violating the Ethics in Government Act.

The Council is not a federal agency and its members and employees are not federal employees. However, “Members of such Council shall be considered officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.)”⁴⁷

The Council, notably excepting its Oregon members, has not only worked diligently to prevent fulfillment of the salmon restoration provisions of the Act, it has been accomplice to what by any standard of measure could be called “unethical” actions, such as complicity in the odious Accords and turning the Bonneville Power Administration into the “super fish and wildlife agency” proscribed by congress, etc.

Relief

Whatever relief is possible under the Ethics in Government Act. Removal for violating trust? Contempt of court for violating 1995 court direction in NRIC v. NPPCC?

States of Idaho and Washington

⁴⁵ See FN 21 re court threatening criminal action against a federal official for serially flaunting the law.

⁴⁶ The Act provides for the Secretary to establish a federal Council if the states failed to do so.

⁴⁷ *Northwest Power Act*, §4(b)(3), 94 Stat. 2702-3.

20—Public trust doctrine suit(s) against the states of Idaho and/or Washington for refusing to do their duty to protect the trust asset.

These states have worked aggressively in support of federal actions to drive the trust asset to the brink of extinction and support the BiOp which would keep it there. Idaho should be a slam dunk;⁴⁸ the four lower Snake River dams are in Washington. Idaho is the primary victim and, incongruously, a foam-at-the-mouth advocate for the BiOp in federal court.

Argue the states collaborated in subverting the salmon restoration provisions of the Power Act and continue to do so, and also strive to subvert the ESA. This record compels invoking the public trust doctrine. By their dilatory deeds the states cannot use the Power Act as the pretext to preempt action under the public trust doctrine.

Relief

Spell out the specific actions the state(s) must immediately take to remedy their breach of trust duty vis- a-vis Snake River salmon.

⁴⁸ There is Idaho case law and maybe negative related legislation.