

Fish Politics in the Pacific Northwest

or

**Litigation as the continuation
of politics by other means**

(with apologies to Clausewitz)

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Portland, Oregon

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A tumultuous two years.



We are in for more tumult.



But maybe, just maybe, calm seas on
the horizon?





Fish Tumult

- Bonneville loses one in the Ninth Circuit! *NEDC v. Bonneville*: The Fish Passage Center, the Council's Fish and Wildlife Program and Bonneville (January 2007)
- Ninth Circuit affirms Judge Redden's rejection of 2004 FCRPS Biological Opinion (April 2007)
- Bonneville loses another! *Golden NW v. Bonneville*: Fish and wildlife cost estimates in the rate case (May 2007)
- Two+ years of ESA/FCRPS collaboration, in private, with endless policy and technical meetings and side negotiations (2006-08)
- Council calls for recommendations to amend *Columbia River Basin Fish and Wildlife Program* (April 2008)
- Columbia River Treaty entities (Bonneville, Corps and B.C. Hydro) quietly start up "Columbia River Treaty 2014/2024 Review" (April 2008 -- on going)
- 2008 FCRPS Biological Opinion – along with Upper Snake BiOp, *U.S. v. Oregon* harvest BiOp, and overarching "Comprehensive Analysis" tying them together (May 2008)
- 2008 Columbia Basin Fish Accords – historic implementation agreements with four (later five) tribes and States of Idaho and Montana (May 2008)
- new fish and wildlife program cost estimates: + \$100 million (mid 2008)
- Litigation ensues; parties realign like topsy; massive record and briefing (2008-09)
- Willamette BiOp (July 2008)
- Libby Dam/sturgeon BiOp litigation settlement agreement (September 2008)
- Council adopts revised Fish and Wildlife Program (February 2009)
- HSRG basinwide hatchery review process nearing completion (2007-09)
- March 2009: Oral argument in Judge Redden's court, preceded by significant letters to counsel



Bonneville Dam



More Fish Tumult to Come, But Then . . . ?

- March 2009: Oral argument in Judge Redden's court, preceded by significant letters to counsel
 - hazarding the future?
 - judge may accept basic approach (more on that below)
 - leverage some weaknesses to add on additional elements:
 - more spill and flow, if possible
 - more money and actions in estuary
 - somewhat altered survival estimates and recovery standard, w/ bigger package of actions to match
 - contingency plan
- Implement! the BiOp/Accords/Council's Program/Recovery Plans
 - also, nail down recovery plans; implement HSRG recommendations
- What does it all add up to?
 - Power Act concept
 - regulatory framework on top of big mitigation program
 - grand 10-year experiment
 - significant change in policy/litigation dynamic of last 10 years

Columbia River Basin





Energy Tumult

- Bonneville loses big in Ninth Circuit! *PGE v. Bonneville* and *Golden NW v. Bonneville*: Court rejects Bonneville's residential exchange settlement agreements with IOUs and rates charged to public utilities to collect amounts to pay for settlements (April 2007)
- Processes begin to disentangle over-collection/over-payment for exchange settlements and re-establish residential exchange going forward (2007-09)
- Bonneville's Regional Dialogue Policy final decision (July 2007); culmination of many-year effort to reframe Bonneville's role in regional power supply
- Processes begin to implement Regional Dialogue decision: contract discussions, tiered-rate methodology, DSI service, resource augmentation/acquisition program, conservation policy, etc. – hundreds of meeting over two years (2007-09)
- Bonneville decisions: rate case supplement; terms and policies for new power sales contracts; tiered-rate methodology established (late 2008)
- new long-term power sales contracts signed! (late 2008)
- Bonneville loses another case in Ninth Circuit! *PNGC v. Bonneville*: Court rejects contract w/ DSI Alcoa (Dec 2008)
- implications of Court decisions for Bonneville: tied closely to statutory framework; deference only in that context
- dozens upon dozens of petitions filed in Ninth Circuit vs. Bonneville challenging virtually every decision made by Bonneville at end of 2008: rate case supplement; contract policy; tiered-rate methodology; amended contract with Alcoa (Nov 2008-March 2009)





More Energy Tumult to Come, But Then . . . ?

- Entering into litigation vortex? -- dozens upon dozens of petitions filed in Ninth Circuit vs. Bonneville challenging virtually every decision made by Bonneville at end of 2008
- Residential exchange policy dilemma seems to be at root of most of it
- But, indications that we are on our way out here, too?
- Implementing renewable portfolio standards/wind integration and balancing/increasing transmission capability/ramping up energy efficiency investments are key challenges





Next up: NOAA Fisheries

“NOAA understands and predicts changes in the Earth’s environment, from the depths of the ocean to the surface of the sun, and conserves and manages our coastal and marine resources.” *at the end of a NOAA press release (March 5, 2009)*

“NOAA is an agency that enriches life through science. Our reach goes from the surface of the sun to the depths of the ocean floor as we work to keep citizens informed of the changing environment around them.”
<http://www.noaa.gov/about-noaa.html>



