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**Spokane County Bar Association**

**Fifteenth Annual Indian Law Conference**

**Columbia River Settlement Update (outline of presentation)\***

**March 15, 2024**

**General context: Columbia River system operations and actions intended to benefit fish and wildlife, especially salmon and steelhead**

* big program built up over 40+ years – mix of NW Power Act protection and mitigation responsibilities, various Congressional authorizations, and ESA requirements
* implemented largely mostly by Bonneville funding and Corps/Bureau operations and funding
  + reservoir operations, flows, spill and other passage operations and dam modifications
* also predator management in mainstem
  + habitat protection and improvements in mainstem, tributaries, estuary
  + artificial production
  + rme
* focused on all fish and wildlife affected, not just salmon and steelhead, but salmon and steelhead have special prominence, and not just listed species
* affects all dams, not just federal
* premises/hypotheses
  + can be done and enjoy other benefits of system (power, flood control, navigation)
  + those who benefit should bear the cost (ratepayer)
* these categories have been set for decades – listings and litigations and etc. have just ratcheted up the dials (amount of money, actions, spill, etc.)

*\*These are personal reflections on the settlements. This is not an official or even unofficial Council analysis or document.*

**Litigation context and settlement process**

General context

* *NWF* case – continuing jurisdiction since 2000 in US District Court in Oregon
* challenging succession of Biological Opinions from NOAA Fisheries analyzing impacts of system operations and associated fish protection and mitigation actions on listed salmon and steelhead (and eventually Southern Resident killer whales, Green sturgeon and Pacific eulachon) under an ESA umbrella
* litigation is ESA focused – also eventually NEPA too
* defendants have been NOAA (resource agency) and Corps and Bureau of Reclamation (two of three action agencies)
  + companion case in 9th Circ vs Bonneville (other action agency) – NW Power Act jurisdiction
* result has been a succession of remands
  + decisions never really question validity of suite of actions; focus is more on whether the actions have been demonstrated to be enough – i.e., have ESA needs been analyzed correctly? actions and benefits been shown to be sufficiently certain? information in record support actions as sufficient to meet needs and legal standards?
  + remands come w/ associated requirements for sovereign collaboration for future planning
* Columbia Fish Accords in 2008 partly a result, along with shifting of party alignment
  + increased juvenile passage spill as interim relief

Most recent litigation context

* In 2016, Judge Simon bounced the 2008/11/14 BiOp and associated RODs on ESA grounds and also for stale NEPA coverage
* ordered feds to do a programmatic EIS on system ops and ESA (strongly intimating one alternative studied should be dam removal) as well as new BiOp
* feds expected 2021
* Trump administration moved up to 2020
* 2020 CRSO EIS and new BiOps (NOAA and FWS for impacts to listed Kootenai sturgeon/bull trout)

Litigation recommences

* 2020/2021 *NWF* case recommences
  + NWF plaintiffs and Oregon are plaintiffs; Nez Perce Tribe amicus in support
  + Washington and other lower river tribes (Yakama, Umatilla, Warm Springs move from support of feds to unaligned status)
  + new plaintiffs – Spokane Tribe and Coeur d’Alene Tribe
* raising NW Power Act claims as well as ESA/NEPA
* upper Columbia focus – ESA (esp upper Columbia Spring Chinook) and NW Power Act (program measures for mitigation and reintroduction) and NEPA
  + companion case in 9th Circuit vs Bonneville is more interesting, because direct NW Power Act claims vs Bonneville by Spokane/Coeur d’Alene
  + defendant federal agencies remain
  + Idaho/Montana/Kootenai Tribe of Idaho/Colville Tribes/CSKT all in the litigation, largely supporting feds, but …
  + Industry groups (NW RiverPartners, PPC, Ports/Navigation Group, Columbia/Snake irrigators) in case supporting feds’ 2020 decisions
  + Council as amicus in district court/intervener in 9th Circuit to protect NW Power Act interests
* tribes and environmental groups press new Biden administration officials to repudiate Trump-era decisions; engage in comprehensive settlement talks; lower snake dams focus – offer/challenge accepted

Settlement process

* feds engage FMCS; begin lengthy series of discussions
* involving all parties; largely going nowhere
* settlement process eventually breaks off into two distinct discussions involving smaller set of parties (plaintiffs and feds)
  + discussions between federal agencies and Spokane, CdA and Colville Tribes around upper Columbia and especially the tribes’ plans to study the feasibility of reintroducing anadromous fish above Chief Joseph/Grand Coulee dams
  + discussions between federal agencies and newly formed “Six Sovereign” group – Oregon, Washington, Yakama, Nez Perce, Umatilla, Warm Springs
  + others not involved have been testy about being excluded
* three important documents/studies emerge publicly along the way:
  + NOAA paper titled “Rebuilding Interior Columbia Basin Salmon and Steelhead”
    - “For Snake River stocks, the centerpiece action is restoring the lower Snake River via dam breaching.”
    - “For upper Columbia River stocks, the centerpiece action is reintroducing fish into blocked areas.”
    - “For mid-Columbia stocks, in addition to improved passage through lower mainstem dams, it is important to improve water quality and quantity and passage survival in focused areas of low- to mid-elevation tributary habitats.”
  + Bonneville-funded E3 study of replacement resources and costs if lower Snake River dams are breached
  + Presidential Memorandum (Sept 2023) on “restoring healthy and abundant wild salmon and steelhead in the Columbia River Basin”
    - policy statement to restore healthy and abundant salmon, steelhead and other native fish, to secure a clean and resilient energy future, support local agriculture, and invest in communities that depend on the services provided by the federal dams
    - directs all federal executive departments and agencies with applicable authorities and responsibilities to utilize their authorities and available resources to advance the policy above – review and report within 220 days
    - chair of CEQ and Director of OMB directed to explore opportunities and mechanisms to develop an intergovernmental partnership to advance the policy with the basins states and tribes.
* two settlement agreements then emerge, one in Sept 2023 and one in Dec 2023

**P2IP implementation agreement (Sept 2023)**

* Council’s 2014/2020 Columbia River Basin Fish and Wildlife Program under the NW Power Act. Based largely on recommendations and comments from the tribes in the Lake Roosevelt area, Council included program measures to:
  + call on Bonneville and the other federal agencies to work with tribes to pursue a science-based step-by-step investigation of the feasibility of reintroduction of anadromous fish into the waters above Grand Coulee/Chief Joseph dams
  + more generally, a call on Bonneville to “increase significantly the level of mitigation” for anadromous losses in the Lake Roosevelt area
* activities with regard to reintroduction from 2014 to 2023
  + Tribes’ (mostly) and others’ Phase 1 work, including habitat assessments, fish releases, passage assessments elsewhere
  + Phase 1 report; favorable review by Independent Scientific Advisory Board (ISAB)
  + Phase 2 Implementation Plan (P2IP), with favorable review by ISAB
  + federal agencies not overly helpful for awhile; lot of talk (forum), but not a lot of active, hard support
  + 2020 CRSO EIS largely ignores both – even as it describes in preferred alternative all the expected work for fish and wildlife
  + Spokane and Coeur d’Alene Tribes challenge 2020 CRSO EIS and other decisions in court
* but with change in Administrations and serious negotiations, P2IP implementation agreement/MOU emerges in Sept 2023
  + United States government and three Tribes - Spokane Tribe of Indians, Coeur d’Alene Tribe, and Confederated Tribes of the Colville Reservation
  + agreed together on “commitments regarding funding and implementation of the P2IP, a scientific and stepwise approach to test the feasibility of, and ultimately to implement, the reintroduction of anadromous salmonids in blocked area habitats in the Upper Columbia River Basin above Chief Joseph Dam.”
  + Bonneville to provide $10/million year for 20 years or $200
  + other federal agencies will work to secure other funds to make the total closer to $300
  + “whole of government” approach
  + not intended to materially change Grand Coulee operations or configuration
  + also agreed to “work in good faith to develop short and long-term agreements with the Spokane and Coeur d’Alene Tribes that address Tribal needs, such as funding a portfolio of projects including, but not limited to, restoring fish habitat, improving migratory passage in tributary streams, securing water for instream protection, and purchasing lands for conservation and habitat restoration”
  + provisions for dispute resolution and early termination
  + agreed not to litigate claims for the duration of the agreement; followed by joint motion to court to stay litigation
  + MOU/settlement is NOT entered or adopted as court order/court decree/consent decree – so not judicially enforceable
  + other details

**US Government Commitments with Six Sovereigns (Dec 2023)**

* six entities form a group that calls itself the “Six Sovereigns” – Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Spring Reservation, Yakama Nation, State of Oregon, State of Washington
  + Six Sovereigns produce a “Columbia Basin Restoration Initiative” (CBRI) – intended to “provides a framework for a durable long-term strategy that restores salmon and other native fish populations to healthy and abundant levels, ensures a clean energy future, supports local and regional economic resilience, restores ecosystem function and honors longstanding unmet commitments to Tribal Nations”
* Dec 2023 agreement to a set of “U.S. Government Commitments in Support of the “Columbia Basin Restoration Initiative” and in Partnership with the Six Sovereigns”
  + based in but not the same as or as extensive as CBRI
  + also added to it an MOU that describes how the commitments will affect litigation – also has provisions for dispute resolution/early termination
    - NWF plaintiff environmental groups are also a party to the MOU
    - explicitly a 10-year agreement, but stay of litigation to be for five years first
  + joint motion for an extended stay then developed and presented to court – five-year extension of stay which will can be followed by another five years
    - MOU/CBRI/US commitments are NOT entered or adopted as court order/court decree/consent decree, so not judicially enforceable
  + disparate set of commitments, but can be grouped into four or five categories
* “Path to breaching”
  + can’t promise or deliver breaching of Lower Snake dams; requires Congress
  + so committing to a set of actions to prepare in case Congress will make a decision to breach
  + centerpiece are a set of energy commitments – mostly DOE
    - especially, support for tribal clean energy resource development
    - associated regional energy planning
    - “accounting” for new resources as replacement resources
    - Bonneville?
    - mix/mashup of clean energy transition (especially Washington and Oregon needs); support for tribes to be part of energy system and transition; lower Snake River dam removal replacement
    - DOE IRA/infrastructure money probable source for most
  + others
    - river navigation transport; recreation (Corps)
    - water supply – irrigation/municipal (Reclamation)
* Funding commitments
  + in essence, additional funding for all the traditional categories – dam modifications; habitat improvements in mainstem, tribs, estuary; artificial production (especially upgrades); ocean research
  + some of it involves specific Bonneville/ratepayer contributions, but otherwise a commitment to bring substantially more non-ratepayer contributions, that is, general taxpayer funds
  + also, a mix of funds/actions already committed (including things not involving Six Sovs); specific additional commitments of funds; and promises to seek future funds
    - Bonneville
    - Corps
    - NOAA
    - Interior/Reclamation/FWS
    - EPA
* Program/contracting reform
  + broadly written to some extent and in general to be led by NOAA and FWS, but at bottom seems to be mostly about transforming Bonneville from an active manager of contracts/projects into a granter/funder, and transfer more control to fish and wildlife agencies and tribes
  + Bonneville pilot project commitment
  + broader effort – work with other sovereigns; Council too
* Operations: ten-year “durable” set of operations; revised current operations
  + increased spring juvenile passage spill – “125%” level – no more spring “flex spill”
  + summer spill can be reduced beginning in August – benefits/issues
  + lower river pool operations during spring/summer migration season
    - no official change, except:
    - 2020 EIS/BiOp already allowed some relaxation; more here, with increases in minimum generation flows
  + fall/winter spill – relatively new in last few years; stays
  + no change to storage project operations
    - but, what about effects of Columbia River Treaty possible change in flood risk management? not considered here
  + studies
  + additional capital investments in dam modifications
  + commitment to discuss long-term plan
* Miscellaneous, including:
  + environmental compliance
  + budgets
  + continued engagement

**Follow-on litigation**

* unhappiness and/or concerns by some about both process/results
* public statements from Idaho, Montana, Bonneville customer utilities and other energy entities, river navigation companies and ports, allies in Congress
* Public Power Council recently filed petition in 9th Circuit challenging Bonneville portion of commitments in larger set of US govt commitments
  + Northwest Requirements Utilities and Alliance of Western Energy Consumers filed petitions too
  + Pacific Northwest Generating Cooperatives – intervenes in PPC petition
  + issues?