

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

IN THE MATTER OF:

**OVERSUPPLY MANAGEMENT COST-
RECOVERY RATE PROPOSED AS PART OF
COMPLIANCE FILING WITH THE FEDERAL
ENERGY REGULATORY COMMISSION**

Docket No. OS-14

**INITIAL BRIEF
OF
SOUTHERN CALIFORNIA EDISON COMPANY**

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF POSITIONS	4
II. BACKGROUND AND PROCEDURAL HISTORY	5
III. ARGUMENT	8
A. Section 7(g) Of The Northwest Power Act Requires Fish And Wildlife Costs And Costs Incurred Due To BPA's Inability To Sell Excess Electric Power Be Allocated To Power Rates.....	8
B. Oversupply Costs are Incurred Due to Statutory Obligations to Protect Fish and Wildlife and The Inability of BPA to Sell Excess Power.	10
C. Transmission's effect on oversupply costs – if any – is not causal to the oversupply problem and does not change the nature of the costs.	12
D. The Transmission System Act Does Not Govern Allocation of Fish and Wildlife/Excess Power Costs.	13
E. Comparability of Transmission Service Can Only be Assured by Recovering OMP Costs From Power Customers.	15
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Golden Northwest Aluminum, Inc. v. BPA</i> 501 F.3d 1037 (9 th Cir. 2007).....	9
<i>Northwest Forest Resource Council v. Glickman</i> 82 F.3d 825 (9 th Cir. 1996).....	9
<i>Central Lincoln People’ Utilities Dist. v. Johnson</i> 735 F.2d 1101 (9 th Cir. 1984).....	9
<i>Connecticut National Bank v. Germaine,</i> 503 U.S. 249 (1992)	14
<i>United States v. Ron Pair Enterprises, Inc.</i> 489 U.S. 235 (1989)	14

Statutes

Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. Chapter 12(h), (“NWPA” or “Northwest Power Act”) 16 U.S.C. §839, et seq.	<i>passim</i>
Federal Power Act Section 211A, 16 USC §824j-1 (“FPA §211A”).....	4, 5, 7,15
Federal Columbia River Transmission System Act, 16 U.S. C. Chapter 12(g).....	10, 13

FERC Orders

<i>Iberdrola Renewables, Inc., et al v. BPA</i> 141 FERC ¶ 61,234 (2012), <i>reh’g denied</i> , 143 FERC ¶ 61,274 (2013).....	<i>passim</i>
<i>U.S. Dept. of Energy - Bonneville Power Admin.</i> 36 FERC ¶ 61,335 (1986)	9

Legislative History

Testimony of Messrs.’ Scott, Short and Smith, HEARINGS BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES NINETY-FIFTH CONGRESS SECOND SESSION ON H.R. 13931, Serial No. 95-193 pp. 282- 83.....	14
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I. INTRODUCTION AND SUMMARY OF POSITIONS

This initial brief is submitted by Southern California Edison Company (“SCE”) in Bonneville Power Administration’s (“BPA”) proceeding to allocate costs from its Oversupply Management Protocol (“OMP”), docketed as OS-14. SCE is responsible for scheduling and transmitting significant amounts of power from wind-powered electrical generation facilities located within BPA’s Balancing Authority Area (“BAA”), specifically the Caithness Shepherds Flat wind facilities, which are among the largest wind facilities in the country. However, SCE does not own any generation facilities within BPA’s BAA, or serve any load within BPA’s BAA. SCE has been an active participant in this proceeding, and SCE appreciates the efforts of BPA and its staff working in an attempt to fulfill its obligations in a fair, equitable and lawful manner.

In numerous filings and statements, BPA has consistently asserted that its OMP is a “fish and wildlife measure” necessary for BPA to comply with statutory obligations to protect fish and wildlife under circumstances in which BPA has excess power. Section 7(g) of the Northwest Power Act¹ dictates that costs for fish and wildlife measures, as well as costs incurred because of BPA’s inability to sell excess power, must be allocated to power rates. The statute provides no discretion. Attempts by parties to assign proximate cause to other factors, such as growth of the wind generation industry, does not change this fact. The OMP is a fish and wildlife and excess power measure, and is not, and has never been, a transmission issue.

Allocation of the costs incurred due to the OMP (“OMP Costs”) to power customers is also the appropriate way to treat all transmission customers in a fair and non-discriminatory manner, as required by Section 211A of the Federal Power Act (“FPA”).² Even in the unlikely event that OMP Costs were deemed not to be “fish and wildlife” costs, none of the proposals that allocate OMP Costs to transmission customers equitably allocate such costs across all transmission customers and BPA’s native load, and therefore are contrary to the requirements of Section 211A of the FPA.

¹ Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. Chapter 12(h), (“NWPA” or “Northwest Power Act”).

² Federal Power Act Section 211A, 16 USC §824j-1 (“FPA §211A”).

In sum, both the statutory mandate of Section 7(g) of the NWPA and the comparability provisions of Section 211A of the FPA require that OMP Costs be allocated to BPA's power customers. No other cost allocation will survive legal challenge, and adoption of any other mechanism will simply mire the region in continued costly and time-consuming litigation.

II. BACKGROUND AND PROCEDURAL HISTORY

At issue in this case is the proper allocation of rates for recovery of BPA's costs to comply with its OMP. BPA states that the purpose of its OMP is:

to ensure the Federal Columbia River Power System (FCRPS) is operated consistently with the "Clean Water Act" and the "Endangered Species Act" obligations, as well as BPA's obligations under the "Pacific Northwest Electric Power Planning and Conservation Act," (under specific hydro and load conditions) and after all available mitigation measures, such as those described in section 2 of Attachment P, have been implemented. When these conditions exist, BPA will issue orders to generators and replace scheduled generation in BPA's Balancing Authority Area (BAA) with Federal hydropower.³

In the OS-14 docket, BPA initially proposed a mechanism under which fifty percent of such costs would be borne by power customers and fifty percent of such costs would be borne by only one segment of transmission customers (BPA's "Initial Proposal").⁴ While this proceeding was pending, however, the Federal Energy Regulatory Commission ("Commission" or "FERC") issued an order in a related proceeding partially addressing the proposed cost allocation methodology ("FERC OMP Order").⁵ In the FERC OMP Order, the Commission found that BPA's proposed cost sharing mechanism would result in unduly discriminatory rates for transmission service.⁶ The Commission further explained that it was "not persuaded that a 50/50 sharing of displacement costs results in comparable transmission service for displaced wind

³ BPA's Oversupply Management Protocol, version 4, available on line at http://transmission.bpa.gov/ts_business_practices/Content/9_Redispach_and_Curtailment/Oversupply_mgt_protocol.htm

⁴ Fredrickson, et al., OS-14-E-BPA-01.

⁵ *Iberdrola Renewables, Inc., et al v. BPA*, 141 FERC ¶ 61,234, at P 45 (2012) ("FERC OMP Order"), *reh'g denied*, 143 FERC ¶ 61,274 (2013) ("OMP Rehearing Order"). In the FERC proceeding, BPA filed its OMP, which was conditionally accepted by FERC. In that same filing, BPA described its proposed cost allocation methodology in the OS-14 proceeding for informational purposes only, without intending the Commission to rule on the merits of the cost allocation methodology until the Oversupply Rate Case was completed.

⁶ FERC OMP Order, at P 45.

generators,” and therefore ordered BPA to submit a compliance filing “setting forth a methodology to allocate displacement costs in a manner that equitably allocates such costs to all firm transmission customers based on their respective transmission usage during oversupply situations, or setting forth a different method altogether that ensures comparability in the provision of transmission service by Bonneville.”⁷

Pending rehearing of the FERC OMP Order, parties to this proceeding had the opportunity to file Narrative Statements (now entered into the record) proposing alternative cost methodologies. The Narrative Statements filed by parties generally fell into three distinct categories: (1) those proposing to allocate all OMP Costs to the transmission function and melding the costs into existing transmission rates; (2) those proposing to allocate all OMP Costs to the power function and melding the costs into the existing power rates; and (3) those proposing to allocate all OMP Costs to the transmission function and developing a new rate based on the generation within BPA’s BAA that is on line during the oversupply events.⁸

After review of the Narrative Statements, BPA Staff submitted Supplemental Testimony, proposing a new cost allocation proposal. In the Supplemental Proposal, BPA did not adopt any of the positions proposed by parties in the Narrative Statements.⁹ Instead, BPA Staff essentially proposed to allocate costs to all customers using BPA’s transmission system during oversupply event hours.¹⁰

Various parties filed direct testimony subsequent to the BPA Staff’s Supplemental Testimony. Again, such testimony largely took the position either that all costs should be borne by power customers or all should be borne by transmission customers.¹¹ Notably, some of the entities arguing that the OMP Costs should be borne by transmission customers interpreted the FERC OMP Order as requiring, or at least allowing, the allocation of OMP Costs to transmission customers.¹²

⁷ *Id.*, at P 46 (internal citations omitted).

⁸ *See* Parker, *et al.*, OS-14-E-BPA-02, p. 10, lines 20-25.

⁹ Parker, *et al.*, OS-14-E-BPA-02, p. 3, lines 19-23.

¹⁰ *See* Parker, *et al.*, OS-14-E-BPA-02; Metcalf, *et al.*, OS-14-E-BPA-03, p. 1, lines 23-35.

¹¹ *See, e.g.*, Yourkowski, *et al.*, OS-14-E-RN-1, p. 1, line 19 – p. 2, line 1 (recommending allocation to power rates); Bedbury, *et al.*, OS-14-E-WG-01, p. 17, lines 15-17 (recommending allocation to general costs of transmission system).

¹² *See, e.g.*, Baker, *et al.*, OS-14-E-JP03-01, p. 4, line 4 – p. 5, line 11.

Subsequent to the filing of testimony, the Commission issued the OMP Rehearing Order, in which it explained that, contrary to the positions taken by some entities in testimony, FERC did not address the issue of whether BPA could allocate these costs to transmission customers pursuant to its governing statutes, nor did it make a finding that allocation of any such costs to transmission customers was appropriate. Instead, the Commission clarified that:

With respect to the guidance provided in the Compliance Order regarding the cost allocation methodology, we found there, and continue to find here, that Bonneville has not demonstrated how a 50/50 cost sharing arrangement would result in comparable transmission service for generating resources connected to Bonneville's system. Neither Joint Intervenor nor Bonneville raise any arguments on rehearing that convince us that allocating half of the displacement costs to wind generation that represents only a fraction of the firm transmission service provided during oversupply conditions achieves comparable transmission service consistent with the Commission's directive. *Further, we emphasize that the Commission did not make any findings with regard to a cost allocation methodology based on transmission usage during oversupply conditions.*¹³

The Commission went on to state that the "Compliance Order did not make, and should not be interpreted as making, any determination as to the lawfulness, under any provisions other than section 211A, of allocating OMP-related costs to transmission rates."¹⁴

Subsequent to the Commission's OMP Rehearing Order, various parties filed rebuttal testimony, including BPA Staff, which presented a new proposal (the "Rebuttal Proposal"). Unlike the position set forth in the Supplemental Proposal, which spread costs to all transmission customers, Staff's Rebuttal Proposal allocates OMP Costs only to transmission customers taking power from generation within BPA's BAA. Because the Rebuttal Proposal was first espoused in rebuttal testimony, parties did not have an opportunity to address the proposal prior to this brief. In addition, BPA Staff made clear that, in making the Rebuttal Proposal, it was not withdrawing the Supplemental Proposal, but was offering another proposal for the Administrator's consideration.¹⁵

To summarize, BPA Staff thus far has offered three distinctly different allocation proposals: (1) the Original Proposal, allocating fifty percent of the OMP Costs to power customers

¹³ OMP Rehearing Order at p. 39 (emphasis supplied).

¹⁴ OMP Rehearing Order at p. 41.

¹⁵ See Metcalf, et al., OS-14-E-BPA-03; Data Response to TC-BPA-2.

and fifty percent of OMP Costs to one subset of transmission customers (the wind generators); (2) the Supplemental Proposal, allocating costs to all transmission customers, including transmission customers that do not have generation or load within Bonneville's BAA; and (3) the Rebuttal Proposal, allocating costs just to transmission customers based on their generation displaced within BPA's BAA during oversupply events. Some of BPA's preference customers generally support some allocation of costs to transmission customers. Virtually all transmission customers on BPA's system have argued that BPA is required by statute to allocate OMP Costs to power customers.¹⁶

III. ARGUMENT

A. Section 7(g) Of The Northwest Power Act Requires Fish And Wildlife Costs And Costs Incurred Due To BPA's Inability To Sell Excess Electric Power Be Allocated To Power Rates

Stripped of rhetoric, it is clear that Bonneville's OMP Costs can be categorized in only two ways: They are (1) fish and wildlife costs incurred because of BPA's responsibility to protect fish from excess levels of total dissolved gas ("TDG"); and/or (2) costs incurred due to BPA's inability to sell excess electric power generated because BPA is prevented (due to its fish and wildlife obligations) from reducing its generation to match available load. In either case, BPA's governing statutes dictate that these costs be allocated only to power rates. In the Northwest Power Act, Congress clearly manifested its intent that the cost of both fish and wildlife measures and excess power supply costs be allocated to power rates. Section 7(g) of the Northwest Power Act states:

Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on December 5, 1980, or by other provisions of this section, the Administrator *shall equitably allocate to power rates*, in accordance with generally accepted ratemaking principles and the provisions of this chapter, *all costs and benefits not otherwise allocated under this section*, including, but not limited to, conservation, *fish and wildlife measures*, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 839d of this

¹⁶ See, e.g., Caithness Shepherds Flat, LLC, OS-14-E-CS-01, pp. 2, 4, 18; Iberdrola Renewables LLC, OS-14-E-IR-01, pp. 9, 29; Joint Party 5 OS-14-E-JP05-19 01, p. 2; Powerex Corp., OS-14-E-PX-01, pp. 7, 11, 17; Renewable Northwest Project, 20 OS-14-E-RN-01, pp. 1.

title, the cost of credits granted pursuant to section 839d of this title, operating services, and *the sale of or inability to sell excess electric power*.¹⁷

The use in the Northwest Power Act of the phrase “*shall* allocate to power rates *all* costs and benefits ...including conservation, fish and wildlife measures ... and the sale or of inability to sell excess electric power”¹⁸ sets forth a *mandatory* obligation to allocate fish and wildlife costs and the sale or inability to sell excess power to power rates only.¹⁹ Accordingly, *all* costs and benefits of fish and wildlife measures, and *all* costs and benefits related to “the sale of or inability to sell excess electric power” to power customers, must be allocated to power rates. BPA’s own characterization of the OMP establishes that OMP Costs are fish and wildlife measures required because BPA has excess power that it cannot sell (or must sell at negative prices). The statute makes it clear that under either of those circumstances, all costs *must* be allocated to power rates, not to transmission rates.

On the face of the governing statute, BPA does not have discretion to allocate any portion of the OMP Costs to transmission rates. The U.S. Court of Appeals for the Ninth Circuit has confirmed the interpretation that Section 7(g) of the Northwest Power Act requires the allocation of the enumerated power system costs, including costs associated with fish and wildlife mitigation measures, to power customers.²⁰ As stated by the 9th Circuit in *Golden Northwest Aluminum, Inc.*,²¹ the NWPA requires BPA to “take into account its fish and wildlife obligations when it sets its wholesale power rates. Rates must be high enough to ensure that BPA will recover its total costs, including costs associated with ‘fish and wildlife measures.’”

BPA itself has provided support for this position by stating in at least one Final Record of Decision that Section 7(g) mandates the allocation of any *benefits* related to these categories (*i.e.*,

¹⁷ 16 U.S.C. § 839e(g) (emphasis added).

¹⁸ Northwest Power Act, Section 7(g).

¹⁹ See, e.g., *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996) (noting that the term “shall” in statutory construction constitutes mandatory action).

²⁰ See, e.g., *Central Lincoln Peoples’ Utility Dist. v. Johnson*, 735 F.2d 1101, 1123-1124 (9th Cir. 1984) (“Section 7(g) states that unless otherwise provided, costs and benefits, including fish and wildlife measures, shall be equitably allocated to power rates.”); *U.S. Dept. of Energy - Bonneville Power Admin.*, 36 FERC ¶ 61,335, at 61,810 (1986) (“Concerning the section 7(g) argument by the California parties [that section 7(g) of the Regional Act bars the inclusion of fish and wildlife costs in nonfirm rates because it requires that such costs be allocated to regional customers], we agree with BPA that the language and legislative history of section 7(g) do not support the California parties’ interpretation. Section 7(g) refers simply to the allocation of costs to power rates and not specifically to allocation of costs to firm power rates.”) (internal citation omitted).

²¹ *Golden Northwest Aluminum, Inc. v. BPA*, 501 F. 3d 1009 (9th Cir. 2007) (“*Golden Northwest Aluminum, Inc.*”).

surplus power revenues) solely to power rates.²² Because Section 7(g) applies equally to the benefits *and* the costs associated with fish and wildlife measures and the sale of or inability to sell excess electric power, the costs of these measures also may only be allocated to power rates. Even if the statute was not clear that BPA must allocate OMP Costs to power sales, it surely would not be equitable to allocate some costs to transmission rates, but not allocate a share of the benefits.

B. Oversupply Costs are Incurred Due to Statutory Obligations to Protect Fish and Wildlife and The Inability of BPA to Sell Excess Power.

BPA has consistently taken the position that the OMP is necessary to protect fish and other aquatic species. When BPA cannot sell excess power (or must sell at negative prices) – *i.e.*, has an oversupply – it implements the OMP in order to prevent spillage and total dissolved gas levels beyond those permitted by the Clean Water Act and numerous other relevant statutes.²³ The first line of the OMP itself establishes that purpose: “This attachment establishes requirements and procedures used to moderate TDG levels in the Columbia River *to protect endangered fish and other aquatic species*.”²⁴ BPA’s Business Practice for OMP similarly states that the “purpose of Oversupply Management Protocol” is “to ensure the . . . [FCRPS] is operated consistently with the ‘Clean Water Act’ and the ‘Endangered Species Act’ obligations, as well as BPA’s obligations under the ‘Pacific Northwest Electric Power Planning and Conservation Act,’ (under specific hydro and load conditions) and after all available mitigation measures . . . have been implemented.”²⁵

²² See, e.g., 2007 Supplemental Wholesale Power Rate Case, Administrator’s Final Record of Decision, WP-07-A-05 at 346 (Sept. 2008); 2010 Wholesale Power and Transmission Rate Adjustment Proceeding (BPA-10), Administrator’s Final Record of Decision, WP-10-A-02; TR-10-A-02, at p. 308 (Jul. 2009) (“Section 7(g) of the Northwest Power Act specifically requires that secondary sales revenues be equitably allocated to *power rates*. 16 U.S.C. § 839 e(g). Wind Balancing Service is not a power rate. Thus, there is no need to revisit the issue of crediting Wind Balancing Service with secondary sales revenues.”) (Emphasis added).

²³ See, e.g., Bonneville’s Interim Environmental Redispatch and Negative Pricing Policy, Administrator’s Final Record of Decision, issued May 2011 (“Environmental Redispatch Final ROD”), at p. 1 (“Environmental Redispatch is designed to ensure BPA is taking all reasonable efforts to meet its legal responsibilities under the Clean Water Act [], Endangered Species Act [], and court order [], as well as BPA’s legal obligations under its authorizing legislation, such as the Pacific Northwest Electric Power Planning and Conservation Act [], the Federal Columbia River Transmission System Act [], the Pacific Northwest Power Preference Act [], and the Bonneville Project Act [], under specific hydro and load conditions, and after all reasonably practicable mitigating measures have been implemented.”).

²⁴ BPA’s Open Access Transmission Tariff, Attachment P (Oversupply Management Protocol) (emphasis added), <http://www.bpa.gov/Projects/Initiatives/Oversupply/Pages/default.aspx>.

²⁵ See, e.g., OS-14-E-PX-01-AT03 (BPA’s Business Practice for Oversupply Management Protocol, v. 4 (effective May 13, 2013)); Testimony of MacDougall, OS-14-E-PX-1, p. 7, line 12-14.

This concept is echoed in BPA Staff's initial testimony in this proceeding, which states that the OMP is necessary because:

The Clean Water Act (CWA), the Endangered Species Act (ESA), and associated court orders limit the amount of spill over the dams to protect the river's aquatic life, including salmon, steelhead, sturgeon, bull trout, and other species listed under the ESA, as well as non-listed species. Too much spill injects dangerous amounts of nitrogen into the water that can harm fish by causing gas bubble trauma. As a result, the states of Washington and Oregon have used their authority under the CWA to set water quality standards, including total dissolved gas levels. In order to meet its legal responsibilities under the CWA and the ESA, BPA must take all reasonable actions to avoid excess spill and keep total dissolved gas levels within the water quality standards set by the states.²⁶

BPA has made similar representations in its pleadings before the Commission,²⁷ and in its Final Record of Decision on its precursor Interim Environmental Redispatch and Negative Pricing Policies.²⁸

BPA also has made similar representations in other forums. In particular, BPA Staff takes the express position in its testimony that oversupply costs are eligible to be offset through the provisions of Section 4(h)(10)(c) of the Northwest Power Act.²⁹ Section 4(h)(10)(c) specifically applies to fish and wildlife costs, and not to transmission or other costs. For example, in response to a data request, BPA provided copies of the annual letter submitted by BPA requesting recovery of Section 4(h)(10)(c) costs, noting clearly that these are for allocation of fish and wildlife costs, as well as the reply from the Department of Treasury approving such costs for fiscal year 2012, including the express statement that, "The FY 2012 4(h)(10)(C) credits result from fish and

²⁶ Fredrickson, *et al.*, OS-14-E-BPA-01, p. 3, lines 6-14.

²⁷ See, e.g., Answer of the Bonneville Power Administration, filed in Docket No. EL-44-000, July 19, 2011, at p. 8 ("The Policies [precursor to OMP] are narrowly tailored to ensure that, consistent with Bonneville's contracts, the agency can meet its reliability requirements, its legal responsibilities under the Clean Water Act, Endangered Species Act, and Federal court order, and its statutory responsibilities under the Northwest Power Act, when high stream flows, wind generation, and insufficient load combine to endanger fish protected under Federal environmental law.").

²⁸ Environmental Redispatch Final ROD, at p. 14 ("BPA would perform Environmental Redispatch only as a last resort to avoid harm to listed salmon and other aquatic species during high water periods that result in overgeneration in the BPA Balancing Authority Area and dangerous TDG levels in the Columbia River system, and to provide options to reduce generation in BPA's Balancing Authority Area in order to maintain system reliability, while meeting its environmental and statutory responsibilities.").

²⁹ Parker, *et al.*, OS-14-E-BP-02, p. 14, lines 10 -19.

wildlife costs incurred by Bonneville for (1) direct fish and wildlife program operations and maintenance costs; (2) direct fish and wildlife program capital costs [], and cost of power purchases made to replace the electrical system's firm generating capability lost due to fish mitigation measures."³⁰ Clearly, BPA continues to believe that such costs are fish and wildlife costs, given that it will seek recovery for such costs under Section 4(h)(10)(C) and continue to represent this as the case to the Department of the Treasury. BPA has consistently maintained that the OMP is necessary as a fish and wildlife measure, taken when BPA's system has excess power, and the costs of such measures must be borne accordingly.

At least some of BPA's public power customers have also acknowledged that these costs are "fish and wildlife costs." For example, the Western Public Agencies Group's testimony states that "We agree that the costs BPA incurs managing oversupply events can be categorized as fish and wildlife costs."³¹ Similarly, Joint Party 3 ("JP03")³² notes that the "cause" of BPA's need to displace other generation through the OMP is BPA's obligation to operate the FCRPS for non-power uses and to minimize spill to mitigate the creation of excessive TDGs.³³

C. Transmission's effect on oversupply costs – if any – is not causal to the oversupply problem and does not change the nature of the costs.

Despite the seeming clear recognition that OMP Costs are fish and wildlife/excess power costs, various parties argue that other factors contribute to the existence of the oversupply problem. For example, BPA Staff contends that the "cause of oversupply" is "the use of BPA's transmission system during oversupply events."³⁴ Similarly, BPA Staff has stated that it is their understanding that "BPA's fish and wildlife obligations require mitigation of the effect that integration of wind generation into BPA's transmission system has on increasing the TDG levels in the Columbia River basin during the fish passage seasons."³⁵ These arguments are simply attempts to recast the OMP in a manner that avoids the mandate of Section 7(g) and to allocate costs in a manner contrary to express law.

³⁰ See BPA's letter for calendar year 2012 and the Treasury Department's response thereto, Exhibit 1 OS-14-E-SC-01.

³¹ Bedbury, *et al.*, OS-14-E-WG-02, p. 18, lines 4-5.

³² JP03 consists of the Public Power Council, Northwest Requirements Utilities, Industrial Customers of Northwest Utilities, Eugene Water & Electric Board, Public Utility District No. 1 of Cowlitz County, Washington, and Alcoa Inc.

³³ Baker, *et al.*, OS-14-JP-03-02, p. 3, lines 1-5.

³⁴ Data Request Response to IR-BPA-15.

³⁵ Data Request Response to JP05-BPA-8.

As BPA's witnesses acknowledged in several responses to data requests, the OMP is not the result of transmission availability or lack of transmission capacity, and BPA does not identify any transmission reliability issues associated with the OMP.³⁶ BPA Staff has confirmed that oversupply events are not associated with transmission reliability.³⁷ BPA Staff further confirms that "oversupply is too much electricity relative to load, not a lack of transmission capacity."³⁸ OMP is simply not a transmission issue.

Indeed, neither the addition of new transmission facilities within BPA's BAA nor the reduction in existing transmission facilities would have any impact in OMP Costs: Additional transmission, without any change in load, would have no impact on the level of turbidity in the FCRS or on BPA's need to place its excess power supply because of its fish and wildlife obligations.

Some parties to this proceeding argue that BPA's adoption of open access transmission policies, the growth of wind generation within BPA's BAA, and other factors have the effect of increasing the overall level of costs faced by BPA in managing its oversupply.³⁹ But even if accurate, these factors do not change the fundamental fact that, as BPA itself has asserted, the OMP is a "fish and wildlife measure," necessary for BPA to comply with statutory obligations to protect fish and wildlife under circumstances in which BPA has excess power.

D. The Transmission System Act Does Not Govern Allocation of Fish and Wildlife/Excess Power Costs.

In addition to making unconvincing arguments that OMP Costs may be attributable to factors other than fish and wildlife, some parties to this proceeding attempt to ignore the clear mandate of Section 7(g) by raising contorted statutory arguments that do not pass muster. For example, JP03 argues that the Transmission System Act ("TSA")⁴⁰ was in effect prior to the effective date of the Northwest Power Act, and therefore the TSA supersedes the express mandate within Section 7(g) that fish and wildlife and excess power costs be allocated to power.⁴¹

³⁶ See Mecalf, *et al.*, OS-14-E-BPA-03, p. 11, lines 16-26; BPA Response to Data Request CS-BPA-4, OS-14-E-CS-02-V01 at 9; BPA Response to Data Requests IR-BPA-9 and IR-BPA-10, OS-14-E-IR-02 at 2.

³⁷ BPA Response to Data Requests IR-BPA-9; Bean, *et al.*, OS-14-E-IR-01, p. 13, lines 6-8.

³⁸ Data Request Response IR-BPA-10; OS-14-E-BPA-01, at 2, lines 12-13.

³⁹ See, e.g., Direct Testimony of Western Public Agencies, OS-14-E-WG-01, p. 4, lines 3-14; Parker, *et al.*, OS-14-E-BPA-02, p. 5, lines 5-10.

⁴⁰ Federal Columbia River Transmission System Act, 16 U.S.C. Chapter 12(g) ("Transmission System Act").

⁴¹ See JP03 Narrative Statement, OS-14-P-JP03-01, at p. 13.

Although Section 7(g), by its terms, does not apply “to the extent that the allocation of costs and benefits is governed by provisions of law in effect on December 5, 1980,” neither JP03 nor any other party has pointed to any pre- December 5, 1980 allocation that would govern these costs. The fact that Congress specifically identified costs related to fish and wildlife measures and to the inability to sell excess power makes it incontrovertibly clear that such costs are covered by this provision. And, nowhere else in any of BPA’s statutes does Congress address allocation of fish and wildlife measures before December 5, 1980. In fact, the legislative history of the Northwest Power Act notes that there was no statutory requirement of any kind prior to the Northwest Power Act or any affirmative role on the part of the Administrator “having anything to do with the fish and wildlife resources in the river other than the general impact of NEPA.”⁴² As such, the suggestion that allocation of fish and wildlife costs were governed by provisions of law predating the Northwest Power Act is inaccurate.

JP03’s argument that Section 7(g) does not apply to OMP Costs also is based on a fatal logical flaw: JP03, without support, uses a tautology to define the OMP Costs as transmission costs, and therefore (according to JP03), not subject to allocation under Section 7(g). However, notwithstanding JP03’s attempt to rename the costs, they remain properly categorized as fish and wildlife costs, subject to Section 7(g). JP03’s proposal to just “wish away” this result by calling fish and wildlife costs “transmission costs” is improper.

Moreover, JP03’s argument fails under the rules of basic statutory construction. The Supreme Court has found “time and time again that courts must presume that a legislature says in a statute what it means, and means in a statute what it says there.”⁴³ In Section 7(g), Congress clearly and plainly dictated that the Administrator “shall allocate to power rates ... all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures ... and the sale or inability to sell excess electric power.”

⁴² Testimony of Messrs.’ Scott, Short and Smith, HEARINGS BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES NINETY-FIFTH CONGRESS SECOND SESSION ON H.R. 13931, Serial No. 95-193 p. 282-283 (excerpt attached hereto as Appendix A for convenience of the parties).

⁴³ *Connecticut National Bank v. Germaine*, 503 U.S. 249, 254 (1992); *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241-242 (1989).

E. Comparability of Transmission Service Can Only be Assured by Recovering OMP Costs From Power Customers.

In the FERC OMP Order, the Commission ordered BPA to set forth, in its compliance filing, a rate methodology for the OMP that allocates displacement costs in a manner “that ensures comparability in the provision of transmission service by Bonneville.”⁴⁴ The Commission held that an allocation of 50 percent of OMP Costs to wind generators (and not to other transmission customers) was not comparable service, and directed BPA to offer a different solution. And, as described above, the Commission reiterated that its finding only addressed that specific proposal, and did not prejudge whether any allocation to transmission customers would be permissible under the governing statutes.⁴⁵

Neither the Supplemental Proposal nor the Rebuttal Proposal result in an equitable allocation of displacement costs or provide comparable transmission service that is not unduly discriminatory or preferential with respect to at least one set of customers. Under both proposals, transmission customers are asked to pay a rate equal to the rate paid by Bonneville’s own generation, but the transmission customers are subject to interruption and receive a vastly inferior service. Paying the same rate for inferior service does not produce comparability of rates or services. Both proposals also discriminate between and among transmission customers. For example, the Supplemental Proposal allocates OMP Costs to all transmission customers, including transmission customers that have neither generation nor load in BPA’s BAA and do not receive any credit for interrupted generation. Other transmission customers receive compensation for any interruption from OMP. This disparate treatment does not produce an equitable allocation of displacement costs.

The Rebuttal Proposal discriminates between and among transmission customers by requiring them to pay for costs to cover payments to which only some transmission customers are eligible to receive. For example, consider two otherwise identical transmission customers, one of which sources power from a generator within Bonneville’s BAA and one of which sources power from another BAA. The first would bear the cost of OMP, the second would not. Each of these entities is attempting to make identical use of the transmission system – charging one entity for OMP Costs and not charging the other is discriminatory.

⁴⁴ FERC OMP Order, 141 FERC ¶ 61,234, at P 46.

⁴⁵ *See, e. g.*, OMP Rehearing Order, at P 41.

Of the options proffered, allocating all OMP Costs to power rates is the only mechanism that “*ensures comparability in the provision of transmission service*” and equitably allocates costs to all firm customers.⁴⁶ By allocating OMP Costs to power sales (as required by statute), BPA ensures that all transmission customers receive comparable rates for use of the Federal transmission system.⁴⁷ All customers, whether public entities, thermal generators, wind generators, entities providing third party balancing services, *etc.*, will pay their share of transmission costs for the transmission service they purchase, without subsidizing BPA’s power sales or other transmission customers. That allocation of costs would be equitable and fair, and would assure that no transmission customer is subsidizing another transmission customer with respect to use of the transmission system.

Any allocation approach that attempts to place portions of the OMP Costs unevenly on various segments of transmission customers creates a *per se* violation of the comparability requirement. By following the requirements of the Northwest Power Act and applying such costs to power rates, BPA can assure that all transmission customers receive transmission service at the same rate, without regard to the costs for fish and wildlife remediation. It is the only solution that meets statutory requirements.

IV. CONCLUSION

SCE respectfully urges the Administrator to allocate OMP Costs to power customers, as required by the Northwest Power Act and other arguments contained herein.

Dated: August 28, 2013

Respectfully submitted,

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⁴⁶ FERC OMP Order, 141 FERC ¶ 61,234, at P 46 (emphasis added).

⁴⁷ SCE is not addressing in this brief arguments regarding whether the non-rate aspects of the OMP program violate the comparability requirements of Section 211A of the FPA, but reserves all rights to do so in the appropriate forum.

APPENDIX A

Excerpt from Congressional Record, Testimony of Messrs.' Scott, Short and Smith, HEARINGS BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES NINETY-FIFTH CONGRESS SECOND SESSION ON H.R. 13931, Serial No. 95-193 pp. 282- 83

PACIFIC NORTHWEST ELECTRIC POWER ISSUES

HEARINGS **BEFORE THE** **SUBCOMMITTEE ON ENERGY AND POWER** **OF THE** **COMMITTEE ON** **INTERSTATE AND FOREIGN COMMERCE** **HOUSE OF REPRESENTATIVES** **NINETY-FIFTH CONGRESS**

SECOND SESSION

ON

H.R. 13931

A BILL TO ASSIST THE ELECTRICAL CONSUMERS OF THE PACIFIC NORTHWEST THROUGH USE OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM TO ACHIEVE COST-EFFECTIVE ENERGY CONSERVATION, TO ENCOURAGE THE DEVELOPMENT OF RENEWABLE RESOURCES, TO ESTABLISH A REPRESENTATIVE REGIONAL POWER PLANNING PROCESS, TO ASSURE THE REGION OF AN EFFICIENT AND ADEQUATE POWER SUPPLY, AND FOR OTHER PURPOSES

SEPTEMBER 19, 27, DECEMBER 11, 13, AND 14, 1978

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CONTENTS

Hearings held on—	Page
September 19, 1978.....	1
September 27, 1978.....	181
December 11, 1978 (Seattle, Wash.).....	309
December 13, 1978 (Portland, Oreg.).....	515
December 14, 1978 (Boise, Idaho).....	815
Text of—	
H.R. 13931.....	4
Statement of—	
Altman, Roger C., Assistant Secretary for Domestic Finance, Department of the Treasury.....	26
Attneave, Chris, Eugene Future Power Committee, Inc.....	543, 545
Bardin, David J., Administrator, Economic Regulatory Administration, Department of Energy.....	36, 40
Baucus, Hon. Max, a Representative in Congress from the State of Montana.....	181, 190
Bertrand, Dan, president, North Central Washington Central Labor Council.....	369, 398
Bogard, Becky, legislative counsel, National Rural Electric Cooperative Association.....	205
Boldt, Jim, executive director, Washington Public Utility Districts' Association.....	441
Bonker, Hon. Don L., a Representative in Congress from the State of Washington.....	311
Bottinger, R. Ted, chairman, Washington State's Committee on Energy and Utilities.....	314
Brown, Hon. Walter F., Oregon State senator.....	661, 705
Bruce, James E., president, Idaho Power Co.....	853
Canfield, Monte E., Jr., Director, Energy and Minerals Division, General Accounting Office.....	36, 126
Carlson, Jack, vice president, Washington State Commercial Passenger Fishing Vessel Association.....	483, 506
Castle, Del, Seattle Longshoreman's Union.....	414, 427
Cavanaugh, Frank, senior staff, Department of the Treasury.....	26
Cellarius, Richard, member, board of directors, Sierra Club.....	369, 395
Chaney, Ed, director, Northwest Resource Information Center, Inc.....	876, 879
Chatburn, Hon. J. Vard, representative, State of Idaho.....	836
Clack, David A., board chairman and president, Old National Bank-corporation.....	441, 461
Coffey, Forrest G., public affairs director, The Boeing Co.....	414, 419
Criswell, Jack R., on behalf of Public Power Council, and Northwest Public Power Association.....	205
Curtis, Henry G., consultant, on behalf of BPA Industrial Customers.....	876
Davidson, C. Girard, Portland, Oreg.....	802, 809
Dicks, Hon. Norman D., a Representative in Congress from the State of Washington.....	312
Donaldson, John R., chairman, Columbia River Fisheries Council.....	717, 742
Dorran, Russell N., manager, Umatilla Electric Cooperative Association.....	717
Drapkin, Dennis, Senior Staff, Department of the Treasury.....	26
Duncan, Hon. Robert, a Representative in Congress from the State of Oregon, on behalf of Hon. Robert W. Straub, Governor, State of Oregon.....	181, 518
Eckman, Tom, chairperson, energy committee, Washington Environmental Council.....	441, 462
Ellis, John W., president, Puget Sound Power & Light Co.....	369, 372

IV

Statement of—Continued

	Page
Evans, Hon. John V., Governor, State of Idaho.....	181, 184, 816
Farley, Michael, executive director, Common Cause.....	543, 551
Farrell, Russell C., Portland, Ore.....	805, 805
Ferrie, Robert, president, Itarco Aluminum Corp.....	369, 383
Ford, Pat, Idaho Conservation League.....	853, 861
Frisbe, Don C., board chairman, president, Pacific Power & Light Co.....	661, 698
Germond, Norma Jean, Lake Oswego, Ore.....	625
Gill, Rockne, counsel, Public Power Council.....	205
Girmus, Ben, Estacada, Ore.....	625, 635
Goldschmidt, Hon. Neil, mayor, city of Portland.....	640
Granger, Richard, chairman, Washington State Association of Counties Energy Committee.....	314, 323
Hale, Leland, energy project coordinator, Western Environmental Trade Association of Washington.....	441, 465
Haley, Wendell P., Oregon division, Izaak Walton League of America.....	717, 771
Hall, Kirk, director, office of energy, State of Idaho.....	181, 816
Harville, John P., executive director, Pacific Marine Fisheries Commission.....	661, 692
Helton, Harry V., northwest operations manager, Reynolds Metal Co.....	543, 553
Henderson, Mrs., Ore.....	783, 794
Higgs, Kenneth, U.S. Fish and Wildlife Service, Office of the Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.....	836, 838
Hohl, Joan, energy research coordinator, Washington Public Interest Research Group.....	369
Holmes, Paul, program coordinator, Oregon-Washington division, National Farmers Union.....	717, 718
Hudson, Edward G., president, Puget Sound Council of Governments, and cochairman, Local Government Northwest Electrical Energy Task Force.....	314, 319
Ivancie, Francis J., commissioner, department of public utilities, Portland, Ore.....	284, 519
Jones, Allen, coordinator, Northwest Energy Options.....	441, 448
Jones, Herschel F., on behalf of Seattle Chamber of Commerce.....	483, 508
Kahn, Stan, Portland, Ore.....	802
Kempton, M. H., president, board of directors, Raft River Electric Cooperative.....	853, 864
Lamson, Robert D., executive vice president, Spencer Products Co.....	483
Landry, Arlene, Portland, Ore.....	625, 631
Lee, Kai, institute for environmental studies, University of Washington.....	483, 488
Lynch, Tom, Eugene, Ore.....	802, 803
McClain, David W., research analyst, Oregon Institute of Technology.....	876, 886
McKean, John W., member, Pacific Fishery Management Council.....	783, 796
McCormick, Hon. Mike, a Representative in Congress from the State of Washington.....	310
McGovern, Hon. George, a U.S. Senator from the State of South Dakota.....	23
McIsaac, George S., Assistant Secretary for Resource Applications, Department of Energy.....	36
Maribona, Paco, coordinator, Solar Oregon Lobby.....	625, 636
Marritz, Robert C., counsel, Pacific Northwest Utilities Conference Committee.....	414, 416
Marts, Marion, Institute for Environmental Studies, University of Washington.....	483, 486
Marvet, Lloyd K., on behalf of For Laws on Board.....	683, 798
Meeds, Hon. Lloyd, a Representative in Congress from the State of Washington.....	181, 187
Meuret, Forrest L., vice president and legislative director, Save Oregon's Resources Today, Inc., and on behalf of Oregon Wildlife Federation.....	783, 790
Miles, Harold C., chairman, utility committee, Idaho Consumer Affairs, Inc.....	876, 878
Mills, Dennis, on behalf of Victor Atiyeh, Governor-elect, State of Oregon.....	540
Molle, James E., Oregon Solar Institute.....	625, 627
Moment, Samuel, Portland, Ore.....	783

Statement of—Continued

Monroe, David, director, region 5, Aluminum Workers International Union, AFL-CIO.....	Page 717, 722
Munro, Sterling, Administrator, Bonneville Power Administration, Department of Energy.....	36, 46
Nelson, James, Northwest production manager, Green Giant Co....	369, 397
Nelson, Olga M., on behalf of Oregon State Grange.....	543, 613
Nightingale, Wesley, on behalf of Lane County Audubon Society...	717, 720
Piper, David E., manager, Public Power Council.....	543
Platt, John C., executive director, Oregon Environmental Council...	661, 666
Pritchard, Hon. Joel, a Representative in Congress from the State of Washington.....	313
Radin, Alex, executive director, American Public Power Association...	205, 232
Ragsdale, Hon. Mike, Oregon State representative on behalf of the Western Conference of the Council of State Governments.....	661
Redman, Eric, on behalf of Direct-Service Industrial Customers, of the Bonneville Power Administration.....	205, 250
Redmon, Rick, consultant, Italcro Aluminum Corporation.....	369
Reid, Andrew, on behalf of Portland Decommission Alliance.....	802, 806
Revelle, Randy, chairman, energy committee, Seattle City Council...	314, 326
Ribe, Mally, on behalf of League of Women Voters.....	414, 426
Richards, Monte, Idaho Fish and Game Commission.....	816
Robison, Kenneth, senator-elect, State of Idaho.....	836, 840
Roskie, Hon. George, Montana State senator, the Western conference of the Council of State Governments.....	661
Rust, Gerald H., Jr., chairman, board of commissioners, Lane County (Oreg.).....	519, 523
Samsel, Ray, Columbia River Inter-Tribal Fish Commission.....	543, 590
Sandison, Gordon, Department of Fisheries, State of Washington...	414, 421
Schneider, Thomas J., commissioner, Montana Public Service Commission.....	288
Scott, Douglas, Northwest representative, Sierra Club.....	205, 212
Self, Kenneth W., board chairman, Freightliner Corp., subsidiary of Consolidated Freightways, Inc.....	661, 690
Shade, Robert A., director of emergency services, Boise Cascade Corp.	853, 857
Sheldon, Alan C., vice president, environment and energy resources, Aluminum Company of America.....	876, 883
Short, Robert H., president, Portland General Electric Co.....	205, 240
Smith, Hugh, counsel, Portland General Electric Co.....	205
Springer, Ted C., counsel, Idaho Cooperative Utilities Association, Inc.....	853, 862
Stachon, Eric, on behalf of For Laws on Board.....	802, 811
Stafne, Scott, on behalf of Salmon Fisheries in Washington and Alaska.	483, 504
Stratton, James F., director, University of Oregon Survival Center...	661, 688
Straub, Hon. Robert W., Governor, State of Oregon.....	535
Streeter, Jack, president, South Western Idaho Development Association.....	853, 859
Sulzbach, Wilbur, Sandy, Oreg.....	625, 630
Swift, Glen, Portland, Oreg.....	625, 632
Symms, Hon. Steven D., a Representative in Congress from the State of Idaho.....	816
Trent, John, Hillsboro, Oreg.....	625, 629
Vajonc, Ed, field representative for Hon. Bob Packwood, a U.S. Senator from the State of Oregon.....	519, 528
Vincent, Grant, Oreg.....	783, 793
Ward, Conley, Jr., commissioner, Idaho Public Utilities Commission.....	181, 836, 842
Weiner, Ruth F., professor of environmental studies, Western Washington University.....	483, 500
Wertz, William F., Jr., national committee member, U.S. Labor Party.....	441, 472
Widmer, Walter, on behalf of Consumer Power League.....	717, 724
Williams, Ken, Portland, Oreg.....	802, 808
Williams, Luke, president and chief executive officer, American Sign & Indicator Corp.....	441, 446
Williams, Wayne L., director, Peoples Organization for Washington Energy Resources.....	414
Williams, Willie, Roseburg, Oreg.....	802, 812
Williamson, Paul, on behalf of Oregonians for Utility Reform.....	783, 789

VI

Additional material submitted for the record by—

Aluminum Company of America, letter, dated November 22, 1978, from Ms. Walden to Mr. Pritsky re accomplishments of the aluminum industry to conserve energy.....	885
Baucus, Hon. Max, a Representative in Congress from the State of Montana:	
Letter, dated September 19, 1978, from Mr. Judge to Mr. Baucus re State of Montana's recommended amendments to H.R. 13931.....	192
Resolution of Midwest Electric Consumers Association.....	199
Boise Cascade Corp., attachment to Mr. Shade's prepared statement, information on operations in Pacific Northwest region for 1977.....	859
Columbia River Fisheries Council, attachment to Mr. Donaldson's prepared statement, recommendations of Columbia River Fisheries Council for instream flows in the Columbia and Snake Rivers.....	748
Columbia River Inter-Tribal Fish Commission, attachments to Mr. Samsel's prepared statement:	
Memorandum of understanding.....	592
BPA opinion M-36835.....	598
Consumer Power League, attachment to Mr. Widmer's prepared statement, documentation regarding power costs of selected publicly and privately owned utilities.....	727
Direct-Service Industrial Customers of the Bonneville Power Administration, attachment to Mr. Redman's prepared statement, letter, dated September 25, 1978, from Mr. Redman to Chairman Dingell re attachments A and B.....	254
Energy and Power Subcommittee, Committee on Interstate and Foreign Commerce, advertisement from Washington State newspaper.....	145
Energy Department:	
Attachments to Mr. Munro's prepared statement:	
Allocation of Bonneville Power resources discussion paper, with forwarding letter.....	114
Bonneville Power Administration responses to Congressman Dingell's questions of September 8, 1978.....	62
Conservation measures of Bonneville Power Administration. Letter, dated June 24, 1976, from Mr. Hodel to Mr. Mahoney re contract No. 14-03-38576—notice of insufficiency.....	151
Preparation of option papers evaluating BPA and regional power system alternatives.....	122
Table 1—West group area leads and resources.....	73
General Accounting Office: Attachment to Mr. Canfield's prepared statement, other GAO comments on H.R. 13931.....	124
Idaho Cooperative Utilities Association, Inc., letter, dated December 21, 1978, from Mr. Springer to Chairman Dingell re BPA authorization and responsibility to purchase resources.....	138
Idaho, State of, letter, dated December 27, 1978, from Mr. Greenley to Chairman Dingell re fish flow recommendations for the Snake and Columbia Rivers.....	872
Italco Aluminum Corp., attachment to Mr. Ferrie's prepared statement, addendum—Role of the Direct-Service Industries in the power supply system of the Pacific Northwest.....	824
Izaak Walton League of America, attachment to Mr. Haley's prepared statement, letter, dated December 6, 1977, from James Belknap to Dan Hodel re response to BPA role in the Pacific Northwest.....	391
Moment, Samuel, attachments to his prepared statement:	
Additional statement.....	773
Letter, dated December 15, 1978, to Mr. McCormack re further response to questions raised during colloquy with Mr. McCormack.....	787
Montana Public Service Commission, attachment to Mr. Schneider's prepared statement, before the House Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs.....	788
	295

Additional material submitted—Continued

National Rural Electric Cooperative Association, attachments to Ms. Bogard's prepared statement:	
Exhibit A—Draft amendments to the Pacific Northwest Electric Power Supply and Conservation Act.....	Page 264
Pacific Northwest Electric Power Planning and Conservation Act.....	267
Resolution—Pacific Northwest Electric Power Supply and Conservation Act.....	263
Supplemental views of the National Electric Cooperative Association.....	266
Northwest Energy Options, attachment to Mr. Jones' prepared statement, the Bonneville reform bill.....	460
Oregon Environmental Council, attachment to Mr. Platt's prepared statement and additional material:	
Letter, dated January 2, 1979, from Mr. Platt to Chairman Dingell re additional material.....	678
Petition against BPA, private and special interest utilities.....	677
Oregon Institute of Technology, final resource assessment report for 1978.....	887
Oregon State Grange, attachment to Mrs. Nelson's prepared statement, the preference clause.....	614
Pacific Marine Fisheries Commission, attachments to Mr. Harville's prepared statement:	
Resolution 4—Establish minimum flows for fisheries—Snake and Columbia Rivers.....	696
Resolution 9—Recognition of water requirements for anadromous salmonids by water use and water management entities.....	696
Resolution 11—Support concept of compensation for fish production potential of habitat.....	697
Resolution 12—Establish priority water usage and protect habitat for fish.....	697
Portland, city of, Hon. Neil Goldschmidt, mayor, attachments to prepared statement:	
City of Portland regarding H.R. 13931.....	649
Statement before the Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs, December 7, 1977.....	645
Statement before U.S. Senate Committee on Energy and Natural Resources.....	642
Portland General Electric Co., attachments to Mr. Short's prepared statement:	
Statement of John W. Ellis.....	248
Statement of Don C. Frisbee.....	249
Puget Sound Power & Light Co., attachments to Mr. Ellis' prepared statement:	
Exhibit B—Levelized fixed charges.....	383
Map showing service area.....	382
Raft River Electric Cooperative, attachments to Mr. Kempton's prepared statement:	
Exhibit 1—Approximate cost to produce an acre of wheat.....	866
Exhibit 2—Approximate cost to produce an acre of potatoes.....	866
Reynolds Metal Co., Harry V. Helton, Northwest operations manager, additional submitted materials:	
Letter, dated January 2, 1979, from Mr. Helton to Chairman Dingell re additional materials and answers to questions asked during the colloquy.....	556
Statement before U.S. Senate Committee on Energy and Natural Resources (Aug. 25, 1978).....	557
Statement before U.S. Senate Committee on Energy and Natural Resources (Apr. 8, 1978).....	561
Statement of Gordon C. Culp before Subcommittee on Water and Power Resources.....	565

VIII

Additional material submitted—Continued

Seattle City Council, attachments to Mr. Revelle's prepared statement:	
City of Seattle's proposed amendments to the Pacific Northwest Electric Power Planning and Conservation Act.....	334
Letter, dated December 19, 1978, from Mr. Revelle to Chairman Dingell re answers to questions asked during colloquy.....	362
Resolution 25783.....	348
Statement of Mr. Revelle to Subcommittee on Water and Power Resources, Committee on Interior and Insular Affairs.....	330
Sierra Club, attachments to Mr. Scott's prepared statement:	
Amendment to H.R. 13931.....	218
Excerpt from Seattle Post-Intelligencer—BPA must pay \$30 million a year for Trojan nuclear plant.....	218
Northwest regional electric energy.....	219
Statement of James T. Blomquist.....	221
Statement of Douglas Scott.....	231
Washington Public Power Supply System.....	217
Solar Oregon Lobby, attachments to Mr. Marlbona's prepared statement:	
Public Power Action Group.....	638
Ron Dechter's statement.....	639
Rough draft 1979 Oregon Solar Lobby platform.....	638
Treasury Department:	
Attachment to Mr. Altman's prepared statement, statutes which preclude Federal guarantees of tax-exempt obligations.....	31
Direct borrowing from the Treasury.....	34
Specific language of sections 6, 8, and 9.....	26
University of Washington, letter dated December 20, 1978 from Mr. Lee and Mr. Marts to Chairman Dingell, re further comment to their prepared statement on H.R. 13931.....	498
Washington Public Utility Districts' Association, attachment to Mr. Boldt's prepared statement, resolution on regional power Federal legislation.....	445
Washington, State of, attachments to Mr. Sandison's prepared statement:	
Minimum flows at the Columbia River Forks.....	425
Minimum flows at the Lower Columbia River dams.....	424
Minimum flows at Mid-Columbia River dams.....	423
Statements submitted for the record by—	
Aluminum Company of America.....	1078
American Society of Civil Engineers, seattle section.....	898
Anaconda Co., The.....	1022
Audubon Society of Portland.....	941
City of Tacoma, Wash.....	908
Cole, Pat R.....	915
Columbia River Basin Fisheries Alliance.....	931
Columbia River Fisherman's Protective Union.....	935
Common Cause of Montana.....	1012
Fidalgo Environmental Council/SCANP.....	893
Hanna Mining Co., The.....	1045
Hogan, Frances A.....	967
Headwaters Alliance.....	1017
Izaak Walton League of America, Inc.....	925, 928
Lamson, Robert D.....	919
Mid-West Electric Consumers Association.....	1082
Missouri Basin Municipal Power Agency.....	1049
Montana Associated Utilities Legislative Committee.....	1009
Montana Power Co.....	980
Montana Public Service Commission.....	990
Municipal Electric Authority of Georgia.....	1049
National Marine Fisheries Service.....	939
Natural Resources Defense Council, Inc.....	1063

IX

Statements submitted for the record by—Continued	Page
Northern Plains Resource Council.....	1003
Nuclear Information & Resource Service.....	913
Public Power Action Group.....	945
Quaintance, Charles W.....	969
Rinkenburger, Erwin.....	924
Smiley, D. Patrick.....	1036
Stauffer Chemical Co.....	1015
Taylor, Rena.....	961
Trojan Decommissioning Alliance.....	954
Vigilante Electric Cooperative, Inc.....	998
Letters submitted for the record by—	
Clearwater Conservation Forum, Lee Milner, coordinator.....	1093
Dechert, Thomas V.....	1094
Gersh, Frank Sutton.....	1099
Hyde, Cameron.....	1096
North Dakota, State of, Arthur A. Link, Governor.....	1091
Wyoming, State of, Ed Herschler, Governor.....	1092

ORGANIZATIONS REPRESENTED AT HEARINGS

Aluminum Company of America, Alan C. Sheldon, vice president, environment and energy resources.

Aluminum Workers International Union, AFL-CIO, David Monroe, director, region 5.

American Public Power Association, Alex Radin, executive director.

American Sign and Indicator Corp., Luke Williams, chief executive officer.

Boeing Company, The, Forrest G. Coffey, public affairs director.

Boise Cascade Corp., Robert A. Shade, director of energy services.

BPA Industrial Customers, Henry G. Curtis, consultant, on behalf of.

Columbia River Fisheries Council, John R. Donaldson, chairman.

Columbia River Inter-Tribal Fish Commission, Ray Samsel.

Consumer Power League, Walter Widmer, on behalf of.

Common Cause, Michael Farley, executive director.

Direct-Service Industrial Customers of the Bonneville Power Administration, Eric Redman, on behalf of.

Energy Department:

Bardin, David J., Administrator, Economic Regulatory Administration.

McIsaac, George S., Assistant Secretary for Resource Applications.

Munro, Sterling, Administrator, Bonneville Power Administration.

Eugene Future Power Committee, Inc., Chris Attneave.

For Laws on Board:

Marvet, Lloyd K., on behalf of.

Stachon, Eric, member.

Freightliner Corp., subsidiary of Consolidated Freightways, Inc., Kenneth W. Self, board chairman.

General Accounting Office, Monte E. Canfield, Jr., Director, Energy and Minerals Division.

Green Giant Co., James Nelson, Northwest production manager.

Idaho Conservation League, Pat Ford.

Idaho Consumer Affairs, Inc., Harold C. Miles, chairman, utility committee.

Idaho Cooperative Utilities Association, Inc., Ted C. Springer, counsel.

Idaho Power Co., James E. Bruce, president.

Idaho, State of—

Evans, Hon. John V., Governor.

Hall, Kirk, director, office of energy.

Robinson, Kenneth, senator-elect.

Ward, Conley, public utilities commissioner.

Interior, Department of the, Kenneth Higgs, U.S. Fish and Wildlife Service, Office of the Assistant Secretary for Fish and Wildlife and Parks.

Italco Aluminum Corp.:

Ferrie, Robert, president.

Redmon, Rick, consultant.

ORGANIZATIONS REPRESENTED AT HEARINGS—Continued

- Izaak Walton League of America, Wendell P. Haley, Oregon division.
 Lane County Audubon Society, Wesley Nightingale, on behalf of.
 Lane County (Oreg.) Gerald H. Rust, Jr., chairman, board of commissioners.
 League of Women Voters, Mally Ribe, on behalf of.
 Local Government Northwest Electrical Energy Task Force, Edward G. Hudson, chairman.
 Montana Public Service Commission, Thomas J. Schneider, commissioner.
 National Farmers Union, Paul Holmes, program coordinator, Oregon-Washington division.
 National Rural Electric Cooperative Association, Becky Bogard, legislative counsel.
 North Central Washington Central Labor Council, Dan Bertrand, president.
 Northwest Energy Options, Allen Jones, coordinator.
 Northwest Public Power Association, Jack R. Criswell, on behalf of.
 Northwest Resource Information Center, Inc., Ed Chaney, director.
 Old National Bancorporation, David A. Clack, board chairman and president.
 Oregon Environmental Council, John C. Platt, executive director.
 Oregon Institute of Technology, David W. McClain, research analyst.
 Oregon Solar Institute, James E. Molle.
 Oregon State Grange, Olga M. Nelson, on behalf of.
 Oregon Wildlife Federation, Forrest L. Meuret, on behalf of.
 Oregonians for Utility Reform, Paul Williams, on behalf of.
 Pacific Fishery Management Council, John W. McKean, member.
 Pacific Marine Fisheries Commission, John P. Harville, executive director.
 Pacific Northwest Utilities Conference Committee, Robert O. Marritz, counsel.
 Pacific Power & Light Co., Don C. Frisbe, board chairman, president.
 Peoples Organization for Washington Energy Resources, Wayne L. Williams, director.
 Portland, city of, department of public utilities, Francis J. Ivancie, commissioner.
 Portland Decommission Alliance, Andrew Reid, on behalf of.
 Portland General Electric Co.:
 Short, Robert H., president.
 Smith, Hugh, counsel.
 Public Power Council:
 Criswell, Jack R., on behalf of.
 Gill, Rockne, counsel.
 Piper, David E., manager.
 Puget Sound Council of Governments, Edward G. Hudson, president.
 Puget Sound Power & Light Co., John W. Ellis, president.
 Raft River Electric Cooperative, M. H. Kempton, president, board of directors.
 Reynolds Metal Co., Harry V. Helton, Northwest operations manager.
 Salmon Fisheries in Washington and Alaska, Scott Stafne, on behalf of.
 Save Oregon's Resources Today, Inc., Forrest L. Meuret, vice president and legislative director.
 Seattle Chamber of Commerce, Herschel F. Jones, on behalf of.
 Seattle City Council, energy committee, Randy Revelle, chairman.
 Seattle Longshoreman's Union, Del Castle.
 Sierra Club:
 Cellarius, Richard, member, board of directors.
 Scott, Douglas, Northwest representative.
 Solar Oregon Lobby, Paco Maribona, coordinator.
 South Western Idaho Development Association, Jack Streeter, president.
 Spencer Products Co., Robert D. Lamson, executive vice president.
 Treasury Department:
 Altman, Roger C., Assistant Secretary for Domestic Finance.
 Cavanaugh, Dennis, Senior Staff.
 Drapkin, Dennis, Senior Staff.
 Umatilla Electric Cooperative Association, Russell N. Dorran, manager.
 U.S. Labor Party, William F. Wertz, Jr., national committee member.
 Washington Environmental Council, Tom Eckman, chairperson, energy committee.
 Washington Public Interest Resesearch Group, Joan Holl, energy research coordinator.
 Washington Public Utility Districts' Association, Jim Boldt, executive director.

ORGANIZATIONS REPRESENTED AT HEARINGS—Continued

- Washington State Association of Counties Energy Committee, Richard Granger, chairman.
- Washington State Commercial Passenger Fishing Vessel Association, Jack Carlson, vice president.
- Washington, State of, Gordon Sandison, department of fisheries.
- Washington State's Committee on Energy and Utilities, R. Ted Bottinger, chairman.
- Western Conference of the Council of State Governments, the:
 - Ragsdale, Hon. Mike, Oregon State representative.
 - Roskie, Hon. George, Montana State senator.
- Western Environmental Trade Association of Washington, Leland Hale, energy project coordinator.

PACIFIC NORTHWEST ELECTRIC POWER ISSUES

TUESDAY, SEPTEMBER 19, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:35 p.m., in room 2123, Rayburn House Office Building, Hon. John D. Dingell, chairman, presiding.

Mr. DINGELL. The subcommittee will come to order.

The Chair apologizes to all present for the inconvenience which has been imposed upon them by the fact the Chair was detained in a markup in another committee this morning and had to postpone the hearings and then the fact that a sequence of votes on the floor has precluded me from commencing the hearings at the designated time, as had been my wish. So the apologies of the Chair before he commences the hearings.

The Chair does have a brief statement which, without objection, will be inserted in total and I will excerpt therefrom. The Chair observes that today we begin 2 days of hearings on H.R. 13931 and related bills concerning the future use and development of electric energy in the Pacific Northwest. Additional hearings on this legislation may be scheduled later, very possibly in the affected region.

The Chair begins the consideration of the legislation with no preconceived notions and it is the intention of the Chair and the committee to try to achieve all possible information relative to the legislation, also relative to the questions which might be involved therein.

The legislation is significant. It is important to the Pacific Northwest, including the public and private utilities, the State and local governments and, most importantly, the electric consumers of the region.

I want particularly to commend Congressman Meeds and the other House cosponsors of this bill, as well as Senator Jackson, who has sponsored an identical bill in the Senate. They have developed a proposal which identifies issues of concern to many diverse groups in the region and provides possible solutions to them.

This bill represents a good beginning to the ultimate resolution of these problems and it is one to which our subcommittee will give careful thought in the coming days. It is a fact of life, however, that the 95th Congress is rapidly drawing to a close and that the press of other matters may prevent this legislation from being enacted this

year. We will do what we can to avoid this situation, because the evidence before us strongly indicates that Federal legislation in this area is necessary.

The Pacific Northwest is a region which is quite unlike any other in this country. Until recently its power supplies were provided almost exclusively by low cost hydroelectric generation, much of which had been constructed and operated by the Federal Government.

The Bonneville Power Administration has occupied a preeminent role in marketing the federally generated power and it has played an almost equally important role in assuring that public and private utilities were able to coordinate their efforts to insure that the power resources of the region were operated to provide some measure of efficiency in operation.

The Bonneville Project Act gives a definite preference to certain types of power users, and the effects of this preference clause have provided useful and gainful employment for many lawyers in the Pacific Northwest for years. The way in which this preference clause will be impacted by the bill before us is not altogether clear to many, and this is one of several issues which we will be considering in the next few days.

We are informed that the region faces a serious problem in that future projected resources are unlikely to be adequate to meet projected demand, a situation not like that which exists elsewhere in the country. BPA can no longer be certain of its ability to sell firm power to utilities in the region, and direct-service industrial customers have been notified that their contracts, which are due to expire between 1981 and 1991, cannot be renewed. Utility systems in the region are being forced to turn to thermally generated power, both coal- and nuclear-fired, and this in turn threatens considerably higher power rates within a region which has been accustomed to far lower power costs in the past and substantial development of resources.

The bill before us addresses this complex set of issues in an imaginative way. Perhaps its most critical step is to create what amounts to a homogenized power pool within the region, thus minimizing the existing disparity between customers of public and private utilities.

The effect of this pool, under the broad and discretionary powers of the Bonneville power administrator, is to provide a smoothing of this disparity and to encourage the construction of additional resources—or of conservation programs, which amounts to the same thing, at perhaps significantly lesser costs—at the lowest possible costs to the consumers of the region. We want to consider carefully the need for this bill and its possible effects.

This bill is of vital concern to the consumers of the region. As indicated earlier, it raises a number of difficult issues, some of which reach far beyond the borders of the Columbia River Basin in their implications. These include: Impact on traditional Federal marketing priorities, timetables for the implementation of vitally needed energy conservation programs, as well as the adequacy of those programs, the standards to be imposed upon the administrator of BPA, the adequacy of provisions for public participation, the costs of such a program to the Federal Treasury, the provisions for the acquisition

of additional generating capacity and the purchase of power, the impact on the preference clause, antitrust questions, tax issues and more.

This subcommittee is impressed by the urgency and difficulty of these issues. We hope that the witnesses today and at following hearings will help us to understand the precise nature of these issues and their implications and to eliminate or minimize these concerns so that the bill can be moved toward enactment as quickly as may reasonably be done.

Without objection the text of H.R. 13931 will be printed at this point in the record.

[Testimony resumes on p. 23.]

[The text of H.R. 13931 follows:]

I hadn't gone through that. But I think you are probably right.

Mr. DINGELL. I tend to be very skeptical of closed meetings. And the consequences to broad public interest, particularly where we afford them a blank check exemption from the Antitrust Act.

The Chair recognizes counsel.

Thank you.

Mr. ATHY. Let me address this question to Mr. Scott or Mr. Short. In the absence of this legislation wouldn't your customers be better off if the investors were indemnified, the obligation satisfied and a public body took over?

Mr. SHORT. The customer would be several orders of magnitude worse off. The shareholders would likely be better off. A procedure has developed in the Northwest over the past many, many years relating to public takeover. For example, if the city of Portland desired to condemn the properties the general rule is it would have to pay five-and-a-half times annual revenues. All it gets, the city of Portland, is a distribution system with no power. The city has been advised there is no firm power available from Bonneville. Therefore it would have to provide its own power resources and generating facilities and transmission lines.

If it buys power it would purchase it from those sources from which it is available, the same source from which we get it or from our company. The city of Portland's consumers' rates, should they choose to condemn, would pay the additional price for condemnation. They would also be faced with a substantial investment in facilities and a substantial cost to purchase power, clearly in excess of ours.

The ratepayer would suffer. The only person that would benefit if our entire system were condemned would be the shareholder who would probably get bailed out at better than what he got it at.

Mr. ATHY. Let me try to clear up one point. The Department of Treasury sees the U.S. Government behind obligations incurred by Bonneville. They see Federal guarantees being provided.

Congressman Meeds sees these things differently.

Let me ask Mr. Redman whether or not the Treasury is exposed under this bill and to what extent.

Mr. REDMAN. Let me say first that I haven't heard anyone testify that they would be opposed to your putting in a provision that would make sure it wasn't. But I think this bill has to be read in conjunction with the Transmission Act. The Transmission Act requires that Bonneville meet all its obligations out of its revenues. So when a person buys a bond they are not looking to the Treasury. They are looking to Bonneville which through its rates collects money from its ratepayers.

You can dream up scenarios where for some reason people didn't pay, the utilities refused to pay the Bonneville bill or the elasticity of demand was such that you couldn't raise enough revenue. In that extremely remote instance if you don't make a change here there is a theoretical potential for somebody ultimately having recourse against the Treasury. I think that is not realistic.

Mr. ATHY. Let me ask Mr. Criswell, what if renewable resources and conventional resources were considered at the same time? Would that satisfy you?

Mr. CRISWELL. It is obviously an improvement. But the electric boards and managements of consumer-owned utilities in the North-

west have an obligation to be sure power supply is available to meet needs in the future. We are aware of the leadtime necessary to get conventional facilities on line.

We support very strongly the intent of this bill to give priority to conservation. We agree with comments that have been made by other members of the panel that conservation is the quickest, cheapest, most environmentally acceptable way to gain some running room, which is really all it will provide because the region is growing very rapidly.

We think that the procedure has to allow flexibility of developing a program which would give every possible consideration to how much you can gain with conservation, and to give consideration to what may be feasible through renewable resources. My written testimony alludes to the fact that these are unproven in many cases—options that you are going to have to explore, and you cannot be sure where they are going to lead you.

I think for those reasons you have to proceed concurrently, in some cases if your load projections dictate that you do so, with conventional resources.

Mr. ATHY. Could you go one step further and put conservation on the demand side, treating it as part of the planning process?

Mr. CRISWELL. I am not sure what you mean.

Mr. ATHY. As a resource to be acquired under the bill if treated as a demand reduction strategy in that initial step.

Mr. CRISWELL. My concept is it will be treated that way.

Mr. ATHY. I see it a little differently.

One last question is to Doug Scott. You say you favor an open and straightforward process with careful procedural guarantees for public access to decisions from the outset and full direct public accountability. Do you have some specific suggestions?

Mr. SCOTT. Yes; we are working on the full design of amendments to accomplish this purpose. We are consulting widely in the region on those concepts.

But basically what it comes down to is this: This bill proposes a structural participation process. That is, you set up some councils and you get some people in them and they tell Bonneville. We have tried that in the region. It has been very ineffective in broadly representing the public.

Second, a setup with two tiers of appointment means that everything is a great distance figuratively and literally from the consumers. In terms of involvement we are looking for a procedure with public involvement that contains the kinds of guarantees that are typical in ratemaking proceedings, where people may be heard, may cross-examine, where groups of citizens in the region may get involved procedurally and have access to Bonneville and Bonneville in turn has to have some accountability in responding.

If you look at the experience conservation groups have had, planning with the Fish and Wildlife Service and the Bureau of Land Management, the timber management plans for national forests in the region, these are all done through procedural processes. We would go the full route in BPA rulemaking.

Mr. ATHY. If those procedures were implemented would that allay your fears about BPA rushing to thermal acquisitions?

Mr. SCOTT. Substantially.

Mr. ATHY. I have no further questions.

Mr. DINGELL. I think this question should be directed to Mr. Short. Mr. Short, tell me, as power supplies tighten, the percentage of power that is supplied by hydro sources declines relative to the total supply of electricity in the area, what will be the function then of hydro? Might it become increasingly a peaking resource as opposed to a steady flow resource?

Mr. SHORT. In the very long term probably, yes.

Mr. DINGELL. What would be the consequences of this on fish and wildlife, faced with great fluctuations in stream flow?

Mr. SHORT. Mr. Chairman, with all due respect, the Fish and Wildlife people and the individual groups such as the Sierra Club, State Fish and Wildlife people and Federal Fish and Wildlife people, have maintained a significant control of the operation of the river to the substantial detriment of the power operations. That occurred last year. It occurred again this year.

Mr. DINGELL. As regard the salmon resource?

Mr. SHORT. In this particular case the river was very low. They were afraid the salmon would not escape and the mid-Columbia projects and some of the Federal projects were required to spill, to waste energy, to get the fish over the dam and down the river. This was the famous "fish flush" of 1977. I personally would have no concern—and I am a fisherman—that the fish resource was going to be damaged by the operation of the river.

Mr. DINGELL. Perhaps you can then tell me how it was that the order was given for this spilling last year, and what was the statutory basis therefore?

Mr. SHORT. I can only recall what came to me, sir. I don't remember any statutory basis. I do know that the Fish and Wildlife people requested that the water be spilled in order to accommodate downstream migrants. It was feared they would not go over the spillway and die.

Mr. DINGELL. Or maybe go through the turbines.

Mr. SHORT. Or maybe go through the turbines.

Mr. DINGELL. Which is not the healthiest experience.

I am told it turns gills inside out.

Mr. SHORT. To be utterly candid with you, the Columbia public utility districts from which we buy significant amounts of power were requested to make this release. They were reluctant to do so.

Mr. DINGELL. As a matter of fact they refused.

Mr. SHORT. They didn't quite refuse.

Mr. DINGELL. Not quite.

Mr. SHORT. They didn't want to do it.

Mr. DINGELL. I am told it was the personal action by the Bonneville Power Administrator that they would. Isn't that right?

Mr. SHORT. There was a telephone call from the Governor. He said, "You go ahead and tell them to do it. It is your power they are going to waste." So he did.

Mr. DINGELL. Let me ask you another question. Is there a specific statutory authority directing Bonneville people to consider fish and wildlife values in connection with stream flow and other matters?

Mr. SMITH. They are subject to the Fish and Wildlife Coordination Act.

Mr. DINGELL. They are. But that is insofar as construction and not insofar as operation.

Mr. SMITH. It is a planning act. I think it is broader than just construction.

Mr. DINGELL. I would hope so.

Mr. SMITH. I think the administration was of the opinion that they were leaning on that act to find some authority. I would have to check that.

Mr. DINGELL. Is there anywhere in the Bonneville power statute a provision which would afford the Administrator authority to consider fish and wildlife values or mandate him to consider fish and wildlife values?

Mr. SMITH. There is nothing that would prevent him from so considering.

Mr. DINGELL. You will agree that is different however from affirmatively demanding it.

Mr. SMITH. I agree. I don't believe there is anything that can be read as mandating it. One point I would make, Mr. Chairman, and that is that Bonneville, remember, does not operate projects. Projects are owned and operated by the Corps of Engineers and the Bureau of Reclamation and they do act under various authorization acts which in general mandate a multipurpose operation. So that in most of the projects on the river I think you would find that the people who are actually operating them are under a duty to operate them for wildlife purposes.

Mr. DINGELL. Mr. Scott, do you have a comment?

Mr. SCOTT. I guess the comment I would like to make is that to the degree there is any control by the back door and third hand and the threat is not going to be sufficient that "you shall spill" or "you shall not spill," we are going to run out of time and an already beleaguered resource is going to be devastated.

There is no requirement in any Bonneville statute for any affirmative role on the part of the Administrator having anything to do with the fish resource in the river other than the general impact of NEPA. The word "conservation" does not appear in the Bonneville statutes.

We believe that the important thing is to get all of these people together in a council in which fishery and wildlife agencies have enough voice to deal directly with the Administrator at Bonneville and the Secretary of the Army and other agencies in coming to some conclusions. We are preparing and will propose an amendment to that effect.

Mr. DINGELL. How does this serve any purpose when there is no statutory mandate that fish and wildlife stock be considered?

Mr. SCOTT. The amendment that we would propose would include that. The peaking impacts on the river are foreordained. So it is essential.

Mr. DINGELL. Gentlemen and ladies, we thank you all for your assistance to us. We appreciate your diligence and patience. I am sorry about the inconvenience occasioned by the delay. Thank you all very much.

Our next witness is Mr. Francis J. Ivancie, commissioner, public utilities, Portland.

Mr. Ivancie.