

ARTICLES

THE COLUMBIA RIVER GORGE AND THE DEVELOPMENT OF AMERICAN NATURAL RESOURCES LAW: A CENTURY OF SIGNIFICANCE

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The Columbia River Gorge, site of the nation’s first national scenic area and the only near-sea-level passage through the Cascade Mountains, is home to the longest continuously occupied site of human habitation in North America. The Gorge has served as a major transportation corridor between the Pacific and the Great Basin for hundreds of years and is home to spectacular scenery, dozens of waterfalls, many sacred sites, and abundant recreational activities, including world-class kite boarding and wind surfing. The Gorge has also been the location of over a century of legal battles that have made major contributions to American natural resources law. The Gorge has spawned a legal history as rich as its geography, from judicial interpretations of nineteenth-century Indian treaties, to the development of the world’s largest interconnected hydroelectric system, to ensuing declines in what were once the world’s largest salmon runs—ultimately resulting in endangered species listings, to innovative federal statutes concerning electric power conservation and land use federalism, to compensation schemes for landowners burdened with regulation, to dam removal and conflicts between sea lions and salmon. This article surveys these developments and suggests that no area of the country has produced more varied and significant contributions to natural resources law.

TABLE OF CONTENTS

Introduction	2
I. Indian Treaty Fishing Rights and <i>United States v. Winans</i>	4
II. The Bonneville Dam and the Transformation of the Columbia River	6
III. Sharing Salmon Harvests Fairly: <i>Sohappy v. Smith</i> and Its	

Legacy	10
IV. The Northwest Power Act: Electric Power Planning, Conservation, and Attempted Salmon Restoration.....	12
V. The Columbia Gorge National Scenic Act: Innovation in Land Use Regulation.....	16
VI. ESA Salmon Listings and Their Disappointing Results.....	18
VII. Compensating Landowners For Land Use Regulations: The Oregon Revolution (Measure 37) and Its Correction (Measure 49).....	24
VIII. Removing the Condit Dam: A Milestone in Environmental Remediation	27
IX. Salmon vs. Sea Lions: Endangered Species vs. Marine Mammals	30
Conclusion.....	33

INTRODUCTION

The Columbia River Gorge was formed sometime between 700,000 and two million years ago, when the mighty Columbia River, seeking sea level, carved its way to the ocean—producing the only near-sea-level passage that exists through the Cascade Mountains.¹ Dividing the states of Oregon and Washington, the Gorge is a spectacular canyon, roughly eighty miles long and up to 4000 feet deep, extending from the mouth of the Deschutes River westward to the outskirts of the Portland, Oregon, metropolitan area.²

The Gorge is one of the oldest inhabited places in North

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¹ *Columbia River Gorge*, NW. POWER & CONSERVATION COUNCIL, <http://www.nwcouncil.org/history/ColumbiaRiverGorge.asp> (last visited November 9, 2012).

² *Id.*; NAT'L GEOGRAPHIC SOC'Y, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA OUTDOOR RECREATION MAP (2009).

America, with evidence of human habitation going back at least 10,000 years.³ Natives have fished the Gorge's rivers for salmon for millennia.⁴ Since white settlement, the Gorge has served as a major transportation corridor, with highways and railroads connecting the Columbia River Plateau with the Pacific Ocean. With over three million people living within an hour's drive, the Gorge now serves as a major recreational area, a mecca for windsurfers and kite boarders, and home to over ninety waterfalls on the Oregon side alone.⁵ In 1986, in recognition of the Gorge's natural resources, recreational opportunities, and spectacular scenery, Congress designated the Gorge as the nation's first national scenic area.⁶

The Gorge has thus been an important place geographically, culturally, spiritually, and economically since virtually time immemorial. It has also been the scene of numerous disputes over its natural resources over the last century—and arguably, the scene of more important and varied natural resources disputes than any other confined geographic area in the country. One could easily teach a natural resources law course just from the law produced out of the Columbia River Gorge. This article offers a “place-based”⁷ view of natural resources law, and examines nine different ways the Gorge and its resources have contributed to the development of American natural resources law, mostly in chronological order.

³ C. MELVIN AIKENS, *ARCHAEOLOGY OF OREGON* 41 (2d ed. 1986).

⁴ See JOSEPH C. DUPRIS ET AL., *THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER* 3–19 (2006) [hereinafter *SI'LAILO WAY*]; see also Michael C. Blumm & James Brunberg, “*Not Much Less Necessary . . . Than the Atmosphere They Breathed*”: *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 494–96 (2006) and sources cited therein.

⁵ For a list of waterfalls, see *Columbia River Gorge of Oregon*, NW. WATERFALL SURVEY, <http://www.waterfallsnorthwest.com/nws/database.php?z=1&st=OR&cat=region&subj=cgo> (last visited Nov. 9, 2012).

⁶ See discussion *infra* Part V; see also JANET COOK & PETER MARBACH, *THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA* (2011).

⁷ See generally ROBIN KUNDIS CRAIG, *ENVIRONMENTAL LAW IN CONTEXT* (2d ed. 2008); CHRISTINE A. KLEIN, *FREDERICO CHEEVER & BRET C. BIRDSONG, NATURAL RESOURCES LAW* (2d ed. 2009).

I. INDIAN TREATY FISHING RIGHTS AND *UNITED STATES V. WINANS*

The Gorge's first contribution to natural resources law concerned a salmon dispute that was characteristic of disputes along the Columbia River in the late nineteenth century. The disputes grew out of the Indian treaties of the 1850s in which several Columbia Basin tribes reserved "the right of taking fish at all usual and accustomed fishing places . . . in common with" white settlers.⁸ Although there were "usual and accustomed" fishing sites throughout the Columbia Basin, the most valuable place was Celilo Falls on lower Columbia in the heart of the Gorge, where natives had fished for thousands of years.⁹ In fact, Celilo Village is the oldest continuously occupied site in North America.¹⁰

In the decades following the signing of the treaties with Native Americans, white settlers established a commercial salmon fishery, erected numerous salmon canneries, and employed technologies like fish wheels to physically preempt tribal fishers, spawning numerous disputes along the Columbia, some of which ended up in court.¹¹ With the encouragement of Indian agents, one notable case ended up in the Washington Territorial Supreme Court, which reversed a lower court and ruled that a white shoreland owner could not fence tribal fisheries out of their historic fishing places at Tumwater, rapids located below Celilo Falls.¹² The court presciently employed canons of treaty interpretation to liberally construe the Treaty with the Yakima in favor of the Indians and the way they understood it.¹³

This precedent did not prevent the Winans brothers, shoreland owners with a fee patent from the federal government and a state license to operate a fish wheel, from fencing out Indian fishers at the same Tumwater fishery a few years later. In response to their

⁸ Treaty with the Yakima, U.S.-Yakama, June 9, 1855, 12 Stat. 951, 953.

⁹ On Celilo Falls and its significance, see ST'LAILO WAY, *supra* note 4; see also Blumm & Brunberg, *supra* note 4.

¹⁰ WILLIAM DIETRICH, NORTHWEST PASSAGE: THE GREAT COLUMBIA RIVER 52 (1995) (noting that the area around the falls was inhabited for roughly 13,000 years).

¹¹ See Blumm & Brunberg, *supra* note 4, at 507–14 (discussing, inter alia, Spedis v. Simpson (Klickitat County Ct., July 22, 1884)).

¹² *United States v. Taylor*, 13 P. 333 (Wash. Terr. 1887) (discussed in Blumm & Brunberg, *supra* note 4, at 516–22).

¹³ *Taylor*, 13 P. at 334–35.

obstructing access to the fishery, the local district attorney filed suit and obtained a temporary injunction against the brothers' interference with Indian fishing in 1895.¹⁴ But after extended proceedings before the trial court, Judge Cornelius Hanford dissolved the injunction eight years later in 1903, ruling that since the Winans could fence out whites, they could fence out Indians.¹⁵

In a memorable decision, the U.S. Supreme Court reversed in an opinion by Justice Joseph McKenna, who wrote for an 8-1 Court that the lower court result “was an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of a Nation for more.”¹⁶ In words that echo down through the generations, McKenna wrote that the tribes—for whom the right to take fish was “part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary than the atmosphere they breathed”—had a treaty-based “servitude,” “a right in land” that burdened the Winans' land title.¹⁷ This property-rights recognition of treaty rights is one of the key decisions in Indian natural resources law, for it meant that federal and state regulatory processes had to respect Indian treaty fishing rights. It also meant that the treaties preserved rights for the tribes not possessed by non-Indians.¹⁸

Most significantly, the *Winans* decision made the critical distinction that “the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”¹⁹ This was the foundation of the reserved rights doctrine, which three years later was applied by Justice McKenna to water rights in the famous *Winters v. United States* case²⁰ and has been influential ever since.²¹ The concept of reserved rights in natural resources law now extends beyond Indian law and beyond water

¹⁴ See Blumm & Brunberg, *supra* note 4, at 523–24.

¹⁵ See *id.* at 524–29. For a vivid account of this case, called the *White Swan Case* after the lead plaintiff, see SI'LAILO WAY, *supra* note 4, at 73–83.

¹⁶ *United States v. Winans*, 198 U.S. 371, 380 (1905). Justice Edward White dissented without opinion.

¹⁷ *Id.* at 381.

¹⁸ See SI'LAILO WAY, *supra* note 4, at 83.

¹⁹ *Winans*, 198 U.S. at 381.

²⁰ *Winters v. United States*, 207 U.S. 564, 577–78 (1908).

²¹ See 2 WATERS AND WATER RIGHTS ch. 37 (Amy K. Kelley ed., 3d ed. 2011).

law.²²

The property right the tribes reserved in the treaties was “the right of taking fish,” known by common law property lawyers as a piscary profit a prendre.²³ The piscary profit established in the *Winans* decision evolved over the years to include historic fishing sites that were not expressly reserved in treaties,²⁴ an insulation for tribes from state license fees,²⁵ protection against discriminatory state regulation,²⁶ an equal harvest share,²⁷ and, most recently, protection of fish habitat.²⁸ The *Winans* legacy is therefore considerable, and represents the first great contribution of the Gorge to natural resources law.

II. THE BONNEVILLE DAM AND THE TRANSFORMATION OF THE COLUMBIA RIVER

The second great contribution of the Gorge to natural resources law began in the 1930s when the federal government, through the New Deal, began to transform the mighty Columbia into the largest interconnected hydroelectric system in the world.²⁹

²² See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631–32 (1970) (finding that the tribe’s reservation included the bed of a navigable water); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (finding that the tribe’s reservation included timber and minerals within the reservation as “constituent elements” of the land). On federal reserved mineral rights, see, e.g., GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 675–83 (6th ed. 2007). See also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 218 (1999) (endorsing the reserved rights doctrine in majority and dissenting opinions).

²³ See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 445 (1998).

²⁴ *Seufert Bros. v. United States*, 249 U.S. 194, 199 (1919).

²⁵ *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

²⁶ See *Puyallup Tribe v. Dep’t of Game*, 433 U.S. 165, 171 (1977).

²⁷ *Washington v. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979) (largely affirming *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)). The Ninth Circuit affirmed that the 50% harvest share included both hatchery and wild fish. *United States v. Washington*, 694 F.2d 1374, 1379–85 (9th Cir. 1982).

²⁸ *United States v. Washington*, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007); see Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653 (2009).

²⁹ NW. POWER PLANNING COUNCIL, 1 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN 1–1, 5–1 (1986). According to William Dietrich, the Columbia is the quintessential river of the twentieth century:

Bonneville Dam was begun in 1933 with funds authorized under the National Industrial Recovery Act,³⁰ but the Supreme Court halted construction in 1935, when it ruled that that statute did not provide sufficient authority for the dam.³¹ Congress soon responded by specifically directing completion of the dam in the 1937 Bonneville Project Act.³²

The 1937 statute not only authorized completion of the dam, it created the Bonneville Power Administration (BPA) to market electricity from the Bonneville dam, the giant Grand Coulee Dam being constructed upstream on the Columbia upstream of the Gorge,³³ and eventually all of the thirty-one federal dams in the Columbia Basin.³⁴ Even though none of these projects were principally authorized for hydropower,³⁵ marketing low-cost electricity eventually began to dominate river operations, and BPA became the dominant agency in the region, even though it was not

“Its dams represent the optimistic faith in technology of the century’s beginning and restless misgivings about large-scale engineering at the century’s end. It is the river of the turbine, the dynamo, the reactor, and the airplane. It is the river of Tom Swift, Franklin D. Roosevelt, *Popular Mechanics*, and Nagasaki If you want to see how America dreamed at the height of the American Century, come to the Columbia.”

DIETRICH, *supra* note 10, at 46.

³⁰ National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 210 (1933). Under Title II of the statute, some \$3.3 billion was appropriated for the planning and construction of public works projects. See Michael C. Blumm, *The Northwest’s Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 196 n.107 (1983) [hereinafter *Hydroelectric Heritage*].

³¹ United States v. Arizona, 295 U.S. 174, 186–92 (1935).

³² 16 U.S.C. § 832 (2006).

³³ Grand Coulee, located some 450 miles upstream of Bonneville Dam, is the largest concrete structure ever built, with roughly six times the generating capacity of Bonneville. See *Fish Passage at Dams*, NW. POWER & CONSERVATION COUNCIL, <http://www.nwcouncil.org/history/fishpassage.asp> (last visited Nov. 9, 2012); BONNEVILLE POWER ADMIN. ET AL., FEDERAL COLUMBIA RIVER POWER SYSTEM 11 (2003), available at http://www.bpa.gov/power/pg/fcrps_brochure_17x11.pdf.

³⁴ See generally BONNEVILLE POWER ADMIN. ET AL., COLUMBIA RIVER SYSTEM INSIDE STORY (2d ed. 2001) [hereinafter BPA, INSIDE STORY], available at http://www.bpa.gov/power/pg/columbia_river_inside_story.pdf.

³⁵ See generally Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest’s Anadromous Fish Runs for a Peaceful Coexistence with the Columbia River Power System*, 11 ENVTL. L. 211 (1981) [hereinafter *Hydropower vs. Salmon*].

the nominal project operator.³⁶

In line with New Deal policies,³⁷ the Act gave purchasing preference to public agencies,³⁸ which led to years of public versus private power wrangling.³⁹ Today, the region is split: some cities like Seattle and Eugene and most rural areas are served by public power, while most urban areas are served by large privately owned power companies like Pacificorp, Puget Sound Power and Light, and Portland General Electric.⁴⁰ However, unlike the Tennessee Valley Authority,⁴¹ Congress never gave BPA the authority to construct plants, leaving that authority with the project operators—the U.S. Army Corps of Engineers (Corps) and the Bureau of Reclamation (BuRec)—and, of course, the congressional appropriations process.⁴² These institutional arrangements, with BPA as the power marketer, and the Corps and BuRec as the project operators, became the hallmarks of the Federal Columbia River Power System (FCRPS).⁴³

Development of the FCRPS continued far upriver from the Gorge throughout the post-World War II era to include fourteen major federal dams in the Columbia Basin, concluding when the last of four lower Snake River dams were completed in the mid-1970s.⁴⁴ A notable addition was The Dalles Dam in 1957, which was the second major federal dam within the Gorge.⁴⁵ That project

³⁶ The project operators of the federal dams in the Columbia Basin are the U.S. Army Corps of Engineers and the Bureau of Reclamation. BPA, *INSIDE STORY*, *supra* note 34, at 23.

³⁷ See *Hydroelectric Heritage*, *supra* note 30, at 191–202.

³⁸ 16 U.S.C. § 832c (2006).

³⁹ See *Hydroelectric Heritage*, *supra* note 30, at 206–14.

⁴⁰ See BPA, *INSIDE STORY*, *supra* note 34.

⁴¹ TVA was authorized by the Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58 (codified as amended at 16 U.S.C. §§ 831–831c, 831c-3 to 831m, 831n–831dd (2006)).

⁴² See *Hydroelectric Heritage*, *supra* note 30, at 198–200 (discussing the debate over the Bonneville Project Act); *id.* at 207–09 (discussing the defeat of the proposed Columbia Valley Authority).

⁴³ See *Hydropower vs. Salmon*, *supra* note 35, at 223–49 (discussing the evolution and components of the FCRPS).

⁴⁴ On the building of the lower Snake Dams, see KEITH C. PETERSON, *RIVER OF LIFE, CHANNEL OF DEATH: FISH AND DAMS ON THE LOWER SNAKE* (2001).

⁴⁵ The Dalles Dam was authorized by the River and Harbor Act of 1950, ch. 188, 64 Stat. 163, 179. See RICHARD WHITE, *THE ORGANIC MACHINE: THE REMAKING OF THE COLUMBIA RIVER* 50 (1995) (noting that The Dalles Dam generates electricity equal to thirteen times the demand of the City of Portland).

drowned the great Indian fishery at Celilo Falls, the site of the controversy in the *Winans* case.⁴⁶ By the mid-1960s, the FCRPS was being operated as a single entity, including even some utility-owned dams.⁴⁷ These operating practices cemented the dominance of hydropower on the Columbia and its major tributary, the Snake, sending the basin's salmon runs on a decline that would lead to Endangered Species Act listings in the 1990s.⁴⁸

BPA's lack of authority to expand the electric power system would cause problems in meeting a projected mushrooming electricity demand of the Northwest during the 1960s and 1970s.⁴⁹ With virtually all the large dam sites developed, the agency attempted to expand the system by financing the addition of coal and nuclear plants, with disastrous results.⁵⁰ Congress eventually had to step in and rewrite the region's electricity policies in the Northwest Power Act.⁵¹

The developed FCRPS now supplies one-third of the Northwest's electricity, carbon free.⁵² The dams also irrigate some eight million acres of farmland.⁵³ They also are the principal reason for the listing of seven species of upriver salmonids under the Endangered Species Act.⁵⁴ Moreover, one of the most pernicious effects of the hydropower dominance of the Columbia Basin concerns the mitigation that accompanied the dams, as hatchery salmon—introduced to compensate for dam-inflicted losses—now dominate. Hatchery salmon weaken wild runs through competition for food and habitat and genetic drift, while masking the true effect of the dams on wild salmon runs for

⁴⁶ See *supra* Part I.

⁴⁷ See *Hydroelectric Heritage*, *supra* note 30, at 217–19.

⁴⁸ See *infra* Part VI.

⁴⁹ See *Hydroelectric Heritage*, *supra* note 30, at 221–22.

⁵⁰ The chief economic calamity resulting from the program was the default of the Washington Public Power Supply System, a BPA preference customer, which had four of its five nuclear plants stillborn, at a cost of roughly \$2 billion. See Charles P. Alexander et al., *Whoops! A Two Billion Dollar Blunder*, TIME, Aug. 8, 1983, available at <http://www.time.com/time/magazine/article/0,9171,955183,00.html>.

⁵¹ See *infra* Part IV.

⁵² BPA *Financial Information and Rates*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/corporate/finance> (last visited Nov. 9, 2012).

⁵³ See BPA, *INSIDE STORY*, *supra* note 34, at 53.

⁵⁴ See *infra* Part VI.

decades.⁵⁵

III. SHARING SALMON HARVESTS FAIRLY: *SOHAPPY V. SMITH* AND ITS LEGACY

Indian fishers not only faced the habitat loss and passage problems that the dams presented, they were also burdened with discriminatory state conservation regulations, which often imposed the entire burden of conservation on them.⁵⁶ Although the Supreme Court would eventually outlaw discriminatory regulations in 1973 in its second *Puyallup* decision,⁵⁷ the Court's vague antidiscrimination formulation made it unclear what constituted impermissible discrimination, and the Court called for "a fair apportionment" of salmon harvests.⁵⁸

Fair apportionment had already been decreed by District Judge Robert Belloni in a case challenging the State of Oregon's ban on net fishing above The Dalles Dam. The ban effectively closed the upstream portion of the river to Indian harvesters and sent offending tribal fishermen like David Sohappy to jail. Sohappy successfully challenged his conviction in federal court,⁵⁹ and the federal government eventually filed a separate suit, initiating a case that continues to allocate salmon harvests on the Columbia forty-five years later in what may be the longest-running federal case in the country.⁶⁰

⁵⁵ See MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 109–28 (2002) [hereinafter SACRIFICING THE SALMON].

⁵⁶ See, e.g., AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS (1970); FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986).

⁵⁷ *Dep't of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973) (striking down a ban on net fishing because although facially nondiscriminatory, the ban affected only Indian fishers). Earlier, in *Dep't of Game v. Puyallup Tribe*, 391 U.S. 392, 401–03 (1968), the Court allowed state conservation regulations to apply to tribal fishing so long as they were nondiscriminatory and "reasonable and necessary," a standard that Professor Ralph Johnson accurately predicted would prove to be too vague for the state to apply fairly. Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972).

⁵⁸ *Puyallup II*, 414 U.S. at 48–49.

⁵⁹ *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

⁶⁰ The case is now known as *United States v. Oregon*. See Penny Harrison, *The Evolution of a New Comprehensive Plan for Managing Columbia River*

In the most notable of the case's many decisions, Judge Belloni responded to the State's claim that the treaties entitled the tribes to only the same rights as other citizens in memorable words, writing that "[s]uch a reading would not seem unreasonable if all history, anthropology, biology, prior case law, and the intention of the parties to the treat[ies] were to be ignored."⁶¹ The judge saw through the state's conservation regulations for what they were: attempts not only to preserve salmon but also to conserve harvest opportunities for state-licensed commercial and sport fishers.⁶² Consequently, he ruled that the State had to provide "a fair share" for tribal harvesters and set substantive and procedural standards for achieving that fair share.⁶³

Judge Belloni's decision revolutionized salmon management on the Columbia. He later defined "a fair share" to be half the harvests, incorporating the historic decision of Judge George Boldt in the context of Puget Sound salmon harvests.⁶⁴ Both Judge Belloni and Judge Boldt were upheld by the Ninth Circuit and ultimately the Supreme Court in 1979.⁶⁵ The case continues today in the court of District Judge Garr King.⁶⁶

Anadromous Fish, 16 ENVTL. L. 705 (1986); Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia Basin*, 24 ECOLOGY L.Q. 677 (1997).

⁶¹ *Sohappy*, 302 F. Supp. at 905.

⁶² Tribal fishers paid no state license fees under the Supreme Court's *Tulee* decision, *supra* note 25 and accompanying text.

⁶³ *Sohappy*, 302 F. Supp. at 908–11. See SACRIFICING THE SALMON, *supra* note 55, at 78–80 (discussing the standards Judge Belloni set in unpublished opinions, including providing meaningful participation of the tribes in the development of harvest regulations and ensuring that regulations were the "least restrictive which can be imposed consistent with assuring the necessary escapement [spawning] of fish for conservation purposes" (quoting *Sohappy v. Smith*, 302 F. Supp. 899, 907 (D. Or. 1994))).

⁶⁴ See *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

⁶⁵ *Puget Sound Gillnetters v. U.S. Dist. Court for the W. Dist. of Wash.*, 573 F.2d 1123 (9th Cir. 1978), *vacated sub nom. Washington v. Passenger Vessel Fishing Ass'n*, 443 U.S. 676 (1979); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). See SACRIFICING THE SALMON, *supra* note 55, at 80–86 (discussing the Boldt and Belloni decisions and their aftermath, including the Ninth Circuit's statement comparing the state of Washington's resistance to the Boldt decision to Southern states' resistance to desegregation, and the Supreme Court's ruling that the tribe's allocated share "secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living," 443 U.S. at 686–87).

⁶⁶ Continuing jurisdiction is necessary because although the tribal share of

IV. THE NORTHWEST POWER ACT: ELECTRIC POWER PLANNING, CONSERVATION, AND ATTEMPTED SALMON RESTORATION

A decade after the Belloni decision, the Northwest faced an electric power crisis the origins of which can be traced to the FCRPS system reaching its developmental limits and to a grand plan to use BPA revenues to add some twenty-six coal and nuclear plants to the hydroelectric system.⁶⁷ BPA, by this time the dominant federal agency in the region, proposed this ill-fated initiative, termed the “Hydro-Thermal Power Program.” But the plan foundered, first when its creative financing scheme was rejected by the Internal Revenue Service,⁶⁸ and second when the courts imposed injunctions on BPA because the agency had not satisfied the National Environmental Policy Act (NEPA).⁶⁹ Among the catastrophic results was the bankruptcy of one of BPA’s customers, the Washington Public Power Supply System, which scrapped four of its five planned nuclear plants, some of which had federal underwriting.⁷⁰

BPA and local utilities and industries turned to Congress for relief from the NEPA injunctions. But the statute that resulted, the Northwest Power Act of 1980,⁷¹ produced much more than relief from the injunctions. The statute contained innovations that, thirty

the harvest is judicially determined to be 50%, precise run sizes are difficult to predict, vary widely from year to year, and are often the subject of disagreement between the states and the tribes. There are also issues of those streams that are historic tribal fishing grounds (“usual and accustomed” fishing locations, in the terms of the treaties), which can be the source of inter-tribal disputes. *See, e.g.*, *United States v. Oregon*, 2008 WL 3834169 (D. Or. Aug. 13, 2008), *aff’d sub nom. United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010) (affirming Judge King’s decision that the Yakama and Wenatchi Tribes have fishing rights on Icicle Creek).

⁶⁷ The origins of the Northwest electric power crisis of the 1970s are traced in *Hydroelectric Heritage*, *supra* note 30, at 214–22.

⁶⁸ *See Hydroelectric Heritage*, *supra* note 30, at 223 (discussing the IRS’s rejection of BPA’s financing scheme, termed “net billing”).

⁶⁹ The injunctions were a result of *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979) (affirming a lower court injunction of a BPA contract under the program) and *Natural Res. Def. Council v. Munro*, 626 F.2d 134 (9th Cir. 1980) (affirming a lower court injunction on implementation of the program).

⁷⁰ *See* Jean Godden, *Initially, Fiscal Fiasco Can Be Fun*, THE SEATTLE TIMES, Nov. 15, 1998, available at <http://community.seattletimes.nwsourc.com/archive/?date=19981115&slug=2783538>. On the WPPSS saga, *see Hydroelectric Heritage*, *supra* note 30, at 220–21, 240 n.383; Alexander et al., *supra* note 50.

⁷¹ 16 U.S.C. § 839b (2006).

years later, make it worthy of a careful study.⁷²

The 1980 Act authorized BPA to acquire the output of new electric power sources and conservation measures,⁷³ thus allowing for an expansion of the federal electric system but only consistent with a plan approved by a new interstate compact agency, now called the Northwest Power Planning and Conservation Council.⁷⁴ The statute specified that the Council's plan had to treat electricity conservation as the equivalent of power generation,⁷⁵ a policy worthy of emulation elsewhere. Also, the Act established a priority scheme for the Council's plan to follow, with conservation as the first priority, renewable resources as the second priority, and coal and nuclear plants as the lowest priority.⁷⁶

Implementation of the statute survived a constitutional challenge, as the Ninth Circuit upheld the Council's authority to exert some control over federal agencies like BPA as an interstate compact agency without federal members.⁷⁷ Over the last thirty years, the Council's plans have had remarkable success in conservation measures,⁷⁸ helping to keep the Northwest's electric

⁷² Although there have been at least two symposia devoted to the Northwest Power and Conservation Act's power and conservation provisions, see *Symposium on Energy Issues in the Pacific Northwest*, 58 WASH. L. REV. 175 (1983) and *Symposium on the Northwest Power Act*, 13 ENVTL. L. 593 (1983), these analyses are dated. These provisions and their implementation are understudied, and may hold valuable lessons for other regions of the country.

⁷³ 16 U.S.C. § 839b (2006 & Supp. IV 2011).

⁷⁴ *Id.* § 839b(a).

⁷⁵ *Id.* § 839b(e)(1).

⁷⁶ *Id.* All power sources had to be "cost effective," including life-cycle costs. *Id.* § 839a(4)(B) (defining "system cost" to include all life-cycle costs).

⁷⁷ *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power Planning Council*, 786 F.2d 1359, 1363-64 (9th Cir. 1986) (holding that Congress could authorize creation of a non-federal Council, that the states could later form, to exert control over federal agencies). See Michael C. Blumm, *The Appointments Clause, Innovative Federalism, and the Constitutionality of the Northwest Power Planning Council*, 8 J. ENERGY L. & POL'Y. 1 (1987); David D. Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy For The Disease Most Incident To A Federal Government"*, 17 ENVTL. L. 785, 791 (1987). The relevant BPA control provision in the Northwest Power Act is 16 U.S.C. § 839b(h)(10)(A) (BPA to use its financial and legal authorities "in a manner consistent" with the Council's plan); see also *id.* § 839b(h)(11)(A)(ii) (federal water managers to take the Council's fish and wildlife program into account "to the fullest extent practicable" at each relevant stage of their decision-making).

⁷⁸ NW. POWER & CONSERVATION COUNCIL, COUNCIL DOC. 2010-09, SIXTH NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN 4-3 (2010), available

rates among the lowest in the country.⁷⁹ The Council's effectiveness concerning renewable resources development has been more mixed, but lately there have been more investments, particularly in wind power, where some 3000 megawatts have been installed in the last two years, a number expected to double in just two more years.⁸⁰ The infusion of wind power has posed interesting problems, as the transmission system now has much more renewable hydropower and wind power than it can handle, at least in the spring of a high-water year, like 2011.⁸¹ BPA has claimed that when it cannot accommodate both sources of renewable electricity, it must prefer hydropower because it has limited ability to spill water as it must protect ESA-listed salmon and state water quality standards.⁸² There is some irony here, as

at <http://www.nwcouncil.org/energy/powerplan/6/default.htm> (referencing installed energy efficient light bulbs); *Northwest Energy Efficiency Achievements 1980–2008*, NW. POWER & CONSERVATION COUNCIL, <http://www.nwcouncil.org/library/2010/2010-08.htm> (last visited Nov. 9, 2012) (noting efficiency measures such as home and business weatherization, commercial light efficiency, irrigation efficiency, industrial motors, and industrial lighting).

⁷⁹ J. ALAN BEAMON, U.S. ENERGY INFO. ADMIN., COMPETITIVE ELECTRICITY PRICES: AN UPDATE (1998), available at <ftp://ftp.eia.doe.gov/features/beamon2.pdf>; see also U.S. ENERGY INFO. ADMIN., AVERAGE RETAIL PRICE OF ELECTRICITY TO ULTIMATE CUSTOMERS BY END-USE SECTOR, BY STATE (2011), available at <http://large.stanford.edu/publications/coal/references/volprice/> (listing 2010 electricity rate data by state).

⁸⁰ The rise in wind energy in the BPA system was due in part to the American Recovery and Reinvestment Act's emphasis on renewable energy. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 138–48. See also *Balancing Act: BPA Grid Responds to the Huge Amount of Wind Energy*, BONNEVILLE POWER ADMIN. (2008), available at http://www.bpa.gov/corporate/pubs/fact_sheets/08fs/Wind-balancing-act-Nov2008.pdf.

⁸¹ See, e.g., Ted Sickinger, *BPA Throws a Wrench in the Wind Works*, OREGONIAN, May 14, 2011, at A1.

⁸² See, e.g., Ted Sickinger, *BPA Curtails Wind Farm Electricity*, OREGONIAN, May 19, 2011, at C1. The wind generators claimed that this curtailment violated the Federal Power Act. See *AWEA Supports Pacific Northwest Energy Companies' Complaint That Bonneville Power Administration Violated the Federal Power Act in Taking Wind off the Grid*, AM. WIND ENERGY ASS'N (June 13, 2011), <http://www.awea.org/newsroom/pressreleases/WindFERCfilingagainstBPA.cfm>; see also Ted Sickinger, *Wind Farm Owners Set Sights on BPA*, OREGONIAN, June 14, 2011, (discussing the wind generators' appeal to the Federal Energy Regulatory Commission to overturn BPA). In December 2011, while this article was in press, FERC concluded that BPA's cutoff of the wind generators was discriminatory and ordered the agency to revise its transmission policy accordingly. See Ted Sickinger, *Federal Regulators Reel in BPA*, OREGONIAN, Dec. 8, 2011, at B1.

BPA also claims it should not have to spill water in the summer to protect listed salmon due to its expense, a claim that has been rejected by the reviewing court in ongoing ESA proceedings.⁸³

The 1980 Act also called for the Council to develop a Columbia Basin Fish and Wildlife Program that would restore salmon runs damaged by the FCRPS.⁸⁴ Although the Ninth Circuit agreed with arguments that the statute required “parity” between hydropower generation and salmon protection in the mid-1990s,⁸⁵ there has been no parity in river operations, as evidenced by the ESA listing of several upriver runs of Columbia Basin salmonids and persistent injunctions ordering BPA to spill water to facilitate fish passage.⁸⁶ In retrospect, it was naïve for Congress and certain commentators⁸⁷ to think that an interstate compact agency comprised of eight gubernatorial appointees could chart a clear path to salmon restoration when that path required powerful federal agencies like BPA and the Corps, which historically favored hydropower operations that led the salmon runs to the brink of extinction, to change old ways of doing business. These agencies have proved to be masters at defending the status quo of river operations, except when a federal judge orders them to do otherwise.⁸⁸

⁸³ See *infra* note 135 and accompanying text.

⁸⁴ Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. § 839b(h)).

⁸⁵ *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371, 1392 (9th Cir. 1994) (faulting the Council’s fish and wildlife program for failing to give appropriate deference to the views of federal, state, and tribal fish and wildlife agencies); see Michael C. Blumm, *Columbia Basin Salmon and the Courts: Reviving the Parity Promise*, 25 ENVTL. L. 351, 356-359 (1995).

⁸⁶ See *infra* notes 135-136 and accompanying text.

⁸⁷ I include myself among the naïve, see Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 ENVTL. L. 277, 283, 358 (1984); Michael C. Blumm & Brad L. Johnson, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497, 498-99, 553 (1981). For a wiser view, see generally Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657 (1991).

⁸⁸ See *infra* notes 128-131, 135, 140 and accompanying text; see also Michael C. Blumm et al., *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 ENVTL. L. 709, 734-74 (2006) [hereinafter *Practicing Deception*] (discussing status quo efforts from 1992 through 2004).

V. THE COLUMBIA GORGE NATIONAL SCENIC ACT: INNOVATION IN LAND USE REGULATION

The Columbia River Gorge is a spectacularly beautiful place, with diverse plant and animal life, sacred sites, and natural resources in abundance.⁸⁹ But the Gorge is hardly a pristine environment: highways and railroads run along both sides of the river and two large federal hydroelectric dams lie within it.⁹⁰ Over 50,000 people reside within the Gorge in thirteen cities, six counties, and two states.⁹¹ Roughly sixty percent of the land in the Gorge is privately owned; only about forty percent is managed by the U.S. Forest Service.⁹²

Efforts to protect the Gorge's natural resources and scenery have been longstanding. Since the 1930s, there have been initiatives aimed at imposing development controls and overcoming the developmental bias of local jurisdictions that imposed costs on surrounding communities.⁹³ Because of the predominance of private land within the Gorge, the area was not thought to be suitable for national park designation, yet greater-than-local protection seemed necessary.⁹⁴ Under the leadership of Oregon Senator Mark Hatfield, after years of deliberation, Congress enacted the Columbia River Gorge National Scenic Area Act in 1986,⁹⁵ establishing the nation's first national scenic area in an eighty-five-mile-long corridor along the Columbia River.⁹⁶ The Act sought to both (1) preserve the Gorge's natural resources and scenery, and (2) encourage economic growth both in existing urban areas in the Gorge and other growth compatible with the purposes of the statute.⁹⁷

⁸⁹ See CARL ABBOTT ET AL., *PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA 2-4* (1997); CHUCK WILLIAMS, *BRIDGE OF THE GODS, MOUNTAINS OF FIRE: A RETURN TO THE COLUMBIA RIVER GORGE 41-49* (1980).

⁹⁰ See *supra* notes 30-32 (Bonneville Dam), 45 (The Dalles Dam).

⁹¹ See Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty-Year Experiment in Land Use Federalism*, 21 J. LAND USE & ENVTL. L. 201, 202 (2006).

⁹² See *infra* note 103 and accompanying text.

⁹³ See Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 878 (1987).

⁹⁴ See *id.* at 896-932.

⁹⁵ Pub. L. 99-663; 100 Stat. 4274, *as amended* 16 U.S.C. § 544.

⁹⁶ See Blair, *supra* note 93, at 896-932.

⁹⁷ Columbia River Gorge National Scenic Area Act, Pub. L. No. 99-663,

In many respects the 1986 Gorge Act resembles the 1980 Northwest Power Act (NPA),⁹⁸ creating an interstate compact agency to plan for future development. The Gorge's compact agency is slightly larger than the Northwest Power Planning and Conservation Council,⁹⁹ with twelve members instead of eight, three appointed by each governor and one each representing the six counties of the Gorge.¹⁰⁰ Like the NPA, the Act survived constitutional attack, with the Ninth Circuit upholding congressional power to authorize an interstate compact agency to regulate private land use.¹⁰¹ But unlike the NPA, the Gorge Act was focused on controlling local agencies, not federal agencies. In fact, under the Gorge Act, the Gorge Commission shares regulatory authority with the U.S. Forest Service.¹⁰²

The Gorge Act divided the lands in the Scenic Area into three classifications: (1) the special management area (SMA), governed by the Forest Service, consisting of about 114,600 acres, or about 39% of the area; (2) the general management areas (GMA), governed by the Commission's plan, consisting of about 149,000 acres, or about 51% of the area; and (3) urban areas, of which there are nine, consisting of about 28,500 acres, or 10% of the area.¹⁰³ Land use in the GMA has received the most attention. The Commission promulgated its first management plan in 1992 and revised it in 2004.¹⁰⁴ County ordinances may implement the plan if they receive Commission approval.¹⁰⁵ Five of the six counties in

100 Stat. 4274, 4274 (1986) (codified at 16 U.S.C. § 544a (2006)).

⁹⁸ Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. § 839 (2006)).

⁹⁹ See *supra* note 74 and accompanying text; *supra* text accompanying note 87.

¹⁰⁰ Gorge National Scenic Area Act § 5(a)(1)(C).

¹⁰¹ See *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) (upholding the statute against commerce, compact, and takings clause attacks); see also Blumm & Smith, *supra* note 91, at 212-13.

¹⁰² See *infra* note 103 and accompanying text.

¹⁰³ See Blumm & Smith, *supra* note 91, at 205-06.

¹⁰⁴ The 1992 plan survived a challenge by Klickitat County, which unsuccessfully argued that the plan should be the subject of a state environmental impact statement. See *Klickitat Cnty. v. Columbia River Gorge Comm'n*, 770 F. Supp. 1419, 1428 (E.D. Wash. 1991) (concluding that it would be incongruous for Congress to expressly exempt the Commission from National Environmental Policy Act requirements only to have the courts require compliance with Washington State Environmental Policy Act requirements).

¹⁰⁵ Columbia River Gorge National Scenic Area Act § 7(c).

the Gorge have received Commission approval, but the Commission acts as a zoning board for lands within the Scenic Area for the unapproved Klickitat County in Washington.¹⁰⁶

Despite considerable controversy over the Commission's land-use restrictions, there have been no successful takings claims under the Gorge Act.¹⁰⁷ One reason is a rule that requires the Commission to ensure that all landowners have an economically viable use, even when implementation of Commission regulations might not otherwise allow one.¹⁰⁸

An interesting provision of the Gorge Act, section 8(o), allowed landowners in the SMA to "opt out" of Forest Service regulation (opting into regulation by the Gorge Commission) if they made a bona fide offer to sell to the Forest Service.¹⁰⁹ Before section 8(o) expired in 2001,¹¹⁰ landowners filed about 500 claims with the Forest Service, which made some 350 purchases, totaling about 19,000 acres; the remaining 150 claims, totaling around 3000 acres, resulted in releases to GMA status and regulation by the Gorge Commission.¹¹¹

VI. ESA SALMON LISTINGS AND THEIR DISAPPOINTING RESULTS

The sixth contribution of the Gorge to natural resources law concerns the ESA listing of upriver salmon runs that pass through

¹⁰⁶ See Blumm & Smith, *supra* note 91, at 210–11 nn.49, 52.

¹⁰⁷ Conversation with Jeff Litwak, Counsel for the Columbia River Gorge Commission (May 15, 2011); see also Blumm & Smith, *supra* note 91, at 215–18 (discussing relevant case law).

¹⁰⁸ COLUMBIA RIVER GORGE COMM'N, APPEALS FROM COUNTY ORDINANCES § 350-60-090(3)(d), (as amended through May 1, 2011), available at [http://www.gorgecommission.org/client/Commission Rule 350-6020110501.pdf](http://www.gorgecommission.org/client/Commission%20Rule%20350-6020110501.pdf).

¹⁰⁹ Columbia River Gorge National Scenic Area Act § 8(o)(1) (the Forest Service had three years to accept the offer or release the land to GMA status). For details, see Blumm & Smith, *supra* note 91, at 218–21.

¹¹⁰ Congress terminated the "opt out" provision in amendments to the statute passed in 2000 that became effective April 1, 2001. Columbia River Gorge National Scenic Area Act, Pub. L. No. 99-663, 100 Stat. 4274 (1986), amended by Pub. L. No. 106-291 §§ 364-47, 114 Stat. 999, 1000 (2000).

¹¹¹ Telephone Interview with Pam Campbell, U.S. Forest Service (May 17, 2011). An emerging issue for the Gorge Commission may concern protection of the Scenic Area's spectacular views from the proliferating wind farms in the area. See *supra* notes 80–82 and accompanying text; see also Chris Carvalho, *Scenery Stealers: Wind Farms Ruin Views in Columbia River Gorge*, OREGONIAN, July 3, 2011, at B9 (op-ed calling for buffer zones that would provide viewshed protection).

the Gorge on the way to their spawning grounds. Since the first listings in the early 1990s,¹¹² there has been a mountain of commentary on this issue,¹¹³ and, as of this writing, it is hardly clear what changes the ESA might require in hydroelectric operations. But the results over the last two decades have been, it is safe to say, disappointing to salmon advocates.¹¹⁴ Somewhat astonishingly, wild Columbia River Basin salmon runs are only about half of what they were thirty years ago, despite the expenditure of \$600 million annually, and nearly \$10 billion cumulatively.¹¹⁵ Even more alarmingly, they are roughly one percent of historical runs.¹¹⁶

In fact, the case has been made that the listing of Columbia River Basin salmon in the ESA has done more to change the implementation of the statute than it has done to improve the fate of the species.¹¹⁷ For example, the implementing agency, the National Marine Fisheries Service (NMFS), created the “evolutionarily significant unit” (ESU) to define a distinct

¹¹² For an article anticipating the salmon listings, see F. Lorraine Bodi, *Protecting Columbia River Salmon Under the Endangered Species Act*, 10 ENVTL. L. 349 (1980); see also William H. Rodgers, Jr., *What a Salmon Czar Might Hope For*, 74 WASH. L. REV. 511 (1999). The initial salmon listings, like most of the ensuing ones, have been the result of the ESA’s citizen petition provision, 16 U.S.C. § 1533(b)(3)(A), an underappreciated statutory innovation.

¹¹³ See, e.g., Michael C. Blumm, *Salmon Law and Policy in 1995: A Brief Overview*, 26 ENVTL. L. 651 (1996); Blumm & Simrin, *supra* note 87; Michael V. McGinnis, *On the Verge of Collapse: The Columbia River System, Wild Salmon and the Northwest Power Planning Council*, 35 NAT. RESOURCES J. 63 (1995); Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. ENVTL. L. & LITIG. 247 (1996); John M. Volkman, *The Endangered Species Act and the Ecosystem of Columbia River Salmon*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 833 (2008); John M. Volkman & Willis E. McConnaha, *Through a Glass, Darkly: Columbia River Salmon, the Endangered Species Act, and Adaptive Management*, 23 ENVTL. L. 1249 (1993); Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 ECOLOGY L.Q. 677 (1997).

¹¹⁴ See, e.g., *Practicing Deception*, *supra* note 88.

¹¹⁵ See STEVEN HAWLEY, *RECOVERING A LOST RIVER: REMOVING DAMS, REWILDING SALMON, REVITALIZING COMMUNITIES* 129, 138 (2011), reviewed by Michael C. Blumm, *The Real Story Behind the Columbia Basin Salmon Debacle: Dam Preservation Under the Endangered Species Act*, 41 ENVTL. L. 1363, 1364 (2011).

¹¹⁶ HAWLEY, *supra* note 115, at 130–31.

¹¹⁷ See Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519 (1999).

population segment,¹¹⁸ which is the lowest population for which the ESA allows listing.¹¹⁹ This concept arguably overemphasizes genetics at the expense of ecological considerations.¹²⁰ Other changes that the listings meant for ESA implementation included multiyear biological opinions (BiOps), a continuously evolving definition of what constitutes “jeopardy” to the species, and the transformation of NMFS from an agency that was a salmon advocate in the 1980s into an agency that is now a defender of the hydroelectric system status quo.¹²¹

All the while, the condition of wild upriver Columbia River salmon runs has not materially improved, and in some cases has declined. Several upriver wild runs remain at less than forty percent of recovery goals.¹²² This decline has been masked by the effect of heavy reliance on Columbia River hatcheries, which have accompanied the Basin’s dam building as the preferred mitigation, and which have obscured the effect of the dams while working more damage on the wild salmon runs.¹²³ For example, BPA consistently mentions hatchery returns in an effort to minimize the effect of dam operations.¹²⁴ The ESA has, however, subjected

118 See Robin S. Waples, *Pacific Salmon, Oncorhynchus spp., and the Definition of “Species” Under the Endangered Species Act*, 53 MARINE FISHERIES REV., no. 3, 1991, at 11, 11 (explaining that an ESU requires the population to be “substantially reproductively isolated” from other populations and represent “an important component in the evolutionary legacy” of the species).

119 16 U.S.C. § 1532(16) (2006) (defining “species” to include “any subspecies” and “any distinct population segment”).

120 See Daniel J. Rohlf, *There’s Something Fishy Going on Here: A Critique of the National Marine Fisheries Service’s Definition of Species Under the Endangered Species Act*, 24 ENVTL. L. 617 (1994).

121 See Blumm & Corbin, *supra* note 117, at 591–92.

122 See Scott Learn, *Will Surge End the Salmon War?*, OREGONIAN, May 8, 2011, at A1, A12 (stating that Snake River spawners average less than 40% of recovery goal, with reproductive rates declining between 2008 and 2010 and several populations of spring chinook having fewer than 50 spawners; Salmon River spawners are just 20% of recovery levels, with a similar decline between 2008 and 2010; upper Columbia wild steelhead spawners are 40% of their recovery goal, while upper Columbia wild spring chinook are at 20% of their recovery goal).

123 See SACRIFICING THE SALMON, *supra* note 55, at ch. 6 (discussing “the false hope of salmon hatcheries”).

124 See BONNEVILLE POWER ADMIN., COLUMBIA RIVER HATCHERIES: AN EVOLVING ROLE (2010), available at http://www.bpa.gov/corporate/pubs/Columbia_River_Hatcheries_-_Sept_2010.pdf (referring to “mitigation hatchery programs”); GERALD R. BOUCK, BONNEVILLE POWER ADMIN.,

hatchery operations to ecological scrutiny.¹²⁵ In fact, the ESA has subjected all phases of the salmon life-cycle to scrutiny, moving far beyond the NPA's exclusive focus on hydropower¹²⁶ to include also harvest management and habitat—but that scrutiny has not led to materially less reliance on hatcheries in the Columbia system. Moreover, an increased focus on habitat rehabilitation is being used by BPA and NMFS as a defense against changing hydroelectric operations to benefit salmon.¹²⁷

The focus of ESA attention in recent years has centered on the federal BiOps on Columbia Basin hydroelectric operations. In the 1990s, there were two substantial challenges to hydroelectric operations BiOps and one injunction.¹²⁸ Judge James Redden assumed jurisdiction over a challenge to the 2000 BiOp promulgated by the Clinton Administration and struck it down because it too narrowly defined the “action area” of FCRPS operations and failed to assure that its “off-site mitigation measures” were reasonably certain to occur.¹²⁹ Judge Redden also struck down a 2004 Bush Administration BiOp because it (1) defined “jeopardy” to exempt most existing operations from scrutiny as nondiscretionary actions, (2) used a degraded baseline to evaluate proposed actions, and (3) ignored species recovery altogether.¹³⁰ The Ninth Circuit affirmed, finding the 2004 BiOp

CONCEPTUAL PLANS FOR QUALITATIVELY AND QUANTITATIVELY IMPROVING ARTIFICIAL PROPAGATION OF ANADROMOUS SALMONIDS IN THE COLUMBIA RIVER BASIN, PROJECT NO. 1986-11800 (1986), available at <https://pisces.bpa.gov/release/documents/documentviewer.aspx?doc=1087-1> (discussing supplementing “natural production with hatchery outplants”); *Unprecedented Partnership to Build and Operate \$43 Million Hatchery*, BONNEVILLE POWER ADMIN., <http://www.bpa.gov/corporate/BPANews/ArticleTemplate.cfm?ArticleID=article-20101115-01> (last visited Nov. 9, 2012) (announcing a salmon hatchery “to support the recovery of Columbia River Spring Chinook salmon”).

¹²⁵ See SACRIFICING THE SALMON, *supra* note 55, at 23, 177–78.

¹²⁶ See *supra* Part IV.

¹²⁷ See *infra* note 134 and accompanying text.

¹²⁸ See *Practicing Deception*, *supra* note 88, at 736–38, 748–49, 797.

¹²⁹ Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196, 1211–12 (D. Or. 2003), discussed in *Practicing Deception*, *supra* note 88, at 761–63.

¹³⁰ Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-640-RE, 2005 WL 1278878 (D. Or. May 26, 2005), discussed in *Practicing Deception*, *supra* note 88, at 774–94. Earlier, in *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-6940-RE, 2004 WL 1698050 (D. Or. July 29, 2004), discussed in *Practicing Deception*, *supra* note 88, at 766–67, the court rejected BPA's and NMFS's attempt to curtail summer spills of water to facilitate dam

to be “structurally flawed.”¹³¹

Surprisingly, the Obama Administration largely adopted the Bush Administration’s BiOp, although it did propose to employ adaptive management to make adjustments if the results prove to protect fewer salmon than forecasted.¹³² However, opponents claimed that the triggers for taking adaptive management action are actually higher than are required to reinitiate consultation, so the promise of mid-course corrections is chimerical.¹³³ One change that has occurred is in the latest round of litigation the number of plaintiffs has been reduced, as BPA has reached settlements with the state of Washington and several tribes in which they agreed to drop their opposition to the BiOp in return for a promised \$900 million in salmon habitat restoration work over a ten-year period.¹³⁴ Environmentalists, the Nez Perce Tribe, and the state of Oregon refused to settle.

The BiOp critics fault the Obama BiOp for not including summer spills necessary to facilitate dam passage. Judge Redden has repeatedly ordered such spills in the past,¹³⁵ but BPA and NMFS oppose them because of their economic costs.¹³⁶ The

passage.

¹³¹ Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 524 F.3d 917, 923 (9th Cir. 2008).

¹³² See NAT’L MARINE FISHERIES SERV., FCRPS ADAPTIVE MANAGEMENT IMPLEMENTATION PLAN: FEDERAL COLUMBIA RIVER POWER SYSTEM BIOLOGICAL OPINION (2009).

¹³³ See *Science and Law Disregarded in 2010 Obama Plan for Columbia and Snake Rivers*, SAVE OUR WILD SALMON (Oct. 29, 2010), http://www.wildsalmon.org/index.php?option=com_content&view=article&id=303&Itemid=93#Quotes.

¹³⁴ The settlements were euphemistically called the “Columbia Basin Fish Accords.” See *Columbia Basin Fish Accords*, FEDERAL CAUCUS, <http://www.salmonrecovery.gov/Partners/FishAccords.aspx> (last visited Nov. 9, 2012). See also Matthew Daly, *U.S. and Tribes in Salmon Accord: \$900 Million in Habitat, Dams to Stay*, SEATTLE POST-INTELLIGENCER, Apr. 7, 2008, available at <http://www.seattlepi.com/local/article/U-S-and-tribes-in-salmon-accord-1269569.php> (noting that Oregon Governor Ted Kulongoski considered the accords premature, felt the tribes took a short-term view, and said the agreement marked a “sad day”).

¹³⁵ See *Practicing Deception*, *supra* note 88, at 766–67, 795 (discussing spill injunctions in 2004 and 2005).

¹³⁶ See, e.g., Press Release, Chairman Doc Hastings, Hastings: Summer Spill Results in Higher Energy Prices, Not Saved Fish (July 1, 2010), <http://naturalresources.house.gov/News/DocumentSingle.aspx?DocumentID=193321> (describing Doc Hastings, ranking member of the House Natural Resources Committee, complaining about the costs of salmon recovery, including an

BiOp's critics also challenge the latest definition of "jeopardy," which is that a proposal need only to be "trending toward recovery" to avoid species jeopardy.¹³⁷ Under this interpretation, any improvement in the degraded condition of wild salmon runs would satisfy the ESA. Finally, the critics contest the BiOp's use of uncertain future habitat measures to avoid jeopardy, fault the BiOp's climate change analysis and its failure to include a jeopardy analysis for Snake River sockeye, and maintain that the BiOp fails to analyze new evidence showing the effects of depressed Columbia River Chinook on endangered southern resident killer whales.¹³⁸ Nor does the BiOp contain systemwide survival standards,¹³⁹ and a prerequisite for any successful salmon recovery plan would seem to be survival goals linked to the salmon life-cycle.

As of this writing, Judge Redden has all these issues before him. If it loses again, the federal government has suggested that it will likely take another appeal to the Ninth Circuit.¹⁴⁰

alleged \$63 million in foregone hydropower revenues from a court-ordered spill in 2006).

¹³⁷ See Supplemental Memorandum in Support of NWF's Supplemental Motion for Summary Judgment Re 2010 Supplemental BiOp at 25–27, Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-0640-RE (D. Or. Oct. 29, 2010).

¹³⁸ *Id.* at 4–13 (uncertain habitat measures), 16–21 (climate change effects), 31–32 (lack of analysis of Snake River sockeye), 32–35 (effects on southern resident killer whales). On the effect of declining Columbia Basin chinook on the southern resident killer whale populations, see HAWLEY, *supra* note 115, at 31–39.

¹³⁹ See Learn, *supra* note 122, at A13 (noting also that the influential Western Division of the American Fisheries Society backs the challengers to the BiOp, calling the Obama plan "inadequate and short on concrete action").

¹⁴⁰ After this article was in press, Judge Redden handed down a split decision, enjoining implementation of the current BiOp after 2013, but allowing it to proceed during 2012–13. Redden ruled that the federal government had failed to identify the specific mitigation measure it planned undertake to avoid jeopardy to listed salmon after 2013. The judge expressed skepticism about whether the government's promised habitat measures would produce increased salmon survival, and he ordered the post-2013 plan to include reasonably specific and efficacious mitigation measures for the life of the plan and to consider whether more aggressive actions, "such as dam removal and/or additional flow augmentation and reservoir modification, are necessary" to avoid jeopardy and satisfy the ESA. He also ordered continued spills of water at the dams during the summer to facilitate salmon migration. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. CV 01-00640-RE, 2011 WL 3322793, at *7 (D. Or. Aug. 2, 2011) (mitigation measures not reasonably certain to occur), *8 (skepticism concerning the science underlying alleged survival benefits), *10

VII. COMPENSATING LANDOWNERS FOR LAND USE REGULATIONS:
THE OREGON REVOLUTION (MEASURE 37) AND ITS CORRECTION
(MEASURE 49)

Another contribution of the Gorge to natural resources law concerns landowner compensation for restrictive land use regulations. Although this issue ultimately produced two statewide votes, arguably its genesis lies in a land use dispute originating near the Gorge, where restrictions imposed on land development are commonplace. In *Dodd v. Hood River County*, the County denied the Dodds a permit to build on their forty-acre parcel, which was within a forest use zone that prohibited buildings unless “necessary and accessory” to forest use, and had been since the Dodds purchased the land seven years earlier.¹⁴¹ The Dodds unsuccessfully appealed to the state land use board of appeals and then to the courts, seeking compensation under the state constitution’s taking clause.¹⁴² Denied relief in the state courts,¹⁴³ the Dodds appealed to federal court, alleging a taking under the Federal Constitution. The Ninth Circuit affirmed a district court determination that the Dodds had already litigated the amount of economic loss at stake, which was less than a complete wipeout. The court concluded that the Dodds could bring a federal takings claim without suffering a complete economic loss, but that there was in fact no taking because the forest use zone regulations served a legitimate governmental interest, and the Dodds did not possess a reasonable investment-backed interest. The federal district court had ruled that the Dodds had already litigated the basic issue in state court, since there was no “fundamental distinction” between the state and federal takings clauses.¹⁴⁴ The Ninth Circuit affirmed, but suggested that Oregon takings law was different from federal takings law because it seemed to deny

(consider dam breaching and flow augmentation), *11 (continued spills).

141 See *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1223 (9th Cir. 1998). The county planning commission and the county board of commissioners upheld the 1990 permit denial in 1991. *Id.* The court noted that the county ordinance in 1983 was not yet compatible with statewide land use goals, and, without them, “the Dodds may have been able to build a residence under the County’s underlying zoning scheme, as it was worded.” *Id.*

142 See *id.* at 1224 (discussing the administrative and state court decisions).

143 See *Dodd v. Hood River Cnty.*, 855 P.2d 608 (Or. 1993), *aff’d* 836 P.2d 1373 (Or. Ct. App. 1992).

144 *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1224 (9th Cir. 1998) (citing an unpublished district court order).

compensation for any regulation not producing a complete economic wipeout, while under the federal test a taking could occur without loss of all economically beneficial uses of the land.¹⁴⁵

Helping to litigate the *Dodd* case was the Pacific Legal Foundation, a libertarian property rights group well known for pursuing takings claims.¹⁴⁶ The foundation is philosophically aligned with a local Oregon group—Oregonians in Action (OIA)—that won the *Dolan v. City of Tigard* case in the Supreme Court, enabling the Dolans to eventually settle the case for over \$1 million in compensation due to a city requirement that they provide a public bike lane flood plain in return for a permit to double the size of their hardware store.¹⁴⁷ In the wake of the adverse result in *Dodd*, OIA decided to begin a campaign to change Oregon takings law.

Two years after *Dodd*, OIA spearheaded an initiative to revolutionize Oregon land use law. In 2000, Ballot Measure 7 promised 100% landowner compensation for any reduction in market value due to any land use regulation “adopted or first applied” after the landowner acquired the property,¹⁴⁸ subject to a few exceptions.¹⁴⁹ After the voters approved Measure 7,¹⁵⁰ a trial court struck it down, and the Oregon Supreme Court affirmed,

¹⁴⁵ *Id.* at 1228.

¹⁴⁶ See *Property Rights Litigation*, PAC. LEGAL FOUND., <http://www.pacificlegal.org/page.aspx?pid=269> (last visited Nov. 9, 2012) (listing a substantial caseload under “Coastal Land Rights Project: Defending Property Rights in the Coastal Zone”).

¹⁴⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994) (requiring an “essential nexus” between a legitimate government interest and a permit condition imposed by a local government and a “rough proportionality” between the exaction and the effect of the proposed development). In 1998, the Dolans settled for \$1.4 million, \$100,000 in attorneys’ fees and a plaque commemorating their victory along the bike path. See Walt Albro, *Dolan v. Tigard: Owner Gets \$1.4 Million From City—At Last!*, REALTOR MAG., July 1998, <http://realtormag.realtor.org/law-and-ethics/in-court/article/1998/07/dolan-v-tigard-owner-gets-14-million-city-last>.

¹⁴⁸ See Michael C. Blumm & Eric Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279, 299–304 (2007) [hereinafter *Enacting Libertarian Property*] (discussing Measure 7).

¹⁴⁹ See *id.* at 300 (discussing three exemptions for nuisance laws, requirements of federal law, and shops selling pornography, nude dancing, alcohol, or gambling).

¹⁵⁰ See *id.* at 302 (noting that in November 2000 the Oregon electorate approved Measure 7 by a 54–46% vote).

ruling that the measure violated the Oregon Constitution's requirement that each constitutional change be voted on separately.¹⁵¹

Undaunted, OIA sponsored a separate, statutory initiative that would not be bound by the constitutional requirement of a separate vote. Like Measure 7, this measure—which would become known as Measure 37—promised 100% landowner compensation for any market value declines due to an after-acquired regulation, subject to the same exemptions, although it also gave the responsible government the authority to modify or rescind the offensive regulation instead of providing monetary compensation.¹⁵² Measure 37 passed overwhelmingly in 2004, 61-39 percent.¹⁵³ And unlike Measure 7, Measure 37 survived judicial attack, with the Oregon Supreme Court reversing a lower court injunction in 2006.¹⁵⁴ But ironically, considering its origins, Measure 37 had no effect at all within the Gorge Scenic Area, since the Oregon Court of Appeals ruled that Scenic Act regulation was exempt from the measure as a federal law requirement in 2007.¹⁵⁵

Measure 37 proved not to be the final word of the Oregon land use regulation, however. In 2007, the Oregon legislature referred to the voters an amendment, known as Measure 49, which limited the availability of compensation or regulatory waivers largely to three houses,¹⁵⁶ thus eliminating the prospect for windfall recoveries for large landowners.¹⁵⁷ Measure 49 also eliminated claims for commercial development and allowed the

¹⁵¹ *League of Or. Cities v. State*, 56 P.3d 892 (Or. 2002).

¹⁵² *See Enacting Libertarian Property*, *supra* note 148, at 308–10 (discussing Measure 37's provisions, including an exemption for health, safety, and pollution control regulations).

¹⁵³ *See id.* at 304–07 (discussing the Measure 37 campaign and its results).

¹⁵⁴ *MacPherson v. Dep't of Admin. Serv.*, 130 P.3d 308 (Or. 2006) (rejecting claims that the measure impaired the plenary power of the state legislature, violated the state constitution's guarantee of equal privileges and immunities, separation of powers, due process, or unlawfully suspended laws).

¹⁵⁵ *Columbia River Gorge Comm'n v. Hood River Cnty.*, 152 P.3d 997 (Or. Ct. App. 2007).

¹⁵⁶ *See Enacting Libertarian Property*, *supra* note 148, at 360–65 (discussing Measure 49's provisions, which allow for up ten homes within urban areas and also cap at twenty homes the number of exemptions any owner may obtain).

¹⁵⁷ *See id.* at 358 (reporting claims of \$10–19 billion in compensation by Spring 2007).

transfer of claims upon the sale of the property.¹⁵⁸ Measure 49 was overwhelmingly approved by the voters, by the same 61–39% margin that approved Measure 37 three years earlier.¹⁵⁹

The upshot of the combination of Measures 37 and 49 is that slightly over 6000 more homes will be built over the ensuing ten to twenty years than would otherwise have been built under Oregon land use law.¹⁶⁰ This increase represents approximately a 37–75% increase in residential development, depending on whether the development occurs within ten or twenty years.¹⁶¹ Only one compensation claim has ever been paid,¹⁶² so the effect of the Oregon land use revolution, which began in the Gorge area, was not widespread compensation to landowners; rather, it was instead a deregulatory scheme, which Measure 49 limited to a relatively minor regulatory rollback. But future land use controls will no doubt be chilled by the threat of 100% compensation for any decline in developmental value.¹⁶³ This result is celebrated as a victory for liberty by the Pacific Legal Foundation and the OIA.

VIII. REMOVING THE CONDIT DAM: A MILESTONE IN ENVIRONMENTAL REMEDIATION

Another contribution of the Gorge to natural resources law concerns environmental remediation through dam removal. There have been several dam removals in the Northwest in recent

¹⁵⁸ See *id.* at 361 (limiting claims to residences), 363 (allowing waivers to be transferred).

¹⁵⁹ See *id.* at 361 n.466.

¹⁶⁰ See OR. DEP'T OF LAND CONSERVATION & DEV., *BALLOT MEASURES 37 (2004) AND 49 (2007): OUTCOMES AND EFFECTS 9–10, 37* (Jan. 2011), available at http://www.oregon.gov/LCD/docs/publications/M49_2011-01-31.pdf?ga=t (estimating that 6131 new dwellings on 3878 new parcels were authorized under Measure 37 as of December 2010).

¹⁶¹ See Eric Mortenson, *Started with Measure 37, Oregon Land-Use War Settled with a Muted Impact on the Land*, OREGONIAN, Feb. 1, 2011, http://www.oregonlive.com/environment/index.ssf/2011/02/oregon_land-use_war_gets_settl.html.

¹⁶² See Bethany R. Berger, *What Owners Want and Government Do: Evidence from the Oregon Experiment*, 78 *FORDHAM L. REV.* 1281, 1311–13 (2007) (discussing the City of Prineville's payment of \$180,000 to Grover and Edith Palin in September 2007).

¹⁶³ See *Enacting Libertarian Property*, *supra* note 148, at 365–66; see also Marcilynn A. Burke, *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 *NOTRE DAME L. REV.* 1453 (2009) (discussing the shortcomings of replacing traditional land use regulation with citizen initiatives like Measure 37).

years,¹⁶⁴ but the poster-child for dam removal might be the Condit Dam on the White Salmon River fewer than four miles from its confluence with the Columbia. When removal is complete in October 2012, it will be the largest dam removed in the country to date. Still, a dozen years elapsed between the federal licensee's agreement to remove the dam and its actual removal, so the process involved in its removal is worth studying.

Condit was built in 1913 to generate electric power before the enactment of the Federal Power Act in 1920.¹⁶⁵ The dam was never equipped with fish passage, despite its location in the lower basin on a salmon stream. Nor did it have a federal license until 1968.¹⁶⁶ When that twenty-five year term expired, the licensee—PacifiCorp—sought a new license from the Federal Energy Regulatory Commission (FERC). But when the NEPA process produced fishway conditions under section 18 of Federal Power Act that called for construction of upstream and downstream fish passage, the price of a new license increased by about \$30 million.¹⁶⁷ This was far more expensive than the revenues the dam could produce, so PacifiCorp, federal, state, and tribal agencies, as well as environmentalists began what turned out to be a half-dozen years of negotiations, culminating in a 1999 settlement. The agreement called for the dam to be removed in seven years, in 2006, to enable PacifiCorp to amortize the cost of dam removal, which the agreement capped at \$17 million.¹⁶⁸

¹⁶⁴ Notably, three dams have been removed from the Rogue River: the Savage Rapids, Gold Hill, and Gold Ray Dams, meaning that the Rogue now flows over 150 miles to the Pacific. See *Restoring the Rogue*, AM. WHITEWATER, https://www.americanwhitewater.org/content/Project_view_id_rogue (last visited Nov. 9, 2012). Also, two Sandy Basin dams have been removed: the Marmot and Little Sandy Dams, which collectively made up the Bull Run project, were removed in 2007 and 2008. See Michael Milstein, *Oregon's Sandy River Successfully Reinvents Itself After Dam Removal*, OREGONIAN, July 30, 2008, <http://www.oregonlive.com/outdoors/oregonian/index.ssf?/base/news/1217390121239080.xml&coll=7&thispage=1> (discussing the removal of the Marmot Dam, which, at 50 feet high, was the largest dam removal in the Northwest before Condit).

¹⁶⁵ See David H. Becker, *The Challenges of Dam Removal: The History and Lessons from the Condit Dam and Potential Threats from the 2005 Federal Power Act Amendments*, 36 ENVTL. L. 811, 817 (2006).

¹⁶⁶ See *id.* at 817–18 (describing the effects of Condit Dam on salmon migration).

¹⁶⁷ See *id.* at 825–26.

¹⁶⁸ See *id.* at 827 (describing the settlement agreement, which called for an end to project operations in 2006 and complete dam removal in 2007).

But five years after its scheduled removal, the Condit Dam was still in place in 2011, generating power and blocking salmon migration. The delay was due in part to the steadfast opposition of two local counties, in part to an uncharted FERC process for license surrender, and in part to the need to comply with requirements like § 401 of the Clean Water Act and the Washington State Environmental Policy Act.¹⁶⁹ In order to issue the water quality certification required by § 401 for dam removal, the state of Washington had to amend its water quality standard to allow longer short-term exceedances of its turbidity standards.¹⁷⁰ Somewhat surprisingly, EPA, which had to approve the change, has yet to approve a generic waiver of water quality standard for dam removal projects.¹⁷¹ In addition, worried about potential litigation from the counties, the state also decided to do its own EIS on dam removal.¹⁷²

In December 2010, FERC finally accepted PacifiCorp's license surrender.¹⁷³ However, after all this time and trouble FERC surprisingly deemed the § 401 certification waived by the state,¹⁷⁴ an action all parties appealed. Then, in April 2011, on

¹⁶⁹ See *id.* at 828–33 (opposition of the counties and the effect on FERC), 838–40, 846–49 (water quality certification), 839 (state SEPA).

¹⁷⁰ See *id.* at 846.

¹⁷¹ See generally STEPHANIE D. LINDLOFF & LAURA A. WILDMAN, AMERICAN RIVERS, PERMITTING DAM REMOVAL: THE STATE OF (SEVERAL) STATES (2006), available at <http://www.americanrivers.org/library/reports-publications/permitting-dam-removal.html> (discussing permitting processes for dam removal).

¹⁷² WASH. DEP'T OF ECOLOGY, CONDIT DAM REMOVAL FINAL SEPA SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2007), available at <https://fortress.wa.gov/ecy/publications/publications/0706012.pdf>.

¹⁷³ Order Accepting Surrender of License, Authorizing Removal of Project Facilities, and Dismissing Application for New License, 133 FERC 61,232 (2010), available at <http://www.ferc.gov/whats-new/comm-meet/2010/121610/H-1.pdf>.

¹⁷⁴ The effect of the waiver was to make unenforceable state conditions attached to the 401 certification. Under section 401, state certification is deemed waived if the state does not act within one year. 33 U.S.C. § 1341(a)(1) (2006). Throughout the extended Condit Dam removal process, PacifiCorp had been submitting and withdrawing its surrender application each year to avoid the 401 waiver. The last time it did so, it made the withdrawal request within the one-year period electronically, but the hard copy was dated one day late, occasioning FERC's declaration of waiver. Order on Rehearing, Denying Stay, and Dismissing Extension of Time Request, 135 FERC 61,064, 4 (2011), available at <http://www.ferc.gov/whats-new/comm-meet/2011/042111/H-3.pdf> (noting that because "Washington DOE had not acted on the May 12, 2009 certification

rehearing, FERC reversed itself and included the § 401 conditions.¹⁷⁵ Finally, the Corps of Engineers issued a federal 404 permit for the dam removal in May.¹⁷⁶ On October 26, 2011, the dam was breached, a dozen years after the settlement and eighteen years after the license expired.¹⁷⁷ Condit's removal was the second-largest dam removal in the nation to date, following on the heels of the September 2011 removal of the federal Elwah and Glines Canyon Dams on the Elwah River on the Olympic Peninsula.¹⁷⁸

IX. SALMON VS. SEA LIONS: ENDANGERED SPECIES VS. MARINE MAMMALS

The final contribution of the Gorge to natural resources law concerns an ongoing conflict between California sea lions and salmon below Bonneville Dam. The sea lions were not a problem for salmon before around a decade ago, but in recent years predation has become more prevalent.¹⁷⁹ The Corps of Engineers estimates sea lion predation of 0.4% to 4.2% percent of adult salmon migrating in the spring, or up to 5000 chinook and 600

request within the statutory one-year period, and the new request was received by the agency after the period expired, we concluded that certification had been waived").

¹⁷⁵ *Id.*

¹⁷⁶ CORPS OF ENGINEERS, DEP'T OF THE ARMY, PERMIT NO. NWP-2004-523 (2011), available at http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Hydro/Hydro_Licensing/Condit/20110513USACOE404PermitFrontMaterial.pdf.

¹⁷⁷ See Scott Learn, *Century Later, Dam Breaching Sets River Loose*, OREGONIAN, Oct. 27, 2011, at A1. For a spectacular video of the dam breaching, see Columbia Riverkeeper, *Condit Dam: RIP 1913-2011*, YOUTUBE (Oct. 28, 2011), <http://www.youtube.com/watch?v=x7Aey1-7k6k>.

¹⁷⁸ See *Utility Sets Condit Dam Removal for Oct. in Washington*, COLUMBIAN, June 14, 2011, <http://www.columbian.com/news/2011/jun/14/utility-sets-condit-dam-removal-for-oct-in-wash> (noting that 210-foot-high Glines Canyon was larger than 125-foot-high Condit, and also observing that the removal price tag has risen from an estimated \$17 million to \$32 million, which apparently PacifiCorp will pay, perhaps due to the profits it earned in the extra five years of Condit Dam's operation).

¹⁷⁹ The California sea lion population is at a healthy 238,000 and is hardly eligible for ESA protection. See Quinton Smith, *OK Given to Resume Killing or Removing Salmon-Munching Sea Lions Below Bonneville Dam*, OREGONIAN, May 13, 2011, <http://www.oregonlive.com/environment/index.ssf/2011/05/okay-given-to-resume-killing-o.html>.

steelhead.¹⁸⁰

In 2006, the states of Oregon, Washington, and Idaho applied to NMFS for a permit to lethally remove sea lions below Bonneville Dam under § 120 of the Marine Mammal Act, which allows for the legal taking of pinnipeds that have a “significant negative impact on the decline or recovery” of ESA-listed salmon.¹⁸¹ As required by the Act,¹⁸² NMFS appointed a task force to ascertain whether the sea lions were having the statutorily required effect, and seventeen of the eighteen members concluded that the threshold had been met.¹⁸³ Only the representative of the Humane Society dissented.¹⁸⁴

NMFS issued the permit in 2008, authorizing the killing of selected sea lions that met certain criteria for five years, up to eighty-five per year.¹⁸⁵ Under this permit, eleven sea lions were euthanized in 2009, fourteen in 2010.¹⁸⁶ The Humane Society challenged the permit unsuccessfully in district court, but in 2010 the Ninth Circuit reversed.¹⁸⁷ The court faulted NMFS for failing to explain why a four percent sea-lion harvest rate was a “significant negative impact” in light of several earlier NFMS determination that human harvests (both native and nonnative) of up to seventeen percent—or over four times as many—had no such effect.¹⁸⁸ The court therefore enjoined the permit.

But in May 2011, NMFS reissued the permit, explaining that new research indicated that the sea lions actually consume nearly thirteen percent of salmon in low-flow years, and that one researcher found sea-lion-inflicted injuries on twenty-nine percent of listed salmon.¹⁸⁹ NMFS also asserted that the Marine Mammal

¹⁸⁰ See *Humane Soc’y v. Locke*, 626 F.3d 1040, 1045 (9th Cir. 2010).

¹⁸¹ 16 U.S.C. § 1389(b)(1) (2006) (authorizing the “intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks” listed under the ESA).

¹⁸² *Id.* § 1389(c).

¹⁸³ See *Humane Soc’y*, 626 F.3d at 1045–46.

¹⁸⁴ See *id.* at 1046.

¹⁸⁵ See *id.* at 1046 (authorizing the lethal taking of either 85 sea lions per year or “the number required to reduce the observed predation rate to 1 percent of the salmonid run at Bonneville Dam”).

¹⁸⁶ See Smith, *supra* note 179, at B8.

¹⁸⁷ *Humane Soc’y*, 626 F.3d at 1059.

¹⁸⁸ *Id.* at 1048–52.

¹⁸⁹ Memorandum from William Stelle, Jr., Reg’l Adm’r, Nat’l Marine

Act does not require predation to be comparable to other sources of mortality but instead authorizes NMFS to “balance any conflicts between species in its management.”¹⁹⁰ Because this permit was issued late in the spring salmon migration season and because sea lion numbers were down in 2011, no sea lions were euthanized before the Humane Society again filed suit, and the states decided to drop the 2011 permit and work on obtaining a new permit for 2012.¹⁹¹ As of this writing, a federal task force was considering whether NOAA should reissue the lethal-take permit for 2012.¹⁹²

Fisheries Serv., Authorizing the States of Washington and Oregon to Lethally Remove California Sea Lions at Bonneville Dam Under Section 120 of the Marine Mammal Protection Act (May 12, 2011), *available at* <http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/upload/Sec-120-DM-2011.pdf>; *see* Marine Mammals; Pinniped Removal Authority, 76 Fed. Reg. 56,167, 56,168–56,170 (proposed Sept. 12, 2011) (explaining that the NMFS voluntarily revoked the May 2011 permit, and seeking public comment for a possible permit in 2012); Smith, *supra* note 179.

¹⁹⁰ Smith, *supra* note 179, at B8; *see Questions & Answers on NOAA Fisheries' Authorization for the States of Oregon and Washington to Lethally Remove California Sea Lions Under Section 120 of the Marine Mammal Protection Act*, NAT'L MARINE FISHERIES SERV. (2011), <http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/Sec-120-Authority.cfm>.

¹⁹¹ *See* Quinton Smith, *Bonneville Sea Lions' Fate Rests with Panel*, OREGONIAN, Oct. 17, 2011, at A1, A9. *See also* Smith, *supra* note 179, at B8 (noting that the states have a list of 78 sea lions eligible for killing). A problem on the horizon concerns stellar sea lions, which, unlike California sea lions, are listed and tend to be year-round residents. *See California Sea Lion Questions and Answers*, OREGON DEP'T OF FISH & WILDLIFE, <http://www.dfw.state.or.us/fish/SeaLion/faqs.asp> (last visited Nov. 9, 2012). The stellar sea lions have begun preying on Columbia River sturgeon in the pool below Bonneville Dam, reducing opportunities to fish for this ancient species, the largest and longest-lived of all freshwater fish species. *See id.*

¹⁹² *See* Smith, *supra* note 191, at A1 (noting that the task force includes members of federal agencies, Indian tribes, and interest groups and that the permit was the first in the nation to allow the killing of marine mammals to protect listed species). While this article was in press, on March 15, 2012, NOAA reissued the take permit, allowing the taking of up to 92 sea lions in 2012. Only sea lions having a “significant negative impact” on salmon would be taken. NOAA reasoned that sea lions eat 1.5 to 4% of returning adult salmon each year (3600 to 6000 fish), about one-third of which are wild fish listed under the ESA, and maintained that human fisheries are heavily regulated, while sea lion takes—which are proportionally higher in low-return years—are unregulated. The Humane Society, which noted that sea lion predation was down while salmon runs are stable or increasing, was considering filing another suit. *See* Scott Learn, *Bonneville Sea Lion Killing to Resume*, OREGONIAN, Mar. 16, 2012, at B1 (noting that between 2008 and 2010, NOAA permitted the states to trap and remove 38 sea lions, 28 of which were euthanized and 10 of which were relocated to aquariums and zoos).

Of course, if one were to take a life-cycle view of all takes of listed Columbia River salmon that NMFS has authorized under the ESA, the dams would also be scrutinized. They kill many times more salmon than sea lion and human harvesters combined.¹⁹³ A life-cycle analysis would argue for taking out the four lower Snake River dams, which would substantially reduce hydropower mortalities at small economic costs.¹⁹⁴

CONCLUSION

The Columbia River Gorge, the site of the Supreme Court's recognition that nineteenth century Indian treaties recognize important reserved property rights in salmon that burden both private landowners and state regulators,¹⁹⁵ has over the last century been the site of epic conflicts over natural resources and important innovations in natural resources law doctrine. The Gorge was at the center of the Columbia dam building in the early twentieth century¹⁹⁶ and remains today at the hub of the struggle between hydropower and salmon,¹⁹⁷ the conflict between wind energy and hydropower,¹⁹⁸ and the controversy over sea lion predation on salmon.¹⁹⁹

The Gorge was ground zero in the Oregon landowner compensation revolution and the consequent reaction, which reduced but did not eliminate the revolution and has produced a limited rollback in land use regulation in the state, promising to

193 See, e.g., Glen Spain, *The Battle Over the Columbia*, FISHERMAN'S NEWS (Pac. Coast Fed'n of Fishermen's Ass'ns), Oct. 1997, <http://www.pcffa.org/fn-oct97.htm> ("The Oregon Dept. of Fish and Wildlife officially estimates that all Tribal, commercial and recreational fishing combined accounts for less than 5% of all human-caused immediate salmon mortality within the Columbia River Basin, and that roughly 90% of the remaining mortality is caused by the dams by killing baby salmon migrating downstream or as returning adults.").

194 See Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 ENVTL. L. 997 (1998); Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197 (1998).

195 See *supra* Parts I, III.

196 See *supra* Part II.

197 See *supra* Parts IV, VI.

198 See *supra* notes 84–88 and accompanying text.

199 See *supra* Part IX.

chill regulation in the future.²⁰⁰ It also is at the forefront of dam removal, although one of the challenges for dam-removal advocates may be how to avoid the delays that accompanied the Condit Dam removal.²⁰¹ The Gorge is also home to the first National Scenic Act, a statute that bifurcated regulatory authority between the U.S. Forest Service and an interstate compact agency, the latter regulating land use previously left to local governments. The statute also calls for preservation of the Gorge's natural resources while promoting only "compatible" economic development, a dominant use paradigm that continues a trend in public land law.²⁰²

Thus, the Gorge's contributions to American natural resources law are many, varied, and significant. Perhaps no discrete area in the country can claim a larger legacy. Those of us who teach natural resources law would do well to find space in our classes to examine some of the lessons the rich legal history of the Columbia River Gorge teaches. Our students would be the beneficiaries because context matters.²⁰³

²⁰⁰ See *supra* Part VII.

²⁰¹ See *supra* Part VIII. The challenges may have to do with anticipating and responding to local opposition and working closely with both state and federal regulatory agencies that must approve dam removals.

²⁰² See *supra* Part V.

²⁰³ See generally CRAIG, *supra* note 7; KLEIN, *supra* note 7.