

MEMORANDUM

September 18, 2007

TO: Brian Lipscomb
FROM: Joe Mentor
RE: Bonneville Power Administration "In-Lieu" Funding Policy

As you requested, I reviewed the Bonneville Power Administration's June 2007 draft in-lieu funding policy, and the questions included with the policy. My comments are summarized below.

Background

The Northwest Power Act requires the Northwest Power and Conservation Council to develop a program to protect, mitigate and enhance fish and wildlife to the extent affected by hydroelectric development. The Act directs the Council to address the Columbia River and its tributaries as a system. In Section 4(h)(8), the Act authorizes the Council, "in appropriate circumstances," to include off-site enhancement measures in the program to achieve protection from -- and mitigation for -- development and operation of hydroelectric facilities.

The Act requires BPA to use the Bonneville Fund consistent with the Council's program. But the Act prevents Bonneville from making expenditures that merely substitute ratepayer funding for other sources. Specifically, section 4(h)(10)(A) requires that -

Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.¹

At the Council's request, Bonneville has worked over the last year to develop a policy to identify "in lieu" funding issues.² On August 3, 2006, BPA Vice President Delwiche wrote to the Council to make the agency's concerns

¹ 16 U.S.C. §839b(h)(10)(A).

² Memorandum from John Shurts, Northwest Power and Conservation Council, to Fish and Wildlife Committee, Northwest Power and Conservation Council (April 5, 2007), available online at: http://www.nwcouncil.org/news/2007_04/fw_bpa.pdf.

known for new proposals received during the joint FY 2007-09 solicitation process. According to Delwiche's letter, BPA will consider the FY 2007-09 funding cycle as a "transitional period," after which BPA may not support funding for proposals that previously have been funded.³ On October 6, 2006, BPA's Fish and Wildlife Director William C. Maslen wrote to Council Chair Tom Karier to describe BPA's preliminary in-lieu ratings for "ongoing" projects.⁴ In June 2007, Bonneville circulated a document entitled "BPA "In Lieu" Interpretive Key & Ratings System," which articulates BPA's emerging policy regarding in-lieu funding issues.

The draft in-lieu policy suggests that in-lieu problems arise whenever another entity is authorized or required to undertake an activity. According to BPA, the problem arises regardless of whether funding actually is available.⁵ Bonneville has included in its draft in-lieu policy several questions about how the in-lieu funding prohibition should apply. The questions in the draft policy apparently are intended to elicit comments on the agency's interpretation of the statutory provision. The nature of Bonneville's questions, however, demonstrates the need to answer a more fundamental question about the in-lieu funding provision in the Northwest Power Act, specifically, whether it limits BPAs authority to fund a fish and wildlife project where another entity is authorized - but not required - to undertake the same activity.

The draft policy claims that an in-lieu problem may arise whenever an agency is authorized to undertake an action, regardless of whether funding actually is available. BPA's reading of the in-lieu provision would prohibit BPA from funding nearly every project recommended in the Columbia Basin Fish and Wildlife Program.⁶ That is because, by definition, there is overlapping authority

³ Letter from Gregory K. Delwiche, Vice President, Environment, Fish and Wildlife, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (August 3, 2006), available online at: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_0803BPAtoNPCC.pdf; Letter from William C. Maslen, Fish and Wildlife Director, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (October 6, 2006).

⁴ Letter from William C. Maslen, Fish and Wildlife Director, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (October 6, 2006), available online at: http://www.cbfwa.org/RegionalIssues/Correspondence/BPA/2006_1006BPAtoNPCC.pdf.

⁵ See Maslen letter, *supra*, at page 3.

⁶ BPA suggests, notwithstanding the language of the statute, the problem can be cured by entering a cost-sharing agreement.

between the region's fish and wildlife management entities, which have statutory authority to protect and enhance fish and wildlife, and Bonneville's responsibilities under the Northwest Power Act to protect, mitigate and enhance the Basin's fish and wildlife resources.⁷

Another interpretation would suggest that the prohibition applies more narrowly, i.e., when funding actually is available to undertake the same activity as is recommended by the Council for funding by BPA, or when another entity, such as a non-federal hydroelectric license holder, is legally required to undertake an expenditure. Thus the statutory language regarding in-lieu funding restrictions is ambiguous. Unfortunately, the legislative history of the Northwest Power Act reveals little about congressional intent behind this provision. The fish and wildlife provisions in the Act first appeared in the version of S. 885 reported by the House Interstate and Foreign Commerce Committee. The Committee's Report on the bill details the need for measures to protect the Columbia River's fish and wildlife resources. The Report explains the framework of the Committee amendment to S. 885. For the first time in the legislative history of the Northwest

⁷ In fact, other federal agencies are prohibited under the Anti-deficiency Act (31 U.S.C. § 1341) from accepting funds from other sources for otherwise unauthorized activities. Several federal laws provide blanket authority to agencies to undertake actions to protect and restore fish and wildlife. For example, the Fish and Wildlife Coordination Act of 1946 added fish and wildlife protection as an authorized project purpose for all federal water resource projects constructed or modified after the date of enactment of the Act. See 16 U.S.C. §663. Furthermore, the Act authorizes agency appropriations in "such amounts as may be necessary to carry out the provisions of this Act." 16 U.S.C. §666. The Multiple-Use Sustained-Yield Act directs the Forest Service to administer national forests for "wildlife and fish purposes." 16 U.S.C. §§528-31. The Mitchell Act directs the Secretary of Commerce to carry on activities for the conservation of fishery resources in the Columbia River Basin. 16 U.S.C. §755. The Fisheries Restoration and Irrigation Mitigation Act of 2000 directs the Secretary of the Interior to establish a program to implement projects, such as installation of fish screens and fish passage devices, to mitigate impacts on fisheries associated with basin irrigation projects. See 16 U.S.C. §777 note. The National Indian Forest Resources Management Act directs the Interior Secretary to undertake management activities on Indian forest lands with tribal participation. 25 U.S.C. §3101 et seq. Indian tribal governments and the Bureau of Indian Affairs are authorized to acquire land and undertake projects to protect and enhance fish and wildlife, both within the boundaries of Indian reservations and in many instances even in ceded areas. Furthermore, fish and wildlife and land management agencies in the four Pacific Northwest states all are authorized to undertake programs to protect and enhance fish and wildlife and to protect and restore habitat.

Power Act, there is discussion surrounding adverse effects on Columbia Basin Fish and Wildlife.⁸

The in-lieu funding provision first appeared as part of the May 15, 1980, Report of the Committee on Interior and Insular Affairs. The Committee's Section-by-Section analysis includes the following discussion of the in-lieu provision:

BPA expenditures shall be in addition to, not in lieu of, other expenditures authorized or required to be made by other entities under other agreements or provisions of law. Other fisheries efforts outside this Act, for example, are expected to continue and to be funded separately.⁹

There is nothing more in the Interior Committee's Report to explain the origin or intent of the in-lieu funding prohibition. During final passage of the bill on the House floor, however, Congressman Lujan described the problem of fish enhancement as "one of the touchiest problems involved in the bill."¹⁰ Congressman Lujan was the primary sponsor of committee amendments to balance fish and wildlife and power interests. Lujan's remarks clearly indicate that he considered "the job of rebuilding salmon and steelhead runs that have been damaged by hydro development on the Columbia River" as a "cost to be paid by the rate-payers of the Northwest, not by U.S. taxpayers." Congressman Lujan explained that -

The job of both committees to whom the bill was referred was to bring out a bill that provides a regional answer to this regional problem, and to make certain that none of the other States will have to pay, in any way, for that regional solution.¹¹

Congressman Lujan's remarks, and those of other of the bill's sponsors, clearly indicate that they saw this responsibility as "a new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and

⁸ The Committee Report quotes extensively from a September 4, 1979, report to Subcommittee Chairman Dingell from the U.S. General Accounting Office (GAO). The Committee Report also cites Jack Donaldson, who at the time was Chairman of the Columbia River Fisheries Council (CRFC) as being critical of the adverse effects of dams in the Columbia Basin. The CRC made five recommendations to be incorporated into the Pacific Northwest Power bill. The House Interstate and Foreign Commerce Committee's version of the bill included several provisions to carry out those five recommendations, but did not address in-lieu funding issues.

⁹ H. Rep. 96-976, Part II, at page 45.

¹⁰ 126 Cong. Record H9845 (daily ed. Sept. 29, 1980)(Remarks of Rep. Lujan).

¹¹ *Id.*

wildlife.”¹² Lujan’s statement makes it clear that Congress intended, as he put it, “to prevent a duplication of measures already being implemented.”¹³ Construing the in-lieu provision to prevent Bonneville from the funding measures simply because other agencies are authorized to undertake the same activity would have the opposite effect of what House sponsors of the fish and wildlife provisions intended.

Response to Questions

In summary, I read the in-lieu prohibition more narrowly than does BPA. In my view, the in-lieu prohibition applies only when money is actually available to be spent, or is required of an entity as a non-discretionary expenditure. This reading of the statute suggests in-lieu problems arise only if expenditures are available, having already been appropriated, or where legally required. An expenditure may be required, for example, under a Federal Energy Regulatory Commission license or a court-ordered remediation. Expenditures are authorized when money is actually appropriated by Congress or, in the case of a state agency, by a state legislature.

With the difference in interpretation in mind, I will now address the questions posed in BPA’s June 2007 draft policy. The first three questions relate to the definition of the term "entity" in the in lieu funding provision. Answers to these questions seem obvious. Congress demonstrated its ability to distinguish between provisions that apply only to public agencies, and those that apply to any entity, public or private, Indian or non-Indian. (For an obvious example, compare Northwest Power Act section 4(h)(10)(A)(referring to “entities”) with section 4(h)(11)(A)(referring to “federal agencies”).

Questions 4 and 5 demonstrate the problems inherent in BPA’s interpretation of section 4(h)(10)(A). First, I see no distinction in the statute as to whether funding is required, or is simply available to be spent, so there is no logical reason for the distinction suggested in Question 4. In either case, expenditure by BPA would “chase the money away,” and impose on the region’s ratepayers the costs for an activity that would have been required of another entity, or for which Congress or a state legislature already had approved taxpayer funding. As for Questions 5 and 6, I don’t see any basis in the statute for a narrow reading of BPA’s purpose for the expenditure rather than the purpose of another entity to fund the activity in question. This would mean that the in-lieu provision only would prohibit expenditures authorized directly for FCRPS

¹² See also 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

¹³ 126 Cong. Record at H9846.

impacts. Instead, I read the in-lieu provision to apply to off-site mitigation as well.

The answers for Questions 7 through 15 depend on the facts of an individual funding decision. For example, a cost-sharing agreement may be perfectly appropriate where a federal appropriation is for a broad, programmatic expenditure, which could be utilized within or outside the Columbia Basin. By contrast, a cost-sharing agreement would be insufficient to address the in-lieu funding prohibition of section 4(h)(10)(A) where, for example, Congress has specifically earmarked an expenditure for a particular project.

The answer to Question 16 depends on whether the expenditure is authorized, or required. In the case of an authorized expenditure, the answer seems fairly obvious, i.e., when the President (or a governor) signs an appropriations bill for the new fiscal year. That is the only point when there is certainty about whether an expenditure is authorized for a particular activity. For a required expenditure, the answer would depend on the timing for BPA's funding commitment. At that point in time, it seems logical for the agency to determine whether another entity is required to fund the activity in question.

Conclusion

Bonneville's proposed in-lieu policy causes far more problems than it solves. Bonneville's paraphrase of the statute omits the word "expenditure" to reach an entirely different result than suggested by common sense and a plain reading of the statute. A fundamental principle of statutory construction is that courts will avoid an interpretation that creates an absurd result, or that frustrates the purposes of the statute. BPA's internet web site shows a fish and wildlife project list with nearly 1,000 individual projects. Carried to its logical extreme, BPA's reading of the in-lieu provision would disqualify hundreds of these projects from consideration for funding from BPA. The in-lieu prohibition in section 4(h)(10)(A) focuses on expenditures that are authorized from other sources, not on activities that may be authorized but not yet funded. To read this provision otherwise would prohibit BPA from funding projects undertaken by other public agencies with statutory authority to undertake the very action proposed for funding.