

W. Bill Booth
Chair
Idaho

James A. Yost
Idaho

Frank L. Cassidy Jr.
"Larry"
Washington

Tom Karier
Washington



Bruce A. Measure
Vice-Chair
Montana

Rhonda Whiting
Montana

Melinda S. Eden
Oregon

Joan M. Duker
Oregon

Council Meeting Vancouver, WA January 15, 2008

Minutes

Tom Karier called the meeting to order at 1:35 p.m. on January 15 and adjourned it at 4:20 pm on January 15. All members were present.

Reports from Fish and Wildlife, Power and Public Affairs committee chair:

Rhonda Whiting chair, fish and wildlife committee; Jim Yost, chair, power committee; and Larry Cassidy, chair, public affairs committee.

Jim Yost reported the Power Committee discussed the wholesale price forecast and a proposal for an efficiency forum. We also had a report on wind integration and approved a charter for the Conservation Resources Advisory Committee, he said.

Rhonda Whiting reported that the Fish and Wildlife Committee discussed the quarterly review of within-year project funding adjustments and follow-up action for FY 2007-2009 projects, including the Sekokini Springs Isolation Facility. We also approved a budget for regional coordination funding, she said. The Committee agreed to a 90-day delay before sending a letter to Bonneville on wildlife O&M recommendations and approved a 60-day extension for fish and wildlife program amendment recommendations, Whiting reported. The Committee received updates on the data management work plan and the Snake River fall chinook transportation evaluation, she added.

Bruce Measure reported on the meeting of the Fish Passage Center Oversight Board held January 14 and on the upcoming meeting schedule for the board.

1. Council decision on follow-up actions for Fiscal Year 2007 - 2009 projects:

Mark Fritsch, manager, project implementation; Tony Grover, director, fish and wildlife division; and Lynn Palensky, program planning and special projects coordinator.

– Step Review for Sekokini Springs Isolation Facility, Hungry Horse Mitigation, Project #199101903

Staffer Mark Fritsch presented a request for Council approval to enable the Sekokini Springs Isolation Facility project to move to Step 2, NEPA review and final design. He said the project is part of the Hungry Horse Mitigation Program and said the facility is proposed to aid in the

recovery of genetically pure westslope cutthroat trout populations in the Flathead River drainage. Fritsch explained some of the concerns about the project expressed by the Independent Scientific Review Panel (ISRP). The Montana Fish, Wildlife & Parks Dept. (MFWP) is addressing the issues raised by the ISRP, said staffer Kerry Berg.

Fritsch said in about a year, the project will be brought to the Council to seek approval to move to the construction phase. This is a very small facility, but a very important one, noted Brian Marotz of the MFWP.

Joan Dukes moved that the Council recommend that the Sekokini Springs Isolation Facility, Hungry Horse Mitigation Program, Project 1991-019-03, proceed to NEPA review and final design, as presented by staff and recommended by the fish and wildlife Committee. Measure seconded, and the motion passed.

– **Budget and project approvals for regional coordination**
Millions for Coordination

Lynn Palensky presented a recommendation from the Fish and Wildlife Committee for FY 2008 funding of \$2.4 million for regional coordination projects. She said the committee recommendation also calls for the \$2.4 million to be carried forward into FY 2009 until an amended fish and wildlife program is adopted by the Council, at which time adjustments would be made to the coordination funding amounts.

Palensky noted that in FY 2007, Bonneville funded five coordination projects for a total of \$2,481,044, and in November of last year, the Council funded a sixth coordination project for the Upper Snake River Tribes (USRT) in the amount of \$160,659 annually for FY 2008 and 2009. She said the fish and wildlife Committee considered different ways to distribute the FY 2008 coordination funds and decided on an approach called Scenario A, a proportionate sharing of the funds. The proposed budget subtracts the funding approved for USRT and includes, according to Palensky: \$1,869,650 for the Columbia Basin Fish and Wildlife Authority (CBFWA); \$62,814 for the Upper Columbia United Tribes; \$58,668 for the Kalispel Tribe; \$58,668 for the Spokane Tribe; and \$189,542 for the Columbia River Inter-Tribal Fish Commission.

Dan Diggs of the U.S. Fish and Wildlife Service, chair of CBFWA, pointed out that the CBFWA funding amount is about \$200,000 less than requested.

Bill Maslen of Bonneville told the Council that Bonneville is agreeable to the \$2.4 million, but that relative to FY 2006 funding, the amount proposed for coordination is about \$250,000 more. If the Council approves Scenario A, we are not prepared to approve that now, he stated. We need to have more government-to-government discussions with the sovereigns, Maslen added. Bonneville thinks some progress is being made, but we are not ready to commit – we want to ensure we meet our responsibility to each sovereign in this process, he stated.

Bruce Jim of the Warm Springs Tribes supported the coordination proposals.

Joan Dukes moved that the Council recommend that Bonneville fund \$2.4 million in FY 2008 and a portion of FY 2009 for regional coordination, pursuant to budgets for individual coordination projects, and consistent with Scenario A. Jim Yost seconded.

Eden moved to amend the motion to say that the \$160,659 in USRT funding will be added to, not subtracted from, the amount being recommended, and Dukes seconded. When I voted for funds for USRT, I didn't think they would be taken from the regional coordination funding, Eden said.

Eden's motion did not pass. The original motion passed, with Rhonda Whiting not voting. She said she would recuse herself from the vote on this item because her daughter has a contract with CBFWA.

2. Council decision on letter to Bonneville regarding recommendations for Wildlife O&M:

Patty O'Toole, program implementation manager.

This item was postponed to a later date.

3. Presentation on the Fall Chinook component of the Umatilla Subbasin Project Review:

Gary James, CTUIR Department of Natural Resources, Fisheries; and Kevin Blakely ODFW, Umatilla District Office.

Gary James from the Natural Resources Dept. of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) gave a presentation on the CTUIR and Oregon Dept. of Wildlife's co-managed Umatilla Fall Chinook Restoration program, focusing on how the managers are addressing some issues raised by the ISRP. The ISRP said all of our projects meet scientific criteria, but the ISRP still has some concerns, he stated. James reported the latest figures on salmon and steelhead returns, noting that of all the fish they are restoring, fall chinook have presented the biggest management challenge. He described the fall chinook program and its goals. James pointed out that while the co-managers have done a lot of adaptive management changes over the years, such as tweaking releases, and changing flows and marking practices, "we're still not there yet." Some adult return improvements have been accomplished, but additional program modifications are likely to be necessary, he said.

The co-managers are receptive to more ISRP and Hatchery Science Review Group input, and we'll continue to work with them on our adaptive management decisions, James concluded. Is there a trend upward or downward with fall chinook adult returns? Why is the ISRP so concerned? Karier asked. We're far from our goals and that's what stands out, replied James.

4. Public comment on issues for the Sixth Power Plan:

Terry Morlan, director, power division.

Morlan said the Council's paper on issues for the Sixth Power Plan is out for comment and that comments are due January 25. He told the Council he gave a presentation about the paper at PNUCC's board meeting the previous week and as a result, received about 15 suggestions for issues, new approaches, or changes that should be addressed in the power plan.

Surprisingly, there was a lot of agreement from the utilities about what the big issues are and what should be addressed in the plan, Morlan stated. I don't know if we can resolve all of the big issues, he noted.

No public comments on the paper were offered at the meeting.

Public comment on any item before the Council

None

5. Council decision on Data Management time and place protocols:

Peter Paquet, manager, wildlife and resident fish.

– Public release of macroinvertebrate protocols

Staffer Tony Grover explained that in December the Council released a document on Best Practices for Reporting Location and Time-related Data for public comment. Dukes moved that the Council adopt the location and time-related protocols described in that paper and recommend that Bonneville implement them through its contracting process. Melinda Eden seconded, and the motion passed.

Grover said the Pacific Northwest Aquatic Monitoring Partnership (PNAMP) has recommended a set of protocols for collecting and analyzing benthic macroinvertebrate assemblages. Dukes moved that the Council release for public comment the "Methods for Collection and Analysis of Benthic Macroinvertebrate Assemblages in Wadeable Streams of the Pacific Northwest" paper, as presented by staff and recommended by the fish and wildlife Committee, and give notice of the opportunity for comment through close of business on February 15, 2008. Yost seconded, and the motion passed.

6. Briefing and retrospective on 2007 litigation:

John Shurts, general counsel.

"2007 was quite a wild year for court decisions," said Shurts at the outset of a summary and retrospective on litigation last year. Usually, we get one significant decision a year, but in 2007, we got seven or eight, he stated. These decisions will structure a lot of what will happen in the coming year with respect to the fish and wildlife amendments and the power plan, Shurts said.

Among the significant power decisions last year were the ones the Ninth Circuit made in May when it invalidated the residential exchange program and its associated rates in *PGE v. Bonneville* and *Golden Northwest Aluminum v. Bonneville*, he reported. The implications are "still spinning themselves out" and include such questions as, what do you do about exchange dollars Bonneville collected in the past, how do you run the 7(b)(2) rate test, and how do you fix the exchange program for the future, including the next rate case and the power sales contracts, according to Shurts. If the region can't find a solution to the exchange, it calls into question a significant underpinning of the Northwest Power Act, he said.

There are also implications involving the Bonneville Project Act because the Ninth Circuit said Bonneville's powers under the Project Act must be seen in light of specific provisions of the Power Act, Shurts explained. That may make Bonneville less able to rely on the Project Act than it has previously, he said. And while in the past, the Ninth Circuit has given Bonneville substantial deference, that seems to have changed in these rulings, Shurts noted.

Another decision of interest is *Northwest Environmental Defense Center v. Bonneville*, involving the Fish Passage Center, in which the Ninth Circuit ruled that Bonneville must provide a rational, lawful explanation for not adhering to the fish and wildlife program language to "protect, mitigate, and enhance fish and wildlife," he said. It's remarkable that we went 20 years without litigating Section 4(h)(10)(A) of the Power Act, Shurts stated. The court said the only reason Bonneville could "drive the agency away from consistency with the program" is if its other statutory obligations cause it to do so, he noted.

The court recognized a level of deference by Bonneville to the Council's program parallel to the level of deference the Council is to give to fish and wildlife agencies and tribes in the development of the program, according to Shurts. This decision has implications for the fish and wildlife amendment process, he added.

The *Golden Northwest v. Bonneville* decision said that Bonneville acted contrary to the law by excluding information related to fish and wildlife costs in rate cases, Shurts explained. There is the possibility now that a number of fish and wildlife program areas could be brought into rate cases, he said. The impact of this decision "can be and has been overstated," Shurts continued. Bonneville is still largely going to have control over its cost projections and rate-setting, he said. But the agency is no longer insulated in rate cases from having to consider countervailing evidence on cost projections or having to provide reasoned explanations for its projections and rates, and that will be subject to judicial review, Shurts noted.

Another key decision was the Ninth Circuit's affirmation of Judge Redden's decision on the Biological Opinion (BiOp), he said. The court's ruling about the "reasonably certain to occur" standard has implications for the fish and wildlife program – for example, the court said Removable Spillway Weirs aren't reasonably certain to occur because they are subject to Congressional appropriations, according to Shurts. In the fish and wildlife amendment process, we will be trying to define a specific set of actions certain to occur, but in light of that, how does a program do adaptive management? he said.

Shurts discussed recent federal court decisions related to the *Alsea Valley* case, in which a judge made a ruling about the inclusion of hatchery fish that called into question all of NOAA Fisheries' previous listing decisions. As a result, NOAA reviewed all of its determinations and came up with new listings and a new hatchery policy, he said. There were "forces in the region" who thought that the *Alsea Valley* case could be "a revolution" in how NOAA develops its listing and hatchery policies, according to Shurts. But after all was said and done, the result has been that NOAA's listings look much like they did before the case came through, he said.

Shurts also explained a federal court decision in *U.S. v. Washington* last year in which the court ruled that treaties reserving tribal rights to take fish impose a duty on a state to refrain from diminishing fish runs through the use of culverts that block fish passage. This case, which is likely to be appealed, has no direct implications, but it may mean something for habitat conditions in the Columbia River over the next 10 years, he said.

The legal landscape did change in 2007, said staffer Tony Grover. We will try to be as conscious as possible of all these legal decisions and their implications in the upcoming program amendment process, he stated. In light of these rulings, we'll likely be taking some risks in the decisions we make as we amend the program, Grover told the Council.

7. Update on Fish and Wildlife Program amendments and Council decision on requests for extension of recommendation deadline:

Patty O'Toole and Lynn Palensky.

We received 11 requests to extend our February deadline for receipt of recommendations to amend the Fish and Wildlife program, staffer Lynn Palensky said. The Committee and staff are now recommending a 60-day extension, with a new deadline of April 4, she told the Council.

Eden asked if the extension would impede the schedule for producing the Sixth Power Plan. We won't draft a plan until early 2009 so I don't think there will be a scheduling problem, Terry Morlan said.

Is there any legal deadline related to the date we opened the program for amendments? Council Chair Tom Karier asked. When the recommendations come in, the requirement is that the Council has one year to act on them, replied staffer John Shurts. We haven't made a secret of our timeline – it's disturbing to have extension requests when everyone has known what our deadline was, stated Eden.

Dukes moved that the Council extend the deadline for submitting recommendations for fish and wildlife program amendments to April 4, 2008 and direct the staff to give notice of this revised schedule. Cassidy seconded, and the motion passed unanimously.

8. Council business:

– Council decision on charter for Conservation Resource Advisory Committee

Staffer Tom Eckman pointed out that technical and scientific advisory committees have been created to assist in the preparation of all of the Council's previous power plans, and a conservation advisory committee has traditionally been established. Having this committee will help the staff in its work on the Sixth Power Plan, he said.

Dukes moved that the Council approve the charter for the Conservation Resources Advisory Committee, as presented by staff and recommended by the Power Committee, and direct the staff to form the committee. Yost seconded, and the motion passed.

– Approval of Minutes

Dukes moved to approve the minutes for the December 11-12, 2007 Council meeting held in Portland, Oregon. Measure seconded, and the motion passed.

– **Election of Officers**

Whiting nominated Measure to serve as the Council's Vice-Chair in 2008. Cassidy seconded the motion, which passed unanimously. Cassidy nominated Booth to serve as Council Chair.

Whiting seconded, and the motion passed unanimously. Booth thanked outgoing Council Chair Karier for his "outstanding leadership and dedication."

Approved February 13, 2008

/s/ Bruce Measure

Vice-Chair

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