

LAW OFFICES OF
TIM WEAVER
402 E. YAKIMA AVENUE, SUITE 190
YAKIMA, WASHINGTON 98901
TEL: 509-575-1500
FAX: 509-575-1227

December 14, 2005

Melinda Eden, Chair
Northwest Power and Conservation Council
851 SW 6th Ave., Suite 1100
Portland, OR 97204

Steve Wright, Administrator
BPA (A-7)
905 NE 11th St.
Portland, OR 97232

Dear Chair Eden and Administrator Wright:

On behalf of the Yakama Nation, I am writing to express the tribe's concerns about the status of the Fish Passage Center following the development of report language accompanying the 2006 energy and water appropriations as passed by the United States Senate. Based on my review of the Congressional Record, the rules of statutory interpretation and the language of both the Northwest Power Act and the Council's Fish and Wildlife Program, it is my opinion that the language of the Council's current Program concerning the Fish Passage Center is binding upon the Council and BPA notwithstanding the report language developed by Senator Craig. The program may not be amended without the formal action required by the Act and without providing deference to the tribes' and other fishery managers' opinions and recommendations.

As you certainly know, the Council's 2003 amendments addressed the Fish Passage Center and its tasks in detail as have previous program amendments since the inclusion of the Water Budget Center in the 1982 Program. These amendments were unanimously adopted by the Power and Conservation Council in accordance with the requirements for Fish and Wildlife Program amendments,¹ and are therefore subject to the authorities and obligations contained in the Northwest Power Act.

A major element of the Northwest Power Act is the link between the Fish and Wildlife Program and the use of the Bonneville Fund to provide resources necessary to implement the Program. The Act provides that the Administrator shall use the fund consistent with the Program.² The administrator may not, de facto, "amend" the program by refusing to

¹ Mar 2001 - Request recommendations on mainstem plan; Jun 2001 - Recommendations received ; Oct 2001 - Comments on recommendations received ; Oct 2002 - Release draft amendments for public review; Oct 2002-Feb 2003 - Public comment; Feb-Apr 2003 - Adopt final amendments (pre-publication version); Aug 2003 - Finalize publication version, including findings and power system analysis appendices, post notice in Federal Register

² 839b(h)(10)(A). The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and

fund its elements based upon report language that neither amends the Act to allow such an action, nor requires formal amendment action by the Council.

The rules of statutory interpretation permit the use of report language to assist in the interpretation of statutory language.³ However, report language provides uncertain guidance at best. First, this is appropriation not authorization language and accordingly cannot be used to somehow imply an amendment of the NWPA. To do so would be a clear error on the Council's and BPA's parts. Here there are several differing opinions—simply choosing the one the council or BPA “likes best” is improper and not the intention of congress. These uncertainties significantly dilute the role of this report language in guiding Council action.

In the case of the report language the chair of the Senate Appropriations Committee, Senator Pete Domenici stated that the language was not intended to supersede either the language of the Northwest Power Act or the language of the Fish and Wildlife Program with regard to the functions to be performed or the role of the tribes and fish and wildlife agencies.⁴

enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter. 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. [Northwest Power Act, §4(h)(10)(A), 94 Stat. 2710.]

³ See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869 (1930) (“...the intention of a legislature is undiscoverable in any real sense.... The chances that several hundred men each will have exactly the same ... situation ... [is] infinitesimally small.”). Of course, legislators often vote for measures for differing motives, including “strategic voting,” which often leads to cyclical and inconsistent outcomes. See generally P. MUELLER, *PUBLIC CHOICE*, 219-58 (1985); KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed.1963). And it is not unknown for staffers to slip language intended to aid certain constituencies into committee reports. It is also not unknown that the inserted language in committee reports either contradicts or (more common) is extraneous to statutory language. The intended result is often a statutory Humpty Dumpty scenario benefiting particular interests or causes, whereby the words or phrases of a statute can possibly be construed in the context of the inserted committee report language in a manner contrary to plain meaning. The result may also be seen as fostering a constructive ambiguity that may speed passage of the bill. Nevertheless, what is constructive for the legislative process may be destructive of the clarity needed for the sake of statutory enforcement.

⁴ Congressional Record, November 14, 2005, p. S12744

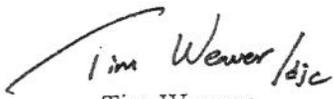
Senator Inouye: The Northwest Power Act called for the NPCC to establish a Fish and Wildlife Program. That Program has called for BPA to fund the Fish Passage Center for the past 20 years. The data and analyses the Center has provided has been invaluable to the states and tribal fishery managers of the Columbia Basin. Can the distinguished Chairman of the Energy and Water Subcommittee tell me if this language was in any way intended to supersede the NW Power Act or the specific provisions in the NPCC's present Fish and Wildlife program calling for a number of key functions to be performed and whether the state and tribal fishery managers will have input into how the Center is reconstituted?

Senator Domenici: The premise of the long-time member of the Indian Affairs Committee is correct. We do not intend this language to supersede the Northwest Power Act or the Council's Fish and Wildlife Program. Certainly both the Bonneville Power Administration and the NPCC are expected to work closely with the state and tribal fishery managers in determining a suitable entity that could take over these functions so that the fishery managers, including the tribes, continue to receive independent analyses they have in the past.

Council reliance upon report language developed by Senator Craig could result in an *ultra vires* action evading the clear requirements for amending the Fish and Wildlife Program. Even if the report language were to have some vitality, the requirements of consultation with and deference to the tribes and fish and wildlife agencies and their plans and programs would still remain operative in order to effectuate the intent of the Northwest Power Act.

Given these considerations, I would respectfully request, on behalf of the Yakama Nation, that the Council and BPA give full credit to the language of the Northwest Power Act and the Fish and Wildlife Program and provide continued funding for the Fish Passage Center as provided in the 2003 Mainstem amendments.

Sincerely,

A handwritten signature in black ink that reads "Tim Weaver" followed by a stylized flourish and the initials "djc".

Tim Weaver
Attorney-At-Law

Cc: Randy Fisher, PSMFC