Litigation and Negotiation: The History of Salmon in the Columbia River Basin

Timothy Weaver*

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INTRODUCTION

For over a hundred years the Columbia River Basin and its most valuable resource, salmon, have been the subject of nearly continuous litigation. Claims upon and competition for the Columbia Basin’s other great resource, its water, have created part of the conflict. Now the litigation and negotiation focus has shifted to the survival of the fish. It is no less continuous.

The complexities of the factual and legal hurdles faced by the salmon and advocates on all sides of the controversy are made graphic by the Ninth Circuit in its most recent ruling on the subject:

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* Partner, Cockrill & Weaver; Chairman, Washington State Bar Association Litigation Section; Washington Representative to the Ninth circuit Judicial Conference.

1. Irrigators, miners, hydropower interests, industrial developers, manufacturers and municipalities would probably debate my analysis that fish, not water, are the Columbia’s most valuable resource. Unfortunately for the fish resource and those who depend upon it, the groups listed above have, until recently, been more successful, or at least more powerful, in furthering their interests, to the great detriment of the fish and their habitat.
The listed salmon are born in tributaries of the Snake River and then travel down the Snake to the Columbia and out to the Pacific Ocean, before returning, two to five years later, to their natal streams to spawn. Along their way, the salmon also come under a bewildering array of agencies and legal regimes. While they are in the ocean, the salmon are covered by the Magnuson Act, which authorizes the creation of fishery management councils under the Secretary of Commerce and requires the councils to develop fish management plans. . . . When the salmon enter the rivers where they spawn, they come under the jurisdiction of a different set of agencies. In the Columbia River, the management and harvest of salmon is supervised by the Columbia River Fish Management Plan, a unique, judicially created, federal-state-tribal compact that controls, through a consent decree, the rules and regulations governing fishing allocations and rights of harvest for fish that enter the Columbia River system. Federal members include the National Marine Fisheries Service, the Bureau of Indian Affairs, and the United States Fish and Wildlife Service. State members include the states of Oregon and Washington. A number of Indian tribes are also members.2

1 EARLY LITIGATION HISTORY OF THE SALMON RESOURCE: WHOSE FISH?

Virtually all of the early litigation concerning the Columbia deals with access to or allocation of fish between non-Indians and Tribal governments holding treaty reserved rights to fish. Precious little energy was expended on the collapse of Columbia River salmon and steelhead runs and the concurrent habitat destruction.

The thrust of the litigation was primarily who could catch what fish, with what gear and at what locations.3 The fishery interests, how-

2. Ramsey v. Kantor, 96 F.3d 434, 437-38 (9th Cir. 1996) (internal citations omitted). To indicate that "a number of Indian tribes are also members" is an exercise in judicial understatement. The Columbia River Fish Management Plan (CRFMP), discussed in detail infra Part II.A, is in fact a creature of litigation brought by the Yakama, Warm Springs, Umatilla and Nez Perce Tribes to enforce compliance with their treaty secured fishing rights. For cases approving of and discussing the CRFMP, see Sohappy v. Smith, 302 F.Supp 899 (D.Or. 1969), and United States v. Oregon, 699 F.Supp. 1456 (D.Or. 1988), aff'd 913 F.2d 576 (9th Cir. 1990).

3. No one was exempt from the rancor of these early years. Excellent compilations of the individual versus individual, individual versus state, and state versus individual cases can be found in the introduction to the United States Supreme Court's decisions in Nielsen v. Oregon, 212 U.S. 315 (1909), and Olin v. Kitzmiller, 259 U.S. 260 (1922). For a discussion of the Tribal and United States versus state issues regarding Tribal access to fishing grounds and state power to regulate Tribal fishing, see United States v. Taylor, 3 Wash. Terr. 88, 13 P. 333 (1887); United States v. Taylor, 44 F. 2 (1890); United States v. Winans, 198 U.S. 371 (1905); Seufert Bros. v. United States, 249 U.S. 194 (1919); Tulee v. State of Washington, 315 U.S. 681, 684 (1942); Sohappy v. Smith, 302 F.Supp. at 904-06.
ever, found themselves litigating over pieces of a rapidly diminishing pie.

A. Interstate Controversies

In some of the earliest non-Tribal litigation, jurisdiction between Oregon and Washington was an explosive issue. Under the Acts creating them, Oregon and Washington had concurrent jurisdiction over the waters of the Columbia and Snake Rivers where they formed a common border. For years, Oregon and Washington passed conflicting laws regarding fishing seasons and the fishing gear that could be used. Those conflicts led to the decision in *Nielsen*, which involved an Oregon prosecution of a Washington citizen using gear legal under Washington law, but prohibited by Oregon. *Nielsen* held that Oregon could not punish conduct that Washington, within its territorial limits, specifically authorized.\(^4\) *Nielsen* solidified the controversy, leaving Washington and Oregon with the power to regulate their citizens’ conduct on the Columbia River in different manners, in spite of the shared nature of the fish resource. This contentious and convoluted management scheme led finally to the first negotiated fishing management agreement on the Columbia.

In 1918, in an effort to standardize Columbia River fishery management, Oregon and Washington agreed to form an Interstate Compact for purposes of managing the water over which they had concurrent jurisdiction.\(^5\) The Compact represents the first effort to negotiate some rationality and uniformity into the maze of Columbia River fish management. Unfortunately, even though the Congressional Compact language speaks of “protecting and preserving fish,” the Compact parties have done little more than set seasons and specify gear that may be used.\(^6\)

B. Tribal-State-Private Controversies

Concurrent with the controversy leading to the Columbia River Compact, Tribal-state-private individual controversies continued to

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6. Regulatory actions preventing Tribal fishers from using gill nets and fishing in many of their traditional areas of the Columbia led to the original decision in *Sohappy v. Smith*, 302 F.Supp. at 909, and its many offspring. See discussion infra Part I.B. See also Comment, *Sohappy v. Smith: Eight Years of Litigation Over Indian Fishing Rights*, 56 OR. L. REV. 680 (1977) [hereinafter *Eight Year of Litigation*].
At the Treaty Grounds in Walla Walla, Washington, on June 9, 1855, the Yakama Tribe agreed to a treaty that, among other things, reserved to them the exclusive right to fish at "usual and accustomed places."8

Many of the best "usual and accustomed places" were on the Columbia River. These sites were of significant value and many non-Indians had purchased the lands on which they were located. With the ink barely dry on the Yakama Treaty, non-Indians began to restrict Tribal access to the fishing places. Thus began the long struggle of the Tribes to force the White community to "do as they have promised" in the Treaties negotiated by Governor Stevens.

In a long series of cases beginning in 1887, the Washington Supreme Court, the Federal District Court of Washington and the United States Supreme Court affirmed the Tribes' rights under their treaties.9 In June 1969, Judge Robert C. Belloni held for the Tribes in a historic ruling.10

The decision turned Columbia River Fish Management on its head. The Court held that the States of Oregon and Washington could no longer manage the fish runs so few or no fish were available when they reached the Tribes' fishing places.11 More importantly, Judge Belloni ruled that the States must do everything necessary to preserve the runs, including restricting non-Indian harvest, before they could regulate Tribal fisheries.12

7. Obviously, much has been written on the Treaties negotiated with Northwest Indian Tribes by Governor Isaac Stevens. An excellent and extensively researched source that discusses both Columbia River and Puget Sound Treaty/non-Treaty issues is Faye G. Cohen, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986).

8. Treaty with the Yakama, June 9, 1855, art. III, 12 Stat. 951.


11. Id.

12. The specific requirement that the states do everything to preserve the runs, including restricting non-Indian harvest, before they may regulate Tribal fisheries appears in Judge Belloni's unreported opinion, United States v. Oregon, Civ. No. 68-513 (D. Or. 1969). Since the court has retained jurisdiction over this matter for more than thirty years, the case file remains open and is maintained by the Clerk's Office in Portland Oregon. However, one can infer the decision from some of Judge Belloni's statements in Sohappy. Specifically, he agreed with plaintiffs' position there that before Oregon could regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

(a) It must first establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulation must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes . . . .

(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of
While the ruling was intended to provide some stability in a complex field, it initially did little to stem the tide of litigation; "[y]ears of what Judge Belloni termed a 'commuter run' between Oregon state agencies and the courthouse followed this decision, as the tribes continued to seek their fair share and state agencies continued to resist implementation." Moreover, none of this ninety-odd-years of litigation was directed toward the problems of the fish, although throughout the course of the litigation, Tribes constantly expressed their concern for the depressing state of the resource.

II
1977 TO PRESENT: WHAT FISH?

A. The United States v. Oregon and the Columbia River Fish Management Plans

After eight years of nearly non-stop litigation, Judge Belloni convinced the parties to negotiate a management plan for the Columbia River. The major goals of the plan were to conserve and enhance the salmon runs, to allocate them fairly, and to give the Tribes a seat at the management table. The plan and its drafters had high hopes for its success. Unfortunately, it did not perform as expected. One reason for failure was the lack of adequate enforcement in the plan to achieve salmon sharing and production goals. A second key omission was the failure to manage ocean fisheries. The 1977 plan excluded ocean fisheries, with the good faith belief that the enactment of the Fisheries and Conservation Management Act, would solve the parties ocean management concerns. This proved a

accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places . . . .

302 F.Supp. at 907-08 (emphasis added).

13. Cohen, supra note 7, at 121. The term "commuter litigation" has special meaning to this writer. Beginning in May 1971, I undertook representation of the Yakama Nation. It became a habit to carry a toothbrush and clean underwear in my briefcase on trips to Portland for fishing regulatory hearings. On numerous occasions, the Tribes would leave regulatory hearings and walk two blocks up the street to the Federal Courthouse to file for injunctive relief for violation of Judge Belloni's orders. From 1972 to 1980 this occurred on at least a yearly basis, and in several years occurred more frequently. This writer has been actively involved in nearly every case discussed from 1970 to the present. Accordingly, many of the comments on the issues are attributable to me. I confess to bias on the side of the fish and the priority rights of the Tribes.


15. See Eight Years of Litigation, supra note 6.


17. The plan was based on optimistic forecasts of salmon abundance. When runs declined, promises could not be kept and litigation continued. See supra notes 14 and 15.

major miscalculation, because the Tribes were suddenly forced to sue their trustee, the United States of America, to prevent overfishing in the Pacific Ocean.\textsuperscript{19} The dispute over ocean harvests of Columbia River stocks in areas far distant from the Columbia River ultimately led the Tribes to join the State of Alaska in the \textit{United States v. Oregon} litigation in 1983. The thrust of this litigation was to either adjudicate whether non-Indian harvests of Columbia River fish in the state of Alaska should count in the allocation scheme, or to bring Alaska to the bargaining table under the auspices of the Pacific Salmon Treaty.\textsuperscript{20} The latter was the ultimate result, with the parties stipulating to stay the allocation litigation, provided that Alaska conducted its fisheries pursuant to the provisions of the United States-Canada Salmon Interception Treaty. That stipulation, found in \textit{Yakama Nation v. Baldrige},\textsuperscript{21} provides a mechanism for the operation of Alaska fisheries under the United States-Canada Treaty.\textsuperscript{22} The Treaty and the stipulation have been crucial in resolving Alaska interceptions of Columbia River salmon.\textsuperscript{23} While the 1977 plan expired by its terms in 1982, Judge Walter Craig, the federal judge then presiding in \textit{United States v. Oregon}, refused to believe that the parties could not agree on a workable plan, and he ordered the parties to negotiate another.\textsuperscript{24}

Although this effort took five years, the parties were able to complete a new and sweeping court-ordered plan for the management of the Columbia.\textsuperscript{25} This plan, known as the Columbia River Fish Management Plan (CRFMP), forms the basis for most Columbia River harvest management decisions today.\textsuperscript{26}

Somewhat to the amazement of those of us who spent our youth in the trenches, the CRFMP has, at least in the harvest arena, worked as advertised. It has also provided a strong framework for the parties to work toward habitat and fisheries restoration. The plan has provided alternative dispute resolution, through the formation of a policy

\begin{itemize}
\item \textsuperscript{20} Prior to this litigation the United States and Canada had attempted to negotiate a Salmon Interception Treaty for nearly thirty years. Alaska's refusal to participate meaningfully had been a roadblock to the negotiations.
\item \textsuperscript{21} 605 F.Supp. 833 (W.D.Wash 1985).
\item \textsuperscript{22} Id. at 836.
\item \textsuperscript{23} Oregon, Washington and the Treaty Tribes sought and received a preliminary injunction against Alaska in the summer of 1995; it halted an Alaska fishery that was in danger of over-harvesting Columbia River and Puget Sound Chinook stocks. Yakama v. Baldrige, 898 F.Supp. 1477 (W.D. Wash. 1995).
\item \textsuperscript{24} Cohen, \textit{supra} note 7, at 122-136.
\item \textsuperscript{25} United States v. Oregon, 699 F.Supp. at 1469.
\item \textsuperscript{26} Id. at 1460.
\end{itemize}
committee structure,\textsuperscript{27} which has reduced court intervention to a minimum.\textsuperscript{28} The CRFMP allows the parties to negotiate yearly fishery management plans, which provide certainty to the parties, protection to the fish, and most importantly, allow the parties to concentrate their efforts on the problems the fish face in negotiating a now deadly river system.\textsuperscript{29}

**B. Litigation to Combat Habitat Destruction**

Coincidentally with the negotiation of the 1977 CRFMP, all parties began to turn their attention to habitat problems throughout the basin. Spurred by a massive fish kill in the Hanford Reach of the Columbia River in 1979, the State of Washington commenced an action before the Federal Energy Regulatory Commission (FERC) against Grant, Chelan, and Douglas County Public Utility Districts (PUDs).\textsuperscript{30} The Columbia River dams operated by these PUDs hold federal operating licenses issued by the FERC pursuant to the Federal Power Act.\textsuperscript{31} All of these actions were brought under the provisions of the Federal Power Act and the PUD's licenses requiring fish and wildlife protection and mitigation.

The State of Oregon, the Yakama and Umatilla Tribes, and the NMFS joined in the action. The commencement of this proceeding ushered in another twenty years of litigation and negotiation that has led to significant rulings and agreements that truly benefit the fish. Unlike the hundred years of litigation discussed in Section I, here the focus was solely on what was needed to improve conditions for the fish at the PUD dams in the Mid Columbia River.\textsuperscript{32} One landmark agreement was concluded through traditional negotiation methods and has been in place for nearly fifteen years.\textsuperscript{33}

\begin{itemize}
  \item \textsuperscript{27} See id. at 1459 (describing the establishment of the Policy Committee under Part IV of the Plan).
  \item \textsuperscript{28} Toothbrushes and clean underwear are no longer standard brief case contents. See supra note 15. As this paper is being written, however, an action against Oregon and Washington has been filed over the Coho production provision of the plan.
  \item \textsuperscript{29} It is interesting that in most of these joint endeavors, the Tribes and the states have been allies, often opposing action of the Federal Government, contrary to the earlier cases, in which the Tribes and the United States traditionally opposed the states.
  \item \textsuperscript{30} Grant County PUD operates two dams in what is known as the Mid Columbia River. The fish kill in question was a result of manipulation of the river by the dam operators assisting in a test of nuclear reactors at Hanford, Washington. FERC Docket No. E9569.
  \item \textsuperscript{31} 16 U.S.C.A. § 791a \textit{et seq.} (West, WESTLAW through P.L. 105-22, approved June 27, 1997).
  \item \textsuperscript{32} Wells Dam, operated by Douglas PUD; Rocky Reach and Rock Island Dams, operated by Chelan County PUD; and Wanapum and Priest Rapids Dams operated by Grant County PUD.
  \item \textsuperscript{33} Wells Dam Settlement Agreement, FERC Docket No. E9569 (Oct. 10, 1980).
\end{itemize}
A second agreement, with Chelan PUD, was achieved through the Columbia River time-tested method of full blown litigation. Several years of difficult and unsuccessful negotiations led to *Confederated Tribes and Bands of the Yakama Indian Nation v. FERC*, in which the Ninth Circuit overturned a decision by FERC to issue a forty year hydropower license to Chelan PUD's Rock Island Dam. Following a remand to FERC for issuance of an environmental impact statement, the parties spent nearly six weeks in trial, followed by countless hours of negotiation. The net result, however, was again a settlement agreement designed for protection of the fishery resource. The agreement, much like the Wells Dam agreement and the CRFMP, provides a technical forum for discussion among the parties' experts, and a dispute resolution mechanism.

**C. Litigation Over the Northwest Power Act**

In December 1980, after two years of intense congressional debate, Congress enacted the Pacific Northwest Electric Power and Planning Act, now commonly known as the Northwest Power Act. The most hotly contested portions of the Act were those intended to protect the Columbia River salmon. Finally, after nearly fifty years of hydropower development done basically in spite of the fish, Congress recognized the importance of the Columbia River resource, including as a purpose of the Northwest Power Act:

(6) to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System . . . .

Fish were finally provided rights equal to that of the kilowatt. Tribal and State fishing agencies felt, for the first time, that their voices would be heard and their recommendations followed in the hydropower planning and operation process.

After nearly fifteen years of unsuccessfully urging the federal hydropower operations and the Northwest Power Planning Council (cre-

34. 746 F.2d 466 (9th Cir. 1984).
35. Rock Island Dam Settlement Agreement, FERC Docket No. E9569 (Oct. 10, 1990). Rocky Reach Dam, Chelan PUD's second facility, is also subject to an agreement between the parties. Mitigation and protection efforts there have not been as successful.
37. *Id.* § 839(6).
38. 16 U.S.C.A § 839b(h)(7).
ated by the Northwest Power Act to deal with power and fisheries issues), however, the Yakama Nation and the environmental community again turned to the Court for relief, challenging the Power Council's "strategy for salmon" process. The underlying basis for the Yakama challenge was that the Power Council, charged with applying the best available scientific information and deferring to Tribal recommendations, had instead given in to pressure from power political and economic interests.

The Yakama asserted, as one court found in a challenge to NMFS policy, that the Council had "selected ... a factor which necessarily focuses more on [hydro]system capability than upon the needs of the species."39 The court in the Yakama's actual challenge agreed, finding that the Power Council had failed to comply with the fish and wildlife provisions of the Act. It concluded that "[r]ather than asserting its role as a regional leader, the Council has assumed the role of a consensus builder, sometimes sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator acceptable to power interests."40

Whether the Power Council chooses to use this lemon for lemonade remains to be seen. Much that is good for the fish can be accomplished by an assertive Council. A new fish plan is in place, which is better than the earlier version. How that plan and the Power Council interact with NMFS ESA recovery efforts may provide the next arena for both litigation and negotiations.

D. Litigation Under the Endangered Species Act

Surprisingly and unfortunately, the least successful efforts to protect and enhance Columbia River resources have been undertaken by the NMFS under the ESA.41 Beginning in 1991, the NMFS embarked upon a series of ESA listings for Columbia River salmon originating in the Snake River system.42 Under the ESA listings, federal agencies, including Columbia River hydrosystem operations,43 are required to

40. Northwest Resource Information Center v. Northwest Power Planning Council, 35 F.3d 1371, 1395 (9th Cir. 1994) [hereinafter NRIC v. NPPC].
41. Obviously that is the author's opinion. However, taking into consideration the plaintiffs in the various suits against NMFS in the Columbia River ESA cases, supra note 3, many others in the Northwest share my opinion. See also comments by Judge Marsh in IDFG v. NMFS, 850 F.Supp. at 893.
43. 16 U.S.C.A. § 1532(7) (West, WESTLAW through P.L. 105-22, approved June 27, 1997) (defining the term "Federal agency" to include "any . . . instrumentality of the United States."
"conserve" threatened or endangered species. The term "conserve" requires "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

As the NMFS recognized that the Federal hydropower system was largely responsible for the plight of the Columbia River salmon, the tribes, State fishery agencies, and environmental groups assumed that the NMFS ESA actions would mandate action at the federal dams that would "conserve" the salmon as required by the ESA, and prevent actions that would "jeopardize" the salmon resource. To date that assumption has been in error.

In two recent District Court opinions, one overturning NMFS actions and the other reluctantly affirming them, Judge Malcolm Marsh described NMFS ESA actions in the following terms:

[T]he process is seriously, "significantly," flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation—that is, relatively small steps, minor improvements and adjustments—when the situation literally cries out for a major overhaul. Instead of looking for what can be done to protect the species from jeopardy, NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption.

In a subsequent case resulting from the remand in IDFG v. NMFS, Judge Marsh upheld NMFS's Biological Opinion, while at the same time reflecting his concern that NMFS actions may be too little too late to save the fish:

Whether the salmon may be saved in time to benefit from such long term system improvements is the risk that NMFS and the action agencies have assumed within this process. Given the dwindling numbers, time is clearly running out. As a long-time observer and examiner of this process, I cannot help but question the soundness of the selected level of risk acceptance, but the ESA says nothing about risk tolerance and the limits of judicial review dictate that I not interfere with a fed-

44. 16 U.S.C.A § 1532(3); see also 16 U.S.C.A. § 1536(a)(2) (requiring all agencies to insure that all agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or adverse modification of habitat of such species which is . . . critical . . . ").


46. IDFG v. NMFS, 850 F.Supp. at 900 (overturning a NMFS Biological Opinion on the basis that NMFS had failed adequately to explain the rational basis for its actions) (emphasis added).
eral agencies' exercise of professional judgement or their reasoned decisions.\textsuperscript{47}

The \textit{American Rivers} case is still before the Court on additional issues. The efforts to save the Columbia River salmon have become the subject of national debate.\textsuperscript{48} Hopefully Judge Marsh's concerns will not be borne out.

\textbf{CONCLUSION}

Litigation and negotiation have their places on the Columbia. Because of the varied nature of the interests and the complexities of the issues, often negotiation has only followed extended litigation. It has been this writer's experience that, without the establishment of judge-imposed ground rules, initial rounds of negotiations have minimal chance of success, primarily because most of the solutions involve changes to a well entrenched status quo, favoring interests referred to by the Ninth Circuit in its \textit{NRIC v. NPPC} ruling.\textsuperscript{49} Voluntarily surrendering long held practices is understandably difficult, and often requires a "nudge" from a third party. As is indicated elsewhere, non-federal entities such as the Mid Columbia PUDs, have been more willing to provide solutions than have the federal agencies, such as the Corps of Engineers, the Bureau of Reclamation, and the Bonneville Power Administration, who, in this writer's opinion, have a statutory obligation under the Fish and Wildlife Coordination Act and the Northwest Power Act to provide equal consideration to the fish. Unless and until the federal entities decide that they must share the burden of recovering the Columbia River ecosystem, little progress will be made outside the courtroom. Having said that, the serious condition of the salmon might prompt federal entities to work with the Tribes, States, and environmental groups. If progress is made quickly, the fish may not be lost.


\textsuperscript{49} See 35 F.3d at 1391-93.