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***97 THE CONDIT DAM REMOVAL AND SECTION 18 OF THE FEDERAL POWER ACT: A
COERCED SETTLEMENT** [\[FNaa1\]](#)Charlton H. Bonham [\[FNaa1\]](#)

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Dams are instruments, not monuments: we evaluate them by the health of the watersheds to which they belong.

-- Bruce Babbitt [\[FN1\]](#)

The White Salmon River starts its journey to the Columbia River from the banks of Mount Adams, Washington; forty-three miles later it pours into the Columbia and the Columbia River Gorge National Scenic Area. [\[FN2\]](#) A federal wild and scenic river, the White Salmon provides a diverse range of benefits including scenic, recreational, historical, and fish and wildlife. [\[FN3\]](#) In particular, the White Salmon offers challenging whitewater paddling in a dramatic canyon; as a result, the local economy has developed a ***98** substantial recreational rafting industry. [\[FN4\]](#) Until the early 1900s, salmon thrived in the White Salmon watershed. [\[FN5\]](#) Today, however, a majority of the White Salmon's wild salmon runs are at a high risk of extinction, and its spring chinook run is already extinct [\[FN6\]](#) due in large part to **Condit Dam**.

Built in 1913, the 125-foot high and 471-foot wide **Condit Dam** blocks the river's flow and salmon migration only three miles from its confluence with the Columbia. Beyond restricting the river's natural flow and blocking salmon migration, **Condit Dam** is caught between plans for removal, [\[FN7\]](#) settlement negotiations, [\[FN8\]](#) the Federal Energy Regulatory Commission's (FERC) relicensing scheme, and the statutory requirements of the Federal Power Act (FPA). Hydroelectric projects not owned by the federal government are regulated under the terms of the FPA, [\[FN9\]](#) which in ***99** turn assigns to FERC [\[FN10\]](#) the responsibility of licensing and relicensing dams. [\[FN11\]](#) FERC implements this system through adjudications and administrative regulations. Pacific Power and Light, the predecessor of PacifiCorp, the current owner of Condit, applied for a FERC license in February of 1963. [\[FN12\]](#) FERC granted the license in 1968. [\[FN13\]](#) Thirty years later, in 1998, **Condit Dam's** FERC license expired. [\[FN14\]](#)

The Federal Water Power Act of 1920 established the foundation for regulation of nonfederal hydroelectric projects. [\[FN15\]](#) Although the original Federal Water Power Act did not consider ***100** the possibility of dam removals, [\[FN16\]](#) the Act did incorporate the concept of limiting the duration of licenses. [\[FN17\]](#) Today, like its predecessor the Federal Power Commission (FPC), FERC has the statutory authority to issue license renewals for terms of up to fifty years for the construction and operation of nonfederal hydroelectric developments. [\[FN18\]](#) Interior Secretary Babbitt recently commented that as hydropower operators initiate the FERC relicensing process "they find that Americans don't look at dams simply as engineering marvels [[[like] we did in the heyday of the New Deal." [\[FN19\]](#) Rather, public perception of dams has changed. [\[FN20\]](#)

Historically, desires to provide abundant supplies of cheap hydroelectric power and attempts to use our natural resources to ***101** the utmost created the rush to build dams. [\[FN21\]](#) However, critics attacked the presumptive nature of hydropower's

historical role, and Congress passed a series of congressional amendments to hydropower licensing. [\[FN22\]](#) Moreover, courts began to recognize that FERC improperly, inadequately, and often failed to consider fish and wildlife issues. [\[FN23\]](#) Thus, fish and wildlife are now a factor of consideration in FERC relicensings. [\[FN24\]](#)

Against this backdrop, in 1991, PacifiCorp began the process of relicensing **Condit Dam**. As part of its 1995 Condit Hydroelectric Project Draft Environmental Impact Statement (DEIS), *102 FERC proposed fish passage facilities for **Condit Dam**. [\[FN25\]](#) PacifiCorp publicly stated that the high costs associated with fish passages made the alternative unacceptable. [\[FN26\]](#) Subsequently, in the Final Environmental Impact Statement (FEIS), FERC added an additional financial consideration by deeming dam removal too costly. [\[FN27\]](#)

The **Condit Dam** relicensing is an important topic because it is the first substantial opportunity in the Northwest to analyze section 18 of the Federal Power Act, which gives the National Marine Fishery Services (NMFS) and the United States Fish and Wildlife Service (USFWS) the power to prescribe mandatory conditions for a FERC license. [\[FN28\]](#) The agencies' prescription of fish passage facilities at Condit forced PacifiCorp to argue that the high costs of fish passage made those prescriptions unreasonable. [\[FN29\]](#) Consequently, the Condit relicensing evolved into a negotiating environment where the ultimate question was no longer whether **Condit Dam** would be relicensed, but whether **Condit Dam** would be removed. In short, the "once-unthinkable" will happen: the White Salmon is set to become a free-flowing river. [\[FN30\]](#)

The removal of **Condit Dam** will be the product of a settlement greatly influenced by section 18 of the FPA and the financial costs associated with its fish passage requirements. This paper argues that certain factors contributed to consideration of the dam removal option, including the requirements of section 18, the economic burden of those requirements, the threat of *103 decommissioning, [\[FN31\]](#) pressure from interested parties, and studies providing more realistic dam removal cost estimations. This paper employs the **Condit Dam** relicensing to analyze the characteristics of a coerced negotiated settlement.

Section I of this paper describes the history and resources of the White Salmon River. Section II explains the history of **Condit Dam** and provides an overview of the FERC relicensing scheme. Section III focuses on the section 18 powers of the federal fish agencies, the effect of section 18 in the Condit relicensing, the general dynamics of collaborative settlements, and how those dynamics differ from the Condit negotiated settlement process. Section IV describes the development of the negotiated settlement process within the Condit relicensing, including the controversy surrounding FERC's **Condit Dam** DEIS. In addition, Section IV analyzes the three factors that forced the negotiations: 1) section 18; 2) the economic unfeasibility of fish passage for PacifiCorp; and 3) dam removal cost estimates. Section IV also provides a comparative analysis of the Condit and Edwards Dam settlement processes. The paper concludes by suggesting *104 that the federal conditioning authority in section 18 imposed financial costs on PacifiCorp which transformed the FERC relicensing into a negotiated settlement process in which the interested parties selected removal of **Condit Dam** as an alternative to relicensing. Thus, as illustrated in the Edwards settlement, and reiterated in Condit, the economic imposition of mandatory section 18 fish passage prescriptions could cause many FERC-licensees whose dams do not have fish passage to negotiate dam removal at relicensing.

I The History And Resources Of The White Salmon River

A. History of The White Salmon

In the 1850s, the Columbia Gorge changed rapidly as increased river traffic sparked land development and led to the advancement of railroads. This change brought industrial opportunity to the area by the early 1900s. [\[FN32\]](#) Directly on the heels of the early twentieth century industrial boom, the Northwest entered into a major dam building era during the "go-go"

years of 1930 to 1970, when dams represented symbols of progress. [FN33] The dam building effort was so successful that by 1945 Grand Coulee and Hoover Dam were the two largest power sources in the world. [FN34] Today, the economic base of the Gorge is primarily agricultural and forestry in nature, with a smaller but burgeoning outdoor recreation business sector. [FN35]

Within the Columbia Gorge, near the town of White Salmon, Washington and Hood River, Oregon, is the confluence of the White Salmon River and the Columbia River. [FN36] From its headwaters on the White Salmon and Avalanche glaciers of Mount Adams, at 7,500 feet, the White Salmon River flows forty-five *105 miles to the Columbia, draining the southern Cascade Range of Washington. Interrupting the natural free flow of the White Salmon is **Condit Dam** and the dam's impoundment lake, Northwestern Lake. [FN37] **Condit Dam** partitions the White Salmon into two sections: upstream of the dam and downstream of the dam. The upstream section of the White Salmon is designated a "scenic" river under the federal Wild and Scenic Rivers Act. [FN38] The downstream stretch of river, from the dam to the confluence with the Columbia, a distance of 3.3 miles, is part of the Columbia River Gorge National Scenic Area. [FN39]

According to legend, the name White Salmon derived from the thousands of salmon carcasses that would stain the riverbanks white after spawning and dying. [FN40] Historically, the Klickitat Indians fished the river, [FN41] and their fishing centered around the sacred *106 site of Husum Falls. [FN42] The Klickitats are now part of the Yakama Indian Nation, the principal advocates for dam removal. [FN43] American Rivers, a prominent river advocacy organization, ranked the White Salmon third on its 1997 list of the nation's ten most endangered rivers. [FN44]

B. White Salmon River Resources

1. Yakama Nation Resources

Fishing rights at "usual and accustomed" fishing sites within the Columbia River basin are reserved for Native American tribes as a result of treaties with the United States. [FN45] Consequently, the Yakama Indian Nation is guaranteed a right of access to the White Salmon River to fish from "usual and accustomed" locations, [FN46] particularly at the historically documented traditional fishing site Husum Falls. [FN47] However, no one consulted the Yakama Nation about the construction of **Condit Dam**, nor did the tribes receive compensation or mitigation for the loss of the fishery rights and traditional religious and cultural activities. [FN48] Even though construction of Condit eliminated anadromous runs upstream of the dam, the construction of the *107 dam clearly did not eliminate the tribe's treaty rights. [FN49] The Yakama Nation strongly supports the removal of **Condit Dam** as a means to restore salmon and steelhead trout to the river [FN50] because without fish in the river the Nation's treaty rights exist in a vacuum. [FN51] Moreover, the Yakama Nation believes that the White Salmon itself is a cultural resource because the area includes burial grounds and historical camp sites. [FN52]

2. Fish Resources

It is difficult to accurately gauge the size of the pre-Condit anadromous fish populations. [FN53] However, evidence suggests an abundant historical salmon run, [FN54] and biological studies estimate that, under pristine conditions, the White Salmon runs would *108 produce 5,489 coho, 625 chinook, and 763 steelhead. [FN55] Also unclear is the extent of historic upstream migration because of the existence of a formidable series of high waterfalls at river mile 16.2. Forest Service reports indicate that salmon migrated at least as far as Husum Falls at river mile 7.6, and steelhead at least as far as river mile 16.2. [FN56] The Washington Department of Fisheries has noted that river sections potentially open to migration represent good-to-excellent salmonid rearing and spawning habitat. [FN57] Today, fall chinook, coho, and winter steelhead exist in the downstream 3.3 mile section of the White Salmon from the dam to the Columbia River. Most of these stocks, however, are hatchery fish. [FN58] Regardless of the potential for future runs and the historical nature of past runs, all reports indicate that the native anadromous runs above the dam are functionally extinct. [FN59]

3. Recreational Resources

The White Salmon offers a multitude of recreational opportunities including rafting, fishing, hiking, swimming, and kayaking. Furthermore, the White Salmon's recreational use level is high because of its proximity to the major metropolitan area of Portland, Oregon. [FN60] In 1993, the Forest Service estimated that approximately 6,000 commercial rafters and 3,000 private boaters *109 traveled down the White Salmon River. [FN61] River usage has increased over recent years, [FN62] and removal of **Condit Dam** would potentially more than double the length of the current whitewater rafting trip. [FN63] In addition, removal of the dam will create new rapids in a scenic canyon, which currently lies submerged under the two-mile Northwestern Lake. [FN64] An extension of the commercial river run will undoubtedly generate significant economic benefits and contribute to the growth of the adjacent Hood River and White Salmon communities as recreational destinations. [FN65]

II **Condit Dam** and The Federal Energy Regulatory Commission Relicensing Process

A. **Condit Dam** History

Condit Dam is just one of between 68,000 to 75,000 dams on American rivers. [FN66] The Northwestern Electric Company built *110 **Condit Dam** in 1913 to provide additional power for the Crown Columbia Paper Mill in Camas, Washington, with surplus electricity sold to others in the Northwest. [FN67] The **Condit Dam** facility originally included wooden fish ladders. [FN68] However, shortly after construction, floods destroyed these wooden ladders. [FN69] In approximately 1917, floods also destroyed the concrete ladders built to replace the wooden ladders. [FN70] In a shrewd business decision, Northwestern paid the State of Washington \$5,000 in lieu of building another fish ladder. [FN71] Consequently, anadromous fish [FN72] have been unable to reach their spawning grounds since 1917. [FN73]

The **Condit Dam** Hydroelectric Project consists of the dam, a powerhouse, a water conveyance system, a reservoir, a downstream river by-pass and tailrace, and an electric transmission system. [FN74] Although **Condit Dam** is a fifteen-megawatt dam, the contribution of Condit to the region's overall energy generating capacity is "negligible." [FN75] Specifically, Condit produces only approximately *111 1.5% of PacifiCorp's total power supply, [FN76] roughly enough power to provide electricity to 13,000 homes. [FN77] However, according to PacifiCorp, the dam's fifteen-megawatt capacity is an important part of its energy base. [FN78]

B. The Statutory Scheme

There are several statutory issues concerning the relicensing of **Condit Dam**. Any relicensing decision by FERC must "give equal consideration to the . . . protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." [FN79] Moreover, the FPA requires each FERC relicense to "include conditions for such protection, mitigation, and enhancement." [FN80] These conditions must ensure "adequate and equitable" protection of fish and wildlife. [FN81] Thus, if development, operation, or management of the Condit Project causes damage to fish and wildlife, or their related spawning grounds and habitat, FERC must include mitigation conditions in the relicense. [FN82]

Additional FPA duties require FERC to give "due weight" to fish and wildlife agencies' "recommendations, expertise, and statutory responsibilities." [FN83] Further, the FPA requires FERC to make licensing decisions that "will be best adapted to a comprehensive plan for improving or developing . . . the adequate protection, *112 mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)" [FN84] Finally, and most importantly in the **Condit Dam** relicensing context, the FPA requires the "construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate." [FN85]

These statutory directives attempt to ensure FERC's equal treatment of fish and wildlife on one hand and hydropower on the other. The directives decrease the chance that non-power uses will be overlooked when FERC undertakes a relicensing.

C. The FERC Relicensing Process

Five years before a dam owner's hydropower license expires, the dam owner must file notice of intent to seek a renewal. [\[FN86\]](#) FERC provides public notice of this intent, [\[FN87\]](#) and interested parties can inspect any notice of intent documents. [\[FN88\]](#) However, before filing an application for relicensing the applicant must consult with all federal, state, and interstate resource agencies. [\[FN89\]](#) Moreover, throughout the application process the dam owner must consult with federal and state resource agencies. [\[FN90\]](#) Public involvement at this stage of the application process includes participation in meetings and site visits. [\[FN91\]](#) The objective of a public *113 meeting is to gather opinions on the data and studies proffered by the applicant. [\[FN92\]](#) Two years before the expiration date of its license, the dam owner must submit an application for a new license or forfeit that opportunity. [\[FN93\]](#)

Any interested party that wants to preserve its ability to appeal a final FERC decision must become an official party to the FERC proceeding by filing a motion to intervene with the agency. [\[FN94\]](#) If recommendations from interested parties or resource agencies either cause a need for more information or create questions about data, FERC will request the applicant to conduct additional studies. [\[FN95\]](#) Upon receipt of the additional studies and information, FERC publishes notice that the application is complete, available for review, and ready for environmental analysis by the official interested parties and agencies. [\[FN96\]](#)

Next, FERC prepares a draft environmental assessment or environmental impact statement describing various proposed methods of operation and evaluating the environmental impacts of each alternative. [\[FN97\]](#) During this process FERC identifies a preferred alternative for the relicensing request. [\[FN98\]](#) If FERC intends to disregard any fish and wildlife terms and conditions recommended by resource agencies, it convenes a meeting with those agencies to discuss the disputed conditions and attempts to resolve any differences. [\[FN99\]](#)

FERC then issues a final environmental assessment or environmental impact statement. [\[FN100\]](#) Issuance of a license is a final agency decision as long as no request for rehearing is filed. [\[FN101\]](#) However, if there is a request for a rehearing, the five FERC commissioners rule on the agency decision to issue the license. [\[FN102\]](#) *114 Dissatisfied parties may seek judicial review of the Commission's decision in a U.S. Court of Appeals. [\[FN103\]](#)

D. Condit's Relicensing History

Condit Dam is PacifiCorp's [\[FN104\]](#) first small hydropower project to have its FERC license expire. [\[FN105\]](#) From the beginning of the Condit Project, fish passage at the dam has been overlooked as the original licensee, Northwestern, bargained away that responsibility. [\[FN106\]](#) In addition, Pacific Power & Light Company's (PPL) 1968 FERC license said nothing about fish passage facilities. [\[FN107\]](#)

In 1980, pursuant to PPL's 1968 license, the Commission ordered a feasibility study of anadromous fish passage facilities at Condit. [\[FN108\]](#) PPL responded that its studies showed the feasibility of several passage alternatives but that a trap-and-haul operation [\[FN109\]](#) would improve fish passage best. [\[FN110\]](#) Moreover, foreshadowing *115 PacifiCorp's defenses in the 1990s, PPL questioned the quality, quantity, and potential of upstream habitat, the possible impact to resident fish upstream of the dam by salmon re-introduction, and the cost effectiveness of restoration. [\[FN111\]](#) Concurrent with the Commission's order to study fish passage options, Congress passed the Pacific Northwest Power Planning and Conservation Act. [\[FN112\]](#) The Act authorized formation of the Northwest Power Planning Council (NPPC) as an interstate policy-making and planning

body for electrical power development and fish and wildlife resource protection in the Columbia Basin. [\[FN113\]](#) Subsequently, *116 in a clear directive, the NPPC program stated that "FERC shall require [PPL] to immediately design and construct facilities to allow upstream and downstream migration of anadromous fish at **Condit Dam**. Construction shall be completed by November 15, 1985." [\[FN114\]](#) However, no fish passage facilities currently exist for **Condit Dam**.

PacifiCorp filed an application for relicensing in 1991. [\[FN115\]](#) The application proposed facility upgrades to increase capacity and annual energy generation. [\[FN116\]](#) In 1996, PacifiCorp stated that its goal for the Condit Project was "to relicense the project and continue to operate it in a way that is both economically sound and environmentally responsible." [\[FN117\]](#) Also in 1996, FERC determined that Condit played a minimal role within PacifiCorp's hydropower plans for meeting its existing energy needs, and that the importance of Condit would decrease over time. [\[FN118\]](#) Regardless of PacifiCorp's statements of purpose and goals for the Condit relicensing, the company failed to mention one factor--fish passage.

*117 III Federal Fish Agency Authority and Collaborative Settlements

A. Section 18 of the Federal Power Act

Under section 18 of the Federal Power Act, federal fishery agencies can prescribe conditions for a FERC license. [\[FN119\]](#) The two federal fish agencies are the U.S. Fish and Wildlife Service (USFWS) and, when anadromous fish are involved, the National Marine Fisheries Service (NMFS). [\[FN120\]](#) "Fishways" are devices providing upstream and downstream fish passage around a dam. [\[FN121\]](#) FERC had promulgated a fishway definition, but Congress, in the 1992 Energy Policy Act, [\[FN122\]](#) overruled and vacated FERC's regulation and required that any FERC definition of "fishway" had to be concurred in by the Secretaries of Commerce and the Interior. [\[FN123\]](#) Yet, the language of that Act incorporated language identical to FERC's 1991 definition in that only "physical structures, facilities, and devices" could be considered "fishways." [\[FN124\]](#) In fact, FERC recently used this exact language--*118 "a specific physical structure, facility, or device"--when describing the essence of a valid section 18 "fishway" prescription. [\[FN125\]](#)

FERC has reserved the authority to re-open a license and make amendments to include a fishway prescription at any future time. [\[FN126\]](#) Fundamentally, any project that may affect the passage, either upstream or downstream, [\[FN127\]](#) of any fish species present in the project area is subject to section 18 prescriptions. [\[FN128\]](#) Section 18 also applies when a project may affect passage of a species planned for introduction into the area. [\[FN129\]](#) Simply put, the agencies' goal by prescribing fish passage is "to maintain all life stages" of the fish. [\[FN130\]](#)

FERC must incorporate, without modification, a section 18 prescription which is timely submitted and within the statutory scope. [\[FN131\]](#) And, although FERC may not reject or alter the prescription because it is mandatory, [\[FN132\]](#) FERC has ruled that it has final approval authority over fishway construction plans and *119 schedules. [\[FN133\]](#) Ultimately, it is the responsibility of the federal fish agencies to develop an administrative record to support the prescription's conditions. [\[FN134\]](#) Moreover, the fish agencies' records, to avoid a finding of inadequacy, must provide "substantial evidence" showing reasonable support for the section 18 prescription. [\[FN135\]](#) Unquestionably, the federal fish agencies' section 18 powers greatly influence today's FERC license and relicensing proceedings. [\[FN136\]](#) However, there is virtually no judicial interpretation of this section despite its seventy-year existence. [\[FN137\]](#)

1. The Economic Impact of Section 18 on the Condit Relicensing

NMFS prescribed fish passage at Condit because that "would contribute to restoration of anadromous fish in the Columbia Basin." *120 [\[FN138\]](#) The section 18 prescriptions included: 1) an "Ice Harbor" -type design fish ladder [\[FN139\]](#) to pass fish upstream, and a fixed-panel-type fish screen [\[FN140\]](#) to divert outmigrants downstream from the Condit turbine intakes; 2) a

powerhouse tailrace barrier and Denil-type fish ladder [\[FN141\]](#) to pass upmigrants from the tailrace to the by-pass, and a modified spillway design to safely pass outmigrants downstream during high flows; and 3) flows to efficiently operate the fishway and attract migrating fish. [\[FN142\]](#) In *121 response to the prescriptions, FERC recognized that the fish passage plans would produce "significant enhancements to restore anadromous salmonids upstream of **Condit dam.**" [\[FN143\]](#) However, FERC clearly noted that the section 18 prescriptions reduced the total value of the Condit project [\[FN144\]](#) and resulted in costs estimated at close to \$30 million. [\[FN145\]](#)

The **Condit Dam** relicensing is an example of the regulatory power of section 18. If NMFS had not imposed section 18 fish passage prescriptions on the Condit relicensing, there would be no current settlement process focusing on dam removal. [\[FN146\]](#) *122 Notwithstanding section 18's inherent focus on fish and wildlife issues, in the case of Condit, the provision acted essentially as an economic hammer brought down on PacifiCorp. [\[FN147\]](#) Quite simply, Condit, with the attached fish passage prescriptions, became a money loser for PacifiCorp. [\[FN148\]](#)

B. Collaborative Settlement Dynamics

Unavoidably, conflicts arise during relicensing decisions as a result of changed FERC policies, [\[FN149\]](#) which are a shift away from its once paramount focus on hydropower, and the increased environmental group, tribal, and resource agency involvement. [\[FN150\]](#) *123 The collaborative settlement approach developed by FERC is a response to the glut of modern FERC dam relicensings. [\[FN151\]](#) Even with FERC establishment of a collaborative settlement program, each party still brings to the table their respective plans and goals. [\[FN152\]](#) Consequently, collaborative settlement "means different things to different people." [\[FN153\]](#)

The fundamental idea behind a collaborative relicensing is that the interested parties work in conjunction to create a plan by which disputed issues receive consideration. Thus, a dam's relicensing will account for not only hydropower production but also for concerns about river conservation, fish and wildlife, and recreation issues. Ideally, by considering multiple options, the process creates a result that that everyone can live with--in other words, a successful settlement. [\[FN154\]](#) As the FERC relicensing process evolves, [\[FN155\]](#) collaborative settlement incorporates integrated party involvement at an early stage in the process. [\[FN156\]](#) Fundamentally though, the variety of parties and positions in any given FERC relicensing highlights the case-by-case nature of collaborative settlements. [\[FN157\]](#)

Widespread participation at an early stage by interested parties can facilitate discussion relating to the crucial data generated by *124 dam owners as part of their license application to FERC. Early involvement expedites the relicensing process and reduces disputes over the legitimacy or sufficiency of the dam owner's studies. [\[FN158\]](#) The benefits of collaborative settlement have neither been lost on dam owners [\[FN159\]](#) nor on the parties advocating fish and recreational concerns. [\[FN160\]](#) Dam owners realize the collaborative settlement process "'isn't about ideology . . . It's about trying to make a good business decision[.]'" [\[FN161\]](#) Interested parties realize the process often involves participating in typically long and financially burdensome decision processes in order to protect fish and recreational concerns.

Collaborative settlement can provide benefits to all parties, and the number of relicensings occurring as a result of collaborative settlements is on the rise. [\[FN162\]](#) No longer a pipe dream, collaboration and settlement is becoming the rule rather than the exception. [\[FN163\]](#) The benefits of collaboration include development of comprehensive community based water resource management plans, decreased numbers of disgruntled stakeholders, diminished litigation expenses, lower relicensing costs, better relations between the interested parties, and quicker relicensings. [\[FN164\]](#) In *125 October 1997, FERC recognized the collaborative process as an official option in the relicensing procedures, suggesting that a key to the future of hydropower is collaboration. [\[FN165\]](#)

In 1997, FERC Commissioner William Massey described the collaborative settlement option as one that "depends on a cooperative dynamic" and stated that "[t]he commission is happy to work with all sides if all sides are committed to the effort." [FN166] Such an acknowledged commitment highlights FERC's involvement and willingness to intervene if there are complications. [FN167] After all, it is a FERC relicensing. [FN168]

Notably, one clear criticism of FERC throughout the Condit relicensing and settlement proceedings has been lack of involvement by the agency. [FN169] Because FERC has been absent in the *126 ensuing negotiations, the Condit process is better defined as a negotiated settlement process, not a FERC collaborative settlement.

IV Development Of The Condit Negotiated Settlement Process and Similarities to The Edwards Dam Settlement

In the face of FERC's authority to condition or deny a license and the mandatory nature of fish-passage prescriptions, it is surprising that PacifiCorp failed to propose the construction of fish passage facilities in its December 1991 application for renewal of its Condit Project license. [FN170] This was surprising because in 1982 the NPPC issued a program urging FERC to require fish passage at **Condit Dam**. [FN171] However, FERC did not comment on the lack of fish passage facilities until after PacifiCorp filed the license renewal application in 1991.

A. Condit Draft Environmental Impact Statement Inconsistencies

FERC examined PacifiCorp's proposal and issued the Condit DEIS in 1995. The DEIS included five alternatives: 1) no fish passage (PacifiCorp's proposal relied on trap-and-haul plans as well as less extensive fish passage plans); [FN172] 2) fish passage *127 (FERC's alternative); 3) partial removal of the dam with upstream diversions; [FN173] 4) complete dam removal; and 5) a no-action alternative preserving the status quo, which would involve the relicensing of **Condit Dam** with no substantial changes. [FN174] The preferred alternative chosen by FERC consisted essentially of PacifiCorp's proposal plus NMFS's Section 18 prescriptions. [FN175] In addition, FERC dismissed dam removal as too costly. [FN176] Significant critical response from several expert agencies [FN177] questioned FERC's DEIS final selection and National Environmental Policy Act analysis. [FN178]

*128 Further DEIS debate centered on cost estimates for the removal of **Condit Dam**. FERC estimated dam removal to cost anywhere from \$52.393 million [FN179] to \$58.796 million. [FN180] In contrast, NMFS estimated removal costs to be \$8.7 million to \$10 million. [FN181] Moreover, American Rivers highlighted the internal inconsistencies of FERC's analysis, questioning how FERC could find that dam removal is the best option for Condit [FN182] while basing its over-estimated removal cost figures on "methodological and factual errors and omissions, in every step of its analysis, contrary to its own policies." [FN183] The Yakama Nation throughout this process acted as principal advocate for dam removal. [FN184] Removal of Condit creates an opportunity for restoration of a native salmon run, thereby providing fish for tribal treaty rights. [FN185]

*129 Regardless of the criticism, FERC released the Final Environmental Impact Statement (FEIS) on the Condit Project relicensing in October of 1996. [FN186] FERC selected PacifiCorp's proposed alternative with enhancements [FN187] and stated that "no single alternative provides positive benefits to all resources The applicant's proposal with enhancements provides the best balance of environmental and hydropower development benefits." [FN188]

Although the enhancements included the NMFS's prescribed upstream and downstream fish passage facilities, [FN189] language indicating a "best balance" is not the equivalent of statutory requirements to adequately protect fish and wildlife. [FN190] Perhaps even more telling are NMFS' comments that by no means should its fish passage prescriptions be interpreted to preclude consideration of dam removal, as NMFS considered dam removal the best method of fish passage

available. [\[FN191\]](#)

B. Shift to a Negotiated Settlement Process

Three specific factors caused the Condit relicensing to become a negotiated settlement: 1) section 18 fish passage prescriptions; 2) PacifiCorp's financial discomfort with the prescribed section 18 enhancements; and 3) evidence of less expensive dam removal costs. However, there would be no settlement today if not for the section 18 prescriptions. [\[FN192\]](#) Under the mandatory language of section 18, FERC had to adhere to NMFS' prescriptions. [\[FN193\]](#) In response, PacifiCorp officially announced a reluctance to relicense the project because of economic considerations; [\[FN194\]](#) namely, section 18 increased the relicense to \$30 million dollars. [\[FN195\]](#) The prescriptions pushed PacifiCorp to the edge of financial discomfort. Subsequently, money became the driving factor that forced the shift to a negotiated settlement process, [\[FN196\]](#) and *130 the other two specific factors toppled the Condit relicensing over the edge resulting in a negotiated settlement process.

As the economics of the situation became more clear, PacifiCorp faced either: 1) \$30 million for fish passage; or 2) according to FERC, approximately \$50 million to remove the dam. [\[FN197\]](#) Because PacifiCorp was unwilling to spend \$30 million for fish passage, it unquestionably considered \$50 million too expensive. However, the Yakama Nation and environmentalists continued their support for dam removal as a legitimate result of the relicensing process. The interested parties, including the tribe, governmental agencies, environmentalists, and PacifiCorp [\[FN198\]](#) hired an independent consultant to develop a least-cost-plan for removing Condit. [\[FN199\]](#) FERC, which had clearly overestimated dam removal costs, did not participate. [\[FN200\]](#) The Seattle firm, R.W. Beck, Inc., "pegged the cost of Condit's removal at \$10.4 million." [\[FN201\]](#) With a \$10 million estimate in hand, dam removal became the leading solution, and the process shifted away from a FERC relicensing towards a negotiated settlement. [\[FN202\]](#)

C. Edwards Dam Similarities

In a landmark 1997 decision, FERC denied the relicensing of the Edwards Dam and ordered the dam removed. [\[FN203\]](#) The grounds for this decision: the public interest. [\[FN204\]](#) In a ruling attracting national attention, FERC stated that because the negative effects of the dam outweighed the benefits from continued *131 operation "dam removal is the only alternative that will be consistent with . . . the FPA." [\[FN205\]](#) The scope of FERC's decision is grand in many regards. [\[FN206\]](#)

Built in 1837, Edwards did not include fishways. [\[FN207\]](#) Nor did the original license, issued in 1964, require fish passage facilities. [\[FN208\]](#) In response to the poor water quality standards of the river, a series of state legislative efforts in the 1980s attempted to better manage the river. [\[FN209\]](#) The Maine Comprehensive Rivers Management Plan developed as a goal the restoration of all anadromous fish to historical habitat. [\[FN210\]](#) To comply with that plan the Edwards Dam licensee, beginning in 1989, utilized a vacuum-pump fish lift for upstream passage and screened intake by-passes for downstream passage to ensure that Atlantic salmon, alewives, and American shad safely navigated around Edwards Dam. [\[FN211\]](#)

Like the Condit relicensing and negotiations, the Edwards settlement was a process greatly affected by a discrete list of specific factors. The extent of similarity between the two is significant. [\[FN212\]](#) Common factors include early 1900s construction, 1960s licensing, once historically abundant fisheries, blockage of spawning grounds, fish passage prescriptions, negligible amounts of power produced by the projects, and federal, state, and public support for dam removal. However, the most telling similar factor between *132 the two relicensings is the economic impact that section 18 imposed.

Without the economic hammer of section 18, the Condit negotiated settlement process would not have developed. Similarly, in Edwards, the economics of fish passage were dramatic. If FERC had accepted the licensee's proposal, the Edwards

hydroelectric project would have cost "about \$497,000 annually more than the current cost of alternative power." [\[FN213\]](#) In contrast, with the additional cost of fish passage imposed on the economic analysis, the project would cost "\$1,317,000 annually . . . more than the current cost of alternative power." [\[FN214\]](#) And, foreshadowing Condit's posture, the Edwards project accounted for only a small percentage of the area's annual energy supply-- approximately one-tenth of one percent. [\[FN215\]](#)

Why dam removal in the Edwards relicensing? There are two reasons: section 18 and money. Fish passage, according to the environmental impact statement, would have cost the owners \$10 million. [\[FN216\]](#) whereas dam removal would cost about \$2.7 million. [\[FN217\]](#) Why dam removal in Condit? Because of section 18 and money. Fish passage facilities at Condit, according to the FEIS, would cost about \$30 million, compared to the estimated dam removal cost of \$10 million. [\[FN218\]](#)

Conclusion

This issue is going to heat up From what I am hearing, there is a substantial possibility that a fair percentage of dam owners will choose to take the dams out instead of providing fish passage. [\[FN219\]](#)

The Edwards Dam decision, lauded as perhaps "just the beginning," now lives on in Condit. [\[FN220\]](#) Within the two relicensings, negotiations, and dam removal discussions existed discrete sets of *133 specific factors. Clearly similar, both involved signature regional fish species in a biological crisis, section 18 prescriptions, and vastly disparate scales of economy as a result of those prescriptions. However, without the factor of fish passage prescriptions and section 18, neither Condit nor Edwards Dam would attract attention. Indeed, without section 18 pressure neither the White Salmon nor the Kennebec rivers, today, could possibility regain their natural splendor as free-flowing rivers.

The hydropower industry perceives section 18 as the power to destroy through "taxation." [\[FN221\]](#) Consequently, as hydropower utilities feel the increasing squeeze of fish and wildlife values, their calls to limit federal fish agency involvement and power in FERC relicensings take a more concerted focus. [\[FN222\]](#) The utilities, however, fail to appreciate the importance of federal fish agency prescriptions in the struggle to stop the extinction of salmon. Limiting section 18 is not the answer for a remodeled FERC relicensing process. Nor is the answer in the utilities' plea to "balance the various conditions." [\[FN223\]](#)

Pacific Northwest fisheries are in trouble, that is clear. Equally clear is the FPA mandate to ensure protection of those endangered and threatened fish and wildlife values. Faced with section 18 prescriptions, utilities will bear the statutory burden to comply with the protection of fish and wildlife values. And when a dam is a small hydroelectric producer, the public interest is often better served by decommissioning the dam. For utilities, this should *134 not be something to fear because the number of dams possibly facing Condit-like section 18 prescriptions is decidedly small. [\[FN224\]](#)

Indeed, section 18 can impose substantial costs on hydropower utilities. However, it is also true that continued operation of a negligible power producing dam imposes substantial costs on fish species. The Condit relicensing is a case study of the effects of section 18 in FERC relicensings. When specific Condit-like factors exist, section 18 can transform a FERC relicensing into a negotiated settlement process whereby dam removal becomes the preferred alternative. Hopefully, other suspect hydroelectric projects, which cannot legitimize their continued operation in light of fish passage costs, will progress through the FERC relicensing process just as the Condit project did. Subsequently, the hydropower industry will be one step closer to being regulated in the public interest.

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[FNaa1]. During the preparation of this Article for publication, the parties involved settled. The **Condit Dam** will be removed. See [Jonathan Brinckman, Utility Plans to Remove Condit Dam, Oregonian, Sept. 23, 1999, at A1, available in 1999 WL 28262512.](#)

[FN1]. Secretary of the Interior, Bruce Babbitt, Remarks at a Federal Energy Regulatory Commission Distinguished Speakers Series Lecture, in U.S. Newswire, July 8, 1998 (available in [1998 WL 13603508](#)) [hereinafter Babbitt Comments].

[FN2]. See Columbia River Gorge Commission, An Overview: Columbia River Gorge National Scenic Management Plan 1 (1994) (discussing the unique values of the Gorge); see also [Bowen Blair, Jr., The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History, 17 Envtl. L. 863, 869-71 \(1987\)](#) (discussing natural resources of the Gorge).

[FN3]. See National Wild & Scenic Rivers Act, [16 U.S.C. § 1271 \(1994\)](#) (listing features the Act is designed to protect); see also [Peter M.K. Frost, Protecting And Enhancing Wild and Scenic Rivers in the West, 29 Idaho L. Rev. 313, 316-30 \(1992-93\)](#) (describing the process by which a river is included in Wild and Scenic System).

[FN4]. See Office of Hydropower Licensing, Federal Energy Regulatory Commission, FERC No. 2342-005, Condit Hydroelectric Project Final Environmental Impact Statement 3-50 to 3-51 (1996) [hereinafter FEIS].

[FN5]. See Phillip M. Bender, [Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest, 17 J. Land Resources & Envtl. L. 189, 208-09 \(1997\).](#)

[FN6]. See FEIS, supra note 4, at 3-16 to 3-21.

[FN7]. What dam removal will involve is actually somewhat uncertain because the engineering of dams historically focused on construction, not removal. See [Michael T. Pyle, Note, Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers, 14 Stan. Envtl. L.J. 97, 107-08 \(1995\)](#). In the Condit case, FERC assumed the occurrence, in sequence, of the following:

1) [c]onstructing a new diversion tunnel to draw down Northwestern Lake and divert river flows during sediment removal and dam demolition; 2) sequentially removing a portion of the dam to control the reservoir pool elevation; 3) stabilizing sediments in Northwestern Lake to the extent possible, within the impoundment; 4) constructing a 2-mile long temporary road between the existing dam access road and the dam structure; 5) incrementally and completely removing the remainder of the dam and other project structures; and 6) reclaiming and revegetating the dewatered area.

FEIS, supra note 4, at B-1. FERC estimated that the entire process would require at least five years. FEIS, supra note 4, at B-3. However, more recent plans suggest that dam removal will occur through drilling an eighteen-foot-wide and twelve-foot-high hole in the downstream side of the dam. See [Allen Thomas, Quandary At Condit, Columbian, July 23, 1998, available in 1998 WL 11745519.](#) Engineers would then blast the hole through the upstream side of the dam thereby releasing more than a million cubic yards of sediment in about a six hour muddy rush. *Id.*

[FN8]. The current status of the Condit settlement process is also uncertain. Recently, the largest utility in Scotland purchased PacifiCorp for \$7.75 billion. See Julie Tripp, Scottish Utility Buying PacifiCorp, Oregonian, Dec. 7, 1998, at A1. Consequently, PacifiCorp may be preoccupied with the merger.

[FN9]. See Federal Water Power Act of 1920, [16 U.S.C. §§ 791-825 \(1994 & Supp. III 1997\)](#); see also Michael C. Blumm, Hydroelectric Regulation under the Federal Power Act, in 4 Waters and Water Rights § 40.01-40.15 (Robert E. Beck ed. 1996) [hereinafter Hydro Regulation I].

[FN10]. See Hydro Regulation I, supra note 9, at 378 n.6 (citing [Pub. L. No. 95-91 § 301\(b\), 401-07, 91 Stat. 565, 578, 582-87 \(1977\)](#)) ("The Department of Energy Organization Act of 1977 replaced the [Federal Power Commission] with FERC, an independent regulatory agency within the Department of Energy.").

[FN11]. See [16 U.S.C. § 797\(e\)](#).

[FN12]. See Bender, supra note 5, at 209.

[FN13]. Bender, supra note 5, at 209. **Condit Dam** fell through the regulatory licensing framework because the construction of the dam predated the licensing authority given to the Federal Power Commission [FPC] by the Federal Water Power Act of 1920. See [Max J. Mizejewski, Comment, FERC's Abdication of Jurisdiction over HydroElectric Dams on Nonnavigable Rivers: A Potential Setback for Comprehensive Stream Management, 27 Envtl. L. 741, 743 \(1997\)](#). Further, the FPC's licensing authority, under the FWPA, extended only to projects "1) located on navigable waters of the United States, 2) occupying public land, 3) using surplus water or water power from a federal dam, or 4) located on nonnavigable waters over which Congress ha[d] Commerce Clause jurisdiction and that ha[d] undergone construction or major modification after August 26, 1935." [Id. at 747-48](#); see also Hydro Regulation I, supra note 9, at § 40.03. It was not until 1996 that FERC determined the Condit was on a navigable waterway due to its historic river usage for log drives. See [Mizejewski, 27 Envtl. L. at 742 n.4](#).

The United States Supreme Court, in 1965, affirmed the FPC's "authority to require projects on nonnavigable rivers to be licensed if they were connected to an interstate power grid[]" thereby breaching the Commerce Clause nexus. [Id. at 743](#) (citing [Fed. Power Comm'n v. Union Elec. Co., 381 U.S. 90, 95 \(1965\)](#)). This decision affected Condit because post-Union Electric, the FPC "encourage[d] unlicensed projects ... to file license applications, including those built before 1935." Mizejewski, [27 Envtl. L. at 743](#).

[FN14]. Even though Condit's license has expired, FERC "issues an annual license upon the expiration of the original-term license and continues to issue an annual license each year until action is taken on the application for relicense." David Paul Sharo, Note, Regulatory Inertia: FERC's Failure to Consider Endangered Species' Protection in the [Issuance of Hydroelectric Annual Licenses: Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C., 4 Admin. L.J. 321, 323 n.8 \(1990\)](#). Section 15(a) of the Federal Power Act of 1920 governs the issuance of annual licenses. [16 U.S.C. § 808\(a\)\(1\)](#).

[FN15]. In 1935, the Federal Water Power Act became part of the Federal Power Act of 1920. See Hydro Regulation I, supra note 9, at 378 n.2.

[FN16]. See Pyle, supra note 7, at 123 n.156 (citing Jerome G. Kerwin, Federal Water-Power Legislation 196 (1926)). Kerwin's study is "the most exhaustive study of the legislative history and politics of the period, [and] the only reference to dam removal is a brief comparison to a French regulation requiring licensees to restore the premises or deliver the hydroelectric facility to the nation if the license was not renewed." Pyle, supra note 7, at 123 n.156.

[FN17]. Pyle, supra note 7, at 123 (quoting President Theodore Roosevelt: "the public must retain control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to the revision when changed conditions demand.") (citing Message from the President to the Speaker of the House (Apr. 13, 1908), reprinted in H.R. Rep. No. 507 at 11-12 (1986)).

[FN18]. See Donald H. Clarke, Relicensing Hydropower: The Many Faces of Competition, 11 Nat. Resources & Env't, Fall 1996, at 8, 8; see also Bender, supra note 5, at 193.

[FN19]. See Babbitt Comments, *supra* note 1, at 1.

[FN20]. Fifty years ago, no one foresaw how drastically dams might alter the natural cycle of rivers from the headwaters to the estuaries. Now we do. Few then ever saw dams as disrupting the spawning runs of anadromous fish up from the Pacific and Atlantic Oceans. Now we all do. No laws back then required protection of aquatic habitat for rare and declining species. Now they do.

Babbitt Comments, *supra* note 1, at 1-2. This change is dramatically evidenced in a 1994 FERC policy statement. See [Federal Energy Regulatory Commission, Project Decommissioning and Relicensing: Policy Statement, 60 Fed. Reg. 339 \(1995\)](#) (codified at [18 C.F.R. § 2.24 \(1999\)](#)); see also Andrew H. Sawyer, Hydropower Relicensing in the Post Dam-Building Era, 11 Nat. Resources & Env't, Fall 1996, at 12, 12. In this statement, FERC announced its "authority to deny new project licenses when existing licenses expire and to order owners to remove a dam during the relicensing process." [60 Fed. Reg. at 339](#). FERC, in the Condit FEIS, specifically referenced the Decommissioning Statement and noted that pursuant to that statement the Commission could review the existing conditions and the public interest considerations and subsequently "either deny a license, or issue a new license with conditions that may be unacceptable to the applicant." FEIS, *supra* note 4, at 2-12.

[FN21]. See Sawyer, *supra* note 20, at 12; see also [Leslie A. Carlough, Pooling Our Resources: A Review of Northwest Passage: The Great Columbia River, 25 Envtl. L. 1271, 1275 \(1995\)](#) (book review) (commenting that President Theodore Roosevelt stated "every stream should be used to the utmost.").

[FN22]. See [16 U.S.C. §§ 791\(a\)-828\(c\)](#); see also Federal Water Power Act of 1920, Pub. L. No. 66-285, 41 Stat. 1063 (1920). These amendments placed fish and wildlife conditions on FERC's authority to issue licenses. See discussion *infra* Part II.B.

[FN23]. Notably, in 1965, the Second Circuit set aside the issuance of a license to a pumped storage hydroelectric project. The court held that "the Commission should take the whole fisheries question into consideration before deciding whether ... [the] project is to be licensed." [Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 354 F.2d 608, 624 \(2nd Cir. 1965\)](#). The Ninth Circuit has also held FERC's outlook on fish and wildlife issues inadequate. See [Confederated Tribes and Bands of the Yakama Indian Nation v. F.E.R.C., 746 F.2d 466 \(9th Cir. 1984\)](#), cert. denied, [471 U.S. 1116 \(1985\)](#). Indicating what it considered to be violations of FERC's regulations, the court noted the law clearly laid out the agency's task and because FERC failed its Federal Power Act obligation to consider fishery issues prior to licensing, it concomitantly failed to meet its obligation to give fish equal consideration under the [Fish and Wildlife Coordination Act] and equitable treatment under the [Pacific Northwest Power Planning and Conservation Act]. [Id. at 473-74](#) (internal quotation marks omitted).

Attorney Adam Berger noted that a main objective of his preparation for litigating [Northwest Resource Info. Ctr. Inc. v. Northwest Power Planning Council, 35 F.3d 1371 \(9th Cir. 1994\)](#), involved focusing on ways to establish the clear dichotomy that power interests had consistently superseded the positions of the fishery agencies and tribes. See [Adam Berger, An Insider's Perspective on Northwest Resource Information Center v. Northwest Power Planning Council, 25 Envtl. L. 369, 372 \(1995\)](#). Berger felt that illustrating the misplaced historical deference to power interests over fish and wildlife recommendations swayed the court to rule that regional agencies, in this case, had improperly overlooked fish and wildlife concerns. [Id. at 373](#).

[FN24]. See [16 U.S.C. § 797\(e\)](#). The Electric Consumers Protection Act of 1986 (ECPA), another example of a more equal balance, amended the FPA to include several fish and wildlife friendly provisions. [Pub. L. No. 99-495](#), 100 Stat. 1243 (1986). Most specifically, the ECPA mandated that FERC give equal consideration to non-developmental values in licensing decisions, consider state comprehensive plans in licensing decisions, and defer to fish and wildlife agency recommendations

that were consistent with the purpose of the FPA. See Clarke, *supra* note 18, at 8.

[FN25]. See Federal Energy Regulatory Comm'n, FERC No. 2342-005, Draft Environmental Impact Statement, Condit Hydroelectric Project (1995) [[[hereinafter Condit DEIS].

[FN26]. See [Loretta Callahan, A River of No Returns, *Columbian*, Apr. 17, 1997, available in 1997 WL 6520107](#) (quoting Terry Flores, PacifiCorp administrator "[w]e know fish passage at \$28 million is not a good option.").

[FN27]. See FEIS, *supra* note 4, at 5-25 (giving FERC's comment that "we cannot justify the huge expenditures [for dam removal]").

[FN28]. See [16 U.S.C. §§ 803-811](#).

[FN29]. See FEIS, *supra* note 4, at ix (including prescriptions for upstream and downstream passage facilities, spillway modifications, operational flow requirements, and tailrace barriers); see also *infra* notes 159-68 and accompanying text.

[FN30]. For the first time in eighty-five years, the White Salmon could run free with PacifiCorp poised to dismantle the dam. See [Joan Laatz Jewett, PacifiCorp is Cutting Deal for Fish, *Oregonian*, Feb. 15, 1998, available in 1998 WL 4182640](#); see also [Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1376 \(9th Cir. 1994\)](#) (noting the Federal Columbia River Hydropower System accounts for 80% of the decline of salmon in the Columbia Basin).

[FN31]. Although perhaps not a direct factor in the Condit relicensing, decommissioning creates the phenomenon of bargaining in the shadow of legal uncertainty. Decommissioning has been described by commentators as "a generic term that refers to a spectrum of activities from simply denying a new license and shutting down the power operations to tearing out all parts of the project, including the dam, and restoring the site to its pre-project condition." Katharine Costenbader, Comment, [Damning Dams: Bearing the Cost of Restoring America's Rivers, 6 *Geo. Mason L. Rev.* 635, 636 n.11 \(1998\)](#). Further, FERC commented that if a project becomes uneconomical due to relicensing conditions, decommissioning may be the result. See Michael A. Swiger et al., *Paying for the Change: Can the FERC Force Dam Decommissioning at Relicensing?*, 17 *Energy L.J.* 163, 163 (1996). This news is exciting to some and terrifying to the hydropower industry. See *id.* (quoting Secretary Babbitt that he would "love to be the first secretary of the interior [sic] in history to tear down a really large dam."); see also Jewett, *supra* note 32 (quoting Julie Keil, director of dam relicensing for Portland General Electric, that "[t]he fact that (the commission) can mandate dam removal was pretty scary.").

The ramifications of this pronouncement are enormous because FERC believes that "relicensing will constitute a large element of the Commission's future hydropower agenda." Swiger et al., 17 *Energy L.J.* at 164 n.9. In November 1997, FERC ordered the owners of Edwards Dam, on the Kennebec River in Maine to decommission their hydroelectric project and remove the dam. See [Edwards Mfg. Co., 81 F.E.R.C. P 61,255, at 62,199 \(1997\)](#). The question of FERC's legal power to force dam removal through decommissioning, however, remains unanswered because the Edwards parties and FERC reached an agreement for the removal of the dam from the river. See Babbitt Comments, *supra* note 1 (noting the major parties involved--the dam operators, a ship builder, and environmentalists--agreed to jointly fund the dam removal). Consequently, since no court has yet ruled on FERC's decommissioning authority, it still exists as a legal uncertainty.

[FN32]. The primary spark for expansion involved the construction of the Cascade locks, enabling the navigation of Cellilo Falls on the lower Columbia, a river wide falls. See FEIS, *supra* note 4, at 3-1.

[FN33]. See Sawyer, *supra* note 20, at 12 (referring to Marc Reisner's descriptive term the "go-go" years for the dramatic increase in dam and water projects during this time, Marc Reisner, *Cadillac Desert: The American West and It's Disappearing*

Water 151-177 (1986)).

[FN34]. See Costenbader, *supra* note 31, at 635.

[FN35]. See FEIS, *supra* note 4, at 3-45 (finding that windsurfing and other recreational uses of the Gorge create new employment growths in retail and tourist industries).

[FN36]. See FEIS, *supra* note 4, at 3-1.

[FN37]. An impoundment lake is created by blocking a river's flow. Like a retention basin, or upground reservoir, the lake is used to capture waters that normally flow downstream through the natural river bed. See [Jason Perdion, Comment, Protecting Wetlands through the Clean Water Act and the 1985 and 1990 Farm Bills: A Winning Trio](#), 28 U. Tol. L. Rev. 867, 880 n.128 (1997); see also Carlough, *supra* note 21, at 1277 n.38 (describing the toil involved for a salmon to navigate the miles of impounded water in the Columbia River system because of the lakes' deep and slow moving waters which are silted at the bottom and hot at the surface). Of the 581 miles between the Bonneville dam and the Canadian border, 531 of those miles are impoundment lake waters caused by the eleven major dams of the Columbia's mainstem. Carlough, *supra* note 21, at 1275. Moreover, the Ninth Circuit has also recognized the damaging effect of impoundment lakes on salmon. See [Northwest Resource Info. Ctr. Inc. v. N.W. Power Planning Council](#), 35 F.3d 1371, 1376 (9th Cir. 1994). Describing the migration of a young salmon smolt, the court noted that the slow moving water of the reservoirs means "the river no longer has the strong, swift current needed to carry the smolts rapidly downstream and out to sea. It now takes young fish more than twice as long to migrate downstream as it did before the dams were built." *Id.* (quoting [H.R. Rep. No. 96-976, pt. 1, at 46 \(1980\)](#)). Subsequently, the court concluded the net result is more smolts lost. *Id.*

[FN38]. [16 U.S.C. §§ 1271-1287 \(1994 & Supp. III 1997\)](#).

[FN39]. FEIS, *supra* note 4, at 3-48.

[FN40]. See Jewett, *supra* note 32. Other possible origins of the name White Salmon are that "each autumn, there entered the stream vast schools of salmon so sick that not only their flesh had blanched but also the numerous sores on their skins, through possible fungus attack ... had whitened as well", or that the river "used to be the spawning ground for the Steelheads, whose pink flesh was so much lighter, in comparison with the dark red flesh of the Chinook salmon, that the Indians spoke of the river where the 'white fish' come." FEIS, *supra* note 4, at I-37 to I-38 (Draft Environmental Impact Statement Comment Letter, Columbia Basin Fish and Wildlife Authority, a regional association of the Columbia Basin's fish and wildlife managers) (citing Edmond S. Meany's *Origin of Washington Geographic Names in Washington* (Hist. Quar. XIV at 211-12)).

[FN41]. See FEIS, *supra* note 4, at 3-58 to 3-59.

[FN42]. Husum Falls is located at river mile 7.6. The Falls are approximately fifteen feet high. See FEIS, *supra* note 4, at 3-25.

[FN43]. See FEIS, *supra* note 4, at 2-1 ("[A]lternative 3 involves retiring the project with dam removal. While PacifiCorp does not propose to retire the Condit Project, the staff considered this option at the request of the Yakama Indian Nation.").

[FN44]. See Callahan, *supra* note 26 (discussing American Rivers' reasons for listing the White Salmon River as an endangered river including the extinction of the once abundant salmon runs, the dwindling steelhead runs, and the regulatory battle over fish passage). The Missouri and the Upper Hudson were the only rivers that topped the White Salmon River on

the endangered rivers list. Callahan, *supra* note 26.

[FN45]. See FEIS, *supra* note 4, at 3-58; see also Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Col. L. Rev. 407, 426 (1998). The authors note that "[i]n a three and one-half year period between 1853 and 1856, 52 treaties were signed in which the Indians granted to the United States about 174 million acres, one of the most astounding real estate transactions in recorded history." *Id.* at 426 n.91.

[FN46]. On June 9, 1855, at the treaty grounds in Walla Walla, Washington, the Yakama Nation signed a treaty reserving their fishing rights. See [Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 Ecology L.Q. 677, 680 \(1997\)](#) (citing the Treaty with the Yakama, June 9, 1855, art. III, 12 Stat. 951).

[FN47]. See FEIS, *supra* note 4, at 3-58 to 3-59.

[FN48]. See Bender, *supra* note 5, at 215 n.138 (citing Confederated Tribes and Bands of the Yakama Indian Nation, *Yakama Indian Nation Comments on the Draft Environmental Impact Statement for the Condit Hydroelectric Project 1* (1996)).

[FN49]. See Bender, *supra* note 5, at 215 n.138. "The U.S. Supreme Court [[[has] construed the treaty fishing promise as a property right that was not defeasible by time, statehood, or non-Indian denial." Blumm & Swift, *supra* note 45, at 435 (discussing [United States v. Winans](#), 198 U.S. 371 (1905)). Today, a tribal subsistence fishery exists with exclusive access at the mouth of the river. See FEIS, *supra* note 4, at 3-58.

[FN50]. FEIS, *supra* note 4, at I-85 (quoting a Comment letter from Ted Strong, Executive Director of the Columbia River Inter-Tribal Fish Commission, on the behalf of the Yakama Nation, Confederated Tribes of Warm Springs, Umatilla Reservation, and Nez Perce Tribe: The Commission "endorses the project removal ... which is consistent with full restoration of the White Salmon watershed and consistent with upholding our member tribes' treaties with the United States.").

[FN51]. "I think this is an attempt to try to reconcile some of those historical losses to the tribes." Jewett, *supra* note 30 (quoting Bob Heinith, hydropower coordinator for the Columbia River Intertribal Fish Commission). The Supreme Court has addressed the unfortunate phenomenon of treaty rights where no fish were available in the rivers. The Court noted that "the treaty guarantee of 'the right of taking fish' was meaningful only if fish were available for the taking." [Northwest Resource Info. Ctr. v. Northwest Power Planning Council](#), 35 F.3d 1371, 1376 n.6 (1994) (citing [Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n](#), 443 U.S. 658, 667 n.1 (1979)).

[FN52]. FEIS, *supra* note 4, at 3-59. Clearly, the White Salmon River is a place tied to the Nation's history and representative of essential traditional beliefs and practices.

[FN53]. See FEIS, *supra* note 4, at 3-25.

[FN54]. FEIS, *supra* note 4, at I-38 (citing comments from the Columbia Basin Fish and Wildlife Authority which note that "Spring Creek National Fish Hatchery records indicate that 7,714,000 eggs were collected in 1906 in the White Salmon River."). Katherine Ransel, co-director of American Rivers' Northwest Office has commented that "the salmon and steelhead were once so abundant in the White Salmon, they supported two Native American villages." *White Salmon River Named Nation's Third Most Endangered River*, U.S. Newswire, Apr. 16, 1997, available in [1997 WL 5712065](#).

[FN55]. FEIS, *supra* note 4, at 3-25 (citing D.W. Chapman, U.S. Department of Interior, Bureau of Indian Affairs, *Pristine*

Production of Anadromous Salmonids--White Salmon River 99 (1981)).

[FN56]. See FEIS, supra note 4, at 3-25 (concluding that: 1) before construction of **Condit Dam** anadromous fish could migrate upstream at least to Husum Falls, chinook and coho salmon would have had difficulty here, but steelhead could have negotiated the falls; 2) neither salmon nor steelhead passed the falls at river mile 16.2; 3) the upper river basin above these falls had no anadromous fish; 4) fall chinook mainly used the river reach near the mouth of the river).

[FN57]. FEIS, supra note 4, at 3-24 (citing Washington State Department of Fisheries et al., *The White Salmon River Anadromous Fish Production Potential* 36 (1989)).

[FN58]. FEIS, supra note 4, at 3-17 (citing Columbia River Basin System Planning Council & Northwest Power Planning Council, *White Salmon River Sub-basin Plan* (1990)); see also FEIS, supra note 4, at 3-26 (noting that PacifiCorp reported that the Endangered Species Act listed that Snake River Chinook may stray into the White Salmon en route to their spawning grounds).

[FN59]. FEIS, supra note 4, at 3-17 (citing Yakama Indian Nation et al., *Report from the Joint Fishery Party Intervenors in the Condit Hydroelectric Project* (1995)).

[FN60]. See FEIS, supra note 4, at 3-49 (highlighting a PacifiCorp study that 80% of respondents in a recreational use survey were from the Portland/Vancouver area or other non-local locations).

[FN61]. See FEIS, supra note 4, at 3-51.

[FN62]. FEIS, supra note 4, at 3-51 (noting that a Forest Service report indicated a 12% increase in river use between 1992 and 1993).

[FN63]. See Bender, supra note 5, at 207 (citing Federal Energy Regulatory Comm'n, FERC No. 2342-005, *Draft Environmental Impact Statement, Condit Hydroelectric Project* 3-15 (1995)). Specifically, "removal of **Condit Dam** would provide 8 additional miles of class II white water, when connected to the 3 miles downstream of Husum Falls and the reach downstream of the dam, which is currently inaccessible." FEIS, supra note 4, at I-44 (citing comments from the Columbia Fish and Wildlife Authority).

[FN64]. See FEIS, supra note 4, at I-44. For white water enthusiasts, the removal of Condit will increase the availability of moderately-difficult (class II) white water within the Columbia Gorge because nearby water on the Deschutes, Wind, Hood, and Washougal Rivers, as well as the upper sections of the White Salmon requires skill levels above the class II level.

[FN65]. "Over 13 million people use commercial boating outfitters each year, which contributes over \$700 million to the U.S. economy ... [i]n 1996, there were approximately 15.8 million recreational boats used in the US [sic], with \$17.7 billion spent on boating." American Rivers, *Testimony of Margaret Bowman, Chair of the Hydropower Reform Coalition, Director of Hydropower Programs, American Rivers before the Subcommittee on Energy and Power of the House Commerce Committee* (Sept. 25, 1998) <[http:// www.amrivers.org/hydrotest1.html](http://www.amrivers.org/hydrotest1.html)> [hereinafter *Bowman Comments*]; see also Bender, supra note 5, at 207 (noting the restoration in non-hydro benefits of the Elhwa River in Washington State is estimated to generate \$6.3 billion per year).

[FN66]. See Pyle, supra note 7, at 102 (acknowledging the existence of 595,000 miles of formerly free-flowing waters now lying quiet behind concrete). The EPA estimates that there are approximately 68,000 dams in the United States. The National

Park Service estimate is even higher at 75,000 dams. See Facts about Hydropower and Dams (visited Dec. 7, 1998) <<http://www.amrivers.org/facts.html>>.

[FN67]. FEIS, supra note 4, at 3-57.

[FN68]. Bender, supra note 5, at 209 n.96 (citing Joan Laatz, Dam's Fate Lies on Salmon Issue, *Oregonian*, Aug. 9, 1993, at A1).

[FN69]. Bender, supra note 5, at 209 n.96.

[FN70]. See FEIS, supra note 4, at 3-28.

[FN71]. In 1919, Northwestern and the Fish Commissioner of Washington State struck a deal releasing the company from future fish passage responsibility. FEIS, supra note 4, at 3-28 to 3-29; see also Bender, supra note 5, at 211 n.109 (noting that the money was used for a hatchery to mitigate the loss of fish habitat near the mouth of the Columbia River) (citing Federal Energy Regulatory Comm'n, FERC No. 2342-005, Draft Environmental Impact Statement, Condit Hydroelectric Project 2-32 to 2-35 (1995)).

[FN72]. "Anadromous fish include species like salmon, steelhead, shad, sturgeon, and striped bass that are born in freshwater, spend most of their adult life in saltwater, and return to freshwater to spawn." Pyle, supra note 7, at 103 n.32 (citing Robert M. McDowall, Diadromy in Fishes: Migrations Between Freshwater and Marine Environments 20-24 (1988)).

[FN73]. See FEIS, supra note 4, at 3-28 (stating that a replacement concrete ladder, the last fish passage facility for **Condit Dam**, was destroyed in 1917).

[FN74]. FEIS, supra note 4, at 2-1. See also [John A. Clements, Federal Energy Regulatory Comm'n, 76 F.E.R.C. P 62,268, Order Finding Hydroelectric Project Jurisdiction \(1996\)](#) (stating that the project consists of: 1) a 125-foot-high, 471-foot-wide concrete dam; 2) a reservoir with a surface area of 97 acres at normal pool elevation of 301 feet and a storage capacity of 1,081 acre-feet with a 13-foot drawdown; 3) a 13.5-foot-diameter, 5,100-foot-long wood stave pipe; 4) a 40-foot-diameter surge tank; 5) two 650-foot-long penstocks; 6) a powerhouse containing two generating units with a combined capacity of 9,600 kilowatts; 7) a 50 mile-long transmission line; and 8) appurtenant facilities); Chris Watson, *Relicensing the Northwest: A Study of Condit Hydroelectric Project 7* (1995) (on file with the Northwest Water Law & Policy Project, Portland, Oregon).

[FN75]. Bender, supra note 5, at 206. Cf. Michael Blumm et al., [Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s](#), 27 *Envtl. L.* 21, 100 (1997). FERC relied on a recent power planning study prepared by the Pacific Northwest Utilities Conference Committee, and noted the Northwest's energy sources were capable of meeting any peak load periods. However, even though FERC clearly established and acknowledged the current excess energy generating capacity in the Northwest, the agency nonetheless concluded that the Condit Project can help to serve the continuing need to "maintain and use the region's hydroelectric generating facilities." FEIS, supra note 4, at 1-4. Yet, later in the report, FERC unequivocally stated that "hydropower plays a small role in meeting PacifiCorp's existing energy needs ... and will play a decreasing role [in the future]." FEIS, supra note 4, at 1-5 to 1-6.

[FN76]. Bender, supra note 5, at 206 n.79 (citing Federal Energy Regulatory Comm'n, FERC No. 2342-005, Draft Environmental Impact Statement, Condit Hydroelectric Project 3-1 (1995)).

[FN77]. [Jewett](#), supra note 30.

[FN78]. [Bender](#), supra note 5, at 216.

[FN79]. [16 U.S.C. § 797\(e\)](#).

[FN80]. [16 U.S.C. § 803\(j\)\(1\)](#).

[FN81]. [Id.](#)

[FN82]. [Id.](#)

[FN83]. [16 U.S.C. § 803\(j\)\(2\)](#).

[FN84]. [16 U.S.C. § 803\(a\)\(1\)](#).

[FN85]. [16 U.S.C. § 811](#).

[FN86]. [18 C.F.R. § 16.6\(c\) \(1998\)](#).

[FN87]. [18 C.F.R. § 16.6\(d\)](#) (listing methods that FERC utilizes to provide public notice of the intent to relicense a project: publication in the Federal Register; one publication in a newspaper that is distributed within the project area; and, notification to appropriate federal agencies and Indian tribes).

[FN88]. [18 C.F.R. § 16.7\(b\)-\(d\)](#) (detailing the extensive list of information a licensee must make available upon request, such as: construction and operation information; drawings; annual operational information; project generation data; net investment figures; and, safety and structural adequacy information).

[FN89]. [18 C.F.R. § 16.8\(a\)](#) (requiring the applicant to consult with NMFS, USFWS, the National Park Service, EPA, any federal agency that manages the lands on which the applicant's project operates, state fish and wildlife agencies, state water boards, and any permitting body under section 401(a)(1) of the Clean Water Act, [33 U.S.C. § 1341\(a\)\(1\) \(1994\)](#)).

[FN90]. [18 C.F.R. § 16.8\(b\)-\(d\)](#) (detailing the three mandatory stages of consultation required).

[FN91]. [18 C.F.R. § 16.8\(b\)\(3\)](#) ("Members of the public attending the meeting are entitled to participate fully ... and to express their views regarding resource issues that should be addressed in any application for new license that may be filed by the potential applicant.").

[FN92]. [18 C.F.R. § 16.8\(b\)\(2\)\(i\)](#).

[FN93]. [18 C.F.R. § 16.24\(2\)](#) (stating the application for a new license must be filed "at least 24 months before the expiration of the existing license.").

[FN94]. [18 C.F.R. § 385.214\(a\)\(3\)](#) (stating that if a party wishes to appeal, it must first be a party to the FERC proceeding which requires that "any person ... seeking to become a party must file a motion to intervene.").

[FN95]. [18 C.F.R. § 16.8\(c\)\(2\)](#).

[FN96]. [18 C.F.R. § 16.9\(d\)](#).

[FN97]. [18 C.F.R. §§ 380.5-.6](#).

[FN98]. [18 C.F.R. § 380.7](#).

[FN99]. [18 C.F.R. § 4.34\(e\)\(5\)](#).

[FN100]. [18 C.F.R. § 380.2\(e\)](#).

[FN101]. See [16 U.S.C. § 8251\(b\)](#) (allowing that any aggrieved party has sixty days after the Commission's order to file a request for a rehearing).

[FN102]. Id. The Commissioners can, however, deny a request for a rehearing. See [16 U.S.C. 8251\(a\)](#).

[FN103]. See [16 U.S.C. § 8251\(b\)](#). If the dissatisfied party seeking Court of Appeals review is the license applicant, "the court is to sustain the conditions if they are consistent with law and supported by evidence presented to the Commission, either by the Secretary or other interested parties." [Bangor Hydroelectric Co. v. F.E.R.C.](#), 78 F.3d 659, 662 (D.C. Cir. 1996) (citing [Escondido Mut. Water Co. v. La Jolla Band of Mission Indians](#), 466 U.S. 765, 778 n.20 (1984)).

[FN104]. In 1947, Pacific Power & Light Company, PacifiCorp's predecessor, merged with Northwestern Electric Company. See FEIS, supra note 4, at 1-1.

[FN105]. See Bender, supra note 5, at 209 n.99 (citing Battle Brewing over Fish Protection in First of PacifiCorp Relicensings, Electric Util. Wk., Aug. 16, 1993) (noting that Condit is the first of thirteen small PacifiCorp projects for which the license will expire).

[FN106]. See supra note 75 and accompanying text.

[FN107]. See Bender, supra note 5, at 209 ("In February of 1963, Pacific Power & Light, the forerunner of PacifiCorp, applied for a FERC license, which was granted in 1968.") (citing Federal Power Commission, Order Issuing License (Major) 1 (Dec. 20, 1968). This license required fish habitat protection-minimum water flows from the dam, in the one mile distance between the dam and power house. See FEIS, supra note 4, at 2-7 (stating that the most recent license, under article 28, required PacifiCorp to maintain a minimum flow of 15 cfs (cubic feet per second) from the impoundment lake into the river). To enhance downstream fisheries, PacifiCorp discharges a minimum flow of 100 cfs when the dam is generating energy. FEIS, supra note 4, at 2-7.

[FN108]. See FEIS, supra note 4, at 3-29.

[FN109]. "Adults [salmon] are captured at the dam, trapped, and hauled over or around the dam and released into the reservoir; smolts are trapped at the dam end of the reservoir as they make their way toward the ocean and trucked around it." Bender, supra note 5, at 199 n.39 (citing PacifiCorp comments regarding the Condit DEIS). Trap-and-haul is a mitigation procedure modeled after the larger U.S. Army Corps of Engineers Columbia River Basin transportation program. The Columbia mainstream transportation program occurs under the jurisdiction of a permit under section 10(a)(1)(A) of the Endangered Species Act of 1973. [16 U.S.C. § 1539\(a\)\(1\)\(A\) \(1994\)](#). See [American Rivers v. National Marine Fisheries Serv.](#), 126 F.3d 1118, 1121 n.6 (9th Cir. 1997) ("The transportation program is premised on the idea that smolt transportation enhances the survival of the Snake River salmon."). The illogic of this arrangement is well described as the technological

attempts to mitigate the effects of technology. See [Michael C. Blumm, *The Amphibious Salmon: The Evolution of Ecosystem Management in the Columbia River Basin*, 24 *Ecology L.Q.* 653, 658-59 \(1997\)](#). Professor Blumm illustrates that it is fundamentally absurd for a scheme to exist by "which grain and other agricultural commodities are shipped on the river, and the salmon are loaded on to trucks to ride on Interstate 84." *Id.* (citing [Daniel Rohlf, *Legal Issues Shaping Salmon's Future*, 25 *Envtl. L.* 413, 414 \(1995\)](#)).

Not surprisingly, utilities cite to trap-and-haul programs as the best method to mitigate fish passage problems because these programs are substantially less expensive than alternatives, such as actually building fish passage. Email Interview with Katherine Ransel, Counsel for American Rivers Northwest Office (Nov. 11, 1998) (on file with author). Environmentalists, the Indian tribes, and biologists view trap-and-haul methods as attempts to avoid truly proactive mitigation efforts like changing the operation of the dam. See [Blumm, 24 *Ecology L.Q.* at 657-58](#). Lastly, the effectiveness of trap-and-haul programs is scientifically questionable. *Id.* at 658 (citing Independent Scientific Group, *Return to the River: Restoration of Salmonid Fishes in the Columbia River Ecosystem* 328 (1996); Philip R. Mundy et al., *Transportation of Juvenile Salmonids from Hydroelectric Projects in the Columbia Basin: An Independent Peer Review* 116-7 (1994)).

[FN110]. See FEIS, *supra* note 4, at I-39 (noting the Columbia Basin Fish and Wildlife Authority commented that PacifiCorp favored the less expensive trap-and-haul method).

[FN111]. See FEIS, *supra* note 4, at 3-29.

[FN112]. [16 U.S.C. § 839](#). Enacted by Congress in 1980, the power industry faced the mandate "to protect and restore the fish and wildlife damaged by hydropower 'to the extent affected by the development and operation' of the system." Blumm, *supra* note 109, at 660 (citing a subsection of the Northwest Power Act, § 839h(10)(A)).

[FN113]. See [16 U.S.C. § 839b\(a\)](#) (creation of Council); [§ 839b\(e\)](#) (power plan); [§ 839b\(h\)](#) (fish and wildlife program). In 1982, the NPPC called for protection, mitigation, and enhancement of fish and wildlife resources affected by the development, operation, and management of hydroelectric facilities on the Columbia River through adoption of the Columbia Basin Fish and Wildlife Program. See FEIS, *supra* note 4, at 3-29; see also [Northwest Resource Info. Ctr. v. Northwest Power Planning Council](#), 35 F.3d 1371, 1380 (9th Cir. 1994) ("[T]he council promulgated the Columbia Basin Fish and Wildlife Program in November 1982.").

[FN114]. Northwest Power Planning Council, *Columbia River Basin Fish & Wildlife Program* 7-11 (1982). The "Council's authority with respect to fish and wildlife measures is constrained; the Council can guide, but not command, federal river management." [Northwest Resource](#), 35 F.3d at 1378 (citations omitted). However, "the Act requires federal water managers to act in a manner consistent with the Council's fish and wildlife program." *Id.* at 1379 (citing [16 U.S.C. § 839b\(h\)\(10\)\(A\)](#)); see also Blumm et al., *supra* note 75, at 61 n.253 (giving an in-depth analysis of the Council's power and surmising that "we do not know how much enforcement authority the Council possesses because the Council has chosen not to test its authority....").

[FN115]. See FEIS, *supra* note 4, at 1-1.

[FN116]. FEIS, *supra* note 4, at 1-1 (listing the efficiency improvements at Condit: replacing existing turbine runners; rewinding the generators; upgrading the turbines; replacing the transformer; and upgrading appurtenant electrical equipment).

[FN117]. Bender, *supra* note 5, at 216 (citing PacifiCorp, *Comments Regarding Condit Draft Environmental Impact Statement*, at 1 (Mar. 5, 1996)).

[FN118]. PacifiCorp operates in California, Utah, Arizona, Colorado, Wyoming, and the Northwest. See FEIS, supra note 4, at 1-5 to 1-6. PacifiCorp's power plans are distinctly different from other power suppliers in the Pacific Northwest because it relies more heavily on coal-fired power generation and less on hydropower generation. FEIS, supra note 4, at 1-5 to 1-6.

[FN119]. [16 U.S.C. § 811 \(1994\)](#) ("[FERC] shall require the construction, maintenance, and operation by a licensee at its own expense of ... such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate."). In addition, the FPA requires FERC to inquire into fish and wildlife issues during a relicensing as if it was an application for an original license. See [Confederated Tribes and Bands of the Yakama Indian Nation v. F.E.R.C., 746 F.2d 466, 470 \(9th Cir. 1984\)](#) (citing § 15(a) of the FPA, [16 U.S.C. § 808\(a\)](#): "the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations."). The Seventh Circuit has recognized there is "nothing to distinguish relicensing situations from the grant of original licenses with respect to the application of a Section 18 reservation." [Wisconsin Pub. Serv. Corp. v. F.E.R.C., 32 F.3d 1165, 1170 \(7th Cir. 1994\)](#).

[FN120]. See 16 U.S.C. § 1523(15) (1994).

[FN121]. See [18 C.F.R. § 4.30\(b\)\(9\)\(iii\) \(1998\)](#). Other things beyond the agencies' section 18 power, according to FERC, include non-physical mitigation efforts like minimum instream flows or water temperature controls. Moreover, FERC considers the following to be beyond agency authority as well: final design; monitoring of the "fishways;" fish mortality rate standards; inspection programs; studies; design testing; or the ability to delay project construction until after installation of the fish passage technology. See also Michael C. Blumm, Hydroelectric Regulation, 4 Waters and Water Rights § 40.09(b) (Robert E. Beck ed., 1998 Supp.) [hereinafter Hydro Regulation II (1998)].

[FN122]. [Pub. L. No. 102-486](#), 106 Stat. 2776 (1992).

[FN123]. See Hydro Regulation I, supra note 9, at 430.

[FN124]. Hydro Regulation I, supra note 9, at 430 (citing [Pub. L. No. 102-486](#), § 1701(b), 106 Stat. 3008 (1992)). The 1988 FERC definition contained the following language:

"Fishway" means any structure, facility, or device used for the upstream passage of fish through, over, or around the project works of a hydropower project, such as fish ladders, fish locks, fish lifts and elevators, and similar physical features; those screens, barriers, and similar devices that operate to guide fish to a fishways; and flows within the fishways necessary for operation.

[18 C.F.R. § 4.30\(b\)\(9\)\(iii\) \(1988\)](#). Not vastly different, but less specific, is the language of the Energy Power Act of 1992, which defines items that may constitute a "fishway" under section 18 as:

[items] for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.

[Pub. L. No. 102-486](#), § 1701(b), 106 Stat. 3008 (1992). Today, neither the FPA, FERC regulations, or the Department of Interior or Commerce's regulations define fishway.

[FN125]. [Wisconsin Pub. Serv. Corp., 82 F.E.R.C. P 61,271 at 62,064 \(1998\)](#).

[FN126]. [Wisconsin Pub. Serv. Corp. v. F.E.R.C., 32 F.3d 1165, 1170 \(7th Cir. 1994\)](#) (holding this reservation of authority to be "an appropriate measure for the protection of the public interest.").

[FN127]. See Pub. L. No. 102-486, § 1701(b), 106 Stat. 3008 (1992).

[FN128]. See [Pub. Util. Dist. No. 1 of Okanogan County, Washington, 76 F.E.R.C. P 61,271, at 62,375-79 \(1996\)](#).

[FN129]. Id.

[FN130]. [Pub. L. No. 102-486, § 1701\(b\), 106 Stat. 3008 \(1992\)](#).

[FN131]. See [Bangor Hydroelectric Co. v. F.E.R.C., 78 F.3d 659, 662 \(D.C. Cir. 1996\)](#).

[FN132]. See [City of LeClaire, 66 F.E.R.C. P 61,270 \(1994\)](#) (ruling that even if FERC disagreed with the fish passage conditions it must include them in the license).

[FN133]. FERC's reservation of final approval authority means that, according to FERC, section 18 does not give the federal fish agency power to deny a license. See [Pub. Util. Dist. No. 1 of Okanogan County, Washington, 76 F.E.R.C. P 61,271 \(1996\)](#); see also [Bangor, 78 F.3d at 663](#) ("[T]he Commission retains authority to issue the underlying license").

[FN134]. See [Bangor, 78 F.3d at 664](#).

[FN135]. Id. See also Hydro Regulation II, *supra* note 121, at 60.

[FN136]. For example, Idaho Power recently testified, before the Senate Subcommittee on Water and Power, that section 18 undercuts FERC's ability to manage the licensing process. See [FERC Hydroelectric Relicensing Procedures, Hearing Before the Comm. on Energy and Natural Resources, 105th Cong. 105-381 \(1997\), available in 1997 WL 14153276](#) (statement of Laurel Heacock, Attorney for FERC and Regulatory Affairs, Idaho Power Company, accompanied by Elaine Kleckner, Senior Relicensing Project Manager, Idaho Power Company). Moreover, before the Senate Subcommittee on Water and Power, Jerry L. Sabattis, Hydro Licensing Coordinator for Niagra Mohawk Power Corporation, presented a summary of what he considered to be the general ramifications of fishway prescriptions: 1) fish passage and attraction flows causing diminished power generation output by at least two to five percent; 2) expenditure of millions of dollars of capital; 3) increased ownership, operation, and maintenance costs; 4) increased risk of a "re-opener" action by the Commission to require fish passage in the future; 5) mandatory fishways outweighing concerns for other resource values; 6) a viable existing project being turned into an unprofitable project; and, 7) an increase in the attendant environmental impacts of non hydropower energy sources as other sources of energy consumption increase because of the higher cost of hydropower. Hydroelectric Relicensing Procedures, Hearing Before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources, 105th Cong. (1997), available in [1997 WL 14153129](#) [hereinafter Hydroelectric Relicensing].

[FN137]. Section 18 has been interpreted by the Seventh Circuit in [Wisconsin Pub. Serv. Corp. v. F.E.R.C., 32 F.3d 1165 \(7th Cir. 1994\)](#) and by the D.C. Circuit in [Bangor Hydroelectric Co. v. F.E.R.C., 78 F.3d 659 \(D.C. Cir. 1996\)](#). See Hydro Regulation I, *supra* note 9, at 431.

[FN138]. FEIS, *supra* note 4, at I-140. NMFS also commented that "[t]he Pacific Northwest is experiencing a salmon crisis in which every action has an effect. In general, Pacific Northwest rivers are over-appropriated, fish habitat has been rendered inaccessible or unusable, and entire populations of fish have become extinct due to hydropower development." FEIS, *supra* note 4 at I-135 to I-136.

[FN139]. The "Ice Harbor" fish ladder, in order to pass fish around **Condit Dam**, would consist of: a) standard eight-foot by ten-foot pool sections, with one-foot water surface increments from the fishway pool to the project forebay with a 25 cfs

(cubic feet per second) flow; b) a vertical slot regulating section to accommodate forebay fluctuations, consisting of ten pools with twelve-inch slots, with a minimum through-slot water depth of five feet, with flow no greater than 25 cfs; c) a make-up water diffuser to maintain a constant water level in the pool located between the main ladder and the vertical slot regulating section, having a one-inch space grating with a twenty-square foot area, capable of passing between 25 cfs to 32 cfs; and d) an add-on auxiliary water diffuser system, with one-inch spaced vertical grating, 175-square foot area designed to provide one to two feet of fishway entrance gate head throughout the tailwater range, with an attraction flow of 200 cfs. See FEIS, supra note 4, at 2-36.

[\[FN140\]](#). The fixed panel type fish screen consists of: "a) vertical fixed screens designed to protect fry according to NMFS standards; b) a trash rack and automated rake and removal system; c) adjustable baffles to maintain a perpendicular approach velocity of 4 feet per second (fps), plus or minus 1 fps, with a screen surface providing sufficient submerged area to maintain these velocities at all forebay areas; d) a minimum bypass entrance velocity of 2 fps and minimum bypass width of 2 feet; e) full-depth bypass entrance ramping to an overflow weir set below the minimum forebay elevation; and f) an automated screen cleaner." See FEIS, supra note 4, at 2-36 to 2-37.

[\[FN141\]](#). The prescriptions included installation of a tailrace barrier consisting of: a diffuser grating with 1-inch bar spacing, and a maximum of 1-inch openings where the diffuser rack seats against other project features, sized to maintain a 1-fps average velocity across the area using flow distribution features, hinged at the upstream end and cleaned via backwash flow, with a positive lock system, set in a concrete sill on the tailrace floor[.] See FEIS, supra note 4, at 2-37 to 2-38. Incorporated into the barrier is a: denil or steep-pass ladder to pass fish from the tailrace to the river throughout a 1-foot wide chute passing with 1-inch of water, having an entrance pool, a 3-by-4-foot adjustable entrance gate with a 75 cfs attraction flow and the entrance at the upper end of the tailrace, the ladder and entrance pool protected with fencing. FEIS, supra note 4, at 2-37 to 2-38.

[\[FN142\]](#). See FEIS, supra note 4, at x. In addition to flows to ensure correct operation, NMFS and the USFWS prescribed a fish counting station, fishway pools with a minimum depth of five feet, trash collection and removal capabilities for all ladder water supply entrances, and modifications of the spillways. See FEIS, supra note 4, at 2-36 to 2-37. Clearly though, NMFS viewed complete dam removal as the best method to safely pass fish through the project area. See FEIS, supra note 4, at H-13. Further, the agency did not intend for its prescriptions to preclude the consideration of dam removal. FEIS, supra note 4, at H-13.

[\[FN143\]](#). FEIS, supra note 4, at xi.

[\[FN144\]](#). "The provisions of the recommended environmental ... modifications at Condit will unavoidably produce a project with negative annual net economic benefits. Stated in another way, the high costs incurred in installing and operating these modifications results in a project where: 1) the annual unit cost of producing power is approximately 55 mills/kWh; and 2) the annual power generation cost exceeds the current cost of obtaining the same amount of generation from the least-cost alternative by approximately \$4.367 million dollars." FEIS, supra note 4, at 5-24. Ultimately, FERC framed the question as whether "the modifications provide significant environmental and recreational benefits that offset the high power cost at Condit." FEIS, supra note 4, at 5-23. In answering its own question, FERC stated that indeed the modifications were justified by the benefits provided to environmental and recreational values. FEIS, supra note 4, at 5-23. Not surprisingly, FERC decisions that drop the economic hammer of section 18 prescriptions are resisted so vehemently by the hydropower industry that recently the industry petitioned Congress to take action to eliminate the federal fish agencies' authority. See 25 [Energy Rept., Nov. 3, 1997, available in 1997 WL 12976704](#).

[FN145]. See [Allen Thomas, Never-Ending Story, Columbian, Jan. 9, 1997, at E, available in 1997 WL 6513154](#) (describing PacifiCorp's proposal cost as estimated at \$9.3 million and FERC's recommendation, which included the utilities' proposal and section 18 prescriptions, at \$28.9 million).

[FN146]. Several observers of the hydroelectric industry have noted and opined on this characteristic of the Condit relicensing. For example, "don't forget about the most important factor: this is a marginal project economically to start with. The fish passage requirement simply gave it negative signs rather than break even. Had the NMFS not required fish passage as Condit then we would more than likely be looking at a scenario where a marginal project is granted a new 30-year license at great expense to other resource uses." E-mail Interview with John Gangemi, Conservation Director American Whitewater Association (Oct. 13, 1998) (on file with author). Similarly, because NMFS used "their full authority to prescribe fishways that were state of the art" as opposed to the cheaper trap and haul process supported by PacifiCorp, the pressure centered on PacifiCorp and the agencies began to recognize that "the license was too high for the power produced." E-mail Interview with Katherine Ransel, Counsel for American Rivers Northwest Office (Nov. 11, 1998) (on file with author). Further, PacifiCorp's hydropower administrator, Terry Flores commented that "we're willing to talk about anything, including dam removal if it is an economic option for the company and customers ... we know fish passage at \$28 million is not a good option." Callahan, *supra* note 28.

[FN147]. In its comments on the Condit Draft Environmental Impact Statement, PacifiCorp stated that if "the project cannot be operated in an economically acceptable manner, and the only alternative is to operate at a significant net loss, PacifiCorp must consider rejecting a license and investigate sale, decommissioning or other options." FEIS, *supra* note 4, at I-71. In that same vein, PacifiCorp argued "that responsible lower cost alternatives exist to benefit anadromous fish and provide affordable power. The fishway prescriptions contained in the DEIS must be accomplished at a lower cost to allow for continued project operation." FEIS, *supra* note 4, at I-72.

[FN148]. Condit's power, with the section 18 fish passage requirements, would cost about 55 mills per kilowatt, and electricity bought on the open market typically costs 22 mills per kilowatt. Thus, if fish passage costs are factored into the analysis, it would be about \$4 million dollars cheaper for PacifiCorp to buy the same amount of electricity produced at Condit rather than produce the energy itself. See, e.g., Thomas, *supra* note 145.

Economic pressure from section 18 prescriptions is becoming more evident in hydroelectric relicensings. Today, federal regulatory measures like section 18 are in place which were not in existence thirty years ago when FERC/FPC granted the original license. FERC has even commented that "[w]hen these dams were put in people were thinking about power generation and not fish and wildlife." Bender, *supra* note 5, at 210 n.104. As a result, it is no longer uncommon for a utility to spend large sums to satisfy federal prescriptions. For example, according to Jerry Sabattis, Niagara Mohawk Power's hydro licensing coordinator, when the company relicensed thirty-two hydro plants that expired in 1993, it spent \$33 million. See Hydroelectric Relicensing, *supra* note 136. Niagara subsequently argued that the cost of installing the fishways would be \$800 per fish. Hydroelectric Relicensing, *supra* note 136. Sabattis commented that "fishway prescriptions increase risk, increase production costs, decrease operating flexibility and decrease generation." Hydroelectric Relicensing, *supra* note 136.

[FN149]. See Sawyer, *supra* note 20, at 70.

[FN150]. Environmental group involvement in hydropower licensing increased dramatically in 1992, when forty conservation and recreation groups formed the Hydropower Reform Coalition. See Bowman Comments, *supra* note 65. The purpose of the Coalition is to improve river health and recreation opportunities "through the relicensing of hydropower dams through [FERC]." See Bowman Comments, *supra* note 65. With a combined membership base of 600,000, the Coalition is "actively involved in more than 75 percent of the relicensing cases currently pending before FERC." See Bowman

Comments, *supra* note 65.

[FN151]. See Sawyer, *supra* note 20, at 70 ("FERC has encouraged a collaborative approach to licensing, relying on negotiations among the parties to licensing proceedings.").

[FN152]. FERC termed this process an "alternative procedure." [18 C.F.R. § 4.34\(i\)](#).

[FN153]. Sawyer, *supra* note 20, at 70; see also Hydropower Reform Coalition, Recommendations for Cooperative Relicensing Proceedings (visited Dec. 7, 1998) <<http://www.amrivers.org/coop-rel.html>> (noting that cooperative approaches take various forms depending on the circumstances and participants).

[FN154]. See Kenneth D. Kearns et al., Hydro Settlements: Providing an Opportunity for Agreement, *Hydro Review*, Oct. 1995, at 24.

[FN155]. See Bowman Comments, *supra* note 65 (noting that the FERC Cushman Dam relicensing on the Skokomish River in Washington state took the last twenty-four years to complete and the recently settled Kingsley relicensing on the Platte River in Nebraska took almost as long); see also Babbitt Comments, *supra* note 1 ("[T]his process unites those who in the past would usually have met face to face only in adjudication.").

[FN156]. The process "invites federal agencies, states, businesses, sporting groups, and conservationists to come together and participate in a negotiated river restoration plan as part of the relicensing process." Babbitt Comments, *supra* note 1.

[FN157]. The Director of dam relicensing for Portland General Electric noting that "as relicensing continues, each dam must be analyzed on a case-by-case analysis." Babbitt Comments, *supra* note 1.

[FN158]. See Bowman Comments, *supra* note 65.

[FN159]. "In an independent evaluation of the costs of hydropower relicensing, the Electric Power Research Institute (EPRI) found that on average, savings of 20 to 50 percent can be realized by using a collaborative approach. EPRI also found that the settlement process, on average, leads to reduced mitigation costs of 5 to 20 percent." Bowman Comments, *supra* note 65.

[FN160]. See Kearns et al., *supra* note 154 (Interested parties, "stakeholders see the approach as giving them a voice before basic decisions about the project license and operation have already been made").

[FN161]. Jewett, *supra* note 30 (quoting Terry Flores, hydropower policy administrator for PacifiCorp).

[FN162]. See [Collaborative Hydro Licensing Option Now Official FERC Policy, Electric Util. Wk., Nov. 3, 1997, available in 1997 WL 16425814](#) [hereinafter Hydro Licensing] ("According to FERC, about 30% of licensing cases are using the voluntary alternative already[.]"). Examples of collaborative settlement include: New England Power Company signed two settlement agreements for eight dams (77 megawatts total) on the Deerfield River and for three dams (290 megawatts total) on the Connecticut River; Wisconsin Electric Power Company used collaborative settlements to address relicensing eight dams on the Menominee River; and Niagara Mohawk Power Company's settlements, in the past four years, affected twenty-six dams on four major river basins in New York state. See Bowman Comments, *supra* note 66; see also Costenbader, *supra* note 31, at 639 (noting that the process approving a settlement offer included a removal plan for the Stronach Dam on the Pine River in Michigan) (citing [Consumers Power Co., 68 F.E.R.C. P 61,077 \(1994\)](#)).

[FN163]. See Bowman Comments, *supra* note 65.

[\[FN164\]](#). See Kearns et. al., supra note 154 (citing reports by the Electric Power Research Institute).

[\[FN165\]](#). Hydro Licensing, supra note 162.

[\[FN166\]](#). Hydro Licensing, supra note 162.

[\[FN167\]](#). Hydro Licensing, supra note 162 (quoting Commissioner Massey that FERC will step in and "direct the applicants how to complete the process[.]").

[\[FN168\]](#). This collaborative process is FERC's attempt to streamline the relicensing procedures in response to criticism. See [Energy Rept., Nov. 3, 1997, available in 1997 WL 12976704](#). FERC chairman, James Hoecker, has stated that the collaborative process "fits my overall plans for procedural innovation at the commission[.]" Hydro Licensing, supra note 162.

[\[FN169\]](#). Logically, in a FERC process, one would expect FERC involvement. However, the term "collaborative process" is now a term of art, in part, due to FERC's codification of the option into its relicensing procedures. In the process of conducting interviews for this article, several commentators suggested that the Condit negotiations are not a "collaborative process" because Condit is a settlement process lacking FERC involvement. Interview with Barbara Scott-Brier, Attorney with the Department of Interior's Regional Solicitor's Office, in Portland, Or. (Nov. 18, 1998) (on file with author). Thus, because FERC has chosen to not participate in the Condit negotiations, the parties at the negotiating table are left without feedback, participation, or insight into what the governing federal licensing agency thinks. Id. The Condit settlement process is consequently a non-FERC negotiation driven by the following parties: Washington State Department of Ecology; Washington State Department of Fish and Wildlife; United States Forest Service; NMFS; Department of the Interior representing the United States Fish and Wildlife Service and Bureau of Indian Affairs; Yakama Nation; American Rivers; and PacifiCorp. Id. This article employs the term "negotiated settlement process" to refer to the Condit negotiations.

Criticism of FERC is not uncommon. For example, when FERC relicensed the Eugene Water & Electric Board, in Eugene, Oregon in 1998, the Oregon Department of Fish and Wildlife and the United States Fish and Wildlife Service filed suit against FERC challenging the relicensing process. See [Thomas F. Armistead, Relicensing Flood Pushes Change, 240 Engineering News-Rec., May 11, 1998, available in 1998 WL 8135647](#). The utility first initiated the relicensing in 1986 and finally proposed an application with about \$15 million in improvements. Id. According to Jeff Ziller, a state biologist, Oregon did not "feel FERC did a good job of going through the [[[relicensing] process and coming up with a negotiated settlement." Id.

[\[FN170\]](#). See Bender, supra note 5, at 211; see also FEIS, supra note 4, at 4-19 (noting that PacifiCorp's proposed action provided only for fish passage through the tailrace into the by-pass reach, and that in lieu of passage at the dam, PacifiCorp proposed to expand the steelhead trout net pen operation in Northwestern Lake).

[\[FN171\]](#). See Bender, supra note 5, at 211 (citing Northwest Power Planning Council, Columbia River Basin Fish & Wildlife Program 7-11 (1982)). In 1982, PacifiCorp "identified a trap-and-haul operation as the most feasible upstream passage option following their analysis of various passage alternatives [][.]" FEIS, supra note 4, at 4-60. See also discussion supra Part II.D.

[\[FN172\]](#). PacifiCorp's application for relicensing proposed to: "increase power generation; reduce reservoir fluctuation; and provide enhancement measures for fishery, recreation, and cultural resources[.]" FEIS, supra note 4, at 2-7. Specifically, for fish passage, PacifiCorp proposed project modifications and upgrades including using target minimum flows in the bypass reach and below the powerhouse to enhance downstream fisheries. See FEIS, supra note 4 at 2-9. The proposed actions involved establishing a 100 cfs target flow for bypass reach and 400 cfs below the tailrace; limiting rising rates during ramping to six inches per half-hour; placing a tailrace barrier in the last fifty feet of the existing tailrace channel; placing a

Denil-type fish ladder into the bypass reach; expanding an existing floating fish rearing pen in Northwestern Lake; and operating on a strict program to avoid load factoring when flow downstream of the powerhouse is less than 400 cfs. See FEIS, supra note 4, at 2-9.

[FN173]. This alternative would remove most of the dam, drain Northwestern Lake, and restore that section of the river to almost natural conditions. In addition, this alternative would provide natural-like fish passage and whitewater passage through a constructed cascade as well as create an upstream diversion for power production to offset the power capability lost by partial dam removal. See FEIS, supra note 4, at 2-13.

[FN174]. See Condit DEIS, supra note 25.

[FN175]. See FEIS, supra note 4, at 2-11.

[FN176]. See Bender, supra note 5, at 212 (citing Federal Energy Regulatory Comm'n, FERC No. 2342-005, Draft Environmental Impact Statement, Condit Hydroelectric Project at 2-1 (1995)).

[FN177]. See [Michael C. Blumm & Stephen R. Brown, Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation, 14 Harv. Envtl. L. Rev. 277, 281 n.26 \(1990\)](#) (defining expert agencies as "comment agencies:" either federal, state, or local agencies with special expertise in environmental analysis). NEPA requires action agencies to solicit comments from other agencies with environmental expertise. [Id. at 292](#) (citing [Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1021-22 \(9th Cir. 1980\)](#)). The expert agency reviews the action agency's Environmental Impact Statement. *Id.* Through the analysis of "threshold" cases, the authors establish the existence of a "decided judicial sensitivity to the comments of agencies with environmental expertise," *id.*, where adverse comments from an expert agency provide support for a judicial determination of inadequacy by the action agency. [Id. at 296](#).

[FN178]. NMFS specifically noted that, in contrast to FERC's position, a no-action proposal for a project does not mean a relicensing and continued dam operation. See FEIS, supra note 4, at I-137. NMFS also argued that "the Federal Power Act contemplates much more than a mere continuation of the status quo when the decision is made to relicense." [Confederated Tribes of the Yakama Indian Nation v. F.E.R.C., 746 F.2d 466, 476 \(9th Cir. 1984\)](#); see also FEIS, supra note 4, at I-137. In addition, EPA commented that FERC's no-action position was inadequate and inconsistent with its responsibilities. See FEIS, supra note 4, at I-351 ("FERC's No Action alternative and resulting environmental baseline result in a highly unbalanced consideration of environmental quality ... FERC fails to give adequate, much less equal, consideration to mitigating the damage to fish and wildlife caused by project operation."). EPA's role under NEPA for commenting is more defined than other expert agencies because section 309 of the Clean Air Act mandates that EPA conduct an independent review and comment on federal actions affecting environmental quality. See Blumm & Brown, supra note 179, at 285 (citing [42 U.S.C. § 7609 \(1982 & Supp. 1987\)](#)). Section 309 requires the EPA to review and comment "on the environmental impact of any matter relating to [its] duties and responsibilities" [42 U.S.C. § 7609](#). If EPA comments that an EIS is "unsatisfactory" then, the end result could be resolution of the matter by the President. See Blumm & Brown, supra note 177, at 285-87 (describing the administrative chain of an EPA review).

[FN179]. See FEIS, supra note 4, at I-139 (NMFS commenting that "the DEIS estimates that dam removal would cost \$52.393 million. However, it provides no details on how this number was derived.").

[FN180]. See FEIS, supra note 4, at C-5.

[FN181]. See FEIS, supra note 4, at I-140 (NMFS commenting that "Meyer Resources (1995) estimates that removal of

Condit Dam, including sediment management would cost about \$10 million. In addition, Mr. Dennis Gathard, a civil engineer who worked extensively on dam removal and sediment management for the Elwha River projects, estimates dam removal for Condit to be approximately \$8.7 million.").

[FN182]. See FEIS, supra note 4, at I-299 (giving American Rivers' comments citing multiple FERC statements that dam removal is the best option in the DEIS).

[FN183]. See FEIS, supra note 4, at I-298 (citing American Rivers' comments).

[FN184]. See FEIS, supra note 4, at 2-1.

[FN185]. See FEIS, supra note 4, at I-157 (Barbara Scott-Brier of the Department of Interior's Regional Solicitor Office commenting that "the project is within the area ceded to the United States by the Yakama Tribe. The Yakama Tribe reserved an interest in the fishery resources within their ceded area in their treaty with the United States.") FERC's Condit analysis was inconsistent with the tribes' status as an equal sovereign. See [Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n](#), 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian Tribe, is essentially a contract between two sovereign nations.") (citation omitted). Consequently, the Department of Interior labeled the DEIS's analysis as inadequate with regards to Yakama Nation treaty rights. See FEIS, supra note 4, at I-157 ("[T]he DEIS does not address the existence of tribally reserved rights and resources in the project area. Furthermore, the DEIS does not address the trust responsibility of the United States with regard to these reserved rights. In this regard, the DEIS is inadequate.").

[FN186]. See FEIS, supra note 4, at ix.

[FN187]. FEIS, supra note 4, at ix.

[FN188]. FEIS, supra note 4, at ix.

[FN189]. FEIS, supra note 4, at ix.

[FN190]. See discussion supra Part II.B.

[FN191]. See FEIS, supra note 4, at H-13.

[FN192]. See discussion supra Part III.A.1.

[FN193]. See supra note 136 and accompanying text.

[FN194]. See supra note 136 and accompanying text.

[FN195]. See Sawyer, supra note 20, at 70.

[FN196]. See Jewett, supra note 30 ("[T]he cost of facing stricter rules for salmon passage has owners of dams weighing abandonment rather than make improvements ... [the] reason: it's cheaper to blow up the dam and forsake its power production than it is to make improvements that help fish pass it."); see also FEIS, supra note 4, at I-71 (PacifiCorp comments on passage requirement).

[FN197]. See FEIS, supra note 4, at ix.

[\[FN198\]](#). See Thomas, *supra* note 145.

[\[FN199\]](#). See FEIS, *supra* note 4, at ix.

[\[FN200\]](#). See Sawyer, *supra* note 20, at 70.

[\[FN201\]](#). See Sawyer, *supra* note 20, at 70.

[\[FN202\]](#). See Thomas, *supra* note 145 (noting the 2-1 vote of support for dam removal at a July 23, 1998 comment meeting).

[\[FN203\]](#). [Edwards Mfg. Co., 81 F.E.R.C. P 61,255, at 62,199 \(1997\)](#) ("[W]e deny the application for a new license, and we direct Edwards Manufacturing Company and the City of Augusta (licensees) to file a plan to decommission the hydroelectric generating facilities and remove the project dam."). The Edwards Dam decision marks the first time FERC denied a license.

[\[FN204\]](#). *Id.* at 62,204 ("[T]he public interest is best served under the circumstances of this case by denying a new license and requiring the removal of the Edwards Dam."); see also Costenbader, *supra* note 31, 635, 639-40 ("In a two to one decision, the Commissioners concluded that continued operation of the Edwards Dam ... was not in the public interest."); Ellen Jovin, *Edwards Dam: A Watershed Decision For Hydropower*, 212 *Elect. World*, Mar. 1, 1998, available in [1998 WL 9825796](#).

[\[FN205\]](#). *Edwards Mfg. Co., 81 F.E.R.C. at 62,210.*

[\[FN206\]](#). For example, not only was this FERC's first assertion of dam removal authority, but the size of the river and fisheries involved are grand. "The Kennebec is unique in having once supported runs of every native species of anadromous fish in the northeast United States." *Id.* at 62,202. Moreover, with fully restored conditions, FERC noted that "it is anticipated that 1,538,668 alewives, 371,000 American shad, and 7,500 Atlantic salmon will need to bypass the dam." *Id.* at 62,203 n.25.

[\[FN207\]](#). *Id.* at 62,202.

[\[FN208\]](#). *Id.* at 62,202 (Nov. 25, 1997).

[\[FN209\]](#). See [Edwards Mfg. Co., 81 F.E.R.C. P 61,255 at 62,202 \(Nov. 25, 1997\)](#).

[\[FN210\]](#). See *id.* (finding the act exempted one anadromous fish, the lamprey).

[\[FN211\]](#). See *id.* (noting that in 1990 the licensee proposed a fish lift to pass around the dam nearly 250 adult salmon, 82,000 alewives, and 40,000 shad annually). FERC evaluated the licensee's proposals and concluded that "some, but not all, of the impacts of the dam and impoundment on the fishery resources can be reduced through mitigation and enhancement measures proposed by the licensees, the prescribing agencies, and the Commission staff. However, if the dam were removed ... 15 miles of impounded waters would be restored to riverine habitat, and passage inefficiencies would be eliminated for all species." *Id.* at 62,203.

[\[FN212\]](#). So similar is the factual posture that removal of the Edwards Dam, like Condit removal, would substantially boost "[r]egional whitewater boating ... from the increased availability of Class I and Class II whitewater ..." *Edwards Mfg. Co., 81 F.E.R.C. at 62,204 n.33.*

[\[FN213\]](#). *Id.* at 62,207.

[FN214]. *Id.*

[FN215]. See Costenbader, *supra* note 31, at 640.

[FN216]. Costenbader, *supra* note 31, at 644 (citing Office of Hydropower Licensing, Federal Energy Regulatory Comm'n, Final Environmental Impact Statement for the Kennebec River Basin xxvii (1997)).

[FN217]. Costenbader, *supra* note 31, at 644 (citing [Edwards Mfg. Co., 77 F.E.R.C. P 61.285 \(1996\)](#)).

[FN218]. See discussion *supra* Part III.A.1.

[FN219]. See Jewett, *supra* note 30 (quoting Brian Gorman, spokesperson for the National Marine Fisheries Service).

[FN220]. See Babbitt Comments, *supra* note 1.

[FN221]. See Hydroelectric Relicensing, *supra* note 136. In concluding its comments before the House subcommittee, Niagara referred to the 1819 Supreme Court case [McCulloch v. Maryland, 4 Wheat. 316 \(1819\)](#) and Daniel Webster's infamous line: the "power to tax involves necessarily, a power to destroy." *Id.* at 327. For Niagara and the utilities, "use of the mandatory prescription authority given by section 18 of the FPA represents a perfect example of the Webster admonition. In not judiciously prescribing fishways, based on need and viability, those prescribing fishways unreasonab[ly] tax project facilities in a manner that destroys the project by undercutting the project's economic viability." Hydroelectric Relicensing, *supra* note 136.

[FN222]. Even Secretary Babbitt feels pressure by the hydro industry. He has noted that "some want to narrow the participation, weaken voices outside the hydropower industry, and downgrade status of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service." Babbitt Comments, *supra* note 1.

[FN223]. Jovin, *supra* note 204 (citing National Hydropower Association President, Julie Keil's comments that FERC should peruse a more active role in "balancing the various conditions").

[FN224]. Of the estimated 75,000 dams in the United States only three percent (2,259 dams) have hydroelectric generation as a primary purpose. Further, FERC's jurisdiction only covers a certain number of that three percent. In fact, FERC currently licenses only 1,890 hydropower plants. Department of Energy, Hydropower Resources at Risk: The Status of Hydropower Regulation and Development (1997).

As this Article indicates, in only an even smaller discrete class of relicensings that evidence the "Edwards/Condit" factors will section 18 prescriptions actually have an effect. The environmentalists themselves have noted that they do not wish to remove all the dams in the country, but rather only the ones "where the negative impacts of a dam outweigh the benefits to society." Bowman Comments, *supra* note 65. "The Hydropower Reform Coalition does not advocate removal of all hydropower dams. We do not even advocate removal of most hydropower dams." Bowman Comments, *supra* note 65. Specifically, "[c]oalition members are only seeking removal of 22 operating dams," of which only three generate a substantial amount of energy justifying their continued operation. Bowman Comments, *supra* note 65. Instead, utilities should view section 18 as an opportunity to participate, at least in the Northwest, in the recovery of the region's signature species, the Pacific salmon.

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