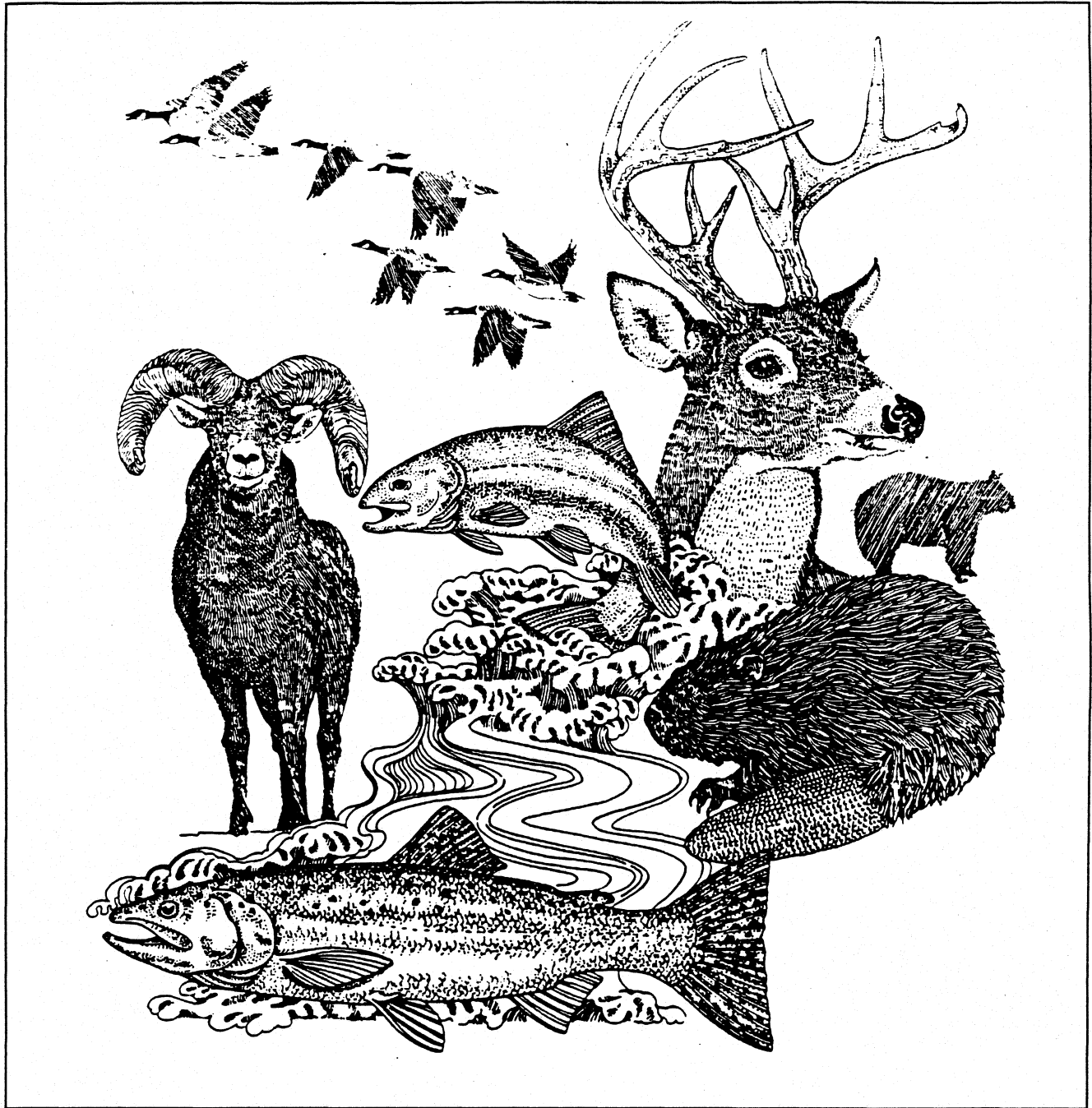


**RESPONSE TO COMMENTS: 1992
PROTECTED AREAS RULEMAKING 92-26**



NORTHWEST POWER PLANNING COUNCIL
August 13, 1992

TED HALLOCK
CHAIRMAN
Oregon

Angus Duncan
Oregon

James A. Goller
Idaho

Robert (Bob) Saxvik
Idaho

NORTHWEST POWER PLANNING COUNCIL

851 S.W. SIXTH AVENUE, SUITE 1100

PORTLAND, OREGON 97204

Phone: 503-222-5161

Toll Free: 1-800-222-3355

FAX: 503-795-3370

STAN GRACE
VICE CHAIRMAN
Montana

John C. Brenden
Montana

R. Ted Bottiger
Washington

Tom Trulove
Washington

RESPONSE TO COMMENTS

1992 PROTECTED AREAS RULEMAKING

August 13, 1992

BACKGROUND

Statutory authority: The Northwest Power Act directs the Council to develop a "program to protect, mitigate, and enhance fish and wildlife including related spawning grounds and habitat on the Columbia River and its tributaries." See 16 U.S.C. section 839b(h)(1)(A). The Act also directs to Council to develop "a general scheme for implementing conservation measures and developing resources pursuant to section 6 of the Act to reduce or meet the Administrator's obligations with due consideration by the Council for (a) environmental quality, (b) compatibility with the existing regional power system, (c) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantity and quality of flows for successful migration, survival, and propagation of anadromous fish, and (d) other criteria which may be set forth in the plan." See 16 U.S.C. section 839b(e)(2).

1988 protected areas rule: In August of 1988, the Council amended its fish and wildlife program and power plan to designated approximately 44,000 miles of Northwest streams as "protected areas." Protected areas are river reaches which contain important habitat for certain valued species of fish and wildlife. Reaches are identified as protected for anadromous fish or resident fish or wildlife or some combination of these categories. The Council maintains a data base which lists the designation for each reach and the specific species of concern on each reach.

Protected areas designations basically apply to new hydroelectric projects only. Dams in existence or licensed as of August 10, 1988 are not covered by the protected areas rule. In addition the protected areas rule provides that developers may seek exemption from the Council for a project with "exceptional fish and wildlife benefits."

Previous amendments to protected areas: The protected areas rule recognizes that amendments to the protected areas designations will be needed from time to time. The rule commits the Council to taking up proposed amendments "on a regular schedule" and also allows amendments to be considered on an expedited basis when there is a need to do so.

A special expedited amendment process was conducted in early 1989 on a small number of changes. The first regular amendment process was begun in the fall of 1989 and concluded with the issuance of final amendments and a response to comments in August, 1990. The rulemaking described in this document was the second regular amendment process.

1991-1992 amendment process: In August of 1991, the Council announced that it would receive petitions for amendment to be considered in 1992. Petitions were received through November 15, 1991. Each petition was referred for review and recommendations to the protected areas coordinating agency in the state affected by the petition. In the case of these amendments, the coordinating agencies were the Idaho Department of Fish and Game and the Washington Department of Wildlife.

On the basis of these petitions, on February 12, 1992, the Council voted to initiate rulemaking pursuant to section 4(d)(1) of the Northwest Power Act to consider amending the protected areas provisions of the Council's Fish and Wildlife Program and the 1991 Northwest Power Plan.

During the rulemaking, public comment was received on the proposed amendments through Friday, May 1, 1992. During this period, public hearings on the proposed amendments were held at the following locations:

Bozeman, Montana	March 11, 1992
Boise, Idaho	April 1, 1992
Idaho Falls, Idaho	April 2, 1992
Warm Springs, Oregon	April 9, 1992
Seattle, Washington	April 16, 1992

A final decision on the proposed amendments to protected areas was approved by the Council at its June 10 meeting in Post Falls, Idaho.

Because of the large number of comments, the summaries of comments which appear below do not list all of the commentators on each of the proposed changes. However, each comment received by the Council was taken into consideration and has been included in the record of this rulemaking.

COMMENTS AND RESPONSES:

Note: In this rulemaking, no changes were proposed for protected areas in Montana or Oregon.

Washington:

1. **Teanaway River, Middle Fork** (Kittitas County), from mouth to headwaters. Reach No. 1703000103000.00; ID No. 11953. Currently protected for anadromous fish (summer steelhead), resident fish, and wildlife from river mile 0 to river mile 7.5; unprotected above river mile 7.5. Petition would add protection for resident wildlife from river mile 7.5 to headwaters, a distance of approximately 7.5 miles. Submitted by Alpine Lakes Protection Society. No pending hydro projects.

Supported by Washington Department of Wildlife, U.S. Bureau of Indian Affairs, Sierra Club, Friends of the Earth, Northwest Rivers Council, and other commentators. No opposition. Reach is currently proposed for National Wild and Scenic River designation. Contains nesting area for the harlequin duck, a species of special concern for Washington. May also contain spotted owl habitat. One Department of Wildlife biologist commented that the reach is potential steelhead habitat.

Council response: Although the petition is not opposed, the Council is concerned that areas added to the protected areas designations meet the same criteria as those originally approved for this designation. The Council has requested the Washington Department of Wildlife to review the proposed change using the original protected areas criteria. The Council has deferred a decision on the petition until September, 1992, in order to allow time for this review. A supplementary decision and response to comments will be issued at the time of the Council's decision.

2. **Teanaway River, West Fork** (Kittitas County), from mouth to headwaters. Reach No. 1703000103100.00; ID No. 11954. Currently protected for anadromous fish (summer steelhead), resident fish, and wildlife from river mile 0 to river mile 5.8; unprotected above river mile 5.8. Petition would add protection for resident wildlife from river mile 5.8 to headwaters, a distance of approximately 9 miles. Submitted by Alpine Lakes Protection Society. No pending hydro projects.

Supported by Washington Department of Wildlife, U.S. Bureau of Indian Affairs, Sierra Club, Friends of the Earth, Northwest Rivers Council, and other commentators. Reach is currently proposed for National Wild and Scenic River designation. Contains nesting area for the harlequin duck, a species of special concern for Washington. May also contain spotted owl habitat.

Council response: Although the petition is not opposed, the Council is concerned that areas added to the protected areas designations meet the same criteria as those originally approved for this designation. The Council has requested the Washington Department of Wildlife to review the proposed change

using the original protected areas criteria. The Council has deferred a decision on the petition until September, 1992, in order to allow time for this review. A supplementary decision and response to comments will be issued at the time of the Council's decision.

3. Upper Cowlitz River Basin above Mayfield Dam (primarily in Lewis County, although some affected reaches are in Skamania County). Currently, some of these reaches are unprotected, some are protected for resident fish and wildlife, and some for wildlife only. Petition would add protection for anadromous fish to all reaches accessible to anadromous fish if they were reintroduced in the upper basin. A reintroduction of anadromous fish has been proposed and is now under study. The petition includes all reaches on the **Cowlitz, Cispus, and Tilton Rivers and all of their tributaries** above Mayfield Dam which would be accessible to anadromous fish. Submitted by National Marine Fisheries Service.

There are a number of pending hydro projects in the Upper Cowlitz Basin. The rule proposed that projects which have received preliminary permits prior to February 12, 1992 (the date the Council entered rulemaking) would be grandfathered, assuming that they were not in an area already protected for resident fish or wildlife.

Supported by NMFS, Washington Department of Wildlife, Washington Department of Fisheries, U.S. Bureau of Indian Affairs, U.S. Fish and Wildlife Service, and various individuals and environmental groups including Northwest Rivers Council, Friends of the Earth, and the Sierra Club. These commentators were in agreement about the high potential of this habitat for salmon and steelhead.

In 1991, Permit/Engineering received preliminary permits on ten hydro sites in the Upper Cowlitz. Lewis County PUD subsequently filed competing applications with FERC for projects at the same ten sites. The PUD applications for preliminary permits were not filed until 1992, and were not approved by FERC until after the Council had entered rulemaking on these protected areas changes. In its comments, Lewis County PUD has requested that the Council allow it to proceed with further consideration of the projects, noting its past record of environmental protection.

Eight of the proposed projects are located on reaches which are already protected for resident fish or wildlife. Two of the proposed projects (Silver Creek and Willame Creek) are located on reaches which are not now protected. At this time, it has not been determined how far up Silver Creek and Willame Creek anadromous fish will be able to travel. Until this determination is made, it is not possible to say whether the projects proposed on Silver Creek and Willame Creek will be within the reaches affected by this change.

Council response: The Council approved the changes as proposed. The use of these reaches by anadromous fish prior to the construction of Mayfield and Mossyrock Dams provides good evidence that these reaches are suitable habitat for anadromous fish.

The Council did not agree to create special transition provisions to "grandfather" the ten projects which for which preliminary permits have been obtained. Eight of these ten are in areas already designated as protected. This means that these eight were proposed in areas of high-value fish and wildlife habitat that, prior to any consideration of potential anadromous fish habitat, had already been designated by the Council as areas in which hydroelectric development would pose an unacceptable risk of loss.

In its 1990 amendments to protected areas, the Council agreed that developers should be able to rely on the protected areas designations as a guide to project areas which are acceptable to the Council. On the other hand, the Council recognized that the protected areas designations would continue to require updating, and that reaches once designated as unprotected might, as a result of additional information, be designated as protected. The Council therefore adopted a transition provision which exempts from the new designation projects in areas which are initially unprotected but are designated as protected before the project is complete. This transition provision appears in the Fish and Wildlife Program at section 1103(b)(5)(b).

The exemption applies to projects where the developer had obtained a preliminary permit from the Federal Energy Regulatory Commission or had filed a license application with the Commission prior to the time the Council entered rulemaking on the change. In this instance, the Council entered rulemaking on February 12. The Lewis County PUD did not have either a preliminary permit or a pending license application on that date.

Although the Council has carefully considered the comments of the Lewis PUD, the Council does not find that the facts of this case justify revising the transition language to provide special treatment to these projects. Anadromous fish habitat is already limited, and habitat below Bonneville Dam is especially valuable. The Council believes that the existing transition provision continues to strike a reasonable balance between the need for habitat protection and the need for reliable guidance to developers.

The Council recognizes that the reintroduction of anadromous fish to the Upper Cowlitz Basin was made feasible by the construction of the Cowlitz Falls Dam, a project of the Lewis County PUD. The PUD has demonstrated its ability to work cooperatively to resolve environmental concerns and, in its comments, has suggested that there may be ways in which some of the projects in the Upper

Cowlitz Basin for which it has obtained preliminary permits may be able to provide significant benefits for anadromous fish.

The Council's decision here, that the transition provisions will not be expanded, does not preclude Lewis County PUD from filing later petitions for exemption of particular projects based on exceptional benefits for fish and wildlife. However, all parties should be aware that the standard for exemption based on exceptional benefits is very demanding and the Council expresses no opinion about whether any of the projects now proposed for protected areas in the Upper Cowlitz Basin could meet this standard.

4. Little Mashel River (Pierce County) from mouth to headwaters. Reach No. 1711001503400.00; ID No. 24407. Currently protected for anadromous fish and resident fish and wildlife over entire 7.6 mile reach. Petition would change that portion of the reach from river mile 0.7 to river mile 1.2 to unprotected, and that portion of the reach above river mile 1.2 would be protected for resident fish and wildlife. Petition based on developer studies showing no anadromous fish passage above river mile 0.7, and low habitat value for resident fish and wildlife from river mile 0.7 to river mile 1.2. Submitted by Harza Northwest for Ohop Mutual Light Company.

The proposed change was supported or not opposed by Washington Department of Fisheries, Washington Department of Wildlife, and U.S. Fish and Wildlife Service. Opposed by U.S. Bureau of Indian Affairs on grounds that the project may affect treaty rights (no further explanation given).

The proposed change is opposed by the Northwest Rivers Council, the Sierra Club, Friends of the Earth, and other commentators on grounds that development could affect water temperatures and spawning conditions for anadromous fish, that development violates the Nisqually River Management Plan, and that development will affect the abundance of wildlife in the general vicinity of the project.

Council response: The Council adopted the change.

Although the record showed that high-value habitat was present at portions of the reach, the developer presented information showing that, because of the high-gradient slope in the immediate area of the project, the project itself would not be located in the high-value habitat. The fish and wildlife agencies concurred with this finding and were not opposed to the proposed change.

The Council seeks to pay careful attention to treaty rights, and appreciates the advice of the BIA that the project could affect treaty rights. However, there was no indication of what treaty rights were at stake or how the Council's decision might affect them. In making decisions on protected areas, the Council's primary

focus is on habitat impacts, not on whether particular projects ought to be licensed. The licensing decision remains one for the FERC. The Council anticipates that the BIA will have full opportunity to raise any treaty concerns as part of that licensing process.

The Council requested comment from the Nisqually River Commission regarding the effect of the proposed change on the Nisqually River Management Plan. Since we have received no objection from the Nisqually River Commission, the Council assumes that the Commission does not oppose this change.

5. Methow Basin tributaries (Okanogan County) Currently, some of these reaches are unprotected, and some are protected for wildlife only. Petition would add protection for anadromous fish to all reaches accessible to anadromous fish. In the absence of information about the existing barriers to anadromous fish passage, the full extent of each reach would be designated as protected for anadromous fish. Submitted by Okanogan Wilderness League, based on observations of anadromous fish redds (steelhead and spring chinook) in the area and the historical use of these streams by anadromous fish.

Washington Department of Fisheries notes that it has insufficient information about salmon and steelhead access. The Department recommends that a decision be postponed until after habitat issues are addressed in Phase Three. Washington Department of Wildlife supports the change and reports extensive studies of anadromous fish habitat in the Methow River Basin. The Washington Department of Wildlife recommends specific changes based on these studies.

The Okanogan County Commissioners note that the Methow River Basin has been designated as a Pilot River Project and that the Basin also been designated a ground water management area. The efforts resulting from both designations are being coordinated to explore thoroughly all considerations for use of the Basin. They request that the Council take no action until these studies are complete. Friends of the Earth supports proposed changes based on Forest Service data showing anadromous fish use. Friends of the Methow support and suggest several other reaches which should also be protected in the Methow Basin. Northwest Rivers Council and Sierra Club support and note that several of the reaches are proposed for National Wild and Scenic designation. Several parties stated that the Council should revise the scale of its protected areas database to include the smaller streams in the Methow Basin. The Business Caucus of the Methow River Basin Pilot Planning Project commented that the Council's action is premature as the Basin's planning committee has not completed its work and needs to keep as many options as possible open. The petition was opposed by several parties on the grounds that it would interfere with water rights or local planning efforts.

Council response: The Council chose not to make a final decision in this rulemaking on revising the areas protected for anadromous fish in the Methow River Basin, but intends to incorporate the proposed changes in the general revision of areas protected for anadromous fish. This revision is tentatively scheduled to be before the Council in the fall of 1992. The new revision will be based on a more detailed map scale, which will allow more accurate identification of smaller reaches. Delaying the changes until the general revisions will also allow the fish and wildlife agencies to review information on the existing use of reaches in the basin by anadromous fish and come to agreement on the extent of anadromous fish habitat present in the basin.

6. Clearwater Creek. (Whatcom County) Reach No. 1711000408800.00; ID No. 25756. Currently protected for resident fish and wildlife from mouth to Rocky Cr., a reach of 7.7 miles. Petition would change entire reach to unprotected. Petition based on studies showing low habitat values for resident fish and wildlife in reach. Submitted by Nooksack River Hydro.

Washington Department of Wildlife notes close cooperation from developer in conducting requested studies. Wildlife supports the proposed change based on data from developer studies. Reach status has been changed to "sensitive" in Draft Washington State Hydropower Development/Resource Protection Plan, a status which would allow hydro development. Washington Department of Fisheries has no comment since reach is presently not accessible to anadromous fish. U.S. Fish and Wildlife Service does not support change in current designation of the reach, but believes this particular project could be constructed in a manner consistent with the designation. U.S. Bureau of Indian Affairs opposes, citing "treaty rights issues". Lummi Tribe and the Nooksack Tribe oppose based on potential for restoration of anadromous fish runs to the area. Northwest Rivers Council, Friends of the Earth, and the Sierra Club oppose, for several reasons, especially on the ground that current low habitat value is the result of seasonal flooding from which the reach is likely to recover. Several individual commentors raised similar concerns.

Council response: Accept proposed change. Although there is disagreement among the agencies, the Washington Department of Wildlife is the one most familiar with the project and has worked closely with the developer. Wildlife supports the proposed change.

The petition shows that the proposed project has taken into consideration the possibility that anadromous fish may be reintroduced in the area. The powerhouse has been located above the primary spawning area on Clearwater Creek to minimize the potential impact on anadromous fish if they are reintroduced into the area.

Based on the information provided by the Bureau of Indian Affairs, the Council found no indication that its decision would adversely affect treaty rights. In making decisions on protected areas, the Council's primary focus is on habitat impacts, not on whether particular projects ought to be licensed. The licensing decision remains one for the FERC. The Council anticipates that the BIA will have full opportunity to raise any treaty concerns as part of that licensing process.

7. Park Creek. (Whatcom County) Reach No. 1711000516601.00; ID No. 25352. Currently protected for resident fish and wildlife from Baker Lake to headwaters. Petition would change river mile 0 to river mile 1.4 to protected for anadromous fish, with the remaining portion of the reach (river mile 1.4 to river mile 6.1) designated as unprotected. Petition based on studies showing natural barrier to anadromous fish at river mile 1.4, and low habitat values for resident fish and wildlife in remainder of reach. Submitted by Washington Hydro Development Company.

Washington Department of Wildlife notes close cooperation from developer on this project and does not oppose proposed change, based on data developed during these studies. Washington Department of Fisheries supports the reclassification of the lower 1.4 miles of the reach to protected for anadromous fish and has no comment on remainder of proposed change. U.S. Fish and Wildlife Service supports reclassification of lower 1.4 miles, but opposes remainder of change, citing Forest Service data showing extensive resident fish use in the bypass range, and wintering elk and mountain goat use in the area near the upper part of the project. The Fish and Wildlife Service also notes that the Park Creek watershed contains suitable habitat for threatened and endangered species, including the bald eagle, the northern spotted owl, the grizzly bear, and the gray wolf, as well as the marbled murrelet, which is proposed for state threatened species protection. The U.S. Forest Service opposes based on excellent fish habitat, use of project area by elk and deer for winter and summer range, calving and fawning, wallow areas, and travel corridors. The U.S. Bureau of Indian Affairs opposes, citing "treaty rights issues." Northwest Rivers Council opposes, citing the species present and the geological instability of the basin, which raises safety and sedimentation questions. Friends of the Earth and Sierra Club oppose on similar grounds. Several individual commentators raised similar concerns.

Council response: The Council adopted the proposed change. Like the preceding project, there is considerable disagreement among the agencies and other commentators. The Council has carefully reviewed the submissions of all parties. In resolving this factual dispute, the Council gives considerable weight to the level of knowledge and experience each commentator has had with the proposed project and the specific project site. As in the instance of Clearwater Creek project, the Washington Department of Wildlife is the agency most familiar with the project. The Department has worked closely with the developer on the

project for several years and has been intimately involved in the underlying studies. Wildlife supports the proposed change.

Based on the information provided by the Bureau of Indian Affairs, the Council found no indication that its decision would adversely affect treaty rights. In making decisions on protected areas, the Council's primary focus is on habitat impacts, not on whether particular projects ought to be licensed. The licensing decision remains one for the FERC. The Council anticipates that the BIA will have full opportunity to raise any treaty concerns as part of that licensing process.

8. Canyon Creek. (Whatcom County) Reach No. 1711000405400.00; ID No. 25783. Currently protected for anadromous fish, resident fish, and wildlife. Petition would leave current protection in place from mouth to approximately river mile 1.1, change to unprotected the high gradient portion of the reach (approximately river mile 1.1 to river mile 5) and change to protected for resident fish and wildlife above approximately river mile 5. Petition based on applicant's continuing studies since 1981 showing low habitat values of steep gradient reach (approximately river mile .9 to river mile 5), minimal resident fish use, no impact to wildlife and anadromous fish usage and productivity between barrier at river mile 1.3 and .9 minimal to nonexistent. Submitted by Glacier Energy Company.

The proposed change was opposed by all commentors other than the developer. Opposition was expressed by state and federal agencies, tribes, environmental organizations, and individual commentors. At least a portion of the reach is used for anadromous fish spawning and rearing habitat.

Council response: The Council deferred a final decision and directed staff to work with the developer and interested parties to determine whether the project could be constructed so as to benefit anadromous fish. Due to a major continuing earth movement, a large quantity of gravel and sediment is entering the reach downstream from the project area each year. The gravel and sediment movement appears to be severely damaging downstream spawning habitat for anadromous fish. The proposed project would move part of the flow around the reach while maintaining some flow in the reach. It may be possible to design and operate the project so that sedimentation is decreased and spawning and rearing conditions are improved. This alternative has not yet been reviewed by affected parties and the Council believes that this alternative should be more fully considered before it makes a final decision on the petition.

9. Racehorse Creek. (Whatcom County) Reach No. 1711000403400.00, ID No. 25775. Currently protected for anadromous and resident fish or wildlife from mouth to river mile 1.2, protected for wildlife only from river mile 1.2 to headwaters at river mile 7.7. Petition would leave current protection in place from mouth to approximately river mile 1.2, change the designation to unprotected in the project area (approximately river mile 1.2 to river mile 4), and leave current

protection in place above the project area. Petition based on studies showing no adverse impact on wildlife of concern (bald eagles). Submitted by Glacier Energy Company.

The proposed change was opposed by state and federal agencies, tribes, organizations, and individual commentors.

Council response: The Council deferred a final decision and directed staff to conduct additional fact-finding. A substantial factual dispute exists between the agencies and the developer. The Council is not satisfied that the record provides the Council with adequate information for reaching a conclusion about which set of facts is correct. The staff will report to the Council in September, 1992, regarding progress in resolving the factual dispute.

10. Diobsud Creek. (Whatcom County) Reach No. 1711000511200.00; ID No. 25549. Currently protected for anadromous fish, resident fish, and wildlife from mouth to the natural barrier to anadromous fish at approximately river mile 1.8, protected for resident fish and wildlife from river mile 1.8 to headwaters at river mile 10.7. Petition would leave current protection in place from mouth to anadromous fish barrier, change project area (from anadromous fish barrier at approximately river mile 1.8 to approximately river mile 3.5) from protected for resident fish and wildlife to unprotected, and leave current protection in place above the project area. Petition based on applicant's studies showing low habitat value in steep gradient reach, low use of habitat by resident fish and no adverse impact on wildlife. Submitted by Glacier Energy Company.

The proposed change was opposed by state and federal agencies, tribes, organizations, and individual commentors.

Council response: The Council deferred a final decision and directed staff to conduct additional fact-finding. A substantial factual dispute exists between the agencies and the developer. The Council is not satisfied that the record provides the Council with adequate information for reaching a conclusion about which set of facts is correct. The staff will report to the Council in September, 1992, regarding progress in resolving the factual dispute.

Idaho:

11. Twentymile Creek (Idaho County) Reach No. 1706030502800.00; ID No. 6709. Currently protected for resident fish and wildlife from mouth to headwaters at river mile 9.9. Petition would change that portion of the reach from the mouth to river mile 1.8 to unprotected, and leave current protection in place above river mile 1.8. Petition based on applicant's studies, including new facts since 1990 rulemaking, showing low habitat value for fish and wildlife in that

portion of the reach for which change is requested. Submitted by Baldwin Hydro Corporation.

The Idaho Department of Fish and Game notes that information submitted by the developer appears to support the request, but further review is necessary. In particular, the developer recently submitted three field books of raw data which proved difficult to decipher. A comprehensive survey of the Twentymile drainage is planned for this summer and the Department requests that the Council delay a decision until that survey is completed. The proposed change is opposed by several other individuals and organizations.

Council response: The Council deferred its decision until September, 1992. The Idaho Department of Fish and Game was requested to complete its review and report to the Council on its findings by the end of August, 1992.

12. **Snake River** (Shelley area in Bingham County) Reach No. 1704020604300.00; ID No. 11368. Currently protected for wildlife (bald eagle). Petition asks for a change from protected for wildlife (bald eagles) to unprotected in project area only, approximately a 4 mile portion of the reach, based on the city's studies showing the potential for exceptional benefits to bald eagles. The petition also asks the Council to determine that the project qualifies for "transition project" status.

Comments on request for exemption based on exceptional benefits: The City of Idaho Falls submitted documentation intended to show that the proposed project would provide exceptional benefits for bald eagles, a species of concern in the project areas. However, shortly before the close of the comment period, the City of Idaho Falls requested that the Council defer consideration of the "exceptional benefits" portion of its petition until after the FERC licensing record is completed. The City indicated that it intends to submit revised mitigation plans to the FERC. The City stated that, if the Council based its decision on the information submitted by the City during this rulemaking, the Council would be "proceeding upon the basis of information that is now subject to substantial change in the near future."

On this issue, the Council received extensive written and oral comment. Most of the commentators opposed any finding of exceptional benefits and many opposed the project generally. The change was opposed by the Idaho Department of Fish and Game, the Shoshone Bannock Tribes, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, the U.S. Bureau of Land Management, the U.S. Bureau of Indian Affairs, the County Commissioners for the county in which the project is located, the residents in the project area, and a variety of organizations and individuals, including Idaho Rivers United, the Snake River Audubon Society. Numerous individual in the area of the proposed project commented on the value of the existing habitat. Save Our Snake, Inc. presented a

very detailed review of the potential impacts of the proposed project. Some of these comments suggest that additional species qualifying for protected reach status are present on the reach.

A draft EIS prepared by FERC concluded that both the proposed project and a smaller alternative project would be harmful to bald eagles. The draft also concluded that the likely cost of power from the project would be more than the region's avoided cost over the lifetime of the project. The draft EIS noted that the proposed project does not meet the standards for new hydroelectric development in Section 1100 of the Council's fish and wildlife program. The City of Idaho Falls has indicated that their new proposals will contain additional mitigation in response to the draft EIS.

Council response regarding exceptional benefits exemption: The City's representation that the proposed mitigation plans were being substantially changed in the near future, and its request that this part of the petition not be acted on during this rulemaking, made pointless any decision by the Council on this portion of the petition. Accordingly, the Council did not make a determination of whether the mitigation proposed by the City during this rulemaking would result in exceptional benefits.

As a matter of procedure, the Council does not agree to the City's request that the petition for an exceptional benefits exemption be allowed to continue in a "deferred" status. The City originally submitted its petition for an exceptional benefits exemption in the Council's 1989-1990 protected areas rulemaking. After receiving substantial opposition in that rulemaking to the petition, the City asked that the petition be deferred so that the City could consult further with the Idaho Department of Fish and Game. The Council agreed.

In the two years since the first "deferral", the City has had ample opportunity to complete its consultations and present its proposal to the Council for decision. In this rulemaking, the City came forward with an extensive petition. Commentors have spent a great deal of time, effort, and money in responding to this petition. The Council devoted an entire hearing to this subject. Then, once again, the City decided not to seek a Council decision.

To continue to treat the City's petition as "deferred" gives the impression that the Council is waiting for additional information before it makes a decision on what the City has proposed. This impression would not be correct. The City has in effect withdrawn its proposal and the Council therefore considers the petition to be concluded. This does not preclude the City from submitting a new petition in a subsequent protected areas rulemaking.

Comments on request for "transition project" status: The City of Idaho Falls also requested that the Council determine that the project qualifies for "transition

project" status. The City submitted a project history showing that the project has been underway since 1978, that it had obtained a preliminary permit for the project in 1981, that its application for license was filed with the FERC in 1984, and that the application was accepted in 1986 after an appeal to the Commission. The City argued that the principles of fairness that led the Council in 1990 to exempt from future changes projects which were started in areas originally designated as unprotected should be extended to the Shelley project.

Although most of the commentators expressed opposition to any decision which would remove Council opposition to the project, several commentators specifically opposed the request for transition status.

Council response to "transition status" comment: There are two transition provisions contained in the protected areas rule. One, known as Section 5(a), was adopted in 1988 and covers those projects underway before the protected areas were first designated by the Council. The other, known as Section 5(b), was adopted in 1990 and protects projects which are begun in areas which have already been designated by the Council as not protected (and thus potentially suitable for development).

The City of Idaho Falls has applied for exemption under Section 5(b), the 1990 transition provisions. In addition, since the project was underway before 1988, the status of the project under the other transition provision, Section 5(a), is also discussed.

Transition status under section 5(b) of the protected areas rule: The City of Idaho Falls has requested that the Council expand the transition provisions of Section 1103(b)(5)(b) to include the Shelley Project. Adopted in 1990, that section states:

(For projects affected by rulemakings after 1988) The Council recognizes that there may exist preliminary permits or applications for licenses or exemptions for hydroelectric projects at sites which were not previously within protected areas but which may be included within protected areas as a result of amendments approved by the Council. An important purpose of protected areas is to encourage developers to site projects outside protected areas. The Council therefore exempts from the effect of an amendment designating a previously unprotected area as protected any project for which the developer had obtained a preliminary permit or filed an application for license or exemption prior to the date on which the Council entered rulemaking on the amendment. However, it is the Council's intention that the Federal Energy Regulatory Commission give full

consideration to the protection of fish and wildlife resources located at these project sites and provide suitable protection and mitigation for such resources in the event that a license or exemption is approved.

The City of Idaho Falls argues that, as a matter of fairness, the Shelley project should also be exempted. The City notes that the project was well underway and substantial investments had been made before protected areas were designated.

In 1990, when section 5(b) was proposed for adoption, the City of Idaho Falls made similar arguments that this exemption should apply to the Shelley project. At that time, the Council rejected the City's arguments and limited the exemption to projects which were begun after the adoption of protected areas. The Council explained:

The Council's intention is that the protected areas designations should provide reasonable certainty to developers that a project begun outside protected areas will not be later restricted. . . . By making the existing designations a reliable guide to project siting, the Council believes that developers will be further encouraged to site projects outside protected areas.

In other words, Section 5(b) was adopted to protect those developers who rely on protected areas designations in siting a project. Part of the purpose of the protected areas designations was to provide developers some measure of certainty about which hydro sites are better locations for development. Section 5(b) fulfills that purpose by rewarding those who locate prospective projects outside protected areas with a measure of assurance about future Council actions.

As the City points out, the Shelley project was well underway before the Council adopted any protected areas designations. In fact, the project was underway before the Council was in existence. The City chose the project site based on its own investigations and assessments. The City did not rely on any action of the Council designating the site as unprotected or non-critical habitat. When protected areas were initially adopted in 1988, the reach containing the Shelley project site was designated as a protected reach, and it remains so.

The Council finds nothing in the arguments raised by the City in this rulemaking which suggests that the City has relied to its detriment on representations made by the Council encouraging development at the proposed site. Therefore the Council finds no reason to expand the exemption contained in Section 5(b) to include the Shelley project.

Transition status under Section 5(a) of the protected areas rule: Those hydroelectric projects, such as the Shelley project, which were underway at the time the Council originally adopted protected areas designations are dealt with in another section which remains in effect today.

When the Council adopted the protected areas rule in 1988, it gave careful consideration to providing fair treatment for projects which were then underway. It adopted a transition provision for all such projects. That provision, now designated as Section 1103(b)(5)(a), says:

(For projects affected by 1988 rulemaking) The Council recognizes that there exist, as of August 10, 1988, applications for hydroelectric projects at various stages of completion. In many cases the applicants have made substantial investments and have completed, or nearly completed, agreements with all interested parties, including state fish and wildlife agencies. The Council recognizes that the Federal Energy Regulatory Commission may be obligated to complete its processes on these applications, but expects where possible that this measure will be taken into account to the fullest extent practicable.

The Shelley project plainly qualifies for FERC consideration under this provision. No petition by the City of Idaho Falls or amendment to the protected areas rule or designations is necessary. This provision has been applicable to the project since the protected areas rule was first adopted.

It should be noted that section 5(a) is not an outright exemption. The section recognizes that there are equitable considerations for projects pending before the adoption of protected areas, that such considerations are best resolved case-by-case rather than by a broad-brush pronouncement by the Council, and that the FERC is better equipped than the Council to address such considerations. Nevertheless, in considering projects under section 5(a), the Council believes that the FERC should take protected areas into account where possible.

The Council also believes that the comment received by it on the Shelley project may prove helpful to the FERC in reaching its decision on the Shelley project. Accordingly, the Council has directed its staff to send a full copy of all information received in this rulemaking regarding the Shelley project for consideration by the FERC in making its determinations, including those under Section 5(a).

13. Idaho Natural and Recreational Rivers. River reaches in the **Payette Basin, the South Fork of the Boise sub basin, and the Priest River Basin** were

included in the first river basin plans to be completed by the Idaho Water Resources Board and approved by the 1991 Idaho Legislature. Because these designations give consideration to values beyond the fish and wildlife values used by the Council in its initial designations, the Council proposed a new category of protected area, Category S, showing that the reach is designated protected by action of a state. Those reaches which are already protected by Council action will retain their current protected status and the listing will show both categories of protection.

Most commentators favored the change. CHI Mountain States Operations, however, commented that it was dangerous precedent for the Council to rely on state determinations which used criteria other than those used by the Council in its protected areas designations.

Council response: The Council approved the proposed designations, establishing a new category S to indicate that the designations were made by a state. The category S designations will be used by the Council in determining, for the Council's planning purposes, which reaches are available for hydro sites. The category S designations, however, will not be used as the basis for Council recommendations to the FERC regarding proposed projects, and the Council will not expect Bonneville to take such designations into account in determining whether to grant transmission access or purchase power from projects located in reaches designated category.

L:\BL\WW\91RTC.PRO