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January 14, 1988

The Honorable Cecil D. Andrus  
Governor, State of Idaho  
Statehouse  
Boise, Idaho 83720

Dear Governor Andrus:

Your letter of December 15, 1987, requested a response to four questions regarding the Northwest Power Planning Council's "Protected Areas Designation Plan." Each question will be addressed in the order contained in your letter; however, two of the questions have been modified so that they reflect legal questions rather than policy questions.

1. What implications does the Plan present for decisions by the Federal Energy Regulatory Commission (FERC) on hydropower licenses?

The Northwest Power Planning Council published an issue paper on October 8, 1987 requesting comments on whether the Council should designate certain river segments in four northwest states as protected areas. This proposal reflects an attempt by the Council to balance the need for future hydropower development against the need for protecting the region's investment in fish and wildlife. Protected areas would be those in which the Council has determined that the fish and wildlife values outweigh any benefits associated with future hydropower development. If the Council adopts this proposed plan, it will become part of the Council's Fish and Wildlife Program and the Power Plan.

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Page 2

fashion as the current program. Under the Northwest Power Planning Act, FERC in exercising its responsibilities, must take "into account at each relevant stage of decision making processes to the fullest extent practicable, the program adopted by the Council. . . ." 16 U.S.C. § 839(b)(h)(11)(A)(ii); National Wildlife Federation v. FERC, 801 F.2d 1505, 1514-15 (9th Cir. 1986). Further, the Act requires that FERC provide equitable treatment to fish and wildlife. 16 U.S.C. § 839(b)(h)(11)(A)(i). The Ninth Circuit has said that these provisions of the Act impose substantive as well as procedural requirements on FERC. Confederated Tribes and Bands of Yakima Indian Nation v. FERC, 746 F.2d 466, 473 (9th Cir. 1984); National Wildlife Federation v. FERC, 801 F.2d 1505, 1515 (9th Cir. 1986). Thus, the Northwest Power Planning Act requires FERC to give great deference to the Council's program. Further, FERC will be required because of the substantive requirements of the Northwest Power Planning Act to articulate reasons for licensing a project that conflicts with the program.

2. Will the Plan affect the state's influence before FERC?

Under the Federal Power Act, as amended, the state can influence FERC through one of three mechanisms. First, the Federal Power Act requires FERC to consider any state comprehensive plan when deciding whether a project would be best adapted to the comprehensive plan for development of a waterway. 16 U.S.C. § 803(a)(2). Second, FERC is required to consider any recommendation of state agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the state in which the project is located. 16 U.S.C. § 803(a)(2)(b). Finally, FERC is also required to consider the recommendations of state fish and wildlife agencies regarding the protection, mitigation, and enhancement of fish and wildlife. 16 U.S.C. § 803(j).

While the Federal Power Act establishes substantive standards for review of fish and wildlife recommendations, the Act does not specify how FERC is to treat state comprehensive plans or recommendations in its decision making. Further, the Act does not specify how FERC is to treat multiple comprehensive plans or recommendations. The Act merely states that FERC is to consider

"the extent to which the project is consistent with" a state comprehensive plan. 16 U.S.C. § 803(a)(2).

As a practical matter, FERC will attempt to reconcile to the extent possible all comprehensive plans and recommendations submitted with respect to a project. In the event of a conflict between comprehensive plans or recommendations, however, FERC will have great latitude in deciding which plans or recommendations it will follow. Thus, to the extent that additional plans or recommendations are submitted to FERC, the influence of a state comprehensive plan or state recommendations may be diminished. Further, if there is a conflict between the Council's Fish and Wildlife Program and a state comprehensive plan or state recommendations, the FERC may contend that it is required to give greater deference to the program because of the substantive requirements contained in the Northwest Power Planning Act.

3. What approaches may the state pursue to enhance its influence before FERC?

The following discussion identifies two approaches that the state could pursue to enhance its influence before FERC. In providing this discussion, I do not intend to endorse either approach. Whether one or both of the approaches should be adopted is a policy question.

A quick way of gaining added influence before FERC is for the state to speak with one voice. Presently, each agency is permitted to intervene in FERC proceedings. Oftentimes the recommendations of the agencies are in conflict. Because of these conflicts, FERC gives little or no weight to the recommendations submitted by state agencies. FERC is free to select whatever recommendations suit its objectives. If a mechanism were put into place requiring all agencies to coordinate their recommendation on a project, state influence before FERC could be greatly enhanced.

Section 10 of the Federal Power Act as amended by the Electric Consumer Protection Act requires FERC to consider state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project. 16 U.S.C. § 803(a)(2). Thus, an obvious way for obtaining greater state

influence before FERC is to develop a comprehensive plan for the state's waterways.

The FERC defines a comprehensive plan as containing the following:

- (1) A description of the waterway or waterways that are the subject of the plan, including pertinent maps detailing the geographic area of the plan;
- (2) a description of significant resources of the waterway or waterways;
- (3) a description of various existing and planned uses of these resources; and
- (4) a discussion of goals, objectives, and recommendations for improving, developing or conserving the waterway or waterways in relation to these resources.

52 Fed. Reg. 39906 (October 26, 1987). A comprehensive plan need not cover the entire state, it may be limited to a river segment, river basin, drainage area, or other geographical area. Id. In order for a state plan to be accorded the greatest weight; however, FERC requires that the plan contain the following elements:

The description of the significant resources in the area should contain, among other things:

- (1) Navigation;
- (2) power development;
- (3) energy conservation;
- (4) fish and wildlife;
- (5) recreational opportunities;
- (6) irrigation;
- (7) flood control;
- (8) water supply; and
- (9) other aspects of environmental quality.

The description of existing and planned uses of a waterway or waterways should include the items listed above as well as a description of

currently unused areas of the waterway and any future plans for these areas. The Plan should also address the advantages and disadvantages associated with each planned use.

In establishing goals, objectives, and recommendations for improving, developing, or conserving the waterway or waterways, the plan should contain an examination of how the different uses would promote the overall public interest, a statement as to the goals the plan expects to achieve, and an analysis of how any specific recommendations of the plan further those goals. A description of the methodology used in developing the plan should also be included.

Id.

Presently, the FERC has not been willing to consider any of the state of Idaho's agency plans as comprehensive plans. Although FERC does consider the existing state plans, they are accorded less weight than comprehensive plans in the Commission's licensing decisions. Thus, if the state were to develop a comprehensive plan that complies with the above requirements, it could gain additional influence before FERC. Further, FERC findings must be based upon substantial evidence; thus, the more detailed a comprehensive plan is, the more difficult it will be for FERC to ignore the state's recommendations.

4. Will the plan interfere in any way with the state's responsibility under the Idaho Constitution to appropriate unappropriated water rights, or to otherwise manage state water?

The Northwest Power Planning Act provides that:

Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act of [or] any plan or program adopted pursuant to the

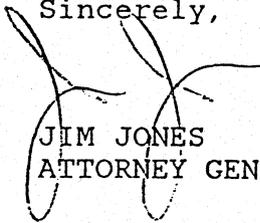
The Honorable Cecil D. Andrus  
January 14, 1988  
Page 6

Act (1) affect the rights or jurisdiction of the United States, the States, Indian tribes, or other entities over water of any river or stream or over any ground water resource, (2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States, or (3) otherwise be construed to alter or establish the respective rights of States, the United States, Indian tribes, or any person with respect to any water or water related rights.

16 U.S.C. § 829(g)(h). This provision makes it clear that the Northwest Power Planning Act itself does not provide a basis for using the Council's protected areas plan to interfere with the state's right to regulate its water. Any effect on state regulation of its water resources would have to be as a result of another federal agency relying on the program as a basis for a decision under other statutory powers.

With best wishes, I am,

Sincerely,



JIM JONES  
ATTORNEY GENERAL

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