NEPA Meets the Northwest Power Act (and Prevails): The Ninth Circuit Orders an EIS on the Bonneville Power Administration's Power Sale Contracts

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A principal purpose of the 1980 Northwest Power Act1 was to reallocate the Bonneville Power Administration’s (BPA)2 low-cost hydropower among competing user groups, thereby averting what might have become a regional “civil war.”3 With electric power shortfalls apparently imminent,4 the Act directed BPA to offer new long-term power contracts to its cus-

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2. A self-financing federal agency within the Department of Energy, BPA is the Northwest’s federal electric power wholesaler, created by the 1937 Bonneville Project Act, 16 U.S.C. §832 (1982), to market electric power produced by the Bonneville Dam. Today, BPA sells power generated from some 28 federal hydroelectric projects and two nuclear power plants to nearly 150 utility and industrial customers throughout the Northwest and in California. For an introduction to BPA and its role in Northwest electric power policymaking, see G. NORWOOD, COLUMBIA RIVER POWER FOR THE PEOPLE; A HISTORY OF THE POLICIES OF THE BONNEVILLE POWER ADMINISTRATION (1981); BONNEVILLE POWER ADMIN., FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE ROLE OF THE BONNEVILLE POWER ADMINISTRATION IN THE PACIFIC NORTHWEST POWER SUPPLY SYSTEM, INCLUDING ITS PARTICIPATION IN A HYDRO-THERMAL POWER PROGRAM (1980); see also Blumm, The Northwest’s Hydroelectric Heritage: Prologue to the Pacific Northwest’s Electric Power Planning and Conservation Act, 58 WASH. L. REV. 175 (1983) [hereinafter cited as Hydroelectric Heritage].
3. See Forelaws on Board v. Johnson, 743 F.2d 677, 679 (9th Cir. 1984). This “war” would have been fought largely in the courts. Its motivating force would have been the great electric rate disparities among Northwest utilities in the 1970s. For example, the 1978 retail rate paid by consumers served by Portland General Electric (PGE), an investor-owned utility denied access to BPA power since 1973, was $27 for 1000 kilowatt-hours, while consumers served by Clark County Public Utility District (a BPA preference customer), serving Vancouver, Washington, across the Columbia River from Portland, paid only $11.10 for the same amount of power. See K. LEE, D. KLEMK & M. MARTS, ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST 282 n.16 (1980) [hereinafter cited as K. LEE] (also noting that in 1971 PGE retail rates were more than five times the federal wholesale rate, while Clark County’s rate was about three times less than the federal wholesale price).
tomers within nine months of its enactment. Supra at 128. It then gave the customers another full year to accept or reject the contract offers. Id.

Implementation of these directives quickly became controversial. Procedure, BPA chose not to perform an environmental impact statement (EIS) on the contracts, claiming in an "Environmental Report" that (1) the decision to offer the contracts was a nondiscretionary duty exempt from EIS requirements; (2) it was impossible to negotiate a contract while preparing an EIS; and (3) there was insufficient time to prepare an EIS. See infra notes 42, 45-47 and accompanying text. During the ensuing litigation, BPA de-emphasized the claim that it was impossible to negotiate a contract and perform an EIS at the same time; emphasized the infeasibility of performing an EIS in the statutorily allotted time, and claimed that the issuance of power sale contracts, as a matter of law, had no effect on the environment. See infra notes 46, 70. BPA prepared the "Environmental Report" to fulfill the non-EIS provisions of NEPA and the general environmental policies of the Northwest Power Act. U.S. DEPT. OF ENERGY, BONNEVILLE POWER ADMIN., ENVIRONMENTAL REPORT PREPARED TO ACCOMPANY THE FINAL POWER SALES AND RESIDENT EXCHANGE CONTRACTS 1-7 (Sept. 1981) [hereinafter cited as BPA FINAL ENVIRONMENTAL REPORT].
Substantively, BPA rejected a number of recommended contract conditions aimed at ensuring that the contracts helped to fulfill the Act’s conservation and fish and wildlife goals.\textsuperscript{8}

In protest, Forelaws on Board,\textsuperscript{9} an Oregon-based environmental group, brought suit against BPA, alleging that the power agency’s failure to perform an EIS violated the National Environmental Policy Act (NEPA).\textsuperscript{10} Although delayed by troublesome jurisdictional questions,\textsuperscript{11} on September 25, 1984, over three years after the contracts were offered, the Ninth Circuit Court of Appeals ruled, in Forelaws on Board v. Johnson (Forelaws I)\textsuperscript{12} that BPA had in fact violated NEPA and ordered the agency to write an EIS on the contracts.

The court rejected BPA’s assertion that the power sale contracts involved no issues of environmental significance\textsuperscript{13} and also refused the agency’s contention that the time deadlines in the Northwest Power Act constituted an implied waiver of EIS requirements.\textsuperscript{14} Aided by the Northwest Power Act directive that it be construed “consistent with applicable environmental laws,”\textsuperscript{15} as well as the Act’s “clear . . . emphasis on environmental concerns,”\textsuperscript{16} the Ninth Circuit determined that any conflict between the time afforded for contract offers and NEPA requirements was due to BPA’s interpretation, and not to any irreconcilable conflict between the statutes.\textsuperscript{17} Because the agency’s interpretation would have frustrated NEPA compliance, the court gave little deference to BPA’s construction of the Act.\textsuperscript{18} But finding “a clear tension” between the 1980 Act’s time

\textsuperscript{8} See infra notes 52-54 and accompanying text; see also infra notes 36, 75-76 and accompanying text.

\textsuperscript{9} “Forelaws on Board” is a reference to Barry Commoner’s four laws of ecology. See B. COMMONER, THE CLOSING CIRCLE (1971). Originally, the National Wildlife Federation and several other environmental groups were also plaintiffs, but they decided not to pursue the case after the trial court decision, infra note 60.


\textsuperscript{11} See infra section entitled The Jurisdictional Quagmire.

\textsuperscript{12} 743 F.2d 677 (9th Cir. 1984). In the first Forelaws on Board v. Johnson case, 709 F.2d 1310 (9th Cir. 1983) (Forelaws I), the Ninth Circuit determined that it, not the district courts, has jurisdiction over NEPA suits challenging actions under the Northwest Power Act. See infra notes 60-61 and accompanying text.

\textsuperscript{13} See infra text accompanying notes 73-78.

\textsuperscript{14} See infra text accompanying notes 79-93.

\textsuperscript{15} See infra note 71 and accompanying text.

\textsuperscript{16} See infra text accompanying note 84.

\textsuperscript{17} See infra note 82 and accompanying text.

\textsuperscript{18} The prospect of frustrating NEPA compliance distinguishes Forelaws on Board from the Supreme Court’s decision in Aluminum Co. of America v. Central Lincoln Peoples’ Utility Dist., ---U.S.---, 104 S. Ct. 2472 (1984), where the Court gave “great weight” to BPA’s interpretation of the Northwest Power Act’s allocation of power entitlements. Because NEPA’s fundamental purpose is to restructure agency decisionmaking to produce greater sensitivity to environmental concerns, no agency should be considered an expert agency in terms of NEPA compliance (see infra note 83). Typically, the courts liberally construe NEPA’s provisions. See, e.g., F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 2.21 (1981 & 1984 Supp.) (collecting cases). For divergent perspectives on the Aluminum Co. of America decision, see Alexander, Aluminum Co. of America v. Central Lincoln Peoples’ Utility District, 15 ENVTL. L. 325 (1985); Haagensen & Waldron, Aluminum Co. of America v. Central Lincoln Peoples’ Utility District: Supreme Deference to Appellate
deadlines and the time necessary for EIS preparation, the court refused to apply the Ninth Circuit presumption that the proper remedy for NEPA violations is an injunction. Instead of enjoining execution of the power contracts, Judge Mary Schroeder let the contracts stand because she felt that the existing contracts contained language sufficiently flexible to allow for amendments in light of the results of the EIS she ordered.

The result in Forelaws II was entirely predictable. In 1981, the Ninth Circuit indicated that it would construe narrowly a NEPA exemption created by the United States Supreme Court for alleged conflicts between NEPA and other federal statutes. In the Ninth Circuit, agencies are excused from NEPA compliance only where they can demonstrate "clear and unavoidable" statutory conflicts. In view of the circuit's consistent "hard look" standard of review in NEPA cases, it is not surprising that the Forelaws II court was skeptical of BPA's allegations that it lacked

19. See infra note 94 and accompanying text.
20. See infra text accompanying notes 94-97.
21. In Flint Ridge Development Co. v. Scenic Rivers Assoc. of Oklahoma, 426 U.S. 776 (1976), the Supreme Court interpreted the Interstate Land Sales Full Disclosure Act's directive that disclosure statements become effective 30 days after filing with the Secretary of Housing and Urban Development to deprive the Secretary of the discretion to suspend the effective date of the statement to prepare an EIS. The Court stated that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." Id. at 788. See also Gulf Oil Corp. v. Simon, 502 F.2d 1154 (Temp. Emerg. Ct. App. 1974) (EIS exemption implied in the Emergency Petroleum Allocation Act's requirement that the Federal Energy Office promulgate regulations within 15 days of passage of the Act).
22. Grindstone Butte Project v. Kleppe, 638 F.2d 100, 103 (9th Cir. 1981), cert denied, 454 U.S. 965 (1981) (interpreting NEPA to give the Secretary of the Interior the discretion to impose environmentally protective terms and conditions in irrigation rights-of-way permits across federal lands, even though the original 1891 statute authorizing such rights-of-way contained no similar provisions).
23. See W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 79 (1984 Supp.) (describing divergent standards of judicial review as "hard looks," "soft glances," or "tempered gazes"). Marcel, The Role of the Courts in a Legislative and Administrative Legal System—The Use of Hard Look Review in Federal Environmental Litigation 62 Or. L. Rev. 403 (1983). Cf. Foundation for North American Wild Sheep v. U.S., 681 F.2d 1172 (9th Cir. 1982) (holding a Forest Service decision not to prepare an EIS on a special use permit that would have authorized reconstruction and use of a road directly through a Bighorn Sheep lambing and calving area to be unreasonable); California v. Block, 690 F.2d 753 (9th Cir. 1982) (holding the Forest Service's EIS on its Roadless Area Review Evaluation II inadequate for failing to sufficiently describe site specific environmental effects and consider a reasonable range of alternatives); Southern Oregon Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475 (9th Cir. 1983), cert denied, ___ U.S. ___, 105 S. Ct. 446 (1984) (judging the adequacy of a Bureau of Land Management "Environmental Assessment" on a herbicide spraying program by EIS standards and enjoining the program pending preparation of a "worst case analysis"); Save Our Ecosystems v. Clark, 746 F.2d 1240 (9th Cir. 1984) (enjoining the herbicide spraying programs of both the Forest Service and the Bureau of Land Management pending preparation of "worst case analysis"); Yakima Indian Nation v. Federal Energy Regulatory Comm'n., 746 F.2d 466 (9th Cir. 1984), cert denied, ___ U.S. ___, 105 S. Ct. 2358 (1985) (enjoining relicensing of the Rock Island Dam for failure to perform an EIS); Thomas v. Petersen, 753 F.2d 754 (9th Cir. 1985) (enjoining construction of a timber road pending preparation of an EIS on road construction and associated timber harvesting).
discretion over contract terms that could significantly affect the environment, or that it lacked sufficient time to prepare an EIS. Moreover, given the strong environmental concerns expressed in the Power Act, the court’s unwillingness to construe that statute to impliedly exempt BPA from NEPA procedures seems sound.

More surprising, and perhaps of more far-reaching consequence, was the court’s reason for ordering the EIS. Judge Schroeder ruled that the Northwest Power Act’s overriding concern with environmental protection meant that BPA had to interpret the Act’s nine month deadline for offering the contracts in a way that would allow the agency to meet the deadline and satisfy NEPA at the same time. She rejected the agency’s contentions that a “proposal” for NEPA purposes was not formulated until after six months of negotiations between BPA and its utility and industrial customers. Breaking new NEPA ground, the court concluded that BPA’s failure to examine all significant alternatives violated not only NEPA, but also the Administrative Procedure Act. In reaching this conclusion, the court recognized that the chief concern of both NEPA and the Administrative Procedure Act is the creation of pluralistic procedures in which those affected by agency action have a full and fair opportunity to present alternatives and have those alternatives examined rationally and in writing by the agency.

The forthcoming court-ordered EIS, if properly “scoped” and forth-


Earlier, in the first suit brought under the Northwest Power Act, the Ninth Circuit held BPA’s narrow construction of its authorities under that statute to be unreasonable. Central Lincoln People’s Utility Dist. v. Johnson, 686 F.2d 708 (9th Cir. 1982). Although this result was overturned by the Supreme Court in Aluminum Co. of America v. Central Lincoln Peoples’ Utility Dist., 104 S. Ct. 2472 (1984), see supra note 18, that case did not involve NEPA or a directive similar to NEPA’s directive of compliance “to the fullest extent possible.”

25. See infra notes 71, 84 and accompanying text.

26. Cf. infra note 79 (NEPA “repeals by implication” are disfavored).

27. See infra text accompanying notes 83-90.


29. Forelaws II, 743 F.2d at 684-85.

30. Id. at 685; see infra note 93.

31. Cf. infra note 105 and accompanying text.

32. Under the Council on Environmental Quality’s NEPA regulations, to determine the proper scope of an EIS, agencies must consider (1) connected, cumulative, and similar actions; (2) the “no action” alternative, other reasonable courses of action, and mitigation measures; and (3) direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.25 (1984); see also infra note 119.
rightly written will offer the public an opportunity to evaluate the effect of BPA power sale policies on regional fish and wildlife restoration efforts and conservation programs. Because the terms and conditions of power sale contracts (especially industrial power contracts) affect operations at hydroelectric projects, and therefore the quantity and timing of streamflows, they can have significant effects on fish and wildlife, particularly on migrating anadromous fish.33 BPA has acknowledged these effects,34 but has never systematically analyzed them.35 Similarly, power sale contract terms and conditions could contribute considerably to the efficacious implementation of regional conservation programs.36 Exactly how fish and wildlife and conservation concerns ought to be reflected in contract terms and conditions should be a principal focus of the EIS. However, given BPA's past reluctance to perform an EIS on these issues, the public must play an active, informed role in the forthcoming scoping and commenting processes if the EIS is to become a vehicle ensuring that the contracts foster these goals. This article aims to improve prospects of a meaningful EIS on BPA's contracts by explaining both the issues at stake before the Ninth Circuit as well as those that await resolution in the forthcoming EIS process.

BACKGROUND

Described by the Ninth Circuit Court of Appeals as a "unique piece of regional energy legislation,"37 the Northwest Power Act was signed into law on December 5, 1980.38 Section 5(g) of the Act required BPA to offer new long-term contracts to its customers by September 5, 1981, within nine months of the law's enactment.39 The customers were then given a year to decide whether to accept the offer. The Act therefore

34. BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at 4-16 (noting that reservoir drafts to serve industrial power loads may affect spring fish flows).
35. See Blumm, supra note 33, at 265-68; NATURAL RESOURCES LAW INST., 10 ANADROMOUS FISH LAW MEMO 7-9 (Oct. 1980) (arguing for an EIS on coordinated Columbia Basin hydroelectric operations).
36. See BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at 2-9 (suggestion of Natural Resources Defense Council that BPA require as a power sale contract condition that customers participate in conservation programs).
37. Forelaws II, 743 F.2d at 679 (citing Central Lincoln Peoples' Utility Dist. v. Johnson, 735 F.2d 1101, 1106 (9th Cir. 1984)).
envisioned a new system of contracts in place by September 5, 1982, within twenty-one months of its effective date.\(^{40}\)

Immediately after the statute’s enactment, BPA began to negotiate with its customers over the terms of new power sale contracts. Six months of negotiations produced draft prototype contracts which, on June 11, 1981, were made available for thirty days of public review.\(^{41}\) Although BPA issued a draft “Environmental Report” (ER) along with the draft contracts, the agency refused to do a formal EIS, claiming that its obligation to make contract offers was a non-discretionary duty imposed by Congress and therefore exempt from EIS requirements.\(^{42}\) This claim was sharply disputed by one publication,\(^{43}\) which contended that BPA’s “ER” was no substitute for an adequate EIS because it placed the burden on the public, rather than BPA, to propose alternatives and mitigating measures.\(^{44}\)

Nevertheless, BPA proceeded to make contract offers on August 28, 1981 without an EIS,\(^{45}\) expanding its reasons for not doing so. The agency

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\(^{40}\) Id. § 839c(g)(2) (1982); see Forelaws II, 743 F.2d at 680.

\(^{41}\) See Forelaws II, 743 F.2d at 684 (outlining BPA’s activities between December 5, 1980 and September 5, 1981).

\(^{42}\) Bonneville Power Admin., Draft Environmental Report at 1-6 (June 1981): “[t]he offering of these new power sales contracts is a nondiscretionary duty imposed by Congress. Therefore, the decision to offer the contracts is not subject to the preparation of an EIS under Section 102(2)(C) of the National Environmental Policy Act (NEPA).”

\(^{43}\) See Natural Resources Law Inst., 14 Anadromous Fish Law Memo 5 (July 1981): It should be apparent, then, that the Act leaves BPA with considerable discretion to make decisions that may result in long-term environmental impacts on the region. For example, what if BPA’s obligations under the new DSI contracts inhibit it from complying with a subsequently adopted fish and wildlife program or regional power plan? Should not BPA be considering the insertion of clauses in the contracts to deal with such contingencies? The many alternative forms the contracts may take—together with their probable environmental impacts—should be considered and explored by BPA through compliance with NEPA. It would seem most unlikely that Congress would include expansive public participation provisions in the Act and, at the same time, permit BPA to make long-range decisions affecting the entire region without involving the public through NEPA’s environmental impact statement process. . . .

Thus, the significant discretion BPA possesses in drafting the power supply contract terms coupled with the potential long-range implications of the contracts, makes the content of the contracts (as opposed to the decision to issue them) precisely the kind of federal action that an EIS is designed to deal with. (Emphasis in original) (footnotes omitted).

\(^{44}\) The difference between an adequate EIS and an ER should be clearly understood. An EIS requires a rigorous examination of alternative courses of action available to the agency, a comparative evaluation of the anticipated environmental impacts of each alternative, an identification of the environmentally-preferred alternative and any mitigation measures that can be taken, and a response to all significant comments before proceeding with the chosen alternative. These requirements make the agency more accountable to the public, produce more reasoned decisions, and result in less exacting judicial review of agency action. BPA’s ER, on the other hand, places the burden on the public to come forward with alternative contract terms from those negotiated by the agency and its customers, contains no comparative evaluation of environmental impacts of various alternatives, identifies no environmentally preferred alternative, makes no mention of any mitigation measures that may be available, and promises no specific responses to significant comments.

\(^{45}\) Id. at 5-6 (footnote omitted).

claimed that the time deadlines imposed by the Northwest Power Act impliedly exempted the contracts from EIS requirements.\(^4\) BPA also asserted that "it is not possible to negotiate a contract and prepare an EIS at the same time."\(^4\)

In terms of substantive contract provisions, BPA originally had seemed to agree with its industrial customers that it possessed no authority to include fish and wildlife protective language in the contracts.\(^4\) However, in response to an uproar from the fish and wildlife protectionist community,\(^4\) BPA did include weak language protecting fish and wildlife in the draft contract\(^5\) and more forceful protective language in the final offers.\(^5\) But the agency refused to include a condition suggested by the National Marine Fisheries Service that would have required both BPA and its customers to implement fish and wildlife measures as directed by the Columbia Basin Fish and Wildlife Program.\(^5\)

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46. BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at app. 3-10 (memorandum from Acting Environmental Manager to BPA Administrator). This argument became BPA's principal defense before the Ninth Circuit. See Brief of Federal Respondents in Forelaws on Board v. Johnson, No. 82-719 (9th Cir.) at 11-28 [hereinafter cited as BPA Brief].

47. BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at app. 2-3.

48. See NATURAL RESOURCES LAW INST., 14 ANADROMOUS FISH LAW MEMO 8-9 (July 1981).

49. See id. at 6 (citing public dissatisfaction at the lack of fish and wildlife provisions).

50. See id. at 6-8 (critical examination of BPA's draft provisions).

51. See BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at 2-8:

In meeting its obligation under this contract, Bonneville affirms its obligations under Sections 4 and 6 of P.L. 96-501 and other applicable law with respect to implementation of measures and objectives for the protection, mitigation, and enhancement of fish and wildlife while assuring the Pacific Northwest an adequate efficient economical and reliable power supply. This contract shall not impair compliance with such obligations.

The Purchaser affirms its legal obligations related to fish and wildlife established in any license or order issued by the Federal Energy Regulatory Commission. This contract shall not expand, impair, or in any way alter the Purchaser's legal obligations related to fish and wildlife established in a license or order issued by the Federal Energy Regulatory Commission.

52. See Letter from H.A. Larkins, Regional Director, National Marine Fisheries Service to Earl Gjelde, Acting Administrator, Bonneville Power Administration, at 1-2 (March 4, 1981):

In carrying out the obligations under this contract, the parties also agree to implement measures necessary for the protection, mitigation, and enhancement of fish and wildlife resources, particularly anadromous fish and their habitat. Necessary measures are those which are established: (1) in a license or order issued by the Federal Energy Regulatory Commission; (2) in the Section 4 power plan or the Section 4(h) fisheries program established under the Pacific Northwest Electric Power Planning and Conservation Act; or (3) by the Administrator, upon the recommendation of a State or Federal fish and wildlife agency or Indian tribe, in order to satisfy his obligations to protect, mitigate, and enhance the fish and wildlife under the Pacific Northwest Electric Power Planning and Conservation Act. Nothing in this contract shall be interpreted to prevent or impair the implementation of measures for the protection, mitigation, and enhancement of fish and wildlife resources.

(Footnote omitted.) BPA did not respond to this language, or even acknowledge it, in its Environmental Report. Instead, the power agency wrote a letter apparently rejecting the language on the basis of its (unsubstantiated) conclusion that both the fish and wildlife and power objectives of the Northwest Power Act would be "best satisfied by planning for sufficient resources" and by taking
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The Natural Resources Defense Council advocated for conservation provisions. The agency deleted a contract provision protecting the Columbia River Gorge. Because all of these decisions were made without an EIS, Forelaws on Board filed suit.

THE JURISDICTIONAL QUAGMIRE

The merits of the suit were not decided quickly. The Ninth Circuit described judicial review provisions as "unusual," specify that challenges to "final agency actions" under the Act must be filed in the Ninth Circuit, rather than in federal district court. Although power sale contracts are defined as a final agency action, Forelaws on Board did not allege that the contracts violated the Act. Instead, the organization claimed a NEPA violation. Usually federal district courts initially hear NEPA suits. However, the Northwest Power Act did not make any reference to NEPA in its judicial review provisions.

Faced with these ambiguities, Forelaws, along with the National Wildlife Federation, filed suit in district court and, to preserve its case, also attempted to file in the Ninth Circuit. On March 10, 1982, Judge Redden ruled that the Northwest Power Act deprived him of jurisdiction over the case, and consequently the suit would have to be heard in the appeals court. A year later, on July 6, 1983, in Forelaws I the Ninth Circuit affirmed the district court. The appeals court held it had other steps "outside of the ongoing contract negotiations." Letter from Stanley E. Efferding, Bonneville Power Administration, to H.A. Larkins, National Marine Fisheries Service (March 27, 1981). See NATURAL RESOURCES LAW INST., 14 ANADROMOUS FISH LAW MEMO 3 (July 1981); BPA FINAL ENVIRONMENTAL REPORT, supra note 7, at 2-7 to 2-9.

53. See id. at 2-7 to 2-9.
54. See id. at 2-4 to 2-7. Despite recognizing that "the public is concerned that the environmental damage in the prior general contract provisions ... has not been strong enough ... [and] various groups proposed language for BPA to include in the [contracts], including possible termination for environmental noncompliance," BPA rejected restoring the strong 1938 and 1950 contract language: "Unlike other Federal and state agencies, BPA is not authorized and does not wish to be put in the position of having to monitor or enforce the customers' compliance with applicable environmental laws." Id. at 2-5.
55. Forelaws I, 709 F.2d 1310, 1311 (9th Cir. 1983).
59. However, § 9(e)(3) of the Northwest Power Act, 16 U.S.C. § 839i(e)(3) (1982), refers to the 1937 Bonneville Project Act, the 1964 Northwest Preference Act, and the 1974 Federal Columbia River Transmission System Act, as well as to the Northwest Power Act. Section 9(e)(5) also states that challenges under other, unlisted provisions and statutes should be brought "in the appropriate court." Id.
jurisdiction because (1) the Northwest Power Act sought consolidated and expedited judicial review, and (2) district court jurisdiction over NEPA claims could produce judicial "bifurcation," causing "confusion, delay, and potential for conflicting results."61

Although they ultimately did not affect the merits of the case, these procedural decisions warrant some comment. While they may in fact reflect a fair reading of the intent of the Northwest Power Act and recent Supreme Court decisions, they create a nearly unworkable situation, as the Ninth Circuit itself has recognized more than once.62 Appellate courts are equipped to decide questions of law and procedure, but they are poorly equipped to develop facts. Unfortunately, NEPA cases, especially those involving the question of whether an EIS is necessary, are fact-intensive. The proper forum to hear such cases is before a trial court that can take evidence and before which witnesses may appear. Congress ought to amend section 9(e)(5) of the Act to indicate that only decisions which are accompanied by an adequate factual record should be heard originally in the Ninth Circuit.63

Thus, nearly two years after BPA made its contract offers, Forelaws on Board found itself without a court to hear its case. Originally denied access to filing in the Ninth Circuit by that court's clerk,64 Forelaws I denied the organization access to the district court. As a result, the case was not properly filed until after the ninety-day deadline specified in the statute.65 BPA and some of its customers66 claimed that this barred the Ninth Circuit from hearing the case.67 However, the appeals court ruled that, since the failure to file within ninety days was the result of a mistake of its clerk, it would consider the merits of the case.68

63. In the alternative, Congress could indicate that the language in § 9(e)(5) of the Act, 16 U.S.C. § 839f(e)(5) (1982)—indicating the claims under unlisted statutory provisions can be brought in the "appropriate court" (see supra note 59)—should be interpreted to mean that district courts have original jurisdiction, unless there is a substantially similar case pending before the Ninth Circuit.
64. The clerk rejected Forelaws' complaint because normally the Ninth Circuit has no jurisdiction over original complaints. See Forelaws II, 743 F.2d at 680.
68. Forelaws II, 743 F.2d at 680. Martin Marietta also unsuccessfully alleged that Forelaws on Board lacked standing because it could not show how BPA's contract offers injured the organization. The court noted that (1) environmental injury is sufficient injury, (2) general allegations of potential harm can demonstrate standing, and (3) an organization can represent the interests of injured members. Id.
THE MERITS

In Forelaws II, the Ninth Circuit had to decide whether BPA's contract offer constituted "a major federal action significantly affecting the quality of the human environment,"69 which would, under NEPA, require the preparation of an EIS. BPA claimed that an EIS was unwarranted because: (1) the contracts did not produce significant environmental effects; and (2) even if they did, the agency did not have to perform an EIS because of time deadlines imposed by the Northwest Power Act.70 Before considering these allegations, the court gave an important judicial gloss to the Act by emphasizing that the statute expressly required that it be "construed in a manner consistent with applicable environmental laws."71 Judge Schroeder, writing for a unanimous three-judge panel, characterized the issues in the case as implicating "two of the Act's most important objectives: a new system of contracts governing BPA's delivery of power to its customers and an energy program for the Pacific Northwest that is sensitive to environmental concerns."72 In resolving the questions of whether the contracts significantly affected the environment and whether the time constraints imposed on BPA created a statutory conflict with NEPA requirements, the court was heavily influenced by these twin congressional objectives.

The Power Contracts' Environmental Significance

BPA claimed that its discretion in contract terms was limited only to matters having no effect on the environment, alleging that power allocation could have no such effects.73 But the Ninth Circuit disagreed, citing BPA's own statements about the nature of its discretion, and concluding that "the content of [contract provisions affecting the environment] is not

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70. BPA Brief, supra note 46, at 33-38 (power allocation does not significantly affect the quality of the human environment), 11-29 (time deadlines in Northwest Power created a statutory conflict, making EIS preparation impossible). BPA also continued to argue that, since the Act mandated the issuance of the contracts, no EIS was required because the agency lacked discretion not to issue the contracts. Id. at 28-33. However, this argument was not forcefully pressed, and it was actually closely related to BPA's argument that the contracts did not produce significant environmental effects, since what the agency was really arguing was that any discretion it possessed over contract terms and conditions was limited to matters of environmental irrelevance. The Ninth Circuit considered the two arguments to be indistinguishable. See Forelaws II, 743 F.2d at 681-82.
71. Forelaws II, 743 F.2d at 680 (citing § 2 of the Northwest Power Act, 16 U.S.C. § 839 (1982)).
72. Id.
73. Id. at 681-82. BPA relied on City of Santa Clara v Andrus, 572 F.2d 660 (9th Cir. 1978) cert. denied, 439 U.S. 859 (1978), and Sierra Club v. Hodel, 544 F.2d 1036 (9th Cir. 1976), in support of its allegation that merely allocating power among different customers does not have significant environmental effects.
mandated but is clearly discretionary." The court also rejected BPA's suggestion that the contracts reflected only a choice of which customers received BPA power. Instead, it ruled that the contracts "involve considerations of far greater historic and regional import and significantly affect the environment" because of their effects on long-range regional energy plans, energy conservation, and fish and wildlife restoration.

Regarding the contract's potential effects on fish and wildlife, Judge Schroeder wrote:

> In the record before BPA, a great many groups suggest provisions which would mitigate fishery damage and improve conservation efforts. As the National Marine Fisheries Service pointed out to BPA, a major purpose of the Regional Act was to treat fish and wildlife interests as *coequal partners* in the management of the Northwest hydrosystem. Again, without an EIS, we do not know to what extent these proposals were evaluated as *feasible alternatives* to the provisions eventually proposed.

Essentially, the court found BPA's "Environmental Report" insufficiently detailed to inform BPA and the public of the environmental effects of the contracts and to assess the feasibility of alternative provisions. As a result, it determined that the contracts were "significant federal actions affecting the environment," and that they therefore required an EIS unless the time deadlines in the Northwest Power Act impliedly exempted BPA from EIS requirements.

**Implied EIS Waiver Due to Time Constraints**

Having determined that BPA's contracts involved issues of environmental significance, the Ninth Circuit turned to BPA's principal defense—that the Northwest Power Act's time deadlines made it impossible for the

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75. *Forelaws II*, 743 F.2d at 682. The court stated that the policy choices which could affect conservation incentives included rate reductions for those who conserve, conservation-related conditions, shortfall allocation plans that account for utility conservation efforts, and tiered rates. *Id.*

76. *Id.* (emphasis added) (citing comments made to BPA by the Columbia River Citizens Compact, the Northwest Steelhead Salmon Council, the Upper Skagit Tribes, the National Marine Fisheries Service, the Columbia River Fisherman's Protective Union, and the Washington Department of Fisheries).

77. *Id.* at 681: "[BPA] did what it termed an 'Environmental Report,' a document not contemplated by NEPA, and which did not analyze in detail any possible environmental consequences of the contracts and ways that they might be avoided." See also *id.* at 685. Cf. *supra* notes 43-44 and accompanying text. BPA prepared the Environmental Report not as a substitute for an EIS but to fulfill the non-EIS requirements of NEPA. See *supra* note 7.

78. *Forelaws II*, 743 F.2d at 683. Influencing the court was the fact that BPA's "Environmental Report" did not allege a lack of significant environmental effects; instead, it emphasized the time constraints imposed by the Northwest Power Act as the reason not to prepare an EIS. *Id.* at 682-83.
agency to comply with NEPA. BPA claimed that these deadlines put the Act in "fundamental and irreconcilable conflict" with NEPA, thus exempting the agency from preparing an EIS under the United States Supreme Court's *Flint Ridge Development Co. v. Scenic River Association of Oklahoma* decision. However, *Flint Ridge* had involved a thirty-day deadline, while BPA had nine months to offer its contracts, and its customers had another year to decide whether or not to accept the offer. BPA argued that the agency did not actually have nine months to prepare the EIS, a period of time that the Supreme Court has indicated is adequate, but only thirty-two days. In *Forelaws II*, the Ninth Circuit ruled that even if this restrictive time schedule was accurate, it was BPA's and not the Act's creation. Therefore, there was no "irreconcilable statutory conflict" justifying a NEPA exemption.

Judge Schroeder also indicated that, in light of NEPA's directive requiring agency compliance "to the fullest extent possible," coupled with the Northwest Power Act's "clear statutory emphasis on environmental concerns," a NEPA exemption would be "inconsistent with the congressional objectives of the Regional Act." This interpretation may well set precedent beyond the issues of this case, but in *Forelaws II*, it

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80. See 426 U.S. at 780, n.10 (an agency can produce a draft EIS in five months, and final action can be taken within three months thereafter); see also 40 C.F.R. § 1508.10(d) (1984) (CEQ regulations providing for a "fast track" EIS schedule). Owen Schmidt, attorney with BPA's Office of General Counsel, disputes the conclusion drawn in the text, arguing that footnote 10 in the *Flint Ridge* decision refers only to simple EISs written by an experienced staff. He notes that neither BPA nor any other federal agency has prepared an EIS on twenty-year power contracts. Memorandum from Owen Schmidt to the author at 3 (March 14, 1985).

81. BPA managed to reduce the nine months to 32 days, largely by claiming that it could not begin to prepare an EIS until it had a "proposal for action," and that it took six months of negotiating with its customers to arrive at a proposed course of action. See *Forelaws II*, 743 F.2d at 684.

82. Id. at 683, 685.

83. 42 U.S.C. § 4332(2) (1982). The Ninth Circuit adopted a statement from NEPA's legislative history indicating that this provision was aimed at ensuring strict agency compliance with NEPA. Noncompliance would be justified only if:

the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the [NEPA] directives impossible... Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with [NEPA] directions... No agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

*Forelaws II*, 743 F.2d at 683 (quoting from the Conference Report on NEPA, 116 CONG. REC. 39702-703 (1969) (emphasis added)).

84. Conference Report on NEPA, 116 CONG. REC. 39702-703 (1969). Note that Congress, in the opening sentences of the Northwest Power Act, 16 U.S.C. § 839 (1982), directed that its purposes and the purposes of all other statutes governing the Federal Columbia River Power System, were "to be construed in a manner consistent with applicable environmental laws." See *supra* note 71 and accompanying text.

85. See *infra* note 109 and accompanying text.
led the court to conclude that BPA's position "represents the type of 'excessively narrow construction' that NEPA['s directive of compliance to the fullest extent possible] cautions against."  

According to the court, a broader interpretation of its environmental responsibilities would have led BPA to follow a schedule designed to secure compliance with all of its statutory responsibilities. For example, Judge Schroeder suggested that BPA need not have consumed the initial six months negotiating with its customers, but could have employed this time to develop a proposal to which the public could react through the EIS process.† In effect, the court ruled that the overarching environmental protection concerns of both NEPA and the Northwest Power Act limited BPA's discretion in deciding how to meet the nine-month deadline for contract offers. Adopting a procedure that required six months of negotiations to arrive at a proposal was therefore an unreasonable interpretation of the statute.† The court noted that had BPA used the nine months to satisfy its NEPA responsibilities and to initiate negotiations, the agency could have continued to negotiate after the nine-month deadline, since the statute did not require the contracts to be executed for another year.†

The injury suffered as a result of not complying with NEPA, the court emphasized, was the failure to explore alternative courses of action that might have better achieved all of the Northwest Power Act's purposes, especially energy conservation and fish and wildlife preservation.† Because BPA failed to examine all significant alternatives, the court concluded that the agency violated NEPA. This is unsurprising because consideration of alternatives is the heart of the NEPA process.† More surprising was Judge Schroeder's conclusion that this failure also violated the Administrative Procedure Act (APA), implying a duty to examine alternatives under the APA's "arbitrary and capricious" standard of judicial review.† This pathbreaking interpretation means that where an agency fails to satisfy its procedural obligation to evaluate alternatives

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86. "Giving full deference to BPA's interpretation ... we find its position is unreasonable, particularly when viewed in light of the congressionally mandated objectives of NEPA." Forelaws II, 743 F.2d at 684 n.5.
87. Id.
88. See supra notes 83 and 84.
89. "Giving full deference to BPA's interpretation ... we find its position is unreasonable, particularly when viewed in light of the congressionally mandated objectives of NEPA." Forelaws II, 743 F.2d at 684 n.5.
90. Id. (citing § 5(g)(2) of the Northwest Power Act, 16 U.S.C. § 839c(g)(2)(1982)). Presumably, if negotiations after the initial offer changed the contract terms and conditions, a supplemental EIS would be warranted. See 40 C.F.R. § 1502.9(c) (1984).
91. "Giving full deference to BPA's interpretation ... we find its position is unreasonable, particularly when viewed in light of the congressionally mandated objectives of NEPA." Forelaws II, 743 F.2d at 682, 684-85.
93. Under the 'arbitrary and capricious' standard of review authorized by the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), a court may require an agency's decision to be 'based on a consideration of relevant factors.' Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 824, 28 L.Ed.2d 136 (1971). This requirement that an agency examine alternative courses of action has long been a part of the APA's standard of review, see The Supreme Court, 1982 Term, 92 HARV. L.REV. 70, 236-37 (1983), and has recently been reaffirmed by the Supreme Court. See Motor
under NEPA, it also violates the APA's substantive standard prohibiting arbitrary and capricious action. In short, a failure to adequately consider alternatives constitutes a per se arbitrary administration action.

The Remedy

Although the court ordered BPA to prepare an EIS, it refused to enjoin the operation of the contracts pending its preparation. While the presumed remedy for a NEPA violation in the Ninth Circuit is injunctive relief,94 Forelaws II indicates that this presumption can be overcome by time deadlines in another statute. Here, the Northwest Power Act's directive that executed power contracts be in place twenty-one months after its enactment created a "clear tension" between an injunction invalidating the contracts and this deadline. Accordingly, Judge Schroeder determined injunctive relief to be inappropriate.95 The court was convinced that Forelaws on Board gained an effective remedy without injunctive relief, since the contracts which were negotiated contained provisions contemplating amendments.96 Noting that the contracts envisioned a flexible, "ongoing, changing relationship among BPA, its customers, and the public interest represented by the Regional Council established under the Act," the Ninth Circuit concluded that "only a full environmental impact statement will inform BPA, its customers, the public, and the Regional Council of all the environmental consequences of the contracts and serve as a guide to future actions."97

94. Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984); see also Forelaws II, 743 F.2d at 685 (noting that an injunction is "the most common judicial response to a NEPA violation"); 743 F.2d at 685 (citing American Motorcyclist Ass'n. v. Watt, 714 F.2d 962, 965-66 (9th Cir. 1983)).
95. Forelaws II, 743 F.2d at 685.
96. Id. at 686.
97. Id. The court specifically noted that BPA's Environmental Report was "not a sufficiently detailed analysis for informing BPA and the public of the environmental consequences of the choices represented by the contracts." Id. "Even less informative," according to the court, "was the Finding of No Significant Impact (FONSI) which BPA filed in connection with the contract amendments of October 1982." Id. See NATURAL RESOURCES LAW INST., 18 ANADROMOUS FISH LAW MEMO 6 (May 1982) (describing these amendments, which would enable greater reservoir drawdowns by authorizing "Economic Shifts" of "Firm Energy Load Carry Capability"). But the court refused to order a separate EIS on the amendments, since they weren't challenged within the statutorily-required 90-day period. Forelaws II, 743 F.2d at 686 n.6. However, since it is not clear that the operations envisioned by these amendments have in fact been instituted, there is no reason why the environmental consequences from these operations should not be evaluated in the EIS that the court ordered.
CONCLUSION

Forelaws II is an important decision, with potential ramifications considerably beyond its facts. On the heels of the Rock Island Dam decision,98 the case clarifies the Ninth Circuit’s view that the Northwest Power Act, like the Alaska Lands Act,99 contemplates administrative decisionmaking that is sensitive to environmental concerns.100 And, like the Rock Island Dam case, Forelaws II shows that the Ninth Circuit is quite reluctant to accept agency interpretations of organic statutes that inhibit compliance with NEPA.101 Particularly noteworthy in Forelaws II was the court’s sensitivity to NEPA’s role in fostering public involvement and interagency coordination.102 The case may well have turned on the substantial opposition that BPA’s proposed contract terms engendered, including opposition from federal and state agencies and Indian tribes.103

In the wake of its substantive demise,104 NEPA’s legacy will depend upon how zealously the courts protect the pluralism generated by its procedures. The Ninth Circuit seems prepared to ensure that NEPA realizes some of its potential to democratize agency decisionmaking.105 Moreover, the Forelaws II court may revive interest in NEPA’s ability to affect substantive agency decisionmaking. If a failure to adequately consider alternatives is an arbitrary administrative action,106 it seems a small step to suggest that choosing a particular alternative may also be arbitrary in light of the environmental record reflected in an EIS.


100. Forelaws II, 683 F.2d at 683 (“clear statutory emphasis on environmental concerns”).

101. In the Rock Island Dam case, Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), cert denied, ___ U.S. ___, 105 S. Ct. 2358 (1985), the court refused to allow FERC to construe section 15(a) of the Federal Power Act, 16 U.S.C. § 808(a) (1982), to permit a looser standard of administrative review in the case of a relicensing than in the case of an initial licensing.

102. See Forelaws II, 743 F.2d at 682, 685.

103. Supplying critical comments on BPA’s draft contracts were the Columbia River Citizens Compact, the Columbia River Fisherman’s Protective Union, the Environmental Protection Agency, Fair Electric Rates Now, the National Marine Fisheries Service, the Natural Resources Defense Council, the Northwest Steelhead Salmon Council, the Oregon Department of Energy, the Upper Skagit Tribes, and the Washington Department of Fisheries. See id. at 682 nn.3-4.


105. I believe that a major function of the judiciary in reviewing administrative environmental decisionmaking is to encourage widespread participation and pluralistic debate. See Blumm, Environmental Decision Making, Judicial Review and the Democratization of the Leviathan State: Some Comments on the Huffman/Funk Colloquy, A D V O C A T E, at 10 (Spring 1985) ( Lewis & Clark Law School Alumni Magazine).

106. See supra note 93 and accompanying text.
Forelaws II also contains lessons for entities with important Northwest Power Act implementation responsibilities such as BPA, the Federal Energy Regulatory Commission (FERC), the Northwest Power Planning Council, and the public. First, by determining that NEPA requires BPA to prepare an EIS on its power sale contracts, the court read NEPA's directive of procedural compliance "to the fullest extent possible" to require the agency to demonstrate a "fundamental and irreconcilable conflict" with a statutory provision. Consequently, Judge Schroeder refused to allow BPA to create administrative roadblocks to NEPA compliance. If this represents a harbinger of the Ninth Circuit's pending interpretation of the provision in the Northwest Power Act requiring compliance with the Columbia Basin Fish and Wildlife Program "to the fullest extent practicable," the court will have helped to clarify a critically important statutory ambiguity inhibiting effective implementation of a program promising significant restoration of the Columbia's anadromous fish runs.

Second, the case is further evidence that, in interpreting the Northwest Power Act, the Ninth Circuit will turn to the statute's purposes to help resolve ambiguities in its directives. Because of the unmistakable congressional intent to have the Act interpreted consistently with environmental laws such as NEPA, the court refused to accept BPA's claim that administrative inconvenience justified an implied waiver of NEPA compliance. Third, it seems apparent that, due to the "coequal partnership" the Northwest Power Act envisioned between fish and wildlife protection

107. See supra notes 79-82 and accompanying text.
108. This program was authorized by section 4(h) of the Northwest Power Act to protect and restore Columbia Basin fish and wildlife, particularly anadromous fish, to the extent adversely affected by the development and operations of Columbia Basin hydroelectric projects. See NORTHWEST POWER PLANNING COUNCIL, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM, as amended (1984) [hereinafter cited as COLUMBIA BASIN PROGRAM].

Section 4(b)(11)(A)(ii) of the Northwest Power Act, 16 U.S.C. §839b(h)(11)(A)(ii) (1982), requires federal water management agencies such as FERC, the U.S. Army Corps of Engineers, and the Bureau of Reclamation to take into account the Columbia Basin and Wildlife Program "at each relevant stage of [their] decisionmaking processes to the fullest extent practicable."

109. Section 1304(a)(5) of the Columbia Basin Program, supra note 108, interpreted this provision to require implementation of program measures or explanations (with supporting information) "of why implementation is physically, legally or otherwise impractical, including all possible allowances available to permit program implementation." Unfortunately, agencies like BPA, FERC, and the U.S. Army Corps of Engineers disagree, alleging that §4(h)(11)(A)(ii) of the Act imposes no mandatory duties on them. See NATURAL RESOURCES LAW INSTITUTE, 30 ANADROMOUS FISH LAW MEMO 7-11 (1983). The Ninth Circuit has been asked to interpret the statutory provision in a suit filed by the National Wildlife Federation contesting FERC's failure to assess the cumulative effects of numerous proposed hydroelectric projects in Idaho's Salmon River Basin. The Wildlife Federation alleges this failure not only violates the Northwest Power Act but also NEPA and the Federal Power Act. National Wildlife Federation v. Federal Energy Regulatory Comm'n., No. 84-7325 (9th Cir.). See Blumm, Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program, 14 ENVT'L. L. 277, 336-37 (1984).

110. See supra text accompanying note 71.
and power production, BPA's obligations to investigate and explore feasible alternatives increase.

Fourth, the decision reflects a healthy skepticism of BPA, an agency which has consistently demonstrated a bias against meaningful fish and wildlife measures. Long ago "captured" by its utility and industrial customers, BPA has been slow to see that a fundamental purpose of the Northwest Power Act is to open up its decisionmaking processes and make it responsible to a broader constituency. In this case, the court recognized that BPA's attempt to evade its NEPA responsibilities was tantamount to refusing to treat long underrepresented fish and wildlife and energy conservation interests as the "coequal partners" Congress envisioned.

Finally, the case reflects considerable optimism regarding the role of another key implementor of the Northwest Power Act, the Northwest Power Planning Council. The court even referred to the Council as representing "the public interest." Nevertheless, it is far from clear whether the Council will seize the opportunities presented by the court-ordered EIS to make BPA rigorously explore alternatives to existing Federal Columbia River Power System (FCRPS) operating assumptions, which might inform the Council of feasible alternative system operating assumptions that could supply greater fishery protection.

111. Forelaws II, 743 F.2d at 682 ("a major purpose of the Regional Act was to treat fish and wildlife interests as coequal partners in management of the Northwest hydrosystem"); see also Yakima Indian Nation v. FERC, 746 F.2d 466, 473 (9th Cir. 1984) cert denied ___ U.S. ___ 105 S. Ct. 2358 (1985) (fish and wildlife protection stands "on an equal footing" with power generation).

112. Forelaws II, 743 F.2d at 682 (noting the necessity of evaluating feasible alternatives). Requiring BPA to explore all feasible alternatives is consistent with the legislative history of the Northwest Power Act, which indicated Congress' expectation that power managers could "devise effective and imaginative measures" to protect and restore fish and wildlife without jeopardizing the region's power supply." House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 976, pt.1, 96th Cong., 2d Sess. at 47 (1980).

113. See, e.g., Blumm, supra note 109, at 323-27, 352 n.312; NATURAL RESOURCES LAW INST., 24 ANADROMOUS FISH LAW MEMO 2-10 (Mar. 1984); id., 27 ANADROMOUS FISH LAW MEMO 9-11 (Sept. 1984).

114. See, e.g., Hydroelectric Heritage, supra note 2, at 206-07 (describing BPA as a regional chamber of commerce).


116. Forelaws II, 743 F.2d at 686.

117. For an overview of these operation assumptions, including an explanation of "critical water year" planning, see NATURAL RESOURCES LAW INST., 18 ANADROMOUS FISH LAW MEMO (May 1982); see also J. Bowler, Coordinated Power Production on the Pacific Northwest (University of Washington, Master's degree thesis) (1982).

118. For example, the Council rejected Snake River fish flows recommended by the Columbia Basin Indian Tribes as infeasible, although it was not very clear as to why. See Blumm, supra note 109, at 298-301. Moreover, it is hard to believe that the Council adequately fulfilled this responsibility by supporting BPA's position in an amicus brief in this case. The Council may have supported BPA out of concern that doing an EIS on the contracts might set an unfortunate precedent regarding BPA's
Given BPA’s track record and uncertainty regarding the Council’s position, the Northwest public must play an active role in formulating and evaluating BPA’s EIS. It is imperative that the EIS be properly “scoped.” Among the questions that must be addressed are, of course, those suggested by the court, such as why it is not feasible to incorporate into BPA’s contracts the fishery protection conditions suggested by the National Marine Fisheries Service, and the conservation provisions suggested by the Natural Resources Defense Council and others.

But other unresolved questions should not be overlooked, especially those involving FCRPS operations. For example, do the contracts influence FCRPS operations in ways that might affect fishery flows? Are there contract provisions that might facilitate such flows, including making feasible the Snake River flows which the region’s fish and wildlife agencies and Indian tribes believe are biologically necessary? What is the relationship between secondary energy sales and the implementation of the Council’s Water Budget? How does this relationship reflect “equitable treatment” for fish and wildlife, a Northwest Power Act standard that is judicially enforceable? Can “Firm Energy Load Carrying Capability Shifts,” made for the benefit of BPA’s industrial customers, produce extraordinary reservoir drafts at Hungry Horse, Libby, and Dworshak Dams in the autumn months without consideration of their potential implementation of the Columbia Basin Program, supra note 108, a precedent that BPA could invoke to delay program implementation. However, there were a number of other means by which such a result could have been avoided. See Natural Resources Law Inst., 19 Anadromous Fish Law Memo 11-12 (Sept. 1982).

119. 40 C.F.R. § 1501.7 (1984) (Council on Environmental Quality regulations describing an “early on open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action”).

120. See supra notes 52-53, 75-76 and accompanying text.

121. See Natural Resources Law Inst., 27 Anadromous Fish Law Memo 9-10 (Sept. 1984) (assertion of Water Budget Managers, see infra note 123, that the Corps and BPA have elevated reservoir refill and secondary energy sales over fish flows).

122. See supra note 118.

123. “The Water Budget,” established by § 304 of the Columbia Basin Program, supra note 108, is a volume of approximately four and a half million acre-feet of water made available to representatives of fish and wildlife agencies and Indian tribes (i.e., “Water Budget Managers”) during April 15 to June 15 each year to facilitate downstream juvenile fish migration. Essentially, the Water Budget functions to augment flows to simulate the lost spring freshet, now largely stored behind multi-purpose dams, on which juvenile anadromous fish historically depended to reach the ocean. Water Budget flows come from flows which dam operators would otherwise save to generate electricity later in the year. Although an innovative concept, the Water Budget has encountered numerous implementation difficulties. See Natural Resources Law Inst., 30 Anadromous Fish Law Memo 8-10 (June 1985).


125. See BPA Final Environmental Report, supra note 7, at 4-12 to 4-17 (explaining “FELCC Shifts” and “advance energy sales” and some of their potential environmental effects).
effects on Water Budget flows? Are there contract provisions which would facilitate implementation of the Council's Water Budget?

If these questions are to be addressed in BPA's EIS, they almost certainly will have to be asked by the public or the Northwest Power Planning Council. Unless BPA is prodded to take a hard look at the relationship between its power sales, FCRPS operations, and fish and wildlife protection, the opportunities presented by *Forelaws II* will, unfortunately, remain unfulfilled.

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126. See Blumm, *supra* note 109, at 295-96, n.77 (pointing out that such "shifts" are considered by BPA to be for the purpose of serving firm power loads, which may give them priority over fish flows); *see also* NATURAL RESOURCES LAW INST., *18 ANADROMOUS FISH LAW MEMO 6* (May 1982).

127. On March 4, 1985, BPA issued a Notice of Intent to prepare the EIS Judge Schroeder ordered. In response, sixteen commentators made suggestions concerning the range of actions, alternatives, and impacts to be addressed in the EIS. "Scoping" meetings (see *supra* notes 32, 119) were scheduled for June 1985. Letter from Roy B. Fox, Environmental Coordinator, Bonneville Power Administration to author (May 15, 1985).