

Acquisition of Energy Resources Under the Pacific Northwest Electric Power Planning and Conservation Act: A Look at the Future*

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I. INTRODUCTION

The Bonneville Power Administration (BPA)¹ is a separate and distinct entity within the Department of Energy,² serving as the marketing agency³ for hydroelectric power generated at thirty of the largest power dams in the Columbia River Basin.⁴

* The opinions presented here are solely those of the authors and do not necessarily represent the views of the Bonneville Power Administration or the United States Department of Energy.

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1. Congress created the Bonneville Power Administration (BPA) in 1937. Bonneville Project Act of 1937, Pub. L. No. 75-329, 50 Stat. 731 (codified at 16 U.S.C. § 832 (1977 & Supp. III 1979)). The Bonneville administrator's function is to market the power generated by the Bonneville project. 16 U.S.C. § 832 (1977 & Supp. III 1979).

2. Congress created the Department of Energy in 1977. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7152 (Supp. III 1979)). The Department of Energy Organization Act transferred the functions of the Bonneville Power Administration from the Department of Interior to the Department of Energy. 42 U.S.C. § 7152(a)(1)(D) (Supp. III 1980). The Secretary of Energy performs these functions, acting by and through the Bonneville Administrator. *Id.* § 7152(a)(2).

3. The Bonneville Project Act provides that the Administrator shall "make all arrangements for the sale and distribution of electric energy generated at the Bonneville Project not required for the operation of the dam and locks" 16 U.S.C. § 832a(a)(1977). The Federal Columbia River Transmission System Act designates the Administrator as "the marketing agent for all electric power generated by Federal generating plants in the Pacific Northwest, . . . except electric power from the Green Springs project of the Bureau of Reclamation." *Id.* § 838f.

4. For a list of Pacific Northwest federal and nonfederal projects, see U.S. DEP'T OF ENERGY, BONNEVILLE POWER ADMINISTRATION, MULTIPURPOSE DAMS OF THE PACIFIC NORTHWEST (1978). This publication includes a map of major hydroelectric projects, photographs of most, the purposes of each, and the name of each project's operators.

The 1961 Columbia River Treaty with Canada⁵ significantly enhanced the capacity⁶ of these dams as well as the twenty-five nonfederal projects. The BPA also markets a limited amount of thermal power⁷ and has net billing contracts to acquire more.⁸

5. Columbia River Basin Treaty, Jan. 17, 1961, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638. Under the Columbia River Basin Treaty, Canada built three large storage dams on the upper reaches of the river and the United States built Libby Dam in Montana. The three Canadian dams store up to 15.5 million acre-feet for power production in the United States and for flood control. This storage arrangement permitted downstream United States plants to produce 2.8 million kilowatts of additional power in 1975. The United States and Canada share this power equally. See U.S. DEP'T OF ENERGY, BONNEVILLE POWER ADMINISTRATION, BPA DEFINITIONS 10 (1979) [hereinafter cited as DEFINITIONS].

In 1964, federal and nonfederal dam operators on the Columbia River signed an agreement to coordinate operation of their projects to fulfill the United States' responsibilities to Canada under the Columbia River Basin Treaty. See Agreement for Coordination of Power Systems Operations, Sept. 15, 1964, United States-Canada; DEFINITIONS, *supra*, at 17.

6. "Capacity" means "[t]he maximum load that a machine station or system can carry under existing service conditions. Equivalent terms; peak capability, peak generation, firm peakload, carrying capability. In transmission, the maximum load a transmission line is capable of carrying." DEFINITIONS, *supra* note 5, at 11. "Load" means "[t]he amount of electric power or energy delivered or required at any specified point or points on a system. Load originates primarily at the energy-consuming equipment of the customers." *Id.* at 40. "Energy" means "[t]he capability of doing work. In electrical systems energy is expressed in kilowatthours." *Id.* at 25. "Power" means "[t]he time rate of transferring or transforming energy. Electrically, power is expressed in watts, which is the product of applied voltage and resulting in-phase current. Power is the rate of energy production or transfer." *Id.* at 51.

The Pacific Northwest Electric Power Planning and Conservation Act defines "electric power" as "electric peaking capacity, or electric energy, or both." 16 U.S.C.A. § 839a(9) (West 1980 Laws Special Pamphlet).

7. Thermal power is electric power produced by generating heat and converting the heat into electricity. See DEFINITIONS, *supra* note 5, at 71. Most Pacific Northwest thermal plants use coal or nuclear fuel to generate the heat. Bonneville presently acquires and markets power from the Handford Nuclear Thermal-Electric Plant (NPR). The NPR is a dual-purpose reactor producing waste steam as a by-product of plutonium manufacture. The Washington Public Power Supply System (WPPSS) operates the generating plant using the excess steam and sells the output, which amounts to up to four and one-half million megawatt hours per year, to Bonneville. Bonneville also has acquired the City of Eugene's 30% share of the Trojan Nuclear Thermal-Electric Project (Trojan) near Rainier, Oregon. BONNEVILLE POWER ADMINISTRATION, U.S. DEP'T OF INTERIOR, THE ROLE OF THE BONNEVILLE POWER ADMINISTRATION IN THE PACIFIC NORTHWEST POWER SUPPLY SYSTEM, app. A, at I-26 (1977) (Draft Environmental Impact Statement) [hereinafter cited as REIS].

8. Bonneville has agreed to purchase additional thermal generation from the WPPSS Nuclear Projects 1, 2, and 3 and Portland General Electric's Pebble Springs Nuclear Project Number 1 through net-billing agreements. REIS, *supra* note 7, at app. A, at I-20 to I-24, I-37 to I-39. When these projects are completed, they will add an additional 3,007 megawatts to regional power resources. *Id.*

Net-billing is a system of offsetting payments due to one party against another party under various contracts between those parties. Bonneville acquires preference customers'

Overall, the BPA controls and wholesales approximately half of the Pacific Northwest's electric energy.⁹ It also has built and maintains nearly eighty percent of the region's mainstream transmission system.¹⁰

The BPA's power marketing role is central to the economic future of the Northwest. The agency effectively controls the region's single largest block of power generation and transmission. Although the utility and environmental communities often fiercely debate the BPA's role, the rest of the region is only now coming to appreciate fully the BPA's significance.¹¹ This earlier lack of awareness was understandable in an era of energy surplus, but, in an era of shortage,¹² a broader public understanding

entitlement to the Trojan and WPPSS 1, 2, and 3 nuclear plants by net-billing the preference customers' costs in those nuclear plants against power sales revenues due Bonneville from the preference customers. See DEFINITIONS, *supra* note 5, at 45. Congress has approved net-billing by Bonneville since 1961. The statutory authority for net-billing for the thermal projects is clear and unambiguous and is found in Appropriations Acts from 1968-1972 and attendant legislative history. See Act of Oct. 7, 1970, Pub. L. No. 91-439, 84 Stat. 899 (net-billing authorization for WPPSS Projects 1, 2 and 3); Act of Dec. 11, 1969, Pub. L. No. 91-144, 83 Stat. 333 (net-billing authorization for Trojan Project). The net-billing arrangements are affirmed by 16 U.S.C.A. § 838i(b) (West 1980 Laws Special Pamphlet), which provides in pertinent part that:

[t]he Administrator may make expenditures from the [Bonneville] Fund . . . for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law, including but not limited to . . . (6) purchase of electric power (including the entitlement of electric plan capability) . . . (ii) if such purchase has been heretofore authorized or is made with funds expressly appropriated for such purchase by the Congress

9. U.S. DEP'T OF ENERGY, BONNEVILLE POWER ADMINISTRATION FISCAL YEAR 1978 FINANCIAL AND STATISTICAL SUMMARY 6 n.20 (1978) [hereinafter cited as 1978 FINANCIAL SUMMARY]; see REIS, *supra* note 7, at app. B, at I-1.

According to the Act, "Pacific Northwest," "Region" or "Regional" means (1) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the States of Nevada, Utah, and Wyoming within the Columbia drainage basin, and (2) any contiguous areas, not in excess of 75-airline miles from said region, which are a part of the service area of a rural electric cooperative customer served by the Administrator which has a distribution system from which it serves both within and without such region. See 16 U.S.C.A. § 839a(14) (West 1980 Laws Special Pamphlet).

The legislation eliminated the requirement that distribution cooperatives must not possess any generation of their own, and specified that they must be rural. See *id.*

10. 1978 FINANCIAL SUMMARY, *supra* note 9, at 6 n.20.

11. Forrester, *NW Energy Bill Criticized by Public Power Lobby*, Eugene Reg. Guard, Sept. 25, 1979, § A, at 8, col. 2; Rose, *Northwest Power Bill Generates Controversy*, Spokesman-Rev., Nov. 18, 1979, § h, at 1, col. 5.

12. Recent projections indicated that Bonneville would be unable to meet its preference customers' firm loads after 1983. Accordingly, on October 5, 1979, prior to enactment of Public Law 96-501, Bonneville published a "Proposed Policy and Formula to Guide Allocation of Firm Electric Energy and System Reserve Energy From the Federal Columbia River Power System and Opportunities for Public Review and written com-

of the BPA's role is essential.

This article addresses the impact of the Pacific Northwest Electric Power Planning and Conservation Act, focusing on two issues: (1) proposed administrative procedures, and (2) the BPA purchase authority. "Purchase authority" permits the BPA to purchase additional electric energy beyond the hydroelectric and thermal power it already markets. Purchase authority was at the heart of the debate over the regional power legislation. The administrative procedures the agency may adopt will establish the framework for many of the BPA's majority policy decision. Discussion of these issues necessarily involves an analysis of how the legislation will affect the BPA's actions.¹³

II. BPA ADMINISTRATIVE PROCEDURE: AN OVERVIEW

Purchase authority under the Act necessarily involves administrative law issues. Procedure may establish the framework for purchase and, if so, a purchase decision must adhere to procedure or risk the uncertainty, possible delay, and costs inherent in protracted litigation. Experience shows that the gamble in shortcutting the administrative process is not worthwhile.

Before Congress passed the Administrative Procedure Act (APA),¹⁴ administrative law principles had little applicability to the BPA. Congress had charted the BPA's course in the Bonneville Project Act of 1937.¹⁵ Congress granted the Administrator great discretion in an effort to make the bold Federal Columbia River Power System succeed.¹⁶ Power sales contracts and imaginative promotional efforts were necessary to dispose of excess electric power.¹⁷ Sound technological decisions were the basis on which the BPA would build the vast transmission grid.¹⁸ Congress' instruction to the BPA governing disposition of electric power from Corps of Engineers' reservoir projects was "to encourage the most widespread use thereof at the lowest possi-

ment." See 44 Fed. Reg. 57, 824 (1979).

13. This article is necessarily of limited scope. It does not discuss many important questions of law and policy, including the preference clause, rate-making, conservation initiatives, and environmental issues.

14. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 557 (1976)).

15. Pub. L. No. 75-329, 50 Stat. 731 (1937) (codified at 16 U.S.C. § 832 (1976)).

16. See note 44 *infra*.

17. See 16 U.S.C. § 832d(a) (1976).

18. *Id.* § 832a(b).

ble rates to consumers consistent with sound business principles."¹⁹ The region did not need additional power; it needed markets for its abundant supply. Administrative law played no part in the process.

Business was booming at the BPA when Congress passed the Administrative Procedure Act in 1946. Anyone suggesting that the whole effort slow down for a little informal rulemaking would have been branded a heretic, a lunatic, or both. The Administrative Procedure Act evolved from laws permitting review of traditionally independent regulatory agency actions. Such agencies, with legislative, adjudicative, and administrative functions, held the power to disturb the rights of those subject to regulation. The APA was less applicable to the executive departments, especially those according "privileges."²⁰ The BPA was not even included among the major subagencies listed in a contemporaneous study of the applicability of the APA to the Department of the Interior.²¹

Although the BPA was clearly a "public agency" within the APA definition,²² its actions fell within the "public property . . . [and] . . . contracts" exceptions to informal rulemaking.²³ These exceptions relieved the BPA of the obligation to adopt rules pursuant to the notice and comment provisions.²⁴ The public property exemption is broadly interpreted and is viewed as applying to hydroelectric power disposal.²⁵ Moreover, the BPA sells the power by contract, thereby gaining an alternate exemption.²⁶ No one questioned whether these provisions applied to the BPA. In addition, aside from rate schedules,²⁷ most of the BPA's state-

19. See *id.* §§ 825s, 838g; 16 U.S.C.A. § 839f(b) (West 1980 Laws Special Pamphlet).

20. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.3 (2d ed. 1978); B. SCHWARTZ, ADMINISTRATIVE LAW 170 (1976). Schwartz discusses the blurring of the distinction between rights and privileges, *id.* at 221-24, and the import of *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). B. SCHWARTZ, *supra*, at 223.

21. Wheatley, *A Study of Administrative Procedures, the Department of the Interior*, 43 Geo. L.J. 166 (1955).

22. "[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . ." 5 U.S.C. § 551(1) (1976).

23. *Id.* § 553(a)(2).

24. *Id.* § 553(b), (c).

25. See Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 577 (1970).

26. See 16 U.S.C. § 832d(a) (1976). The Ninth Circuit reaffirmed the public contract exception's vitality. *Rainbow Valley Citrus Corp. v. Fed. Crop Ins. Corp.*, 506 F.2d 467 (9th Cir. 1974).

27. See 16 U.S.C. § 832f (1976); 16 U.S.C.A. § 839e(i) (West 1980 Laws Special

ments of "general or particular applicability and future effect"²⁸ fall within the interpretive rules exception.²⁹ Although the BPA makes countless discretionary decisions, they are not adjudicatory in nature, but informal decisions other than rulemaking.³⁰ Until recently the APA has had little impact on the BPA.

However, since the creation of the Department of Energy (DOE) in 1977,³¹ some changes have come to the BPA. The Department of Energy Organization Act transferred the BPA from the Department of the Interior to the Department of Energy, a move that was made with some trepidation within the BPA. Forty years of working relationships and bureaucratic understandings regarding the regional nature and independent status of the BPA went by the boards. Although the DOE statute³² and its legislative history³³ clearly called for continuing the

Pamphlet).

28. 5 U.S.C. § 551(4) (1976).

29. *Id.* § 553(b)(3)(A).

30. Actions that are neither rulemaking nor adjudicatory are now coming under judicial scrutiny. Although the Supreme Court suggested that a reviewing court might take evidence on issues of fact, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1975), the Court later indicated that courts should confine review to determining that the official's statement of reasons is not so irrational as to be arbitrary and capricious. *Vt. Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-45 (1978); *Dunlop v. Bachowski*, 421 U.S. 560, 572-73 (1975).

31. 42 U.S.C. § 7131 (Supp. III 1979).

32. "[T]he Bonneville Power Administration . . . shall be preserved as [a] separate and distinct organizational entit[y] within the Department." *Id.* § 7152(a)(2).

33. See SENATE COMM. ON GOVERNMENTAL AFFAIRS, DEPARTMENT OF ENERGY ORGANIZATION ACT, S. REP. NO. 164, 95th Cong., 2d Sess. 1-125, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 854-977. The report stated: "The transfer of the functions of BPA from the Department of the Interior to the Department of Energy is not intended to diminish in any way the authority or flexibility which is a requisite to the efficient management of a utility business." *Id.* at 30, [1977] U.S. CODE CONG. & AD. NEWS at 884.

As recently as October 18, 1974, Congress again evidenced the need for Bonneville to be operated as an independent bureau, free from the constraints normally associated with a governmental function, by enacting the Federal Columbia River Transmission System Act, 16 U.S.C. § 838 (1980). One purpose of this act was to enable Bonneville to handle its fiscal affairs in a businesslike manner, subject only to the constraints of the Government Corporation Control Act, 31 *id.* § 841 (1976). It is the intent of the Senate Governmental Affairs Committee that these relationships not be disturbed by this act. As the responsibilities of Bonneville have grown over the years, the organizational structure has been tailored to meet those responsibilities. The Administrator must continue to have the flexibility to manage the organization in order to cope with future expression and directions in the public interest. The independent bureau status of Bonneville within the Department of Energy will preserve this flexibility. SENATE COMM. ON GOVERNMENTAL AFFAIRS, *supra*, at 4, [1977] U.S. CODE CONG. & AD. NEWS at 858. See BONNEVILLE POWER ADMINISTRATION, THE LEGAL AUTHORITY OF THE BONNEVILLE POWER ADMINISTRATION: A SEPARATE AND DISTINCT ORGANIZATIONAL ENTITY OF THE DEPARTMENT OF ENERGY (n.d.) (copy on file with BPA, Portland, Oregon).

status quo, the agency still must find its home in the DOE and convince its DOE parent that Congress really meant what it said, that the BPA "should be preserved as a separate and distinct entity."³⁴

Almost overlooked because of the more practical concerns about the BPA's transfer to the DOE was the fact that Congress significantly changed certain administrative procedures under which the BPA must do business. The BPA's actions classifiable as substantive rules were made subject not only to the APA,³⁵ but also to broader notice³⁶ and comment requirements³⁷ required by the DOE Act. The "public property . . . or contracts" exceptions are not available.³⁸ In one fell swoop, Congress determined that in the area of substantive rulemaking, the BPA's free rein was over. The new requirements do not affect the Administrator's authority with respect to interpretative rules, which still require only publication in the Federal Register

The Pacific Northwest Electric Power Planning and Conservation Act also seeks to clarify further the role of the BPA to the Department of Energy and reaffirms the "separate and distinct" entity status BPA is accorded within the Department of Energy:

The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), Section 302 (a)(2) and (3) of the Department of Energy Organization Act . . . the Administrator shall take such steps as are necessary to assure the timely implementation of this Act in a sound and businesslike manner. Nothing in this Act shall be construed by the Secretary, the Administrator, or any other official of the Department of Energy to modify, alter, or otherwise affect the requirements and directives expressed by the Congress in Section 302(a)(2) and (3) of the Department of Energy Organization Act or the operations of such officials as they existed prior to enactment of this Act.

16 U.S.C.A. § 839f(b) (West 1980 Laws Special Pamphlet).

34. See 42 U.S.C. § 7152(a)(2) (1980).

35. "Rule" is a defined term in the Administrative Procedure Act (APA). 5 *id.* § 551(4) (1976). Substantive rule is an agency determination which affects individual rights and has the effect of law. In order to achieve this effect, the agency must have and use legislative authority granted to it by Congress. See generally 1 K. DAVIS, *supra* note 20, at ch. 6. Substantive rules are promulgated under the procedures provided by the APA, which expressly exempt interpretative rules "[e]xcept when notice or hearing is required by statute" 5 U.S.C. § 553(b)(3) (1976).

36. In addition to the Federal Register notice requirement of the APA, the Department of Energy Act requires that the notice state the research, analysis, and other available information in support of the need for, and the probable effect of, any such proposed rule. 42 U.S.C. § 7191(b)(1) (Supp. III 1979). Additional notice may be made by "[o]ther effective means of publicity . . . as may be reasonably calculated to notify concerned or affected persons of the nature and probable effect of any proposed rule" *Id.*

37. *Id.* § 7191(b)(1)-(2).

38. *Id.* § 7191(b)(3).

to become effective.³⁹

Independently, the BPA staff, after reviewing the United States District Court decision in *City of Santa Clara v. Kleepe*,⁴⁰ concluded that the BPA needed clearer procedures to govern many of its power marketing policy decisions. The BPA conformed these procedures to what it believed was the law of the case of *Santa Clara*, and published the procedures one day before Congress passed the Department of Energy Organization Act.⁴¹ It has since amended these procedures three times. In the wake of the Regional Act's directive to offer greater opportunity for public involvement in the formulation of major regional power policies,⁴² the BPA has revised its procedures to more accurately follow the Act's requirements in the public involvement area.⁴³ The scope of activities covered by the procedure is broadened from major power marketing formulation to development of major regional power policies. The procedure also recognizes that public meetings and other activities may be appropriate. The balance of this article suggests how the administrative law features of the new law might affect purchase authority.

III. PURCHASE AUTHORITY

A. Background

To understand the BPA purchase authority issue and to appreciate what all the Regional Act fighting was about, it is first necessary to understand that Congress created the BPA

39. APA procedures require only the publication of interpretative rules in the Federal Register. They become effective immediately upon publication and no notice or comment period is required. 5 *id.* § 552(a)(1)(D) (1976). The Department of Energy requirements do not apply to interpretative rules. 42 *id.* § 7191(a)(1) (Supp. III 1979). See also *Energy Reserves Group v. Dep't of Energy*, 589 F.2d 1082 (Emer. Ct. App. 1978); *Pennzoil v. Dep't of Energy*, 480 F. Supp. 1126, 1136-37 (D. Del. 1979).

40. 418 F. Supp. 1243 (N.D. Cal. 1976), *rev'd sub nom.* *Santa Clara v. Andrus*, 572 F.2d 660, (9th Cir. 1978), *cert. denied*, 439 U.S. 859. The district court held that the Secretary of Interior had violated the APA, by failing to allocate Central Valley Project power according to rulemaking procedures. The court rejected the argument that the rulemaking procedures of section 553 applied, relying on the public property exception for hydroelectric power. The court concluded, however, that section 552(a)(1) did require publication of procedures. The Court of Appeals for the Ninth Circuit concluded that even the publication required by section 552 was unnecessary.

41. See 42 Fed. Reg. 39,277 (1977). The final procedures are set out in 42 Fed. Reg. 62,950 (1977).

42. 16 U.S.C.A. §§ 839(3), 839b(g) (West 1980 Laws Special Pamphlet).

43. See 46 Fed. Reg. 26, 368-70 (1981).

almost as an afterthought to assure that there would be an agency to dispose of surplus electric power generated at facilities it had authorized as navigation and flood control projects.⁴⁴ Congress hotly debated⁴⁵ the New Deal social philosophy, that the federal government should take the lead in bringing electricity to the Pacific Northwest's rural areas⁴⁶ and provide a public standard against which to measure private performance.⁴⁷ The

44. See *Columbia River (Bonneville Dam): Hearings on H.R. 7642 Before the House Comm. on Rivers and Harbors, 75th Cong., 1st Sess. 1-513 (1937)* [hereinafter cited as *1937 Hearings*]. Major General E.M. Markham, Chief of Army Engineers, stated in those hearings:

I think there is a comparatively necessitous situation having to do with the very great desirability that legislation should be passed as speedily as may be, so that the valuable produce of Bonneville, which should be available not later than December, should be put on the market, with a recovery to the Government, or partial recovery of the government's investment. Physically it stands in that fashion. We will have finished the power plants and locks sometime in December. We have had substantial inquiries upon the projected industrial installations as to the rates and the conditions under which Bonneville power might be had for industrial expansion in the territory which might result, and to none of them can we make response until legislation has been consummated.

Id. at 6.

The navigation issue is expressly dealt with by statute, 16 U.S.C. § 832 (1976): "The electric energy thus generated and not required for the operation of the dam and locks . . . and the navigation facilities . . . shall be delivered to the administrator, for disposition as provided in this chapter." For reference to flow control, see note 48 *infra*.

45. Some of the fiercest protagonists of the Pacific Northwest Electric Power Planning and Conservation Act were Oregon Congressman Pierce, Oregon Governor Charles Martin, and Hamilton Corbett, President of the Portland, Oregon Chamber of Commerce. While inveighing that he did not plead "for the power interests," the Governor maintained that "we have a very heavy consumption [of electricity] per capita . . . We have all of our people filled up with electricity now; they are just choked with it." *1937 Hearings, supra* note 44, at 65. The Governor wanted a bill with industry favored by lower rates at the dam site. He viewed the combination of sea access to Bonneville and cheap power as ideal for fostering industrial growth. *Id.* at 68.

Secretary Corbett did not believe the Federal Government should be involved in distributing power. The distribution facilities "already in existence of the private companies are adequate to handle it." *Id.* at 106.

46. See, e.g., 81 CONG. REC. 4442 (1937). Representative Pierce stated:

In Oregon 70 percent of the farms are not as yet served with electricity. From these figures it must be realized that there is a large potential market for Bonneville power for rural uses . . . This rural current will have to be included in Bonneville capacity. Organizations of rural districts in Oregon have been impeded by utility tactics.

Id.

47. Congressman Pierce described the "yardstick principle" and its rural benefits: In September 1932 Candidate Roosevelt paid a visit to Portland, and I had the privilege of presenting him to the people at an inspiring meeting. He said, "The next great hydroelectric development in the United States must be on the Columbia River", [sic] and added that this should serve as a yardstick for electrical rates to be charged by private companies in the Pacific Northwest, as

BPA's initial mandate — to sell power, stimulate economic growth and promote public power — was apparent but downplayed as a matter of law.⁴⁸

T.V.A. [Tennessee Valley Authority] should be the yardstick in the Southeast. He also mentioned Boulder Dam and the St. Lawrence in the same connection. Now, from the very beginning, the emphasis has been laid by the President on the "yardstick", [sic] and I have not yet heard a word in favor of it in the testimony before the committee. If we abandon the yardstick idea, we depart from the President's basic plan. The President's visit and his promise moved toward making an actuality of the great dream of harnessing the Columbia River for the benefit of all the people. When Bonneville was dedicated in 1934 it was consecrated to the "more abundant life." It brought to our citizens the hope, through a supply of electricity at low rates, of relief from drudgery in the home, and on the farm, and expectation of filling the workmen's dinner pail [sic] through this opportunity for labor in the industries to be established.

The words "rural electrification" have proven a great stimulus which has been reflected in legislation for people's power districts. The program has lagged in Oregon, and we must now energize it by a helpful Bonneville bill. Oregon is now fourteenth among States in the use of rural electricity.

The President wanted the yardstick for the measurement of electric rates. It is of paramount importance that we preserve the yardstick idea. My purpose is to fight for the principles enunciated in the President's Portland speech and repeated in his messages.

What does Bonneville power mean? If properly handled, Bonneville will demonstrate to the Nation the difference in costs between generation, transmission, and distribution. Cheap yardstick current will encourage further use of electricity and compensate the Columbia River States for their lack of oil, coal, and natural gas. It will be instrumental in removing the economic disadvantage now existing because of the lack of these basic materials.

Id. at 4439.

48. The legal theory supporting construction of the Bonneville Project and many similar federal power dams rested initially on the federal power to regulate commerce and navigation. See 16 U.S.C. § 832 (1976). The following exchange before the House Committee on Rivers and Harbors shows, however, just how tongue-in-cheek Congress treated this legal fiction. The dialogue included references to the Boulder Canyon Project because the committee was considering the two projects simultaneously.

Mr. Robinson. [I]t seems to be a matter of common sense and understanding that in the case of the Tennessee Valley Authority and Bonneville that very substantial portions of the cost incurred for navigation and flood control and other purposes will be written off while so far as the Boulder Canyon project is concerned there is no writing off of anything, even as a flood-control project. The Chairman. Have any of them been written off yet? Mr. Robinson. Not in the sense of their being a final determination of what they should be. . . . Mr. Culkin (interposing). As a matter of fact, navigation is and will remain a sort of historic fiction, in connection with Boulder Dam, will it not?

. . . .

Mr. Robinson. The Supreme Court has rested its decision in part on the theory of navigation.

Mr. Culkin. You think that decision covers a multitude of sins under the term "navigation?"

Mr. Robinson. The purpose of navigation was one of the things recognized by the Supreme Court. In mentioning navigation—

Consistent with the BPA's original property disposal role, Congress denied the BPA authority to own or control directly the projects from which it markets power.⁴⁹ The Bonneville Project fails to provide the BPA Administrator with express authority to make long-term purchases of new resources.⁵⁰ Congress did not charge the BPA with a public utility responsibility, that is, the legal obligation to assure that the lights go on when needed — or to explain why not. Rather, the BPA acted as a jobber, wholesaling electric energy at a price just high enough to recover the costs of production and transmission.⁵¹ In these ways the BPA, and the other Federal Power Marketing Agencies⁵² until passage of the Regional Act, fundamentally differed from the Tennessee Valley Authority (TVA). The TVA is a government corporation.⁵³ Until recently only utility lawyers and power company executives considered these distinctions between the TVA and the BPA important. This was particularly true of the

Mr. Culkin (interposing). You need not go into that; I am familiar with it. I do not mean the presence of a two-oared rowboat or a Government launch. I am talking about tonnage.

Mr. Robinson. I understand that.

Mr. Culkin. There will never be any tonnage.

Mr. Robinson. No. There may be some small pleasure-boat navigation, but nothing beyond that.

1937 Hearings, *supra* note 44, at 381.

49. The Bonneville Power Administration was, until passage of the Regional Power Act, a property disposal unit of the United States Government. Congress established the Bonneville Power Administration to market the benefits of what is described as navigation projects. Bonneville does own the projects, which the Corp of Engineers and the Water and Power Resources Services (formerly the Bureau of Reclamation) built and manage. REIS, *supra* note 7, at app. A, at I-18.

50. See text accompanying notes 58-94 *infra*.

51. For financial purposes, the Government treats Bonneville as a Government corporation under the Government Corporation Control Act. 16 U.S.C. § 838i(c) (1976); 31 *id.* § 841. The statute fixes Bonneville rates at a level sufficient to recover cost of production and transmission, including amortization of investment. 16 *id.* § 832 (1976); *id.* §§ 838g, 838h (1976 & Supp. III 1979); 16 U.S.C.A. § 839e(a)(1) (West 1980 Laws Special Pamphlet).

52. Bonneville is not the only federal agency which markets power. The others are the Alaskan Power Administration, the Southwestern and Southeastern Power Administrations, and the Western Area Power Administration. All are agencies of the Department of Energy. 42 U.S.C. § 7152 (Supp. III 1979). Only Bonneville, however, has independent statutory authority.

53. The Tennessee Valley Authority (TVA) is a wholly owned government corporation administered by a board of directors rather than a single administrator. 16 *id.* §§ 831-831dd (1976 & Supp. III 1979). TVA constructs and operates its own generating facilities, *id.* § 831h-1 (1976), whereas Bonneville, prior to the passage of the Regional Act, merely marketed power from projects that other agencies constructed. The other power marketing agencies continue to play only this latter role.

BPA's inability to acquire resources on a long-term basis. What practical difference did it make when there was more electric power available than the BPA could ever sell?⁵⁴ In a sense, the BPA was viewed as a bottomless well from which electric power would be forever extracted. How important is a new well when you are absolutely sure that the old well will never run dry?

Since the mid-1960's, however, the pump drawing water from the BPA well has been sucking mud,⁵⁵ and more recently air.⁵⁶ The essence of the fight, over purchase authority ended by the Regional Act, was whether to drill the BPA well a little deeper, whether the utilities that retail BPA power should all drill their own wells, or whether the Northwest should just get along with what water the well currently produces and drink a lot less.⁵⁷ Different interest groups contended the BPA should play different roles in the region's power future. With the region facing a significant long-term electric energy shortage, the debate revolved around how best to assure an adequate electric supply. Should the BPA be a catalyst for conservation and renewable resources? A promoter of thermal development? Or a bureaucracy that prefers the former but will take what is necessary of the latter to get the job done? Or should it maintain the status quo and let others purchase and supply the region's needs? Should the BPA take an expanded leadership role in the utility community, maintain its present position, or become a follower? The visions of electric power planners and utility executives were on trial in the 96th Congress and the decisions of that Congress have rewritten our electric power future.

54. The debate on the Bonneville Project Act is replete with statements similar to one made by W.D.B. Dodson a representative of the Portland, Oregon Chamber of Commerce: "You have the Columbia River, adjoining it, so much power that you cannot even begin to absorb it." *1937 Hearings, supra* note 44, at 311. See note 45 *supra*.

55. Bonneville has occasionally been unable to provide sufficient power to satisfy demand. Several times during the 1970s, Bonneville interrupted power to direct-service industrial customers (DSI's) in order to serve other loads.

56. In 1976, Bonneville notified its preference customers that it would be unable to meet their firm power requirements after July 1, 1983. This "Notice of Insufficiency" was statutorily withdrawn with the passage of the Regional Act. Letter from Bonneville Power Administrator to Richard H. Windsor, Acting Manager, Ferry County Public Utility District (undated) (on file at University of Puget Sound Law Review).

57. Some commentators have suggested that Pacific Northwest consumers are the nation's least efficient electric power users. The combination of abundant hydropower and very low prices has produced consumers which a Wall Street Journal article called "energy hogs." Blundell, *Electricity Hogs, Darker Days Loom for Electricity Hogs of Pacific Northwest*, Wall St. J., Jan. 16, 1980, at 1, col. 6.

B. BPA Purchase Authority Prior to Adoption of the Regional Act

1. Express Purchase Authority

The BPA's express purchase authority before passage of the Regional Act was short-term only.⁵⁸ Congress granted this short-term authority to meet contract obligations in 1974 when the possibility the BPA might exhaust its supply became more than an energy planner's nightmare. The Federal Columbia Transmission System Act permits the BPA Administrator to spend from the Bonneville Fund⁵⁹ without further appropriation or fiscal year limitation "for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law" ⁶⁰ According to appropriations act directives, the BPA may spend such funds as it deems necessary for the "purchase of electric power (including the entitlement of electric plant capability) (i) on a short-term basis to meet temporary deficiencies in electric power which the Administration is obligated by contract to supply" ⁶¹

Congress was silent as to the meaning of "short-term basis," "temporary deficiencies," and "obligated by contract to supply." The legislative history does reflect, however, a clear congressional concern that the region was running out of electric power and steps should be taken to remedy the situation.⁶² The short-

58. See 16 U.S.C. § 838i(b)(6)(i) (West 1980 Laws Special Pamphlet). Bonneville, however, has long-term implied purchase authority which is discussed at length in the following legal opinions: (1) Opinion of the Solicitor of the Department of Interior, Authority of the Bonneville Power Administrator to Acquire Power Output from Non-Federal Plants in the Hydro-Thermal Power Program, Sept. 21, 1970 (M-36812); (2) Opinion of the Solicitor of the Department of Interior, Purchase of Power for Resale by the Bonneville Power Administration, Dec. 18, 1968 (M-36769); (3) Opinion of the Regional Solicitor, Purchase of Energy from the Hanford Reactor, Feb. 19, 1962. (Opinions on file at University of Puget Sound Law Review).

59. The Transmission Act created the Bonneville Power Administration Fund within the United States Treasury. The fund consists of (1) all receipts, collections, and recoveries of the Administrator in cash; (2) all proceeds from bond sales; and (3) any appropriations Congress makes for the fund. See Pacific Northwest Federal Transmission System Act of 1974, 16 U.S.C. § 838(i)(a) (1976).

60. *Id.* § 838i(b).

61. *Id.* § 838i(b)(6). The Regional Act provides for the continuous use of the short term purchase authority. 16 U.S.C.A § 839d(a)(2) (West 1980 Laws Special Pamphlet).

62. *Federal Columbia River Transmission Systems Act: Hearings on H.R. 14168 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 72 (1974) (statement of Gordon C. Culp, Pacific Northwest Utilities Conference Committee).

term purchase provision was a step in that direction and many thought it would be sufficient. Some, however, disagreed. For example, in 1974, former BPA Administrator Henry R. Richmond strongly argued the BPA would need more comprehensive purchase authority.⁶³

2. *Implied Purchase Authority*

The BPA has also had implied purchase power authority which it has used under carefully defined circumstances for both

63. Regarding the power purchase provisions of the Transmission Systems Act, Mr. Richmond stated:

[I] regard this proposal as only a small and timid step in the right direction as it may affect the region's short and long term power supply problems.

The region needs something more than a new method to finance the capital and operation-maintenance costs of Bonneville Power Administration. The minimum requirement . . . is legislation authorizing BPA to purchase steam power in regular increments in future years so that it may continue to serve its preference and industrial customer loads as they continue to increase.

Absent such legislation BPA will not be able to renew its industrial customer [*sic*] contracts as they expire, with the preference customers exercising rights to these blocks of power as they become available.

In these circumstances, it would appear that the industrial customers of BPA will have to move out of the Northwest, perhaps out of the U.S.

In the meantime the private companies will be forced to build high cost new generation facilities to serve their loads and, assuming the State regulatory agencies grant rate increases to the Companies adequate to finance their construction programs, the rate disparities between the public systems may become untenable. Oregon will become a high power cost state while Washington costs will remain relatively low. This is because Washington is a predominantly public power state and Oregon is vice versa.

It is ironic that, while in the early days of federal power in the Northwest public systems were given preference to federal power to permit them to get into business, it might be argued today that [*sic*] it would not be appropriate to give the private companies preference or at least parity treatment in the interest of rate equity among all the consumers of the region.

What is needed, I feel, is some kind of regional entity—public, private, federal what have you—with an overall responsibility and direction to plan and build major generation and transmission facilities as needed to meet the future loads of the region. Sales would be made on the same terms and conditions to all regional wholesale power purchasers. For the purpose of ratemaking the higher cost new plants would be blended with the low cost plants now in service. New facilities would be financed on the basis of power sales contracts.

Under this approach the Northwest would have, I believe, power at the lowest costs and the most environmentally acceptable power system attainable.

Bonneville Power Administration Financing Act: Hearings on S. 3362 Before the Subcomm. on Water and Power Resources of the Senate Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 290-91 (1974) (letter from Henry R. Richmond to Mark O. Hatfield).

short-term⁶⁴ and long-term purchases.⁶⁵ Implied purchase authority is much broader in scope than express purchase authority. Consequently, until passage of the Regional Act, it served as the legal underpinning for much of the BPA's expanding conservation program.⁶⁶ The BPA still contends this authority is unlimited when needed to firm up⁶⁷ and maximize the region's efficient use of hydro resources.⁶⁸

Extensive legal theories support the purchase of additional

64. See note 58 *supra* and note 65 *infra*.

65. In a congressional hearing the BPA legal advisor Kenneth Kaseberg, described this authority when responding to a question concerning BPA's legal authority to participate in the Hydro-Thermal Power Program (HTPP), pursuant to which BPA made the WPPSS and Trojan purchases.

Mr. Kaseberg: The authority for Bonneville to acquire thermal power is implied from other provisions of the Federal power marketing laws. There is no express authority authorizing these purchases to which you can point your finger and say Congress expressly said you could do this. These net-billing agreements are part of the security behind the bonds that the public agencies will issue to supply the funds with which to build these plants. Since these bond issues involve such substantial amounts of money, the bond counsel and the underwriting bankers have requested that Congress give express recognition to this existing implied authority to acquire the power. This goes back to the question you asked earlier, Mr. Chairman.

Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Bill, 1971: Hearings on H.R. 18127 Before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 2d Sess. 867-68 (1970). Bonneville is treating its conservation "weatherization" program as a short-term power purchase. The BPA's Fiscal Year 1981 budget includes \$25,000,000 for short-term firm purchases. It makes short-term resource acquisitions on an "as available and if needed" basis. See REIS, *supra* note 7, at app. A, at I-32.

Long-term Bonneville power purchases utilizing implied authority and approved by Congress include the net-billing purchases of WPPSS Plants Nos. 1, 2, and 3 and the Trojan Plant. See note 8 *supra*.

66. See note 8 *supra*. See also Memorandum from BPA General Counsel Robert E. Ratcliffe (March 2, 1979) (analyzing BPA's "Need for Express Congressional Approval Authorizing BPA to Implement Long-Range Conservation Programs") (Memorandum on file at University of Puget Sound Law Review).

67. The term "firm up" means to increase the degree of likelihood that power will be available. Supplies guarantee that firm power will be available at all times except during unexpected outages. See DEFINITIONS, *supra* note 5, at 29.

68. The power marketing statutes pursuant to which the Bonneville Power Administration conducted business contain no express authority to acquire the long-term output of any project, nuclear, conservation, or otherwise. While implied authority is used, it is limited to the purchase of energy that can demonstrably be shown to maximize the economical and efficient operation of the hydroprojects from which BPA markets power. The use of such authority to engage in conservation is therefore limited; conservation can be engaged in not for its own sake but only to the extent that it can be shown to augment the hydroresource or to meet temporary deficiencies in the Administrator's contractual obligation to deliver power. Memorandum from BPA General Counsel Robert E. Ratcliffe, *supra* note 66.

resources pursuant to implied authority. The most important of these directs the Administrator to "encourage the widest possible use of all electric energy that can be generated and marketed . . . provide reasonable outlets therefore, and to prevent the monopolization thereof by limited groups . . ." ⁶⁹ During a shortage, the Administrator may take any and all steps to stretch the existing supply to meet the demand.⁷⁰ The widespread use provision is read *in pari materia* with Section 2(f) of the Bonneville Project Act which provides that the Administrator "is authorized to enter into such contracts, agreements, and arrangements . . . and to make expenditures, upon such terms and relations and in such manner as he may deem necessary."⁷¹ Comparable authority is found in the Flood Control Act of 1944,⁷² under which Bonneville also markets power.⁷³ This language clearly indicates that Congress granted the Administrator broad authority to accomplish the purposes of the Bonneville

69. 16 U.S.C. § 832a(b) (1976).

70. The term "widest possible use" implies that the Administration must distribute power to as many people as possible. Of course, improvements in efficiency of use also stretch the available supply to serve more people.

71. "Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof . . . and to make such expenditures, upon such term and conditions and *in such manner as he may deem necessary.*" 16 U.S.C. § 832a(f) (1976) (emphasis added). Congress significantly amended this section eight years after it originally passed the Act to provide for what then Congressman Henry M. Jackson characterized as a need to "put the Bonneville administration on a more businesslike basis. I would like to say that in a broad sort of way it will help to get the administration away from red tape. It will make it possible [*sic*] for them to function in a more businesslike manner." *Bonneville Administration: Hearings on H.R. 2690 and H.R. 2693 Before the House Comm. on Rivers and Harbors, 79th Cong., 1st Sess. 1-2* (1945).

As if Section 832a(f) were not enough, Congress repeated the same delegation of authority with regard to power sales agreements: "[C]ontracts entered into with any utility engaged in the sale of electric energy to the general public shall contain such terms and conditions . . . as the Administration may deem necessary, desirable, or appropriate to effectuate the purposes of this Act . . ." 16 U.S.C. § 832b(a) (1976) (emphasis added). These sweeping provisions of general authority with respect to contracts are reaffirmed by the Regional Act provision which provides that "[a]ll power sales . . . shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 and, in particular, section 4 and 5 thereof." 16 U.S.C.A. § 839c(a) (West 1980 Laws Special Pamphlet) (emphasis added). Section 2(f) is also reaffirmed by section 9(a) of the new Act. *Id.* § 839f.

72. 33 U.S.C. §§ 701-709a (1976).

73. 16 U.S.C.A. § 826(s) (West 1980 Laws Special Pamphlet). As noted by the United States Attorney General, statutes concerning the disposition of federal power are to be construed *in pari materia* to determine Congressional intent. 41 Op. Att'y Gen. 236, 245 (1955). *United States v. ICC*, 18 F. Supp. 94, 98 (D.D.C. 1937).

Project Act.

The BPA's implied purchase authority has its roots in the rule that an agency has the implied powers necessary and incident to discharge its express legislative directives.⁷⁴ If the Administrator must stretch his resources in a period of shortage, and may enter any contracts, agreements, or arrangements that are deemed necessary to effectuate this purpose, then he may purchase power on a long-term basis if such purchase is necessary. By analogy, in *City of Santa Clara v. Andrus*,⁷⁵ the Ninth Circuit Court of Appeals in effect affirmed a broad reading of the Administrator's authority. In *Santa Clara*, plaintiff sued the Bureau of Reclamation alleging that the Secretary of Interior erred in refusing to supply the city with a nonwithdrawable electric power allocation from the Central Valley Project in California. The court stated with respect to interpreting broad and general authority that "clearly the 'most widespread use' standard is susceptible of widely divergent interpretations."⁷⁶ The court also quoted a previous decision, *Stickland v. Morton*,⁷⁷ construing a different statute: "The provisions of this statute breathe discretion at every pore."⁷⁸ The *Santa Clara* court also ruled that "the statute permits the exercise of the widest administrative discretion by the Secretary. It does not supply 'law to apply.'"⁷⁹

74. "The grant of an express power carries with it the authority to exercise all other activities necessary to carry it into effect, and this has been employed with great liberality in interpreting statutes granting administrative powers." C.D. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 65.03, at 164 (4th ed. 1974).

75. 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 869 (1978).

76. *Id.* at 668.

77. 519 F.2d 467 (9th Cir. 1975).

78. *Id.* at 469.

79. 572 F.2d 660, 668. The preference clause of the Reclamation Act of 1939 provides as follows:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: . . . *Provided further, that in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936.* Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the

With respect to the "most widespread use" standard, the Flood Control Act of 1944, forms one of the two linchpins of the BPA's implied purchase authority.⁸⁰ The *Santa Clara* court's conclusion respecting discretion in sales supports the corollary proposition that the BPA Administrator's implied purchase power to meet sales obligations is very broad.

Most recent debate on the purchase authority issue has centered on the BPA's authority to invest in conservation, which could be characterized as either a power purchase or a demand reduction.⁸¹ Although recent opinions do not fully agree on the scope of the Administrator's authority prior to enactment of the Regional Act,⁸² all agree that his discretion was great and none disputes the Comptroller General's conclusion regarding the legislative history of the Bonneville Act: that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of government business and to enable the Administrator to conduct the business of the project with the freedom similar to that exercised by corporations carrying on comparable activities.⁸³ In view of such broad authority, it appears that the scope of the activities contemplated under the Act and the appropriate means of accomplishing the same, are matters for the Administrator to determine.⁸⁴

The question is then raised as to why the BPA did not place a greater emphasis on the use of its implied authority? If the BPA already had purchase authority, albeit implied, what was

Secretary, it will not impair the efficiency of the project for irrigation purposes. 43 U.S.C. § 485h(c) (1976) (emphasis added).

80. For a general discussion of preference clauses see Comment, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 ENV'T L. 601 (1979).

81. Viewing conservation as demand reduction has complicated the forecasting of demand. Under this view, demand curves must be constantly updated to reflect less consumption than anticipated. But by treating conservation as a power resource, the demand curve will not change with consumption. Conservation supplies some of the power; other resources supply the rest. Viewing conservation as a power supply is merely an accounting technique which simplifies demand forecasting. The Regional Act resolved this debate and treats conservation as a resource. 16 U.S.C.A. § 839a(19) (West 1980 Laws Special Pamphlet).

82. Letter from United States Comptroller General to Rep. James Weaver (July 10, 1979); Opinion letter from Deputy Assistant Attorney General Larry Sims to the Office of Management and Budget (Oct. 12, 1979); Memorandum from BPA General Counsel Robert E. Ratcliffe, *supra* note 66 (Letters and memorandum on file at University of Puget Sound Law Review).

83. See Comptroller General Opinion of September 21, 1951, No. B-105397.

84. See note 71 *supra* and accompanying text.

all the fighting about and why did the BPA need a new, vastly more complex, Regional Act to accomplish that which it appears the BPA would have been able to do under the well worn and broadly discretionary Bonneville Project Act? The reasons were several and stemmed from the fact that the BPA's implied authority is limited in certain important ways.

First, it is important to reemphasize that the BPA could only use its implied purchase authority to firm up the existing hydrobase. The BPA could not bootstrap an implied authority to stretch existing resources into authority to add new resources wholly independent of the existing system. The BPA justified the Hydro-Thermal Power Program (HTPP),⁸⁵ under which it has acquired limited thermal resources, as an exercise of implied authority permitting the BPA to reshape the hydro resource and use it increasingly for peaking purposes.⁸⁶ Additional purchases permitting still more reliance on hydro as a peaking resource were theoretically possible, but unlikely to occur. The ability to use the system in this manner diminished as the region added thermal resources to serve base load.

Another inhibition to relying on implied purchase authority stemmed from a tax regulation. A public agency can no longer finance a power plant with tax exempt bonds if a federal agency has purchased more than twenty-five percent of the capability of the power plant.⁸⁷ The regulation grandfathers tax-exempt financing arrangements already initiated, including those HTPP plants for which the BPA has entered purchase agreements.⁸⁸ In terms of new commitments, however, the IRS regulation significantly deterred the BPA's additional exercise of its implied

85. BPA designed the Hydro-Thermal Power Program (HTPP) to integrate thermal power produced by non-federal entities with federal hydropower. The arrangement essentially sought to use thermal power for the baseload and hydro for peaking power. See generally REIS, *supra* note 7, at app. A, at II-7 to II-18.

86. See *Public Works For Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972: Hearings on H.R. 18127 Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 1st Sess. pt. 3 at 539-689 (1971). Former BPA Administrator, and now Under Secretary of the Interior, Don Hodel explained in an appendix to his opening statement that "there is no other area in the United States where a similar situation exists in regard to the availability of a large quantity of low-cost hydropeaking capacity. This permits a substantial enhancement in the value of present large federal investment multipurpose dams and powerplants through a relatively small investment in peaking capacity." *Id.* at 826. See note 5 *supra*.

87. See 26 C.F.R. § 1.103-7(b)(s)(a)(1) (1980).

88. See *id.* § 1.103-7(b)(2).

purchase authority.⁸⁹

A third limitation on the BPA's use of implied authority was that the BPA could not exercise its implied powers without congressional approval. Although Congress had expressly recognized the BPA's implied authority,⁹⁰ the BPA had, as a matter of administrative practice, sought congressional approval before exercising such authority in matters involving major acquisitions.⁹¹ In the HTPP case, Congress approved the BPA's exercise of implied purchase authority in the Public Appropriations Acts for 1970-71.⁹² Express congressional approval also eliminated ambiguities that could result from the BPA's reliance on

89. See Conference Proceedings for the Bonneville Regional Advisory Council for 1974 (March 5, 1974) (on file at Bonneville Power Administration). BPA Power Manager Bernard Goldhammer attributes the demise of net-billing to four factors: (1) The IRS revenue ruling; (2) unanticipated significant increase in costs; (3) lead time needed to plan and construct a large nuclear power unit; and (4) delays in bringing generating plants on line that were already planned.

Regarding the tax aspects of net-billing, Goldhammer noted that the revenue ruling raised considerable questions on financing:

Tax-exempt bonds are sold in a different market than taxable bonds. The tax-exempt bonds had experience with the public system bonds in the region and also with the bonds relating to net-billing. The taxable bonds market did not. Some purchasers in the taxable bond market when contacted said they probably would not be interested in purchasing net-billing as there were adequate bonds available with substantial equity behind them that were traditionally purchased [sic]. There was also concern that a greatly expanded regional utility financing in the taxable market might make it more difficult to finance the generating units that were needed if they all went into the same market for their money.

Id.

The growing percentage spread between net-billing bonds (WPPSS Nuclear Projects 1, 2, and 3) and non-net-billing projects (WPPSS Nuclear Projects 4 and 5) bears witness to Goldhammer's perception. Federal backing, therefore, can significantly reduce the cost of acquiring needed resources.

90. See note 8, *supra*.

91. BPA had not yet defined a major acquisition. Rather, the agency submitted all major expenditures to Congress as part of its annual budget pursuant to the Transmission Act. See *Energy and Water Development Appropriations for 1981: Hearings on 1981 Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 2d Sess. pt. 5, at 2552-2670 (1980) (testimony of former Assistant Secretary of Energy, Ruth Davis).

92. The 1970 Act approved BPA's execution of net-billing agreements to obtain generating capability from the Trojan nuclear plant. Public Works Appropriation for Water, Pollution Control, and Power Development and Atomic Energy Commission Act, 1970, Pub. L. No. 91-144, 83 Stat. 323 (1969). The 1971 Act specifically approved BPA's use of net-billing agreements to acquire power from nonfederal generating plants built under the Hydro-Thermal Power Program, Public Works Appropriation for Water, Pollution Control, and Power Development and Atomic Energy Commission Act, 1971, Pub. L. No. 91-439, 84 Stat. 890 (1970). See generally note 8 *supra*.

implied power. Further, bond counsel insisted on congressional approval where the BPA's agreements provided the financial backing for public financing.⁹³

In short, the Administrator exercised the implied purchase authority, particularly with respect to long-term purchases, cautiously and only after congressional assent. In 1980, with its passage of the Regional Act, Congress upgraded and expanded this implied authority to an express purchase authority. This will facilitate the BPA's acquisition of additional resources.⁹⁴ In the absence of this legislation, the BPA would have had to allocate firm energy resources insufficient to meet the projected shortage, in effect, allocating a power shortage.⁹⁵ Specific congressional approval of new resources would have been cumbersome and slow, and financing resources without guarantees would have been difficult and more costly. The BPA has never had express authority to construct new resources on its own initiative, and could not have extended even a broad implied purchase authority to such great lengths.

C. BPA Purchase Authority Under the Regional Act

This section of the article focuses on how the Regional Act reshuffles the power purchase card deck and what the rules are for the new game. Principal credit for sponsoring the game goes to Washington's Senator Henry M. Jackson, who then chaired the Senate's Energy and Natural Resources Committee. Jackson was the Senate bill's principal author. In the House, two committees had concurrent jurisdiction. The Interstate and Foreign Commerce Committee took the lead and reported an amended version of the Senate bill with a "do-pass" recommendation.⁹⁶ The bill was also before the House Interior and Insular Affairs Committee which also reported the bill.⁹⁷ After reconciliation of

93. See note 65 *supra*.

94. See note 77 *supra*.

95. BPA published the "Proposed Policy and Formula to Guide Allocation of Firm Electric Energy and System Reserve Energy From the Federal Columbia River Power System and Opportunities for Public Review and Written Comment" on Oct. 5, 1979. 44 Fed. Reg. 57,824 (1979).

96. The Interstate and Foreign Commerce Committee favorably reported S. 885 on May 15, 1980. H.R. REP. No. 976, 96th Cong., 2d Sess., Part 1, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 5989.

97. The Interior and Insular Affairs Committee favorably reported S. 885 on September 16, 1980. H.R. REP. No. 976, 96th Cong., 2d Sess., Part 2, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 6023.

the two House versions of the bill, the House Rules Committee reported the bill to the floor on September 23, 1980. The legislation finally passed the House on a suspense calendar vote on November 17, 1980, after extensive floor debate.

The Act provides for four types of BPA resource purchases some of which are not mutually exclusive: (1) major resources,⁹⁸ (2) minor resources,⁹⁹ (3) conservation measures,¹⁰⁰ and (4) billing credits which recognize the value of independent customer activities. Billing credits are a unique "purchase" because the BPA does not acquire the resource. Rather, it credits local customers for actions that reduce the load obligation the Act otherwise places on the BPA. Billing credits are available to those BPA customers with 1) conservation programs independently undertaken or continued after the effective date of the Act, or 2) those with cost-effective "renewable resources or multipurpose projects or other resources . . . not inconsistent with the plan or, in the absence of a plan, not inconsistent with the criteria" and considerations to be used in preparing a plan.¹⁰¹ Major resources, minor resources, and conservation activities and resources accorded billing credits must be (1) cost-effective, (2) consistent with the priority scheme, and (3) satisfy the regional plan or planning criteria.¹⁰²

The definition of cost-effectiveness is particularly important.¹⁰³ A resource is cost-effective if forecasters predict it will be reliable and available within the time the BPA needs it, and it serves to meet or reduce electric power demand "at an estimated incremental system cost no greater than" the least-cost similarly available and reliable alternative resource.¹⁰⁴ The Act favors

98. "Major resource" means a resource having a capability greater than 50 average megawatts, and, if acquired by the Administrator, is acquired for a period longer than five years. 16 U.S.C.A. § 839a(12) (West 1980 Laws Special Pamphlet). "Resource" means (1) electric power, including the actual or planned electric power capability of generating facilities, or (2) actual or planned load reduction resulting from direct application of a renewable energy resource, or from a conservation measure." *Id.* § 839a(19).

99. The Act does not contain the term "minor resource." The authors will use this term to indicate resources other than major resources.

100. Under the Act, the term "resources" includes conservation measures. 16 U.S.C.A. § 839a(19) (West 1980 Laws Special Pamphlet). For purposes of analysis, however, this article discusses conservation measures independently. The Act defines "conservation" as "any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution." *Id.* § 839a(3).

101. *Id.* § 839d(h)(1).

102. *See id.*

103. *See id.* § 839a(4)(A).

104. *Id.*

conservation and renewable resources over other acquisitions.¹⁰⁵ It gives conservation measures up to a ten percent edge in estimated incremental system cost over other resources.¹⁰⁶ Cost estimates are to include all direct system costs of the resource over its effective life, including quantifiable environmental costs and benefits directly attributable to that resource.¹⁰⁷

Interpretative rulemaking appears to be the appropriate way to delineate the priorities within which these judgments will be made. Given the nature of the definition, the cost-effectiveness standard is multifaceted, requiring intricate factual determinations and many value choices by the agency. However, because it is likely that the BPA will be required to choose among competing resources on the basis of the complex cost-effectiveness standards, conflicting claims may lead to challenge and possible judicial scrutiny.

1. *How to Purchase*

a. Purchase of Major Resources

The Pacific Northwest Electric Power Planning and Conservation Act requires the Regional Council¹⁰⁸ to adopt a regional energy plan and a program to protect fish and wildlife within the Columbia River Basin within two years of formation of the Council.¹⁰⁹ The plan is a broad policy document addressing the major issues involved in planning and developing resources, including conservation, and setting forth a program for the protection, mitigation and enhancement of fish and wildlife.¹¹⁰ The BPA can acquire major resources by following procedures which may vary according to (1) whether the Council had adopted a regional energy plan, and (2) whether the acquisition is consistent with the adopted plan.

105. See *id.* §§ 839a(4)(D), 839b(e)(1).

106. Any conservation measure may have an estimated incremental system cost of up to 110% of the least-cost alternative nonconservation resource. *Id.* § 839a(4)(D). A sunset clause on the conservation advantage provides that not later than October 1, 1987, or six years after the Council is established, whichever is later, the Council must analyze their costs and the Administrator may determine whether to continue the 10% edge. *Id.* § 839b(k).

107. *Id.* § 839a(4)(B).

108. *Id.* § 839b(a)(1).

109. *Id.* § 839b(d)(1).

110. *Id.* § 839b(e)(2), (h).

(i) Acquisition in Absence of the Plan

In acquiring major resources, as in all acquisition decisions, the Administrator must first take into account planned savings from all conservation measures implemented and renewables installed by residential and small commercial consumers.¹¹¹ He must also find that the proposed major resource acquisition is consistent with the bill's priority scheme and the considerations pertaining to environmental quality, compatibility with the existing regional power system, and with the protection, mitigation, and enhancement of fish and wildlife.¹¹² Second, the Administrator must determine that the major resource acquisition is necessary to meet his contractual obligations or to assist fish and wildlife.¹¹³ In so doing he must give notice of the proposed action to the Regional Council, his customers, and the state in which the major resource is to be acquired.¹¹⁴ On these issues he must receive testimony and evidence, and develop a record in support of the acquisition.¹¹⁵ Finally, he must determine that a reasonable share of the major resource "has been offered to each Pacific Northwest utility for ownership, participation, or other sponsorship"¹¹⁶

The Administrator's determinations are subject for sixty days to Council review. During this time the Council may determine that the proposed acquisition is inconsistent with the priorities of 839b(e)(1) and the criteria of 839b(e)(2).¹¹⁷ If the Council makes such a determination, the acquisition may still proceed but the administrative record will reflect the Council's negative view.¹¹⁸

The Administrator must also compile and file with appropriate congressional committees a record of his decision, together with a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act (NEPA).¹¹⁹ He must then publish notice of his acquisition

111. *Id.* § 839d(a)(2)(A).

112. *Id.* § 839d(c)(1)(D)(ii).

113. *Id.*

114. *Id.* § 839d(c)(1)(A).

115. *Id.* § 839d(c)(1)(D).

116. *Id.* § 839d(m).

117. *Id.* § 839d(c)(2).

118. *Id.* § 839d(c)(4).

119. *Id.* § 839d(c)(4)(A).

decision in the Federal Register,¹²⁰ and note it in the budget he submits pursuant to the Federal Columbia River Transmission System Act.¹²¹ The Administrator's decision is subject to judicial review¹²² if suit is commenced within ninety days.¹²³

(ii) Plan in Effect

After the Council adopts a regional plan, acquisition procedures are expected to take on a new dimension, even though the Administrator must give the same notice and conduct the same type of public hearing as required before implementation.¹²⁴ With a plan in effect, the Administrator has to find that the acquisition is either consistent or inconsistent with the plan.¹²⁵ The important distinction is that under the plan the Administrator would need to deal not only with the statute's abstract criteria, but with the very real personalities and philosophies of the council members and their appointing Governors. The Governors may be expected to influence in large measure both the type and site of the resources acquired. Moreover, the Council can express a contrary position to the Administrator's determination respecting consistency with the plan by a majority vote within sixty days¹²⁶ and may request the Administrator to make an acquisition decision consistent with the plan.¹²⁷ The Administrator must also determine that a reasonable share of the major resource has been offered to other utilities in the Pacific Northwest,¹²⁸ submit the administrative record and NEPA compliance procedures to appropriate congressional committees, and publish notice of his decision in the Federal Register.¹²⁹

(iii) Acquisitions Inconsistent with the Plan or the Planning Criteria of 839b(e)(1)(2)

The Act also recognizes that the Administrator may need to acquire a major resource that either he or the Council determine

120. *Id.* § 839d(c)(4)(B).

121. *Id.* § 839d(c)(4)(C).

122. *Id.* § 839f(e)(1)(C).

123. *Id.* § 839f(e)(5).

124. *Id.* § 839d(c)(1).

125. *Id.* § 839d(c)(1)(D)(i).

126. *Id.* § 839d(c)(2)(A).

127. *Id.* § 839b(j)(1).

128. *Id.* § 839d(m).

129. *Id.* § 839d(c)(4).

is inconsistent with the plan or planning criteria. In this event, the Administrator takes into account planned savings from all conservation measures implemented,¹³⁰ and determines that the resource is needed to meet his contractual obligations.¹³¹ Expenditure of funds for such an inconsistent resource would have to be specifically authorized by an Act of Congress.¹³²

b. Purchase of Minor Resources

In contrast to major resources, minor resource acquisitions are simple. When the Administrator acquires a minor resource, he will only have to determine that the resource is consistent with the bill's priority scheme and criteria, or an adopted plan,¹³³ and that the region needs the resource after accounting for planned conservation.¹³⁴ The Administrator can acquire a minor resource that does not meet the priority criteria if it is "an experimental, developmental, demonstration, or pilot project of a type with a potential for providing cost-effective service to the region."¹³⁵ Only in the latter instances will the Administrator need to note the proposed acquisition in his annual budget submittal to Congress pursuant to the Transmission System Act.¹³⁶ As in the case of major resources, the Council may request the Administrator to make an acquisition decision consistent with the plan.¹³⁷

c. Acquisition of Conservation Resources

The Act places the highest priority on the acquisition of conservation resources,¹³⁸ which it defines very broadly.¹³⁹ Because the Act establishes conservation as the priority means of meeting the region's anticipated firm electric energy shortfall, the procedures for implementing conservation measures are expected to be relatively streamlined. The Act provides that "[n]otwithstanding any acquisition of resources, . . . the

130. *Id.* § 839d(a)(2)(A).

131. *Id.*

132. *Id.* § 839d(c)(3)(B).

133. *Id.* § 839d(b)(1).

134. *Id.* § 839d(a)(2)(A).

135. *Id.* § 839d(d).

136. *Id.*

137. *Id.* § 839b(j)(1).

138. *Id.* § 839b(e)(1).

139. *Id.* § 839a(3).

Administrator shall not reduce its efforts to achieve conservation”¹⁴⁰

The Administrator must implement conservation measures that are consistent with the plan or priority scheme and the considerations of 839b(e)(2).¹⁴¹ Among the almost infinite array of conservation techniques, the Administrator can provide technical and financial assistance to encourage conservation measures, provide loans and grants for insulation or weatherization, increase system efficiency, and take action to effect waste energy recovery by direct application.¹⁴² The Act also requires the BPA to assist conservation by cooperating with retail customers and government authorities to encourage maximum cost-effective conservation,¹⁴³ and by helping implement conservation standards.¹⁴⁴ Therefore, counsel for the BPA’s retail customers and government authorities with electric energy responsibility within the BPA service area should advise their clients to move quickly with the BPA on regionwide conservation efforts. The Act also provides an opportunity for demonstration projects to determine the cost-effectiveness of conservation.¹⁴⁵ Indeed, the cost-effectiveness test itself is stacked in favor of the conservation measures.¹⁴⁶

The Act directs the Administrator to make maximum practicable use of his customers and other local entities in administering and carrying out conservation measures that require direct arrangement with retail consumers.¹⁴⁷ Congress not only granted the BPA authority but mandated it to undertake significant conservation actions. The fact that several of the area’s private utilities are already implementing regionwide insulation and weatherization programs, and that the BPA has experience with pilot weatherization programs facilitates early implementation of these provisions of the Act. The BPA’s implementation of conservation activities is subject to judicial review within

140. *Id.* § 839d(b)(5).

141. In acquiring conservation as a resource and, indeed, in acquiring all resources, the Administrator must demonstrate that the acquisition meets or reduces his otherwise existing firm load obligations. *See id.* § 839b(e)(2).

142. *See id.* § 839d(a)(1).

143. *Id.* § 839d(a)(1)(B).

144. *Id.* § 839d(a)(1)(C).

145. *Id.* § 839d(d).

146. *Id.* § 839a(4)(D).

147. *Id.* § 839d(e)(2).

ninety days of the execution of the contract or grant therefor.¹⁴⁸

2. *Billing Credits: An Alternative to Purchase*

The Act mandates that the Administrator grant billing credits upon the request of a customer for conservation activities independently undertaken and resources constructed or acquired by the customers, on behalf of a customer or by a political subdivision served by the customer.¹⁴⁹ The test of whether resources would qualify is whether they reduce the obligation of the Administrator to acquire equivalent resources.¹⁵⁰ Also qualifying for credits are retail rate structures voluntarily instituted by customers which "induce conservation or installation of consumer-owned renewable resources"¹⁵¹ Congress sought to provide "an economic incentive for the development of such resources taking into account the risks and benefits accruing to the entity to be credited and the Administrator's other customers."¹⁵² The amount of the credits to be granted in any case is to be set to reflect an array of measures set forth in the Act.¹⁵³ By these standards, by requiring that notice of at least major resources be published in the *Federal Register*,¹⁵⁴ and by providing that the cost of the credit be included in the annual budget submittal,¹⁵⁵ Congress sought to guarantee that the grant of such credits be deliberate and the need economically justifiable. The *Federal Register* notice must contain the methodology the Administrator will use in determining the amount of the proposed credit.¹⁵⁶

148. *Id.* § 839f(e)(5).

149. *Id.* § 839d(h)(1)(A), (B).

150. *Id.*

151. *Id.* § 839d(h)(5).

152. S. REP. No. 272, 96th Cong., 1st Sess. 30 (1979).

153. 16 U.S.C.A. § 839d(h)(2)-(4) (West 1980 Laws Special Pamphlet).

154. *Id.* § 839d(c)(1)(A), (h)(6)(A).

155. *Id.* § 839d(h)(6)(B).

156. *Id.* § 839d(h)(6)(A). The BPA published notice of its intent to formulate guidelines and methodology to compute billing credits. 46 Fed. Reg. 18,581 (1981). The BPA sought comments on issues including the timing of submittals for planning, evaluation and NEPA compliance; eligibility criteria; frequency and duration of billing credits; determination and verification of actual savings from eligible conservation activities; derivation of net costs of an eligible resource; program oversight; development of prototype contractual provisions; classification criteria for capacity, energy and reserves; BPA services for activities and resources; procedures to assure compatibility with the regional power system; determination of BPA's incremental cost; rate impact test methodology; definition of "multi-purpose projects uniquely suitable for development." *Id.* at 18,582. The BPA indicates that it plans to formulate and publish policy guidelines in the sum-

IV. JUDICIAL REVIEW OF RESOURCE DECISIONS

The bill's drafters originally conceived the judicial review provisions as an explicit enforcement mechanism effectively confining the BPA's discretion within statutory standards, procedural requirements, and the regional plan. As the Act was amended in the House of Representatives, Council review of agency action or Council request for agency action provides supplementary enforcement.¹⁵⁷

The Act provides for judicial review of the Administrator's section 839d acquisitions and for grants of billing credits.¹⁵⁸ The BPA is required to compile an administrative record for each of these decisions. The record is subject to a scope of review defined by the Administrative Procedure Act.¹⁵⁹ What this means to the BPA is that resource acquisitions must be supported by the record and must not be arbitrary and capricious.

mer of 1981 for hearing and comment pursuant to BPA's Procedure for Public Participation in Power Marketing Policy Formulation. 45 Fed. Reg. 73,531 (1980).

157. 16 U.S.C.A. § 839b(i), (j) (West 1980 Laws Special Pamphlet).

158. *Id.* § 839f(e)(i)(c), (f). Other final actions subject to judicial review are Council adoptions and determinations; sales, exchanges and purchases of electric power; implementation of conservation measures; execution of section 839d(f) contracts; final role determinations; and any section 839e(m)(2) rule prescribed by the administrator. *Id.* § 839f(e)(1)(A), (B), (D), (E), (G), (H).

159. 5 U.S.C. § 706 (1976). The Administrative Procedure Act provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.

However, a statutory caveat makes it clear that any hearing procedure otherwise required or voluntarily provided will be of an informal rulemaking nature rather than adjudicative.¹⁶⁰ Minor resource acquisition decisions are not subject to any hearing requirement, although the BPA could elect to hold public meetings on such decisions. In this event the record of such meetings could become a part of the record.

Congress also incorporated a ninety day statute of limitations for appealing resources decisions, conservation measures, rates, and many other actions.¹⁶¹ The trigger on the ninety-day provision varies according to the activities undertaken. In the case of a major resource acquisition the clock begins to run on the date of publication in the *Federal Register*. Conservation and minor resources are deemed acquired upon execution of the contract. Conservation measures are deemed to occur on award of a grant.¹⁶² Parties failing to file suit within the prescribed ninety days are barred from pressing their case.¹⁶³

Where an issue is joined, the suit will be filed "in the U.S. Court of Appeals for the region."¹⁶⁴ The Ninth Circuit can be expected to hear these matters on the record, although remand to the agency to supplement the record is always possible if the court determines the record to be inadequate. The manner in which these judicial review provisions will impact the acquisition process merits discussion. The requisites of the Act, by which resource decisions will be tested in judicial review, will necessarily delineate the agency's range of choice and the factual basis required for action. Where the Administrator must find facts, the BPA may need to establish procedures to determine such facts if the law does not otherwise provide them. In many cases the BPA may also have to choose among competing values, and the agency needs to predict its breadth of discretion because that is the ultimate decision the reviewing court will make. Buzz

160. 16 U.S.C.A. § 839f(e)(2) (West 1980 Laws Special Pamphlet) provides: "Nothing in this section shall be construed to require a hearing pursuant to section 554, 556, or 557 of title 5 of the United States Code." This is so even though the statute requires "substantial evidence in the rulemaking record—considered as a whole" to support a final determination regarding rates. *Id.* As Professor Davis points out, the "anomalous combination" of informal rulemaking with the substantial evidence standard does not automatically trigger a trial proceeding. See 2 K. DAVIS, *supra* note 20, at § 6.6.

161. 16 U.S.C.A. § 839f(e)(5) (West 1980 Laws Special Pamphlet).

162. *Id.* § 839f(e)(4).

163. *Id.* § 839f(e)(5).

164. *Id.*

word epithets cribbed from the scope of review section— “arbitrary,” “capricious,” and “abuse of discretion”¹⁶⁵ —are not sufficient to predict precisely the agency’s decision making latitude, even though the court would review only the agency’s record of reasons for its actions.¹⁶⁶

The Act may be searched for the reviewable elements in a resource acquisition decision. The court may be called upon to answer a dozen or more questions: (1) Do the BPA’s contractual obligations require the acquisition?¹⁶⁷ (2) Would it assist in meeting fish and wildlife requirements?¹⁶⁸ (3) Has the BPA properly accounted for planned savings from conservation measures?¹⁶⁹ (4) If the resource is major, has the BPA determined that a reasonable share has been offered to each Pacific Northwest electric utility for ownership, participation or other sponsorship?¹⁷⁰ (5) If no plan is in effect, is acquisition of a minor resource consistent with the criteria of section 839b(e)(1) and the considerations of section 839b(e)(2)?¹⁷¹ (6) If the resource is minor and does not meet the bill’s priority criteria, is it “an experimental, developmental, demonstration or pilot project . . . with a potential for providing cost-effective service?”¹⁷² (7) Has the Administrator made maximum practicable use of conservation or renewable resources before acquiring other type resources?¹⁷³ (8) Does the acquisition decision require direct arrangements with consumers, and if so, has the BPA used its

165. 5 U.S.C. § 706(2)(A) (1976). Existing statutory and judicial formulations for reviewing the exercise of discretion are among the most unsatisfactory in the area of judicial review of agency action. Words such as arbitrary, capricious, or abuse of discretion state conclusions, not premises from which a conclusion may be derived. When a statute or line of precedents instructs a reviewing court to set aside action found to be arbitrary, capricious, or an abuse of discretion, it merely provides the terms in which the conclusion of invalidity may be pronounced. These terms do nothing to articulate the process of analysis by which the issue of invalidity is to be litigated and decided. Indeed, these conclusory epithets in statutes or case law appear to sanction review and reversal of governmental action on the basis of the judge’s reaction to the particular circumstances before him, without any need for premises more searching than the stigmatizing phrases themselves. See Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537.

166. 16 U.S.C.A. § 839f(e)(2) (West 1980 Laws Special Pamphlet).

167. *Id.* § 839d(a)(2)(A).

168. *Id.* § 839d(a)(2)(B).

169. *Id.* § 839d(a)(2)(A).

170. *Id.* § 839d(m).

171. *Id.* § 839d(b)(3).

172. *Id.* § 839d(d).

173. *Id.* § 839d(e)(1).

customers and other local entities to the maximum practicable extent?¹⁷⁴ (9) What terms and conditions are necessary or proper to "insure timely construction, scheduling, completion, and operation of resources," and to "insure that the costs . . . are as low as reasonably possible," and to provide means for "effective oversight, audit, and review of . . . construction and operation?"¹⁷⁵ (10) Has the Administrator insured that the acquisition's beneficial aspects are distributed equitably throughout the region?¹⁷⁶ (11) If the acquisition is a major resource and inconsistent with the plan or the criteria and considerations of section 839b(e), has Congress specifically authorized expenditure of funds for that purpose?¹⁷⁷ (12) If the acquisition is a major resource consistent with the plan or Act, has it been noted in the Administrator's annual or supplementary budget submittal?¹⁷⁸

These questions governing acquisitions fall into several categories: those to be answered based upon generally available facts; those requiring the BPA to devise a procedure to assure accurate, factual determinations on which to base a value judgment; and those reserved to agency discretion. To build an agency record competent to withstand judicial scrutiny, the agency will need to analyze these reviewable questions to determine which may require interpretation or elucidation, additional definition, or decision procedures. For the most part, such interpretations do not require notice and comment but may be made as interpretive rules and implemented after publication in the *Federal Register*.¹⁷⁹

The BPA expects to have the statistical basis for the determination at hand for those questions of general fact applicable to all resource acquisitions, such as the amount of firm resources required to meet contractual obligations, and the amount of planned savings from conservation measures. External factfinding should not be required. To forestall challenge of such statistics, the agency may, however, use a rulemaking process to set

174. *Id.* § 839d(e)(2).

175. *Id.* § 839d(i).

176. *Id.* § 839d(k).

177. *Id.* § 839d(c)(3)(B).

178. *Id.* § 839d(c)(4)(C).

179. Under the Administrative Procedure Act these rules would be defined as interpretive rather than substantive. Substantive rules require notice and comment because they have the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1978).

uniform standards or assumptions that utilities, political subdivisions, and the BPA would apply to establish what reasonable conservation savings might be expected. To buttress the statistical basis the agency also might rely on a factfinding hearing, outside experts, or recitation into the record of the BPA's own expertise and experience.

For example, the agency might establish a procedure to assure a factual basis for a judgment. To make a section 839d(m) determination that a reasonable share of a particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest utility for ownership, participation, or other sponsorship, the BPA might establish a procedure requiring each applicant to demonstrate that it has made this offer. Alternatively, the agency could undertake that exercise itself in its application review.

Several questions may require the agency to make a threshold factual determination and then make a value judgment. For example, the agency might have to conclude that a minor resource proposed for acquisition was experimental, developmental, or a demonstration or pilot project. This decision would require the BPA to distinguish among frontier technology, inventors' dreams, and established technology. The agency could presumably rely on rulemaking to define these parameters or it could rely exclusively on its own judgment because the variety of proposals defy reasonable classification. This question would require the BPA to diagnose the present situation; the need to experiment, the availability of capital, the degree of acceptable risk, a policy choice as to the agency's goals in advancing frontier technology, a choice of means to achieve the goal, and a determination of appropriate timing or pace in pursuit of the goal.¹⁸⁰ Each determination could depend upon facts or a value choice.¹⁸¹ Such value choices, of course, are not made in a vacuum but would reflect the abundant guidance provided in the Pacific Northwest Regional Power Planning and Conservation Act,¹⁸² the Bonneville Project Act,¹⁸³ the Pacific Northwest Consumers Power Preference Act,¹⁸⁴ the Pacific Northwest Federal

180. *Cf.* Brodie & Linde, *supra* note 169, at 533 (discussion of judicial review).

181. *Id.*

182. 16 U.S.C.A. § 839 (West 1980 Laws Special Pamphlet).

183. 16 U.S.C. §§ 832-832I (1976).

184. *Id.* §§ 837-837h.

Transmission System Act,¹⁸⁵ and the National Environment Policy Act.¹⁸⁶

Perhaps the most compelling determination the BPA must make is whether a proposed resource acquisition is consistent with the plan or the criteria and considerations of section 839b(e)(1)(2).¹⁸⁷ Challenge of an acquisition decision sooner or later is likely to reach these consistency or cost-effective issues. Perhaps the Council will consider including in its plan some standard to guide the consistency test, as well as delineating additional criteria. Alternatively, the BPA may publish such

185. *Id.* §§ 838-838k.

186. 42 *Id.* § 4321.

187. The plan shall "give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources." 16 U.S.C.A. § 839b(e)(1) (West 1980 Laws Special Pamphlet). The plan shall set forth a general scheme "with due consideration . . . 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 quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan." *Id.* § 839b(e)(2).

(A) "Cost-Effective", when applied to any measure or resource referred to in this chapter, means that such measure or resource must be forecast-

(i) to be reliable and available within the time it is needed, and
(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumer of the customers at an estimated incremental system cost no greater than that of the least cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

Id. § 839a(4)(A)-(D).

standards of consistency as an interpretative rule. As a base beginning, the Council, or the Administrator where the Council has not acted, is charged with determining a methodology to determine quantifiable environmental costs and benefits. Accordingly, the BPA has published a notice of intent to develop that methodology.¹⁸⁸ Here again, review of some of the issues raised in the notice signals the complexity of the standard. Those issues include: (1) identifying the environmental costs and benefits typically associated with classes of resources specified in section 893b(e)(1) of the Regional Act and appropriate for treatment in the methodology; (2) identifying relevant categories of environmental costs and benefits appropriate for elaboration in the methodology; (3) identifying environmental costs and benefits "directly attributable" to a measure or resource whose system cost is to be evaluated under the Regional Act; (4) determining viable approaches previously applied to quantify impacts associated with measures or resources, by project type and scale, size of capability or output, and site characteristics; (5) identifying costs and benefits, by resource or project type, that can be meaningfully converted to dollars; and (6) identifying alternative means to value costs and benefits, by resource or project type.

Consistency and cost-effectiveness are apt to become the talisman of challenge not only of the BPA's authority to act, but additionally of the BPA's choices among alternatives. There will be some frustrated and disappointed sponsors of proposed but rejected resources. There will be some advocates of conservation more confident than the BPA of the potential for that resource. To the contrary, there will be some "doubting Thomases" who believe that the BPA has over-invested in conservation, beyond the amount justified by prudent application of the cost-effectiveness test. All of these are potential litigants, and to the extent the agency abstains from interpreting the cost-effectiveness standards the courts will likely fill in the details.

V. CONCLUSION

Although the policies and procedures for resource purchases and billing credits are independently important, the messages they jointly convey are most important. The bill's messages all

188. 46 Fed. Reg. 22,925 (1981).

stem from one common thread: the recognition of the reality that the day of cheap hydroelectric power and large firm power surpluses is over. Instead of aggressively marketing power, the BPA is promoting conservation and looking to purchase resources to avoid the allocation or shortage of firm resources.

Recognition that no one wins in allocating a shortage was the common thread that prompted many concerned and often diverse interest groups to work together for a legislative solution for the Pacific Northwest's electric energy future. Part of Congress' legislative solution is clear: resource purchase authority for the BPA, and the treatment of conservation as the preferred resource. The BPA was the logical candidate for the purchase authority because it already controlled the largest share of generation and because it could more cheaply finance new acquisitions. The bill not only increases the BPA's powers, but it also increases its responsibility; in effect, it gives the BPA power supply responsibility for the Pacific Northwest. The BPA, however, shares that responsibility. Historically, some BPA customers have felt that the agency has taken unfair advantage of its size and role as the primary supplier of electric power resources. Because those groups perceived an even greater risk with the BPA's expanded powers, the BPA must share its power with other utility groups and political representatives, and will act pursuant to standards and legislation facilitating judicial review of its actions.

Some remained reluctant to have Congress revamp the Bonneville Power Administration, even with all the checks and balances, without infusing some social philosophy into the process. Whereas the BPA's original social mandate was to electrify the rural countryside, its new social mandate is to acquire resources to meet load in conformity with what Congress and the Regional Council perceived as sound guidelines. Resources must be cost-effective, reliable, and available within that framework, conservation must come first, renewable resources second, waste heat on high-fuel conversion efficiency third, and thermal last. The regional plan will undoubtedly attempt to structure what the BPA acquires to meet the region's needs. The extensive public participation opportunities, both before the Council and at the BPA, make both the planning and operational process courtrooms of ideas between those who believe that conservation and renewable resources are adequate and those who recognize their desirability but maintain that additional conven-

tional generation is also necessary.

Procedures will govern many BPA actions related to purchase authority, particularly adoption of the regional plan and resource acquisition. The procedures should be as simple as possible, given the complex nature of the Act. Congress appears to view procedural safeguards as important protection against potential abuses of administrative discretion. They also assure due process and public access to the BPA's decisionmaking process. If people of goodwill creatively use the procedures, the agency can fairly and efficiently govern the Federal Columbia River Power System to a unique extent, and the region can gain a significant voice in managing its own prime resource.

At the same time a dark cloud always hovers over legislative schemes built on elaborate procedural requirements. There is a risk that the process could revert to unproductive and irresponsible delay and indecision. Unequivocal standards may become rigid and unsuited to changing circumstances. Congressional understanding and amendment may not keep pace with regional needs. Although these are real concerns, they need not pose an insurmountable threat; they are only pitfalls that must be avoided to assure that the legislation's virtues and its opportunities for a more creative partnership between the BPA and the people of the Pacific Northwest will flourish. Meanwhile, the bill can assure adequate supplies of safe and environmentally acceptable electric power.