

Elkhorn Ruling Boosts State Authority

By Hal A. Beecher

On 31 May 1994, a landmark U.S. Supreme Court decision expanded state authority to establish conditions to protect water quality and included instream flows, aesthetics, and, potentially, other elements in a broad definition of water quality. Called the “Elkhorn case” (PUD No. 1 of Jefferson County and City of Tacoma, Petitioners v Washington Department of Ecology et al.; No. 92-1911), the Supreme Court ruled that the state of Washington Department of Ecology has authority to set instream flows for fish (primarily steelhead, chinook, and coho salmon) as a condition of a Water Quality Certification (WQC) issued by the state under Section 401 of the federal Clean Water Act (CWA).

The case surrounded the petitioners (applicants) proposed building of the Elkhorn Hydroelectric Project on the Dosewallips River, Washington. The project would have consisted of a dam near the boundary of Olympic National Park and a pipeline to carry diverted water around a 1.2-mile bypass reach to a powerhouse at Olympic National Forest’s Elkhorn Campground.

Since the case was originally filed, some salmonid stocks (coho salmon, steelhead; coastwide review of status of all anadromous salmonids is in process) in the Dosewallips River have been included in petitions for listing under the Endangered Species Act.

Initially, two issues existed: (1) instream flow and (2) state authority to set instream flows as conditions of the WQC under Section 401 of the CWA—e.g., Rock Creek decision (California v Federal Energy Regulatory Commission [FERC]-U.S. Supreme Court, 21 June 1990)—and First Iowa decision (First Iowa Hydro Electric Cooperative v Federal Power Commission-U.S. Supreme Court, 1946). The first is a technical issue decided in a lower court; the second is a legal issue addressed at each level of the court system.

Technical Issue—Flows for Fish

Two instream flow proposals were developed, one by each side in the case. Fish biologists who developed flow regimes for each party then testified about the rationale for their respective flow regimes. The applicants’ proposal emphasized juvenile rearing, a limiting factor for these species in many Washington streams. The state’s proposal (developed jointly by three state agencies, the U.S. Fish

and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council) emphasized spawning and incubation. State biologists argued that, because the bypass reach was near the upper limit of anadromous fish use, spawning and incubation became more important since little seeding occurred from upstream. There would be no rearing without spawning.

The applicants argued that the state flows were enhancement because the flows provided more habitat than a year having median monthly flows. Although the state’s flow regime was based on Instream Flow Incremental Methodology (IFIM) study results, the state’s fisheries witnesses argued that too many uncertainties existed in IFIM to risk any additional lowering of flows below the state’s proposal. In fact, the state’s fishery witnesses even expressed concern that the state’s proposal was too low. A direct relationship between weighted usable area (WUA, an index of habitat in IFIM) and fish production had not been established, although empirical support for use of IFIM grows (Jowett 1992; Nehring and Anderson 1993).

At the initial hearing, the state Pollution Control Hearings Board ruled 2–1 for the applicants’ flows. On appeal, Thurston County Superior Court reversed this decision in favor of the state. Subsequent appeals to the Washington State Supreme Court and U.S. Supreme Court did not concern fish and flow issues; they remained as set by the Superior Court.

Legal Issues

Robie (1990a, 1990b), reviewing major decisions concerning state and federal jurisdiction over instream flows, noted that the Supreme Court was unwilling to give states veto power over federal licensing. However, Birnbaum (1991) anticipated that careful state use of Section 401 of the CWA would lead to the outcome found in the Elkhorn decision.

Major legal issues in the Elkhorn case included federal supremacy and the applicability of the CWA to instream flows. In the first instance, states do not have authority, on their own, to overrule a federal license. The state claimed to be implementing a federal law (CWA), as required by same. Therefore, this case was ruled to be not one of state v federal law. No conflict existed between FERC and the CWA—despite the petitioners’ contentions that FERC licensing should take precedence over the CWA—because FERC had not ruled on instream flows nor issued a license.

In the matter of applicability of the CWA to instream flows and water quantity, the majority opinion concluded

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To Set Instream Flows on Federal Projects

that "a sufficient lowering of quantity could destroy all of a river's designated uses, and since the CWA recognizes that, reduced stream flow can constitute water pollution." Thus, the Supreme Court opened the way for use of the act to address instream flows.

The Elkhorn decision explained, "A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard.... Washington's requirement is a limitation necessary to enforce the designated use of the River as a fish habitat.... The section's language makes it plain that water quality standards contain two components and is most naturally read to require that a project be consistent with both: the designated use and the water quality criteria.... Washington's requirement also is a proper application of the state and federal antidegradation regulations, as it ensures that an existing instream water use will be 'maintained and protected.'"

The CWA has many sections, some of which appear to be requirements for mere bureaucratic exercises. Like puzzle pieces, they must be painstakingly assembled with participation by many players. However, when taken together these sections interact, complementing and reinforcing each other, creating a powerful federal tool that can be wielded by states. This state-managed federal tool averts federal supremacy or preemption often asserted by FERC over state water law; as a federal law, CWA stands on equal footing with the Federal Power Act, which FERC administers.

Section 303 of the CWA requires states to establish water quality goals and standards. Standards must identify designated uses of waters and water quality criteria based on uses. Standards also must include an anti-degradation policy. Section 401 requires states to provide a Water Quality Certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters. The WQC must set forth any effluent limitations and other limitations necessary to ensure compliance with provisions of the CWA and any other appropriate state law requirements.


Conclusions and Future Applications

The results of this case rested on considerable background work conducted during many years. Numerous interested parties (agencies, citizens, lawmakers, and

special interest groups) participated in the passage of federal and state laws and development of state standards (under CWA and otherwise). An important early step was passage of the federal CWA, enabling states to set water quality standards that exceed the minimum requirements. This case would not have been heard by the Supreme Court without visionaries such as Ken Slattery

(Washington Department of Ecology), who explored broader use of CWA for the purpose of protecting instream flows.

Technical standards were not addressed by the Supreme Court. Instream flows are often decided by an agency or lower court, and the burden on biologists, hydrologists, and

hydraulic engineers will be to bring their best technical assessment to bear on the issues and to communicate effectively to decision makers. 

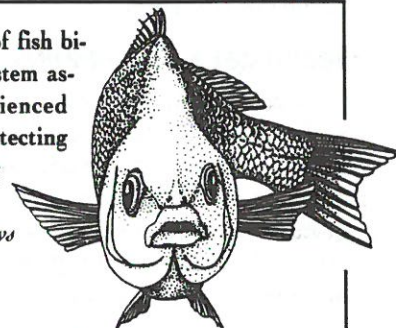
Major legal issues in the Elkhorn case included federal supremacy and the applicability of the CWA to instream flows.

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